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Borders, Bans, and Courts in the European Union

Maryellen Fullerton*

Building new borders and banning immigrants have been rallying cries in some European Union (EU) countries in recent months. Hungary constructed a fence along its southern border to keep out asylum seekers; the Hungarian prime minister later demanded 400 million in EU funds to pay for the fence.¹ Crowds in Poland called for banning refugees crying out, “Today refugees, tomorrow terrorists!” and “Poland, free of Islam!”² Together, the Slovak Republic and Hungary went to court to overturn the EU emergency plan designed to relieve the frontline states reeling under the Syrian refugee crisis by relocating 120,000 asylum seekers in Greece and Italy to other EU countries with fewer asylum seekers.³ Borders, bans, and courts in Europe have echoed developments in the United States in the second decade of the twenty-first century. The analogs are palpable: demands to build a wall along the border with Mexico, the travel ban on

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1. Nikolaj Nielsen, *Hungary demands EU payments for border wall*, EUOBSERVER (Sept. 1, 2017), <https://euobserver.com/migration/138849>.

2. Kashmira Gander, *‘Today refugees, tomorrow terrorists’: Eastern Europeans chant anti-Islam slogans in demonstrations against refugees*, INDEPENDENT (Sept. 13, 2015, 23:01 BST), <http://www.independent.co.uk/news/world/europe/refugees-crisis-pro-and-anti-refugee-protests-take-place-in-poland-in-pictures-10499352.html>.

3. *Hungary and Slovakia take EU refugee quota scheme to court*, DW (Oct. 5, 2017), <http://www.dw.com/en/hungary-and-slovakia-take-eu-refugee-quota-scheme-to-court/a-38781422>.

nationals of majority-Muslim countries, and litigation filed by Texas to halt a program to provide temporary relief for groups of vulnerable immigrants.⁴

The comparisons diverge in one noticeable respect, however. The anti-immigrant sentiment in the United States is occurring at a time when the number of illegal border-crossings is dramatically lower than it has been in decades.⁵ In contrast, Europe has been facing the largest number of refugees and migrants since the end of World War II. Applications for asylum rose from 431,000 in 2013 to 627,000 in 2014, only to be exceeded by more than 1.3 million applicants in both 2015 and 2016.⁶ Large numbers do not excuse racist chants and actions, but the logistical and psychological challenges that accompany the arrival of such large numbers of human beings in a short period of time are manifold.

Part I of this Article notes three sets of European borders, some of which feature newly built physical barriers and some of which involve the resurrection of former passport and customs inspections. Part II briefly highlights the calls from some European politicians to ban refugees and the rallying cries they provided to xenophobic crowds. Part III turns to the EU institutions and their efforts to design emergency measures to respond to the millions of asylum seekers entering EU territory in 2014 and 2015. Part IV focuses on the Court of Justice of the European Union (CJEU) and the litigation challenging the EU decision to relocate asylum seekers from frontline Member States to more distant EU Member States. Part V summarizes the immediate responses to the CJEU opinion and the current fate of the relocation program.

4. *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

5. The United States apprehended 1.2 million unlawful arrivals at its southern border with Mexico in 1992; 1.6 million in 2000; and 325,000 in 2011—the lowest in forty years. Federico S. Mandelman & Andrei Zlate, *The Slump in Undocumented Immigration to the United States*, ECONOMIST'S VIEW (Oct. 5, 2016), <http://economistsview.typepad.com/economistsview/2016/10/the-slump-in-undocumented-immigration-to-the-united-states.html> (relying on data from the U.S. Department of Homeland Security).

6. *Asylum Statistics*, EUROSTAT, http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics (last visited Mar. 13, 2018).

I. BORDERS

The recent refugee crisis in Europe has drawn attention to three sets of European borders: the border of the European Union, the territorial boundaries of each of the Member States that comprise the EU, and the borders of the Schengen area. The EU, comprised of 28 Member States, covers roughly 1,700,000 square miles.⁷ Its borders stretch from Ireland and Spain in the west to Finland and Romania in the east to Greece and Italy in the south. Notably, there is no EU border patrol.⁸ Rather, each of the EU Member States maintains its own national borders, patrolled by the national police and military officials.⁹ Most, but not all, of the EU Member States have joined the Schengen Area.¹⁰ Countries that join the Schengen zone agree to abolish internal borders in order to facilitate visa-free travel within this geographical area.¹¹ For example, travelers may pass between Portugal, Spain, France, Belgium, Germany, and Poland, all of which are in the Schengen Area, without facing certain border crossing restrictions. Several non-EU States, such as Switzerland and Norway, have also joined the Schengen zone and benefit from the ease of Schengen travel.¹²

A. *EU Asylum Legislation*

The external EU borders are formed by the outermost

7. *Facts and Figures*, EUROSTAT, https://europa.eu/european-union/about-eu/figures/living_en (last visited Mar. 13, 2018). The EU population totals over 500 million people. *Id.* The Brexit decision by the United Kingdom will reduce the EU population by 65 million and reduce to 27 the number of Member States. *See id.*

8. *See European Border and Coast Guard Agency (Frontex)*, EUROPA, https://europa.eu/european-union/about-eu/agencies/frontex_en (last visited Mar. 13, 2018) (explaining that Frontex—the European Border and Coast Guard Agency—can provide technical support for countries that are encountering “severe migratory pressure,” whereas countries with an external border are responsible for their own border control).

9. *See id.*

10. *Schengen Area Countries List*, SCHENGEN VISA INFO., <https://www.schengenvisa.info.com/schengen-visa-countries-list/> (last visited Mar. 13, 2018). The Schengen countries include twenty-two EU countries plus Iceland, Liechtenstein, Norway and Switzerland. *Id.*

11. *Schengen Agreement*, SCHENGEN VISA INFO., <https://www.schengenvisa.info.com/schengen-agreement/> (last visited Mar. 13, 2018).

12. *Id.*

territorial boundaries of the Member States. The Atlantic Ocean, the North Sea, the Baltic Sea, and the Mediterranean Sea form most of the western, northern, and southern borders of the EU. In addition to the 40,000 miles of maritime boundaries, the land-borders in the east, and to some extent, in the south, stretch more than 8,000 miles. Two EU Member States, Finland and Poland, for example, have lengthy eastern borders with Russia, Ukraine, and Belarus. Two other EU Member States, Hungary and Croatia, share significant southern borders with Serbia and Bosnia Herzegovina. Romania borders both Serbia and Ukraine, while Bulgaria shares land boundaries with Serbia and Turkey. As noted earlier, national border guards—not EU officials—control the perimeter of the European Union.¹³

Throughout the European Union, all Member States are governed by the Common European Asylum System.¹⁴ This EU legislation, in theory, imposes common standards, but, in practice, places enormous pressures on EU Member States along the southern and eastern borders. This is due to the Dublin III Regulation,¹⁵ the EU venue provision concerning asylum applications.¹⁶ Absent the presence of a limited set of factors, venue is established in the first EU State that an undocumented asylum seeker enters. This provision applies in most all asylum cases.¹⁷ Effectively, the EU Member States on the periphery are thus obliged to decide almost all of the asylum applications filed within the EU territory.

The most common migratory routes in recent years have approached Europe from the south and the east. Specifically, asylum seekers and other migrants have crossed the

13. See *European Border and Coast Guard Agency (Frontex)*, EUROPA, *supra* note 8.

14. The Common European Asylum System contains both substantive and procedural standards that all EU Member States must, at a minimum, apply. See Maryellen Fullerton, *A Tale of Two Decades: War Refugees and Asylum Policy in the European Union*, 10 WASH. U. GLOBAL STUD. L. REV., 87–88, 98–120 (2011).

15. Council Regulation 604/2013, 2013 O.J. (L 180) 31 (EU) [hereinafter Dublin III Regulation].

16. See Susan Fratzke, *Not Adding Up: The Fading Promise of Europe's Dublin System*, MIGRATION POLY INST. EUR. (Mar. 2015), <https://www.migrationpolicy.org/research/not-adding-fading-promise-europes-dublin-system>.

17. See *id.*

Mediterranean Sea and the Aegean Sea in increasing numbers, and they most frequently have made landfall in Italy and Greece. The number of people on the move has been enormous: over 800,000 asylum seekers arrived in Greece by sea in 2015, while 150,000 arrived by boat on Italy's shores.¹⁸ According to the Dublin Regulation, these two Member States should be responsible for adjudicating almost one million asylum applications. This is grossly disproportionate in terms of the quantity of cases, and the unfairness is intensified by the disparities in terms of available resources and infrastructure. Greece, in particular, is much poorer than many of the more northern EU States. Furthermore, the capacity of its asylum system is minuscule compared to that in wealthier countries. Indeed, this led the European Court of Human Rights to issue a groundbreaking decision concluding that returning asylum seekers to Greece pursuant to the Dublin Regulation constituted a human rights violation.¹⁹ Relying on Article 3 of the European Human Rights Convention, which prohibits cruel, inhuman, and degrading treatment throughout Europe,²⁰ the European Court of Human Rights ruled that Belgium's transfer of an Afghan asylum seeker back to Greece pursuant to the Dublin Regulation was unlawful.²¹ The court's descriptions of the conditions in Greece were horrifying.

[C]onfining an asylum seeker to a prefabricated cabin for two months without allowing him outdoors or to make a telephone call, and with no clean sheets and insufficient hygiene products, amount[s] to degrading treatment within the meaning of Article 3. Similarly, [detention for] six days, in a confined space, with no possibility of taking a walk, no leisure area, sleeping on dirty mattresses and

18. John Clayton & Hereward Holland, *Over one million sea arrivals reach Europe in 2015*, UNHCR (Dec. 30, 2015), <http://www.unhcr.org/afr/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>.

19. *M.S.S. v. Belgium and Greece*, App. No. 30606/09 (Eur. Ct. H.R. Jan. 21, 2011).

20. The European Convention on Fundamental Freedoms and Human Rights has been ratified by forty-seven European states. Article 3 specifies: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

21. *M.S.S.*, App. No. 30606/09, paras. 231, 233–34.

with no free access to a toilet is unacceptable.²²

[The asylum seeker lived outdoors] in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving.²³

[T]he Court does not see how the authorities could have failed to notice or to assume that the applicant was homeless in Greece. The Government themselves acknowledge that there are fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum-seekers.²⁴

Italy is a less extreme example, but it, too, is a poorer nation with an asylum system that is less developed than that in many other EU Member States. In 2014, the European Human Rights Court again concluded that the Dublin Regulation collided with European human rights law.²⁵ The Court prohibited Switzerland from transferring a family of asylum seekers to Italy.²⁶ These rulings threatened one of the key components of the Common European Asylum System (CEAS) and sent shock waves throughout the EU. Asylum seekers began to file lawsuits in the national courts of EU Member States to forestall Dublin Regulation orders transferring them to the EU country where they first entered the European Union. A variety of national courts in Germany and elsewhere enjoined Dublin transfers to Italy and Hungary.²⁷ Several EU States informally halted Dublin transfers to Hungary, Bulgaria, and Italy,²⁸ as they had earlier suspended

22. *Id.* para. 222 (citation omitted).

23. *Id.* para. 254.

24. *Id.* para. 258.

25. *Tarakhel v. Switzerland*, App. No. 29217/12, para. 115 (Eur. Ct. H.R. Nov. 4, 2014).

26. *Id.* paras. 120–22.

27. Maryellen Fullerton, *Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law*, 29 HARV. HUM. RTS. J. 57, 107–12 (2016).

28. *E.g., id.* at 79–81. *Accord*, European Council on Refugees and Exiles, *Italy, Council of State Suspends Transfers to Hungary and Bulgaria*, ASYLUM INFO. DATABASE (Sept. 29, 2016), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-10343&filename=002-10343.pdf&TID=ihgdqbxnfi>.

transfers to Greece in the wake of the MSS judgment.²⁹ By 2015, the European asylum system had devolved into significant disarray.

B. The Rise in EU Asylum Seekers

As the CEAS was fracturing, the flow of asylum seekers to the EU was increasing geometrically. The numbers were large, and they steadily and quickly grew larger. The total number of arriving asylum seekers in the European Union in 2009 was more than 200,000.³⁰ By 2012 it had increased to 330,000.³¹ By 2013 the total had grown to 413,000.³² By 2014 it had leaped to 627,000.³³ Finding shelter for so many individuals was a herculean task; each year, many more people needed shelter than in the prior year. With vastly overtaxed asylum infrastructures, backlogs of asylum cases expanded exponentially.

And then the dam burst. The Syrian civil war kept grinding on; the World Food Program reduced rations to Syrian refugees in Turkey; the lack of effective state control in Libya resulted in more boats setting sail for Europe from Libya's northern coast. These, and other factors, contributed to an exodus of asylum seekers and migrants in the Mediterranean in 2015. More than 1,300,000 asylum seekers arrived in Europe within twelve months.³⁴ Another 1,300,000 entered in 2016,³⁵ and 313,000 in the first six months of 2017.³⁶

29. The European Commission recommended the gradual resumption of Dublin transfers to Greece for asylum seekers arriving after March 2017, so long as Greek officials provide assurances in individual cases of treatment in compliance with EU asylum law. European Commission Press Release IP/17/349, Questions and Answers: Commission calls for renewed efforts in implementing solidarity measures under the European Agenda on Migration (Mar. 2, 2017), http://europa.eu/rapid/press-release_MEMO-17-349_en.htm.

30. See *Asylum in the EU: The number of asylum applicants in the EU jumped to more than 625,000 in 2014*, EUROSTAT (Mar. 20, 2015), <http://ec.europa.eu/eurostat/documents/2995521/6751779/3-20032015-BP-EN.pdf/35e04263-2db5-4e75-b3d3-6b086b23ef2b>; *Asylum Statistics*, EUROSTAT, *supra* note 6, at fig.1.

31. *Asylum Statistics*, EUROSTAT, *supra* note 6, at fig.1.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *First time asylum applicants, EU-28, Jan. 2016 – Sept. 2017*, EUROSTAT, <http://ec.europa.eu/eurostat/statistics-explained/index.php/File:>

C. *New Borders and Fences*

The continually increasing waves of asylum seekers led to a crisis tone in Europe in 2015. As detailed below, EU institutions held extraordinary meetings and drafted emergency policies in response to the mass influx of asylum seekers. As the spring turned to the summer, the numbers of boats launched toward Greece and Italy steadily increased. Hundreds of thousands of migrants landed in Greece and many began walking north. News cameras recorded their progress through drought and rain. Vivid images flashed around the world of Syrian families carrying small children and their belongings through fields, over hills, and across rivers, sleeping in cornfields, sheltering in small tents from downpours.

As more asylum seekers headed from Greece toward Hungary, the Hungarian government decided to impede their arrival. In July 2015, Hungarian soldiers and contractors erected a 12-foot-high fence topped by razor wire along its southern border with Serbia to prevent asylum seekers from entering.³⁷ Asylum seekers modified their route, traveling further west through Croatia on their northward journey. In response, in September 2015, Hungary expanded its border fence project to its southern border with Croatia.³⁸ As asylum seekers turned further westward to Slovenia, Hungary began building a fence along its southwestern border with Slovenia.³⁹

Hungary completed building 325 miles of border fencing, and then started again.⁴⁰ By April 2017, it had finished constructing

First_time_asylum_applicants_EU-28_January_2016_%E2%80%93_September_2017.png (last updated Dec. 13, 2017, 10:03 AM).

37. *Hungary Expects to Complete Serbian Border Fence by November: Lawmaker*, REUTERS (July 24, 2015), <https://www.reuters.com/article/us-europe-migrants-hungary-fence/hungary-expects-to-complete-serbian-border-fence-by-november-lawmaker-idUSKCN0PY0VX20150724>.

38. Alasdair Sandford, *Hungary completes new anti-migrant border fence with Serbia*, EURONEWS (Apr. 28, 2017), <http://www.euronews.com/2017/04/28/hungary-completes-new-anti-migrant-border-fence-with-serbia>.

39. *Hungary removes razor wire at Slovenian border*, DEUTSCHE WELLE (Sept. 26, 2015), <http://www.dw.com/en/hungary-removes-razor-wire-at-slovenian-border/a-18743491>.

40. Noah Buyon, *Hungary to Build (Another) Border Fence: In the Trump era, Hungary is doubling down on its hardline immigration policies*, FOREIGN POL'Y (Feb. 24, 2017, 12:44 PM), <http://foreignpolicy.com/2017/02/24/hungary-to-build-another-border-fence/>.

two security walls along the Serbian border.⁴¹ The new wall, equipped with heat sensors, cameras, and loud speakers that warn against entry in multiple languages, provides electric shocks to those who touch it.⁴² Viktor Orbán, the Hungarian Prime Minister proclaimed: “It is 155 kilometers long and 3 meters high, and is able to stop any masses of people”⁴³

The security walls keep asylum seekers out, and as a result, asylum seekers are forced to huddle outside the EU in Serbia, just across the Hungarian border. Hungary permits only ten asylum seekers to approach its border posts each day to apply for asylum. Consequently, asylum seekers must wait in Serbia in shipping containers or worse while Hungarian officials review their applications.⁴⁴ Predictably, the result is rejection. Hungary has denied ninety-two percent of the asylum applications; it granted refugee status in three percent of the cases and humanitarian status five percent of the time.⁴⁵ This grim Hungarian scheme has led Germany to suspend all returns of asylum seekers to Hungary.⁴⁶

Nevertheless, Hungary was not the only scene of border wall construction. In November 2015, Slovenia erected a fence along the Croatian border,⁴⁷ and Macedonia built a wall along its southern border with Greece.⁴⁸ The following year, Macedonia

41. Saim Saeed, *Hungary’s second border fence is finished, says Orbán: The fence cost the government €120m*, POLITICO (Apr. 28, 2017, 12:32 PM), <https://www.politico.eu/article/hungary-orban-border-fence-migrants-refugees-second-is-finished-says/>.

42. Marton Dunai, *Hungary builds new high-tech border fence — with few migrants in sight*, REUTERS (Mar. 2, 2017, 2:01 PM), <https://www.reuters.com/article/us-europe-migrants-hungary-fence/hungary-builds-new-high-tech-border-fence-with-few-migrants-in-sight-idUSKBN1692MH>.

43. Saeed, *supra* note 41.

44. Duanai, *supra* note 42.

45. *Country Report: Hungary: Hungarian Helsinki Committee 2016 Update*, ASYLUM INFO. DATABASE 7 (Dec. 31, 2016), <http://www.asylumineurope.org/reports/country/hungary>.

46. Saeed, *supra* note 41. Germany suspended migrant returns to Hungary this month until it can be sure that those transferred “will be dealt with according to European procedures,” an interior ministry official said. *Id.*

47. Barbara Surk, *Slovenia Builds Border Fence to Stem Flow of Migrants*, N.Y. TIMES (Nov. 11, 2015), <https://www.nytimes.com/2015/11/12/world/europe/slovenia-border-fence-migrants-refugees.html>.

48. *Migrants attack Macedonian police as construction of Greek border fence begins*, GUARDIAN (Nov. 28, 2015, 8:08 PM),

followed Hungary's lead and began constructing a second razor-wire barrier parallel to its first border wall.⁴⁹ Bulgaria, too, decided to erect a border wall.⁵⁰ It began constructing a wall along its border with Turkey in 2014, and continued expanding the wall in 2015 and 2016.⁵¹

In addition to the new walls and fences erected along national boundaries, the Schengen Area was disrupted as border controls were resurrected. For years, when individuals—citizens or noncitizens—crossed the border into one of the Schengen countries, they could travel freely throughout all the Schengen countries with no passport checks or border controls anywhere. It was like the United States: passport control upon arrival at an international port of entry, such as JFK Airport in New York, but no further inspections when traveling from New York to New Jersey to California or to the rest of the fifty states. In the Schengen Area, as in the United States, the removal of internal borders had resulted in free, area-wide travel by tourists—and by clandestine migrants or asylum seekers. The large numbers of asylum seekers entering southern Europe in 2015, coupled with the masses of individuals trudging northward toward safety, unnerved many Schengen nations. Though far from the EU frontiers, many Schengen countries in the heart of Europe revived passport controls along their national borders.⁵² Germany reintroduced border checks with Austria, which in turn reintroduced border controls with Slovenia.⁵³ Slovakia started imposing border controls with Hungary.⁵⁴ Norway imposed

<https://www.theguardian.com/world/2015/nov/29/migrants-attack-macedonian-police-as-construction-of-greek-border-fence-begins>.

49. *Europe builds another wall: Macedonia erects second barrier of razor wire to stem the human tide from Greece*, DAILYMAIL, <http://www.dailymail.co.uk/news/article-3437717/A-second-wall-razor-wire-stem-human-tide-Macedonia-builds-fence-border-Greece-send-message-migrants-attempts-cross-illegally.html> (last updated Feb. 8, 2016, 8:21 PM).

50. Damien Sharkov, *Bulgaria to Complete Turkey Border Fence by End of Year*, NEWSWEEK (Nov. 21, 2016, 9:49 AM), <http://www.newsweek.com/bulgaria-complete-turkey-border-fence-end-year-523324>.

51. *Id.*

52. Barbara Tasch, *This map shows how much the refugee crisis is dividing Europe*, BUS. INSIDER (Mar. 1, 2016, 4:46 AM), <http://www.businessinsider.com/map-refugees-europe-migrants-2016-2?r=UK&IR=T>.

53. *Id.*

54. *Id.*

controls all along its border with Sweden, as well as on ferry arrivals from Denmark and Germany.⁵⁵ Sweden introduced border controls with Denmark, which, one day later, imposed controls at its border with Germany.⁵⁶ Even Belgium and France took similar actions: Belgium, fearing the consequences of French action to level the migrant camp at Calais, imposed border controls along its French border.⁵⁷ Pedestrians and passengers in cars, trucks, buses, trains, and airplanes were forced to produce valid travel documents to journey into the adjacent European countries. The ease of visa-free travel disappeared in significant portions of the once open Schengen zone. Under Schengen principles, border controls were reintroduced for short periods of time, which could then be extended. The EU predicted that, due to terrorism concerns, the re-instituted border checks in the Schengen Area would last two years or more.⁵⁸

Hundreds of thousands of people continued to walk across the European landscape in the summer and fall of 2015, notwithstanding the fences, walls, and border checks. As Hungary, Croatia, and other EU States tried to deflect asylum seekers, large groups of asylum seekers overwhelmed various European train stations and spilled onto divided highways, heading northward to seek safety. In light of the hostile actions that governments in southeastern Europe employed in the face of this humanitarian crisis, German officials recognized that they could not send asylum seekers back to Greece, Hungary, or Bulgaria—even though many had first entered EU territory there.⁵⁹ In response to the ever-emerging crisis, Germany suspended the Dublin Regulation. Angela Merkel, Germany's Chancellor, looked to the German people to take in the asylum

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *The EU: To keep border control checks in the Schengen Area for at least another two years*, SCHENGEN VISA INFO. (Sept. 18, 2017), <https://www.schengenvisainfo.com/eu-keep-border-control-checks-schengen-area-least-two-years/>.

⁵⁹ Von Tina Hildebrandt & Bernd Ulrich, *In the Eye of the Storm*, Seite 4/5: "We can do it," DIE ZEIT ONLINE (Sept. 20, 2015), <http://www.zeit.de/politik/deutschland/2015-09/angela-merkel-refugees-crisis-chancellor/seite-4>.

applicants.⁶⁰ “We can do it,” she said.⁶¹

II. BANS AGAINST MUSLIM REFUGEES

In addition to erecting new borders, prominent politicians in Europe have called for bans against Muslim refugees and asylum seekers. Viktor Orbán, the Prime Minister of Hungary, has not been shy. He calls Hungary the “gatekeeper of Christian Europe.”⁶² Orbán continued to proclaim his exclusionary religious viewpoint by stating “if Europe allows a competition of cultures, then the Christians will lose. These are the facts.”⁶³ The Interior Minister of Slovakia, in the guise of volunteering to shelter 100 refugees out of a group of 40,000, declared: “Slovakia as a Christian country can really help Christians from Syria to find a new home in Slovakia.”⁶⁴

Initially, Poland volunteered to receive fifty Christian families from Syria.⁶⁵ However, Islamophobic rhetoric became a successful strategy during the 2015 national elections across Europe. The head of Poland’s winning party, Jaroslaw Kaczyński, asserted that Muslims had “imposed Sharia law in parts of Sweden,”⁶⁶ and

^{60.} *Id.*

^{61.} *Id.*

^{62.} Orsolya Lehotai, *The New Iron Curtain of Europe: The One Year Anniversary of the Fence that Divides Europe in Two*, JOURNEY 2016 (Sept. 18, 2016), <https://journey2016.atavist.com/the-new-iron-curtain-of-europe/>; Rebecca Collard, *Hungary Closes the Gates to Europe*, TIME (Sept. 14, 2015), <http://time.com/4033770/hungary-gates-europe/>.

^{63.} *Viktor Orbán’s Interview with Bild*, HUNGARIAN SPECTRUM (Sept. 12, 2015), <http://hungarianspectrum.org/2015/09/12/viktor-orbans-interview-with-bild/>; see Dora Vardo et al., *Darum baut Ungarn einen Zaun gegen Flüchtlinge*, BILD (Dec. 9, 2015, 8:25 PM), <https://www.bild.de/politik/ausland/viktor-orban/darum-baut-ungarn-einen-zaun-gegen-fluechtlinge-42544402.bild.html>.

^{64.} *Slovakia Says It Prefers Christian Refugees under Resettlement Scheme*, REUTERS (Aug. 20, 2015, 9:46 AM), <https://www.reuters.com/article/us-europe-migrants-slovakia/slovakia-says-it-prefers-christian-refugees-under-resettlement-scheme-idUSKCN0QP1HN20150820>.

^{65.} Zosia Wazik & Henry Foy, *Poland favours Christian refugees from Syria*, FIN. TIMES (Aug. 21, 2015, 12:09 PM GMT), <https://www.ft.com/content/6edfdd30-472a-11e5-b3b2-1672f710807b>.

^{66.} Remi Adekoya, *A Law and Justice victory in Poland could be good news for Putin*, GUARDIAN (Oct. 24, 2015, 7:00 EDT), <https://www.theguardian.com/commentisfree/2015/oct/24/law-and-justice-poland-putin-russia>.

warned that migrants carry “all sorts of parasites and protozoa, which . . . while not dangerous in the organisms of these people, could be dangerous here.”⁶⁷ He claimed that Poland “would have to completely change [its] culture and radically lower the level of safety in [its] country.”⁶⁸ Crowds in Poland marched to protest providing refuge to Syrians bombed out of their homes. They chanted “Poland, free of Islam!”⁶⁹ and “Today refugees, tomorrow terrorists!”⁷⁰

Elsewhere in the European Union, many politicians raised similar anti-Islamic and xenophobic claims. The nationalist Alternative for Germany party, which was the third largest party in the parliamentary elections in Germany in 2017, argued that “Islam does not belong to Germany,” and urged a ban on mosques.⁷¹ Further, the party stated “[i]magine at what level we have to start with these [illiterate and uneducated] people.”⁷² A party official continued:

I don’t think that there is much . . . possibility to integrate them in a way that they could stay in Germany They’re coming from a different culture, mainly with an Islamic background, mainly from different countries [T]hey’re coming to a Christian culture—and this is totally different.⁷³

In Sweden, far-right parties protested against non-white refugees. “We have to show them that people don’t want them here. We want to stop the invasion,” said a member of the Nordic Youth.⁷⁴ Dutch Prime Minister Rutte criticized asylum seekers,

67. Jan Cienski, *Why Poland doesn’t want refugees*, POLITICO (May 21, 2017, 2:20 PM CET), <https://www.politico.eu/article/politics-nationalism-and-religion-explain-why-poland-doesnt-want-refugees/>.

68. *Id.*

69. Monika Scislowska, *Poles ambiguous over EU’s, Francis’ call on refugees*, SAN DIEGO UNION-TRIB. (Sept. 12, 2015, 12:08 AM), <http://www.sandiegouniontribune.com/sdut-polands-catholics-ambiguous-over-francis-call-on-2015sep12-story.html>; Gander, *supra* note 2.

70. Gander, *supra* note 2.

71. Patrick Strickland, *The rise of Germany’s anti-refugee right*, AL JAZEERA (Apr. 7, 2016), <http://www.aljazeera.com/indepth/features/2016/03/rise-germany-anti-refugee-160331123616349.html>.

72. *Id.*

73. *Id.*

74. Dan Harris & Jackie Jesko, *Anti-Immigrant Protests Grow as Thousands of Refugees Flood Europe*, ABC NEWS (Dec. 21, 2015, 5:12 PM),

asserting that they had recently arrived and abused the freedom offered by the Netherlands.⁷⁵ “We will have to actively defend our values,” he proclaimed.⁷⁶ The chief of the national police force in Italy said that migrants are responsible for “instability and threats.”⁷⁷ Marine Le Pen, leader of the National Front, which won second place in the 2017 French presidential election, criticized uncontrolled and never-ending refugee crises⁷⁸: “[Some migrants] speak their own language and follow their own rules and traditions.”⁷⁹ “[A] large majority . . . [have] declared war on France. They have intimidated and threatened France via a series of anti-French and terrorist attacks. Civil war is no longer a dream, but a real possibility.”⁸⁰

The rise of Islamophobia and xenophobia has accompanied the erection of border walls to keep asylum seekers out of the European Union. Meanwhile, the real, non-metaphoric civil war in Syria has continued unabated, as have the humanitarian crises that impelled asylum seekers to leave their homelands and seek safety in Europe.

III. THE EU INSTITUTIONS

A. *The Spring and Summer EU Council Meetings*

For years EU institutions have closely monitored the rising numbers of asylum seekers and other migrants entering the European Union. As the EU-wide total of asylum applications increased from roughly 431,000 in 2013⁸¹ to 627,000 in 2014,⁸²

<http://abcnews.go.com/International/anti-immigrant-protests-grow-thousands-refugees-flood-europe/story?id=35888428>.

75. Judith Vonberg, *How some European countries are tightening their refugee policies*, CNN (Feb. 22, 2017, 11:36 AM ET), <https://www.cnn.com/2017/02/22/europe/europe-refugee-policy/index.html>.

76. *Id.*

77. *Id.*

78. Romina McGuinness, *Le Pen says uncontrolled immigration has pushed France to the brink of 'CIVIL WAR,'* EXPRESS (Mar. 14, 2017, 12:35 PM), <https://www.express.co.uk/news/world/778995/marine-le-pen-french-election-president-civil-war-immigration>.

79. *Id.*

80. *Id.*

81. Statistical Office of the European Union Data, *Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data (rounded)*, EUROSTAT, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza&lang=en (last updated Feb. 7, 2018).

and continued to climb into the millions in early 2015, the sense of crisis escalated. In April 2015, the European Council, composed of heads of government of each of the EU Member States, agreed to increase emergency assistance to frontline Member States and to consider options including voluntary redistribution of asylum seekers among all EU Member States.⁸³ That same month, the European Parliament issued a call for all EU Member States to share responsibility in addressing the humanitarian situation.⁸⁴ Asylum seekers continued to set sail from Turkey and north Africa in ever-increasing numbers and news cameras caught many harrowing escapes and beamed them around the world.

In June, the EU Council met again and decided on a temporary relocation of 40,000 asylum seekers from Greece and Italy.⁸⁵ In July, the EU Council issued a Resolution formally adopting an emergency program to relocate 40,000 asylum seekers from Greece and Italy.⁸⁶ The details were set forth in an early September decision reached by consensus that contained no enforcement mechanism.⁸⁷

Events outpaced the EU plan. By mid-2015, more than 200,000 migrants had landed in Greece and more than 100,000 had arrived in Italy.⁸⁸ During July and August, the rate at which asylum seekers arrived in Greece increased by more than 250 percent.⁸⁹ Thousands of new asylum seekers also arrived in Italy and Hungary.⁹⁰ As noted earlier, Hungary and other EU States

⁸² *Id.*

⁸³ EU Council Statement EUCO 18/15 of 23 April 2015, at 3, *noted in* Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v. Council of the European Union*, ECLI:EU:C:2017:631, Judgement of 6 Sept. 2017, at 5.

⁸⁴ Resolution on the Latest Tragedies in the Mediterranean and EU Migration and Asylum Policies, 28 Apr. 2015, EUR. PARL. DOC. 2015/2660(RSP) (2015), *noted in* *Slovak and Hungary v. Council*, ECLI:EU:C:2017:631, at 5.

⁸⁵ Council Conclusions EUCO 22/15 of 25-26 June 2015, at 2.

⁸⁶ European Council Resolution of 20 July 2015, 10831/2/15 REV 2.

⁸⁷ Council Decision (EU) 2015/1523, 2015 O.J. (L 239/146).

⁸⁸ Council Decision (EU) 2015/1601, preambular para. 13, 2015 O.J. (L 248/80) 80; *see also* *Slovak and Hungary v. Council*, ECLI:EU:C:2017:631, at 6.

⁸⁹ *Id.*

⁹⁰ Nikolaj Nielsen & Eszter Zalan, *New EU proposal to relocate 160,000 asylum seekers*, EUOBSERVER (Sept. 3, 2015, 11:43 PM), <https://euobserver.com/migration/130105>.

began constructing border fences to keep asylum seekers out.⁹¹

B. The EU Council Decision of September 22, 2015

In the face of this escalation, in early September, the EU Commission proposed another two-year emergency plan.⁹² The EU Commission, the executive branch of the EU—roughly akin to federal administrative agencies in the United States—noted that many of the asylum seekers were from countries experiencing rampant persecution, torture, and extrajudicial killings, thus entitling them to asylum in the EU.⁹³ In order to provide significant relief to the frontline countries, the Commission proposed relocating forty-three percent of the individuals with a “clear need of international protection” who had entered Greece and Italy in July and August 2015.⁹⁴ This totaled 120,000 asylum seekers, and the Commission plan apportioned the relocation from the three Member States that had received the largest number of migrants at their borders: 54,000 asylum seekers from Hungary, 50,400 from Greece, and 15,600 from Italy.⁹⁵

Eligibility for relocation would be limited to those who had filed an asylum application in Hungary, Greece, or Italy.⁹⁶ For this group of relocated asylum seekers, the proposal expressly suspended the Dublin Regulation for the two year duration of the program.⁹⁷ The Commission plan also limited relocation to asylum seekers from national groups whose asylum applications had had a seventy-five percent success rate in the EU in the past quarter.⁹⁸ Effectively, this meant Syria, Afghanistan, and Iraq.

The Commission proposal envisioned relocating asylum seekers to the other EU Member States based on a formula that

91. See Sandford, *supra* note 38.

92. European Commission Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary, COM (2015), Sept. 9, 2015, *noted in Slovak and Hungary v. Council*, ECLI:EU:C:2017:631, at 7.

93. For discussion of the significant proportion of the migrants with clear needs for international protection, see *Slovak and Hungary v. Council*, ECLI:EU:C:2017:631, at 7; Council Decision (EU) 2015/1601, preambular paras. 23, 25–26, 2015 O.J. (L 248/80) 82–83.

94. Council Decision (EU) 2015/1601, preambular para. 26 at 83.

95. *Slovak and Hungary v. Council*, ECLI:EU:C:2017:631, at 7.

96. Council Decision (EU) 2015/1601, art. 3(1), 2015 O.J. (L 248/80) 88.

97. *Slovak and Hungary v. Council*, ECLI:EU:C:2017:631, at 8.

98. Council Decision (EU) 2015/1601, art. 3(2), 2015 O.J. (L 248/80) 88.

took into account the size, population, density, gross domestic product, unemployment rate, and number of asylum seekers per inhabitants.⁹⁹ To ease the process, the Commission proposed paying at least 6,000 Euros to a host Member State for each asylum seeker relocated there.¹⁰⁰ In exceptional circumstances, EU Member States could request suspension of their obligation to receive relocated asylum seekers.¹⁰¹

Hungary demurred. By the middle of September, Hungary's border fence on its southern border, in addition to Germany's welcome to asylum seekers exiting Hungary, had significantly diminished the numbers of asylum seekers within Hungarian territory.¹⁰² Hungary did not want to participate in the EU plan, even if Hungary would have been the single biggest beneficiary of the relocation proposal.¹⁰³ As a consequence, the Commission proposal was modified so that the first phase of the relocation plan concerned only relocation from Greece and Italy.¹⁰⁴ In September 2016, after one year of the relocation process, a decision would be made concerning the 54,000 relocations originally envisioned for Hungary.¹⁰⁵

Negotiations within the European Council were intense.¹⁰⁶ There was a strong, but not unanimous, view that all EU Member States must accept some relocated refugees because past volunteer efforts to relieve the frontline states had fallen woefully

99. *Slovak and Hungary v. Council*, ECLI:EU:C:2017:631, at 25, 44.

100. With the exception of Italy and Greece, who would receive at least 500 euros per relocated asylum seeker. Council Decision (EU) 2015/1601, art. 10(1)(a), 2015 O.J. (L 248/80) 91.

101. *Id.* art. 9.

102. *Slovak and Hungary v. Council*, ECLI:EU:C:2017:631, at 43.

103. Hungary formally requested that the EU Council remove Hungary as a beneficiary of the relocation program; the Council agreed on Sept. 16, 2015. *Id.*

104. Council Decision (EU) 2015/1601, art. 4(1)(a)–(b), 2015 O.J. (L 248/80) 88.

105. *Id.* art. 4(1)(c) and 4(2). One year later, on Sept. 29, 2016, the EU Council agreed that the 54,000 relocations originally envisioned for asylum seekers in Hungary could be directed to Syrian asylum seekers in Turkey, consonant with the EU-Turkey Agreement that had been negotiated in March 2016. Council Decision (EU) 2016/1754, 2016 O.J. (L 268) 82.

106. Jacopo Barigazzi & Maia de la Baume, *EU forces through refugee deal*, POLITICO (Sept. 23, 2015, 4:51 PM CET), <https://www.politico.eu/article/eu-tries-to-unblock-refugee-migrants-relocation-deal-crisis/>.

short.¹⁰⁷ A consensus—the usual approach employed by the European Council—could not be reached. When the refugee relocation plan was put to a vote, it passed overwhelmingly, but Hungary, Slovakia, the Czech Republic, and Romania cast negative votes and Finland abstained.¹⁰⁸ Although Denmark and Ireland were exempt from EU migration measures, pursuant to prior agreements, both countries volunteered to accept refugees relocated from Greece and Italy.¹⁰⁹

As a matter of EU law, the Council Decision of September 22, 2015, took effect on September 25, 2015, in all Member States.¹¹⁰ For example, France had a quota of roughly 12,962 (3,064 asylum seekers from Italy and 9,898 from Greece).¹¹¹ Germany had to accept 17,036 (4,027 from Italy and 13,009 from Greece).¹¹² Hungary's total allotment was 1,294 (306 from Italy and 988 from Greece).¹¹³ The Czech Republic's total was 1,591;¹¹⁴ Slovakia's total was 802.¹¹⁵ The Council Decision stipulated that the relocation program would be in effect for two years.¹¹⁶ Reports on the progress of the Member States would be due every six

107. Ian Traynor & Patrick Kingsley, *EU governments push through divisive deal to share 120,000 refugees*, GUARDIAN (Sept. 22, 2015, 12:17 EDT), <https://www.theguardian.com/world/2015/sep/22/eu-governments-divisive-quotas-deal-share-120000-refugees>.

108. Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v. Council of the European Union, ECLI:EU:C:2017:631, Judgement of 6 Sept. 2017, at 7.

109. Ireland volunteered to accept 4,000 asylum seekers. Suzanne Lynch, *Irish refugee opt-in sets us apart from Britain and Denmark*, IRISH TIMES (Sept. 10, 2015, 13:42), <https://www.irishtimes.com/news/world/europe/irish-refugee-opt-in-sets-us-apart-from-britain-and-denmark-1.2347107>. Under the 1997 Treaty of Amsterdam and the 2009 Treaty of Lisbon, Denmark, Ireland, and the United Kingdom secured the right to opt out of EU legislation regarding migration, which is subsumed in the Justice and Home Affairs arena. Although Denmark and Ireland expressed solidarity with frontline EU States by agreeing to accept relocated asylum seekers, the UK refused to participate in the September 2015 EU relocation plan, noting that the UK had separately promised to receive 4,000 refugees in 2015. Traynor & Kingsley, *supra* note 107.

110. Council Decision (EU) 2015/1601, art.13, 2015 O.J. (L 248/80) 92.

111. *Id.* at 93–94.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 92.

months.¹¹⁷

Despite the small numbers—a quota of roughly 1,000 asylum seekers to relocate to their territory within a two-year period—Hungary and Slovakia announced they planned to defy the EU Council decision.¹¹⁸ Their governments banned any relocation of refugees from Italy or Greece.

IV. THE EU COURT OF JUSTICE

In December 2015, Hungary and Slovakia filed suit in the Court of Justice of the European Union (CJEU) to overturn EU Council Decision 2015/1601.¹¹⁹ Other EU States joined the fray. The Polish government, which had voted in favor of the Council Decision, changed hands in October 2015¹²⁰ and the new government intervened to support the plaintiffs.¹²¹ The defendant EU Council was supported by eight intervenors: Belgium, France, Germany, Greece, Italy, Luxembourg, Sweden, and the EU Commission.¹²²

Hungary and Slovakia raised three principal legal arguments: (1) EU Council Decision 1601 was an improper exercise of executive action in contravention of existing legislation; (2) the EU Council did not provide appropriate notice and otherwise comply with procedural requirements in adopting the Decision; and (3) Decision 1601 was not a proportional response to the situation.¹²³

From a comparative perspective, there is a familiar echo between the first two arguments set forth by Hungary and Slovakia and the central arguments raised by Texas and twenty-

117. *Id.*

118. Jennifer Rankin, *EU met only 5% of target for relocating refugees from Greece and Italy*, *GUARDIAN* (Dec. 8, 2016, 9:35 EST), <https://www.theguardian.com/world/2016/dec/08/eu-met-only-5-of-target-for-relocating-refugees-from-greece-and-italy>.

119. *Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v. Council of the European Union*, ECLI:EU:C:2017:631, Judgement of 6 Sept. 2017, at 5.

120. *Poland elections: Conservatives secure decisive win*, *BBC NEWS* (Oct. 26, 2015), <http://www.bbc.com/news/world-europe-34631826> (reporting that the Oct. 25, 2015 elections resulted in the opposition Law and Justice Party (PiS) obtaining 37% of the vote, against the 24% obtained by the incumbent Civil Platform party).

121. *Slovakia and Hungary*, 2017 E.C.R. 631 at 4.

122. *Id.*

123. *Id.* at 14.

five sister states in *Texas v. United States*,¹²⁴ the 2015 challenge to the Obama Administration's Deferred Action for Parents of Americans, and Lawful Permanent Residents (DAPA) program.¹²⁵ In that case, Texas argued that the DAPA program was unlawful because the President and the Department of Homeland Security were using executive action to reform U.S. immigration laws that they had been unable to change via the legislative process.¹²⁶ Texas also argued that the DAPA program was unlawful because it had not followed the lengthy notice and comment procedure required when agencies adopt substantive rules.¹²⁷

On September 6, 2017, roughly eighteen months after litigation began, the EU Court of Justice issued a ruling. A Grand Chamber of 15 judges unanimously and resoundingly upheld the executive action to craft provisional measures in response to the major migration crisis.¹²⁸ In analysis, tone, and result, the CJEU opinion stands in stark contrast to the U.S. Court of Appeals for the Fifth Circuit, which affirmed the trial court's ruling in favor of Texas.¹²⁹ The CJEU dismissed, one by one, each of the legal arguments advanced by Hungary, the Slovak Republic, and Poland. The CJEU rejected the assertion that the EU Council had run roughshod over the Dublin III Regulation provisions of European asylum legislation when it adopted the plan to relocate 120,000 asylum seekers from Greece and Italy to other Member States.¹³⁰ Emphasizing that fundamental EU law authorizes the EU Council to craft temporary measures,¹³¹ the CJEU concluded

124. 809 F.3d 134, 149 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

125. *Id.* at 146.

126. *Id.* at 178–82.

127. The Administrative Procedure Act requires agencies to utilize the notice and comment process when they adopt substantive rules. However, in *Texas*, the United States argued that the DAPA program was exempt from notice and comment procedures as a policy statement. *Id.* at 171.

128. Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v. Council of the European Union*, ECLI:EU:C:2017:631, Judgement of 6 Sept. 2017.

129. *Texas*, 809 F.3d at 188.

130. *See Slovak and Hungary v. Council*, ECLI:EU:C:2017:631.

131. Treaty on the Functioning of the European Union (TFEU) is one of the primary EU treaties. It evolved from the 1957 Treaty of Rome that established the European Economic Community; in 1992, as a consequence of the Maastricht Treaty, it was renamed the Treaty on establishing the European Union (TEC); in 2007, as a consequence of the Lisbon Treaty, it

that the well-documented and growing migration crisis in frontline states justified the Council's two-year relocation plan.¹³² The Court refuted the plaintiffs' related claims that the provisional measures were not warranted because the emergency was not sudden,¹³³ and that the two-year period was lengthier than needed.¹³⁴ In sum, the Court ruled that the Council Decision did not constitute legislation by subterfuge.¹³⁵

The Court also forcefully rejected the procedural challenges to the decision to relocate asylum seekers.¹³⁶ It ruled that there had been adequate notice to and consultation with the European Parliament,¹³⁷ that the requirement of setting forth the proposed Decision in every one of the EU's official languages did not apply,¹³⁸ and that the Council had not been required to seek the opinion of each of the Member States' national parliaments before taking action.¹³⁹

With regard to the proportionality argument, the Court accentuated both the unprecedented and fast-moving migration crisis¹⁴⁰ and the Council's design of a relocation plan that took into account the population, unemployment rate, GDP, and ratio of asylum seekers to inhabitants in each EU Member State.¹⁴¹ The Court quickly considered and rejected the plaintiffs' assertions that the Council should have adopted a temporary protection regime instead of the refugee relocation scheme¹⁴² or devised a plan that could have been adopted by consensus.¹⁴³ Indeed, the Court strongly refused to second guess the Council.¹⁴⁴ This, the Court said, was "essentially political choice, the

was renamed the TFEU. Art. 78(3) of the TFEU grants power to the Council to act based on a proposal from the EU Commission. *See id.* at 24.

132. *See id.* at 18.

133. *See id.* at 23.

134. *See id.* at 20.

135. *See id.* at 19.

136. *See id.* at 24–33.

137. *See id.* at 28.

138. *See id.* at 32.

139. *See id.* at 31.

140. *See id.* at 34.

141. *See id.* at 44–45.

142. *See id.* at 39.

143. *See id.* at 38–39.

144. *See id.* at 38.

appropriateness of which cannot be examined by the Court.”¹⁴⁵

In closing, the Court dismissed Hungary’s argument that Council Decision 1601 violated international refugee law because it did not allow the relocated asylum seekers to remain in the country in which they had lodged their asylum applications.¹⁴⁶ Refraining from offering observations about the irony—or chutzpah—of Hungary presenting itself as the protector of the legal rights of refugees, the Court ruled that the Council Decision did not contravene the 1951 Refugee Convention relating to the Status of Refugees or EU law.¹⁴⁷ Accordingly, the CJEU dismissed the action filed by Hungary and the Slovak Republic and ordered the plaintiffs to pay the costs of the EU Council.¹⁴⁸

The CJEU Judgment of September 6, 2016, is an important affirmation of the executive power and discretion of the EU Council, as well as of the necessity of the EU Council to act via qualified majority in crisis situations. The CJEU ruled that the EU Council must be allowed broad discretion when adopting measures that entail policy choices and involve complex assessments.¹⁴⁹ This ruling does far more than affirm the relocation policy set forth in Council Decision 1601. The Court’s central message is that EU institutions, such as the EU Council, have great power and substantial latitude in devising and implementing EU-wide programs.¹⁵⁰

V. STATE RESPONSES

Upon losing the litigation, Hungary declared that the CJEU had not issued a legitimate court judgment, but a political decision.¹⁵¹ The Foreign Minister, Peter Sziljarto, adopted violent

145. *Id.* at 18.

146. *Id.* at 39.

147. *Id.* at 49. The final series of arguments centered around Hungary’s contention that the Council Decision 1601 violated the principles of legal certainty and normative clarity. The Court noted that the Decision 1601 contained a series of measures that derogate temporarily in specified ways from the common European asylum law. The details in both European asylum law and the temporary relocation plan are sufficient to guide Member States. *Id.* at 46–47.

148. *Id.* at 49.

149. *Id.* at 33.

150. *Id.* at 48.

151. James Kanter, *E.U. Countries Must Accept Their Share of Migrants, Court Rules*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/>

and ugly language: “[The ruling is] ‘appalling and irresponsible.’”¹⁵² “This decision jeopardises the security and future of all of Europe. Politics has raped European law and values.”¹⁵³ Two weeks later the Prime Minister, Viktor Orbán, added that 60 million people would flee Africa to Europe by 2020.¹⁵⁴ He also stated that “the western countries ‘will rape us’ if we do not cooperate” with the refugee quota.¹⁵⁵ “A consequence of Brussels’ failed immigration policy,” he added, “is the dramatic decrease in public safety, the now weekly terrorist attacks.”¹⁵⁶

Orbán also declared that the EU should pay Hungary for building its border fences to keep out asylum seekers.¹⁵⁷ Hungary sent a letter to Brussels seeking \$523 million as payment for fifty percent of the construction costs.¹⁵⁸ These fences protect “[the entirety of] Europe against the flood of illegal migrants.”¹⁵⁹ The European Union should show solidarity with Hungary, not just with Italy and Greece, he asserted.¹⁶⁰

Hungarian citizens mounted protests against Orbán and his defiance of the EU Court ruling.¹⁶¹ Other European leaders expressed dismay at his stance. German Chancellor Angela Merkel called on Hungary to implement the CJEU judgment and drop its confrontational approach.¹⁶² “It’s unacceptable that a

world/europe/eu-migrants-hungary-slovakia.html.

152. Nick Gutteridge, *Raping European values’ EU threatens Hungary with court as Orbán slams ECJ refugee ruling*, EXPRESS (Sept. 6, 2017, 13:20), <https://www.express.co.uk/news/politics/850651/Migrant-crisis-EU-Hungary-Orban-ECJ-refugee-quotas>.

153. *Id.*

154. Benjamin Novak, *Orbán: “[Western Europe] will rape us” if we do not consent*, BUDAPEST BEACON (Sept. 18, 2017), <https://budapestbeacon.com/orban-western-europe-will-rape-us-not-consent/>.

155. *Id.*

156. *Id.*

157. *Hungary Asks EU to Pay Half the Cost of Anti-migrant Fence*, VOICE OF AM. NEWS (Sept. 1, 2017, 4:24 AM), <https://www.voanews.com/a/hungary-migrant-fence-bills-europe/4011061.html>.

158. *Id.*

159. *Id.*

160. *Id.*

161. Katarina Linos et al., *Hungary and Slovakia challenged Europe’s refugee scheme. They just lost badly.*, WASH. POST (Sept. 8, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/08/hungary-and-slovenia-challenged-europes-refugee-scheme-they-just-lost-badly/?utm_term=.24d295a8cdae.

162. *Merkel calls on Hungary to implement court ruling on refugee*

government says a ruling of the European Court of Justice does not interest them,” Merkel said.¹⁶³ “Europe is an area of the rule of law. We will have to talk about this at the European Council in October.”¹⁶⁴

To date, EU Member States have received approximately 33,000 asylum seekers from Greece and Italy pursuant to the relocation program.¹⁶⁵ This is fifty percent of the 66,000 envisioned by the EU Council’s plan.¹⁶⁶ Fifty percent is hardly a resounding success. Faced with the unenthusiastic participation of Member States, the EU decided not to extend the relocation program when it expired in late September 2017.¹⁶⁷ The EU Commissioner for Migration noted that the expiration of the two-year period would not end the relocations: many asylum seekers were still being processed in Italy and Greece, and asylum seekers who arrive prior to September 26, 2017, and meet the eligibility criteria for relocation could still be transferred to other EU Member States.¹⁶⁸

In contrast to the lack of enthusiasm of other EU Member States, Hungary, Poland, and the Czech Republic stand out in their recalcitrance. Hungary and Poland have resolutely failed to accept a single relocated asylum seeker from Greece or Italy.¹⁶⁹

distribution, REUTERS (Sept. 11, 2017, 7:10 PM), www.reuters.com/article/us-europe-migrants-germany-hungary/merkel-calls-on-hungary-to-implement-court-ruling-on-refugee-distribution-idUSKCN1BM2UW.

163. *Id.*

164. *Id.*

165. *Member States’ Support to Emergency Relocation Mechanism*, EU COUNCIL, 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 (last updated Mar. 26, 2018).

166. *See id.* Council Decision 1601 specified 50,400 relocations from Greece, 15,600 from Italy, and 54,000 to be allocated in a second phase. Council Decision (EU) 2015/1601, 2015 O.J. (L 248/80) 82. The second phase took form in September 2016, when the EU Council agreed that the 54,000 relocations originally allocated to Hungary could be directed to Syrian refugees in Turkey in accordance with the EU-Turkey Agreement negotiated in March 2016. *Id.*

167. Jacopo Barigazzi, *Brussels to end mandatory refugee relocation (for now)*, POLITICO (Sept. 15, 2017), <https://www.politico.eu/article/brussels-to-end-mandatory-refugee-relocation-for-now/>.

168. *Id.* Asylum seekers arriving after September 26, 2017, however, would not fall within the EU relocation plan.

169. Aria Bendix, *EU Takes Legal Action Against Czech Republic, Hungary, and Poland*, THE ATLANTIC (June 14, 2017),

The Czech Republic has accepted 12 of its allotted 1,591, but has refused to accept any additional asylum seekers in the past eighteen months.¹⁷⁰ The Slovak Republic has moved away from its obstructionist stance and has accepted the relocation of some asylum seekers from Greece.¹⁷¹ It has signaled that it will work with EU institutions to resolve the impasse.¹⁷²

Continued defiance by Hungary, Poland, and the Czech Republic has led the EU institutions to take further action. When Member States breach EU law, the EU Commission can begin enforcement proceedings, known as infringement actions, against the Member States. These proceedings have multiple stages, including referrals to the CJEU. They can lead to a variety of penalties, from monetary fines to expulsion from the European Union.¹⁷³

In the face of the public refusal of Hungary, Poland, and the Czech Republic to comply with the EU relocation law and accept any of the asylum seekers in Italy and Greece still waiting for transfer to other EU Member States, the EU Commission has initiated formal proceedings to enforce Council Decision 1601 against them.¹⁷⁴ The EU Commission sent letters of formal notice to all three states.¹⁷⁵ Hungary, Poland, and the Czech Republic sent responses which the EU Commission deemed insufficient. As a result, the EU Commission moved to the second stage of infringement proceedings and sent reasoned opinions to each of the non-complying Member States.¹⁷⁶ Hungary, Poland, and the Czech Republic continue to refuse to accept any asylum seekers relocated from Italy and Greece. Accordingly, in December 2017, the EU Commission proceeded to the third stage of the

<https://www.theatlantic.com/news/archive/2017/06/eu-takes-legal-action-against-czech-republic-hungary-and-poland/530241/>.

170. *See id.*

171. Kanter, *supra* note 151.

172. *Id.*

173. *See id.*

174. European Commission Press Release IP/17/1607, Relocation: Commission Launches Infringement Procedures Against the Czech Republic, Hungary and Poland (June 14, 2017).

175. *Id.*

176. European Commission Press Release IP/17/2103, Relocation: Commission Moves to Next Stage in Infringement Procedures Against the Czech Republic, Hungary and Poland (July 26, 2017).

infringement process. The EU Commission decided to refer Hungary and Poland and the Czech Republic to the EU Court of Justice based on their non-compliance with their legal obligations on relocation.¹⁷⁷ The Court has taken the matter under consideration.

This case that began with border walls and proceeded to refugee bans is returning to the highest EU court. It is a critical moment in the history of the European Union. The United Kingdom has voted to leave the European Union. Restive regions, from Scotland to Catalonia, want to secede from EU Member States. Voices of populism and xenophobia loudly criticize the EU institutions. The Czech Republic re-elected an anti-immigrant prime minister,¹⁷⁸ and Viktor Orbán recently swept to a resounding re-election victory in Hungary.¹⁷⁹ Europe—and the rest of the world—is watching. What will the EU Court of Justice do?

177. European Commission Memoranda 17/4767, December Infringements Package: Key Decisions (Dec. 7, 2017).

178. Marc Santora, *Czech Republic Re-elects Milos Zeman, Populist Leader and Foe of Migrants*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2018/01/27/world/europe/czech-election-milos-zeman.html>.

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