

# TEMPORARY REFUGE FROM WAR: CUSTOMARY INTERNATIONAL LAW AND THE SYRIAN CONFLICT

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**Abstract** The rule of temporary refuge forms the cornerstone of the response of States to large-scale influx of refugees. In the context of civilians fleeing armed conflict, this legal rule imposes a positive obligation on *all* States to admit and not to return anyone to a situation where there is a risk to life, and to provide basic rights commensurate with human dignity. Also implicit in the rule is the expectation of shared responsibility for large numbers of refugees and of international cooperation towards finding durable solutions. This article examines the customary international law of temporary refuge (also known as temporary protection) in relation to the Syrian conflict. It discusses implementation of the rule in the practice of three countries neighbouring Syria, and in the EU. It finds that the practice of Turkey, Lebanon and Jordan has been consistent with the rule of temporary refuge. However, the EU has decided not to use the Temporary Protection Directive; instead individual Member States have relied on the Refugee Convention and EU law, combined with various other measures not pertinent to temporary protection. It is concluded that shared responsibility is the linchpin of temporary refuge. Absent this keystone, the rule of temporary refuge is likely to continue to be implemented primarily in a regional context by those countries nearest to the country affected by the conflict, as in the case of Syria.

**Keywords:** armed conflict, customary international law, refugee law, Syrian refugees, temporary protection, temporary refuge.

## I. INTRODUCTION

There is nothing new about mass flight from war, or the mass movement of people across borders. Refugee crises are a recurring phenomenon,<sup>1</sup> yet large-scale influxes have long posed an acute challenge to countries implementing their obligations under the 1951 Convention Relating to the Status of Refugees<sup>2</sup> (Refugee Convention) because its asylum procedures are designed to assess in detail *individual* applications for protection

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<sup>1</sup> P Gatrell, *The Making of the Modern Refugee* (Oxford University Press 2013).

<sup>2</sup> 189 UNTS 150. The Convention was updated by the 1967 Protocol Relating to the Status of Refugees (606 UNTS 267).

and to grant *permanent* asylum<sup>3</sup> (subject to the invocation of a cessation clause).<sup>4</sup> Hence, the Refugee Convention, although in principle relevant, is not necessarily the most suitable framework for dealing with flight from armed conflict or massive violations of human rights that result in a large number of individual claims for asylum.<sup>5</sup>

Other salient reasons for the limited suitability of the Refugee Convention include the absence of a positive obligation to offer admission to territory,<sup>6</sup> circumstances of flight which may not at first sight be actually covered by the Refugee Convention,<sup>7</sup> and the problem that some States (including, for example, Jordan, Lebanon, Iraq, Kuwait, Bahrain, Oman, Saudi Arabia and the United Arab Emirates) have not yet ratified the Refugee Convention.

Anticipating these limitations, the drafters of the Refugee Convention

expresse[d] the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.<sup>8</sup>

Furthermore, Preamble to the Refugee Convention expressly provides

that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution ... cannot therefore be achieved without international cooperation.<sup>9</sup>

Possibly inspired by these provisions and pre-existing humanitarian traditions (such as rescuing persons in distress at sea)<sup>10</sup>, or indeed by the promise of preventing permanent integration,<sup>11</sup> temporary refuge developed as a key element of the response of States towards victims of armed conflict or massive violations of human rights.

<sup>3</sup> This is not the case in countries with a procedure for refugee status determination that uses *prima facie* as ‘a specific rule of evidence’, J-F Durieux and A Hurwitz, ‘How many is too many? African and European legal responses to mass influxes of refugees’ (2004) 47 *German Yearbook of International Law* 105, 119.

<sup>4</sup> Art 1C, Refugee Convention. Fitzpatrick talks about refugee law becoming ‘increasingly irrelevant as a solution, especially in situation of mass influx’, J Fitzpatrick, ‘Flight from Asylum: Trends Toward Temporary “Refuge” and Local Responses to Forced Migration’ (1995) 16 *Immigration and Nationality Law Review* 407, 410.

<sup>6</sup> eg States may refuse entry to stowaways and refugees rescued at sea or by application of the ‘safe third country’ concept without necessarily breaching the principle of non-refoulement in art 33 of the Refugee Convention; GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 267. See also GJL Coles, ‘Temporary Refuge and the Large Scale of Influx of Refugees’ (1980) 8 *AustYBIL* 189 at 195 arguing that ‘admission on a temporary basis facilitates the implementations of the principle of *non-refoulement*’ (196).

<sup>7</sup> The Convention defines a refugee as a person with a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion’ (art 1A(2)). According to the UNHCR, the violence characterizing most modern conflicts is motivated by or conducted along lines of race, ethnicity, religion, politics or social group ground, or impacts people for the same reasons. However, national decision-makers regularly fail to see it that way. UNHCR Guidelines on International Protection No 12, HCR/GIP/16/12 (2 December 2016), paras 1, 35, 36.

<sup>8</sup> Final Act of the Conference of Plenipotentiaries, para E.

<sup>9</sup> Preamble, 1951 Refugee Convention, Recital 4.

<sup>10</sup> GS Goodwin-Gill, ‘*Non-Refoulement*, Temporary Refuge, and the “New” Asylum Seekers’ in DJ Cantor and J-F Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill/Nijhoff 2014) 441–2.

<sup>11</sup> MJ Gibney, ‘Between Control and Humanitarianism: Temporary Protection in Contemporary Europe’ (2000) 14 *GeoImmigrLJ* 689, at 690 arguing that European States may have been motivated

The practice of temporary refuge emerged in the early part of the twentieth century and was soon extended to many parts of the world in order to provide a practical, humane, and immediate solution in cases of large-scale influx of refugees, pending the finding of a permanent home.<sup>12</sup> Thus, it was always meant to be a short-term solution to an emergency situation and has generally been applied for the duration of a conflict.<sup>13</sup> However, due to the prolonged length of some armed conflicts, temporary refuge has in some cases developed into a de facto permanent resettlement in the country of refuge.<sup>14</sup>

It has been identified as a rule of customary international law by numerous scholars, based on a considerable amount of consistent State practice across the globe, accepted as law.<sup>15</sup> It has grown into what is known as temporary protection,<sup>16</sup> but the reality of protracted conflicts and the issue of non-return have ‘exercised powerful influence’ on what countries (particularly Western countries) are prepared to offer.<sup>17</sup> This article uses the phrase ‘temporary refuge’ throughout in order to emphasize the customary nature of the rule; it uses the phrase ‘temporary protection’ only where States and/or international organizations expressly refer to it as such.

This article focuses on temporary refuge as a rule of customary international law, separate and independent from refugee law treaties and from non-refoulement, and binding on all States. It examines the practical application of temporary refuge to ‘war refugees’ today. With ‘15 conflicts either erupted or re-ignited over the past five years’,<sup>18</sup> the empirical focus of this article is on refugees from the conflict in the Syrian Arab Republic (Syria). The United Nations High Commissioner for Refugees (UNHCR) has described this situation as ‘the world’s single largest driver of forced displacement with half of the population displaced’ (approximately 12 million).<sup>19</sup>

Temporary refuge is a ‘diverse and multifaceted’ phenomenon, with ‘no single manifestation, purpose or character’.<sup>20</sup> Thus, section II begins with clarifying the scope of temporary refuge (both *ratione personae* and *ratione temporis*) by reference to evidence of practice worldwide as analysed by scholars. This section also discusses

by two main objectives: the ‘humanitarian objective’ and the ‘control objective’, when offering temporary protection.

<sup>12</sup> P Weis, ‘The International Protection of Refugees’ (1954) 48 AJIL 193, 196. Goodwin-Gill and McAdam (n 6) 289.

<sup>13</sup> Gibney (n 11) 689.  
<sup>14</sup> eg the conflict in Afghanistan since 1979 that has resulted in temporary protection being offered for an indefinite duration by Pakistan. D Perluss and JF Hartman, ‘Temporary Refuge: Emergence of a Customary Norm’ (1986) 26 VaJIntL 551, 564 and 598.

<sup>15</sup> *ibid* 551—a shorter version of this article, with a more US focus, was published by JF Hartman, ‘The Principle and Practice of Temporary Refuge: A Customary Norm Protecting Civilians Fleeing Internal Armed Conflict’ in DA Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Martinus Nijhoff 1988) 87; GS Goodwin-Gill (n 10) 897—reproduced in Martin *ibid* 103.

<sup>16</sup> K Kerber, ‘Temporary Protection in the European Union: Chronology’ (2000) 14 GeoImmigrLJ 35; D Luca, ‘Questioning Temporary Protection’ (1994) 6 IJRL 535.

<sup>17</sup> Gibney (n 11) 692.

<sup>18</sup> eg in Central African Republic, Democratic Republic of the Congo, Iraq, Libya, Nigeria, South Sudan, Ukraine, Yemen etc. UNHCR currently estimates over 60 million people as forcibly displaced; the highest number since WWII. ECRE interviews V Türk, ‘We Should Not Forget History When Addressing Current Challenges’ ECRE Weekly Bulletin (23 October 2015).

<sup>19</sup> Of a total population of approximately 22 million before April 2011, over five million refugees are now living outside Syria, and seven million persons are internally displaced. UNHCR, ‘International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic – Update IV’ (November 2015) para 8.

<sup>20</sup> Gibney (n 11) 690.

UNGA resolutions, UNHCR EXCOM conclusions, and case law of international courts as further evidence of the normative character of such practice. Section III briefly discusses pertinent elements of current practice that may be considered to be undertaken pursuant to the customary obligation of temporary refuge (as opposed to treaty or EU law) in the Syrian context. It signals that in the case of EU countries, State practice is primarily rooted in treaty law (eg, the Refugee Convention) or EU law. Section IV examines the implementation of existing customary obligations in the daily practice of three countries neighbouring Syria (Jordan, Lebanon and Turkey), where the vast majority of refugees are located. It then contrasts these practices with the response of the EU.

The three neighbouring countries were selected for legal and geopolitical reasons. Turkey, despite having ratified both the Refugee Convention and the 1967 Protocol relating to the Status of Refugees (Refugee Protocol), maintains a geographical limitation to the effect that only asylum seekers from countries of the Council of Europe can be ‘Convention refugees’. Neither Lebanon nor Jordan has ratified the Refugee Convention and/or the Refugee Protocol. Hence, the practice of these three countries is particularly relevant in examining custom-based practices independently from refugee treaty law. In contrast, EU Member States are all parties to the Refugee Convention and Refugee Protocol.<sup>21</sup> Hence, the challenge in the context of EU countries consists in identifying distinctive custom-based practices and not just current practices based on treaty and EU law. In addition, the position of the European Union, as a *supra-national* organization (*sui generis*), is examined as further manifestations of practice by its Member States.

Section V concludes by considering the contours and pertinence of the rule of temporary refuge for Syrian refugees and argues that, although anchored in understandings of shared responsibility, it has been implemented primarily in a regional context by those countries proximate to Syria.

## II. THE SCOPE OF TEMPORARY REFUGE

This section reviews academic authorities on relevant State practice, before considering the position of international organizations and international courts concerning the rule. Its current application in relation to Syrian refugees is examined in sections III and IV.

### A. Doctrine

Temporary refuge has been described by Coles as a practice ‘to facilitate admission and the obtaining of satisfactory solutions’ in situations where the scale of such influx is such that problems of a humanitarian nature, of public order, of national security or even of international peace and security may be at stake.<sup>22</sup> It emerged at a time when State practice indicated that ‘the only sort of refuge was permanent asylum’.<sup>23</sup>

From the start, it was premised on ‘polite or explicit *quid pro quos*’ that other countries than the countries of temporary refuge would screen and grant resettlement to a large

<sup>21</sup> For a discussion on non-EU countries but close to the EU, such as Albania, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Georgia, Montenegro, the Republic of Moldova, the Russian Federation, the former Yugoslav Republic of Macedonia, Serbia, Kosovo, and Ukraine, see UNHCR, *Syrian Refugees in Europe: What Europe Can Do to Ensure Protection and Solidarity* (July 2014) 29–33. <sup>22</sup> Coles (n 6) 191. <sup>23</sup> Goodwin-Gill (n 10) 433.

proportion of the population concerned; '[t]he promise of resettlement was the defining "temporary" element in the refuge offered by the States of first asylum, because the causes of flight were often of indefinite duration'.<sup>24</sup> For instance, in South Asia, the 1979 Agreement provided for temporary asylum to be given to refugees from Indochina *on condition of* resettlement in a third country; it was replaced by the Comprehensive Plan of Action in 1989.<sup>25</sup> In other instances, temporary refuge was provided (short-term) until voluntary repatriation could start, eg, in Eastern Pakistan in 1971, following events which resulted in the sudden arrival in India of some ten million refugees ('evacuees').<sup>26</sup> Should voluntary return not be possible, or offers of resettlement not be forthcoming from the international community, material assistance to the countries of temporary refuge was expected and was generally given.

It has often been argued by scholars that the obligation to provide temporary refuge in cases of mass influx finds its roots in the principle of non-refoulement (Article 33, Refugee Convention), which covers persons fleeing armed conflict.<sup>27</sup> Less noted is the origin of this legal obligation in an emerging rule of customary international law of temporary refuge, distinct from refugee law and finding authority in a considerable amount of relevant State practice accepted as law.<sup>28</sup>

Mushkat, for instance, one of the first scholars to have written about temporary refuge in 1982, considered Hong Kong to be a country-colony of temporary refuge for Vietnamese refugees, unlike its Asian neighbours, and pointed to the challenges of having 'to cater' for their needs on a long-term basis when the situation becomes protracted.<sup>29</sup> She explained that non-refoulement and temporary refuge both entail 'an obligation of states to *permit entry*' but they differ significantly in that temporary refuge 'appears to impose additional obligations on receiving countries and is a more tangible step towards a durable solution'.<sup>30</sup> She further noted that, despite the practice having 'found expression – whether explicit or implicit – in a number of legal instruments', there exists among States a 'reluctance to institutionalise the phenomenon', which she described as 'avoidance of self-conscious choice' so as not to undermine non-refoulement and permanent asylum.<sup>31</sup>

Four years later, Perluss and Hartman argued that 'as a norm of customary humanitarian law, temporary refuge is far better equipped than current codified law to deal with situations

<sup>24</sup> J Fitzpatrick (n 5) 462. Note that the present article leaves out the issue of so-called 'safety zones', regarded as highly controversial (eg the Allied forces Kurdish safe zone in Iraq, the UNSC safe areas in Bosnia-Herzegovina, and the UNSC secure humanitarian area in South-West Rwanda).

<sup>25</sup> WC Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck' (2004) 17 *Journal of Refugee Studies* 319. See also UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* 79–103.

<sup>26</sup> Coles (n 6) 192–4.

<sup>27</sup> UNHCR EXCOM Conclusion 19 (XXXI) Temporary Refuge (1980); Goodwin-Gill and McAdam (n 6) 290; Coles (n 6) 189; N Chandrasaran, 'Precarious Refuge: A Study of the Reception of Tamil Asylum Seekers into Europe, North American and India' (1989) 2 *HarvHumRtsJ* 55 (arguing that India's response towards Tamil asylum seekers in the late 1980s found legal basis in the norm of non-refoulement); D Luca, 'Questioning Temporary Protection' (1994) 6 *IJRL* 535–7.

<sup>28</sup> Perluss and Hartman (n 14) 551; Goodwin-Gill (n 10) 897; J Fitzpatrick Hartman, 'Temporary Refuge and Central American Refugees' in *In Defense of the Alien* (Centre Migration Studies 1987) 171.

<sup>29</sup> R Mushkat, 'Hong Kong as a Country of Temporary Refuge: An Interim Analysis' (1982) 12 *HKLJ* 157.

<sup>30</sup> Mushkat *ibid* 159–60. See also Goodwin-Gill (n 10) 433.

<sup>31</sup> Mushkat, 'Hong Kong as a Country of Temporary Refuge', at 161–162.

of mass influx' for practical and juridical reasons; it circumvents individualized determination of refugee status and it does not require the same level of factual evidence of persecution as under the Refugee Convention.<sup>32</sup> They explained that the norm 'has emerged out of the essential principle of humanitarian law: the balance between necessity and humanity'<sup>33</sup> and it exists 'at the point of intersection of ... international humanitarian law, refugee law, and human rights law'.<sup>34</sup> The norm 'resides within that portion of humanitarian law which remains uncodified',<sup>35</sup> ie, the humanitarian law of rescue.

Durieux develops the 'rescue paradigm' by reference to the discourse of disaster and emergency. For Durieux 'the primary duty of frontline States' must be conceptually separated from the duty of *non-refoulement* for reasons of fundamental fairness.<sup>36</sup> He proposes instead thinking about large refugee influxes as 'complex emergencies', in which the victims of the disaster are not just the refugees themselves but also the frontline States and their populations, and the 'rescuer' becomes all other States.<sup>37</sup> This idea resonates with the duty imposed by international law for the *nearest* country to provide a 'place of safety' to those persons rescued at sea,<sup>38</sup> and the customary international law rule of temporary refuge, which is rooted in international cooperation and understandings of shared responsibility (see section IIB below).<sup>39</sup>

To be sure, State practice provides numerous instances where countries have obstructed access to protection (eg, through push-back policies), but as Perluss and Hartman have argued, these must be seen as mere examples of States evading meeting their obligations under the rule, nothing more.<sup>40</sup> Thus, temporary refuge is clearly distinguished and detached from treaty law, that is, the Refugee Convention, and in Europe the EU Qualification Directive<sup>41</sup> and the European Convention on Human Rights (ECHR).<sup>42</sup> The rule may (on occasion) overlap with the principle of non-refoulement but the two are distinct.<sup>43</sup>

<sup>32</sup> Perluss and Hartman (n 14) 584.

<sup>33</sup> *ibid* 602.

<sup>34</sup> *ibid* 553. See also JF Durieux, 'Three Asylum Paradigms' (2013) 20 *International Journal of Minority and Group Rights* 165; Goodwin-Gill (n 10) 448; J Moore, 'Protection against the Forced Return of War Refugees' in Cantor and Durieux (n 10) 413, referring to 'humanitarian *non-refoulement*'.

<sup>35</sup> Perluss and Hartman (n 14) 607.

<sup>36</sup> JF Durieux, 'The Duty to Rescue Refugees' (2016) 28 *IJRL* 637, 640–1.

<sup>37</sup> *ibid* 643.

<sup>38</sup> Goodwin-Gill and McAdam (n 6) 279. See also Durieux (n 36) 643.

<sup>39</sup> A Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009).

<sup>40</sup> Perluss and Hartman (n 14) 557 and 572. For a review of sceptical views on the rule, see Goodwin-Gill (n 10) 433–59.

<sup>41</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJEU L 304/12 (30 September 2004), and Directive 2011/95/EU of the European Parliament and of the Council of 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 (recast), OJEU L 337/9 (20 December) 2011.

<sup>42</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome (4 October 1950) E.T.S. No 5.

<sup>43</sup> Goodwin-Gill (n 10) 458. For a discussion of non-refoulement as customary international law and *jus cogens*, see C Costello and M Foster, 'Non-Refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test' 46 (2016) *Netherlands Yearbook of International Law* 2015 273.

Independently from its customary nature, the rule of temporary refuge has 'crystallized' in other sources of international law, reinforcing its normative character. The Organization of African Unity Convention, which extends protection to persons fleeing events such as external aggression or occupation, provides that

Where a refugee has not received the right to reside in any country of asylum, he may be granted *temporary residence* in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement.<sup>44</sup>

The Cartagena Declaration, which also extends protection to persons fleeing situations of generalized violence, internal conflicts, or massive violations of human rights, emphasizes consideration of UNHCR EXCOM conclusions, particularly No 22 on the Protection of Asylum Seekers in Situations of Large-Scale Influx (see section IIB below).<sup>45</sup> As a result, there is considerable practice relating to temporary refuge in Africa<sup>46</sup> and Latin America<sup>47</sup> where there have been large-scale influxes from armed conflict and where group determination of *prima facie* refugee status is the norm. This has also been the case in India and other Asian countries.<sup>48</sup>

The United States too has afforded protection against the return of large numbers of people fleeing armed conflict or natural disaster, be they from Haiti, Cuba, El Salvador, or Nicaragua.<sup>49</sup> These ad hoc responses resulted in the adoption of Temporary Protected Status in 1990, which has even been granted in the context of environmental disasters, eg, the earthquake in Haiti in 2010 or the volcanic eruptions in Montserrat in 1995 and 1997. This involved both admission and temporary status being provided to Haitian and Montserratian refugees by the United States, and a decision by other countries not to forcibly return those already within their territories.<sup>50</sup>

Finally, in Europe, States have long afforded some form of protection on a temporary basis to persons fleeing armed conflict who fall outside the framework of the Refugee Convention (*de facto* refugees). For instance, Austria temporarily hosted large numbers of refugees from Czechoslovakia in 1968 while solutions for permanent settlement in Western countries were found.<sup>51</sup> The practice of *de facto* humanitarian status increased significantly in the late 1970s and 1980s<sup>52</sup> and reached a considerable magnitude in the 1990s following the conflicts in the former Yugoslavia and Kosovo. Some countries introduced a policy of temporary protection as a way to cope with 'an

<sup>44</sup> 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, art II(5) (emphasis added).<sup>45</sup> Art III(8).

<sup>46</sup> T Wood, 'The African War Refugee: Using IHL to Interpret the 1969 African Refugee Convention's Expanded Refugee Definition' in Cantor and Durieux (n 10) 179ff.

<sup>47</sup> D Cantor and D Mora, 'A Simple Solution to War Refugees? The Latin American Expanded Definition and its Relationship to IHL' in Cantor and Durieux (n 10) 204.

<sup>48</sup> N Chandrasaran, 'Precarious Refuge: A Study of the Reception of Tamil Asylum Seekers into Europe, North American and India' (1989) 2 *HarvHumRtsJ* 55. See now, Asian-African Legal Consultative Organization (AALCO), 'Bangkok Principles on the Status and Treatment of Refugees' (Bangkok Principles), 31 December 1966, adopted on 24 June 2001 at the AALCO's 40th Session, New Delhi.<sup>49</sup> Fitzpatrick (n 5) 438–43.

<sup>50</sup> S Martin, A Schoenholtz and D Waller Meyers, 'Temporary Protection: Towards a New Regional and Domestic Framework' (1998) 12 *GeolmmigrLJ* 543.

<sup>51</sup> Gibney (n 11) 689. See also H Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (Martinus Nijhoff 1995) 126.

<sup>52</sup> eg Council of Europe Parliamentary Assembly Recommendation 773 (1976).

all-time high' number of asylum seekers.<sup>53</sup> Over half a million received temporary protection in Germany, with large numbers also going to Austria, Sweden and Switzerland, pending their return home after the conflict. The great disparity between EU countries in the numbers of refugees received prompted numerous calls for 'burden sharing' from the most affected countries, the European Union, and the Council of Europe,<sup>54</sup> leading eventually to the adoption of a EU Directive on Temporary Protection.<sup>55</sup>

Because it has developed from general practice accepted as law, the exact contours and content of temporary refuge have never been entirely clear as some countries confine beneficiaries of temporary refuge to camps, whereas other countries offer far more, even in some cases refugee status or a status akin to it.<sup>56</sup> The premise of temporary refuge (in terms of durable solutions) has also varied, namely eventual return to the country of origin (the model in Europe during the 1990s) in contrast with resettlement in a third country and only later repatriation (the model used in the case of Indochina).<sup>57</sup>

As will be apparent from section IV below, EU countries have been reluctant to provide large-scale resettlement, and return is likely to remain the model in Europe given that cessation provisions are now increasingly invoked and proposals have been brought forward for a systematic and 'compulsory status review' mechanism of international protection statuses.<sup>58</sup> The practices of countries neighbouring Syria, on the other hand, show temporary refuge being applied.

### *B. International Organizations*

International organizations have long recognized the imperative for States to offer temporary refuge for large numbers of people fleeing armed conflict. This imperative is reflected in UN General Assembly (UNGA) resolutions<sup>59</sup> and UNHCR Executive

<sup>53</sup> G Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press 2001) 315.

<sup>54</sup> J Thorburn, 'Transcending Boundaries: Temporary Protection and Burden-Sharing in Europe' (1995) 7 IJRL 459.

<sup>55</sup> 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 (OJEU L 212, 7 August 2001).

<sup>56</sup> According to Perluss and Hartman, the norm of temporary refuge itself 'does not require a regularization of legal status', for example through permanent asylum and the acquisition of nationality (at 597–8). However, should the armed conflict last, 'the norm of temporary refuge may result in a *de facto* permanent resettlement in the refuge State' through integration, ie, asylum, or resettlement elsewhere (at 598).

<sup>57</sup> Goodwin-Gill and McAdam (n 6) 340–1. See also Gibney 'Between Control and Humanitarianism'. Thorburn too has questioned Europe's focus on return in its formulation of policies to manage refugees from former Yugoslavia, ie, on the 'temporary' rather than the 'protection' aspect of the phenomenon, in J Thorburn, 'Transcending Boundaries: Temporary Protection and Burden-Sharing in Europe' (1995) 7 IJRL 459, 459–60.

<sup>58</sup> Art 1C(5) of the Refugee Convention and arts 11 and 16 of the Qualification Directive; see also Proposal for a Qualification Regulation introducing a 'compulsory status review' mechanism that would lead to increased cases of return to countries of origin COM(2016) 466 final, 13 July 2016, 2016/0223 (COD) at 14.

<sup>59</sup> Note that UNGA resolutions on temporary refuge related matters were all adopted without vote.



Committee (EXCOM) conclusions.<sup>60</sup> Whilst this body of work does not constitute custom, it nonetheless provides evidence of the normative character of such practice.<sup>61</sup>

A snapshot of UNGA instruments reveals several instances where the General Assembly recommended States to offer provisional asylum or temporary refuge as a collective measure of solidarity.<sup>62</sup> For instance, UNGA Resolution 69/152 (2014)

Urges all States and relevant non-governmental and other organizations, in conjunction with the Office of the High Commissioner, *in a spirit of international solidarity and burden-sharing, to cooperate* and to mobilize resources, including through financial and in-kind assistance, as well as direct aid to host countries, refugee populations and the communities hosting them, with a view to enhancing the capacity of and reducing the heavy burden borne by countries and communities hosting refugees, in particular those that have received large numbers of refugees and asylum seekers, and whose generosity is appreciated.<sup>63</sup>

Pursuant to these policy directives, the UNHCR has played a leading role in fostering the growing interest of States in temporary refuge.<sup>64</sup> The UNHCR referred to ‘temporary asylum’ for the first time in 1977,<sup>65</sup> but the first explicit reference to temporary refuge *in the context of mass-influx* appears in EXCOM Conclusion 15 (XXX) in 1979: ‘In cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge.’<sup>66</sup> The point was reaffirmed a few months later in EXCOM Conclusion 19 (XXXI), which also called for further study of the practice.<sup>67</sup> Following a Group of Experts meeting on temporary refuge, EXCOM Conclusion 22 (XXXII) was adopted which provided detailed provisions concerning protection and international solidarity, burden sharing and the duties of States.<sup>68</sup> EXCOM Conclusion 23 (XXXII) is the last

<sup>60</sup> UNHCR EXCOM members currently total 98 States, including Jordan, Lebanon, Turkey, and most EU countries; hence ratification of the Refugee Convention/Protocol is not a requirement. The EU has observer status.

<sup>61</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para 70. See also International Law Commission (ILC), Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th Session of the ILC, UN Doc A/CN.4/L.869 (14 July 2015) draft conclusion 12.

<sup>62</sup> Art 3(3), UN General Assembly, *Declaration on Territorial Asylum* (14 December 1967) A/RES/2312(XXII); UNGA Res 37/195, OP4 (18 December 1982) para 4, adopted without vote; UNGA Res 49/169, OP7 (23 December 1994) para 7, adopted without vote.

<sup>63</sup> UNGA Resolution 69/152, OP39 (18 December 2014) (emphasis added), adopted without a vote.

<sup>64</sup> UNHCR’s role is ‘one of guidance, supervisions, co-ordination and oversight’ to help States manage large numbers of refugees. C Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (Routledge 2012) 22.

<sup>65</sup> EXCOM Conclusion 5 (XXVI) Asylum (1977) (b); and again in EXCOM Conclusion 11 (XXIX) General (1978) (d) and EXCOM Conclusion 14 (XXX) General (1979) (c). Conclusions of the Executive Committee (EXCOM) of the UNHCR relating to temporary refuge constitute ‘expressions of opinion which are broadly representative of the views of the international community’ – these conclusions are taken by consensus.

<sup>66</sup> EXCOM Conclusion 15 (XXX) Refugees without an Asylum Country (1979) (f). The first conclusion to refer to ‘temporary refuge’, it was adopted in the aftermath of the Indochina crisis. See also UNHCR, ‘Protection of Persons of Concern to UNHCR Who Fall outside the 1951 Convention: A Discussion Note’, UN Doc EC/1992/SCP.CRP.5 (2 April 1992).

<sup>67</sup> EXCOM Conclusion 19 (XXXI) Temporary Refuge (1980) (c) and (e).

<sup>68</sup> EXCOM Conclusion 22 (XXXII) Protection of Asylum-Seekers in Situations of Large-Scale Influx (1981).

to refer to ‘temporary refuge’,<sup>69</sup> leading Fitzpatrick to write that ‘By 1985 the UNHCR had almost assimilated the norm of temporary refuge into the fundamental protection regime for refugees.’<sup>70</sup>

The shift in label from temporary refuge to temporary protection dates back to 1992,<sup>71</sup> but the importance of temporary refuge, as expressed in EXCOM Conclusion 22 (XXXII), has continued to be reaffirmed ever since.<sup>72</sup> By the early 1990s, temporary refuge was recognized ‘as a legitimate tool of international protection’,<sup>73</sup> a strategy for asylum clearly distinct from other forms of protection, such as complementary (or subsidiary) protection.<sup>74</sup> It was essentially aimed at unburdening asylum procedures in cases of mass influx and, for UNHCR it was clearly anchored in international cooperation and responsibility sharing.<sup>75</sup>

Notwithstanding this level of interest and involvement, by 2012, UNHCR conceded that ‘No consensus has however been reached on the situation in which temporary protection could be applied or its minimum content’.<sup>76</sup> Following two Roundtables on Temporary Protection,<sup>77</sup> the UNHCR adopted Guidelines elaborating on the duty of States to cooperate, to protect against *refoulement*, and to provide basic minimum treatment pending the finding of a durable solution.<sup>78</sup>

The acknowledgement of ‘shared responsibility to manage large movements of refugees and migrants ... through international cooperation’ was again made explicit in the New York Declaration for Refugees and Migrants, signed by 193 Member States at the first UN Summit on Refugees and Migrants on 19 September 2016.<sup>79</sup> Although not expressly about temporary refuge, the Declaration acknowledges the disproportionate burden that protracted refugee crises and the resulting large movements of refugees place on countries of refuge and their communities.<sup>80</sup> The Declaration enshrines the commitment of States ‘to a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees’, and empowers the UNHCR to develop and initiate a comprehensive response.<sup>81</sup>

<sup>69</sup> EXCOM Conclusion 23 (XXXII) Problems Related to the Rescue of Asylum-Seekers in Distress at Sea (1981).

<sup>70</sup> Fitzpatrick (n 5) 436.

<sup>71</sup> EXCOM Conclusion 68 (XLIII) General (1992) (u).

<sup>72</sup> EXCOM Conclusion 71 (XLIV) General (1993) (m).

<sup>73</sup> With protection meaning ‘admission to safety, respect for basic human rights, protection against *refoulement*, and safe return when conditions permit to the country of origin’. EXCOM Conclusion 74 (XLV) General (1994) (r).

<sup>74</sup> UNHCR, *The State of the World’s Refugees: The Challenge of Protection* (Penguin 1993) 41.

<sup>75</sup> EXCOM Conclusion 100 (LV) International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations (2004).

<sup>76</sup> UNHCR, Roundtable on Temporary Protection (19–20 July 2012) International Institute of Humanitarian Law, San Remo, Italy, Discussion Paper, para 1.

<sup>77</sup> *ibid* ‘Discussion Paper’ and ‘Summary Conclusions’; and UNHCR, Roundtable on Temporary Protection (15–16 July 2013) San Remo, Italy, ‘Concept Note’. Note that these were preceded by a UNHCR, Expert Meeting on International Cooperation to Share Burdens and Responsibilities (28 June 2011) Amman, Jordan.

<sup>78</sup> UNHCR, *Guidelines on Temporary Protection or Stay Arrangements* (2014), reproduced in (2015) 27 IJRL 157 (with Introductory Note at 154).

<sup>79</sup> UNGA New York Declaration, A/71/L.1 (13 September 2016) para 11. See also Volker Türk, ‘A Minor Miracle: A New Global Compact on Refugees’, Address at the Andrew & Renata Kaldor Centre for International Refugee Law, University of New South Wales, Sydney (18 November 2016).

<sup>80</sup> UNGA New York Declaration, A/71/L.1 (13 September 2016) para 7.

<sup>81</sup> *ibid* para 68.

## C. The Case Law of International Courts

Decisions of international and national courts are subsidiary means for the determination of rules of customary law.<sup>82</sup> Decisions by International courts on the issue of temporary refuge are scarce. The International Court of Justice, although in theory competent to interpret the Refugee Convention, has never been called upon to do so; neither has it been seized to pronounce on a matter relating to temporary refuge.

It is nevertheless worth noting that in the last decade, the European Court of Human Rights has extended its protective role to persons fleeing an armed conflict and for whom 'substantial grounds' exist for believing that they would face a 'real risk' of treatment contrary to Article 3 of the ECHR.<sup>83</sup> The European Court of Human Rights recently ruled unanimously that the forced return of three asylum applicants (one stateless Palestinian from Syria and two Syrian nationals) to Syria would violate their right to life and lead to a real risk of torture or of inhuman or degrading treatment under the ECHR.<sup>84</sup> This was the first judgment by the European Court of Human Rights in the context of the Syrian conflict (since most European countries do not at present carry out involuntary returns to Syria but process Syrian claims). The Court accepted that the applicants 'originated from Aleppo and Damascus, where heavy and indiscriminate fighting has been raging since 2012'<sup>85</sup> and concluded that 'if the applicants were expelled to Syria, it would be in breach of Articles 2 and/or 3 of the Convention'.<sup>86</sup>

The Court also referred to a policy summary published by the UK Home Office in 2014 according to which 'Internal relocation within Syria to escape any risk from indiscriminate violence is extremely unlikely to be possible or reasonable' due to the unpredictability of the violence, the humanitarian situation for internally displaced, and the very limited ability to move safely within Syria.<sup>87</sup>

Whilst only safeguarding the applicants against their refoulement to Syria, it may be argued that, read in conjunction with other judgments of the European Court of Human Rights on minimum standards of protection expected to be provided to asylum seekers in the country of return,<sup>88</sup> this finding requires contracting parties to guarantee admission to their territory and access to certain basic rights (both of which are also core elements of the rule of temporary refuge).

In conclusion, the analysis above indicates that temporary refuge has become a cornerstone of the response of States in cases of large-scale influx of refugees. The rule is rooted in shared responsibility and the search for durable solutions through

<sup>82</sup> ILC, Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th Session of the ILC, UN Doc A/CN.4/L.869 (14 July 2015) draft conclusion 13.

<sup>83</sup> *NA v United Kingdom*, App No 25904/07, Judgment of 17 July 2008; *Sufi and Elmi v United Kingdom*, App Nos 8319/07 and 11449/07, Judgment of 28 June 2011. See H Lambert, 'The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence' (2013) 23 *IJRL* 207 (also discussing the Court of Justice of the European Union case law).

<sup>84</sup> *LM and others v Russia*, App Nos 40081/14, 40088/14 and 40127/14, European Court of Human Rights, First Section, Judgment of 15 October 2015. <sup>85</sup> para 110.

<sup>86</sup> para 126. See also, *SK v Russia*, App No 52722/15, European Court of Human Rights, Third Section, Judgment of 14 February 2017. <sup>87</sup> para 80.

<sup>88</sup> *MSS v Belgium and Greece*, App No 30696/09, Grand Chamber, Judgment of 21 January 2011; and *Sufi and Elmi v United Kingdom*, App Nos 8319/07 and 11449/07, Fourth Section, Judgment of 28 June 2011.

international cooperation. Its scope includes a duty on *all States* to offer immediate admission to territory for a limited duration (usually the duration of the conflict). It also includes an obligation to provide certain minimum rights, including non-refoulement and basic socio-economic rights, until a more durable solution is found (eg, asylum, resettlement, or voluntary repatriation). Its normative value (and clear roots in shared responsibility) is further set out in UNGA declarations and resolutions UNHCR EXCOM conclusions, and regional instruments. That there is only scant authority in the case law of international courts does not undermine this conclusion.

### III. ELEMENTS OF CURRENT PRACTICES PURSUANT TO THE RULE OF TEMPORARY REFUGEE

Customary international law emerges from ‘evidence of a general practice accepted as law’.<sup>89</sup> These two elements (practice and *opinio juris*) are sometimes ‘closely entangled’ and ‘the relative weight to be given to each might vary according to the circumstances’, but they are ‘indispensable’.<sup>90</sup> Thus evidence of both elements is commonly found in the same materials, although each must be ascertained individually.<sup>91</sup> General practice means primarily the practice of States.<sup>92</sup>

To identify current practice in the case of Syria, this article draws on the following: conduct on the ground in Turkey, Jordan, Lebanon, and in the EU and its Member States; conduct undertaken in connection with and also independently of the Refugee Convention and/or EU law; public statements by the governments of these countries; national legislation, including newly enacted legislative acts. This material was examined for the purpose of identifying the admissions practices of these countries independently and separately from treaty or EU law, the number of refugees they have been taking in or have allowed to stay, and the status granted to these people (temporary or permanent protection). Particular challenges are associated with identifying current practices that are primarily based on the Refugee Convention or EU law, such as in the EU Member States.

To ascertain *opinio juris*, this article looks at the following: conclusions of the UNHCR EXCOM relating to temporary refuge (refer to section II B above); enactment in domestic law;<sup>93</sup> official publications; and public statements by State

<sup>89</sup> Art 38(1)(b), Statute of the International Court of Justice. See also for a recent pronouncement, ICJ, *Jurisdictional Immunities of the State (Germany v Italy)*, Greece Intervening, Judgment of 3 February 2012, para 55.

<sup>90</sup> ILC, Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th Session of the ILC, UN Doc A/CN.4/L.869 (14 July 2015) draft conclusion 3(2). See also ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, paras 74, and 77; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, para 207; and M Wood (Special Rapporteur to the International Law Commission), ‘Second report on Identification of Customary International Law’ (UNGA 22 May 2014) A/CN.4/672, paras 3 and 23.

<sup>91</sup> M Wood (Special Rapporteur to the ILC), ‘Third Report on Identification of Customary International Law’ (UNGA 27 March 2015) A/CN.4/682, para.18.

<sup>92</sup> ICJ, *North Sea Continental Shelf Cases*, para 74. See also R Jennings and A Watts (eds), *Oppenheim’s International Law* Vol.1 (9th edn, Longman 1996) 26.

<sup>93</sup> Note that there are no decisions of national courts on temporary refuge (or temporary protection), in contrast with the large number of decisions on refugee protection or subsidiary/complementary protection.

officials regarding the duty to provide temporary refuge, bearing in mind that sovereignty is a powerful factor in this area and that as a result such statements may be couched in cautious language.

With regard to public statements and the ‘duty’ to provide temporary refuge, a particularly thorny issue concerns the relationship between law and morals. The law applicable to refugees is deeply moral in that it is grounded on humanitarian principles and values. The argument has been made that in a context such as human rights, where ‘the stakes are high’ and the ‘customary norm is not morally neutral’, it is difficult to ignore public statements based on and accepted as having a moral character.<sup>94</sup> However, such ‘conceptual stretching’ has been met with criticism by proponents of the traditional approach to the formation and identification of customary international law.<sup>95</sup> Be that as it may, this article embraces Gerety’s position that ‘Law does in some imperfect sense *mean* morality; and similarly morality *means* law’,<sup>96</sup> as best fitting situations of large numbers of refugees in dire need of emergency protection.

Next section discusses the approaches taken by Turkey, Jordan, Lebanon, and the EU, in implementing temporary refuge in the context of refugees from Syria.

#### IV. TESTING THE RULE OF TEMPORARY REFUGE IN THE CONTEXT OF THE SYRIAN CONFLICT

The Syrian conflict has created the largest refugee crisis today, and ‘is poised to become ... the largest protracted refugee situation of the decade’.<sup>97</sup> Since the conflict began in April 2011, five million refugees have fled Syria; the vast majority of them have sought refuge in neighbouring countries.<sup>98</sup> A third of the Syrian population has been displaced within Syria (approximately seven million).<sup>99</sup> The conflict has also created a longer-term crisis within Syria as a result of ‘the bombing of schools, hospitals and other civilian installations’.<sup>100</sup> This section examines custom-based practices in the response to the large-scale influx of Syrian refugees, by countries both near to and far from Syria, with a view to identifying how the existing customary obligation of temporary refuge has been implemented.

<sup>94</sup> M Wood (Special Rapporteur to the ILC), ‘First Report on Formation and Evidence of Customary International Law’ (UNGA 17 May 2013) A/CN.4/663, at 51, fn 245 referring to J Wouters and C Ryngaert, ‘Impact on the Process of the Formation of Customary International Law’ in MT Kamminga and M Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009).

<sup>95</sup> For a full discussion, see Wood, First Report, 52–53. ILC draft conclusion 9(1) refers to State practice being ‘undertaken with a sense of legal right or obligation’ and does not elaborate on the place of morality.

<sup>96</sup> T Gerety, ‘Sanctuary: A Comment on the Ironic Relation between Law and Morality’ in Martin (n 15) 159, at 174—discussing the 1982 US law making the sanctuary of an alien, not lawfully entitled to enter or reside within the US, a federal crime.

<sup>97</sup> High Commissioner’s Dialogue on Protection Challenges, ‘Understanding and addressing root causes of displacement’, Preliminary Concept Paper, Geneva (7 August 2015) para 3.

<sup>98</sup> Between April 2011 and October 2016, 884,461 Syrians have claimed asylum in 37 European countries. <<http://data.unhcr.org/syrianrefugees/regional.php>>.

<sup>99</sup> By January 2016, more than 250,000 Syrians had been killed and 1.2 million injured (Co-host Declaration of the Supporting Syria and the Region Conference, London, 4 February 2016).

<sup>100</sup> UNSC, Report of the Secretary-General on the Implementation of Security Council Resolutions 2139 (2014), 2165 (2014) and 2191 (2014) and 2258 (2015), S/2016/1057 (14 December 2016) 17.

A. *The Response by Turkey, Lebanon and Jordan: Temporary Refuge*

None of the Syrian 'refugees' in the region have been recognized as refugees under the Refugee Convention. Hence, the response of these countries is useful in identifying current practice on temporary refuge without the background of treaty obligation.

1. *Turkey: temporary protection*

Turkey has a long-standing practice of keeping its borders open in cases of mass influx of refugees (which it refers to as 'guests'). This practice goes back to World War Two and the unconditional admission and hosting of Jews, Bulgarian, Turks ('kindreds') in 1944, 1968, and 1989, and more recently Afghans, Iraqis and Syrians.<sup>101</sup> According to the Turkish Government, this practice is in compliance with international law.<sup>102</sup> For the last two years, Turkey has hosted the largest refugee population in the world (over 2.5 million).<sup>103</sup>

Turkey is a party to both the Refugee Convention and the Refugee Protocol. However, it maintains a geographical limitation to the effect that only asylum seekers from countries of the Council of Europe can be 'Convention refugees'.<sup>104</sup> Thus, the Refugee Convention has limited application.

Turkey is also a party to the ECHR, the UN Convention Against Torture, and the International Covenant on Civil and Political Rights.<sup>105</sup> Hence, an argument could be made that Turkey's obligation of non-refoulement and granting certain basic rights (which are both elements of the rule of temporary refuge), may instead be based on treaty law.<sup>106</sup> Be that as it may, these treaty obligations post-date Turkey's practice of temporary refuge. Furthermore, there is no evidence that Turkey's conduct was in fact based on provisions of the ECHR or other human rights treaties. Thus the source of obligation for opening borders to large numbers of refugees fleeing war and violence and granting certain basic rights seems more convincingly based on customary-based practice than treaty law.<sup>107</sup>

<sup>101</sup> K Kirişçi, 'Syrian Refugees and Turkey's Challenges: Going beyond Hospitality' (Brookings Institution 2014) 14.

<sup>102</sup> Republic of Turkey, Prime Ministry Office of Public Diplomacy, 'Turkey as the Long-Standing Safe Harbour on the World Refugee Day' (2010) 3, available at <<http://kdk.gov.tr/en/haber/turkey-as-the-long-standing-safe-harbour-on-the-world-refugee-day/494>>. <sup>103</sup> <<http://www.unhcr.ie/about-unhcr/facts-and-figures-about-refugees>>. <sup>104</sup> <<http://www.unhcr.ie/about-unhcr/facts-and-figures-about-refugees>>.

<sup>105</sup> Art 3 ECHR, art 3 CAT and art 7 ICCPR have all been interpreted as guaranteeing non-refoulement; see H Lambert, 'Protection against *Refoulement* from Europe: Human Rights Law Comes to the Rescue' 48 (1999) ICLQ 515.

<sup>106</sup> It may also be based on the customary international law rule of non-refoulement; see E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E Feller, V Turk and F Nicholson (eds), *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection* (Cambridge 2003) 87 (arguing for non-refoulement to have become a rule of customary international law).

<sup>107</sup> Reliance on the UNHCR Statute does not change this conclusion because although the Statute provides a definition of refugees akin to that in art 1A(2) of the Refugee Convention (as revised by the 1967 Protocol), it is not a treaty but 'the defining document for the organization's structure and powers'. Lewis (n 64) 13.

In 2013, the practice of temporary refuge was incorporated in Turkey's first comprehensive Law on Foreigners and International Protection.<sup>108</sup> Article 91 of the 2013 Law provides:

- (1) Temporary protection may be provided for foreigners who have been forced to leave their country, cannot return to the country that they have left, and have arrived at or crossed the borders of Turkey in a mass influx situation seeking immediate and temporary protection.<sup>109</sup>

Article 7 of Regulation No 29153 (2014) further specifies that beneficiaries of temporary protection may be anyone 'to whom international protection status determination procedures do not apply'. Today, persons benefitting from temporary protection include all Syrian nationals, Palestinian refugees, and stateless persons living in Syria.

Temporary protection under this Regulation includes (a) unconditional admission under the open border policy; (b) compliance with the principle of non-refoulement, including non-rejection at the border; (c) the provision of basic needs and access to rights on a temporary basis.<sup>110</sup> However, the provision of basic needs and access to rights is subject to the discretion of the administrative authorities; significantly, the duration of temporary protection is also discretionary (being subject to a decision of the board of ministers).<sup>111</sup> At present, no time limit applies to Syrians, but after more than five years, temporary protection is developing into de facto permanent resettlement in Turkey.

The introduction of a national database system (launched by the Directorate General of Migration Management in May 2015), coupled with a strengthening of the registration capacity of the Turkish Government through a new Regional Refugee and Resilience Plan (3RP),<sup>112</sup> and, arguably, the EU–Turkey deal,<sup>113</sup> means that Turkey should continue to keep its borders open and admit Syrian refugees. However, in reality, since 2016, Turkey has begun forcibly returning ('refouler') large numbers of Syrian

<sup>108</sup> The Law does not affect Turkey's geographical limitation to the Refugee Convention, which therefore remains.

<sup>109</sup> Law No 6458, *Official Gazette*, No 28615 (11 April 2013) <<http://www.resmigazete.gov.tr/eskiler/2013/04/20130411-2.htm>>. The Law entered into force on 11 April 2014. A newly set up General Directorate of Migration Management (within the Ministry of the Interior) is responsible for its implementation, and therefore for granting Temporary Protection.

<sup>110</sup> Regulation ('by-law') No 29153 on Temporary Protection—the Regulation entered into force on 22 October 2014.

<sup>111</sup> M Ineli-Ciger, 'Implications for the New Turkish Law on Foreigners and International Protection and Regulation No. 29153 on Temporary Protection for Syrians Seeking Protection in Turkey' (2014) 4(2) *Oxford Monitor of Forced Migration* 32–3.

<sup>112</sup> 3RP Regional Refugee and Resilience Plan 2016–2017 in Response to the Syria Crisis, Turkey. The Regional Refugee and Resilience Plan is a new global initiative for the UN, the first of its kind, in terms of its response to crises; it was launched in Ankara in December 2014. 'It is an inclusive model for delivering an effective, comprehensive, and coordinated response which addresses, through national plans, immediate vulnerabilities, strengthens social cohesion, and builds the resilience of people, communities and national system' at <<http://www.bmdergi.org/en/the-regional-refugee-and-resilience-plan-3rp-launched-in-ankara/>>.

<sup>113</sup> The EU–Turkey deal provides that for every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU—EU-Turkey statement (8 March 2016) Press Release 144/16, 18/03/3016 <[http://www.consilium.europa.eu/press-releases-pdf/2016/3/40802210113\\_en.pdf](http://www.consilium.europa.eu/press-releases-pdf/2016/3/40802210113_en.pdf)>. See also Council of Europe Parliamentary Assembly, Resolution 2109 (2016), adopted on 20 April 2016.

refugees arriving by land at its Southern border with Syria, in contravention of its own law, international law, and EU law.<sup>114</sup>

In summary, two years after Syrian refugees began to cross the border, Turkey adopted its first legislation on temporary protection. This new legal framework appears to have successfully implemented Turkey's long-standing custom-based practice of temporary refuge (albeit the quality of protection for Syrian refugees is subject to discretion and restrictions). However, the expected collective response of the international community to alleviate the burden on Turkey has not been forthcoming. Thus what started as short-term humanitarian assistance has progressively turned into de facto permanent resettlement.

## 2. *Jordan and Lebanon: Temporary 'Hosting'*

Neither Jordan nor Lebanon is a signatory to the Refugee Convention or Refugee Protocol. Hence, refugees from Syria do not benefit from any special status and must obtain entry and stay documentation in accordance with domestic law. In Jordan, for instance, they are often referred to as 'visitors', 'guests' or 'Arab brothers', ie, terms with no legal meaning under domestic law.<sup>115</sup> In Lebanon, an asylum seeker means 'a person seeking asylum in a country other than Lebanon'.<sup>116</sup> Both countries are nevertheless parties to the UN Convention Against Torture and the International Covenant on Civil and Political Rights,<sup>117</sup> but, like in Turkey, custom-based practices of opening borders to people fleeing violence have existed long before these treaties were ratified, and there is no evidence that these countries' conduct was in fact based on provisions in these treaties.

Jordan and Lebanon have for decades hosted a particularly large number of Palestinian refugees following the 1948 Arab–Israeli conflict and the 1967 war pending repatriation. This custom continued between 2011 and 2015, with both countries operating a policy largely about keeping its borders open to Syrian refugees, for humanitarian reasons.<sup>118</sup> By 2016, Lebanon was hosting approximately 1.2 million refugees from Syria (ie, a quarter of its population pre-2011 and the third largest refugee-hosting country in the world) and Jordan 665,000 (as registered Syrian refugees).<sup>119</sup>

<sup>114</sup> <<https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>>.

<sup>115</sup> International Labour Organisation, Regional Office for Arab States, 'Access to Work for Syrian refugees in Jordan: A Discussion Paper on Labour and Refugee Laws and Policies' (30 March 2015) 12.

<sup>116</sup> Memorandum of Understanding between the UNHCR and the Government of Lebanon (2003). See also M Janmyr, 'Legal Status of Syrian Refugees in Lebanon', Working Paper 33 Issam Fares Institute for Public Policy and Internal Affairs, Beirut (March 2016) at 7.

<sup>117</sup> However, Jordan is not a party to the Optional Protocol to the Convention Against Torture and neither Jordan nor Lebanon are parties to First Optional Protocol to the International Covenant on Civil and Political Rights.

<sup>118</sup> H Naufal, *Syrian Refugees in Lebanon: The Humanitarian Approach under Political Divisions* (Migration Policy Centre Research Report 2012/13 (24 September 2012)) 12; C Thibos, 'One Million Syrians in Lebanon: A Milestone Quickly Passed' (Migration Policy Centre, European University Institute (2014)) at 1; L Achilli, 'Syrian Refugees in Jordan: A Reality Check' (Migration Policy Centre, European University Institute, February 2015) at 3.

<sup>119</sup> Lebanon's policy of not setting formal camps for Syrian refugees has meant that the great majority of refugees live in some of the poorest neighbourhoods, where opportunities for



However, in January 2013, the Jordanian government officially announced a policy of non-entry for Palestinian refugees from Syria (on the ground that they should be allowed to return to Israel and Palestine) and those already living in Jordan were denied identification cards, resulting in access being denied to basic services and in children only being able to enrol in UNRWA schools.<sup>120</sup> Such discriminatory restrictions on entry and denials of refuge to Palestinians fleeing Syria are not specific to Jordan and extend to Lebanon and Egypt, forcing Palestinians from Syria to travel to Turkey or Europe;<sup>121</sup> these restrictions appear consistent with Resolution 5093 adopted by the Council of the League of Arab States, which authorizes host countries in the region to treat Palestinian refugees in accordance with their own domestic law.<sup>122</sup>

Under increased pressure in all sectors (employment, education, health, housing, water and electricity supply), Lebanon and Jordan have also introduced general restrictions on entry into their territory since 2015. For instance, the Lebanese Government instated visa restrictions for Syrian nationals, coupled with tight time limits of stays ranging from 24 hours to one month.<sup>123</sup> These have generally resulted in instances of refoulement and arbitrary detention becoming more frequent.<sup>124</sup> Other restrictive measures introduced include fees for Syrian refugees to access public health centres, with an exception for vulnerable families.<sup>125</sup>

The legal and policy framework of Jordan and Lebanon for addressing the situation of refugees remains underdeveloped and is unable to cope with the challenges of these two countries economic needs. Both Jordan and Lebanon have signed a Memorandum of Understanding with the UNHCR (Jordan in 1998; Lebanon in 2003), setting out key principles of international protection, but these have limited application to Syrian refugees.<sup>126</sup> With offers of resettlement outside the region continuing to be low in

employment are almost inexistent; ECHO Factsheet – Lebanon: Syrian crisis – May 2016, at 2. In Jordan, approximately half of Syrian refugees are registered with UNHCR and receive humanitarian assistance and shelter from the organization; the other half live outside camps, in some of the poorest parts of the country; UNHCR Operational Update – Jordan – May 2016.

<sup>120</sup> J Abisaab *et al.*, 'Syrian Refugees in Jordan: Urgent Issues and Recommendations' (FXB Center for Health and Human Rights and Harvard School of Public Health, November 2014) at 7–8.

<sup>121</sup> Human Rights Watch, 'Not Welcome: Jordan's Treatment of Palestinians Escaping Syria' (7 August 2014) 31–3.

<sup>122</sup> A Khalil, 'Socioeconomic Rights of Palestinian Refugees in Arab Countries' (2011) 23 *IJRL* 680, 693.

<sup>123</sup> New Circular (entered into force 5 January 2015) and regulations on entry, residency and regularization of 13 January, 3 and 23 February 2015. See Janmyr (n 116) 13.

<sup>124</sup> Amnesty International (Jordan), 'Time to Live up to International Human Rights Commitments', Submission to the UN Universal Periodic Review, October–November 2013, at 5; Achilli (n 118) 4.

<sup>125</sup> Care International, 'Five Years into Exile: The challenges faced by Syrian refugees outside camps in Jordan and how they and their host communities are coping' (30 June 2015) 2. On the positive side, in 2016, the UNHCR launched, and subsequently expanded, the 'Cash for Health' scheme to allow an increase in the number receiving essential health care by channelling funds *directly* to refugees, thereby making health care cheaper to afford. UNHCR, Jordan Factsheet, May 2016.

<sup>126</sup> D Aranki and O Kalis, 'Limited Legal Status for Refugees from Syria in Lebanon' (2014) 47 *Forced Migration Review* 17–18; D Stevens, 'Rights, Needs or Assistance? The Role of the UNHCR in Refugee Protection in the Middle East' (2015) *IntJHRts* 1.

numbers,<sup>127</sup> plans for local integration are now being pursued through the Migration Compact (which builds on the EU–Turkey deal)<sup>128</sup> and Regional Refugee and Resilience Plan (3RP),<sup>129</sup> at the same time as advocating positive measures to offer admission to territory.<sup>130</sup>

### 3. Conclusion

Since the Syrian conflict began in April 2011, official statements and the conduct of the governments of Turkey, Lebanon, and Jordan have demonstrated (until recently) an open border approach; inherent to this practice is the admission of large numbers of refugees to territory, respect for non-refoulement, and the recognition of certain minimum rights for refugees. This policy seems to be based on long-standing custom-based regional practices of offering temporary refuge to persons in need (eg, Palestinians in Lebanon and Jordan, and the ‘kindreds’ in Turkey). While Turkey’s legal and policy framework addressing the protection needs of Syrian refugees has developed into a proper temporary protection legal regime, Jordan’s and Lebanon’s has remained rudimentary.

None of the Syrian refugees have been protected under the Refugee Convention (or Refugee Protocol), which is inapplicable in these three countries (Jordan and Lebanon are not parties; Turkey only recognizes refugees coming from Europe). It is therefore suggested that these countries constitute successful examples of implementation of the existing customary obligation to provide temporary refuge to large numbers of refugees.

However, what started as short-term humanitarian assistance has since turned into a protracted situation, creating pressure on resources for Turkey, Jordan and Lebanon. The governments of these countries feel deeply let down by the international community of States and the lack of shared responsibility,<sup>131</sup> as temporary refuge is transitioning to de facto permanent resettlement in all three countries. Parallel to this, a tightening of entry into their territories and the range of rights provided can be observed. The Syrian case seems to confirm historical examples that there is no precise time when it comes to the ‘temporariness’ of temporary refuge. However, after five years of conflict, the patience and resources of countries of refuge has run out, the emergency scenario has withered away, and shared responsibility has become even more imperative.

As will be discussed below, the EU’s approach contrasts starkly with that of Turkey, Jordan and Lebanon.

<sup>127</sup> UNHCR, Jordan Factsheet, May 2016. One notable exception is UNHCR submission (in 2016) of 15,000 Syrians to the US for fast-track resettlement.

<sup>128</sup> EU Commission Press Release, ‘Commission Announces New Migration Partnership Framework: Reinforced Cooperation with Third Countries to Better Manage Migration’, Strasbourg, 7 June 2016.

<sup>129</sup> 3RP Regional Refugee and Resilience Plan 2016–2017 in response to the Syria crisis – Regional Strategic Overview, at 13.

<sup>130</sup> UNHCR Operational Update – Jordan – May 2016.

<sup>131</sup> Al-Monitor, ‘Lebanese Foreign Minister: We Cannot Be the Only Ones Receiving Refugees’ (25 September 2015) <<http://www.al-monitor.com/pulse/originals/2015/09/lebanon-foreign-minister-bassil-interview-syria-refugees.html>> and UN News Service, ‘Lebanese President appeals for support to assist hundreds of thousands of Syrian refugees’ (24 September 2013) available at <<http://www.refworld.org/docid/524956ae4.html>>.

*B. The Response of the EU and Its Member States: International Protection (Asylum)*

The response of the EU to the arrival of refugees from Syria has been slow and idiosyncratic, raising serious concerns about the future of the Common European Asylum System.<sup>132</sup> Both the EU Temporary Protection Directive<sup>133</sup> and Article 78(3) (together with Article 80) of the Treaty on the Functioning of the European Union<sup>134</sup> foresee a solidarity mechanism in the case of a sudden influx of refugees.

The Temporary Protection Directive (which is illustrative of *opinio juris*), an instrument adopted under the Common European Asylum System, has a wide personal scope and flexible eligibility criteria. In particular, it does not require a status determination procedure because membership of the designated group is sufficient, and it would apply to a significant number of people, such as *all* people from a particular country or region (eg, Syria). Furthermore, it requires the Member States to ensure that the temporary and immediate protection status it offers includes certain guarantees.<sup>135</sup> Finally, it provides for financial assistance, and a structured burden sharing mechanism, but only to the extent that Member States are to notify each other of their reception capacity but not actually undertake sharing or redistribution of asylum seekers. Compared to existing refugee resettlement and humanitarian admission programmes (both limited in their personal scope, for instance to unaccompanied children or family members), the Temporary Protection Directive would therefore offer considerable advantages.<sup>136</sup>

However, the Directive has never been activated; *individual* Member States preferring instead to apply protection statuses by application of the Refugee Convention/EU Qualification Directive.<sup>137</sup> For instance, in 2013 most EU countries granted subsidiary protection status to Syrian refugees already present in Europe;<sup>138</sup> in 2014 and 2015, the UNHCR noted a welcome increase in the granting of refugee status, for instance on actual or imputed political grounds, to asylum seekers from Syria.<sup>139</sup>

<sup>132</sup> Communication from the Commission to the European Parliament and the Council, 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe', COM(2016) 197 final, Brussels (6 April 2016).

<sup>133</sup> 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, OJEU L 212 (7 August 2001) 12–23.

<sup>134</sup> OJEU C 326 (26 October 2012) 47–390.  
<sup>135</sup> ie residence permit, emergency health care, shelter, social benefits, children education, limited right to family reunification, guaranteed access to the normal asylum procedure on the basis of art 2(e) QD (refugee status) or art 2(g) QD (subsidiary protection status), and limited access to employment on a temporary basis (up to three years).

<sup>136</sup> C Orchard and D Chatty, 'High Time for Europe to Offer Temporary Protection to Refugees from Syria' Oxford Human Rights Hub Blog (27 October 2014). <<http://ohrh.law.ox.ac.uk/high-time-for-europe-to-offer-temporary-protection-to-refugees-from-syria/>>

<sup>137</sup> M 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 European Journal of Migration and Law 1, 14–19; J Walsh, 'Is Temporary Protection the Answer to Europe's Refugee Crisis?' 19 (2015) *The Researcher* 31–4.

<sup>138</sup> Under art 15c of the EU Qualification Directive. eg in Bulgaria, Syrian nationals who are able to prove their identity and nationality with original Syrian documents have been automatically granted subsidiary status as a prioritized group (Law on Asylum and Refugees, Article 15, State Gazette No. 54/31.05.2002, last amended and supplemented, SG No. 82/16.10.2009).

<sup>139</sup> Under Chapters II and III of the EU Qualification Directive incorporating art 1A(2) of the Refugee Convention). See UNHCR, 'International Protection Considerations with regard to

Time may also be relevant in that Syrian refugees did not arrive on the EU's doorsteps until the summer of 2015, four years after the conflict had begun. By then, it had been decided that the collective priority should be to support Syria and the region through funding, *protect Europe's borders*, and agree upon durable solutions (eg, a small number of resettlement) while considering other humanitarian options for accessing Europe.

Thus, Article 78(3) (together with Article 80) of the Treaty on the Functioning of the European Union was used instead (of the Temporary Protection Directive) as a basis for collective EU action, including the adoption of a European Agenda on Migration.<sup>140</sup> The Agenda was followed by a set of Priority Actions for its implementation, namely, national financial pledges, Member States support for an emergency relocation mechanism for the 160,000 people already in the EU, a new 'hotspot' approach, and ensuring effective returns pursuant to the EU action plan on return;<sup>141</sup> none of these involved temporary protection.

Resettlement measures were also adopted to enable refugees from Syria to lawfully access and settle in the EU. Resettlement in EU law guarantees the person being resettled one of the following statuses: refugee status,<sup>142</sup> subsidiary protection status,<sup>143</sup> or any other similar status under national or EU law. Hence it offers a more permanent solution than, for instance, humanitarian admission programmes which are meant to be only temporary.<sup>144</sup> As a durable solution, resettlement is not therefore pertinent for examining the custom-based practice of temporary refuge/temporary protection; the number of actual places for resettlement in the EU has also been small.<sup>145</sup>

Other safe and lawful options to access the EU include humanitarian visa and humanitarian admission programmes,<sup>146</sup> private sponsorship,<sup>147</sup> emergency scholarships for higher education,<sup>148</sup> vulnerable persons relocation scheme,<sup>149</sup> and family reunification programme.<sup>150</sup> Most of these options are not relevant either to an examination of a distinctive custom-based practice of temporary refuge because they are based on the Refugee Convention or EU law. For instance, France has been using

people fleeing the Syrian Arab Republic – Update IV' (November 2015) para 36—referring to Eurostat, Asylum Quarterly Report – First Instance Decisions in the EU-28 by Outcome, Selected Citizenships, 2nd Quarter 2015 (16 September 2015); and European Asylum Support Office (EASO), Newsletter September 2015 (October 2015) 3.

<sup>140</sup> This was adopted in May 2015 by the European Commission—COM(2015) 240 final, European Agenda on Migration, Brussels 13.5.2015.

<sup>141</sup> COM(2015) 490 final/2, Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration, Brussels 29.9.2015.

<sup>142</sup> Art 2(e) of the Qualification Directive.

<sup>143</sup> Art 2(g) of the Qualification Directive.

<sup>144</sup> Humanitarian admission programmes are ad hoc processes whereby a Member State admits a number of non-EU nationals to stay on its territory for a temporary period of time in order to protect them from urgent immediate humanitarian crises due to events such as conflicts. See Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration, Official Journal 20.5.2014 L 150/168, art 2(b).

<sup>145</sup> By 6 December 2016, 13,887 people had been resettled from Turkey, Jordan and Lebanon, to 21 resettling countries of the Council of Europe, out of the 22,504 agreed under the resettlement scheme of July 2015 (European Commission, *Eighth Report on Relocation and Resettlement*, Brussels (8 December 2016) COM(2016) 791 final.

<sup>146</sup> Austria, France, Germany, the UK and Ireland are all countries operating humanitarian admission programmes.

<sup>147</sup> As in the case of Germany and Ireland.

<sup>148</sup> As offered by Portugal.

<sup>149</sup> As offered in the United Kingdom.

<sup>150</sup> In place in Switzerland.

humanitarian visas for Syrians but pre-assessment at French consulates in Syria and neighbouring countries is entirely based on the Refugee Convention and rules for subsidiary protection.<sup>151</sup> Similarly, Syrians granted admission under humanitarian admission programmes introduced in Austria, France and the UK, have been granted refugee status or subsidiary protection upon arrival, hence they were not offered 'temporary refuge' but asylum (or quasi-resettlement) as a durable solution.<sup>152</sup>

One possible exception is the humanitarian admission programmes established in Ireland and Germany, which seem to have considered temporary protection at some point in time. However, the Irish Syrian Humanitarian Admission Programme (SHAP) was very limited in scope: it was only in place for six weeks (in Spring 2014) and only 44 applications for 119 family members were granted;<sup>153</sup> it operated as a private (family) sponsorship mechanism and offered up to two years residence in Ireland.<sup>154</sup> Where family members could no longer meet the financial requirements or at the expiry of the two-year period, most beneficiaries were able to apply for refugee status.<sup>155</sup> As for Germany, it introduced three humanitarian admission programmes, between March 2013 and April 2014. The programmes offered a total of 20,000 places to Syrians in Lebanon and Egypt. This was the first time a European country committed 'to large-scale, ad-hoc admission of Syrians outside of regular resettlement quotas'.<sup>156</sup> Syrians arriving in Germany under one of these programmes were originally granted two-year temporary residency with the possibility of renewal for another two years. However, like in other EU countries, they have since been allowed to stay permanently.

It may be worth noting that the European Commission recently embarked upon a comprehensive reform of its asylum policy to address the challenges of high migratory pressures.<sup>157</sup> Core to the reform is the introduction of a 'compulsory status review' to ensure that protection is granted only for as long as it is needed taking into account, for example, changes in countries of origin which could impact the need for

<sup>151</sup> <<http://www.resettlement.eu/country-situation-syria/france>>. Since 2012, France has provided 2,622 asylum visas for Syrians. UNHCR, 'Resettlement and Other Forms of Legal Admissions for Syrian Refugees' (18 March 2016) available at <<http://reliefweb.int/report/syrian-arab-republic/resettlement-and-other-forms-admission-syrian-refugees-18-march-2016>>.

<sup>152</sup> eg in France, see <<http://www.resettlement.eu/country-situation-syria/france>>; in Austria, see <<http://www.resettlement.eu/country-situation-syria/austria>>; in the UK, the 'Syrian Vulnerable Person Resettlement Programme' provides for Humanitarian Protection status (ie subsidiary protection status), see House of Commons Briefing Paper No 06805 (10 June 2016) 'Syrian refugees and the UK response'.

<sup>153</sup> Speech by Minister David Stanton at a UNHCR National Conference on Refugee Sponsorship Programmes and Students Scholarship Schemes (9 September 2016) at <<http://www.inis.gov.ie/en/INIS/Pages/speech-09092016>>. <sup>154</sup> <<http://www.inis.gov.ie/en/INIS/Pages/111%20Syrians%20admitted%20under%20sponsorship%20programme>>.

<sup>155</sup> A Arnold and E Quinn, 'Resettlement of Refugees and Private Sponsorship in Ireland' ESRI Research Series No 55 (December 2016) 50.

<sup>156</sup> <<http://www.resettlement.eu/country-situation-syria/germany>>. These programmes were adopted at a time when Germany fell the 'responsibility' to accept as much as 800,000 refugees from Syria and Iraq in 2015, the largest number in the history of Germany; The Federal Chancellor, Meeting of Federal and State Governments on Refugees, "'A Good Day for Local Authorities'", Says Chancellor' (24 September 2015) <[http://www.bundeskanzlerin.de/Content/EN/Artikel/2015/09\\_en/2015-09-24-fluechtlinge-kanzleramt\\_en.html](http://www.bundeskanzlerin.de/Content/EN/Artikel/2015/09_en/2015-09-24-fluechtlinge-kanzleramt_en.html)>.

<sup>157</sup> European Commission Press Release, 'Completing the Reform of the Common European Asylum System: Towards an Efficient, Fair and Humane Asylum Policy', Brussels (13 July 2016) IP/16/2433.

protection.<sup>158</sup> It is therefore predicted that cases of return of persons recognized as needing protection at a particular time, from Europe to countries of origin, will likely increase in future.

To conclude, the EU has not considered it necessary to activate its own solidarity mechanism, namely the Temporary Protection Directive. In the absence of its doing so, EU Member States have responded to claims by Syrians in the usual way through their procedures for international protection—examining their eligibility for refugee status under the Refugee Convention first, and then, if they are not recognized as refugees, whether they are eligible for subsidiary protection under EU law. It is therefore unlikely that in the absence of a collectively activated temporary protection mechanism, the rule of temporary refuge is being applied in the EU with respect to refugees from Syria. One narrow exception might be the humanitarian admission programmes in Germany and possibly also Ireland, which at some point in time considered offering protection for Syrian refugees to be granted on a temporary basis. The response of the EU therefore contrasts starkly with the practices of Turkey, Lebanon, and Jordan; it further highlights key challenges in identifying current practices in countries (ie, EU Member States) that primarily rely on the Refugee Convention or EU law.

#### V. CONCLUSION

This article has examined the customary international law rule of temporary refuge in relation to the Syrian conflict (2011–). The rule, which was first acknowledged in the legal literature in the 1980s, enshrines a positive obligation on *all* States to admit to territory large numbers of persons fleeing a situation of armed conflict, and to grant certain rights commensurate with human dignity, until a more durable solution is found. The application of the rule further triggers an obligation on States and international organizations to cooperate and to take concrete steps towards a durable solution. Insufficiently recognized in the academic literature, but as highlighted in this article, is that shared responsibility is the linchpin of temporary refuge.

The practices in countries neighbouring Syria (ie, Turkey, Lebanon and Jordan) during the last five years indicate that when the Refugee Convention is not applicable, temporary refuge has been relied on as a basis for protection in the case of large-scale influx of refugees. The response of these countries, which has been to keep their borders open to refugees from Syria, is based on long standing custom-based practices in the region of providing temporary refuge. In Turkey, the rule has also been enshrined in a new legislation.

These practices further confirm that temporary refuge applies to a wider category of people than refugee status because the circumstances of flight do not have to be those provided for by the terms of the Refugee Convention. Temporary refuge also appears to include a *positive* obligation to offer admission to territory (eg, through keeping borders open) that is distinct from the negative obligation of non-refoulement. Finally, temporary refuge supports States' obligation to protect certain essential human rights to

<sup>158</sup> A first set of proposals was adopted by the European Commission on 4 May 2016 ('Towards a sustainable and fair Common European Asylum System', IP/16/1620); these were completed by a further set on 13 July 2016 (IP/16/2433).

everyone within their territory, eg, non-refoulement, non-discrimination, education, and other human rights commensurate with human dignity, independently from any status under refugee law. This is crucial and goes to the heart of 'understanding protractedness', not just in terms of time but also in terms of marginalization, threats to freedom, and dependency.<sup>159</sup> However, after five years of conflict, rights are becoming squeezed and shared responsibility for finding permanent solutions is needed even more than ever.

The EU, in contrast, offers a very different approach. Despite temporary refuge having found expression explicitly in EU law (in the Temporary Protection Directive), EU Member States decided not to activate this mechanism, considering instead that the numbers of asylum seekers involved could simply be processed through national procedures for international protection. As a result, most refugees from Syria have been granted refugee status or subsidiary protection status under the Refugee Convention or EU Qualification Directive. In sharp contrast to Turkey, Lebanon and Jordan, the approach of the EU has remained focused on the individual and refugee/subsidiary protection status as a solution. With the exception of Germany, none of the humanitarian admission programmes come near a large-scale ad hoc admission of Syrians, and even then, in Germany, beneficiaries of these programmes ended up being granted permanent residence.

The fact that the EU has not applied the Temporary Protection Directive should not be read as a rejection by EU Member States of the practice of temporary refuge, given that these countries did engage in such practice in response to the former Yugoslavia and Kosovo wars, and subsequently codified such practice in the Temporary Protection Directive itself. The EU case does, however, represent a failure of shared (EU) responsibility, in failing to activate the optimum mechanism for dealing with the Syria crisis. This has left Member States having to apply different solutions, resulting in variations in the scale and level of protection afforded to Syrian refugees.

Temporary refuge is practised the world over, and has been codified in regional legal instruments in Europe, Africa, Asia, as well as in national law, such as in the United States and Turkey; but as long as shared responsibility is lacking, the rule is likely to continue being implemented primarily in a regional context by those countries nearest to the country affected by conflict, as in the case of Syria.

<sup>159</sup> W Kälin, 'Reconceptualizing Durable Solutions for Refugees as a Protection Challenge', Distinguished Keynote, Refugee Law Initiative 1st Annual Conference (30 June 2016). It would be desirable if the rule could evolve into encompassing a legal obligation not to render anyone stateless following displacement as a result of an armed conflict (eg, a temporary relaxation of the rules on acquisition of nationality for newborn babies); see H Lambert, 'Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status' (2015) 64(1) ICQL 1; or to combat forced marriages during displacement—see F Dionigi, 'Do We Need a Regional Compact for Refugee Protection in the Middle East?' LSE Middle East Centre Blog (30 October 2015).