

Limits to Harmonization: The “Temporary Protection” of Refugees in the European Union¹

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ABSTRACT

This article examines the limits to harmonization at the level of the European Union through a case study of policy towards people who fled the war in Bosnia and Herzegovina in the early 1990s.

Specific attention is paid to the development of the policy of granting “temporary protection” instead of full refugee status to Bosnian asylum-seekers, which stretched across all fifteen member states.

It is argued that “temporary protection” emerged as a set of specific responses to the outbreak of war in the former Yugoslavia, involving compromises between states’ desires to restrict asylum on the one hand, but meet demand from public opinion and international organizations to offer protection to refugees on the other.

Subsequent analyses have suggested that these compromises might provide an effective way forward for harmonization of policy at a European level, and even a reformulated international system of refugee protection.

However, the authors question this view: they analyse the extent to which “temporary protection” for Bosnians was coordinated, and whether it actually provided the states and individuals with the benefits that have been suggested.

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INTRODUCTION: THE CHALLENGE OF HARMONIZATION

The harmonization process in the field of immigration and asylum is closely linked to the completion of the Internal Market and the elimination of border controls within the European Union. While common policies have been forged relating to the movement of persons within the European Union (EU), such as the Schengen Implementation Agreement, there has been far less policy coordination concerning immigrants and asylum-seekers from outside the EU. Asylum policies in particular have tended to be developed at a national and sometimes bi-lateral level, and state responses have generally combined efforts to restrict the entry of asylum-seekers and to set tight limits on recognition rates (Joly et al., 1992; Koser, 1996). Where discussions have occurred at a supra-national level, they have focused on two main issues: the interpretation of the legal definition of a refugee; and measures for the expulsion of persons, including unsuccessful asylum-seekers (van der Klaauw, 1997).

Many non-governmental organizations, lawyers and academic commentators have voiced criticism of developments in asylum policy-making in the EU. It has been argued that policies do not conform to the principles of international refugee law; they have been characterized as exclusionary and restrictive; and that they impinge upon bona fide as well as “bogus” refugees (Collinson, 1993). Amongst their hidden costs is the growing incidence of trafficking, which has contributed to the “criminalization” and growing vulnerability of asylum-seekers (Koser, 1998). In this context, the demands of harmonization are considered to extend beyond procedural coordination alone, to include the more conceptual challenge of devising a comprehensive framework with common denominators, including minimum guarantees, the search for “durable solutions” and more inclusive definitions of the refugee concept.

The humanitarian crisis in former Yugoslavia has proved to be a litmus test for the harmonization of asylum policies in the EU. The war resulted in the largest displacement of refugees into western Europe since the Second World War – refugees from Bosnia and Herzegovina alone numbered some 500,000 and arrived in every member state. There were also substantial numbers in non-member European states, especially Croatia and Switzerland. In addition, the displacement challenged the restrictive paradigm which has evolved in Europe. While many of the displaced did not qualify for refugee status in its strict legal definition, there were compelling humanitarian reasons why they could not be sent back.

The principal response to this displacement has been the development and implementation of a policy in most European states of “temporary protection”. As a policy, “temporary protection” is difficult to define, since it has involved a series of different legal and administrative changes in different European countries. However, within the European Union, it has generally included the

suspension or by-passing of normal asylum procedures for applicants from certain countries, and the conferral of temporary residence rights on the grounds of a generalized impossibility of return to that country. The most significant group to have benefited from such "temporary protection" are those who fled from Bosnia-Herzegovina after 1992, although in some European countries similar provisions have been extended to refugees from elsewhere in the former Yugoslavia, or even in some cases from elsewhere in the world.

Although "temporary protection" has not been without its critics (Kjaerum, 1994; Marx, 1994; Collinson, 1995), the policy has been heralded as a constructive first step towards harmonization of European asylum policies. For example, Mrs Ogata, the United Nations High Commissioner for Refugees, has observed that: "Temporary protection is an instrument which balances the protection of the needs of people with the interests of states receiving them" (Ogata, 1997). The most recent report on the *State of the World's Refugees*, published by the Office of the High Commissioner (UNHCR), cites three main benefits of a system of "temporary protection". First, it has "provided immediate security to a large number of people whose lives and liberty were at risk", saving both these people, and governments, the expense of complex and protracted asylum-determination procedures (UNHCR, 1997c: 209). Second, temporary protection shows that states acknowledge their "broader humanitarian obligation to provide a place of safety". Third, it reasserts "the principle of international responsibility sharing". Such an assessment suggests that "temporary protection" has considerable potential as the basis for a more harmonized asylum policy at the EU or wider pan-European level.

A range of positive and negative consequences of "temporary protection" that have emerged in practice or exist in theory have been discussed in the literature (Luca, 1994; Thorburn, 1995). UNHCR itself has recognized the limitations of "temporary protection", noting that it needs to form part of a comprehensive international strategy, that it should not be used as a substitute for clearly defined residence rights, and that it should not be extended indefinitely. Nonetheless, the premises on which "temporary protection" is generally considered to be a successful innovation in European asylum policy have rarely been subject to systematic empirical analysis. This article considers whether those features of "temporary protection" regimes that are said to be attractive to policy makers have actually proved significant in practice. It is based on a review of the evolution of policies of "temporary protection" across all 15 EU member states, including field visits to 12 states where interviews were conducted with senior government officials, as well as with representatives of international and non-governmental organizations concerned with Bosnian asylum-seekers.²

The article is divided into three main sections. The first provides a background to the temporary protection of Bosnians in the EU, placing it in the historical

context of arrivals of, and responses to, refugees and asylum-seekers in Europe since the Second World War. The next section focuses on how the policy evolved once this new status was granted to Bosnians. An important finding is that even though “temporary protection” was granted at least in part on the premise of return, in most countries many Bosnians have now been either granted or promised permanent residence rights. The reasons why this has occurred are also discussed. On the basis of this overview of “temporary protection” in the EU, the final section critically examines the extent to which the policy can be considered as a positive response to the “asylum dilemma”, and one which might break through the limits to harmonization in European immigration and asylum policies.

FROM ASYLUM TO TEMPORARY PROTECTION

In many Northern states permanent residence rights have historically been conferred upon persons recognized as refugees, even though the legal obligation is only to admit refugees as temporary residents. Broadly speaking, both the pattern of arrival of refugees in western Europe, and European states’ policies towards refugees, have shifted during the post-war period, with distinct phases corresponding to the different decades (Table 1, page 539). In the immediate post-war era, refugees in Europe were mainly Jewish and eastern European populations who had been forced to flee as a direct consequence of the war. Although some settled in western Europe, the largest proportion was resettled outside the continent, particularly in North America. By the 1960s, the principal locations of origin remained the same, but both the cause of flight, and settlement policy, had begun to change. At this time, refugees in Europe were primarily persons “escaping” from Communist Europe and the former Soviet Union; and although resettlement in the US continued, the main response in western Europe had begun to shift towards local integration. The 1970s marked the first significant entry of refugees from outside Europe, and it was during this phase that local settlement developed as the most likely outcome. In part, this related to the reception and settlement of large numbers of Vietnamese refugees in European countries under quotas, especially as part of the organized programme of resettlement from Hong Kong negotiated at the Geneva Conference of 1979 (Rogge, 1985). Although a small proportion repatriated voluntarily in later years, the majority settled permanently in western Europe.

What in retrospect appear quite generous admission policies for these groups of refugees to the end of the 1970s arguably arose from an interest convergence between refugees and the governments of industrialized states (Hathaway, 1996). During the 1950s and 1960s refugees were mainly of European origin, and their cultural assimilation was perceived as relatively straightforward. Effective control – via quotas – of the number of arrivals from key parts of the Third World during the 1970s sought to limit greater problems perceived to be

involved with their assimilation. The reception of refugees opposed to Communist regimes moreover reinforced the ideological and strategic objectives of the capitalist world. In addition, refugees also helped to fill labour market gaps during the three decades after the war.

This apparent generosity ended in the face of the arrival of so-called spontaneous asylum-seekers in the 1980s. These persons generally originated from outside Europe and claimed asylum independently and spontaneously after their arrival in western Europe. A particular brand of public and political concern was expressed about persons falling within this category, for which a number of reasons can be identified. First, in contrast to quota refugees, their movement was seen as irregular, meaning that their numbers and conditions for arrival were no longer under the control or influence of receiving states (Widgren, 1989). Second, these flows began to be perceived as the harbingers of mass South-North migration in the face of uneven economic development (Loescher, 1989). A related third point was the perception that these flows were dominated by "bogus" applicants who were actually economic migrants seeking to overcome restrictions upon immigration procedures that had been in place since the mid-1970s. As a result, a decreasing proportion of applicants were granted refugee status, and European asylum policies during the 1980s became increasingly concerned with restricting the scale of what were seen as non-refugee flows.

In the 1990s the main refugee or migration concern to European policy makers became persons fleeing the civil war first in the former Yugoslavia, and then specifically in Bosnia-Herzegovina, although asylum-seekers continued to arrive in considerable numbers from elsewhere, joined in the early 1990s by ethnic Germans and Greeks from the former Soviet Union who had a constitutional right to move to the West. The population of Bosnian refugees in the EU over the last five years or so has exceeded half a million (Table 2, page 539), and the number of displaced outside Bosnia is about one million. This displacement has provided a test case in Europe for the management of large-scale, unplanned population influxes. Although the so-called doomsday scenario of mass arrivals from the former Soviet Union did not materialize in Europe during the early 1990s, there is still great concern amongst European governments about the potential for mass movements from other sources, including, for example, across the Mediterranean "population gradient" (Salt, 1996), or resulting from political emergencies in the Caucasus (Cohen, 1991; Marx, 1994), or most recently from the war in Kosovo.

The sudden displacement of over 500,000 Bosnians to the EU in 1992-1993 demanded a new response from member states. Unlike some previous groups of asylum-seekers, it was recognized that Bosnians deserved some form of protection. The proximity of the war to the EU, and extensive media coverage, helped create conditions in which *refoulement* (forced repatriation) was unlikely to be practicable. At the same time, it was argued by European states that

Bosnians' reasons for flight generally did not correspond with the very specific criterion of a threat of individual persecution, which defines refugee status. Despite abundant evidence of ethnically-based persecution, many Bosnians were considered to be fleeing a generalized threat of violence, and to comprise a "mixed" population of refugees and other vulnerable migrants. In this way, the discourse that maintained tight controls against "bogus" refugees was maintained.

The political and economic incentives to maintain restrictions on the granting of refugee status in the early 1990s were strong. Even excluding the Bosnian exodus, asylum applications to EU countries were historically high, and politicians' unease was fuelled by rising xenophobia within domestic public opinion, and predictions of a mass influx from other Central and East European countries after the fall of the Berlin Wall. Applications from Bosnians placed further logistical and financial strains on a refugee regime considered by many to be close to collapse, with a large backlog of claims from asylum-seekers in some countries. At the same time, there was no clear political advantage to resettling Bosnians, as their arrival coincided with a period of retrenchment, recession and unemployment across western Europe.

It was not just the scale of the Bosnian displacement that was significant, but also its distribution. Every EU member state was affected, as well as other non-EU states, notably Switzerland, Norway, Croatia and Slovenia, and in this way the Bosnian experience tested cooperation over migration policy amongst member states and their non-EU neighbours. At the same time, the distribution of Bosnians was very uneven, with almost 60 per cent of those in the EU located in Germany, and a further 30 per cent in Austria, The Netherlands and Sweden. Although the significance of Germany as a receiving state declines if the proportional size of the Bosnian population to the host population as a whole is considered, the Bosnian displacement nonetheless has tested the concept of burden-sharing amongst member states. It has also brought into question the extent to which a unified migration and return policy can be arrived at, given varying pressures upon, and subsequently different priorities in, the member states.

In this context, "temporary protection" evolved both as a political compromise, and for some, an attempt at burden-sharing and harmonization. The Office of the United Nations High Commissioner for Refugees (UNHCR) felt compelled to promote "temporary protection" because of concerns that states would otherwise refuse admission to Bosnians. At the same time, the status was seen as guaranteeing for its recipients a set of basic legal rights, perhaps foremost of which was protection against *refoulement*. Meanwhile, for states, the new policy also had a number of advantages. First, by granting "temporary protection" *en masse* to Bosnians, normal asylum procedures were circumvented, so that no additional strain was added to the asylum system. Second, public support could be maintained by stressing the temporary nature of the status, and by conveying the Bosnian displacement as a matter of protection, rather than a disguised form

of economic migration. Third, repatriation was considered an easier and less disruptive solution than is often the case for refugees, as no formal process had to be initiated to withdraw status.

These underlying principles notwithstanding, "temporary protection", unlike refugee status, never became a consistent category enshrined in international law. In practice, the concept of "temporary protection" has covered a range of regimes for the temporary admission of Bosnians, even within the EU. Variations in the administration and evolution of these regimes have occurred both between and within countries (Marx, 1994; IGC, 1995; Thorburn, 1998). Thus, whilst countries such as Austria, Belgium, Denmark and Greece modified their asylum laws to create, or enable the designation of a special "temporary protection" status, an appropriate legislative framework already existed in Finland, France, and the UK, although it was generally adapted to meet the specific circumstances of Bosnians. In Germany, an amendment to the Aliens Act in July 1993 provided the legislative basis for the granting of "temporary protection" to civil war refugees. Yet this amendment was never applied to Bosnians because of a dispute between the Federal government and individual *Länder* over financing the consequent redistribution of Bosnians already on German territory. As a result, Bosnians continued to receive a form of "temporary protection", but one which had already existed prior to the conflict, and which was at the discretion of individual *Länder*.³

In addition, as Suhrke (1998) has shown, "temporary protection" had only limited impact in promoting the principle of burden-sharing, especially if placed in the context of earlier efforts to resettle refugees after the Second World War or from the war in Vietnam. Nor did "temporary protection" represent the sole response to the asylum dilemma in the case of Bosnia. Other approaches have included containment in safe havens inside the country, as well as increasingly familiar attempts to restrict movement out of Bosnia and access to Europe through carrier sanctions, visa restrictions, and the like. This was despite initial commitments by member states to maintain "flexible" arrangements for visas from persons originating in the former Yugoslavia, and to consider the potential for burden-sharing in terms of the overall distribution of those displaced (de Jong, 1996; Thorburn, 1996). Indeed, the emerging discourse in all member states was that Bosnians could best receive protection and assistance if they remained as close as possible to their original homes, a policy that, in many respects, "temporary protection" was designed to reinforce.

HOW TEMPORARY IS "TEMPORARY PROTECTION"?

In discussing recent developments of asylum policy in EU member states, it is helpful to keep in mind both the perceived advantages of "temporary protection" listed above, and potentially broader motivations lying behind such policy

development. A major review of international refugee law by James Hathaway highlights two aspects of the current international refugee regime that are particularly problematic for states. First, there is little or no burden-sharing, so that full legal responsibility for protection of refugees is assigned to “whatever state asylum-seekers are able to reach”. Second, the “de facto permanency of refugee admissions” is of considerable importance (Hathaway, 1997). Yet, in this context, it is ironic that “temporary protection” in the European Union at least appears in practice to have hardly addressed either of these issues. Indeed, despite the fundamental premise that the new status should be temporary, in the majority of EU countries most Bosnians have now been transferred to a status that either confers or leads to permanent residence, and repatriation has remained limited as both a policy objective and an outcome.

The last point is perhaps least surprising, since it might be expected that actual return of those initially granted “temporary protection” would be limited by willingness to return, conditions in Bosnia, and personal circumstances. Although repatriation of Bosnians with “temporary protection” was expected to be less difficult than that of refugees, it was never expected to be easy. However, more surprising is the observation that the “end of temporary protection” – declared by Mrs Ogata in December 1997 for Bosnian populations – appears to have signalled not a push for mass return, but an acceptance of the permanency of populations originally granted temporary status. Even by the middle of 1997, a majority of Bosnians retained temporary protection status in only four states of the EU (Table 3, page 540). By the end of that year, only one – Germany – had not implemented, or at least started to develop, plans for the systematic transfer of Bosnians from temporary to more permanent status.

With nearly 60 per cent of the EU’s Bosnian population, Germany represents a significant exception to the above analysis. In Germany, the majority of Bosnians ended up being “tolerated” under two main types of permit, the *Duldung* and *Aufenthaltsbefugnis*, both of which were temporary, and intended to remain so. By mid-1997, Germany stood alone in the EU in insisting that all or most Bosnians originally granted “temporary protection” should return to Bosnia now that Peace Accords have been signed. Moreover, whilst Federal Government policy remained focused publicly on the promotion of voluntary return, a number of *Länder*, notably Bayern and Berlin, started to forcibly repatriate some Bosnians in 1997, and continued to do so in 1998. According to UNHCR (1997b), about 100,000 Bosnians were repatriated from Germany in 1997, although the proportion actively deported remained relatively small.

In other EU member states, provisions for the transfer of Bosnians with “temporary protection” to a more permanent status have fallen into two main categories. In Austria, Finland and Luxembourg provisions were made simply

to transfer the majority of Bosnians with temporary protection *en groupe* to a more permanent status of residence. In Denmark and the Netherlands, asylum applications – which were originally suspended during the granting of temporary protection – have been assessed. For the majority, the outcomes have been positive, with Bosnians being granted either full refugee status or some form of humanitarian status. In Sweden, in contrast with all other EU member states, the majority of Bosnians were processed through the asylum procedure immediately upon arrival, and were never granted “temporary protection”. For the remainder, their asylum applications were re-activated, although it was thought unlikely that they would be granted.

Data in Table 3 also demonstrate that with the exception of Finland and Spain, transferral of status has not applied to all Bosnians holding temporary protection. Some of the criteria used to determine which Bosnians would benefit from a transferral to a more permanent status in selected countries (those for which information is available) are listed in Table 4 (page 541). While these criteria have varied across the EU, they fall into three main categories. One relates to time of arrival: indeed, in many countries Bosnians arriving after a set cut-off date were not granted “temporary protection” in the first place. Although the date varied, it generally corresponded with a time when events in Bosnia were no longer perceived to be insecure – and was thus intended to deter economic migrants from Bosnia. In those countries where transferral of status was achieved via the asylum procedure, the reason for flight – which lies at the heart of the asylum decision – became another important criterion, although there is some evidence that Bosnian asylum applications have been dealt with in a more summary manner, reflecting higher level political acceptance of their case to remain. A third criterion, which applies across a number of countries in the EU, relates to measures of integration. Thus permanent residence was only granted variously to those Bosnians who had found regular employment, or private accommodation, and/or had not been convicted of a crime in the host country.

Many reasons can be suggested to explain this rather surprising reversal of the main principle of “temporary protection”. For example, in retrospect, and despite public statements at the time, it could be argued that eventual return was in fact less of a priority for governments who granted “temporary protection” than the range of other “benefits” described above. Nonetheless, the status did allow states the choice of whether or not to grant permanent residence – in contrast to refugee status which, *de facto*, if not *de jure*, is very difficult to withdraw in Europe. It also placed that decision – as well as the decision on the right to remain initially – firmly within the executive power of the state, rather than allowing it to remain subject to legal interpretation of international agreements such as the Geneva Convention.

Another reason is that Bosnians on the whole have been reported to have integrated very successfully in EU member states. At a social and cultural level,

integration has been aided in some countries by strong social networks based on decades of labour migration between former Yugoslavia and countries of the EU. In the context of a resurgence of racism towards immigrants in the EU, the fact that Bosnians are white is probably not an inconsequential factor either, although it is interesting that there has been little evidence of a backlash on the basis of their predominant religion, which is Islam. As noted above, economic integration was an essential prerequisite in some countries for the transferral to permanent status, although what is more surprising is that so many appear to have fulfilled this criterion.

A third reason has been that attitudes in EU towards return to Bosnia have evolved over time. In practice, return has proved a far more complex concept than was originally expected, or at least hoped for. A particular problem has emerged as a result of so-called “ethnic cleansing”, in that many Bosnians cannot at present return to the areas whence they originally fled. This is either because they would now be part of an ethnic minority there, and would risk attack from the majority ethnic group should they return, or because their homes are occupied by those displaced internally during the “cleansing” process. These problems are superimposed on broader issues such as the housing crisis in Bosnia, unemployment and a crippled economy, land mines, war taxes and a range of gender specific difficulties. Whilst return is perceived by some both as a solution to Europe’s asylum dilemma, and as potentially contributing to the reconstruction of Bosnia by promoting reconciliation and the reintegration of skilled personnel, others, notably in the foreign ministries of EU member states, have taken a more cautious stance. The fear is that mass return could risk rekindling exactly the type of social and ethnic tensions that helped fuel the war in the first place.

Why has Germany not granted permanent residence rights to Bosnians holding temporary permits? Although specific responses have varied across the different *Länder*, one reason regularly given by government officials is that Germany has received a far greater number of Bosnians than any other EU country, although this disparity is not so significant if one considers numbers in relation to the size of the host population. At the same time, in recent years, Germany has also received the greatest number of asylum applications in the EU. In 1996, 150,000 applications in Germany represented 60 per cent of total applications in the EU (UNHCR, 1997a). In the context of these compounded pressures, and against a backdrop of economic recession and a growing incidence of social unrest and violence targeted on immigrants, Germany is the only country in the EU where Bosnians have remained high on the public and political agendas, and where their integration is simply not countenanced by the state. Nonetheless, even repatriation from Germany has proceeded at a rather slower rate than was intended.

“Temporary protection”: first step on the road to harmonization?

To what extent does “temporary protection” really represent a first step on the road to the harmonization of asylum policies? In answering this question it is important to return to the distinction made in the Introduction to this article between procedural challenges to a harmonized asylum policy in Europe, and more conceptual challenges relating to the need to balance the conflicting interests of state sovereignty and international responsibility to provide protection to people in need.

Focusing initially on the issue of procedure, it is clear that there has been a general lack of coordination and communication across the EU in the reception of Bosnians. “Temporary protection” has not been a consistent category. It has evolved in different ways and with different outcomes in different states, very much according to the prerogatives of individual states. While there have been a few intergovernmental efforts to draw up inventories of temporary protection systems across Europe (HIWG, 1995; Black et al., 1997; UNHCR, 1997a), there has been no centralized decision making or even consultative fora. A similar conclusion has been drawn concerning return to Bosnia, with an added observation that communication between Bosnia and the EU is similarly uncoordinated (Walsh et al., 1999).

However, it is also the case that in most countries the legislation and administration of temporary protection has proceeded on an ad hoc basis in response to the evolution of displacement from Bosnia, and as such, attitudes towards return have also evolved over time. Hathaway’s project on the reformulation of refugee law has focused on the benefits that could derive from a more comprehensive system of “temporary protection”, albeit with a number of improvements in the way it has operated to date. For Hathaway’s team, “temporary protection” is seen at least as a feasible alternative to a current system that itself has already largely broken down (Hathaway, 1995; 1997). The Bosnian experience has proved to be the catalyst in a number of countries for the formulation of a more integrated temporary protection regime, and in Denmark, Italy, Finland, Greece and Sweden, for example, this is an ongoing process.

An equally important question, however, concerns the extent to which “temporary protection” represents a policy that can rise to the more conceptual challenges facing the harmonization of asylum policies. One way of answering this question is to return the analysis to the main conceptual benefits of “temporary protection” outlined in the Introduction. These include the notion that “temporary protection” represents acknowledgement by states of a broader humanitarian obligation; that it represents the reassertion of the principle of international responsibility sharing; and that it can be sold as a temporary solution to national populations suspicious of population influxes.

Acknowledgement of a broader humanitarian obligation?

The extent to which “temporary protection” has signalled acknowledgement of a broader humanitarian obligation on the part of European states can be approached from two perspectives. First, to focus specifically on the Bosnian case; second, to consider the links between “temporary protection” and the wider asylum regime.

The perception that Bosnians arriving in Europe comprised a mixed population of “genuine” refugees and other migrants was similar to the general perception of “spontaneous” asylum-seekers. In this context, “temporary protection” contrasted with the predominant responses to asylum-seekers, both by allowing Bosnians to enter European states, and by providing them a basic set of legal rights. Seen in historical perspective, “temporary protection” might therefore be argued to have represented a shift away from a reliance on the exclusionary legal definition of refugee status to acknowledgement that even persons who fall outside the definition can be deserving of international protection. Such a shift might be seen as particularly useful in the context of the exodus from Kosovo initiated at the beginning of 1999.

However, closer analysis of the evolution of the policies of EU member states raises two doubts about such an assertion. First, although it is true that initially no effort was made to distinguish between “genuine” refugees and other migrants, this distinction at a later stage formed one of the criteria in many countries for the transferral of the status of Bosnians to permanent residence rights. In several countries those Bosnians who did not satisfy the criteria for refugee status continue to receive the limited rights associated with “temporary protection”, but are the main targets for repatriation initiatives. Second, the observation that the majority of Bosnians satisfied the criteria for refugee status begs the question of why they were not granted refugee status via a shortened or summary procedure immediately upon arrival. To provide basic rights under “temporary protection” to “genuine” refugees is an improvement on incarcerating them during a lengthy asylum procedure, as is sometimes the case in the UK but, objectively, is hardly evidence for fulfilling a humanitarian obligation.

It has also been demonstrated that in addition to asylum criteria, a range of other criteria have been applied across EU countries to distinguish Bosnians who should stay and others who should return to Bosnia. One of the most prevalent set of criteria relate to economic integration; moreover, it has been suggested that their success in integrating in the labour market is an important reason why so many Bosnians have been accepted on a permanent basis in Europe. The implication is that state interests, rather than a broader international responsibility, have largely determined the response to Bosnians in the EU. It is interesting that a similar reason can be cited in explaining why refugee status in

Europe has evolved as a permanent status. This raises a question concerning the extent to which the European response to refugees in the post-war era is a useful benchmark against which to measure the acknowledgement of humanitarian obligations.

If "temporary protection" is accepted as indication of a broader humanitarian obligation on the part of European and other industrialized states, another question which needs to be asked is the extent to which this obligation extends beyond Bosnia. While certain other populations have received some form of "temporary protection" in European countries and North America, the Bosnian population is by far the largest, and was the first and, until the recent Kosovo crisis, the only population consistently received in this manner throughout the EU. It has been suggested that the Bosnian displacement represented a very specific and unusual challenge to Europe's asylum regime. As can be argued for all other European responses to refugees, "temporary protection" appears to have been a specific response arising out of specific circumstances. It is certainly the case that "temporary protection", or the humanitarian obligation which it is supposed to flag, has not on the whole been extended to asylum-seekers who continued to arrive in parallel with Bosnians. The only exceptions to this have been equally specific populations such as Algerians fleeing attacks by Islamic fundamentalists, or individuals from Rwanda who arrived in France after the genocide in 1994. Indeed, "temporary protection" for Bosnians may have impacted negatively upon other populations, for example by filling any notional refugee quotas which still exist in EU countries.

Reassertion of the principle of international responsibility sharing?

One reason why UNHCR accepted the compromise of "temporary protection" was the belief that the temporary nature of the status would encourage burden-sharing among EU countries. This has clearly not been the case. Table 2 (page 539) shows that some 345,500 Bosnians of a total 580,000 have been received in Germany alone. Adding the total in Germany to the next two most substantial Bosnian populations – Austria and Sweden – it can be seen that 89 per cent of all Bosnians in the EU have been received in just three countries. The migration patterns of Bosnians arose from a combination of factors, including geographical proximity and social networks; and in general Bosnians have remained where they initially arrived. While not underestimating the importance on an individual basis of relocation schemes, for example of medical evacuees from Germany to the UK, on an aggregate basis these have been insubstantial.

The only way in which the experience of temporary protection for Bosnians in the EU might be argued to have contributed to a reassertion of the principle of international responsibility sharing is by illustrating some of the consequences of failing to achieve the principle (Suhrke, 1998). There is a strong belief in certain quarters in Germany that the rest of Europe has some responsibility for

the plight of Bosnians in Germany. While the integration of a smaller number of Bosnians might have been easier to “sell” to the German public, this argument surely should not be extended to justify forced repatriation from Germany. On the other hand, there have been a few cases of secondary migration: Bosnians leaving Germany for Benelux countries to escape the threat of forced migration. The main response to these arrivals has been to return them to Germany. Similarly, in France, the ending of temporary protection for new arrivals in December 1996 appears to have been motivated more by a desire to avoid secondary migration of Bosnians from Germany than a response to changed circumstances in Bosnia. Finally, again from a German perspective, it can also be argued that if there is a new environment of burden-sharing in Europe, it certainly has not yet relieved the German state of its disproportionate number of asylum-seekers.

Temporary guests and permanent solutions

The immediate response to the claim that “temporary protection” was a temporary measure is to note the fate of some 275,000 Bosnians who remain under some form of temporary status in Germany. For the majority of Bosnians in Europe “temporary protection” has in effect provided no long-term solution. Indeed, the legislative changes enacted in Germany were not even applied to them. Moreover, most Bosnians in Germany do not have a realistic chance to integrate locally. Those who voted with their feet in the hope of resettling in another European country have generally been returned, although there is an agreement for resettlement in the US of up to 8,000 Bosnians in Germany. Serious doubts arise about the only officially-remaining “solution”, namely repatriation. For some returnees from Germany this solution has been forced upon them; for others return has been primarily in response to the threat of forced migration. Germany is also the only EU country which in 1997 operated outside UNHCR guidelines by returning persons to areas where they may form “ethnic minorities”, so that return is often under conditions in which dignity and security upon return cannot be guaranteed.

Elsewhere in the EU, the predominant solution for Bosnians has been local integration. It needs to be stressed, however, that this was not the solution towards which “temporary protection” was originally oriented. The integration solution for Bosnians was largely determined by their positive impact upon labour markets and the relative ease of their cultural assimilation, based in turn on pre-existing social networks and the relative lack of a racist response in receiving communities. These are a set of circumstances quite specific to the Bosnian population. There is no reason to suppose that other populations receiving “temporary protection” would integrate or assimilate as easily, and it follows that there is no reason to suppose that for other populations local integration would be the solution adopted by the host state.

The specific case of Germany aside, it should also be noted that in all but two of the remaining 14 member states there are small populations of Bosnians who have not been granted permanent residence rights. Repatriation is the intended solution for these people, but it is a solution which is proving hard to achieve. Meantime, these Bosnians find themselves in an insecure and short-term environment, with limited rights or incentives to become integrated. Indeed, this distinction between short-term and long-term solutions can also be applied to those Bosnians who have been granted permanent residence rights but nevertheless spent several years in an unsure situation. The psychological impacts of insecurity have been demonstrated to be significant and potentially harmful in the different but comparable context of asylum-seekers awaiting the outcomes of their applications (van Ewijk and Grifhorst, 1998).

CONCLUSION

The preceding critique has arisen partly in response to the ad hoc manner in which "temporary protection" has evolved for Bosnians in the EU, and partly in response to broader concerns about the concept and its practical consequences in terms of right to work or access to welfare benefits. Whatever the merits of the latter set of arguments, some commentators consider that "temporary protection" has the potential to form the cornerstone of a new, harmonized asylum regime (Hathaway, 1997). This article highlights several lessons which can be learned from the Bosnian experience in discussions about the development of this regime.

First, there is no consistent category of "temporary protection". Different Bosnians in different member states received different rights under "temporary protection" regimes. If it is to be formalized into a single status, then "temporary protection" should enshrine a standard set of legal rights. Careful consideration would need to be given to whether and how these rights are distinguished from those granted both to asylum-seekers and to refugees. Such rights should be consistently applied not only across states in the EU, but also across different populations receiving the status. Foremost amongst them should be safeguards – preferably exercisable on a supra-national level – against *refoulement*.

Second, there has been no conformity on the question of how to end "temporary protection". Some member states have transferred individuals to status entitling them to permanent residence, others to refugee status, and Germany has shifted the status downwards. Some member states have ended "temporary protection" for all Bosnians, others have drawn distinctions. Where distinctions have been drawn, they have often been on the basis of different combinations of criteria. If "temporary protection" is to be a meaningful status, there is surely a need to determine how the status is concluded.

A related third question relates to when “temporary protection” should come to an end. Different states have come to different conclusions on this issue, based largely on their perception of conditions in the country of origin. There are, however, alternative criteria that might be considered in the decision, including the psychological impacts of prolonged temporary status. There remains a significant gap between states such as Denmark, where two years was set as the maximum period for which “temporary protection” could be applied, and Germany, where the temporary “*Duldung*” status can in theory be renewed indefinitely.

What lies at the heart of all these issues is the question of what is temporary about “temporary protection”. Is it a temporary sojourn in a host country, or is it a precursor to more permanent protection? One of the most important lessons from the Bosnian experience is that it does not make sense to orientate the status towards a single solution. Return after the Dayton Peace Accord has proved difficult for many, while local integration for certain parts of the population has proved relatively easy. The range of often unexpected outcomes lies as a salutary warning as Europe again responds to mass exodus from the Balkans.

NOTES

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2. The research visits were conducted between January – September 1997, with follow up visits in Germany, Austria and the Netherlands. For a full report on the research results, see Richard Black, Khalid Koser and Martha Walsh, *Conditions for the Return of Displaced Persons from the European Union: Final Report* (University of Sussex, 1997). The EU states not visited as part of this research were Ireland, Portugal and Spain.
3. Sweden also amended its refugee law to allow for the issuance of temporary residence permits, but these were used primarily to suspend the deportation of convicted criminals whose country of origin was in a state of war. It was also used for a specific group of Bosnian Croats who arrived with Croatian passports, but for the majority of Bosnians refugee status was granted after application of the normal asylum procedures.

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TABLE 1
EVOLUTION OF RESPONSES TO REFUGEES IN EUROPE

| Period | Populations of concern | Predominant responses |
|-------------|----------------------------------|--|
| 1940s-1950s | Jews, Eastern Europeans | Third country resettlement |
| 1960s | "Escapees" from Communist Europe | Third country resettlement, local integration |
| 1970s | "Third World" refugees | Local integration, some repatriation |
| 1980s | "Spontaneous" asylum-seekers | Restrictions on entry, repatriation of failed asylum-seekers |
| 1990s | Bosnians | Temporary protection, restrictions on entry, "safe havens" |

TABLE 2
ESTIMATED BOSNIAN POPULATIONS IN THE EU

| Country | Population |
|----------------|------------|
| Austria | 88,609 |
| Belgium | 6,000 |
| Denmark | 21,458 |
| Finland | 1,350 |
| France | 15,000 |
| Germany | 342,500 |
| Greece | 4,000 |
| Ireland | 886 |
| Italy | 8,827 |
| Luxembourg | 1,816 |
| Netherlands | 25,000 |
| Portugal | * |
| Spain | 1,900 |
| Sweden | 60,671 |
| United Kingdom | 6,000 |
| Total | 584,017 |

*No data available.

Source: UNHCR, 1997a: 5.

TABLE 3
 BOSNIANS IN EU MEMBER STATES WITH "TEMPORARY PROTECTION"
 AND AS A PERCENTAGE OF THE TOTAL BOSNIAN POPULATION
 (as of 1 July 1997)

| Country | Number with "temporary" protection | Per cent of Bosnian population |
|----------------|------------------------------------|--------------------------------|
| Austria | 8,609 | 9.7 |
| Belgium | 5,704 | 95.1 |
| Denmark | 1,421 | 6.6 |
| Finland | 0 | 0 |
| France | 7,394 | 49.3 |
| Germany | 275,000 | 80.3 |
| Greece | 250 | 6.3 |
| Ireland | 16 | 1.8 |
| Italy | 8,827 | 100 |
| Luxembourg | 466 | 34.6 |
| Netherlands | 6,000 | 24.0 |
| Portugal | 0 | 0 |
| Spain | 0 | 0 |
| Sweden | 3,441 | 5.7 |
| United Kingdom | 3,340 | 55.6 |

Source: UNHCR, 1997a: 5.

TABLE 4
CRITERIA FOR THE TRANSFER OF BOSNIANS
WITH TEMPORARY PROTECTION TO A MORE PERMANENT STATUS

| Country | Criteria |
|-------------|---|
| Austria | <ul style="list-style-type: none">• Regular employment• Private accommodation• No criminal record |
| Denmark | <ul style="list-style-type: none">• Subject to individual asylum applications |
| Finland | <ul style="list-style-type: none">• Arrived pre-Dayton• Resident for 2 years |
| France | <ul style="list-style-type: none">• Subject to individual asylum applications |
| Luxembourg | <ul style="list-style-type: none">• Regular employment• Private accommodation• No criminal record |
| Netherlands | <ul style="list-style-type: none">• Arrived before 1 January 1994 |
| Sweden | <ul style="list-style-type: none">• Subject to individual asylum application |

Source: Black et al., 1997.

LES LIMITES DE L'HARMONISATION:
LA "PROTECTION TEMPORAIRE"
DES RÉFUGIÉS DANS L'UNION EUROPÉENNE

Cet article examine les limites de l'harmonisation au niveau de l'Union européenne à travers une étude de cas portant sur la politique pratiquée à l'égard des personnes ayant fui la guerre en Bosnie-Herzégovine au début des années 90.

Une attention particulière est accordée à l'élaboration de la politique de "protection temporaire", par opposition au statut de réfugié à part entière accordé aux demandeurs d'asile bosniaques, cette politique ayant été mise en place dans l'ensemble des quinze Etats membres de l'Union.

L'argument des auteurs est que ce statut de "protection temporaire" est le fruit d'un ensemble de mesures spécifiques adoptées lorsque la guerre a éclaté en ex-Yougoslavie, constituant un compromis entre le désir des Etats de restreindre l'asile d'une part, tout en répondant aux attentes de l'opinion publique et des organisations internationales dans le sens d'une protection des réfugiés d'autre part.

Des analyses ultérieures ont révélé que ce compromis pouvait constituer un moyen efficace d'harmoniser les politiques au niveau européen, et même de reformuler le système international de protection des réfugiés.

Les auteurs pour leur part se montrent plus dubitatifs sur ce point: ils citent à ce propos l'analyse qu'ils ont faite de la mesure dans laquelle la "protection temporaire" accordée aux Bosniaques a été coordonnée ou a dans la pratique apporté aux Etats et aux migrants les bénéfices annoncés.

LÍMITES DE LA ARMONIZACIÓN:
LA "PROTECCIÓN TEMPORAL"
DE REFUGIADOS EN LA UNIÓN EUROPEA

Este artículo examina los límites de la armonización, a nivel de la Unión Europea, a través de un estudio por casos de la política aplicada para con las personas que huyeron de la guerra en Bosnia y Herzegovina a principios de los años 90.

Se concede particular atención al desarrollo de una política que otorga "protección temporal" en lugar del estatuto de refugiado a los solicitantes de asilo bosnios, que se hallan dispersos en los 15 Estados miembros.

Se arguye que la "protección temporal" emergió como una serie de respuestas específicas al inicio de la guerra en la ex Yugoslavia y era un compromiso entre

la voluntad de los Estados de restringir el asilo por un lado y de satisfacer la demanda de la opinión pública y de las organizaciones internacionales para ofrecer protección a los refugiados por otro.

Los análisis ulteriores sugieren que estos compromisos podrían proveer un medio efectivo para alentar la armonización de políticas a nivel europeo, incluso un sistema internacional reformulado de protección de refugiados.

No obstante, este artículo cuestiona esta perspectiva a través de un análisis en el que se pregunta en qué medida la "protección temporal" de bosnios fue coordinada o aportó en la práctica los supuestos beneficios para Estados e individuos.