**CRITIQUE OF EU REFUGEE CRISIS MANAGEMENT:**

**ON LAW, POLICY AND DECENTRALIZATION**

Nika Bačić Selanec[[1]](#footnote-1)

*Summary: This article aims to uncover the legal background behind the European Union’s response to the ongoing refugee crisis. Pursuant to its Agenda on Migration, the EU has implemented a wide set of legal, financial and operative measures to face the challenges of the mass inflows of refugees onto its territory. Some of those measures aim to respond to what was classified as most pressing duty of saving lives at the Mediterranean and strengthening EU external borders. Others aim to uphold EU’s international obligations and values by assisting third countries most affected. A core set of measures was then introduced to repair the existing EU legal framework on asylum, proven as dysfunctional when faced with the unprecedented pressures of incoming refugees. These measures came about in the context of an already deficient Common European Asylum System, yet the Union still decided to place the Dublin Regulation as a starting point to all operative plans of dealing with the refugee crisis within the Union territory. Although the Dublin Regulation was not envisaged to function in a time of crisis, all the EU measures introduced were in effect merely exceptions to that inherently inefficient system. On the other hand, a true emergency mechanism was not something the Union was unequipped with during the crucial moments of creating the operative plan for the Agenda. The existing Union framework on asylum creates two quite different concepts for determining the Member State responsible for providing international protection to refugees – one for regular asylum procedures, and another one for emergency situations. By choosing the former instead of the latter, the EU went for the wrong option. The author’s position is that the Union in its centralized capacity failed to activate an efficient legal framework to respond to a crisis of the present magnitude, thus creating a perfect ground for individual Member States to become the main actors of the crisis management, each invoking its own political particularities and national interests. The outcome was polarization of the Member States every day going further away from the ever-closer Union.*

**Introduction**

The ongoing refugee crisis in Europe, the biggest one this world has seen in decades, has been subject to much debate - both in public, through the eyes of the media, but also in the sphere of politics. What still seems to still be lacking, however, is a coherent critique of the crisis’ legal setting. In other words, what has the European Union actually done pursuing its legislative and operative agenda for managing mass inflows of refugees, as compared to what other legal avenues were available? Is the EU response adequate, and is there anything else EU could or should have done? This paper aims to provide answers to those questions, filling in the missing pieces of the legal story.

The main claim of the author is the following. Most measures taken by the European Union in responding to the refugee crisis present nothing more than *ad hoc* solutions to the problems already raging on its territory or at its borders. The remaining measures are simply efforts to prevent the refugee crisis to reach the Union territory in the first place. The Union still lacks a coherent and systematic approach to crisis management in timely manner - something that is, ironically, well within its legislative and operational capabilities. Instead, political particularities of individual Member States now seem to be prevailing, blocking a solidary approach that ought to be taken by an ever-closer integrated Union. Although certain Member States’ efforts did ultimately take effect, and the overall response of a *decentralized* Union cannot be categorized as inactive or completely inadequate, much more could and should have been done by the Union in its centralized capacity taking great pride in its underlying values of fundamental rights protection.

Arguments for proving this claim will be presented in the following manner.

The first chapter will dissect the legal and political measures already taken by the European Union and explain these efforts currently undergoing. The author will try categorizing those measures in a few groups, aiming to uncover the background stories behind the formal actions.

The second chapter will then place these measures in a perspective of the Union’s current legal framework of the *Common European Asylum System*, revealing the system’s downsides and vagrancies.

The third chapter will then explain what other legal measures within the Union legal framework were available as an alternative. It will deal with measures that the European Union could have taken in its uniform capacity, using the existing mechanisms of its legal system to more effectively and timely respond to migratory pressures that ultimately escalated into a true refugee crisis.

The final chapter will try to explain the consequences of the Union policy in managing the unstoppable mass inflows of refugees, political and otherwise. It will also assess its impact for the future of the *ever-closer* Union, or at least the idea that should have existed thereof.

Some conclusory remarks will follow.

1. **Managing the refugee crisis - Operationalizing the European Agenda on Migration**

Escalation of migratory pressures in the early 2010s came as no surprise in the general public considering the geopolitical background of the Middle East and North Africa, and especially the raging Syrian civil war. Yet no European actor took the matter seriously enough until the migratory pressures resulted in grave tragedies and numberless lives lost at sea of those fleeing war and persecution in their respective countries of origin. Starting with the 2013 Lampedusa shipwreck that cost lives of more than 500 migrants set in their route to Italy, the Mediterranean soon started counting loss of lives in thousands.[[2]](#footnote-2) The main turning point for the European Union came after the media outburst following upon the 19 April 2015 tragedy, when a migrant boat sank just off Libya resulting in more than 800 dead men, women and children. Apparently, early 2015 witnessed a 1600% increase in the number of migrants drowning while attempting to cross the Mediterranean as compared to the same period in early 2014.[[3]](#footnote-3)

European Council meeting on 23 April 2015 was the first one to call upon the Commission to respond to the necessity of undertaking a coordinated Union action to prevent further loss of lives at sea by strengthening the presence of naval forces at the Mediterranean and fighting human smugglers and traffickers.[[4]](#footnote-4) The European Council also reiterated the importance of *preventing illegal migration flows* and *reinforcing internal solidarity and responsibility* of the Member States. Just a few days later, the European Parliament continued in that vein, adopting a resolution to urge both the EU and the Member States to *build on the existing cooperation* in the Common European Asylum System and *do everything possible to prevent further loss of life at sea*.[[5]](#footnote-5) All relevant actors were called upon *to take a comprehensive European approach* and *step up fair sharing of responsibility and solidarity* between Member States.[[6]](#footnote-6)

The Commission’s response to the migratory pressures soon followed the European Council and the Parliament, bringing about the 13 May 2015 *European Agenda on Migration*[[7]](#footnote-7) as a cornerstone of Union’s actions for tackling the refugee crisis.

The Agenda set out a core system of EU measures in pursuing a *consistent and clear* common policy on migration. A *new, more European approach* was set as a priority. In other words, coordinated action at the European level, based on principles of *solidarity* and *shared responsibility,* was presented as the only effective way for Europe to meet its *international and ethical obligations[[8]](#footnote-8)* towards those fleeing persecution and war*.[[9]](#footnote-9)*

The system of measures envisaged in the Agenda may be categorized in three main groups based on their material and territorial scope. The first group of measures aims to resolve what was classified as most pressing duty of saving lives at sea,[[10]](#footnote-10) together with protecting the Union borders. The second one encompasses Union efforts in the international arena to uphold its *international obligations and values.* The ultimate goal of the second set of measures is yet again to secure Union external borders, alongside the humanitarian approach.[[11]](#footnote-11) The final group of introduced emergency measures aims to repair internally the existing European policy on asylum proven to fall short faced with the *pressure of thousands of migrants*.[[12]](#footnote-12) These measures specifically include the quotas for internal relocation, revision of the Dublin Regulation[[13]](#footnote-13) and more stringent application of CEAS rules.

Insofar, two sets of implementation packages have been introduced by the European legislator or the Commission to operationalize the measures envisaged in the Agenda on Migration.[[14]](#footnote-14) Instead of focusing on many technicalities of the implementation packages, the author will further on categorize the undertaken measures pursuant to the objectives those measures aim to pursue, taking into account their material and territorial scope.

* 1. **Saving lives at the Mediterranean and strengthening EU borders**

Set out as the immediate priority for Union action, saving lives at the Mediterranean while also strengthening the Union’s maritime borders was actually the most effective set of measures undertaken by the Union.

The EU has been funding its agency Frontex[[15]](#footnote-15) for patrolling the Mediterranean waters since 2006, starting with the Frontex-led operation *Poseidon* in the eastern Mediterranean just off Greek shores. Shortly after the aforementioned Lampedusa shipwreck, another naval operation called *Mare Nostrum* was launched in 2013 by the Italian Navy for patrolling waters close to Italian shores. In October 2014, coordination of the operation was taken over by Frontex, now being EU-funded and renamed into operation *Triton*. This operation was, like its Greek counterpart operation Poseidon, aimed not only at preventing further loss of lives at sea, but also at reinforcing EU maritime border surveillance. [[16]](#footnote-16) Following the measures called upon by the European Council and later on set out the Agenda on Migration, the Commission tripled the capacities and budgetary assets for these Frontex-led, now joint-operations[[17]](#footnote-17) Triton and Poseidon in 2015 and 2016.[[18]](#footnote-18)

In addition to saving lives at the Mediterranean, the EU actions based on the Agenda also included targeting criminal networks of smugglers and traffickers of migrants and refugees in the Mediterranean. For that purpose, the Council decision of 18 May 2015[[19]](#footnote-19) formally established the first time ever EU military operation, named EUNAVFOR Med.[[20]](#footnote-20) The operation was launched in June 2015, first focusing on surveillance and assessment of human smuggling and trafficking networks. As of October 2015, the operation was given an expanded mandate to also include actions of boarding, search, seizure and diversion on high seas of suspicious vessels, all under the conditions prescribed under international law.[[21]](#footnote-21) This expanded mandate was also followed by renaming the operation into operation *Sophia*.[[22]](#footnote-22)

Results of the EU-coordinated naval operations for saving lives at the Mediterranean were very soon witnessed. The number of people who drowned or disappeared at sea in their attempts to reach the European shores lowered dramatically in the months following the deployment of naval forces. The death rate between January and April 2015 was 1 in 16, or 6.2%, while the numbers between April and June of the same year were significantly reduced to 1 in 427, or 0.23%. Amnesty International marked these numbers as a *massive improvement* of the situation.[[23]](#footnote-23)

On the other hand, strengthening the EU’s external land borders, deemed as fundamental for managing the migration flows within the EU,[[24]](#footnote-24) fell short of the success witnessed in the maritime actions.

The basic idea behind the Agenda on Migration was to achieve effective control of the EU's external borders by strengthening the marginal role and capacities of Frontex as an EU based agency, both in operative and financial terms.[[25]](#footnote-25) Frontex was determined to work on the ground with frontline Member States to swiftly identify, register, fingerprint (or return some of the) incoming refugees and migrants by utilizing new technologies[[26]](#footnote-26) for creating a more effective border control system. The so-called *Hotspot approach* was envisaged by the Commission as a coordinated operation of European Asylum Support Office, Frontex and Europol that will provide *help* to the frontline Member States first ones on the front. The intention was to activate the system in all Member States dealing with mass influxes at the EU’s external borders, such as Italy, Greece, but also Hungary and Croatia as the first Member States on the run in the Western Balkans route.[[27]](#footnote-27) Due to the politically sensitive connotation of being referred to as a *hotspot area*, both of the latter countries refused. The newly established *Migration Management Support Teams* (MMST) operationalizing the Hotspot system were deployed only to Greece and Italy.[[28]](#footnote-28)

Mass inflows of refugees and migrants coming towards the Union through the Western Balkans route, however, mandated providing assistance to the most effected Member States who refused to be considered a *hotspot*. The Commission thus responded by strengthening the capacities of the Frontex-coordinated *Rapid Border Intervention Teams* (RABIT),[[29]](#footnote-29) and emphasizing to the Member States that they can request the deployment of such teams at any time, and receive immediate border guard support.[[30]](#footnote-30) Through MMST, RABIT, bilateral agreements or some other form of cooperation, Frontex has so-far dispatched border support to Greece, Italy, Hungary, Bulgaria, Croatia and Slovenia.[[31]](#footnote-31) However, all these Frontex-coordinated actions proved incapable of showing much success or results within the context of unstoppable inflows of refugees coming through the Western Balkans route,[[32]](#footnote-32) as well as the complex problems faced by the Member States in their effective and timely registration and processing.[[33]](#footnote-33)

* 1. **The international arena**

The Agenda on Migration sets out tackling the global issues of the refugee crisis as another one of the Union’s main priorities, emphasizing the importance of a broad approach and strong cooperation with countries of origin and transit.[[34]](#footnote-34) Key actions to be undertaken by the Union in the international arena were addressing the root causes of irregular migration through development, cooperation with third countries and providing international humanitarian or financial assistance.[[35]](#footnote-35) In addition to the Union truly stepping up to its humanitarian obligations, this would effectively mean that the Union is trying to find logistical solutions for the refugee crisis to stay outside the EU external borders.

In June 2015, the European Council called upon the Union to *step up cooperation with Turkey and other relevant countries in the Middle East, including Iraq, Jordan and Lebanon*.[[36]](#footnote-36) Following upon that commitment, in September 2015 the Council agreed to *assist Lebanon, Jordan, Turkey and other countries in dealing with the Syrian refugee crisis* and *mobilise at least €1 billion in additional funding for the UN High Commissioner for Refugees and the World Food Programme.[[37]](#footnote-37)*

Partnership with countries of origin and transit through bilateral and regional cooperation frameworks on migration would take place through *stepping up the role on migration of EU Delegations* in key third countries*,*[[38]](#footnote-38) through technical and operative support to those third countries by deploying *European migration liaison officers*[[39]](#footnote-39) in EU Delegations and, finally, through providing those third countries with *substantial financial assistance.*[[40]](#footnote-40)

The most intensive cooperation and political dialogue has been made with Turkey, as the country hosting the greatest number of refugees worldwide.[[41]](#footnote-41) In addition to strengthening cooperation to more effectively prevent irregular migration, the joint EU-Turkey action aimed to support Syrian refugees and their hosting communities in Turkey, discouraging them from reaching Union borders and reducing their incentives to move towards the EU. In exchange, the Union would provide Turkey with substantial operative and financial assistance.[[42]](#footnote-42)

In a broader context,[[43]](#footnote-43) supporting the efforts of hosting refugees from Syria and Iraq, the EU has mobilized EUR 855 million in 2015 for humanitarian assistance within those countries, but also within refugee camps in Lebanon, Jordan and Turkey.[[44]](#footnote-44) The European Union has also stepped up its support for the non-EU Western Balkans countries, such as Serbia and Macedonia, which are currently receiving unprecedented flows of refugees set on their way to the EU. [[45]](#footnote-45)

In addition to providing assistance to third countries hosting refugees, the EU has agreed to resettle a certain number of persons in clear need of international protection from third countries to the EU Member States through multilateral and national schemes. The Agenda on Migration aimed at introducing this *resettlement* mechanism to improve the management of legal migration and asylum flows. On 25 June 2015, the European Council agreed[[46]](#footnote-46) that *all* Member States will participate in resettling 20 000 people in need of international protection from the most affected and endangered areas, pursuant to a specific distribution key.[[47]](#footnote-47) Details of the proposed resettlement were set down in Council conclusions from 20 July 2015.[[48]](#footnote-48) Introducing this measure, and taking over 20 000 people in need of international protection from third countries to the European Union on purely humanitarian grounds may surely be welcomed. However, this measure must be viewed in a broader context revealing its true impact. Before the Commission proposal on the EU-based act on resettlement, Member States have since 2013 already pledged in their individual capacities to resettle 38 000 refuges from third countries into their own territories. Interestingly enough, 78% of those places were pledged by Germany (30 000 places, as compared to the 2015 Union’s 20 000), 7% by Sweden, while all other EU countries pledged only 14%.[[49]](#footnote-49)

Finally, the last international aspect of operationalizing the Agenda on Migration is an attempt to more effectively prevent abuses of the European asylum system. In the Agenda, the Commission reported that too many requests are unfounded: “in 2014, 55% of the asylum requests resulted in a negative decision and for some nationalities almost all asylum requests were rejected, hampering the capacity of Member States to provide swift protection to those in need.”[[50]](#footnote-50) To reinforce the fight against abuses, the Union had to find a way to more easily reject unfounded asylum applications from third country nationals who do not require a visa to come to the EU, and do not fulfil the conditions to be granted asylum.[[51]](#footnote-51) Following upon that reasoning, the Council adopted conclusions on 20 July 2015,[[52]](#footnote-52) calling upon the Commission to designate certain third countries as *safe countries of origin*.[[53]](#footnote-53)

Marking countries from where asylum seekers come from as *safe countries of origin* would allow *swift processing of unfounded asylum applications*[[54]](#footnote-54) and effective return of those applicants to their countries of origins or some other safe third countries.[[55]](#footnote-55) This would, in essence, mean that asylum applications of persons coming from third countries designated as safe would be presumed as unfounded, although in each case the authorities of the Member States would have to allow the individual asylum applicant a chance to prove otherwise.

On 9 September 2015, the Commission set out a Proposal for a regulation establishing an EU common list of safe countries of origin – namely: Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey. [[56]](#footnote-56) This proposal is currently under discussion at the Council.

* 1. **Patching up the EU asylum system**

The final set of measures implemented pursuant to the European Agenda on Migration aims at addressing the downsides of the current EU legal framework on asylum, as applied on the Union territory in the Member States. As emphasized by the Commission, “the migration crisis … has revealed much about the structural limitations of EU migration policy and the tools at its disposal.”[[57]](#footnote-57) A *clear and well implemented framework* of a *strong common asylum policy* was outlined as the only way to achieve an efficient asylum system capable of responding to the ongoing refugee crisis of such a magnitude.[[58]](#footnote-58)

First action undertaken by the Commission in this regard was to request from the Member States a more stringent application of the existing legislation – the rules of the Common European Asylum System (CEAS).[[59]](#footnote-59) Enhancing the process of monitoring Member States’ implementation and application of the asylum rules, the Commission has soon after the Agenda on Migration, in September 2015, initiated 37 infringement procedures against 19 Member States for failing to transpose into their national laws the recently adopted directives[[60]](#footnote-60) that form part of CEAS.[[61]](#footnote-61)

The second, more substantive Union action in addressing structural limitations of the asylum legal framework is also the one often praised as the EU’s most solidary attempt to respond to the unstoppable inflow of migrants to the frontline Member States. In the Agenda on Migration, the EU was called upon to respond to the unprecedented *high-volumes of arrivals* to the Union territory by ensuring a *fair and balanced participation of all Member States* in the common efforts of reception of all those in need of international protection.[[62]](#footnote-62) The measure envisaged in the Agenda was *ad hoc* activation of Article 78(3) TFEU emergency mechanism for adopting provisional measures for the benefit of the Member State(s) faced with sudden and massive inflows of refugees. In essence, this would characterize introducing exceptions to the applicable rules of CEAS and relieve the frontline Member States most affected from their Dublin-imposed exclusive responsibility for processing asylum claims of all those who enter into their territory. Through Article 78(3) TFEU, the EU would activate a system of *relocation* of a certain and predetermined number of refugees from the frontline Member States to other parts of the Union territory. For these purposes, *relocation* is defined as a transfer of persons who *already applied* for international protection from the Member State in charge of examining their application to another EU Member State.[[63]](#footnote-63)

The relevance of this measure must be viewed in the context of the entire Union legal framework for asylum. Pursuant to the default rules of the CEAS Dublin Regulation,[[64]](#footnote-64) only those Member States where the asylum seekers first enter the EU territory have an obligation to conduct the asylum procedures and remain responsible for providing protection to refugees.[[65]](#footnote-65) This obligation proves only more significant considering that in the EU there is no “positive mutual recognition” of approved asylum decisions, meaning that persons who were granted asylum do not have the right to move to or reside in the territories of any other Member State.[[66]](#footnote-66) Activating Article 78(3) TFEU emergency mechanism as an exception to the applicable Dublin system would assist the frontline countries, by providing that all other Member States take over a part of their burden.[[67]](#footnote-67) The Member States who would receive the relocated asylum seekers would become responsible for examining their asylum applications.

The Agenda on Migration also provided a technical guideline on how to determine what proportionate number of asylum seekers would each of the Member States receive. The proposed *distribution key* was based on *objective, quantifiable and verifiable criteria* – namely, the size of population (40%), total GDP (40%), past numbers of asylum seekers and resettled refugees (10%) and the unemployment rate in the state concerned (10%).[[68]](#footnote-68) The proposed mechanism aimed not only to ensure a somewhat fair and balanced distribution of given numbers of asylum seekers within the EU, but also to *reflect the capacity of the Member States to absorb and integrate refugees*.[[69]](#footnote-69)

Insofar, the Commission has proposed triggering the Article 78(3) TFEU emergency response system on two occasions. Both times the Council has approved, and introduced two relocation schemes for a predetermined number of persons in clear need of international protection for the benefit of the most influenced frontline states – Greece and Italy. It is important to emphasize that persons for whom the two relocation systems apply are asylum applicants for whose nationality the average recognition rate of international protection at the EU level is more than 75%.[[70]](#footnote-70) Currently, only three nationalities meet the requisite recognition rates: Syrians, Eritreans and Iraqis.[[71]](#footnote-71)

The stories behind introducing these emergency response systems hold many complexities are will thus be further explained only in very general terms.

On 27 May 2015, the Commission issued its first proposal[[72]](#footnote-72) for the resettlement of 24 thousand asylum seekers from Italy and 16 thousand from Greece to other Member States, 40 thousand of them in total.[[73]](#footnote-73) The European Council called for the rapid adoption of this measure, inviting *all Member States to agree by consensus* by the end of July 2015 on the distribution of such persons.[[74]](#footnote-74) Reaching a decision by unanimity on such a politically sensitive issue for the first time ever in Union history proved to be much more difficult than the European Council expected. As a result, the first relocation scheme was introduced by a Council Decision[[75]](#footnote-75) only on 14 September 2015, almost 4 months after the Commission’s initial proposal in May. The decision was reached by a consensus.

However, during the summer 2015, “the migratory pressure at the Southern external land and sea borders again sharply increased, and the shift of migration flows has continued from the Central to the East Mediterranean and the Western Balkans route towards Hungary, as a result of the increasing number of migrants arriving in and from Greece.”[[76]](#footnote-76) In the first eight months of 2015, approximately 116 thousand *irregular migrants* arrived in Italy (10 thousand of them registered), 211 thousand in Greece (28 thousand registered) and 145 thousand in Hungary through the Western Balkans route (3 thousand registered). Between January and July 2015, these three countries received 39, 8 and 98 thousand asylum applications, respectively.[[77]](#footnote-77) By the end of summer 2015, Europe was facing what was altogether amounting to around 2/3 of a million asylum seekers and irregular migrants.[[78]](#footnote-78) In that context, the amount of 40 thousand relocations proposed by the Commission in the first emergency relocation scheme seemed nothing but marginal.

On 9 September 2015, the Commission came out with its second proposal[[79]](#footnote-79) for relocation of another 120 thousand asylum seekers from Italy, Greece and Hungary[[80]](#footnote-80) – in addition to those 40 thousand relocations already proposed. However, relying on the lessons learned from the 4-month political fight for a consensus on the first proposal for just a one third of the relocations being proposed currently, the Council implemented the second emergency decision[[81]](#footnote-81) only 12 days after the Proposal. The decision was made by a qualified majority vote, outvoting Hungary, Czech Republic, Romania, and Slovakia.[[82]](#footnote-82) Interestingly enough, Hungary even rejected having the relocations take place for its own benefit, which is why the final decision designated Hungarian numbers for relocations to Italy and Greece proportionally.[[83]](#footnote-83)

The more pressing issue of the second relocation decision, however, was the qualified majority by which it was passed in the Council. The legislative provision upon which the decision was based is the aforementioned Article 78(3) TFEU, which merely states that the Council may adopt emergency measures, after consulting the European Parliament. Given the Article’s legal setting in Title V of the TFEU, the default rules should apply whereby Council votes by a qualified majority unless explicitly stated otherwise.[[84]](#footnote-84) However, not all relevant legal actors seem to agree on that point, which is why the outvoted Slovakia and Hungary both announced[[85]](#footnote-85) filing an action for annulment[[86]](#footnote-86) of the Decision to the Court of Justice of the EU.[[87]](#footnote-87)

The prospect of the envisaged innovation of “relocations” was seen as bringing much needed solidarity to the existing Dublin system. This encouraged the Commission to also propose making the emergency relocation mechanism originally envisaged under Article 78(3) TFEU a lasting solution to the EU’s asylum policy problems. “The EU needs a permanent system for sharing the responsibility for large numbers of refugees and asylum seekers among Member States*.”*[[88]](#footnote-88) In its proposal[[89]](#footnote-89) from 9 September 2015 (the same day when the second emergency relocation was proposed), the Commission sought the Parliament and the Council to amend the existing Dublin Regulation by introducing into it a permanent crisis *relocation* mechanism as an exception to the otherwise applicable Dublin rules. The proposal would introduce the very same mechanism of relocation that was triggered under the emergency Article 78(3) TFEU into the existing Dublin framework, thus making it an integral part of the Common European Asylum System, and not just an addition thereto under the Treaties.

The idea was that, once introduced in the Dublin Regulation, the Commission itself would have the power to activate the emergency exception. As proposed, the relocation regime would be triggered automatically for the benefit of a certain Member State when, based on substantiated information gathered by EASO and Frontex, the Commission establishes that this State is *“*confronted with a crisis situation jeopardizing the application of the Dublin Regulation due to extreme pressure characterised by a large and disproportionate inflow of third-country nationals or stateless persons, which places significant demands on its asylum system*.”*[[90]](#footnote-90)

Amending the Dublin Regulations under Article 78(2) TFEU falls within the Title V general rule on an ordinary legislative procedure,[[91]](#footnote-91) whereby the Council votes by a qualified majority, co-legislating with the European Parliament. Introducing a relocation system under this concept would mean bypassing the problems of the kind witnessed with outvoted Member States under Article 78(3) TFEU by formally incorporating the relocation mechanism within the Dublin Regulation, which can undoubtedly be made by a qualified majority.

In other words, if the Union would want to initiate a relocation scheme, it would no longer have to pass each individual decision through the Council. Once the relocation scheme entered into the Dublin Regulation through an amendment that was passed in an ordinary legislative procedure, it would be solely for the Commission to determine, based on objective criteria, whether there is a crisis situation that merits activating the relocation scheme.

Finally, the last piece of Commission action pursuant to the Agenda on Migration was to undertake a substantive evaluation of the Dublin system in 2016. In doing so, the Agenda called for *drawing on the experience from the relocation and resettlement mechanisms* which would help to determine whether a *revision of the legal parameters of Dublin will be needed to achieve a fairer distribution of asylum seekers in Europe*.[[92]](#footnote-92)

1. **Legal setting of the Agenda measures – Dublin system as a default**

The previous chapters, dissecting the measures that were envisaged in the Agenda on Migration and later on operationalized, corroborate the conclusion that all EU actions in responding to the refugee crisis were either answers to the problems already occurring on Union’s territory or at its borders, or efforts to prevent the refugee crisis to reach the Union in the first place.

For example, the Mediterranean operations and strengthening external border controls, alongside the humanitarian approach, aim at effective management of migration flows into the Union territory. The international efforts of the Union in offering financial support to third countries hosting refugees undoubtedly aims at ensuring that part of the refugee crisis remains someone else’s concern. Resettlement of 20 thousand of refugees could be seen as a way of giving something in return to those third countries for keeping a great deal of the problem outside the Union borders. Yet, a number of 20 thousand seems quite marginal as compared to the existing number of displaced persons, especially following the Syrian civil war. UNHCR estimates that, in the present moment, more than 4 million Syrian refugees are displaced in Turkey and the Middle East.[[93]](#footnote-93)

The final set of measures, those for addressing the proven downfalls of the Union legal framework, likewise present responses to the refugee crisis that already started raging on the Union territory. Activating the emergency exception to the CEAS framework under Article 78(3) TFEU in itself shows that the existing legal system was not functioning properly from the very beginning. The Union policy choice of introducing innovations to the system was presented as the only way to save the system from completely falling apart. The *relocation scheme* was precisely that type of an innovation, set to relieve the pressure from the frontline Member States which would otherwise be held responsible for the refugees through Dublin rules*.* Under this concept, refugees who already sought asylum in the frontline Member States, adhering to the existing Dublin regime, would then be relocated to other Member States who would then take over the obligation of processing their asylum claims. Precisely here lies the core problem of Union crisis management technique - all measures the Union has taken presuppose that Dublin system is a default rule to which all the actors comply to.

As previously stated, the Dublin system is based on the *country of first entry* concept, making the frontline Member States, in general, the ones responsible for processing asylum applications and providing international protection. However, this system for allocating Member States’ responsibilities to examine asylum applications has long proved itself to be inefficient. Instead of sharing responsibilities, the system resulted in shifting the burdens to the Member States on the EU’s external borders. The pressure placed on those states resulted in extensive litigation both in front of the Strasbourg[[94]](#footnote-94) and the Luxembourg[[95]](#footnote-95) court a few years ago, before anyone could even anticipate a refugee crisis of the present magnitude. In essence, both of these litigations ended by concluding that stringent imposition of Dublin rules on the over-capacitated Greece violates refugees’ fundamental rights not to be subjected to inhuman or degrading treatment.[[96]](#footnote-96) In other words, the Dublin system proved to be inefficient even in situations verging with the normal sphere.[[97]](#footnote-97)

Even the Commission emphasized in the Agenda on Migration that “the Dublin system is not working as it should. In 2014, five Member States dealt with 72% of all asylum applications EU-wide*.” [[98]](#footnote-98)*

At this point, it must be clearly emphasized that the Dublin system was not envisaged to function in emergency situations. It proved itself not to function under normal terms, let alone would it function in the present refugee crisis. “When the Dublin system was designed, Europe was at a different stage of cooperation in the field of asylum. The inflows it was facing were of a different nature and scale*.*”[[99]](#footnote-99)

Still, all Union measures taken pursuant to the Agenda presuppose that the Dublin system is a default rule to which all the actors comply to, without substantively shifting the Dublin’s most problematic paradigm. This mainly refers to the *relocation mechanism* both as an *emergency* exception to CEAS under Article 78(3) TEFU and as an announced *permanent* solution for crisis situations introduced by amendments into the Dublin Regulation.

The author’s strong position is that no emergency situation and refugee crisis could ever be resolved by reliance on the Dublin system and by introducing the amendments thereto, whatever the scope and effect of those amendments. This is so due to two reasons:

Firstly, because Dublin is based on the *country of first entry* concept, no exception to that system can reverse its underlying rule that frontline Member States are always ones *initially* responsible for asylum seekers. To this notion, it must be reiterated that this core principle of Dublin has been found to violate refugees’ fundamental rights even before the 2015 crisis situation. In the Agenda on Migration, the Commission nonetheless provides that “the EU can provide further assistance, but the rules need to be applied in full. Member States are responsible for applying the Dublin system.”[[100]](#footnote-100)

This statement bluntly proves that the Commission insists on applying the Dublin Regulation as a default rule (which none of the Member States currently adhere to in practice, as will be assessed later on). It also shows that the Commission sees all the relocation measures undertaken as “assistance” provided to the *otherwise responsible* Member States by enabling mechanisms of relieving *their* pressure. However, insisting on adherence to the Dublin Regulation must be viewed in a broader context than the Commission seems to suggest. In a situation where frontline Member States are being confronted with mass inflows of refugees, insisting on their initial responsibility of which the other Member States will so solidary relieve them from (pursuant to the relocation scheme) brings into question the entire *fair sharing of responsibility* concept underlying the Union common policy on asylum.[[101]](#footnote-101)

Secondly, introducing exceptions to the Dublin Regulation by means of infiltrating within it a relocation scheme presupposes that Dublin is a default rule to which all the relevant actors comply. Under the framework of *relocations*, only refugees *who already sought asylum in the frontline Member States*, adhering to the existing Dublin regime, would be relocated to other Member States who then take over the obligation of processing their asylum claims. However, this presumption must be again placed in a real-life context where most refugees, especially as witnessed in the case of Croatia, do not want to seek asylum in the frontline Member States.[[102]](#footnote-102) They do not submit asylum applications in the Member State in which they should pursuant to the Dublin rules that, formally, do not provide them with the right to choose a Member State of their preference.[[103]](#footnote-103) The only real-life option is to let them through, disregarding the Dublin legal framework in practice. The alternative is violating the Geneva Convention and the Member States’ international and humanitarian obligations. In other words, this alternative is *refoulement* and violation of refugees’ human rights set as underlying values of the Union legal order protected by the Charter, as well as the European Convention of Human Rights. Insofar, only few Member States chose the alternative in the name of salvaging the Dublin system.

1. **Was there an alternative? Crisis management system within CEAS**

The author submits that Union’s policy choice of saving the entire Common European Asylum System by introducing the exceptions to the default Dublin rule on frontline Member States’ responsibility presents an *intentional* misconception of the entire system. The crux of refugee crisis management problems brakes down precisely at this point. Namely, the Dublin Regulation is *not* the only concept of allocating Member States’ responsibility for processing asylum claims within the existing framework of CEAS.

In addition to the Dublin system, CEAS provides for another concept of determining the responsible Member State – the one provided for by the Temporary Protection Directive.[[104]](#footnote-104) Unlike the Dublin Regulation, the system of temporary protection provides that, in crisis situations, all the Member States share the responsibility for protecting refugees on the basis of solidarity.[[105]](#footnote-105) Moreover, this system was specifically designed as a scheme of offering international protection in cases of *mass influx of refugees* onto the Union territory, which is an *underlying* reason for its existence.[[106]](#footnote-106)

Temporary Protection Directive was introduced into the Common European Asylum System back in 2001, following upon the experiences of the EU Member States dealing with unprecedented flows of Kosovar refugees displaced by the conflict in former Yugoslavia.[[107]](#footnote-107) In essence, the Temporary Protection Directive codified into Union legal framework the rules of a coordinated EU Member States’ action in humanitarian evacuation of Kosovar refugees to temporary safety.[[108]](#footnote-108)

The temporary protection system, as implemented in the Union legal order, is not a new concept on the world-wide scale. The initially envisaged variation thereto was first mentioned in the 1969 African refugee convention.[[109]](#footnote-109) It was also “promoted during mass flows from Southeast Asia and vigorously debated in the context of flight from Central American civil wars in the 1980s.”[[110]](#footnote-110) A first coherent structure of the temporary protection scheme was described in the UNHCR’s 1994 Report on International Protection.[[111]](#footnote-111) The general purpose of this legal instrument was to provide the international community with a tangible solution of dealing with sudden mass influxes of refugees. It is an “emergency response to the large-scale movement of asylum-seekers, providing immediate protection from refoulement and basic minimum treatment.”[[112]](#footnote-112)

In the EU context, this system was designed in the following manner.

Article 1.1(a) of the Directive defines ‘temporary protection’ as a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx, all displaced persons with immediate and temporary protection, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation. In that sense, temporary protection is an entirely different status than asylum, an entirely different mode of international protection.

The essential characteristic of this system may be seen from the following fact. General asylum procedures under CEAS grant protection to specific *individuals* who meet the necessary requirements to be granted asylum.[[113]](#footnote-113) On the other hand, temporary protection offers international protection to *groups* – all displaced persons coming to the Union territory in a *mass influx*, those who are unable to return to their country of origin in safe and durable conditions because of the situation prevailing in that country(for example,because they fled areas of armed conflict or endemic violence;[[114]](#footnote-114) or were subject to systematic or generalised violations of their human rights).[[115]](#footnote-115)

In procedural terms, the temporary protection mechanism is activated in a special simplified legislative procedure – when the Council adopts a Decision by a qualified majority, on a proposal from the Commission, submitted on Commission’s own behalf or following upon a request made by any of the Member States.[[116]](#footnote-116) The European Parliament does not participate in the decision-making process, but is merely informed of the Council Decision.[[117]](#footnote-117)

Based on the Commission’s assessment of the emergency situation and the scale of arrivals into the Union, the Council Decision would automatically designate a group of beneficiaries of the temporary protection (those who satisfy the Directive requirements - they fled armed conflict, endemic violence or systematic and generalized violations of their human rights). This would apply likewise when the beneficiary group spontaneously arrives in mass numbers onto the Union borders, but also in the case of their assisted evacuation into the EU from the endangered areas in third countries.[[118]](#footnote-118) The Council Decision would furthermore specify the date on which the temporary protection would take effect, but would also pre-designate the quotas – in figures or in general terms –for the reception capacities of the Member States. The quotas would be determined in the Council Decision based on the information received from the Member States on their reception capacities. The Council would also consider the information received from the Commission, other Union institutions, the UNHCR and other relevant international organizations.[[119]](#footnote-119)

Pursuant to the Council Decision, all individuals belonging to the group of designated beneficiaries (for example, all Syrian refugees fleeing from armed conflict in their country of origin) would *automatically* be granted *temporary protection status* as soon they reach Union borders, without any need of conducting individual and detailed assessments impossible to perform in the context of a mass influx. This, of course, goes without prejudice to the Member States being allowed to exclude a person from entry into their territory and from temporary protection for public security reasons, if there are serious grounds for regarding that this person committed a serious crime.[[120]](#footnote-120) Beneficiaries of the protection would then, subject to their own consent, be transferred from the Member State in which they cross the Union border into one of the other EU Member States, pursuant to a proportionate system of transfers to all the Member States in line with the quotas designated in the Council Decision. All transfers would take place through administrative and operative cooperation between the Member States’ national authorities.[[121]](#footnote-121)

As previously stated, status of temporary protection would be granted to all displaced persons as soon as they reach Union territory. This would entail that the Member State of entry would instantly issue for them a short-term residence permit, making their stay in the Union territory automatically legal. Once displaced persons are transferred to the Member State of their destination, they would be issued a new residence permit from that Member State. In addition to the residence permit, persons under temporary protection would automatically receive an entire set of rights that are, however, of a lesser scope than provided for by virtue of the asylum status. These would include: limited access to employment,[[122]](#footnote-122) access to suitable accommodation and, if necessary, receiving the means to obtain housing, emergency health care and essential treatment of illness, medical assistance to persons with special needs, access to education for minors, representation of unaccompanied minors and a limited right[[123]](#footnote-123) to a family reunification.[[124]](#footnote-124)

The system of protection provided to displaced persons pursuant to this Directive, per its wording, would last only for a limited period – three years at a maximum. The duration of temporary protection scheme, under which displaced persons are protected, as well as accepted into the Union territory, would initially be one year. This period could be extended automatically by six monthly periods for a maximum of one year. If, however, the reasons for temporary protection persist, the Council may again decide by qualified majority to extend that temporary protection by up to one year.[[125]](#footnote-125)

The *most significant* aspect of the EU temporary protection scheme lies in the fact that temporary protection does not prejudice recognition of *refugee status* under the Qualification Directive (and the Geneva Convention) - meaning that individual persons enjoying temporary protection must be able *at all times* to lodge an application for *asylum* as a more permanent status of international protection.[[126]](#footnote-126)

Furthermore, and even more importantly for the purposes of this article - the Member State that is *ab initio* responsible for examining asylum claims of persons under temporary protection is *solely* the Member State to which they were *transferred* pursuant to the quota system of the temporary protection scheme, and not the Member State in which they took their first step onto the Union territory.[[127]](#footnote-127) The importance of this provision cannot be overstated, as it establishes within the existing framework of CEAS a system of determining *responsible Member States* for examining asylum application that exist *in addition to* the Dublin Regulation. Moreover, this system of Member States’ responsibility for refugees, unlike the Dublin Regulation, is *per se* designated for crisis situations. By introducing the Temporary Protection Directive, the Union itself admitted it is *necessary* to establish a mechanism for events of *mass influx of displaced persons* thatpromotes *a balance of efforts between the Member States in receiving and bearing the consequences of receiving such persons* - *for reasons of effectiveness, coherence and solidarity and in order, in particular, to avert the risk of secondary movements.*[[128]](#footnote-128)

Temporary protection, along with the limited rights attached to that status, in itself is indeed a *lesser degree of protection than what is currently required by international refugee law* (namely, by the Geneva Convention which binds all the EU Member States).[[129]](#footnote-129) However, no such concerns of possible violations of Geneva obligations arise in the EU context - precisely because temporary protection rules are instantly paired with a provision that allows all persons under temporary protection to seek asylum. A provision that, moreover, introduces a truly *solidary* mechanism of sharing responsibility for processing asylum applications *between all the Member States*.

In other words, this type of protection allows EU Member States “to offer temporary protection to groups, and deal with the individual cases later.” In this sense, temporary protection allows EU Member States to efficiently deal with mass inflows of refugees. “While [asylum] law deals with refugees individually, temporary protection would allow [dealing] with a refugee crisis.” “Once a mass influx of refugees subsides, [Member States may return] from temporary to ‘normal’ refugee protection.”[[130]](#footnote-130)

Considering all the aforementioned, one might doubtlessly say that temporary protection *paired* with solidary relocation of asylum responsibility is, by its very definition, “a Dublin alternative”. Precisely this point makes the Temporary Protection Directive the EU’s strongest weapon in the arsenal of legal measures available for dealing with a refugee crisis.

However, as all seemingly perfect measures must have a catch, indeed so does the Temporary Protection Directive. From the provisions of the Directive, it cannot be ascertained beyond any doubt that the Council can, as a matter of law, impose quotas on Member States who refuse to take part in the temporary protection scheme – those who were outvoted in the qualified majority decision-making process. In the real-life context where certain Member States challenge the imposition of quotas even in a small-scale relocation system,[[131]](#footnote-131) this instantly poses a pressing question.

The answer, however, is not that simple and raises complicated issues such as EU competences, subsidiarity, harmonization, literal and teleological interpretation of the Directive and its proposals, *travaux préparatoires*, legal setting within the Treaties, etc. - matters which would ultimately be up for the Court of Justice to decide. That is why the author will address these issues in most simple terms necessary for the current discussion.

The problem arises because the Directive does not explicitly refer to situations in which one of the Member States refuses to accept quotas, or denies the Council access to information on their reception capacities. It simply states that *Member States shall receive persons who are eligible for temporary protection in a spirit of Community solidarity* and *shall indicate* to the Council – in figures or in general terms *– their capacity to receive such persons*.[[132]](#footnote-132) These capacity indications would then be included in the Council decision.[[133]](#footnote-133) However, capacity figures subjectively provided for by the Member States are not the only ones included in the Council Decision. The Council Decision must also take into account the objective information received from UNHCR and other relevant international organisations, but also the information received from the Commission itself.[[134]](#footnote-134) This could be interpreted as to mean that there is nothing to prevent the Council from introducing quotas that differ from the reception capacity that was communicated by the Member States.

The only eye-poking term in the Directive that would suggest otherwise is Article 18 thereof, stating that a Member State responsible for asylum applications of persons enjoying temporary protection is the Member State that *accepted* the transfer onto its territory. At first sight, this seems to indicate that Member States have the right not to *accept* the *transfers*. However, it says nothing decisive on the issue of the Council imposing initial *quotas*, irrespective of the latter transfers. Nonetheless, should this issue occur, the author would not hesitate to claim[[135]](#footnote-135) that *quotas* (defined as indicators of Member States’ capacity) can indeed be imposed on those Member States, as a matter of law.[[136]](#footnote-136)

The arguments for proving this claim could be formed as follows. It must be recalled that Temporary Protection Directive is a full-fledged part of Title V TFEU and the harmonized Common European Asylum System. Within Title V, all measures are decided by default in an ordinary legislative procedure in which certain Member States may be outvoted.[[137]](#footnote-137) Moreover, the Council Decision of activating temporary protection scheme is per very wording of the Directive made by a *qualified majority*. The Council Decision is also stated to have the effect of introducing temporary protection for the displaced persons *in all the Member States*.[[138]](#footnote-138) Furthermore, when the sudden and massive influx into the Union territory exceeds the reception capacities indicated by the Member States themselves, the Council is obliged, as a matter of urgency, to examine the situation and take appropriate action.[[139]](#footnote-139) This would mean that, if the Member States would not want to proceed with quotas on a voluntary basis, the Council is called upon to act.

The aforementioned arguments could support the conclusion that temporary protection mechanism may indeed be legally imposed on all the Member States. This is also fortified by the fact that preamble of the Directive defines a solidary mechanism of temporary protection as “*actual* reception” of displaced persons in the Member States – which is specifically relevant because the initial Commission Proposal of the Directive[[140]](#footnote-140) stated that solidary mechanism entails reception of displaced persons “on the basis of a *voluntary action by the receiving Member States*.”[[141]](#footnote-141) There must have been a reason why this underlying explanation of the Directive was amended in the course of the legislative procedure.[[142]](#footnote-142) The final text of the Directive was similarly amended on various other instances, as compared to what the Commission initially intended – removing all referrals to the Member States’ voluntary and decisive role in the application of the scheme.[[143]](#footnote-143) The Union legislator obviously aimed at leaving this matter ambiguous, with a certain agenda in mind. Although the introduced Proposal amendments do not provide a definitive answer, they give us a benefit of the doubt that quotas could indeed be imposed. The textual ambiguity was most likely left there for a reason, as to provide more leeway for the Council and the Commission in the well-expected political struggles with Member States when pushing for the activation of the temporary protection mechanism.

Nonetheless, even if this entire issue is set aside, and even if the temporary protection scheme would be based on Member States’ voluntary action, this in no way undermines the importance of the Temporary Protection Directive and its solidary system of determining the Member States responsible for asylum seekers. In the worst-case scenario, where this scheme would be activated for 23 or even 15 out of 27 Member States,[[144]](#footnote-144) all the benefits of the temporary protection would still outweigh all the core downfalls of the current EU crisis management technique - insisting on the Dublin system as the default rule and introducing exceptions thereto in order to prevent the system from completely falling apart.

Firstly, unlike the Dublin exceptions where the primary responsibility for asylum seekers still stays on the frontline Member States but is then taken over by other Member States, the temporary protection system designated all (participating) Member States *ab initio* responsible for asylum seekers. Aside from taking care of the current political struggles of the frontline Member States to prevent returns of asylum seekers onto their territory by invoking Dublin rules, this system would introduce true *crisis solidarity* within the full meaning of that word.

Secondly, temporary protection would also give an immediate status to all those displaced persons arriving on Union territory without imposing on them the oblivious Dublin obligation of applying for asylum in the frontline Member State – the obligation that is, under the currently applied relocation mechanisms, a precondition for those persons to be relocated to other Member States. It would also allow the Union to be realistic in terms of numbers.

In the first eight months of 2015, approximately 76 out of 116 thousand refugees who arrived in Italy *did not seek asylum* in that country. For Greece, the situation is even worse - asylum was sought by only 8 out of 211 thousand refugees.[[145]](#footnote-145) And all these shocking numbers do not include, for the most part, the statistics of the Western Balkans route from the second part of 2015 - whereby 145 thousand refugees passed through Hungary[[146]](#footnote-146) and 465 thousand passed through Croatia.[[147]](#footnote-147) Furthermore, only Germany will accept approximately one million refugees in 2015, none of whom fall within the category of those who sought asylum in frontline Member States.[[148]](#footnote-148) Under these circumstances, it cannot be hard to see what real life effect does Union Article 78(3) TFEU *relocation system for the benefit of Italy and Greece* actually has on the course of the present refugee crisis. The effect is marginal, just so nobody can say that the centralized Union is doing absolutely nothing substantive to tackle the refugee crisis.

Despite all these legal interpretations, facts, numbers and common sense, the system of temporary protection has not been activated. In 2013, the Parliament[[149]](#footnote-149) did call on the Commission to consider this system as one of the options for handling current and future inflows of Syrian refugees – which all happened very early after the commencement of Syrian Civil War. Since then, however, no European institution invoked this option for the ongoing refugee crisis. The system was not publically considered at all, except for a few authors and NGOs invoking it as the most practical and efficient framework for the EU to deal with mass influx situations, while at the same time safeguarding fundamental rights of refugees.[[150]](#footnote-150)

The mechanism of the Temporary Protection Directive has, actually, never yet been activated in the European Union. The only official request to the Commission to consider drafting a proposal for activation was made by Italy in 2011, in the context of the Libyan refugees crossing the Mediterranean in boats trying to reach the Italian shores. Although initially the Commission did consider it,[[151]](#footnote-151) the proposal was never submitted to the Council. The Commission believed there was no need for temporary protection in that situation due to the *limited number* of arrivals.[[152]](#footnote-152) Drawing from the Kosovo experience that motivated drafting the Directive, the number of people fleeing Libya was considered as insufficient when compared to the 500 thousand that were fleeing Kosovo. The same logic of comparison with the Kosovo situation was, however, never used in the context of the current refugee crisis where the number of displaced persons on their way to the Union territory is bigger in size even more than two times.[[153]](#footnote-153)

Under these circumstances, one cannot but wonder *why* temporary protection was never placed on the Union’s table.

The initial reaction might be its ambiguous referral to voluntary participation of the Member States. In other words, some Member States could simply refuse to participate. However, the arguments presented above prove exactly why temporary protection system, even if activated only in some of the EU Member States, is more effective in tackling mass inflows better than any possible Dublin exception. Moreover, nothing would prevent the Union to introduce legislative amendments to the Temporary Protection Directive as to remove these textual ambiguities and solve the situation, just as it did with relocations schemes through Article 78(3) TFEU or the proposed amendments for the Dublin Regulation.

The same number of refugees that currently arrived in the EU illegally could as well have arrived onto the Union territory legally. The inflows would most likely be less drastic, as the temporary protection system would include only the most affected nationalities of refugees, thus discouraging those who do not qualify from joining the masses entering the Union territory. Reducing this *pull-factor*, there would also be less abuses of the EU asylum system. The truly displaced persons could have been transferred to their Member States of destination through temporary protection scheme in the exact same numbers to the existing ones, only through a more coordinated (EU financed) system of transfers.[[154]](#footnote-154) Sticking to the Dublin rules, with marginal impact of Dublin exceptions, results in the fact that most of the displaced persons created the Western Balkans route, and in the end reached their destination anyway. Money and operative capacities could have been spent on coordinated transfer activities, instead on fortifying the border controls in EU Member States on the Western Balkans route, even between EU Member States themselves, inside or outside the Schengen system. In other words, nothing would have changed as to the number of actual receptions into the EU – only the status of displaced persons would not be illegal and outside the Union law framework, but legal. Application of this system could have brought faith that the EU can provide adequate legal and operative framework for tackling the refugee crisis, even if only for those Member States who wish to participate.

1. **Consequences of misconception – EU decentralization**

As described in the previous chapter, all possible justifications why temporary protection was not activated could be repudiated as a matter of fact or as a matter of law. However, even if the reasons why temporary protection was not invoked are unclear, this does not mean that some underlying rationalisation does not exist. The misconception behind EU’s management technique of handling the refugee crisis cannot be unintentional. No one could ever claim that temporary protection was never contemplated, or that the Commission or the Council just forgot that this Directive existed within the framework of the Common European Asylum System.

There could be a million explanations for the present outcome. However, the author’s position is that temporary protection was never invoked due to pure politics on the level of the centralized Union and its institutions.

For the European Union in its centralized capacity, the Dublin exceptions route that was taken is much less costly, politically speaking. In other words, it is much easier for Union institutions to try things out with small-scale relocations within the Dublin system of responsibility sharing that is still suitable for the majority of EU Member States. As a consequence, the minority frontline Member States remain at fault for the disastrous scale of refugee migrations in the EU. The route taken does not require much political will or strength, as it proves to be much easier then mobilizing the entire EU (or the majority of its Member States) with a temporary protection mechanism. If the system introduced by the centralized EU does not work large-scale, the EU would be the one to blame for the system and the Union border controls falling apart. Sticking to the responsibility of frontline Member States who must be *helped*, instead of seeing this as a true solidary problem of the Union as a *whole*, allows the central EU institutions to point the finger to somebody else.

Masking the shortcomings in EU crisis management with superficial solidarity invocations hides the fact that the Union has failed to fulfil its own responsibilities towards the Member States. It is important to note that the Union itself is obliged to confront the refugee crisis. By taking over the competences in asylum and migration matters under Title V, and by harmonizing the legal framework of the Common European Asylum System, the Union took over the responsibility from the Member States to ensure their compliance with the Geneva Convention. In other words, it was the Union’s role to activate the system that would provide a legal and more efficient framework for the Member States to respond to migratory pressures. However, instead of activating temporary protection and an emergency system of asylum claims responsibility envisaged for situations of mass influx, the EU still forces the Dublin system as a default, introducing to that system a set of diverse exceptions whose overall effect is nothing but marginal in the given context. The Union failed to provide a more efficient response to the migratory pressures available in its own legal framework in time, and is now covering up the tracks.

As a result of Union inaction, it were the Member States who *took the wheel* and placed themselves in charge of handling the refugee crisis, each on its own behalf. Marginal results of Union Agenda measures effectively mean that EU stepped aside as the main actor of the refugee crisis management, creating the perfect ground for Member States to invoke their own political particularities and national interests. The outcome was polarization of Member States – the first step in creating a *two-fold Europe* each day going further from the *ever-closer* Union. [[155]](#footnote-155)

The first fraction of the Member States, led by Germany, took over the responsibility of international refugee protection from the European Union. In a constitutional context, one might see this as a *reverse subsidiarity* situation, where certain Member States took over the competence in asylum law and policy from the Union who proved to be incapable of handling the situation itself.[[156]](#footnote-156) These Member States followed upon their obligations arising from the Geneva Convention, thus also saving the European Union from being accused of violating refugees’ fundamental rights.[[157]](#footnote-157) They stepped up when the central EU response fell short. Whatever their motives, whether compensating for past, adherence to fundamental rights or purely humanitarian grounds, it was only one part of the Member States who took the burden for Europe. However, the only way for those Member States to do so was to disregard the existing Union asylum rules, effectively putting out of force and out of practice the EU’s Dublin Regulation. In a way, the good guys of the story created anarchy in the Union asylum law.[[158]](#footnote-158)

As previously stated, the Western Balkans route was developed as a by-product of Germany accepting a “million” refugees in order to adhere to the Geneva Convention. It is thus quite ironic to observe that it was precisely this Western Balkans route that resulted in a chain reaction that turned Member States against each other, practically disregarding the entire Union legal framework on asylum. The result were systematic failures to register refugees and illegal migrants; crushing down Union’s external and internal borders; massive inflows of refugees in Hungary, Croatia, Slovenia, Austria, etc.; unregulated secondary movements, inhumane treatments of refugees along the route, human trafficking and smuggling, as well as the collapse of the much needed control of borders for security reasons.[[159]](#footnote-159)

Quite conveniently, this situation also created a perfect excuse for formation of the second fraction of EU Member States – those who oppose accepting refugees, challenge the quotas for relocations (for quite marginal numbers as compared to the overall EU acceptance rates); those soliciting for closing the European borders; those who build up fences and surround Union’s external and internal borders with barbed wires; those who invoke Schengen exceptions to the point where “Union without internal borders” makes no practical sense whatsoever.[[160]](#footnote-160) Some of those actions may well be radical, some could be justified under current circumstances. Altogether, they serve to further deepen the existing divergences between the Member States’ individual national interests.

It is precisely at this point that the convenience of using temporary protection schemes must again be emphasized.

Temporary protection is not just a system that protects individual refugees under its scope. It also protects the EU Member States from the chaos that is an inevitable result of an unmanaged crisis. By an automatic grant of protection to all those who fall within the definition of war-displaced refugees, temporary protection scheme also reduces pressures at the external and internal borders. It comes along with a financial support and administrative framework for cooperation between Member States through a pre-designed system of coordinated transfers of refugees from the frontline countries to their final destination, minimizing secondary movements. It also ensures that all the Member States take on part of the *formal initial* responsibility for processing asylum claims, thus relieving the Member States on the periphery from the pernicious political pressure of being responsible and constantly fearing mass returns of refugees.

If temporary protection scheme was activated in time, there might not have been the Western Balkans route, or at least not in the present magnitude. Operative resources could have been redirected to the external borders to more effectively safeguard entries into Union territory for safety of all the EU Member States and all EU citizens. Financial resources could have been used, instead for blankets and paying for barbed wires on Union’s internal borders, for subsidizing or financing completely Member States' efforts for transferring the Syrian, Afghan and Eritrean refugees from Greece and Italy to Member States of their destination. Internal EU borders would be safer, and there would be no need to close them down in such a systematic manner. Schengen would maybe function better. In other words, there would be no underlying reason of preventing secondary movements by putting up barbed fences between EU Member States and towards EU neighbours. In the context of EU wrapped around in barbed wires, even the “Fortress Europe” attribution may start to seem as an understatement. By using the temporary protection scheme in a timely manner, we maybe could have avoided the existing chaos.

If this system would indeed be applied in practice, nobody doubts that Union would still face a number of problems it is facing anyway. As all other theoretical ideals, temporary protection would surely result in a number of practical difficulties. If the EU had invoked it, there most certainly would be a small mutiny on part of some Member States accusing the Union of centralisation, competence theft and violations of their public policy or public security exemptions. Furthermore, the system of coordinated administrative and operative action for transfers would certainly not function as it should. Other practical difficulties would paralyze the system from time to time, as that is inherent in the very definition of a *crisis* situation.

Nonetheless, it may be argued that one simple added value of temporary protection mechanism overcomes all the difficulties of EU refugee crisis management – EU Member States would have a Union-introduced legal system to work with. All efforts undertaken by the Member States would be within the existing Union legal framework. In other words, the Member States would not be forced by the Union’s own hand to effectively put Dublin rules, and consequently the Union legal framework on asylum out of force.

**CONCLUSION**

Operationalizing the European Agenda on Migration, the EU has implemented a wide set of legal, financial and operative measures to face the challenges of the ongoing refugee crisis. Some of those measures aim to respond to what was classified as most pressing duty of saving lives at the Mediterranean. The EU has also stepped up in the international arena to uphold its international obligations and valuesby assisting third countries most affected*.* Alongside the humanitarian approach, the EU as also strongly committed to do everything within its power to secure the Union’s external borders. The final set of emergency measures was then introduced to repair the existing legal framework on asylum, proven as dysfunctional when faced with the pressure of mass inflows of refugees. Overall, the European Union has indeed done more than any other significant actor in the Western world to respond to the humanitarian crisis. For that reason, the overall critique of EU crisis management technique must be given a certain leeway. Nonetheless, considering the background of the EU’s commitment to introduce a coherent and effective asylum policy and legal framework, the author’s position is that EU could have done it differently, and could have done better.

The Agenda on Migration came about in the already existing context of a deficient Common European Asylum System. Yet the Dublin Regulation for determining the Member States responsible for asylum seekers, being the core problem of CEAS, was nonetheless placed as a starting point to all operative plans of EU crisis management within the Union territory. In other words, all Union measures introduced to internally address the crisis presuppose that the Dublin system is a default rule - starting from the presumption that *initial legal responsibility* is on the frontline Member States who are then aided by measures for transferring that responsibility to other Member States. Diverse exceptions were introduced to the otherwise applicable Dublin rules, creating effects that are nothing but marginal in the given context. The most important exception to that extent – that is, the relocation of 200 thousand people from Italy and Greece – legally covers only around 20% of refugees overall accepted into the Union territory in 2015. The remaining numbers of refugees simply do not fall within the existing EU framework on asylum, but have been accepted through individual efforts of EU Member States.

The author submits that the reason for this inconsistency lies precisely in the EU’s misconception of basing the entire EU crisis management measures on the Dublin presumption. The Dublin Regulation was simply not envisaged to function in a time of crisis. Introducing the exceptions to that already inefficient system is predestined to fail from the very beginning. Amending an inherenly dysfunctional framework may well be seen as saving the system that cannot be saved in the given context.

Ironically, the emergency legal setting was not something the Union was unequipped with during the crucial moments of creating the operative plan for the Agenda. The existing framework of the Common European Asylum System creates two quite different concepts for determining the Member State responsible for providing international protection to refugees. In addition to the Dublin Regulation, CEAS also includes the responsibility sharing mechanism prescribed in the Temporary Protection Directive.

In the words of the Commission, this Directive should be activated in cases of mass influx of displaced persons in order (1) to deal with the influx in a uniform, balanced and effective way, based on solidarity, (2) to ensure that the default asylum system does not collapse, and (3) to preserve intact the operation of the Geneva Convention.[[161]](#footnote-161)

The mere fact that the Temporary Protection Directive exists corroborates the conclusion that the already dysfunctional Dublin is not the proper legal basis for functioning of CEAS in crisis situations, but only in those situations within the “normal” sphere. Measures currently introduced cannot be effective in practice, when their legal setting is based on underlying assumptions that were not envisaged for emergency situations. In other words, the EU crisis management technique is simply set within the wrong legal framework.

In a time of crisis, the starting point should have been an *initial* shared responsibility of all Member States based on solidarity, precisely as envisaged in the Temporary Protection Directive. The Agenda itself recognizes that, in emergency situations, *no Member State can effectively address migration alone*. *A new, more European, solidary approach* would be needed.[[162]](#footnote-162) Unlike the Dublin *first country of entry* concept, temporary protection mechanism presupposes that responsibilities for refugees are mutual and binding on all the Member States.

The current EU refugee crisis management nonetheless failed to invoke the temporary protection scheme envisaged to deal with the influx in a solidary, balanced and effective way. If the temporary protection mechanism was activated, the Union action would be considered fully in line with the original purpose and function of the 1951 Geneva Convention which was created in the aftermath of World War II, intending to provide international protection to all masses fleeing events occurring before 1951.[[163]](#footnote-163)

On the other hand, the Union’s current Dublin-based efforts resulted in a collapse of the EU asylum system and brought into question the conformity of the core set of EU actions with the Geneva Convention. The sole reason why EU is currently not in breach of those international obligations is due to unilateral actions of individual Member States that are outside the EU legal framework. Precisely because EU forces Dublin as a default, it failed to provide Member States with efficient and working solutions to unstoppable pressures of the incoming refugees. The EU has not done enough to create a functional legal system that is truly capable of tackling the refugee crisis of the present magnitude. In other words, by failing recognize the core problems of its existing default approach to Dublin Regulation, the EU allowed for its own asylum system to collapse - simply by insisting on application of the wrong European rules.

By not providing Member States a functioning legal framework to work with, the EU is forcing its Member States to act individually, allowing their particular political interests to prevail. One part of the Member States pursued those interests to fulfil the true Geneva purpose, thus taking on the almost entire burden for Europe. Most other Member States stepped aside, while some of them systematically kept closing their borders and building up barbed fences between the EU Member States and towards EU neighbours in the name of salvaging the Dublin system. If the EU had indeed equipped the Member States with a decent framework for administrative cooperation and organized transfers that are accompanied by EU funds, maybe there wouldn’t be a West Balkans route that is causing most of the problems in preventing secondary movements.

To that extent, it must be emphasized that temporary protection is envisaged to work for the benefit of the Member States, in addition to upholding the fundamental rights of individual refugees. It reduces pressures at the borders by providing for an administrative framework for cooperative transfers of refugees from the frontline Member States to their destinations. A system that could have saved Member States from introducing exceptions to the Schengen system, and thus effectively putting out of practice the idea of Europe without internal borders. Moreover, the temporary protection scheme would ensure that all Member States take on the responsibility from the very beginning, relieving the frontline Member States from the pernicious political pressure of being the one to blame for the chaos of secondary movements, while constantly fearing mass returns.

However, the policy choice of avoiding temporary protection scheme could not have been unintentional on the side of the central EU institutions. Focusing on Dublin must be seen as a cognitive political choice giving the Union institutions someone else to blame for the collapse – namely, the frontline Member States who bear the initial responsibility for the asylum seekers. In real life context, the crisis management route chosen proved to be even more inefficient. Furthermore, if the large-scale system of temporary protection was indeed proposed, and if the Member States disagreed, this would effectively bring to light that just maybe there is no European Union that is ever closer. That the idea of Union integration based on solidarity exists only within the scope of the economic internal market. Mobilizing the entire European Union contrary to the preferences of individual Member States (in such a politically sensitive issue such as asylum law) could suggest that there is no Union as a constitutional quasi-federal legal order based on common underlying values of fundamental rights protection with no individual exceptions.

The Agenda itself admits that “one of the weaknesses exposed in the current policy has been the lack of mutual trust between Member States, notably as a result of the continued fragmentation of the asylum system…. But the EU has common rules which should already provide the basis for mutual confidence, and a further development of these rules will allow for a fresh start.”[[164]](#footnote-164) The measures that were chosen to operationalize the Agenda, however, were not those common rules that could have restored the invoked mutual confidence. Quite the contrary, the path taken resulted in even further fragmentation of the asylum system where only one Member State takes almost 2/3 of the entire burden for Europe. The Union’s own choice resulted in the very fact the Agenda aimed to attenuate - Member States growing even further apart. Refusing to confront these issues, the EU institutions avoid admitting that the ideal Union integration is currently facing its ultimate identity crisis. That political particularities of individual Member States still condition the core selective unity for peoples of Europe.

1. Nika Bačić Selanec LL.M. (UMich), Research Assistant and PhD Candidate, University of Zagreb - Faculty of Law. The author would like to thank Goran Selanec for his valuable input in crystallizing this article’s main thesis. The usual disclaimer applies. [↑](#footnote-ref-1)
2. UNHCR reports that 3,500 lives were lost in 2014, and 1,600 in the first quarter of 2015. For more information on Mediterranean tragedies, see UNHCR: <http://www.unhcr.org/5533c2406.html> [↑](#footnote-ref-2)
3. See <http://www.nytimes.com/interactive/2015/04/20/world/europe/surge-in-refugees-crossing-the-mediterranean-sea-maps.html?_r=0> [↑](#footnote-ref-3)
4. Special meeting of the European Council, 23 April 2015 – Statement, paras. 1-3: <http://www.consilium.europa.eu/en/press/pressreleases/2015/04/23-special-euco-statement/>. [↑](#footnote-ref-4)
5. European Parliament, Resolution on the latest tragedies in the Mediterranean and EU migration and asylum policies, 2015/2660(RSP), para.1:

<http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2015/2660(RSP>). [↑](#footnote-ref-5)
6. Ibid., para. 3; see also Article 80 TFEU [↑](#footnote-ref-6)
7. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 13.5.2015, COM (2015) 240 final (hereinafter: the European Agenda on Migration, the Agenda on Migration, or the Agenda) [↑](#footnote-ref-7)
8. Referring to the 1951 Geneva Convention Relating to the Status of Refugees that is signed and ratified by all EU Member States: UN General Assembly, ‘Convention Relating to the Status of Refugees’ (28 July 1951) UN, Treaty Series vol 189, 137; as amended by the ‘Protocol relating to the Status of Refugees’ (31 January 1967) UNTS vol 606, 267 (hereinafter: the Geneva Convention). [↑](#footnote-ref-8)
9. Agenda on Migration (n.7), p. 2 [↑](#footnote-ref-9)
10. Ibid.: “The immediate imperative is the duty to protect those in need. The plight of thousands of migrants putting their lives in peril to cross the Mediterranean has shocked us all.” [↑](#footnote-ref-10)
11. Ibid.: “we need to use the EU's global role and wide range of tools to address the root causes of migration….Upholding our international commitments and values while securing our borders….” [↑](#footnote-ref-11)
12. Ibid.: “Emergency measures have been necessary because the collective European policy on the matter has fallen short. …across Europe, there are serious doubts about whether our migration policy is equal to the pressure of thousands of migrants…” [↑](#footnote-ref-12)
13. European Union, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 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, *OJ L 180, 29.6.2013, p. 31–59* (hereinafter: the Dublin Regulation). [↑](#footnote-ref-13)
14. For detailed information on the exact measures implemented by the European legislator or the Commission, see <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/index_en.htm> or <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/index_en.htm> [↑](#footnote-ref-14)
15. European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union was established by Council Regulation (EC) 2007/2004 (26.10.2004, OJ L 349/25.11.2004) [↑](#footnote-ref-15)
16. See <http://www.consilium.europa.eu/en/policies/migratory-pressures/saving-lives-targeting-criminal-networks/> [↑](#footnote-ref-16)
17. Frontex reports that 26 European countries are taking part in joint operations by deploying experts and technical equipment: Austria, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland and UK. For more information, see <http://frontex.europa.eu/news/frontex-expands-its-joint-operation-triton-udpbHP>. [↑](#footnote-ref-17)
18. European Parliament resolution of 7 July 2015 on the Council position on Draft amending budget No 5/2015 of the European Union for the financial year 2015 - Responding to migratory pressures (09768/2015 – C8-0163/2015 – 2015/2121(BUD)). Frontex reports that the Commission will provide additional EUR 26.25 million to strengthen Operation Triton in Italy and Poseidon in Greece from June 2015 until the end of the year. The budget for Triton for 2015 will amount to EUR 38 million and EUR 18 million for Poseidon Sea. See <http://frontex.europa.eu/news/frontex-expands-its-joint-operation-triton-udpbHP> [↑](#footnote-ref-18)
19. COUNCIL DECISION (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED),OJ L 122, 19.5.2015, p. 31–35; for more information on this Council-led military operation and the rules on its phases and functioning, see <http://eeas.europa.eu/factsheets/docs/eunavfor_med_factsheet_en.pdf> [↑](#footnote-ref-19)
20. The operation does not deploy or create EU’s own military assets, but is based on the operative contributions of 14 EU Member States (BE, DE, EL, ES, FI, FR, HU, IT, LT, LU, NL, SE, SI, UK). For more information on this Council-coordinated military operation and the rules on its phases and functioning, see <http://eeas.europa.eu/factsheets/docs/eunavfor_med_factsheet_en.pdf> [↑](#footnote-ref-20)
21. See http://www.consilium.europa.eu/en/press/press-releases/2015/09/28-eunavfor/ [↑](#footnote-ref-21)
22. The operation was renamed into "Sophia" after the name given to a baby that was born on a ship participating in the EUNAVFOR Med operation.  [↑](#footnote-ref-22)
23. Amnesty International Public Statement, A safer sea: The impact of increased search and rescue operations in the central Mediterranean, 9 July 2015, AI Index: EUR 03/2059/2015, available at <https://www.amnesty.org/download/Documents/EUR0320592015ENGLISH.pdf> [↑](#footnote-ref-23)
24. <http://www.consilium.europa.eu/en/policies/migratory-pressures/strengthening-external-borders/> [↑](#footnote-ref-24)
25. Agenda on Migration (n.7), pp. 6,10 [↑](#footnote-ref-25)
26. See, for example, Commission Staff Working Document on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints, SWD(2015) 150 final; or Regulation 1052/2013 of 22 October 2013 establishing the European Border Surveillance System (EUROSUR): an information-exchange system designed to improve management of the EU external borders, OJ L 295, 6.11.2013; see also the Agenda on Migration (n.7), p. 11, on the initiative of introducing "Smart Borders". [↑](#footnote-ref-26)
27. For more information on the Western Balkans route, see <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/> [↑](#footnote-ref-27)
28. See European Commission Communication on Managing the refugees crisis - immediate operational, budgetary and legal measures under the European Agenda on Migration:, COM(2015) 490 final/2 - ANNEX II: Migration Management Support Teams working in 'hotspot' areas [↑](#footnote-ref-28)
29. Ibid., ANNEX III: The Rapid Border Intervention Teams mechanism (RABIT). RABIT mechanism was established by Regulation (EC) No 863/2007, OJ L 199, 31.7.2007, whereby Frontex funds and deploys technical and human resources from EU Member States. [↑](#footnote-ref-29)
30. Ibid., p. 6; [↑](#footnote-ref-30)
31. See Leaders' Meeting on refugee flows along the Western Balkans Route: Leaders’ Statement, available at: <http://ec.europa.eu/news/2015/docs/leader_statement_final.pdf> [↑](#footnote-ref-31)
32. For Frontex facts and figures on the Western Balkans route, see

http://ec.europa.eu/news/2015/docs/eastern\_border\_wb\_2015\_presentation.pdf [↑](#footnote-ref-32)
33. A special meeting on the challenges of dealing with the unprecedented flow of refugees and migrants along the Eastern Mediterranean-Western Balkans route was also subject to a special meeting of leaders of the affected EU and non-EU countries in Brussels on 25 October 2015, initiated by the European Commission. For more details, see <http://europa.eu/rapid/press-release_IP-15-5924_en.htm> or <http://ec.europa.eu/news/2015/10/20151025_en.htm>. Leaders’ statement available at

<http://ec.europa.eu/news/2015/docs/leader_statement_final.pdf>. [↑](#footnote-ref-33)
34. See Agenda on Migration (n.7), p.7; see also <http://www.consilium.europa.eu/en/policies/migratory-pressures/preventing-illegal-migration-flows/> [↑](#footnote-ref-34)
35. Ibid., p. 10 [↑](#footnote-ref-35)
36. European Council meeting (25 and 26 June 2015) – Conclusions, Brussels, 26 June 2015 (OR. en), EUCO 22/15, p.5 [↑](#footnote-ref-36)
37. See <http://www.consilium.europa.eu/en/policies/migratory-pressures/preventing-illegal-migration-flows/> [↑](#footnote-ref-37)
38. Agenda (n.7), p.8 [↑](#footnote-ref-38)
39. Council Regulation (EC) No 377/2004 of 19 February 2004 (OJ L 64, 2.3.2004, p. 1): “The Immigration Liaison Officers are representatives of the Member States who are posted in a non-Member State in order to facilitate the measures taken by the EU to combat irregular immigration.” [↑](#footnote-ref-39)
40. See Agenda (n.7), p.8: “The EU is a leading international donor for refugees with EUR 200 million in ongoing projects from development assistance and over EUR 1 billion of humanitarian assistance dedicated to refugees and IDPs since the beginning of 2014.” [↑](#footnote-ref-40)
41. European Commission, Joint Communication to the European Parliament and the Council: Addressing the Refugee Crisis in Europe - The Role of EU External Action, Brussels, 9.9.2015 JOIN(2015)40 final, p.5 [↑](#footnote-ref-41)
42. For more information, see EU-Turkey Joint Action Plan, available at:

 http://ec.europa.eu/priorities/migration/docs/20151016-eu-revised-draft-action-plan\_en.pdf [↑](#footnote-ref-42)
43. For other types of global humanitarian assistance initiated by the EU see, for example: Trust Fund for Africa (<http://ec.europa.eu/europeaid/emergency-trust-fund-stability-and-addressing-root-causes-irregular-migration-and-displaced-persons_en>), Contributions to World Food Programme

(<http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_on_managing_the_refugee_crisis_annex_5_en.pdf>) and EU Regional Trust Fund (<http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_on_managing_the_refugee_crisis_annex_6_en.pdf>). [↑](#footnote-ref-43)
44. European Commission, Joint Communication to the European Parliament and the Council: Addressing the Refugee Crisis in Europe - The Role of EU External Action, Brussels, 9.9.2015 JOIN(2015)40 final, p.5 [↑](#footnote-ref-44)
45. European Commission, Joint Communication to the European Parliament and the Council: Addressing the Refugee Crisis in Europe - The Role of EU External Action, Brussels, 9.9.2015 JOIN(2015) 40 final, p. 6: “Serbia and the former Yugoslav Republic of Macedonia were provided humanitarian aid of EUR 1.75 million.” [↑](#footnote-ref-45)
46. European Council meeting (25 and 26 June 2015) – Conclusions, Brussels, 26 June 2015 (OR. en) EUCO 22/15, p.2 [↑](#footnote-ref-46)
47. The distribution key was based on a) the size of the population (40% weighting), b) the total GDP (40% weighting), c) the average number asylum applications per one million inhabitants over the period 2010-2014 (10% weighting), and d) the unemployment rate (10% weighting). For more information, see Commission Recommendation of 8.6.2015 on a European resettlement scheme, Brussels, 8.6.2015 C(2015) 3560 final, p.3 [↑](#footnote-ref-47)
48. Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection, Brussels, 22 July 2015 (OR. en) 11130/15 [↑](#footnote-ref-48)
49. See <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/relocation_and_resettlement_factsheet_en.pdf> [↑](#footnote-ref-49)
50. Agenda (n.7), p.12 [↑](#footnote-ref-50)
51. In other words, they are not in their countries of origin being persecuted, subjected to torture or inhuman or degrading treatment or punishment, nor are they under threat of indiscriminate violence in situations of international or internal armed conflict, within the meaning of Article 9 of Directive 2011/95/EU, OJ L 337, 20.12.2011. [↑](#footnote-ref-51)
52. Council Conclusions on safe countries of origin, Brussels, 22 July 2015 (OR. en) 11133/15 [↑](#footnote-ref-52)
53. Directive 2013/32/EU sets out common criteria for the designation of safe third countries of origin by the Member States in its Annex I, which provides the following: “A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU2 , no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.” [↑](#footnote-ref-53)
54. Agenda (n.7), p.13 [↑](#footnote-ref-54)
55. For supporting Member States in effectively returning asylum seekers who unfoundedly sought asylum in the EU to their safe countries of origin or other safe third countries, the Commission brough about the following documents: Commission Recommendation of 1.10.2015 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks, Brussels, 1.10.2015 C(2015) 6250 final; Commission Communication: EU Action Plan on return, Brussels, 9.9.2015 COM(2015) 453 final. [↑](#footnote-ref-55)
56. European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU, Brussels, 9.9.2015, COM(2015) 452 final 2015/0211 (COD) [↑](#footnote-ref-56)
57. Agenda (n.7), p.6 [↑](#footnote-ref-57)
58. Ibid. [↑](#footnote-ref-58)
59. The Common European Asylum System (CEAS) is an EU framework of legislative instruments adopted to implement the Geneva Convention Relating to the Status of Refugees (see n.8) in the EU legal system. Pursuant to Article 78(2) TFEU, CEAS comprises of (a) a uniform status (definition) of asylum and (b) subsidiary protection; (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d) common procedures for the granting asylum or subsidiary protection status; (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. For more information, see <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm> [↑](#footnote-ref-59)
60. Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60; Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96. [↑](#footnote-ref-60)
61. For more information, see ANNEX VII to the Commission Communication on Managing the refugees crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration - Implementing the Common European Asylum System, Brussels, 29.9.2015 COM(2015) 490 final/2. [↑](#footnote-ref-61)
62. Agenda (n.7), p.4: “Member States' asylum systems today face unprecedented pressure and, with the summer arriving, the flow of people to frontline Member States will continue in the months to come. The EU should not wait until the pressure is intolerable to act: the volumes of arrivals mean that the capacity of local reception and processing facilities is already stretched thin.” [↑](#footnote-ref-62)
63. ###  Note the difference between the terms *relocation* and *resettlement*. While relocation involves transfers of asylum seekers between the EU Member States, resettlement covers persons in clear need of international protection who are transferred from a non-EU third country to an EU Member State.

 [↑](#footnote-ref-63)
64. See note 13. [↑](#footnote-ref-64)
65. Ibid., Articles 7-15. Pursuant to the Dublin Regulation, the default rule is that the *Member State of first entry* to the Union territory is the only one responsible for processing asylum claims. Certain exceptions to the rules apply, such as instances involving family reunification, protection of minors or humanitarian will of other Member States to take over the responsibility. For more information on the applicable Dublin rules, see, inter alia, N Bacic, ‘Asylum Policy in Europe - The Competences of the European Union and Inefficiency of the Dublin System’, CYELP 8 [2012] 41-76, at pp. 58-59. [↑](#footnote-ref-65)
66. At least until they receive long term residence after having resided legally and continuously in the territory of a certain Member State for five years. See Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, OJ L 132, 19.5.2011, p. 1–4*.* [↑](#footnote-ref-66)
67. Pursuant to Protocols 21 and 22 to the Treaties, the United Kingdom, Ireland and Denmark do not take part in the adoption of measures pursuant to Title V TFEU, such as the present one, unless they notify the Commission or the Member States otherwise. [↑](#footnote-ref-67)
68. For example, 18,42% of a given number of asylum seekers would be relocated to Germany, 14,17% to France, 9,10% to Spain, while smaller countries such as Croatia would take in 1,73%, or Latvia and Lithuania with 1,21% and 1,16% respectively. Austria would take in 2,62%, Netherlands 4,35%. [↑](#footnote-ref-68)
69. See ANNEX I to the Agenda on Migration, Brussels, 13.5.2015 COM(2015) 240 final [↑](#footnote-ref-69)
70. Article 3(2)of both **Council Decision (EU) 2015/1523 and Council Decision (EU) 2015/1601** [↑](#footnote-ref-70)
71. See <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_eu_solidarity_a_refugee_relocation_system_en.pdf> [↑](#footnote-ref-71)
72. European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, Brussels, 27.5.2015, COM(2015) 286 final 2015/125 (NLE) [↑](#footnote-ref-72)
73. This final number was proposed by the Commission upon based on the Eurostat and Frontex data on the number of persons who applied for asylum in Italy or Greece in 2014 and first quarter of 2015. See Council Decision (EU) 2015/1523 (see n. 72), Recitals 10 and 11. [↑](#footnote-ref-73)
74. European Council meeting (25 and 26 June 2015) – Conclusions, Brussels, 26 June 2015 (OR. en) EUCO 22/15, para. 4(b) [↑](#footnote-ref-74)
75. Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, p. 146–156  [↑](#footnote-ref-75)
76. European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary Brussels, 9.9.2015 COM(2015) 451 final 2015/0209 (NLE), Recital 11 [↑](#footnote-ref-76)
77. Ibid., Recital 12 [↑](#footnote-ref-77)
78. Irregular migrants in most cases are indeed refugees who would qualify for asylum, but did not want to apply for asylum in the frontline Member States, thus the term *irregular*. [↑](#footnote-ref-78)
79. European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary Brussels, 9.9.2015 COM(2015) 451 final 2015/0209 (NLE) [↑](#footnote-ref-79)
80. 15 600 from Italy, 50 400 from Greece, 54 000 from Hungary [↑](#footnote-ref-80)
81. Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015, p. 80–94 [↑](#footnote-ref-81)
82. Finland abstained. [↑](#footnote-ref-82)
83. Ibid., Article 4 (2) [↑](#footnote-ref-83)
84. See Articles 293-296 TFEU [↑](#footnote-ref-84)
85. See <https://euobserver.com/migration/131158> and <https://euobserver.com/justice/130499> [↑](#footnote-ref-85)
86. See Article 263 TFEU [↑](#footnote-ref-86)
87. For a more detailed analysis of the legality of the qualified majority vote for the second relocation decision, see S Peers, ‘Relocation of Asylum-Seekers in the EU: Law and Policy’, available at http://eulawanalysis.blogspot.hr/2015/09/relocation-of-asylum-seekers-in-eu-law.html?utm\_source=feedburner&utm\_medium=email&utm\_campaign=Feed:+EuLawAnalysis+(EU+Law+Analysis) [↑](#footnote-ref-87)
88. Agenda (n.7), p.4 [↑](#footnote-ref-88)
89. European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 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, Brussels, 9.9.2015 COM(2015) 450 final 2015/0208 (COD) [↑](#footnote-ref-89)
90. Ibid., Article 33a (1) [↑](#footnote-ref-90)
91. Article 294 TFEU [↑](#footnote-ref-91)
92. Agenda (n.7), p.13 [↑](#footnote-ref-92)
93. See <http://data.unhcr.org/syrianrefugees/regional.php>. Turkey hosts more than 2,1 million Syrian refugees, while 1 million of them is in Libanon and 600 thousand in Jordan. [↑](#footnote-ref-93)
94. Case MSS v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011) [↑](#footnote-ref-94)
95. Joined Cases C-411/10 and C-493/10 N S v Secretary of State for the Home Department and ME and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform (European Court of Justice, 21 December 2011). [↑](#footnote-ref-95)
96. Article 3 ECHR, Articles 4 and 19 Charter; *non-refoulement* principle. [↑](#footnote-ref-96)
97. For a more detailed analysis of the pre-crisis inefficiency and non-application of the Dublin system, see N Bacic, ‘Asylum Policy in Europe - The Competences of the European Union and Inefficiency of the Dublin System’, CYELP 8 [2012] 41-76, at pp. 62-64. [↑](#footnote-ref-97)
98. Agenda (n.7), p.13 [↑](#footnote-ref-98)
99. Ibid. [↑](#footnote-ref-99)
100. Agenda (n.7), p.13 [↑](#footnote-ref-100)
101. See Article 80 TFEU. It should be acknowledged that a substantive shift of Dublin’s underlying principle (on *initial* responsibility of frontline Member States) could in theory bring about acceptable results for handling a refugee crisis. However, this substantive shift would have to distinguish a default system in times of *crisis* from a default system in *normal* situations. When faced with an emergency, the default rule would have to be *initial* responsibility of *all* Member States in a solidary manner. The current proposals for the Dublin amendments still *fail to do so* and insist on introducing exceptions to the generally applicable rules on frontline Member States’ *initial* responsibility. Those frontline Member States are then aided by transferring their responsibility to other Member States. In other words, all proposed amendments still presuppose that crisis measures are only an exception to the default Dublin rules. Precisely this initial responsibility of frontline Member States is what fosters the mutual feeling of distrust and makes it easy to oppose solidarity, which in practice occurs once the responsibilities should be taken over by other Member States. There is no other way to achieve true solidarity in times of crisis unless all Member States are *ab initio* legally responsible, and thus placed on equal starting points. [↑](#footnote-ref-101)
102. Based on informal information available to the author, less than 20 people sought asylum in Croatia since the redirection of the Western Balkans route to that country on 16 September 2015. Since that day, more than 465 thousand refugees have crossed through Croatia on their path to other EU Member States, primarily Germany, Austria or Sweden. See <http://www.mup.hr/219671.aspx> [↑](#footnote-ref-102)
103. Dublin Regulation does not impose an obligation on refugees to apply for asylum in the Member State of their entry into Union territory *per se*. However, Member States where they sought asylum may send them back to other Member States through which they entered its territory illegally. This applies equally to all Member States where refugees resided illegally, resulting in transfers all the way back to the Member State of first entry into the Union territory, as a chain reaction. See Article 13 of the Dublin Regulation, as well as Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98–107 [↑](#footnote-ref-103)
104. 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, OJ L 212, 7.8.2001, p. 12–23 (hereinafter Temporary Protection Directive) [↑](#footnote-ref-104)
105. Ibid., Recitals 7 and 9, Article 25(1) [↑](#footnote-ref-105)
106. Ibid., Recital 2 [↑](#footnote-ref-106)
107. Ibid., Recitals 3-9 [↑](#footnote-ref-107)
108. See Council Resolution on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis, OJ C 262, 7.10.1995, p. 1; Action Plan of the Council and the Commission, OJ C 19, 20.1.1999, p. 1. [↑](#footnote-ref-108)
109. 4 Organization of African Unity, Convention on the Specific Aspects of Refugee Problems in Africa, opened for signature Sept. 10, 1969, 1000 UNTS 46 (entered into forceJune 20, 1974) [↑](#footnote-ref-109)
110. J Fitzpatrick, ‘Temporary Protection of Refugees: Elements of a Formalized Regime’, The American Journal of International Law, Vol. 94, No. 2 (April 2000), pp. 279-306, p. 279 [↑](#footnote-ref-110)
111. UNHCR, Note on International Protection, UN Doc. A/AC.96/830 at 23 (1994) [↑](#footnote-ref-111)
112. UN High Commissioner for Refugees (UNHCR), *Guidelines on Temporary Protection or Stay Arrangements*, February 2014, available at <http://www.unhcr.org/542e99fd9.pdf> [↑](#footnote-ref-112)
113. See 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, OJ L 337, 20.12.2011, p. 9–26; and Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60–95. [↑](#footnote-ref-113)
114. At this point, the author would just like to note the resemblance of this definition with the mass displacement of Syrian nationals in the ongoing refugee crisis. [↑](#footnote-ref-114)
115. Temporary Protection Directive (n.104), Article 1.1(c) [↑](#footnote-ref-115)
116. Ibid., Article 5(1). [↑](#footnote-ref-116)
117. Ibid., Article 5(5). [↑](#footnote-ref-117)
118. Ibid., Article 2.1(d). Also note that assisted evacuation into the EU would be a concept similar to *resettlement* of displaced persons. [↑](#footnote-ref-118)
119. Ibid., Article 5(3). [↑](#footnote-ref-119)
120. For more information on exclusions based on public security, see Temporary Protection Directive (n.104), Article 28 [↑](#footnote-ref-120)
121. See Temporary Protection Directive (n.104), Article 26. Coordinated transfers under this system seem fairly interesting in the context of the current refugee crisis – taking into account the existence of the Western Balkans route often subjecting refugees to inhumane conditions on their path to reach Germany. [↑](#footnote-ref-121)
122. Member States could give priority to EU and EEA citizens, as well as legally resident third country nationals who receive unemployment benefits. [↑](#footnote-ref-122)
123. Spouses, partners, minor children and dependants (close family members who lived in a family unit). [↑](#footnote-ref-123)
124. See Temporary Protection Directive (n.104), Articles 8-16. [↑](#footnote-ref-124)
125. Ibid., Article 4. [↑](#footnote-ref-125)
126. Ibid., Articles 3(1) and 17(1). [↑](#footnote-ref-126)
127. Ibid., Article 18. [↑](#footnote-ref-127)
128. Ibid., Recitals 8 and 9 [↑](#footnote-ref-128)
129. M Bulterman, W van Genugten, *Netherlands Yearbook of International Law 2013: Crisis and International Law: Decoy or Catalyst?*, Springer, May 2014, p. 73 [↑](#footnote-ref-129)
130. #  Ibid.

 [↑](#footnote-ref-130)
131. Referring to the announcements of Hungary and Slovakia to challenge quotas for relocation imposed through a Council decision brought by qualified majority. [↑](#footnote-ref-131)
132. Temporary Protection Directive (n.104), Article 25 [↑](#footnote-ref-132)
133. Ibid., Article 5.3(c) [↑](#footnote-ref-133)
134. The Commission’s assessment for determining the quotas for allocation could undoubtedly be based on objective information gathered from other Union institutions, such as Frontex, EASO and Eurostat, as it was the case with the distribution key set for the relocation scheme mechanism under Article 78(3) TFEU. [↑](#footnote-ref-134)
135. Not all authors would agree on this point. See, for example, M Garlick and J van Selm, ‘From commitment to practice: the EU response’: “The Directive contains no binding obligation for Member States to receive people admitted under temporary protection to other States.”; available at http://www.fmreview.org/north-africa/garlick-vanselm.html#sthash.iewe7fJK.dpuf. [↑](#footnote-ref-135)
136. The question remains, however, on how quotas would be imposed to Member States who refuse to accept the transfers in practice – in other words, would Member States *accept* those transfers (even if they have the right not to accept). Yet again, this is a very similar issue to the one that currently emerges with imposing quotas to Member States in the system of relocations under Article 78(3) TFEU. The problem could hypothetically be resolved by Commission's recourse to the infringement proceedings against the relevant Member State, pursuant to Article 258 TFEU. [↑](#footnote-ref-136)
137. This would also mean that, even if Temporary Protection Directive would be interpreted as meaning that the Council cannot impose quotas on the Member States, the Directive could easily be amended as to explicitly specify the contrary. Amendments are introduced in an ordinary legislative procedure with the Council's qualified majority vote. The same was done with the relocation scheme being proposed as an amendment to the Dublin Regulation. [↑](#footnote-ref-137)
138. Temporary Protection Directive (n.104), Article 5(1). It is important to note that Directive applies to all Member States except Denmark. Even the UK and Ireland, generally excluded from Title V measures pursuant to a Protocol annexed to the Treaties, gave notice of their wish to take part in the adoption and application of this Directive. [↑](#footnote-ref-138)
139. Ibid., Article 25(3). Admittedly, appropriate action is stated to include (though not exclusively) *recommending* additional support for the affected Member States. However, nothing in the Article precluded Council action of a different kind, such as reviewing the Decision initially introducing temporary protection. In this context, it is also interesting to note that the initial Commission proposal of the Temporary Protection Directive did not include urgent and appropriate actions of the Council if the capacities designated by the Member States prove to be insufficient for handling the massive influx. Even more interestingly, the initial Directive proposal did not proscribe that Council Decision must, in addition to the information received from the Member States, also take into account information provided for by the Commission, UNHCR and other relevant international organizations. Quite the contrary, the Proposal, as compared to the final text of the Directive, went more clearly in the favor of the Member States – stating that only *declarations* by the Member States on their reception capacities shall be included in the Council Decision. There must be a reason why the initial proposal was amended as to leave more leeway for the Council. [↑](#footnote-ref-139)
140. 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 /\* COM/2000/0303 final - CNS 2000/0127, OJ C 311 E , 31/10/2000 P. 0251 - 0258 [↑](#footnote-ref-140)
141. Temporary Protection Directive (n.104), Recital 20. [↑](#footnote-ref-141)
142. An explanation of the Commission's resilience of proposing a stronger piece of legislation might be found in the Explanatory Memorandum of the Proposal (para 6.1.): “Commission considers that the question of physical distribution must be settled by the Community legislation, …But only a physical distribution based on the voluntary action of the Member States will found a consensus in the EU.” [↑](#footnote-ref-142)
143. See also note 139. [↑](#footnote-ref-143)
144. Directive applies to all Member States except Denmark. See note 138. [↑](#footnote-ref-144)
145. European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary Brussels, 9.9.2015 COM(2015) 451 final 2015/0209 (NLE), Recital 12 [↑](#footnote-ref-145)
146. Ibid. Interestingly, 98 out of 148 thousand refugees (mostly unregistered in Greece) sought asylum in Hungary under Dublin rules in the first 8 months of 2015. That is, before Hungary closed its borders with Serbia in mid September 2015 and the Western Balkans route was redirected to Croatia. This is particulary relevant in the context where Janos Lazar, the minister in charge of the Hungarian Prime Ministry, makes public statements that refugees should be returned to Greece where they first entered EU. See <http://www.worldbulletin.net/news/165806/hungary-will-not-accept-refugees-from-other-eu-states>. [↑](#footnote-ref-146)
147. See <http://www.mup.hr/219671.aspx> [↑](#footnote-ref-147)
148. See http://www.aljazeera.com/news/2015/09/million-refugees-arrive-germany-year-150914101006005.html, or http://www.theguardian.com/world/2015/oct/05/germany-now-expects-up-to-15-mln-migrants-in-2015-report. Other Member States such as Sweden, Austria, France, etc. also took in their fair share of refugees. The author will however focus on the German example as the most drastic one. [↑](#footnote-ref-148)
149. European Parliament resolution of 9 October 2013 on EU and Member State measures to tackle the flow of refugees as a result of the conflict in Syria (2013/2837(RSP)), para. 14: [The Parliament] calls on the Commission … to work on contingency planning, including the possibility of applying the Temporary Protection Directive, if and when conditions demand it.” [↑](#footnote-ref-149)
150. See, for example M Ineli-Ciger, ‘The Missing Piece in the European Agenda on Migration: the Temporary Protection Directive’, available online at http://eulawanalysis.blogspot.hr/2015/07/the-missing-piece-in-european-agenda-on.html; C Orchard and A Miller, ‘Protection in Europe for refugees from Syria’, Forced Migration Policy Briefing 10, Refugee Studies Centre, University of Oxford, September 2014, available at http://www.rsc.ox.ac.uk/files/publications/policy-briefing-series/pb10-protection-europe-refugees-syria-2014.pdf; C Orchard and D Chatty, ' High Time for Europe to Offer Temporary Protection to Refugees from Syria?', Oxford Human Rights Hub, October 2014, available at http://ohrh.law.ox.ac.uk/high-time-for-europe-to-offer-temporary-protection-to-refugees-from-syria/; E De Capitani, 'Mediterranean Humanitarian Crisis: if not now, then when will the EU trigger the “temporary protection” mechanism ?', April 2015, available at http://free-group.eu/2015/04/20/mediterranean-humanitarian-crisis-if-not-now-when-the-eu-will-trigger-the-temporary-protection-mechanism/; Human Rights Watch, ‘EU: Provide Protection for Syrian Refugees - Allow Access to EU Territory, Step Up Assistance in Region’, December 2012, available at https://www.hrw.org/news/2012/12/23/eu-provide-protection-syrian-refugees; Boston University International Human Rights Clinic, ' Protecting Syrian Refugees: Laws, Policies, and Global Responsibility Sharing', available at http://www.bu.edu/law/central/jd/programs/clinics/international-human-rights/documents/FINALFullReport.pdf. [↑](#footnote-ref-150)
151. The Commission, in turn, only considered introducing temporary situation in 2011 for the refugees fleeing conflict in Libya. See Commission Press Release: The European Commission's response to the migratory flows from North Africa, Brussels, 8 April 2011, MEMO/11/226: The Commission would also be ready to consider proposing the use of the mechanism foreseen under the 2001 Temporary Protection Directive, if the conditions foreseen in the directive are met. Consideration could only be given to taking this step if it is clear that the persons concerned are likely to be in need of international protection, if they cannot be safely returned to their countries-of-origin, and if the numbers of persons arriving who are in need of protection are sufficiently great. Resort to this mechanism would allow for the immediate protection and reception in the territory of EU Member States for persons concerned, as well as offering a "breathing space" for the national asylum systems of the Member States most directly affected.” Press release available at http://europa.eu/rapid/press-release\_MEMO-11-226\_en.htm?locale=fr, [↑](#footnote-ref-151)
152. M Garlick and J van Selm, ‘From commitment to practice: the EU response’; available at http://www.fmreview.org/north-africa/garlick-vanselm.html#sthash.iewe7fJK.dpuf. [↑](#footnote-ref-152)
153. Under these circumstances, it is very difficult to comprehend the refusal to activate the system for the numbers in 2015 setting. The only *difference in treatment* that one could plainly see between the situation in Kosovo and the one currently ongoing is ethnic origin and religion of the displaced persons. Note, however, Article 21 of the Charter: Any discrimination based on any ground such as sex, race, colour, *ethnic or social origin*, genetic features, language, *religion or belief*, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Charter is, pursuant to Article 51 thereof, addressed to all Union institutions and all Member States when they are implementing Union law – such as the Temporary Protection Directive, or to that extent, any other aspect of the Common European Asylum System. [↑](#footnote-ref-153)
154. See Temporary Protection Directive (n.104), Article 24. Measures undertaken pursuant to this Directive would be financed from the European Refugee Fund. [↑](#footnote-ref-154)
155. To that extent, it is interesting to note that Jean-Claude Juncker himself started publicly speaking about a two-speed Europe: "One day we should rethink the European architecture with a group of countries that will do things, all things, together, and others that will position themselves in an orbit away from the core." See https://euobserver.com/institutional/131172. This seemingly marginal statement of the EU highest executive official may, however, uncover the true vision for the future of Union. [↑](#footnote-ref-155)
156. This argument is specifically interesting in the German context and the *Solange* saga: Because the EU response fell short of the level of protection of fundamental rights required by the German Basic Law, Germany no longer recognizes EU law supremacy and is allowed, in its national constitutional capacity, to place Union rules on CEAS out of force. [↑](#footnote-ref-156)
157. Taking over the competences in asylum matters, but not activating an effective emergency system capable of handling the existing refugee crisis, the Union could *de facto* itself be responsible for violations of the Geneva Convention. Luckily, the EU is currently saved by efforts of these individual Member States who took over the role of providing international protection to refugees. [↑](#footnote-ref-157)
158. Admittedly, some might claim that Germany is acting within the scope of Dublin Regulation by using the sovereignty clause exception (Article 17 of the Dublin Regulation), which allows taking over the responsibility of examining asylum applications from another Member State. In the context of Germany taking over more than a million refugees, 2/3 of the entire number of refugees currently in the EU, invoking this exception of Dublin Regulation could only be seen as stretching the system to the level of absurdity. [↑](#footnote-ref-158)
159. An attempt to handle the chaos of the Western Balkans route was also subject to a special meeting of leaders of affected EU and non-EU states on 25 October 2015. See Leaders' Meeting on refugee flows along the Western Balkans Route: Leaders’ Statement, available at:

<http://ec.europa.eu/news/2015/docs/leader_statement_final.pdf>

Furthermore, the security reasons seem specifically prudent in the aftermath of the 13 November 2015 Paris terrorist attacks. [↑](#footnote-ref-159)
160. For more information on invoking exceptions to the Schengen system, see S Peers, ‘Can Schengen be suspended because of Greece? Should it be?’, available at http://eulawanalysis.blogspot.hr/2015/12/can-schengen-be-suspended-because-of.html?utm\_source=feedburner&utm\_medium=email&utm\_campaign=Feed:+EuLawAnalysis+(EU+Law+Analysis) [↑](#footnote-ref-160)
161. Commission Press Release, ‘Temporary protection in the event of a mass influx of displaced persons’, ip/00/518, Brussels, 24 May 2000 (press release following the Commission’s Proposal for the Temporary Protection Directive), available at <http://europa.eu/rapid/press-release_IP-00-518_en.htm?locale=en>. [↑](#footnote-ref-161)
162. Agenda on Migration (n. 7), p. 2 [↑](#footnote-ref-162)
163. Before the 1967 Protocol expanded its territorial and temporal scope, so that the Convention applies to all those who fall within the definition of a refugee. See Introductory note to the Geneva Convention by the Office of UNHCR, available at http://www.unhcr.org/3b66c2aa10.html. [↑](#footnote-ref-163)
164. Agenda (n. 7), p. 6 [↑](#footnote-ref-164)