

Mass influxes and Protection in Europe: A Reflection on a Temporary Episode of an Enduring Problem

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Abstract

This article assesses Temporary Protection (TP) in Europe in response to refugee crises. In 2001 the European Union (EU) adopted a Directive for TP to provide a regional response to a mass influx. It was considered that TP offered a double-win: addressing protection needs of asylum seekers, while enabling states to maintain control based on the understanding that asylum seekers would return home after a short period of stay. The Directive has been endorsed in UNHCR Guidelines on 'Temporary Protection or Stay Arrangements' (2014). Notwithstanding, the analysis in this article indicates that TP was a strategy that failed: it did not give states control nor promote solidarity between them. Failure explains its absence in the responses to the 2015-16 crisis. However, national forms of TP have re-emerged signalling efforts to re-assert control in the face of an enduring problem.

Key words: Europe, refugee crisis, temporary protection, return/repatriation, expectations

1 Introduction

The implementation of temporary protection, ('TP'), is strongly identified as a response to large-scale movement, 'influxes', of people fleeing conflict and violence. 'Crisis' is closely associated with such movements and with TP. It was in the 1990s, as responses to the influxes of people fleeing conflicts in former Yugoslavia, (FY), that TP emerged in Europe as a *strategic* component in the protection architecture.¹ It was claimed that TP was the 'major protection instrument' in western Europe for Bosnians fleeing the 1992-1995 conflict,² and, it could be viewed as something of a success, as it became the 'pre-eminent' solution to that crisis.³ Its measure of success is based on accepting that it achieved two, seemingly opposing objectives: it enabled host states to meet their legal and humanitarian obligations to protect, and, by returning home Bosnians *unburdened* their host states after a short period of stay. A narrative of success seems vindicated in a number of ways. The 1990s was given the epithet of 'the decade of repatriation',⁴ and the repatriation of many Bosnians during 1996-8 following withdrawal of TP, fits within the timeline and the narrative. Another vindication is that the critics of TP were won over by its pragmatism, and, through the EU, states accepted the need for common standards and rights by adopting the Temporary Protection Directive.⁵

¹ Gregor Noll and Susanne Malström, Raoul Wallenberg Institute, 'Report No. 22 Temporary Protection - Problems and Prospects', (9 May 1996, Lund, ISSN: 0283-085X 1996), 28; Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' [2000] 94 A.J.I.L. 279, 280-1, 285.

² Gregor Noll and Susanne Malström (ibid) 19, 23, 33.

³ Gil Loescher, *The UNHCR and World Politics – A Perilous Path* (OUP 2001) 16-17, 280-281.

⁴ Cf: Katy Long, *The Point of No Return: Refugees, Rights and Repatriation* (2013 OUP) chp 5.

⁵ 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. (Directive).

Since then it has been claimed that this instrument establishes a mechanism that the EU can ‘take off the shelf’ and use in the event of a mass influx crisis.⁶ It has been acknowledged as establishing a benchmark in *TP* mechanisms. In 2014 the UNHCR published *Guidelines on Temporary Protection or Stay Arrangements*.⁷ These Guidelines are further acknowledgement that the Directive is considered a model in providing protection and key rights through a predictable, regional, emergency response mechanism to a mass influx situation.⁸

In 2015, fourteen years after the adoption of the Directive, and one year after the publication of the UNHCR Guidelines, Europe experienced its largest migration influx in modern times, with numbers far exceeding the influxes in the 1990s. A significant number were Syrian nationals fleeing a civil war, who were universally acknowledged as needing international protection.⁹ There were calls to activate the Directive to address the Syrian influx.¹⁰

The calls were not heeded. While claims of flaws in the design of the Directive have some validity,¹¹ it is the contention of this article that this is not the reason for the omission of *TP* in the EU’s responses set out in its May 2015 action plan.¹² An analysis of the implementation of *TP* in the 1990s explains why it is unsurprising. European states did implement a variety of national *TP mechanisms* to respond to the Bosnian influx, and in doing so offered a third and alternative way, between rejecting claims for asylum, and granting a right to permanent stay and integration. *TP* was though a gamble¹³ which did not work out well for states. They were severely criticised for comprising the quality and security of protection under *TP*. In most states, *TP* led to permanent integration, something they had ‘so fervently opposed’ when they agreed to grant it.¹⁴ When they did pressurize repatriation, they were, rightly, severely criticised for doing so prematurely in circumstances which exposed many Bosnians to significant risks back in FY.

This article begins with an overview of two contexts which are the *sine qua non* for consideration of *TP* in Europe. One is the perspective of a problem of numbers: too many asylum seekers coming to Europe; the other is related, an outline of the fortress Europe narrative and the so-called Dublin rules to determine responsibility for assessing asylum claims between European states. The article then considers the difficulty *defining TP*, and, through a conceptual approach, analyses its elements, that of protection and the attachment with time frames. The article considers the *practice* of *TP* as it emerged in Europe in the 1990s as a response to the influxes from FY. This is followed by consideration of the

⁶ Steve Peers, *EU Justice and Home Affairs Law* (3rd edn, OUP 2011) 300.

⁷ UNHCR, 2014 Guidelines on Temporary Protection or Stay Arrangements, (UNHCR Guidelines).

⁸ Ibid paragraph 3, footnote 3 and footnote 8.

⁹ UNHCR (2015 News) <<http://www.unhcr.org/5683d0b56.html>>, [European Asylum Support Office Annual Report 2015 on the Situation of Asylum in the European Union, \(EASO 2015\), 22 available at <www.easo.europa.eu/sites/default/files/public/EN_%20Annual%20Report%202015_1.pdf> \[23 January 2018\]](#).

¹⁰ Examples are: European Parliament Motion (28 April 2015); Meltem Ineli-Ciger, ‘Time to Activate the Temporary Protection Directive: Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe’ [2016] 18(1) *European Journal of Migration and Law* 1.

¹¹ H Beirens and others, ‘Study on the Temporary Protection Directive Final report’, (2016) undertaken by ICF Consulting Services Limited sponsored by EU Commission.

¹² European Commission: ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration’, Brussels, 13 May 2015 COM(2015) 240 final.

¹³ Matthew J. Gibney, ‘Between Control And Humanitarianism: Temporary Protection In Contemporary Europe’ (2000) 14 *Geo. Immigr. L.J.* 689: 698-9.

¹⁴ Joelle Hageboutros, ‘The Bosnian Refugee Crisis: A Comparative Study of German and Austrian Reactions and Responses’, *Swarthmore International Relations Journal* Iss. 1 (2017): 50-60, 55; Khalid Koser, ‘Germany: protection for refugees or protection from refugees?’ in Joanne van Selm (eds), *Kosovo’s Refugees in the European Union* (Pinter 2000) 24, 229.

subsequent adoption of the TP Directive. The final sections seek to validate the explanation for the absence of *TP* in the EU's responses to the 2015-16 crisis, while it has emerged in responses at the national level.

The title of this article refers to *TP* in relation to 'Europe'. Yet the focus of the developments and key material in this article relate to the European Union, (EU). The whole continent of Europe is not of course synonymous with this supranational political organisation. Yet the EU can fairly be considered in a number of contexts, including in relation to asylum, as a representation of a 'Europe' wider than the twenty-eight states which constitute its membership.¹⁵ The influxes in 2015-16 are a case in point: given the clear preference for the vast majority of asylum seekers in Europe to seek protection within the EU, the EU has understandably been the focus of what has been commonly described as 'Europe's' crisis.

2 Protecting Europe

It is well documented that from the 1970s the character of the movements of would-be refugees into Western Europe, and the numbers, were changing fundamentally.¹⁶ Larger numbers of people from more diverse regions of the world were seeking refuge in Europe from war and conflict.

Because of practical and legal difficulties hindering removal, seeking asylum became associated with a 'back door' to permanent stay and permanent obligations.¹⁷ In the 1990s the 'Fortress Europe' critique emerged as, through the EU, European states developed a 'battery' of non-admission, (non-entrée), policies to close down entry routes to prevent people getting to Europe.¹⁸ In particular, EU states sought to protect the 'internal market': an economic zone facilitating trade and free movement between EU states. A further significant development aligned to this was the creation of the Schengen area, which required states to remove physical border controls between themselves.¹⁹

In this period EU states took steps to create a system of harmonised pan-EU asylum law as a 'common European asylum system', (CEAS).²⁰ With the removal of borders between states there was a risk of asylum seekers continually moving around the EU 'in orbit', 'shopping'

¹⁵ Norway, Liechtenstein and Iceland are associated legally with the EU through the European Economic Area Agreement which enables free movement between these states and the EU states; Switzerland has an agreement that provides it with many of the benefits and obligations of the EEA agreement. These four states are part of the EU's common European asylum system, (CEAS) – see below on this.

¹⁶ E.g. Gil Loescher (n 3) 229, 235; James C. Hathaway (eds), *Reconceiving International Refugee Law* (Kluwer Law International 1997) xix.

¹⁷ Joan Fitzpatrick 'The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection' (1999) 13 *Geo. Immigr. L.J.* 343, 352-354.

¹⁸ Katy Long (n 4) 106; it has been suggested that policies such as common visa restrictions and carrier sanctions, actually contributed to an increase in asylum numbers, as would-be socio/economic migrants avoided them by turning to asylum as a back door, e.g. James C. Hathaway (1997) (n 16); Gil Loescher (n 3) 235.

¹⁹ 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 out border controls according to the accession agreement.

²⁰ 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 the other EU states, which EU asylum laws they wish to adopt. TP Directive does not apply to Denmark, while Ireland and UK have both opted in.

for a sympathetic country.²¹

To address this the EU created a system, the so-called *Dublin* rules, which came into force in 1997, to allocate responsibility for determining asylum claims between states. The principle of the system was, and remains, that an asylum seeker is entitled to make one claim for asylum in one state only.²² The rules determine which state is responsible for the claim. It is premised on the assumption that all states within the system are safe countries. Under the rules the responsible state is not necessarily the state in which the claim is made. The criterion most commonly applied to allocate responsibility is the state through which the asylum seeker first entered the EU.²³ The system inevitably places the burden of responsibility on frontline states and evidently was not designed to promote fair burden sharing. Not surprisingly the system has been extensively criticised.²⁴

Prior to this in 1992 the break-up of Yugoslavia resulted in significant pressures on some European states, as asylum seekers fleeing conflict and war arrived in large numbers.²⁵ This influx was the trigger for the emergence of *TP* in Europe which is explored below. By the beginning of the twenty-first century the numbers of asylum claims in Europe had dropped, but started rising from 2010-11. The numbers continued to rise steadily, and then in 2015, exponentially, when Europe experienced its largest influx in modern times, with reports of 1.3 to 1.4 million asylum claims recorded across the EU and associated states.²⁶ The pressure on asylum systems in some states was very considerable with reports of over one million asylum cases pending at the end of both 2015 and 2016.²⁷ The main country of origin was Syria, from which people were fleeing a conflict with numerous incidences of attacks on civilians.²⁸ Across the EU the recognition rate for Syrian applications for asylum was 97%.²⁹ States of entry into Europe, (notably the Balkan states), and destination states, (notably Germany),³⁰ were under huge pressure, because of both the unexpected numbers and the lack of solidarity from EU states less affected by dint of geography.

3 Defining Temporary Protection

²¹ 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.

²² The current allocation rules are in 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 [2013] OJ L180/1.

²³ For a summary of the criteria and their application, see report prepared for the EU Commission by ICF International Report (March 2016), Evaluation of the Implementation of the Dublin III Regulation – Final Report, section titled: Criteria for determining the Member State responsible.

²⁴ E.g. 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, 7 – available at < www.rsc.ox.ac.uk/files/files-1/wp105-we-need-to-talk-about-dublin.pdf > [30 October 2017].

²⁵ For a summary of the conflicts and the context see Tony Kushner and Katherine Knox, *Refugees in an Age of Genocide* (Frank Cass 1999) 356-359.

²⁶ EASO 2015 (n 9); associated states - ref (n 15).

²⁷ EASO 2015 (n 9): 13; EASO Annual Report (2016): 16, available at <<https://www.easo.europa.eu/sites/default/files/Annual-Report-2016.pdf>> [23 January 2018].

²⁸ E.g. EASO Report 2015 (n 9): 31-32; EASO Report 2016 (n 27): 31.

²⁹ EASO 2015 (n 9): 22.

³⁰ Alberto Nardelli, 'Angela Merkel's Stance on Refugees Means that she stands alone against catastrophe', The Guardian (UK 8 November 2015) available at <www.theguardian.com/commentisfree/2015/nov/08/angela-merkel-refugee-crisis-europe>.

The 1951 Refugee Convention provides a definition of the ‘refugee’.³¹ There are interpretative difficulties which lead to debates about the scope and adequacy of the definition, notably the concept of ‘persecution’. One of the primary reasons for the emergence of *TP* in Europe was the view, (and it is still argued by some), that those fleeing en masse from conflict and violence, are not within the definition of *individualised* persecution contained in the Refugee Convention; in essence, that war and conflict is typically a form of *generalised* persecution, or, that those fleeing are not doing so for one the five ‘political’ grounds which the Refugee Convention addresses.³²

While there are significant interpretative difficulties under the Refugee Convention, at least it provides a definition. By contrast there is no universal definition of ‘Temporary Protection’ or for the beneficiaries of such protection, and attempts to agree one have been elusive. The 1980 UNHCR Executive Committee Conclusions took note of the ‘extensive practice of granting temporary refuge in situations involving a large-scale influx of refugees’, but at the same time recognised ‘the need to define the nature, function and implications of the grant of temporary refuge’.³³ A generation later, and despite the implementation of a whole range of *TP* mechanisms, it continues to defy definition. In practice, states and refugee organisations have adopted the term to cover various contingencies. The UNHCR’s 2014 Guidelines refer to *TP*, in the plural, as ‘pragmatic “tools” of international protection, reflected in States’ commitment and practice of offering sanctuary to those fleeing humanitarian crises.’ It is noteworthy that the UNHCR Guidelines identify *TP* as ‘complementary to the international refugee protection regime’, but give no basis for it in law.³⁴ This is because there is no incontrovertible legal basis identified with it. Instead its justification, when it has been claimed in law, has been piggy-backed on various sources of human rights law. As Fitzpatrick commented, ‘For several decades, temporary protection has hovered at the edges of refugee law, assuming multiple identities and serving various functions.’³⁵ It still does.

TP is thus protean in what it seeks to achieve and in terms of the bases upon which it is justified. As a generalisation, there are two broad reasons why *TP* emerges in response to mass influx from conflicts: to justify actions to fill in gaps in the protection architecture, and/or, to limit in time the obligation to host a mass influx. In general, refugee advocates promote the first, and states the second.³⁶

3.1 Legal bases for Protection

³¹ 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.

Article 1: A refugee is ‘any person ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’

³² E.g. in Gregor Noll and Susanne Malström (n 1), 8: ‘Persons falling under the definition contained in the 1951 Refugee Convention and persons fleeing armed conflict are two different categories.’ Cf. UNHCR Guidelines (n 7) para 11.

³³ UNHCR Executive Committee 31st Session (1980), ‘No. 19 (XXXI) Temporary Refugee’, para (c), (f).

³⁴ UNHCR Guidelines (n 7) paragraph 3.

³⁵ Joan Fitzpatrick (2000) (n 1) 305; J-F Durieux, ‘Temporary Protection: Hovering at the Edges of Refugee Law’ [2014] Netherlands Yearbook of International Law (45) 221.

³⁶ Cf. Morten Kjaerum, ‘Temporary Protection in Europe in the 1990s’ [1994] Int J Refug Law 6: 444, 449-450.

Undoubtedly, the Refugee Convention is the reference point for protection of refugees and asylum seekers. Despite being set up in the context of the aftermath of the Second World War to address specific problems then existing in Europe, and, despite the considerable changes relating to refugee movements since that time, it remains the benchmark instrument for establishing protection in, and for reflecting the moral dimension of, international law.³⁷

The fundamental principle of protection is *non refoulement* – that a refugee cannot be returned or expelled by a state to territories where it would put his life or freedom in danger.³⁸ It is the *raison d'être* of international refugee law. The ambit of non refoulement is, though, not limited to the Refugee Convention. It has grown with the growth of international human rights law which contains protections with the same aim.³⁹ Given its importance and prevalence, it is widely claimed that non-refoulement is now well established as part of the corpus of customary international law.⁴⁰

By any global measure, EU states have deliberately committed themselves to a wide and comprehensive set of human right instruments to protect those in need of asylum. All EU states are signatories to the Refugee Convention upon which CEAS is premised. The CEAS represents a number of significant commitments to asylum seekers. The EU's Charter of Fundamental Rights has binding force against EU institutions and member states applying EU asylum law.⁴¹ All EU states have committed to the obligations and protections set out in the European Convention on Human Rights, (ECHR), notably protection from torture and inhumane and degrading treatment (article 3), which operates to the same end as non refoulement. Europe has gone further than other regions of the world through the creation of supranational courts. Refugees have relied on article 3 of the ECHR, to secure protection, and, in effect, enforce the principle of non refoulement in the European Court of Human Rights.⁴² EU states have enabled access to the EU's own courts, and the EU Commission has the authority to take actions there against a state for failing to meet its obligations under EU asylum law.

Yet, despite the raft of obligations, it remains the case, even in Europe, that protection has not been 'enthroned' above state self-interest.⁴³ As Goodwin-Gill has put it:

Self-interest remains at the heart of the matter, and action in pursuit of solutions for refugees depends, as it always has done, on the formal consent of States, staggering from one crisis to another.⁴⁴

³⁷ James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 992, 999.

³⁸ Refugee Convention (n 31) article 33.

³⁹ For a comprehensive list of replication of non refoulement in international instruments see Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non Refoulement: Opinion' in *Refugee Protection in International Law* (eds) Erika Feller, Volker Türk and Frances Nicholson 2003, 119 available at <www.unhcr.org/419c75ce4.html> [30 October 2017]; James C. Hathaway 2005 (n 37): 366-367.

⁴⁰ E.g. Lauterpacht and Bethlehem (n 39) 140-149; UNHCR law: <http://www.unhcr.org/419c74d64.pdf>; though this is contested, e.g. James C. Hathaway 2005 (n 37) 355-367, including the view that Refugee Convention art 33 does not apply to mass influx situations where the arrival 'truly threatens [the state's] ability to protect its most basic national interests.

It can be noted that no legal basis, not even customary international law, is identified with *TP* arrangements in the 2014 UNHCR Guidelines – see comment on this above.

⁴¹ Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.

⁴² E.g. *Chahal v United Kingdom* No. 70/1995/576/662 11 November 1996 (ECtHR).

⁴³ Cf. Phillipe Sande, *East West Street: on the Origins of Genocide and Crimes against Humanity*, (Weidenfeld and Nicholson 2016) 340.

This is no different for TP. Indeed, TP has been considered to be more pliant as tool in pursuit of the protection of state-interest; though, as explored in this paper, it has not been any more successful. In relation to mass influxes, as one commentator noted, ‘when discussing the reception of *mass* refugee flows one needs to have in mind that refugee reception does not merely touch on humanitarian obligations of international community but also the broader framework of the host states’ (perceived or real) national interests.’⁴⁵ The ambiguity around the ambit of the definition of ‘persecution’ in the Refugee Convention has provided a justification for states to determine that those fleeing what they consider to be generalised violence caused by conflict and war, to be outside its protection. This contributed to the development of TP which is explored below.

3.2 Framing protection within time

In the 1990s various time frames were associated with TP in Europe. Some rights-based organisations suggested that two years was the outer limit;⁴⁶ others, including the UNHCR, considered that TP could legitimately be stretched up to five years, some linking this to what was considered the norm duration for a post World War Two conflict,⁴⁷ and others, linking this to what they considered tolerable from the perspective of asylum seekers.⁴⁸ European states had their own view and largely copied each other and gave Bosnians permission to reside for six-months. Though, it should be noted that states extended this as the conflict continued.⁴⁹

In order to consider what is the proper time frame, we should recall the two purposes for which TP emerges in response to an influx fleeing conflict and war: gap filling and a return home mechanism. The linkage of these functions with both time frames and protection is now explored.

In the case of addressing resourcing and capacity gaps in the face of a mass influx, McAdam has suggested that this ‘typically European’ approach to *TP* is ‘time-bound’ as an emergency response to a sudden mass influx which would otherwise overwhelm standard refugee determination procedures. ‘As such it should only last for as long as it remains impossible to process the asylum seekers through the normal channels and accord protection on an individual basis.’⁵⁰ As such the duration of *TP* is likely to be short, until the moment the state(s) secures the proper functioning of the regular asylum system. One would expect that this would be a matter of weeks or months, rather than years.

However, and this is key, European *TP* was not simply about addressing lack of resources and capacity to process a mass influx. European *TP* was about protecting Europe, and being seen

⁴⁴ Guy S. Goodwin-Gill, ‘International Refugee Law – Yesterday, Today, but Tomorrow?’ (2016) The Refugee Law Initiative, The Future of Refugee Law Working Paper Series Special Edition (paper 16/22), 4 <https://rli.sas.ac.uk/sites/default/files/files/RLI_final.pdf> [19 September 2017]

⁴⁵ Gregor Noll and Susanne Malström (n 1) 34.

⁴⁶ E.g. European Council on Refugees and Exiles (ECRE) in Joan Fitzpatrick 2000 (n 2): 301.

⁴⁷ Walter Kalin in Joan Fitzpatrick 2000 (n 1): 298; James C. Hathaway (eds) (n 16) 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.

⁴⁸ UNHCR and EU Commission in Joan Fitzpatrick 2000 (n 1): 302; James C. Hathaway (eds) (n 16) 18.

⁴⁹ Gregor Noll and Susanne Malström (n 1) 35; Joan Fitzpatrick 2000 (n 1): 295.

⁵⁰ Jane McAdam, Complementary Protection in International Refugee Law, (OUP 2007) p. 3; 43.

to do so, through securing a mass efflux out of Europe. There are three issues here to address, (i) the quality of the rights for those under *TP*, (ii) the legal basis for those rights, and, (iii) the crucial issue under consideration, *when* does the influx reverse to become a mass efflux, with those who sought asylum, returning home?

There is logic in a reduced level of rights given that the premise for *TP* is that the mass influx of asylum seekers will return home.⁵¹ European states in the 1990s embraced this logic with protection secured outside the Refugee Convention.⁵² The UNHCR supported *TP*, and in doing so, condoned, at least initially, fewer and lesser rights in many states than those associated with the Refugee Convention. The UNHCR's primary motivation for endorsing *TP* acknowledged the concerns that within states there were hostile reactions to further commitments to asylum seekers, and that states would find a justification in a narrow interpretation of obligations under Refugee Convention to deny admission of Bosnians.⁵³ Accepting the non application of the Refugee Convention was the price to secure admission. Despite the UNHCR's support, *TP* 'gained new notoriety'.⁵⁴ As one commentator opined, European 'Temporary protection introduced a "qualitatively different approach", which negates the premise of the Geneva Convention'.⁵⁵

Others sought to justify time-bound obligations through re-visiting the original aims of the Refugee Convention.⁵⁶ This approach promoted the view that pursuing return-focused solutions was properly considered as the primary solution within the framework of the Refugee Convention, and that Western states had changed this by making permanent stay and integration the *de facto* solution to refugee movements. As one commentator was able to put it, '[t]he host country is not merely a transit camp, but a permanent home'.⁵⁷ On the contrary, it was pointed out that this was not the original intention as the status of 'refugee' was intended to be a 'relatively brief interlude' in the life of a person.⁵⁸ In other words, the status of the refugee, and hence the obligations of host states should be conceived as time-limited in law too. It was pointed out that Western states had promoted integration and resettlement of refugees for pure political reasons during the Cold War to discredit the communist world.⁵⁹ So it was said that if the focus on return-orientated solution was thought to be a paradigm shift, it was not, if considered against the original aims and the drafting of the Refugee Convention.⁶⁰ '[A]t least in law', it was said, 'temporary protection is already the universal norm' because the Refugee Convention was, despite the actual practice at that time, premised on 'a jealously guarded formal distinction between refugee determination and permanent residence.'⁶¹ Put differently, this formal distinction was an expression of the autonomy of the state in

⁵¹ Gregor Noll and Susanne Malström (n 1) 8.

⁵² Matthew J. Gibney (n 13) 696-698.

⁵³ UNCHR, 'A Comprehensive Response to the Humanitarian Crisis in Former Yugoslavia', (24 July 1992) para 3, 12 – available at <www.refworld.org/docid/438ec8aa2.html> [30 October 2017].

⁵⁴ Katy Long (n 4) 116.

⁵⁵ Joly D, 'A new asylum regime in Europe' quoted in UK Home Office UK (Research, Development and Statistics Directorate), (ISBN 1 84082 972 9), 'An Assessment of the Impact of Asylum Policies in Europe 1990-2000' Research Study 259 (June 2003) 35.

⁵⁶ Cf. James C Hathaway (n 16).

⁵⁷ Nicholas Blake (n 21) 107.

⁵⁸ Joan Fitzpatrick (2000) (n 1). 279, 298.

⁵⁹ Gil Loescher (n 3) 39.

⁶⁰ Cf. Joan Fitzpatrick 2000 (n 1): 291

⁶¹ James C. Hathaway (n 16) 2; see also Joan Fitzpatrick 2000 (n 1): 298: Temporary protection should last until a durable solution is found, which may involve repatriation after the crisis has ceased. The same is logically true under the 1951 Convention, whose cessation clauses, definition of refugee, and provision on non-refoulement all suggest that international protection may be temporary. Political asylum may constitute a relatively brief interlude in a refugee's existence. Thus, the fact that the duration of TP is linked to the continuation of risk does not set it apart from the existing refugee regime.'

international law; and, if not respected there were dangerous consequences: ‘insistence on the permanency of refugee admission can work against the more critical goals of granting at least basic protection to all who require it’.⁶²

Even those who sought to justify time-bound obligations accepted that *TP* should not result in a state of limbo of reduced rights and uncertainty about the future.⁶³ It was considered that, (whatever the original framers of the Refugee Convention had considered), there was good reason to believe that many conflicts would be brought to an end within five years. This was plausible because expectations had been ‘heightened’ for ‘effective collective action’ to address violent conflicts,⁶⁴ (at least where European and US interests converged).⁶⁵ As one commentator at the time wrote:

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....⁶⁶

Five years was also an acceptable period because it was considered that most people in an influx could tolerate this interlude in their life.

4 Implementation of Temporary Protection

This section considers the implementation and experiences of *TP* in Europe as responses to two periods of influxes from FY: the Bosnian influxes during the Bosnian war, 1992-95, and, the Kosovo crisis in spring-summer 1999.

Between 1992-5 *TP* was used to relieve pressure from asylum systems in the face of Bosnians influxes by the *de facto* automatic recognition of their protection needs.⁶⁷ In the language of UNHCR Guidelines, *TP* represented ‘pragmatic tools’ at the service of asylum systems as normal asylum procedures were suspended or avoided for Bosnians. As explained below, *TP* was used, but less in the face of the Kosovar crisis.

TP was used to make a substantive contribution to the protection architecture by filling in gaps in the legal framework. As has been considered, gaps in the protection frameworks arose through narrow interpretations of obligations under the Refugee Convention. The

⁶² James C. Hathaway (n 16) 6.

⁶³ Though some so-called *TP* regimes in other regions of the world keep people in long-term limbo.

⁶⁴ International Commission on Intervention and State Sovereignty, (ICISS) Report 2001 Responsibility to Protect para 1.4 – available at <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> [3 November 2017].

⁶⁵ James C. Hathaway (n 16) xxi; contrast lack of effective international action at that time in the Great lakes region of Africa.

⁶⁶ Morten Kjaerum (n 36) 446-7.

⁶⁷ Gregor Noll and Susanne Malström (n 1) 9.

implementation of *TP* addressed this gap.⁶⁸ This was a significant development in the protection architecture which was a factor in the adoption of a Directive on *TP*. This is explored below.

So while *TP* proved its use addressing asylum pressures and filling gaps in protection in Europe, neither of these, alone or together, explain the interest in *temporary* protection. European states pursued *temporary* protection as opposed to, say, other forms of ‘complementary’ or ‘humanitarian’ protection, because they desired that the influxes should be reversed. As Gibney aptly put it, they *gambled* on this reversal happening, and, in a short time frame. The *TP* response to the mass influx of Bosnians was based on the crucial premise ‘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.’⁶⁹ As it turned out, the major conflicts causing the Bosnian and the Kosovo asylum crises were brought to (relatively) quick ends because of decisive military intervention involving NATO. The Bosnian war formally ended in 1995 after three years; the Kosovo crisis, as far as it threatened Europe with another crisis, was over within weeks between April – July 1999. It seemed at the time that the post Cold War settlement had resulted in a decisive change in the international arena.

However, by 1999 when the Kosovo crisis threatened another large influx of asylum seekers, EU states had become wary about *TP*. As Fitzpatrick commented, ‘...enthusiasm for temporary protection ... had flagged during the endgame to the Bosnian refugee crisis’.⁷⁰ Why?

This was because the *TP* gamble did not pay off for states. The majority of states granted *TP* for six-months – this was very optimistic. The grant was extended.⁷¹ But still, the conflicts were over comparatively quickly and within the tolerable five-year time frame. Yet, in EU states, with the exception of Germany, *TP* actually led to a permanent residence status for Bosnians.⁷² It is well documented that in general, as an outcome, return is rare, at least in Europe, and diverse reasons have been suggested to explain why.⁷³ But most states had reduced the quality of rights under *TP* in order to reduce the risk of integration. The explanations would seem to be that Bosnians integrated well in many states, economically and socially, so the case for insisting on removal diminished.⁷⁴ It has also been considered that the challenge to ensure and if necessary force return home was going to be no less difficult and no less controversial, even for those on the seemingly less secure *TP* status. The German experience is instructive. Germany hosted a large number of asylum seekers from the Bosnian conflict, around 342,000, (60% of the EU total). It was in the midst of acute economic and political challenges with high levels of unemployment following re-unification of East and West Germany in 1990.⁷⁵ The German government considered that as it was hosting the lion’s share of Bosnians in Europe, this was itself an important factor justifying its insistence on return. With the formal end of Bosnian War on the signing of the Dayton Peace agreement in

⁶⁸ E.g. Joanne van Selm-Thorburn, *Refugee Project in Europe – Lessons of the Yugoslav Crisis* (Kluwer Law International 1998) 177.

⁶⁹ Morten Kjaerum, (n 36) 450-1; Gil Loescher (n 3) 316.

⁷⁰ Joan Fitzpatrick (2000) (n 1) 279.

⁷¹ Gregor Noll and Susanne Malström (n 1) 35; Joan Fitzpatrick 2000 (n 1): 295.

⁷² 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 (eds) (n 14) 29. Gregor Noll and Susanne Malström (n 1) 10

⁷³ Joan Fitzpatrick (1999) (n 17) 352-354; Matthew J. Gibney (n 13) 692.

⁷⁴ Koser and Black *et al* (n 72) 529-530.

⁷⁵ Joelle Hageboutros (n 14) 51-53.

1995, Germany took the decision in 1996 to return Bosnians. Many Bosnians though did not want to return as they considered the situation in Bosnia risky. Despite this, returns were achieved through the removal of the right to residency, which was underpinned by a federal court decision favourable to the government position, and through policies to discourage stay such as prohibition from working and attending schools.⁷⁶ Actual forced returns, (repatriation), were more symbolic rather than numerous instances, it would seem.⁷⁷ By the end of the decade around two-thirds had left Germany.⁷⁸ Though, Germany still ended up hosting more Bosnians long-term than any other EU state.⁷⁹ However while the removal may have accorded with the wishes of many of its public,⁸⁰ Germany was subject to severe and widespread criticisms as many, including the UNHCR, agreed with the Bosnians, that they were effectively being forced to return in circumstances when it was not safe, with the situation in Bosnia remaining tense, and with continuation of ethnic segregation.⁸¹ Following its experiences and the widespread censure, Germany was reluctant to accept more people from FY when the Kosovo conflict erupted in 1999, and, like other states, did not apply *TP* for spontaneous arrivals.⁸²

So, while the claim the 1990s was the ‘decade of repatriation’ might indicate some success in relation to the total numbers of Bosnians who returned from the EU, it did not convey the differences between EU states, or, the end game, which was scepticism of *TP*,⁸³ as states understood the gamble it represented. It would not be surprising then if states would not look to *TP* in a future crisis.

TP failed in another significant respect in that it did not serve or encourage EU solidarity. There was no burden sharing between EU states, and evidently, there was no offer to share Germany’s considerable burden between 1992-5. The Bosnian experience proved that *TP* could not instil solidarity to address fairly the challenges of protecting large numbers of asylum seekers, even between states with the same interest in protecting the EU project. Indeed it may very well have been that the emergence of *TP* itself was a direct legacy of scepticism in Europe of achieving fair burden sharing.⁸⁴

That said, there were other pointers to suggest that EU states were never fully convinced that *TP* could deliver the returns desired, and that they did not consider it the major instrument to protect *their* interests.⁸⁵ The maintenance of non-entrée policies throughout the 1990s even for Bosnian nationals, who it was accepted as being in need of protection, surely manifested

⁷⁶ Ibid 56-7.

⁷⁷ Katy Long (n 4) 117.

⁷⁸ Khalid Koser in Joanne Van Selm (eds), (n 14) 29-30.

⁷⁹ Ibid 29.

⁸⁰ Joelle Hageboutros (n 14) 57

⁸¹ Matthew J. Gibney (n 13) 694; U.S. Committee for Refugees World Refugee Survey 1999 - Germany at <www.refworld.org/docid/3ae6a8b228.html> ; UNHCR website

www.unhcr.org/uk/news/latest/2004/9/414ffba4/bosnia-herzegovina-welcomes-1-million-returnees.html [28 January 2018].

⁸² There was an evacuation programme during the 1999 Kosovo crisis under which nearly 53,000 Kosovar Albanians, (out of an estimated 800,000 persons in need), were evacuated to fourteen EU states; though the programme has been considered something of a success in that the crisis averted quickly, this has to be evaluated against the fact that the contribution of EU states was varied, and overall given the size of the crisis, modest; further the evacuations were contingent upon each state determining what it was prepared to accept, and there was ‘no agreement on solidarity’ between states – Joanne van Selm and Khalid Koser in Joanne van Selm (eds), (n 14) 27, 28-30, 38, 191, 224-225; Karoline Kerber, ‘Temporary Protection in the European Union: a Chronology’, (1999) 14 *Geo. Immigr. L.J.* 35, 48-49.

⁸³ Joanne van Selm (n 14) 191.

⁸⁴ Morten Kjaerum (n 36) 447.

⁸⁵ Cf: Gregor Noll and Susanne Malström (n 1).

states primary approach to limit their obligations, which was, (and remains), as far as possible, to keep the mass flux from reaching the EU.⁸⁶ *TP* was a defensive reaction to spontaneous arrivals, those, who despite the non-entrée policies, had managed to breach the fortress. It was a reluctant acceptance of the realities of the protection needs of those who arrived, but with a desire to effect a turnaround and quick departure.

5. TP Directive

It was suggested at the beginning that the success of *TP* in Europe would be its ability to address the seemingly incompatible objectives, protection in a mass influx situation and the return home of the mass influx after a short stay in the host state(s). It was also suggested that the TP Directive could be seen as supporting the claim that *TP* had been something of a success. The fact that states, had implemented *TP*, and then followed-up with the Directive, could be taken as endorsement of *TP* as a credible response for a mass influx into Europe. The adoption of the Directive could then be considered as undermining the contention that enthusiasm for *TP* really did flag. This is considered now.

The Directive applies to a mass influx, defined as the arrival in the EU of a ‘large number’ of ‘displaced persons’. Under article 2 states are obliged, if the Directive is activated, to protect, among others, persons ‘who have fled areas of armed conflict or endemic violence; and persons ‘at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.’ Displaced persons are provided with decent levels of rights, (articles 8-16). The protections in the Directive plug the gap created by the narrow interpretation of the Refugee Convention and thus ensures protection in the EU for those fleeing war and conflict. It addresses the many criticisms leveled at national forms of *TP*. Lessons it seems had been learned.⁸⁷

The Directive also benefits states. Under article 24 states have access to EU financial support. States can suspend the usual asylum processes under article 17 during the period of *TP* to aid management of a mass influx.

Most importantly though, it seemingly gives states what they want most, by providing time-limited protection. Recital 13 states:

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.*

[Emphasis added]

Under Article 4 *TP* can last for a maximum period of three years. Reflecting this recital 19 states:

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.

⁸⁶ James C. Hathaway (n 37) 291-293.

⁸⁷ Cf TP Directive (n 5) recital 6.

The time-limited obligation would appear to be serious as article 22.1 provides the legal basis for forced returns:

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.

But, what of the contention that enthusiasm in *TP* had flagged? It seems counter-intuitive to suggest this when the EU adopted this Directive and it provides for forced expulsions.

First, the reasons for the adoption of the Directive do not themselves indicate any revival in enthusiasm for *TP*. One reason for its adoption was the acceptance of the need to protect those fleeing war and conflict – proof of this was the inevitability of acknowledging, (if reluctantly), that, despite their uncertain legal status, immediate expulsion for Bosnians fleeing conflict was not acceptable.⁸⁸ Another explanation is that as the later Kosovo crisis confirmed, the risk of further mass influxes into the EU were real. A third explanation is that a combination of the EU Commission's persistence to secure a *TP* measure, with the support of the most important political institution, the European Council, representing the Heads of states and government, led to changes to the EU Treaties to include a binding commitment to adopt an EU *TP* instrument, but not, it should be noted, a commitment on a binding burden sharing mechanism.⁸⁹ Perhaps, the fact that the 1990s European conflicts were concluded within three years was a factor that on the other hand, kept alive the possibility that *TP* could have a role.

However, it is the contention of this article that enthusiasm really had flagged. Other aspects of the Directive confirm this view.

Recital 13, which states that in a *TP* situation '*protection should be of limited duration*', can only translate to an *expectation* that people will return home. It cannot be any stronger in law. As we have seen, EU states are committed through a number of instruments to secure the principle of non refoulement which the Directive cannot undermine. This is recognised at article 3:

Member States shall apply temporary protection with due respect for human rights and fundamental freedoms and their obligations regarding non-refoulement.⁹⁰

⁸⁸ Gregor Noll and Susanne Malström (n 1) 18, 23; the adoption in 2004 of the concept of *subsidiary protection* status is further evidence of this: Qualification Directive, Directive 2011/95/EU of the European Parliament and of the Council 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted OJ L 337/9; articles 2(f) and 15: subsidiary protection is available for a person who would face a real risk of 'serious harm' if returned to country of origin and owing to that risk the person is unwilling or unable to return ; serious harm consists of one more of the following:

(a) the death penalty or execution; or, (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or, (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of inter- national or internal armed conflict.

Cf: Meltem Ineli-Ciger (n 10) 23-25 where some weakness in the concept of 'subsidiary protection' compared to 'displaced persons' under the TP Directive is considered.

⁸⁹ Karoline Kerber (n 82) 40 *et seq*; EU Commission, 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, (OJ C 311 E, 31/10/2000 P. 0251 – 0258)

⁹⁰ See also EU Commission proposal (n 89) 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

Neither does the Directive prevent transition to permanent forms of protection, as article 17 permits suspension only, of normal asylum during the *TP* period.

The strength of protection in law is seen further in that while a legal basis for forced returns is provided under article 22.1, that is conditional under art 22.2 on the basis that states ‘*shall* consider any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases.’ [Emphasis added]

Perhaps though the most significant indicator of scepticism is that *TP* is not an automatic consequence of a mass influx. Instead it is dependent upon a triggering process involving the EU Commission and the approval of a majority of EU states. Even then, if the Directive were triggered, each state would be obliged under the Directive to admit only the number of admissions it is prepared to accept.⁹¹ Whatever the extent and size of the influx, a state could, legally speaking, pledge a lack of capacity. There is then no obligation towards any form of equitable burden sharing: as the title states, the ambition of the Directive is ‘promoting’ burden-sharing, but no more.⁹² Perhaps the greatest flaw is that activation of the Directive could easily be an exercise in futility: even if EU states seek to protect their interests under the Directive by minimal commitments, this does not guarantee that they will not end up with larger ones from undesired but unstoppable spontaneous arrivals.⁹³

So while the Directive could be an instrument of good for the protection of those fleeing war and conflict, key features reflect state’s wariness: its operation is always conditional on political will (article 5); it is weak, if not flawed, on what should be a key attribute of *TP*, burden-sharing, (article 25.1), and, it fails to shut down routes to permanent integration, (articles 17 and 22.2).

6 Resetting expectations

The claim that *TP* is the ‘realistic’ solution to deal with mass influxes in Europe, survived for only a short period. In the 1990s return could be suggested as a realistic outcome supported by evidence which showed ‘a significant portion of refugee-producing crisis were solved within five years after their commencement.’⁹⁴ The ending of the conflicts in Bosnia (1992-1995) and Kosovo (1999) fitted within this timeframe. Since then there has been a movement away from focusing on return solutions.⁹⁵ For example, the 2016 annual report from European Asylum Office considers returns only in relation to *failed* asylum seekers and other irregular migrants.⁹⁶ As has been noted returns of mass influxes are difficult and a broader review

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.

⁹¹ 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.’

⁹² TP Directive (n 5).

⁹³ Cf: *ibid* articles 18; 25.3.

⁹⁴ James C. Hathaway (n 16) 17.

⁹⁵ James C. Hathaway (n 37) 964, 976-977.

⁹⁶ EASO Report 2016 (n 27)141-145.

shows they are infrequent.⁹⁷ Today, the UNCHR reports that the average length of time to resolve a protracted refugee crisis is twenty-six years.⁹⁸ Those who called for *TP* during the 2015-16 European crisis, did so because they considered that it would help address the pressures on asylum systems, or they considered unrealistically that it could be a mechanism to minimize the burdens on European states. It is instructive that while the UNHCR identifies parallels with the protection needs of Bosnians in 1990s with the same needs for asylum seekers in current times, parallels around solutions are not identified:

In the 1990s, the Balkan wars created hundreds of thousands of refugees and asylum seekers. Many of them found refuge in industrialised countries. Today, the surge in armed conflicts around the world presents us with similar challenges. Our response has to be just as generous now as it was then – providing access to asylum, resettlement opportunities and other forms of protection for the people fleeing these terrible conflicts.⁹⁹
UN High Commissioner for Refugees (2014)

7 ***Postscript: European refugee crisis 2015-16***

The EU's responses to the crisis were set out in the 2015 action plan.¹⁰⁰ The EU adopted measures to address the immediate pressures through directing and financing resources to help frontline states through 'Hotspot' reception centres, and through temporary measures under article 78(3) of the Treaty on Functioning of the European Union, to relocate asylum seekers from frontline states to others within the EU.¹⁰¹ The relocation measures contained, for the first time, and in contrast to the TP Directive, binding commitments to specific measurable targets of burden-sharing between EU states. The allocation was based upon a distribution formula, roughly corresponding to each state's relative capacity to share in the burden, adjusted downwards by past efforts to resettle asylum seekers. The scheme reversed the normal Dublin rules to relocate asylum seekers *from* front-line states to others.¹⁰² The relocation scheme ended in September 2017, and by November 2017, the total number of relocations was reported at 31,237, representing 19.5% of the commitment to 160,000 relocations.¹⁰³

The absence of the TP Directive in the EU's responses corresponds with developments in EU asylum law and the conclusion that by the end of the 1990s interest in *TP* had flagged, and nothing has changed that. Subsidiary protection provided protection for Syrians fleeing

⁹⁷ Referred to in J-F Durieux (n 35) 229.

⁹⁸ UNHCR website, Report, 'Global Trends-Forced Displacement in 2015' 20, available at <www.unhcr.org/576408cd7.pdf> [4 November 2017].

⁹⁹ UNHCR Report, 'Asylum Trends 2014: Level and Trends in Industrialized Countries', 8, available at <www.unhcr.org/551128679.pdf> [4 November 2017].

¹⁰⁰ EU Commission (n 12).

¹⁰¹ European Union, 'Consolidated version of the Treaty on the Functioning of the European Union' Official Journal C 326, 26/10/2012 P. 0001 – 0390.

¹⁰² For a comprehensive analysis see Elspeth Guild, Cathryn Costello and Violeta Moreno-Lax, 'Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and Greece' (Study of European Parliament LIBE Committee, 2017) 50-51, available at <[www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU\(2017\)583132_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf)> [4 November 2017].

¹⁰³ EU website, Member States' Support to Emergency Relocation Mechanism (as of 2 November 2017) 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> [4 November 2017].

violence and conflict, so this gave states no reason to look to the Directive. Activation could though have benefitted Syrians and states, as some advocated, by relieving pressure off asylum systems through automatic recognition of Syrian nationals. Though whether states would have been prepared to do this in a period of heightened security concerns is open to doubt. Activation could have been used to secure some level of burden sharing, and that states did agree binding burden sharing targets for relocation is some evidence for this. But activation would not have served their primary interest: it would not have improved the chances, let alone, guaranteed to *unburden* them. Rather states considered it offered more of a risk of pulling in more asylum seekers.¹⁰⁴

While the Directive was left on the shelf, *TP* continued (and continues) to hover around the edges of national policies. The frequent use of subsidiary protection as the basis of protection rather than Convention status means that states can limit stay to one year, (but extendable), as opposed to a minimum stay of three years required for protection under the Refugee Convention.¹⁰⁵ Further, there are examples of changes to national policy adopting, if not a formal *TP* nomenclature, defined time-limits on stay; these include, new temporary humanitarian protection status, (Denmark 2015); new temporary residence permit, (Sweden 2016); revised status to provisional with an automatic review after five years, (Belgium and UK 2016).¹⁰⁶ As in 1990s, some of these developments have been accompanied by alteration of and a reduction in rights, with some groups being kept outside regular national asylum systems.¹⁰⁷ As Goodwin-Gill has remarked, ‘To this day... illusory pull of ‘temporariness’ continues to influence policies and practices at both national and international level.’¹⁰⁸

In one sense this is surprising given that the gamble in the 1990s substantially failed, and that was when the conditions in the international environment were more conducive to resolution of conflicts. As Gibney commented at the time, ‘States have no reason to support temporary protection if it proves simply to be an extended pathway to permanent immigration.’¹⁰⁹ That said, *TP* as a crisis mechanism was always reactive and hints at desperation as states feel under pressure. In this as Goodwin-Gill suggests, *TP* continues to be considered as offering political value as a message: long stayers are not welcome. As Andreas has observed, some asylum policies may be ‘suboptimal from the perspective of a means-ends calculus of deterrence, [but] can be optimal from the political perspective of constructing an image of state authority and communicating a moral resolve.’¹¹⁰ The re-emergence of national forms of *TP* is, it is contended, just as likely to prove sub-optimal as a means-end policy, but, in the face of domestic resistance to international obligations, is intended to signal limited tolerance and welcome.¹¹¹

¹⁰⁴ Beirens H and others (n 11) 15, 35.

¹⁰⁵ Qualification Directive, Directive 2011/95/EU (n 89) article 24.

¹⁰⁶ European Migration Network, ‘The different national practices concerning granting of non-EU harmonised protection statuses’, (December 2010) 98-104 available at <www.refworld.org/docid/51b05e734.html> [4 November 2017]; 105-6; Beirens H and others (n 11) 35, 86-87; Meltem Ineli-Ciger (n 10) 25-26; Alan Travis, ‘Refugees applying to live in UK face being sent home after five years’ The Guardian, UK, (March 2017) available at <www.theguardian.com/world/2017/mar/09/refugees-applying-to-live-in-uk-face-being-sent-home-after-five-years> [12 August 2017].

¹⁰⁷ European Migration Network (n 106) section 3.2.5; 109-110; EASO Report 2016 (n 27) 67-71, 135-140.

¹⁰⁸ Guy S. Goodwin-Gill (n 44).

¹⁰⁹ Matthew J. Gibney (n 13) 692; see also the same view in Joanne Van Selm (n 84) 190.

¹¹⁰ Quoted in Minos Mouzourakis (n 25) 8.

¹¹¹ Elsa Vulliamy, ‘Angela Merkel says most refugees should go home - after Isis has been defeated’ Independent UK (31 January 2016) available at <www.independent.co.uk/news/world/politics/angela-merkel-says-most-refugees-should-go-home-after-isis-has-been-defeated-a6844851.html> [4 November 2017]; Commissioner for Human Rights of the Council for Europe, Annual Activity Report 2015, 4.

8 Conclusion

The EU's responses to the mass influxes into Europe in 2015-16 raises the question about the absence in them of the EU's Directive on *TP*. This article has sought to join up the dots of the *TP* story in Europe: the challenge of and debates over commitments to protect people fleeing conflict and war, the narrative of a large and enduring numbers problem, responses in the 1990s to the FY influxes, the adoption of the Directive and the actual responses to the 2015-16 crisis. In making these connections, the article has sought to draw out the drivers of *TP* in Europe.

In the 1990s it was thought that *TP* could be a way, in law and in practice, to mediate the tension between the duty to protect, and the pressures, (real and perceived), of large numbers of asylum seekers. *TP* offered the possibility of this double win.

The endeavours of those in the 1990s who sought an alternative way to avoid a clash between the protection needs of asylum seekers and (concerns about) a backlash, particularly in response to large influxes of asylum seekers, were valid and commendable. Debate around *TP* was an acknowledgement of all concerns, and, in doing so identified all the risks of ignoring them.

The first *TP* aim was achieved. Through debates around *TP*, progress was made in the protection of those fleeing conflict and war with states coming to accept that they needed to provide protection. This was seen in that fact that states gave, if grudgingly, admission to FY asylum seekers, irrespective of which side they came down on as regards the application of the Refugee Convention. This led to formalised protection through the concept of 'displaced persons' under the *TP* Directive, and later, in the concept of 'subsidiary protection'.

The analysis in this article also shows that the second *TP* aim, to unburden states, through the return of asylum seekers was a gamble that did not succeed. There proved to be no guarantees to ensure return. The circumstances were favourable to ending conflicts, yet return was not secured in most European states, and in the one state in which repatriation was pursued, it proved to be difficult and controversial, even with both the courts and large sections of the electorate on side. Wars might be formally over but the risks of persecution were not. It became clear that successful *TP*, with the double win, would be a rare. The influx in 2015-16 gave states no reason to consider the circumstances were conducive to expecting a double win. In truth, the calls to activate the *TP* Directive were not overwhelming; and noticeably, absent from the EU states, even those under the most pressure.

At this time, the most certain foreseeable outcome, reflecting weak international relations, is that many asylum seekers in Europe will need to be given refuge for an indefinite period. This means serious steps will need to be taken to integrate them into host states. Backlashes to migration are evident and asylum seekers are no exception. The re-emergence of national forms of *TP* is evidence of this because states cannot realistically expect to achieve substantial returns. It has emerged to convey the message: do not stay long (please).

Those who sought to mediate the tension did so because they saw risks in a one-sided outcome. They made some good progress particularly in securing protection for those fleeing war, and the Syrian nationals in Europe have benefited from this; but there is a long way to go to find a satisfactory and necessary solution (and/or perspective) that will convince states and their electorates that refugee protection can be a double win.