**The European Union Temporary Protection Directive: an example of solidarity in law but not in practice. A Review of Temporary Protection in the European Union 1990-2015.**

**Abstract**

Temporary protection mechanisms emerged in Europe in the 1990s in response to mass influxes of asylum seekers. The influxes of asylum seekers from Yugoslavia, fleeing conflicts and violence resulting from the break-up of that country, have been closely associated with its emergence. In the light of the developments in that period, and in particular the responses of European states to the Yugoslavian influxes, this paper reviews the emergence of temporary protection. It reviews the convergence of European norms which lead EU states to agree the Temporary Protection Directive in 2001. The paper juxtaposes the 1990s Yugoslavian influxes and responses, with the 2015 European refugee crisis and the responses of the EU. These responses have included arrangements to relocate asylum seekers from states under the most pressure but have excluded temporary protection. The omission of temporary protection is consistent with the findings in this paper, which show that EU states came to disfavour temporary protection as a response to asylum crises. The paper concludes that while EU states did commit to a set of standards for temporary protection, they did not commit to implementation of temporary protection.

Key words

Temporary Protection, Yugoslavia, Temporary Protection Directive, burden sharing, return/repatriation, humanitarian, Syrian refugees

**Introduction**

Asylum claims have been a major ‘problem’ for European states as their numbers have risen against domestic pressures to reduce immigration. In the 1990s there were new asylum pressures as large numbers of people from eastern European nations arrived in European Union states, (EU), with the collapse of the Soviet block and European communism. The single largest group of asylum seekers was those fleeing conflict in Yugoslavia. A key objective of EU states was to contain the Yugoslavian refugee problem as much as possible outside the EU. Refuge under various national arrangements of temporary protection was given to those who reached the EU from Yugoslavia. While critics of temporary protection were concerned with the ad hoc approach and the precariousness of status and rights under temporary protection, in the main, they accepted the pragmatism of temporary protection arrangements because, whatever their exact forms, they ensured immediate protection. Agreement for a common pan-EU temporary protection instrument was slow coming primarily due to a lack of consensus between states on an acceptable basis for sharing the burden of a mass influx, which was considered as a central part of an effective EU wide arrangement. Following change brought about by the Treaty of Amsterdam in 1999, which required the EU to have a temporary protection instrument by 2004 at the latest, the Temporary Protection Directive 2001/55/EC was agreed in 2001.[[1]](#footnote-1)

The Directive, (TPD), provides the EU with a mechanism to activate an EU-wide temporary protection arrangement in a situation of ‘mass influx or imminent mass influx of displaced persons from third countries’ into the EU.[[2]](#footnote-2) Displaced persons include persons who have fled areas of armed conflict or endemic violence.[[3]](#footnote-3) TPD provides temporary protection for a one-year period initially with the possibility of extension for a further two years.[[4]](#footnote-4)

It has been claimed that TPD establishes ‘the binding legal obligation of temporary asylum’ providing more legal security,[[5]](#footnote-5) and that TPD sets out a model temporary protection system which the EU can ‘take off the shelf’ and use in the event of a crisis.[[6]](#footnote-6)

Fourteen years after the enactment of TPD the EU experienced what has been acknowledged as the largest migration and humanitarian crisis in Europe for decades with close to 1.3 million recorded asylum claims in 2015.[[7]](#footnote-7) The vast majority of these migrants are considered by UNHCR to have fled war and persecution.[[8]](#footnote-8) 363,000 applications came from Syrian nationals alone, representing 29% of all claims in 2015.[[9]](#footnote-9) EU data shows that since 2014 Syrians have had an average EU-wide asylum recognition rate equal to or higher than 75%.[[10]](#footnote-10) Not surprisingly there have been calls to activate TPD to help address the crisis in the EU, and some calls to activate it to facilitate evacuation of Syrians to the EU.[[11]](#footnote-11) Neither the Commission nor any EU state has responded to calls to activate TPD.[[12]](#footnote-12) This seems remarkable for a number of reasons. First, the scale of the crisis seems to merit activation. Given the marathon efforts from the Commission and some EU states, notably Germany, to secure an EU wide temporary protection mechanism for a mass influx, it seems incongruous that there would be silence. It is remarkable too because TPD secures a comprehensive set of obligations which addressed many of the criticisms of national temporary protection regimes in the 1990s.[[13]](#footnote-13) The Directive has been acknowledged as a benchmark in temporary protection mechanisms.[[14]](#footnote-14)

Given the 2015 and on going crisis, the silence to the calls to activate TPD requires exploration. As TPD was passed following experiences in Europe of mass influxes caused by the Yugoslavian wars, and as it records that the EU Commission and member states were exhorted to learn lessons from their responses, it is necessary to revisit that period and the responses to those influxes, to understand the expectations about what temporary protection would achieve for other mass influxes into the EU.[[15]](#footnote-15)

**Structure of the paper**

The paper provides first some broader contexts against which it considers the development of temporary protection. The paper then provides an overview of the two Yugoslavian conflicts and the resulting refugee influxes which are associated with the emergence of temporary protection in Europe: the Bosnian war 1992-1995 and the Kosovo crisis in 1999. Following this there is an overview of the early developments of the common European asylum system, (CEAS), which developed in parallel with the Yugoslavia influxes. The paper considers the emergence of five elements of temporary protection as reflected in TPD passed in 2001. Finally consideration is given to the responses of the EU to the 2015 refugee crisis, in particular the significance of the relocation mechanisms, which have been innovated in lieu of activation of TPD, to relocate asylum seekers from Greece and Italy. The paper concludes that following their experiences of the Yugoslavian influxes, EU states were committed to an instrument on temporary protection but were not committed to implementing temporary protection.

**1990s - some contexts**

A numbers problem and then a security one too; Elisabeth Abiri, “Sweden; the Kosovars and Refugee Policy changes - isn’t it best for everyone if they stay close to home?’ in Van Selm (eds) 92; 109-110

Three general observations can be made about the character of European and international politics in the 1990s which are integral to an understanding of the emergence of temporary protection and the subsequent concerns about its putative benefits and purpose.

At some point asylum became mixed up with immigration debates (eg re Italy –Hein in Van Selm (eds) 141

First, there was the rising migration numbers, and, from the perspective of EU states, this was dominated by an increasing asylum problem. In the 1970s the total number of asylum claims across Western Europe averaged no more than 13,000 annually.[[16]](#footnote-16) In 1980 across the fifteen western European states, (that came to constitute the EU, (EU15))[[17]](#footnote-17), there was a total of 46,000 asylum claims. By the mid-1980s the numbers began to cause serious concern. In 1985 the number had risen to 157000. By 1990 asylum seekers were arriving from Afghanistan, Angola, Ghana, Iran, Iraq, Nigeria, Pakistan, Somalia, Sri Lanka, Viet Nam and Zaire.[[18]](#footnote-18) To resist the trend European states put up a ‘battery’ of non-entrée policies.[[19]](#footnote-19) Hence not surprisingly the ‘Fortress Europe’ critique emerged.[[20]](#footnote-20) These policies did not see a reduction in asylum numbers and it has been suggested that they contributed to the increase as some would-be economic migrants turned to asylum as an entry route to avoid them.[[21]](#footnote-21) The 1990s became a decade of new record numbers of asylum claims as new groups of asylum seekers arrived from eastern Europe. In 1992 the EU15 received a high of 674,000 asylum claims.[[22]](#footnote-22)

Also, EU states becoming states of immigration for first ime in significant numbers, eg Italy (Van Selm 140; eastern states which joined ofrom 2004

The second context was the collapse of the Soviet Union at the beginning of the decade and the decline of its influence.[[23]](#footnote-23) The impact of this was both a period of political uncertainty in the international arena, and, as noted above, an increasing numbers of asylum applications in EU states from east Europeans.

The third observation is how international affairs were increasingly viewed and legitimised from a humanitarian perspective.[[24]](#footnote-24) The increasingly influential role of the facilitated this.[[25]](#footnote-25)

media

The first major international crisis of the 1990s was the first Gulf War, January - February 1991, which was ended by a UN authorized, American lead coalition, which successfully removed Iraqi forces from Kuwait.[[26]](#footnote-26) In the aftermath of this war a huge number of ethnic Kurds, estimated by some at two million, fled, most towards Turkey, after a failed coup attempt against the Iraqi regime. The Turkish government alarmed by the impending mass influx closed its border. A potential humanitarian disaster was averted by international intervention - an American lead operation to secure a ‘safe haven’ - a no-fly zone, to provide a protected space for the Iraqi Kurds. While there were incursions, the safe haven was considered effective. [[27]](#footnote-27)

The humanitarian cause was used to justify a new role for NATO[[28]](#footnote-28) for its interventions in the Yugoslav conflicts.[[29]](#footnote-29)

**1990s - the Yugoslav conflicts**

The break-up of the Socialist Federal Republic of Yugoslavia (SFRY) into separate independent states was a complex series of bloody conflicts representing the first wars in Europe since the end of World War Two. The re-emergence of deep historical divisions along national lines and ethnic groupings shaped the series of conflicts and resulting displacements of huge numbers of people linked to ethnic cleansing.[[30]](#footnote-30) As one commentator has suggested, given the mix of ethnicities and nationalities, the conflicts ‘represented logical (if violent and brutal) steps towards coherent goals’.[[31]](#footnote-31) For the seceding states the goals were independence from an increasingly dominant Serbia, and in the process, to secure territory and protection of their ethnic compatriots. In the course of pursuing nationalistic aims, armies and militia from all sides sought to intimidate, ethnically cleanse and expel minorities from their territories.

Between 1991 and 1992 Croatia, Bosnia-Herzegovina, (Bosnia), Macedonia and Slovenia declared themselves separate states, leaving Serbia, (with its two provinces, Vojvodina and Kosovo), and Montenegro, as the remainder of what was to be re-named the Federal Republic of Yugoslavia.[[32]](#footnote-32) Slovenia seceded first. The first major Yugoslavian conflict was the Croatian civil war between 1991 and 1995. During the course of the war a UN force, UNPROFOR, was deployed to facilitate demilitarization and to monitor.[[33]](#footnote-33)

The second and most bloody conflict was the Bosnian civil war, 1992-1995, with both Croatia and Serbia seeking to make gains from Bosnian territory at the expense of the majority Bosnian Muslims. As the conflict escalated UNPROFOR’s mandate was extended into Bosnia to create ‘safe areas’ to deter attacks on and to protect ethnic Muslims populations in a number of areas including Sarajevo and Srebrenica. UNPROFOR proved to be wholly inadequate in Bosnia as Bosnian ethnic Serb forces attacked these areas with little impunity, sieging and bombing Sarajevo for the duration of the war, and notoriously killing thousands of Muslim men and boys in Srebrenica.[[34]](#footnote-34) After some hesitation, due to differences in the NATO alliance about strategy, but under pressure for a resolution to a worsening humanitarian crisis, NATO’s sustained and intense bombing of Serbian targets in 1995 was seen as instrumental in bringing the conflict to an end.[[35]](#footnote-35) In late 1995 the Dayton Peace agreement was signed.[[36]](#footnote-36)

These wars resulted in what were the largest refugee movements in Europe since World War Two. It has been suggested that the total number of displaced Bosnians was over three million.[[37]](#footnote-37) In 1992, the year with the highest number of recorded asylum applications across the 15 EU states, 224,000 were from those fleeing the conflicts in Yugoslavia, notably Bosnia, representing 33% of all applications.[[38]](#footnote-38) EU states implemented temporary protection arrangements for these refugees.

In the late 1990s there was further disintegration and conflict, this time in Serbia, as the Serbian-lead government sought to put down protests and guerilla style attacks from Albanian-ethnic Kosovars seeking the independence of the Kosovo region from Serbian rule.[[39]](#footnote-39) In the spring of 1999, following increased intensity to the conflict and human rights abuses, there was a sudden and massive increase to the refugee flows, (quite possibly accelerated by NATO bombing).[[40]](#footnote-40) In a very short period very large numbers of Albanian-ethnic Kosovars, estimated around 800,000, fled to Albania and Macedonia.[[41]](#footnote-41) The Macedonian government closed the border and threatened to keep it closed unless there was an international agreement to share the burden. The response, at the initiative of the US, involving a number of countries including most EU states, was an evacuation programme, under which states agreed to take quotas of refugees from the Macedonian border. There were around 90,000 evacuees, with 14 EU states accepting a total of 53,000 of these.[[42]](#footnote-42) EU states used temporary protection mechanisms for these evacuees. In June 1999 following NATO bombing, Serbian aggression in Kosovo ended when the Serbian parliament agreed to a peace plan for the withdrawal of Serb militarised forces, the deployment of UN personnel, the return of refugees and to respect substantial autonomy for Kosovo.[[43]](#footnote-43)

ICF 86 suggests 96k evacuated to EU states – query this

**1990s – developing an EU asylum system**

During the 1990s the EU started developing its common European asylum system, (CEAS): a system of harmonized law applicable across all EU states.[[44]](#footnote-44) While there were sound humanitarian reasons to develop common obligations and standards, it was the case, for reasons already noted, that this development was to address the growing asylum ‘problem’.[[45]](#footnote-45)

A common approach to the ‘problem’ was also intended to protect the EU’s internal market, designed to enable free movement for EU citizens, which, with the EU Schengen rules, required states to remove border controls between themselves.[[46]](#footnote-46) There was a particular risk to the functioning of the internal market of multiple asylum claims by the same person: an asylum claim denied in one state could be made in another state if nothing was done to deny this possibility and to reduce secondary movements between states. It made sense then to develop a common EU wide set of asylum rules to manage, reduce and eliminate multiple claims.

A key innovation was the so-called Dublin transfer rules. The principle of these rules was, and remains, that an asylum seeker can make one claim only for asylum within the EU.[[47]](#footnote-47) The rules are to discourage and prevent multiple applications which as noted were recognized as contributing to increasing numbers of asylum claims.[[48]](#footnote-48) The Dublin rules determine which one state is responsible for the claim.[[49]](#footnote-49) Under the rules it might not be the state in which the claim is made as an asylum seeker could have travelled through a number of EU states to reach a preferred state. The criterion more often applicable for determining responsibility is the state through which the asylum seeker first entered the EU. Given that entry is overwhelmingly through eastern and southern states, as seen in both the 1990s and 2015 influxes, the system places severe burdens on frontline states.[[50]](#footnote-50)

In 1997 EU states agreed the Treaty of Amsterdam, which was intended to provide a firm and coherent legal base to build the common asylum system.[[51]](#footnote-51) The Amsterdam changes incorporated formally into EU law the Dublin transfer rules and the Schengen rules abolishing border controls, (both of which had been developed by EU states but outside mainstream EU law).[[52]](#footnote-52) In addition this Treaty change committed the EU institutions to develop a pan EU temporary protection mechanism. [[53]](#footnote-53) On 1 May 1999, day 39 of the NATO bombing in Serbia, the Treaty of Amsterdam changes came into force.[[54]](#footnote-54) The first post Treaty of Amsterdam instrument was a 2001 Directive on temporary protection: Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, (TPD). [[55]](#footnote-55)

**Yugoslav crises – emergence of European Temporary Protection**

As recitals 3 and 6 of TPD acknowledge, the experiences of the refugee influxes caused by the break up of Yugoslavia, and their responses to them, contextualised the discussions and development of temporary protection. Of particular note is recital 6:

ICF 85 ft 93

On 27 May 1999 the Council adopted conclusions on displaced persons from Kosovo. These conclusions call on the Commission and the Member States to learn the lessons of their responses to the Kosovo crisis in order to establish the measures in accordance with the Treaty.[[56]](#footnote-56)

Before looking at TPD, it is right to emphasise that the emergence of temporary protection was not separated from the politics about how to address and resist increasing migration into the EU particularly from asylum seekers. The maintenance of non-entrée policies, including by some states visa, requirements for Bosnian nationals at the height of the Bosnian conflict,[[57]](#footnote-57) the promotion of ‘safe areas’ despite the risks, and the motivation for supporting the evacuation programmes in response to the Kosovo crisis, are indicative of clear policies to keep the crises and asylum seekers outside the EU as much as possible. Temporary protection emerged because not all refugees could be kept out: as a response to spontaneous arrivals. It was not an admission of defeat.[[58]](#footnote-58) Temporary protection was a part of the control policies vis à vis the influxes.

UK had a resettlement programme for vunerbale Bosnian refugees in 1990s - put on new status ‘temporary refugee’ Van Selm eds 75-76; 81

Eg UK, Sweden, Van selm (eds) 70, 96, 98;

ICF 4, 84

Ft 94/95 urged by UNHCR; Hein in Van Selm (eds) 143;145 – emerged in Italy as ad hoc response to a number of separate immigration crisis

The emergence of temporary protection was controversial. On the one hand it had the support of UNHCR as an innovative response to the Yugoslavian refugee crises.[[59]](#footnote-59) On the positive side, by applying temporary protection, EU states accepted a humanitarian obligation to protect those fleeing war and conflict. On the other side there were concerns. UNHCR support for temporary protection did not insist that displaced people be treated as regular Convention refugees.[[60]](#footnote-60) There was no common set of EU obligations on the form and extent of protection - each state implemented its own arrangements.[[61]](#footnote-61) There were concerns that some states used temporary protection to avoid or water down obligations under the 1951 Convention.[[62]](#footnote-62)

Despite the varied approaches it seemingly became accepted wisdom that temporary protection could be an appropriate response to mass influxes and so states moved towards converging on the key elements.[[63]](#footnote-63) TPD is the result of a decade long journey to an agreement.[[64]](#footnote-64) Using Joan Fitzpatrick’s nomenclature, this paper analyses the ‘elements’ of temporary protection through their formalization in the TPD.[[65]](#footnote-65)

**Elements of EU Temporary Protection**

ICF 84

Temporary protection regimes are classically implemented as emergency responses to mass influx situations and are mostly introduced by first countries of asylum and other host states which cannot cope with large scale influx situations by implementing individual refugee status determination. However, …’

TP not always for mass influx or not always called TP but is

|  |  |
| --- | --- |
| **Elements of EU temporary protection** | **Related provisions of TPD** |
| The purpose: a response providing immediate protection to a mass influx of displaced persons | Recitals 2 and 8  Article 1 – purpose of directive in relation to mass influx of ‘displaced persons’  Article 2(a) – an exceptional procedure  Article 2(a) – in particular to protect asylum system from being overwhelmed |
| Protection for a group fleeing conflict, war or violations of human rights | Article 2(c) - defines ‘displaced persons’  Article 2(d) - group(s) of displaced persons which benefit from TPD |
| A mechanism enabling protection, which does not undermine obligations to protect notably under 1951 Geneva Convention[[66]](#footnote-66) | Recitals 10, 15, 16 and 18  Article 5 and 25 - procedure to activate TPD  Articles 8-16 - protections and rights for beneficiaries of TPD  Articles 17-19 – right to access to regular asylum |
| Solidarity: promotion of sharing the burden between EU states[[67]](#footnote-67) | Recital 20  Article 24 - activation of TPD gives access to EU refugee funding  Article 25 – states to indicate capacity to share the burden  Article 26 – process for transferring displaced persons between states including need for consent of such persons. |
| End of temporary protection | Recitals 13 and 19  Article 4 - length of temporary protection and extensions  Article 6 – ending of temporary protection  Article 21 – facilitating voluntary return  Article 22 – circumstances for enforced return  Article 23 – circumstances when return may have to be delayed |

**The purpose: a response providing immediate protection to a mass influx of displaced persons**

Recital 2 acknowledges that TPD was created to provide an ‘exceptional’ arrangement for ‘immediate temporary protection’ to ‘displaced persons’ arriving in the EU as part of a mass influx ‘who cannot return to the country of origin’.[[68]](#footnote-68) Under article 2(d) the required characteristic of ‘mass influx’ is:

arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided …’.[[69]](#footnote-69)

There is no specified number or formula to determine precisely a ‘large number’ threshold.[[70]](#footnote-70) Under article 2(a) risk to the functioning of the ‘asylum system’ is identified as a particular indicator that the influx is large so TPD applies.[[71]](#footnote-71) Avoiding failures in states asylum systems because of the pressure from large numbers was a clear factor in UNHCR’s support for temporary protection in Europe in the 1990s.[[72]](#footnote-72) Interestingly, Fitzpatrick considered that there were not many EU states whose asylum systems were at risk of failure even at the height of the influxes in 1992 and 1993.[[73]](#footnote-73) During the Kosovo crisis in 1999 the number of asylum claims across EU15 was 40% lower than the 1992 high, with no state under the level of pressure that was experienced by some in 1992-3; so it is even less likely that an EU state’s asylum system was overwhelmed.[[74]](#footnote-74)

No formula was applied in 1990s to determine a mass influx threshold and none applies for TPD. To activate TPD, the UNHCR criterion to avoid risk to the functioning of the asylum system, is a relevant but not contingent factor. Ultimately the decision to activate is, as it was in the 1990s, a matter of political choice. (Though temporary protection requires a majority vote in favour and, unlike in the 1990s, a state cannot now implement such arrangements on its own.[[75]](#footnote-75)) The Commission has acknowledged the political rather than legal character of the activation trigger in its 2000 memorandum when proposing the first draft of the Directive, ‘Finally, except that the number of people must be substantial, it is impossible to quantify in advance precisely what constitutes a mass influx. The decision establishing the existence of a mass influx will rest with the Council’.[[76]](#footnote-76)

The numbers of asylum seekers arriving in the EU in 2015 were unprecedented.[[77]](#footnote-77) It was universally acknowledged as the largest migration and humanitarian crisis in Europe for decades. Across the original fifteen member states, (EU15), 1,044,000 applications were received during 2015.[[78]](#footnote-78) The previous high for these fifteen states, in 1992 during the Bosnian conflict, was 674,000.[[79]](#footnote-79) It is beyond dispute that the majority of the 2015 migrants were considered to be fleeing war and persecution with at least 363,000 fleeing Syria alone.[[80]](#footnote-80) Data shows that from 2014, Syrians had an EU-wide asylum recognition rate equal to or higher than 75%.[[81]](#footnote-81) The pressures on asylum systems caused by these numbers were real, acknowledged by the EU, and were a key reason why the EU responded with relocation measures which are considered below.[[82]](#footnote-82)

Not clear UK asylum figures in 1999 inc HEPs – Guild in Van Slem (eds) 78, 82

While there is a lack of precision and clarity around the notion of ‘mass influx’ it is implausible to suggest that the scale of the crisis in 2015 could not be considered as having met the mass influx threshold of ‘arrival in the [EU] of a large number of displaced persons’.[[83]](#footnote-83) The 2015 numbers climbed and exceed the scale of 1990 influxes, the pressures on asylum systems in 2015 were at least as severe and widespread, if not more so, than 1990s. The unprecedented scale and pressures have been acknowledged universally. None of the key actors vis a vis activation of the TPD, the Commission and the member states, responded in a way to suggest that any of them considered the influx not to be massive and unprecedented. So an understanding of the political calculations for leaving TPD on the shelf needs exploring.

Worth reflecting in disparity between asylum numbers and claims for number of irregular entrants. The gap is substantial. Worth exploring; part of the explanation is backlog of cases; some status probably not declared as asylum claims (eg Hein in Van Selm (eds) 141; 145 re Italy; and some outside the system – who avoid in some cases deliberately. While TP trigger focuses on mass influx vis a vis the asylum system there is a limit to measuring against official figures, not because of the lag, but because the influx and the impact on receiving state is hard to accurately measure at the time when an urgent assessment is needed to determine if a trigger is appropriate.

**Protection for a group fleeing conflict, war or violations of human rights**

Temporary protection is associated with protection of a group of displaced persons. Fitzpatrick explained temporary protection in 1990s Europe as expanding the protection of forced migrants who could not satisfy the criteria under the 1951 Convention by giving group-based protection.[[84]](#footnote-84) Though, it is contested that the 1951 Convention is limited to individualised protection and correspondingly does not provide protection to a group.[[85]](#footnote-85) Group recognition avoids this controversy and provides immediate protection. Temporary protection is then pragmatic, in providing refuge, avoiding delays, (benefitting too those claiming asylum outwith the ambit of the temporary protection mechanism), and avoiding an over legalistic or arguably an erroneous narrow interpretation of the protection obligation.

ICF 84-85

Though differences in description of group – EU states offered group protection during Bosnian crisis, (and Kosovo)

TPD avoids the narrow interpretation of obligations. Under article 2(c) the ‘displaced persons’ beneficiaries are,

third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:

(i) persons who have fled areas of armed conflict or endemic violence;

(ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.

The application of protection to a group is clear. Article 2(d) requires that the character of ‘mass influx’ is ‘arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided …’. Article 5 requires that both the proposal for activation and the final Decision to activate the temporary protection mechanism must include ‘a description of the specific groups of persons to whom the temporary protection applies’.[[86]](#footnote-86)

One final point which can be touched upon, but not developed here, is whether there was an assumption that temporary protection was only intended for a crisis involving displaced Europeans. There are pointers that some commentators and possibly the EU Commission at one time had this in mind.[[87]](#footnote-87) That said, it is clear from article 2(c) that TPD applies to a group arriving from any region in the world as TPD explicitly protects ‘third country nationals or stateless persons’.

TPD could have been activated to protect en masse the large numbers of displaced Syrians arriving in the EU in 2015.

**A mechanism enabling protection, which does not undermine obligations to protect notably under 1951 Geneva Convention**

ICF 85-86 details some of the variation of rights

Temporary protection was promoted by UNHCR for its pragmatism to address immediately a large-scale refugee influx. It has been noted that there were concerns though. These included the lack of a clear status for asylum seekers on temporary protection arrangements, the lack of welfare and social rights, and in some EU states, a denial of the right to regular asylum processes.[[88]](#footnote-88) One commentator opined that ‘Temporary protection introduces a qualitatively different approach, which negates the premise of the Geneva Convention’.[[89]](#footnote-89)

It was incumbent on the EU to address these concerns and it made sense to ensure a harmonised protection system to reduce risks of secondary movements within the EU caused by protection differentials between states.[[90]](#footnote-90)

Under article 2(a) TPD activation is described as a ‘‘procedure’ to offer ‘immediate and temporary protection’ to displaced persons. TPD does not create an alternative form of protection to regular asylum.[[91]](#footnote-91) As has been noted, the process follows the political decision to activate. Under article 5 the process commences with the Commission submitting a proposal, which may have been requested by a Member State, to the Council for temporary protection for a prescribed group or groups of displaced persons, giving an estimation of the scale of the mass influx. Under article 25 states are then required to indicate, ‘in figures or in general terms’ their capacity to receive such persons. The Council, assessing the circumstances and the scale of the movements of displaced persons, votes on the proposal. Under article 5 activation is secured by qualified majority vote.

It has been suggested that the procedure itself is a considerable blocker to activation.[[92]](#footnote-92) However the activation process described above is straightforward. It does not, say, require complicated inter-institution processes, notably it does not require negotiation to secure the consent of the European Parliament, instead only that the latter be informed of activation. But, it cannot be denied there would have been hurdles to overcome and fixes to be made. TPD should have been transposed into the domestic law of all the MSs by the end of 2002.[[93]](#footnote-93) It has been reported that not all states have done this as required.[[94]](#footnote-94) The mechanics for operating the burden sharing transfer mechanism under articles 26 and 27 are untested, and the requirement to achieve convergence between the consent of the proposed asylum seekers for transfer under article 26.1, with the available places across EU states would have been challenging.[[95]](#footnote-95) Valid concern has been raised about how temporary protection status under TPD impacts on the operation of regular Dublin transfer rules as this is articulated poorly in article 18.[[96]](#footnote-96) Achieving political solidarity for enough votes to pass may not have been straightforward of course – resistance by some states to the relocation Decisions, which are considered below, suggests this.[[97]](#footnote-97) But, these hurdles would have been overcome if the political will had been present. And this is the key point.

Consent – p. 24

ICF

‘Cumbersome’ and ‘lengthy’ – one of the main reasons for non activation! ICF 20

Role of media – influencing response, cf ICF p. 18

TPD has harmonised a sound minimum set of rights.[[98]](#footnote-98) It addresses the key criticisms of national temporary protection arrangements it replaced.[[99]](#footnote-99) The rights include a right to a resident permit and access to necessary visas, right to work, (but not necessarily equal priority with EU citizens), access to accommodation, welfare, healthcare and means of subsistence, access to education, rules on family reunification, and measures for unaccompanied minors.[[100]](#footnote-100) Crucially, under article 17, it secures access to regular asylum processes, though processing of the claim can be suspended during the period of operation of TPD. Therefore activation would not have negated the premise of protection under the Geneva Convention.[[101]](#footnote-101) It is also pertinent to note that these rights are no more generous than equivalent rights under regular asylum processes, so the argument that activation would have acted as pull due to the perceived generosity of the rights is less tenable.[[102]](#footnote-102)

ICF 25

Suggested that rights in TPD more costly that those granted under national TP

So there would have been some fixing to do to activate TPD effectively and it is the case that as it has never been activated it is untested with some unclear elements notably in relation to the burden sharing transfer rules and the fit with the Dublin transfer rules under article 18. If the political will was in favour, it is suggested though, TPD would have been activated with the necessary fixes and guidelines. Advocates of refugee rights would not have been concerned in the way they were in 1990s. In short, TPD addresses the earlier criticisms in providing an appropriate level of rights and protections.

**Solidarity: promotion of sharing the burden between EU states**

The physical sharing of the burden between states on some objective and fair basis is strongly associated with an effective response to a mass influx.[[103]](#footnote-103) It may be surprising to consider then there was no such burden sharing between EU states during the Yugoslavian crises. [[104]](#footnote-104)

During the Bosnian influx the reception of asylum seekers was uneven between states. Germany received far more than any other state because of geography – its proximity to Yugoslavia, its cultural and historical connections, and because it was more open to applications for protection.[[105]](#footnote-105) So, unsurprisingly Germany lead proposals for an EU wide burden sharing instrument. But there was no agreement[[106]](#footnote-106) as burden sharing became the most disputed element and block to reaching an agreement.[[107]](#footnote-107) It is for this reason why temporary protection became less attractive during the 1990s. After having used temporary protection for the Bosnian influx, there was reluctance and hesitation to use it again to address the Kosovo crisis:

Sweden also supported call sfo sharing for Kosovo cris Van Sem (eds) 102

When open conflict erupted in Kosovo in both 1998 and 1999, European governments were at first reluctant to repeat the temporary protection experiment. They continued to channel asylum seekers from Kosovo into regular status determination procedures, as had been the case throughout the 1990s. [[108]](#footnote-108)

Sweden also had same attitude ‘ we have already done more than our fairi share; Van Selm (eds) 94; 102.

In particular Germany’s experience of carrying the burden of Bosnian refugees had a direct influence of its reluctance to participate in the Kosovar evacuation programmes.[[109]](#footnote-109) Germany did reluctantly participate, like most EU states, but these programmes were not based on any EU agreement for a division and sharing of numbers, instead each state admitted, (or did not), according to its own reception capacity and political will.[[110]](#footnote-110)

These experiences are reflected in the burden sharing provision in TPD. While, as has been noted, the Amsterdam Treaty changes required EU states to settle a common position on burden sharing, the obligation did not settle the divisions over burden sharing. Instead TPD reflects the existence of the divisions.[[111]](#footnote-111) As unanimity was required to secure a burden sharing mechanism there was little chance of agreeing something radically different.

Under TPD, following a proposal from the Commission, Article 25 requires that states,

‘shall receive [displaced persons] in a spirit of Community solidarity. They shall indicate – in figures or in general terms - their capacity to receive such persons. This information shall be set out in the Council Decision referred to in Article 5.’

The obligation to act in a ‘spirit of Community solidarity’ lacks juridical force beyond a requirement to consider burden sharing. This is a weak obligation. This is clear, as there is no obligation to declare a minimum capacity vis à vis a criteria. The obligation does not require even a statement of reasons. At best it amounts to a “pledging” mechanism but one under which a state can pledge a lack of capacity. This weakness, and a corresponding pessimism in its effectiveness, is clear in the title of TPD as ‘a measure promoting a balance of efforts between Member States in receiving persons and the consequences thereof.’[[112]](#footnote-112)

TPD does not change the status quo evident in the 1990s: states were not then, and are not now under TPD, committed to accepting any burden. TPD is thus no paradigm shift.[[113]](#footnote-113) As Durieux has commented, ‘[i]t appears that no member state was more willing in 2001 than in 1992 to commit to a predictable formula for the distribution of responsibilities and costs.’[[114]](#footnote-114)

Burden sharing would have obviously benefitted frontline states such as Germany, Hungary, Italy and Greece since the 2015. Yet it is telling there is no indication that any of these states sought to start the activation process. It is suggested that given the Yugoslavian experiences and the failure to secure a radical shift to an effective and legally binding burden sharing mechanism, the TPD inherited the divisions on solidarity.[[115]](#footnote-115)

**End of temporary protection**

The defining element of temporary protection is plainly the notion of temporary. What is temporary though in this context: the duration of the mechanism or the duration of the protection, or both? How does temporary fit with obligations to refugees under international law, notably not to return persons in need of protection when the cause of flight is still prevailing – the principle of non refoulement? In short, when does temporary protection end and what are the consequences following the end?

There are two competing conceptions about what happens after temporary protection ends. While both conceptions have the same beginning: a pragmatic arrangement to cast a safety net to secure immediate protection of a group, they differ on what then follows. On one view temporary protection is an exception to regular international refugee law and on this conception there should be ultimately a return of the asylum seekers to the country of origin. The other conception is that return of asylum seekers to the country of origin is but one possible solution. These competing conceptions are considered in turn.

Humanitarian still – but as per Hein referring to ITal’s approach with TP in Van Selm (eds) 141 – please come in but please don’t stay

The return view is driven by the politics of the receiving state and specifically its control agenda. At the end of the period of protection there is an expectation of a return to the state or region of origin. Temporary protection functions as ‘a bar to the possibility of permanent resettlement being considered as a durable solution to flight: ‘solution’ is understood in terms of repatriation alone.’[[116]](#footnote-116)

The attraction to states of this conception is clear. It means that a state can seemingly fulfil its international humanitarian obligations to protect while maintaining ultimate control over immigration numbers.[[117]](#footnote-117) Put another way, if states are prepared to widen the protection net at a time when they are subject to high levels of asylum, then there needs to be a plausible rationale that can also assure the public at large - this is temporary protection.[[118]](#footnote-118)

Under this control and return model the length of the protection ‘lasts only for the duration of the risk that forces them to seek refuge’.[[119]](#footnote-119) However as Kjaerum and others have correctly identified, the return conception operates on an assumption ‘that the refugees will only be living in [the state of asylum] for a relatively short period, and certainly shorter than what is normally anticipated in a refugee situation.’[[120]](#footnote-120)

On what basis could such as assumption be maintained? It will be recalled that with end of the Cold War and extensive media interest in humanitarian causes, there was a cycle of humanitarian interventions leading to expectations for more:

‘The temporary nature of refugee status may in time come to be more extensively explored following the desire of the international community to provide resources for the speedy ending of violent conflicts, and to act upon its unwillingness to accept gross violations of human rights in a particular country or region. The international community will concentrate its efforts on ensuring that civil wars and wars last as short a time as possible; witness the situation in Northern Iraq, Somalia and to some extent also Croatia and Bosnia … As far as refugees are concerned this political development will result in expectations of their return within a foreseeable period of time, a possibility which was not considered for most refugees during the Cold War….’[[121]](#footnote-121)

There was then some degree of confidence in the will of the international community to take action.[[122]](#footnote-122) Commentators could point to evidence for speedier resolutions to conflicts.[[123]](#footnote-123) The ending of the Yugoslavian wars, were, as noted by Kjaerum, part of the proof that there was a post Cold War international resolve. The Bosnian war was effectively brought to an end by NATO bombing with repatriation a key outcome of the peace agreement.[[124]](#footnote-124) The 1999 Kosovo displacement crisis was over within weeks, again following NATO bombing, with immediate mass returns. As Fitzpatrick noted, ‘[t]he Kosovo experience, by restoring faith that some mass influxes are genuinely temporary, may reinvigorate enthusiasm for temporary protection, which had flagged during the endgame to the Bosnian refugee crisis’.[[125]](#footnote-125)

In this context the UNHCR could not but consider the link with temporary protection arrangements, ‘[o]ne of the principal reasons for applying the term ‘temporary’ to protection given to persons fleeing conflicts or acute crises in their country of origin is the expectation – or at least the hope – that international efforts to resolve the crisis will, within a fairly short period, produce results that will enable the refugees to exercise their right to return home in safety’.[[126]](#footnote-126) Temporary protection arrangements for asylum seekers escaping Yugoslavia were tried in the ‘the expectation – or at least the hope’ that efforts of the international community to address the root causes of the conflicts would lead to an ending of the causes of flight.[[127]](#footnote-127)

However there is another view about what temporary protection can achieve. While Fitzpatrick noted the mood change in the international environment, her position on temporary protection was more circumspect.[[128]](#footnote-128) Her description of the competing conception was ‘as a short-term strategy to secure the immediate physical safety of refugees and a way station to more durable protection’.[[129]](#footnote-129) There is no fixation on a particular end with this conception. Indeed the ‘way station’ ‘may well be a prelude to permanent settlement’.[[130]](#footnote-130)

EU states enthusiasm for temporary protection ‘had flagged during the endgame to the Bosnian refugee crisis’.[[131]](#footnote-131) This was because their experiences of temporary protection showed that the expectation of return was not necessarily the outcome. While Germany, which hosted the majority of refugees from the Bosnian conflict, repatriated most, perhaps around 250,000 of approximately 350,000 Bosnian refugees, that is over 70%, the repatriation programme was subject to severe and widespread criticisms on the basis that many were forced to return to circumstances where it was not safe.[[132]](#footnote-132) Given the difficulties of forced return and the fragile peace, research has shown that most states did not force return and that in the majority of EU states Bosnians asylum seekers stayed.[[133]](#footnote-133) The view that temporary protection cannot be fixed on return is borne out by these facts. As Gibney commented during the 1990s, states gambled on the fact that the conflict from which they took refugees would be short in duration’.[[134]](#footnote-134)

Also consider here relevance of weaknesses in returns directive- one its inherent problems and two that it is not linked up to the TPD

Given the need to reach agreement across all EU states perhaps it should not be a surprise that both conceptions of temporary protection, control and return and way station are provided for in TPD.

Perhaps clearest evidence is that TP can last for 3 years - - hard to consider this as necessary vis a vis fixing pressure – better explanation is that it relates to hope for end of crisis

Cf ICF 63

Recitals 13 and 19 emphasise the expectation of return:

Recital 13: ‘Given the exceptional character of the provisions established by this Directive in order to deal with a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, the protection should be of limited duration.’

Recital 19: Provision should be made for principles and measures governing the return to the country of origin and the measures to be taken by Member States in respect of persons whose temporary protection has ended. [[135]](#footnote-135)

Article 20 states that at the end of the temporary protection period the ‘general laws on protection apply’. Article 21 requires states to take measures to enable voluntary return. Article 22 states,

1. The Member States shall take the measures necessary to ensure that the enforced return of persons whose temporary protection has ended and who are not eligible for admission is conducted with due respect for human dignity.

2. In cases of enforced return, Member States shall consider any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases.

Article 22.1 permits forced returns.[[136]](#footnote-136) However this cannot be assured as TPD does not predicate the end of protection on an assumption about an end of the cause of displacement. At the end of the temporary protection period article 22.2 clearly precludes a state from forcing a return when it would violate its international humanitarian obligations. Further, as noted earlier, article 17 grants access to the regular asylum process, which, while it can be delayed, cannot be denied.

However significant refugees flows from FY in EU http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/

Turning to 2015 crisis, it became clear that the complexity of the Syrian war and the very different mood in the international community, made any assumptions or expectations about the end impossible. The most certain prediction could only be that Syrian refugees in the EU would need to be given refugee for an indefinite period. Since the arrival of Syrian refugees, EU statements and actions have pointed to this. The EU Commission has acknowledged that the end to the refugee crisis in Europe is directly linked to the end of the root causes but conspicuously, (but also understandably), makes no reference to any indicators of how and when it sees an end to the war.[[137]](#footnote-137) The Commission has even suggested linkage between the influx and the longer-term demographic challenge of an aging EU population.[[138]](#footnote-138)

If repatriation is the reason for states to consider temporary protection then their experiences from the 1990s show that expecting this is a gamble. As Gibney commented aptly, ‘States have no reason to support temporary protection if it proves simply to be an extended pathway to permanent immigration’.[[139]](#footnote-139) In the final analysis TPD is a way station to possible outcomes, one might be return but another could be permanent residence as was the outcome for Bosnians in most EU states in the 1990s.

**Changes since 2001:**

Enlargement of EU including states not used to immigration and catching up in terms of political debates and allocation of resources

Development of CEAS – commonality of laws but not practices

Development of Subsidiary protection which covered protection for war refugees which was not universally the case in 1990s across EU states

**2015 Refugee crisis: responses and temporary relocation**

In this final section consideration is given to the steps the EU has taken and proposed to address the 2015 refugee crisis. An outline of the key actions is provided as they relate to the issues in this paper. It has been suggested that if there was the political will TPD would have been activated. The reasons why it has not been activated and why there has been no support for activation from either the Commission or the frontline states find their origins in EU states long history of failure in solidarity which TPD does not fix, and, that temporary protection would have represented a clear risk to the setting of expectations of control and return.

Throughout the 2015 crisis TPD remained on the shelf.[[140]](#footnote-140) A raft of proposals and measures were however passed.[[141]](#footnote-141) The May 2015 European Agenda on Migration set out seven key actions to address the immediate crisis.[[142]](#footnote-142) These included EU resources to help frontline states process asylum claims and proposals for temporary and permanent mechanisms to relocate asylum seekers from states under the most pressure to other states.[[143]](#footnote-143) The temporary relocations proposals have been implemented through two EU instruments. The first was an EU Decision passed in May 2015.[[144]](#footnote-144) This Decision seeks to relocate up to 40,000 Syrian, Iraqi and Eritrean asylum seekers from Greece and Italy. [[145]](#footnote-145) The second instrument increased the quotas by another 120,000 to a total of 160,000 relocations.[[146]](#footnote-146) Both Decisions are ‘provisional’ meaning that the period for relocations is time-limited to September 2017.[[147]](#footnote-147) These Decisions constitute a temporary derogation from the normal Dublin transfer rules for determining the responsible state for asylum claims from Syrians, Iraqis and Eritreans, by diverting responsibility for up to 160,000 asylum seekers from Greece and Italy to other states.[[148]](#footnote-148) Both decisions acknowledge that the EU acted to address the ‘unprecedented’ flows of migrants in clear need of protection putting ‘significant pressure of asylum systems.[[149]](#footnote-149)

These Decisions are novel in that, for the first time, burden sharing is secured as a legal obligation. The Treaty basis for these decisions is Article 78.3, which states,

The proposal for a new Dublin regulation introduces an automatically triggered fairness mechanism. It therefore has a similar objective as the proposal made by the Commission in September 2015 on the permanent crisis relocation mechanism. Depending on the results of the discussions on this proposal the commission could consider withdrawing the September proposal.

http://europa.eu/rapid/press-release\_MEMO-16-1621\_en.htm

In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.[[150]](#footnote-150)

That enough EU states considered that this provision applied to the crisis there can be no doubt. It has been shown that TPD could have applied too. While not worded identically, the scope of article 78.3 of the Treaty and TPD overlap extensively. The 2015 crisis can be interpreted as both a ‘mass influx of displaced persons’ and as an ‘emergency situation characterised by a sudden inflow’ of nationals of third countries.[[151]](#footnote-151) The EU Commission is proposing to make further amendments to the Dublin transfer rules by adding a trigger for a permanent relocation mechanism based upon a ‘corrective’ formula which would automatically apply to redistribute asylum claims in ‘situations of disproportionate pressure on Member States’ asylum systems’.[[152]](#footnote-152)

Perhaps the most significant response will prove to be the November 2015 Joint Action Plan with Turkey. Under this Plan, Turkey, which has been one of the major places of departure to the EU, agrees, for an substantial EU payout, to take action to deter and prevent irregular migrants and asylum seekers leaving its territory for the EU. [[153]](#footnote-153)

As in 1990s the EU seeks to keep the asylum problem as much as possible outside the EU borders, this time in Turkey. However for spontaneous arrivals this time, there has been almost complete silence on temporary protection, because the preferred approach has become relocations within the EU. [[154]](#footnote-154)

**Conclusion**

The interventions in Yugoslavia and the responses to the refugee influxes served a humanitarian purpose. However these interventions and the responses to the influxes were predicated on the need to control refugee numbers, and as far as possible, to keep the problem outside the EU. EU support for the risky, and tragically ill-fittingly named, ‘safe areas’, maintenance of visa restrictions, and resistance to burden sharing are all evidence of this. The (valid) narrative of keeping refugees close to their homes to counter ethnic cleansing, helped served this purpose.

Temporary protection did emerge in Europe during the Yugoslavian wars as a response to large influxes into the EU, despite the EU’s efforts to keep asylum seekers away. Temporary protection was for most, if not all states, part of their battery of policies to deflect mass influxes and minimize the impact of asylum immigration. There was at first some enthusiasm for it as it seemingly offered a way of balancing international humanitarian obligations with controlling numbers. But it proved to be a gamble.

Any view that temporary protection proved to be a preferred or an effective solution is not borne out by the evidence. Temporary protection could not support the balancing of obligations to refugees and controlling admission numbers. While there were mass returns of Bosnians following the end of the Bosnian war, these were from one state, Germany, because of the disproportionate burden borne by it due to a failure to secure an agreement to share the load. The manner and timing of the repatriations attracted wide criticism. The difficulties Germany experienced informed responses of Germany and other EU states to the Kosovo crisis in 1999. Following the experiences of spontaneous arrivals from Bosnia, temporary protection was not in the main preferred for the spontaneous arrivals during the Kosovo crisis. Temporary protection was mainly for those who arrived through the evacuation programmes, but even then, EU states were prepared to accept only very modest numbers, or, in the case of one state, none at all.

TPD was passed because the Amsterdam Treaty changes made it a binding obligation to pass an EU wide instrument. The characteristic of the 2015 crisis was within the framework of the TPD. There have been calls to activate TPD but in truth they have been limited. Significantly the support for activation has been lukewarm from UNHCR, a key influence on the emergence of temporary protection in 1990s.[[155]](#footnote-155) It is also telling that neither the EU Commission nor any EU state has called for activation of TPD.

The shelving of TPD in the face of the 2015 crisis is not explained by technical or interpretative ambiguities or problems associated with the TPD. These are excuses. The fact is TPD is no game changer. It was constructed on the same politics of immigration control, and by the end of the 1990s, temporary protection showed it limits to support this. TPD has no answer to the lack of solidarity around burden sharing.[[156]](#footnote-156) Temporary protection would have served no beneficial purpose for EU states, (or for Syrian asylum seekers), and would have been a way station to regular asylum within in the EU.

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1 million entered EU

593 K asylum decisions

425k pending by end of 2015

593 will no doubt contain 2014 entrants

1. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12. (TPD). [↑](#footnote-ref-1)
2. ibid article 1. [↑](#footnote-ref-2)
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5. Nuria Arenas, ‘The Concept of ‘Mass Influx of Displaced Persons’ in the European Directive Establishing the Temporary Protection System’ [2005] European Journal of Migration and Law 435, 437. [↑](#footnote-ref-5)
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10. European Commission Press Release (22 September 2015) <<http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm>> accessed 14 September 2016. [↑](#footnote-ref-10)
11. Examples are:

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12. cf Hanne Beirens and others, Study on the Temporary Protection Directive Final report, (2016) undertaken by ICF Consulting Services Limited sponsored by EU Commission 14, 16-17 available at <<https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/temporary-protection/docs/final_report_evaluation_tpd_en.pdf>> accessed 10 January 2017. (ICF Study on TPD). [↑](#footnote-ref-12)
13. Jean-François Durieux, ‘Temporary Protection: Hovering at the Edges of Refugee Law’ [2014] Netherlands Yearbook of International Law (45) 221, 242-243; ECRE (2001) Information Note on Council Directive 2001/55/EC of 20 July 2001 (1 September 2001). [↑](#footnote-ref-13)
14. Joan Fitzpatrick, ‘Temporary Protection of Refugees: Elements of a Formalized Regime’ [2000] 94 A.J.I.L. 279: 305;

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15. (n 1) Recital 6; see (n 55) below. [↑](#footnote-ref-15)
16. Matthew J. Gibney, ‘Between Control And Humanitarianism: Temporary Protection In Contemporary Europe’ (2000) 14 Geo. Immigr. L.J. 689: 693. [↑](#footnote-ref-16)
17. See (n 37) below for summary of states of EU in 1990s. [↑](#footnote-ref-17)
18. UNCHR, The State of the World’s Refugees 2000: Fifty Years of Humanitarian Action (OUP) 156, available at <<http://www.unhcr.org/3ebf9bb10.html>> - accessed 9 January 2017. [↑](#footnote-ref-18)
19. Katy Long, The Point of No Return: Refugees, Rights and Repatriation (2013 OUP) 106; UNHCR, The State of the World’s Refugees (n 19) 155. [↑](#footnote-ref-19)
20. UNCHR, The State of the World’s Refugees 2000 (n 18) 161;

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21. UNHCR 1997, The State of the World’s Refugees: A Humanitarian Agenda (1997 Chapter 5) 156 available at <[www.unhcr.org/3eb7ba414.html](http://www.unhcr.org/3eb7ba414.html)> - accessed 6 December 2016. [↑](#footnote-ref-21)
22. See (n 37). [↑](#footnote-ref-22)
23. J M Roberts, The New Penguin History of the World (4th edn Penguin 2002) 1141. [↑](#footnote-ref-23)
24. The Independent International Commission On Kosovo, The Kosovo Report – Conflict - International Response - Lessons Learned (2000 OUP) 186 - (The Independent Kosovo Report);

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25. Adam Roberts (n 24); The Independent Kosovo Report (n 24) 6. [↑](#footnote-ref-25)
26. J M Roberts (n 23) 1130-1131. [↑](#footnote-ref-26)
27. For example see comments by Morten Kjaerum (n 56) below. [↑](#footnote-ref-27)
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31. Steven W Soward, ‘The Yugoslav Civil War: Lecture 25’ (1996) <<http://staff.lib.msu.edu/sowards/balkan/lect25.htm>> accessed 19 December 2016. [↑](#footnote-ref-31)
32. UN International Criminal Tribunal for the Former Yugoslavia (ICTY) website at

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33. UN Department of Public Information (1996) <www.un.org/en/peacekeeping/missions/past/unprof\_p.htm> - accessed 6 January 2017. [↑](#footnote-ref-33)
34. # Barbara Crossette, ‘U.N. Details Its Failure to Stop '95 Bosnia Massacre’ *The New York Times* (New York, 16 November 1999) <[www.nytimes.com/1999/11/16/world/un-details-its-failure-to-stop-95-bosnia-massacre.html](http://www.nytimes.com/1999/11/16/world/un-details-its-failure-to-stop-95-bosnia-massacre.html)> accessed 6 January 2017; (ICTY) website ‘Facts about Srebrenica’ - available at [www.icty.org/x/file/Outreach/view\_from\_hague/jit\_srebrenica\_en.pdf](http://www.icty.org/x/file/Outreach/view_from_hague/jit_srebrenica_en.pdf) (n31).

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35. UNHCR (Evaluation and Policy Analysis Unit) (n 24) para 96. [↑](#footnote-ref-35)
36. # NATO website, ‘Peace support operations in Bosnia and Herzegovina’ <[www.nato.int/cps/en/natohq/topics\_52122.htm](http://www.nato.int/cps/en/natohq/topics_52122.htm)> accessed 15 November 2016.

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37. Kirsten Young, ‘UNHCR and ICRC in the former Yugoslavia: Bosnia-Herzegovina’ (2001) 83 International Review of the Red Cross: 782-3. [↑](#footnote-ref-37)
38. According to UNHCR data the total number of all recorded asylum applications in the EU for 1992 was 674,000.

    The data for numbers of recorded claims in the EU in 1990s comes mostly from UNHCR sources, in particular, ‘Asylum Applications In Industrialized Countries: 1980-1999’ Tables III.28 and V.14 <<http://www.unhcr.org/statistics/STATISTICS/3c3eb40f4.pdf>> accessed 6 January 2017 (Figures extrapolated from these tables by author). (UNHCR 1980-1999).

    The 1990s EU data corresponds to fifteen states, (EU15): twelve were full members at the beginning of the 1990s and three were candidate states attaining full membership in 1995. The twelve were: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, UK; the three states which attained full membership in 1995 were Sweden, Finland and Austria. See page x of UNHCR statistics. [↑](#footnote-ref-38)
39. The Independent Kosovo Report (n 24) 50-98. [↑](#footnote-ref-39)
40. UNHCR Kosovo Report (n 24) vi, 88: for a discussion about the extent to which NATO bombing accentuated or even caused displacement as well discussion on the legality of NATO intervention. [↑](#footnote-ref-40)
41. UNHCR Kosovo Report (n 24) para 74; The Independent Kosovo Report (n 24) 304-5. [↑](#footnote-ref-41)
42. Greece did not receive any evacuees: UNHCR Kosovo Report (n 24) para 454; Joanne Van Selm (ed), Kosovo’s Refugees in the European Union (Pinter 2000) Appendix 2: 224. [↑](#footnote-ref-42)
43. The Independent Kosovo Report (n 24) 95-97. [↑](#footnote-ref-43)
44. Under the EU Treaties, Denmark, Ireland and UK have various forms of ‘opt-outs’ from obligations under EU asylum law. While there are some differences between them in general they allow these states to choose, subject to consent by other EU states, which EU asylum laws they wish to adopt and which they do not. TPD does not apply to Denmark, while Ireland and UK have both opted in and accept its obligations – see Peers (n 6) 312-314. [↑](#footnote-ref-44)
45. Home Office UK (Research, Development and Statistics Directorate), ‘An Assessment of the Impact

    of Asylum Policies in Europe 1990-2000’ Research Study 259 (June 2003) 3-4 available at

    < [www.temaasyl.se/Documents/Artiklar/hors259.pdf](http://www.temaasyl.se/Documents/Artiklar/hors259.pdf)> accessed 6 December 2016; (Home Office Research Study 259); UNHCR 1997 (n 21). [↑](#footnote-ref-45)
46. Though not all states are bound by the Schengen rules. Ireland and UK are permitted to maintain border control, (Protocols 19, 20 to the EU Treaties); newly acceded states phase in abolition of border controls according to the accession agreement with the EU. EU Treaties and Protocols [2016] OJ C202/1 available at

    < http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2016:202:TOC> - accessed 14 January 2017. [↑](#footnote-ref-46)
47. The current transfer rules are in a 2013 EU Regulation, 604/2013: European Parliament and Council Regulation 604/2013 of 29 June 2013 [establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person](http://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=uriserv:OJ.L_.2013.180.01.0031.01.ENG&toc=OJ:L:2013:180:TOC) [2013] OJ L180/1. [↑](#footnote-ref-47)
48. Nicholas Blake, ‘The Dublin Convention and Rights of Asylum Seekers in the European Union’ in Elspeth Guild and Carol Harlow (eds), Implementing Amsterdam: Immigration and Asylum Rights in EC Law (Hart Publishing 2001) 104. [↑](#footnote-ref-48)
49. There have been a number of adjustments to the rules and further proposals for revision, some of which are considered in this paper – see at section below, 2015 Refugee crisis: responses and temporary relocation; but the main principles of responsibility have been long standing, controversial and subject to extensive criticism, eg:

    Home Office Research Study 259 (n 45) 29-30; Nicholas Blake (n 48) 104;

    Minos Mouzourakis, ‘We Need to Talk about Dublin: Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union’ Refugees Study Centre, University of Oxford, Working Paper Series 105 – available at <www.rsc.ox.ac.uk/files/publications/working-paper-series/wp105-we-need-to-talk-about-dublin.pdf> accessed 8 December 2016. [↑](#footnote-ref-49)
50. Nicholas Blake, (n 48) 95, 104, 166. [↑](#footnote-ref-50)
51. Karoline Kerber, ‘Temporary Protection In The European Union: A Chronology’ (1999) 14 Geo. Immigr. L.J. 35, 44, 49. [↑](#footnote-ref-51)
52. Johannes Van Der Klaauw, ‘Towards a Common Asylum Procedure’ in Elspeth Guild and Carol Harlow (eds), Implementing Amsterdam: Immigration and Asylum Rights in EC Law (Hart Publishing 2001). [↑](#footnote-ref-52)
53. Under art 63(2) EC Treaty (as amended by the Treaty of Amsterdam): the Council adopt measures on refugees and displaced persons within the following areas:

    1. minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,

    (b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons.

    Following the Treaty of Lisbon changes in 2009, Art 63 EC was replaced by art 78 Treaty on the Functioning of the European Union (TFEU) – (n 46). [↑](#footnote-ref-53)
54. Joanne Van Selm (ed) (n 42) 7. [↑](#footnote-ref-54)
55. (n 1). [↑](#footnote-ref-55)
56. Recital 6 alludes to the Treaty of Amsterdam changes, ‘in accordance with the Treaty’, under which it was incumbent on the Council (of EU migration ministers) to enact measures in the area of temporary protection by 2004. [↑](#footnote-ref-56)
57. Morten Kjaerum, ‘Temporary Protection in Europe in the 1990s’ [1994] Int J Refug Law 6: 444: 448. [↑](#footnote-ref-57)
58. James C. Hathaway (ed), Reconceiving International Refugee Law (Kluwer Law International 1997) 32. [↑](#footnote-ref-58)
59. Home Office Research Study 259 (n 44) 34. [↑](#footnote-ref-59)
60. Matthew J. Gibney (n 16). [↑](#footnote-ref-60)
61. Council of European Union, ‘Responses to Questionnaire on Temporary Protection and Solidarity - National Measures Taken Regarding Kosovars’ 11808/99 (21 October 1999);

    Council Proposal (Com (2000) 303 Final) **for a Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2000]** OJ C311 E/251(31 October 2000)para 2.4;

    Karol Kerber (n 51) 36-37;

    European Commission Press Release (5 March 1997) – table summary of different arrangements across the EU states – available at <http://europa.eu/rapid/press-release_IP-97-178_en.htm> - accessed 10 January 2017. [↑](#footnote-ref-61)
62. Joan Fitzpatrick (n 14) 279, 280. [↑](#footnote-ref-62)
63. Home Office Research Study 259 (n 45) 12. [↑](#footnote-ref-63)
64. Karoline Kerber (n 51). [↑](#footnote-ref-64)
65. Joan Fitzpatrick (n 14) 295, 305. [↑](#footnote-ref-65)
66. Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) as amended by the New York Protocol of 31 January 1967. [↑](#footnote-ref-66)
67. TPD does not apply to Denmark – see (n 44). [↑](#footnote-ref-67)
68. Recital 2:Cases of mass influx of displaced persons who cannot return to their country of origin have become more substantial in Europe in recent years. In these cases it may be necessary to set up exceptional schemes to offer them immediate temporary protection. [↑](#footnote-ref-68)
69. ‘Community’, ie, European Community, which since the Treaty of Lisbon changes in 2009, has been re-named as the ‘European Union’ (EU). [↑](#footnote-ref-69)
70. For further consideration of this point see Nuria Arenas (n 5). [↑](#footnote-ref-70)
71. Article 2(a) ‘temporary protection’ means a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection. [↑](#footnote-ref-71)
72. Kerber (n 51): [I]n the European context in the 1990s the United Nations High Commissioner for Refugees ("UNHCR") described temporary protection as a "flexible and pragmatic means of affording needed protection to large numbers of people fleeing human rights abuses and armed conflict in their country of origin, who might otherwise have overwhelmed asylum procedures."’ [↑](#footnote-ref-72)
73. Joan Fitzpatrick (n 14) 286: ‘The procedures of refugee status determination were hardly overwhelmed in the majority of states responding to the Bosnian crisis. The number of refugees receiving temporary protection during the mid-1990s was quite modest in many European states. Only Germany and Austria (as well as the states that emerged from the breakup of Yugoslavia) could fairly plead that they had experienced a mass influx’. [↑](#footnote-ref-73)
74. In 1999 the EU state with the highest number of total recorded applications, 95,000 applications, was Germany (60% down on its 1992 number) of which 31,000 were from Yugoslavians; second was UK with 71,000 applications, of which 14,000 were from Yugoslavia. [↑](#footnote-ref-74)
75. See (n 1) article 5. See also Peers (n 6) 342, 345. [↑](#footnote-ref-75)
76. Council Proposal (Com (2000) 303 Final)(n 60); cf Nuria Arenas (n 5) above. [↑](#footnote-ref-76)
77. European Commission Press release (14 August 2015) Dimitris Avramopoulos Migration and Home Affairs Commissioner: ‘You have all seen the news headlines – you are the ones writing the reports – you know why I am here….Today the world finds itself facing the worst refugee crisis since the Second World War. And Europe finds itself struggling to deal with the high influxes of people seeking refuge within our borders…There is no simple, nor single, answer to the challenges posed by migration. And nor can any Member State effectively address migration alone. It is clear that we need this new, more European approach. We need the collective courage to follow through on our commitments – even when they are not easy; even when they are not popular. Available at <http://europa.eu/rapid/press-release\_SPEECH-15-5498\_en.htm> - accessed 9 January 2017. [↑](#footnote-ref-77)
78. See (n 38) above. [↑](#footnote-ref-78)
79. Comparison data taken from EU Eurostat source available at <<http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/>>

    - accessed 14 December 2016. [↑](#footnote-ref-79)
80. See (n 9 and 10) above. [↑](#footnote-ref-80)
81. European Commission Fact Sheet ‘Refugee Crisis – Q & A on Emergency Relocation’ (22 September 2015) available at <<http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm>> - accessed 14 September 2016. [↑](#footnote-ref-81)
82. ibid. [↑](#footnote-ref-82)
83. European Parliament Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration ([2015/2095(INI)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2015/2095%28INI%29)) para 42 available at <[www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0102&language=EN&ring=A8-2016-0066](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0102&language=EN&ring=A8-2016-0066)> accessed 10 January 2017;

    cf 2016 ICF Study on TPD (n 12). [↑](#footnote-ref-83)
84. Joan Fitzpatrick (n 14) 280. [↑](#footnote-ref-84)
85. Jean-François Durieux and Jane McAdam, ‘Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies’ (2004) 16 (1) Int J Refugee Law 4: 10;

    UNHCR Guidelines on Temporary Protection or Stay Arrangements (2014) (n 14). [↑](#footnote-ref-85)
86. Emphasis added. [↑](#footnote-ref-86)
87. Joan Fitzpatrick (n 14) 297-9; Joanne van Selm-Thorburn, Refugee Protection in Europe. Lessons of the Yugoslav Crisis (Kluwer Law International 1998).

    Asha Hans and Astri Suhrke, ‘Responsibility Sharing’ in James C. Hathaway (ed) (n 58) 104-7, 8;

    Council Resolution of 25 September 1995 on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis [1995] OJ C 262 (38) 1-3: sixth recital. [↑](#footnote-ref-87)
88. Joan Fitzpatrick (n 14) 286; ‘[EU states] responded by favoring temporary protection and avoiding grants of durable asylum; additional interim measures of protection were introduced in national law and practice …’;

    Home Office Research Study 259 (n 44) 34: ‘in general there were fewer rights for temporary protection compared to those with 1951 Convention status’; European Commission Press Release of 5 March 1997 (n 61). [↑](#footnote-ref-88)
89. Joly D, ‘A new asylum regime in Europe’ quoted in Home Office Research Study 259 (n 45) 35. [↑](#footnote-ref-89)
90. Recital 9 TPD states ‘Those standards and measures are linked and interdependent for reasons of effectiveness, coherence and solidarity and in order, in particular, to avert the risk of secondary movements. They should therefore be enacted in a single legal instrument’. [↑](#footnote-ref-90)
91. Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (31 October 2000) OJ C 311 251 – 258, para 1.4: ‘Temporary protection in the event of a mass influx as proposed by the Commission is not a third form of protection, alongside refugee status on the basis of the Geneva Convention and subsidiary protection, the consequence of which would be to undermine the Member States' international obligations or to prejudice efforts to harmonise and consolidate forms of subsidiary protection in Europe. On the contrary, minimum standards for giving temporary protection in the event of a mass influx and measures promoting a balance of efforts between the Member States on a basis of solidarity are a component of the system, and more specifically a tool enabling the system to operate smoothly and not collapse under a mass influx. It is accordingly a tool in the service of a common European asylum system and of the full operation of the Geneva Convention’. [↑](#footnote-ref-91)
92. ICF Study on TPD (n 12) 19-23. [↑](#footnote-ref-92)
93. Article 32 TPD. [↑](#footnote-ref-93)
94. ICF Study on TPD (n 12) 12-13. [↑](#footnote-ref-94)
95. Article 26.1.

    For the duration of the temporary protection, the Member States shall cooperate with each other with regard to transferral of the residence of persons enjoying temporary protection from one Member State to another, subject to the consent of the persons concerned to such transferral. [↑](#footnote-ref-95)
96. Article 18, ‘The criteria and mechanisms for deciding which Member State is responsible for considering an asylum application shall apply. In particular, the Member State responsible for examining an asylum application submitted by a person enjoying temporary protection pursuant to this Directive, shall be the Member State which has accepted his transfer onto its territory’.

    cf ECRE September 2001 Information Note (n 13) 4. [↑](#footnote-ref-96)
97. See (n 144) and (n 146) below. [↑](#footnote-ref-97)
98. Jean-François Durieux (n 13) 242-243. [↑](#footnote-ref-98)
99. ibid; Proposal for a Council Directive (n 61): Explanatory Memorandum para 4.3, ‘The UNHCR described the 1997 proposal as balanced and as providing a constructive basis for action. … The 1998 revised proposal was welcomed by the UNHCR, which observed that there had been many improvements over the 1997 proposal.’ [↑](#footnote-ref-99)
100. Articles 8-16. [↑](#footnote-ref-100)
101. cf (n 89). [↑](#footnote-ref-101)
102. cf ICF Study on TPD (n 12) 15, 35. [↑](#footnote-ref-102)
103. Joan Fitzpatrick (n 14) 287, 289. [↑](#footnote-ref-103)
104. Kerber (n 51): 49; Gregor Noll and Jens Vedsted-Hansen, ‘Temporary Protection and Burden Sharing’ in Elspeth Guild and Carol Harlow (eds), Implementing Amsterdam: Immigration and Asylum Rights in EC Law (Hart Publishing 2001) 198; Proposal for a Council Directive (n 91): Explanatory Memorandum para 3.2. [↑](#footnote-ref-104)
105. ibid Gregor Noll and Jens Vedsted-Hansen; Home Office Research Study 259 (n 45) xvii, 8, 60; Khalid Koser, ‘Germany: Protection for Refugees or Protection from Refugees?’ in Joanne Van Selm (ed) (n 42) 18, 24; UNCHR, The State of the World’s Refugees 2000: Fifty Years of Humanitarian Action (2000) (n 18) 158. [↑](#footnote-ref-105)
106. ### European Union Commission Press Release (5 March 1997) (n 60) ‘Commission proposal on Joint Action for Temporary Protection of Displaced Persons’ Commissioner Anita Gradin, ‘There was no real co-operation between Member States when the mass influx from Bosnia have occurred. We must build on these experiences. Next time we are faced with such a situation, we have to make sure that a fair and dignified reception can be offered in all our Member States’.

     [↑](#footnote-ref-106)
107. Proposal for a Council Directive (n 90): Explanatory Memorandum para 6.1; Gregor Noll and Jens Vedsted-Hansen (n 103) 204-210; UNCHR, The State of the World’s Refugees 2000: Fifty Years of Humanitarian Action (2000) (n 18) 165. [↑](#footnote-ref-107)
108. UNCHR, The State of the World’s Refugees 2000: Fifty Years of Humanitarian Action (2000) (n 18) 168. [↑](#footnote-ref-108)
109. Khalid Koser, ‘Germany: Protection for Refugees or Protection from Refugees?’ in Joanne Van Selm (ed) (n 41) 24, 28-29, 34. [↑](#footnote-ref-109)
110. UNHCR Kosovo Report (n 24) vi; James C. Hathaway (ed) (n 58) 32; Kerber (51) 48-9. [↑](#footnote-ref-110)
111. Kerber (n 51) 46. [↑](#footnote-ref-111)
112. ibid. [↑](#footnote-ref-112)
113. cf Mortem Kjaerum (n 57) 448. [↑](#footnote-ref-113)
114. Jean- Francois Durieux (n 13): 241. [↑](#footnote-ref-114)
115. ECRE interview with Volker Türk (15 October 2015): ‘If one looks at the numbers of people arriving, one could be led to think that if Europe faces a large scale influx, it would perhaps be the right moment to look very actively into whether or not to activate this directive. I think a number of the conditions are present. Some of the solidarity measures included in the TPD could be advantageous, although they are not binding enough. If the EU were to go down the line of activating the TPD, this measure would have to be accompanied by a more permanent solidarity and distribution mechanism within the EU. So I think the directive is a beginning of perhaps a more permanent emergency mechanism dealing with large scale influxes, but it is not going to be sufficient.’ Available at <www.ecre.org/ecre-interviews-volker-tuerk-we-need-to-remember-why-asylum-was-so-necessary-when-it-was-first-instituted-and-why-it-is-so-necessary-now> - accessed 2 December 2016. [↑](#footnote-ref-115)
116. Matthew J Gibney (n 16) 690; James C. Hathaway (ed) (n 58) 3; Long (n 19) 116. [↑](#footnote-ref-116)
117. Randell Hansen, ‘Asylum Policy in the EU’ (2000) 14 Geo. Immigr. L.J. 779, 784;

     van Selm-Thorburn (n 87) 168: ‘The concept and practice of temporary protection could satisfy the major requirements of all sides, offering protection but not full membership, permitting the individuals to seek and receive protection, without hastily or unacceptably transgressing the boundaries of state sovereignty’. [↑](#footnote-ref-117)
118. Joan Fitzpatrick (n 14) 280: ‘States, especially those under pressure from domestic constituencies preoccupied with migration, hope that temporary protection will help them save costs on status determination, reduce social and economic benefits to asylum seekers, resist full integration of those who are granted asylum, and prioritize their rapid repatriation. Temporary protection may assist democratic states in mediating competing public demands that asylum not be a back door to immigration but that humanitarian ideals be sustained’. [↑](#footnote-ref-118)
119. Matthew J Gibney (n 16) 689. [↑](#footnote-ref-119)
120. Morten Kjaerum (n 57) 447: 450-1. [↑](#footnote-ref-120)
121. ibid 446-7. [↑](#footnote-ref-121)
122. Adam Roberts (n 24); Michael Barutciski and Astri Suhrke, ‘Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden Sharing’ [2001] 14(2) Journal of Refugee Studies 95, 7;

     cf The Independent Kosovo Report (n 24) 19-20. [↑](#footnote-ref-122)
123. James C. Hathaway (ed) (n 58) 17 - notes studies which show that a significant proportion of refugee-producing crises are resolved within 5 years; with one UN study suggesting that around half of the crises looked at were resolved in this time frame. [↑](#footnote-ref-123)
124. Anne Hammerstad, The Rise and Decline of a Global Security Actor: UNHCR, Refugee Protection and Security, (OUP 2014) 111-112. [↑](#footnote-ref-124)
125. Joan Fitzpatrick (n 14) 279. [↑](#footnote-ref-125)
126. Quoted in Jean-François Durieux (n 13): 235. [↑](#footnote-ref-126)
127. International Commission on Intervention and State Sovereignty, (ICISS) Report 2001 Responsibility to Protect para 1.4 – available at <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> - accessed 1 November 2016. [↑](#footnote-ref-127)
128. Joan Fitzpatrick (n 14) 305. [↑](#footnote-ref-128)
129. ibid 280. [↑](#footnote-ref-129)
130. Home Office Research Study 259 (n 45) 34**.** [↑](#footnote-ref-130)
131. Joan Fitzpatrick (n 125). [↑](#footnote-ref-131)
132. Anne Hammerstad (n 124) 112; Matthew Gibney (n 16) 694, 701; Katy Long (n 19) 113, 116; Joanne Van Selm (ed) (n 42) 29-30; van Selm-Thorburn (n 87) 153-4. [↑](#footnote-ref-132)
133. Khalid Koser, Martha Walsh, & Richard Black, ‘Temporary Protection and the Assisted Return of Refugees from the European Union’ (1998) 10 Int J Refug Law 444, 459-460; Khalid Koser in Joanne Van Selm (ed) (n 103). [↑](#footnote-ref-133)
134. Matthew Gibney (n 16) 698-9. [↑](#footnote-ref-134)
135. Emphasis added. [↑](#footnote-ref-135)
136. Subject to article 23 which precludes return for reasons of poor health and gives states a discretion to allow children to finish schooling. [↑](#footnote-ref-136)
137. Commission Communication of 10 February 2016 ‘On the State of Play of Implementation of the Priority Actions under the European Agenda on Migration’: ‘there should be no illusions that the refugee crisis will end before its root causes – instability, war and terror in Europe’s immediate neighbourhood, notably continued war and atrocities in Syria – are addressed in a definite manner. The only responsible course of action is to face this reality and to explaining it openly and honestly to citizens…’ - available at

     < <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-85-EN-F1-1.PDF>> - accessed 12 January 2017. [↑](#footnote-ref-137)
138. Commission Communication of 13 May 2015, ‘A European Agenda on Migration’ - available at

     <<https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf>> - accessed 12 January 2017. [↑](#footnote-ref-138)
139. Matthew Gibney (n 16) 692. [↑](#footnote-ref-139)
140. cf Peers (n 6). [↑](#footnote-ref-140)
141. Summarized in Meltem Ineli-Ciger (n 11) 6-12. [↑](#footnote-ref-141)
142. Commission Communication of 13 May 2015, ‘A European Agenda on Migration’ (n 138). [↑](#footnote-ref-142)
143. Denmark, Ireland and UK are not bound by the Decisions and do not participate in them following their opt-outs permitted under EU law: recitals 39 and 40 May Decision 2015/1523 (n 144); recitals 46, 47 and 59 of the September Decision 2015/1601 (n 146); see also (n 44). [↑](#footnote-ref-143)
144. Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L 239/146 - (May relocation Decision). [↑](#footnote-ref-144)
145. Despite being a frontline state under severe pressure Hungary refused to support the relocation mechanisms. [↑](#footnote-ref-145)
146. 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] OJ L248/80 - (September Relocation Decision). [↑](#footnote-ref-146)
147. ibid article 13. [↑](#footnote-ref-147)
148. See (n 47) above. [↑](#footnote-ref-148)
149. September Relocation Decision (n 146) recital 10: Among the Member States witnessing situations of considerable pressure and in light of the recent tragic events in the Mediterranean, Italy and Greece in particular have experienced unprecedented flows of migrants, including applicants for international protection who are in clear need of international protection, arriving on their territories, generating significant pressure on their migration and asylum systems; also May relocation Decision (n 144) recital 9. [↑](#footnote-ref-149)
150. EU Treaties and Protocols [2016] OJ C202/1 (n 46);

     the original value of article 78.3, introduced by the Treaty of Amsterdam, may relate to the fact that measures under it can be taken by qualified majority voting whereas back in 1999 temporary protection measures could only be passed under the Treaty by unanimity: Kerber (n 51) 46: ‘The new Article 64(2) contains a very important innovation. By qualified majority, the Council may, upon proposal by the Commission and without prejudice to paragraph 1 adopt measures valid for no more than six months for the benefit of a Member State that is confronted with an emergency situation of mass influx. In such cases, the Council may use a simplified voting procedure that is more likely to lead to a quick decision’. cf (n 53) above. [↑](#footnote-ref-150)
151. ibid; 2015 European Parliament Motion (28 April 2015) (n 10) para 6: European Parliament ‘Calls on the Member States to make full use of the existing possibilities for issuing humanitarian visas at their embassies and consular offices; points out, in this connection, that the Council should seriously consider the possibility of triggering the 2001 Temporary Protection Directive or Article 78(3) of the TFEU, both of which foresee a solidarity mechanism in the case of mass and sudden inflows of displaced persons…’. [↑](#footnote-ref-151)
152. European Commission Proposal of 4 May 2016 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) 270 final: 4, 17-18 – available at <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf> - accessed 12 January 2017. [↑](#footnote-ref-152)
153. European Commission Infographic: Managing The Refugee Crisis EU-Turkey Joint Action Plan: Implementation Report available at <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/managing_the_refugee_crisis_-_eu-turkey_join_action_plan_implementation_report_20160210_en.pdf> - accessed 12 January 2017. [↑](#footnote-ref-153)
154. cf ICF Study on TPD (n 12) 38 - a passing reference to temporary protection in a proposed revision of art 2 of the Dublin Regulation. [↑](#footnote-ref-154)
155. For example, UNHCR communication (10 September 2015) ‘UNHCR’s proposals in light of the EU response to the refugee crisis and the EU package of 9 September 2015’: ‘UNHCR recalls that the EU Temporary Protection Directive 2001/55/EC (TPD), which has never been activated, was designed to ensure a uniform status rights across the EU and would allow for fast and simplified processing, resulting in efficiency gains and cost reductions for national asylum systems. The TPD foresees the activation of a solidarity relocation mechanism, financial support and a reception element. With or without the activation of this directive it is important that these objectives are pursued’. Available at <[www.unhcr.org/55f28c4c9.html](http://www.unhcr.org/55f28c4c9.html)> - accessed 2/12/16;

     ECRE interview with Volker Türk 23 October 2015; <[www.ecre.org/ecre-interviews-volker-tuerk-we-need-to-remember-why-asylum-was-so-necessary-when-it-was-first-instituted-and-why-it-is-so-necessary-now](http://www.ecre.org/ecre-interviews-volker-tuerk-we-need-to-remember-why-asylum-was-so-necessary-when-it-was-first-instituted-and-why-it-is-so-necessary-now)> accessed 6 January 2017. [↑](#footnote-ref-155)
156. Nor do the January 2017 relocations figures give reason to believe the binding relocation quotas will significantly enhance fair and effective burden sharing: a little over 10,000 transfers have taken place since 2015 out of the 160,000 quota – data available at <<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>> - accessed 13 January 2017. [↑](#footnote-ref-156)