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## Cutting the Wire: A Comprehensive EU-Wide Approach to Refugee Crises

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# CUTTING THE WIRE: A COMPREHENSIVE EU-WIDE APPROACH TO REFUGEE CRISES

*“A nation ringed by walls would only imprison itself.”<sup>1</sup>*

## INTRODUCTION

On September 3, 2015, the image of a lifeless young boy, who drowned while crossing the Mediterranean Sea with his family to escape war-torn Syria, flooded international media outlets and exposed one of the horrors refugees face when seeking sanctuary.<sup>2</sup> Unfortunately, death is commonplace for migrants traversing the Mediterranean Sea in order to escape their countries of origin.<sup>3</sup> The International Organization for Migration<sup>4</sup> estimates that over 3,500 migrants have drowned in the Mediterranean since the beginning of 2016.<sup>5</sup> Moreover, even when a refugee arrives on European shores, there is no guarantee that he or she will be welcomed or permitted to stay. This

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1. A quote from U.S. President Barack Obama at his last appearance with the U.N. General Assembly, where he pressed for more integrated and cooperative global efforts to address transnational issues such as the refugee crisis. Mark Lander, *Obama, in Farewell to U.N., Paints Stark Choices for World*, N.Y. TIMES, Sept. 21, 2016, at A10.

2. Joe Parkinson, *Image of a Drowned Syrian Boy Echoes Around World*, WALL ST. J. (Sept. 3, 2015, 7:28 PM), <http://www.wsj.com/articles/image-of-syrian-boy-washed-up-on-beach-hits-hard-1441282847>.

3. News media has documented the frequency of overcrowded capsized rafts and European coastguard rescues on the Mediterranean Sea. More recently, the bodies of at least one hundred migrants, “including many women and children” believed to be from mostly African countries, washed ashore on a Libyan beach in June 2016. Josephine McKenna & Louisa Loveluck, *Refugee Crisis: 117 Migrants Found Dead on Libyan Beach as Mediterranean Drownings Rise Alarmingly*, TELEGRAPH (June 3, 2016), <http://www.telegraph.co.uk/news/2016/06/03/refugee-crisis-300-people-rescued-as-boat-cap-sizes-off-island-off/>.

4. The International Organization for Migration is “the leading inter-governmental organization in the field of migration” and works with national governments and intergovernmental and nongovernmental organizations to “ensure the orderly and humane management of migration, to promote international cooperation on migration issues,” among other things. *About IOM*, INT’L ORG. FOR MIGRATION, <http://www.iom.int/about-iom> (last visited Oct. 9, 2016).

5. Int’l Org. for Migration, *Mediterranean Sea, MISSING MIGRANTS PROJECT*, <http://missingmigrants.iom.int/mediterranean> (last visited Sept. 23, 2016).

uncertainty is exacerbated in times of mass migration crises, like the one currently engulfing Europe, which has received over a million refugees since 2015, because states do not have the capacity to process each individual asylum application due to the number they receive.<sup>6</sup>

The U.N. High Commissioner for Refugees (UNHCR) determined that the traditional response by states to large influxes of refugees “has been to use *prima facie* [group] determination[s]” without formally evaluating each individual’s refugee status claim.<sup>7</sup> In essence, *prima facie* group determinations are a state’s recognition of refugee status “on the basis of readily apparent, objective circumstances” in the refugee’s country of origin prompting the exodus.<sup>8</sup> The European Union has not adopted this approach to the current refugee crisis. Instead, EU Member States are at a standstill and divided<sup>9</sup> over how to address the mass influx of migrants while remaining within the bounds of both EU asylum laws and European human rights laws, as well as international refugee law.

The disjointed treatment of refugees among EU Member States demonstrates the dissidence in which Member States view their legal obligations. For instance, in 2015, Germany planned to take in at least eight hundred thousand migrants<sup>10</sup> and contribute significant funds to deal with the refugee crisis.<sup>11</sup>

6. *Irregular Migrant, Refugee Arrivals in Europe Top One Million in 2015*: IOM, INT’L ORG. FOR MIGRATION (Dec. 22, 2015), <http://www.iom.int/news/irregular-migrant-refugee-arrivals-europe-top-one-million-2015-iom> [hereinafter *Irregular Migrant Arrivals*].

7. Global Consultations on International Protection, *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, ¶ 4, U.N. Doc. EC/GC/01/4 (Feb. 19, 2001), <http://www.unhcr.org/558a62299.html>.

8. *Id.* ¶ 6.

9. Rick Lyman & Alison Smale, *As Europe Grasps for Answers, More Migrants Flood Its Borders*, N.Y. TIMES, Sept. 7, 2015, at A1.

10. Luke Harding et al., *Germany Urges Other EU Countries to Take In More Refugees*, GUARDIAN (Aug. 31, 2015), <http://www.theguardian.com/world/2015/aug/31/refugees-found-suffocated-lorry-austria-syrian-family-of-six>. In fact, Germany accepted almost nine hundred thousand refugees in 2015. Rick Noack, *Germany Said it Took in More than 1 Million Refugees Last Year. But it Didn’t.*, WASH. POST (Sept. 30, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/09/30/germany-said-it-took-in-more-than-1-million-refugees-last-year-but-it-didnt/>.

11. In 2015, Germany planned to contribute about \$6.7 billion USD. Rick Lyman et al., *A Steady Flow Staggers Into Europe, Outpacing Pledges of Shelter*, N.Y. TIMES, Sept. 8, 2015, at A9. Additionally, in May 2016, the German

Conversely, Hungary has not been nearly as receptive with respect to taking in refugees within its borders. In fact, the Hungarian Parliament has pursued measures to close its borders, including “building a razor-wire fence along its 108-mile southern border with Serbia” and adopting both harsher laws involving the treatment of migrants and imposing penalties on individuals who help them.<sup>12</sup> The difference in EU Member States’ responses to the refugee crisis is surprising given that all EU Member States are parties to the 1951 Convention Relating to the Status of Refugees (the “1951 Convention”)<sup>13</sup> and the 1967 Protocol Relating to the Status of Refugees (the “1967 Protocol”).<sup>14</sup>

Under the auspices of the United Nations, the 1951 Convention and the 1967 Protocol were the international community’s response to the exodus of individuals who fled Nazi persecution during World War II.<sup>15</sup> The 1951 Convention and the 1967 Protocol lie at the heart of the international regime of refugee protection. In fact, they are the only global treaties of refugee law.<sup>16</sup> Furthermore, the 1951 Convention and the 1967 Protocol are integral to refugee protection, as they elucidate the minimum obligations that states parties must provide to refugees and identify refugees’ legal rights.<sup>17</sup> For example, in defining “refugee,” Article 1 of the 1951 Convention, as enhanced by the 1967 Pro-

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Federal Ministry of Finance projected to spend at least \$100 billion USD by the end of 2020 on costs associated with the refugee crisis. *German Government Plans to Spend 93.6 Billion Euros on Refugees by End 2020: Spiegel*, REUTERS (May 14, 2016), <http://www.reuters.com/article/us-europe-migrants-germany-costs-idUSKCN0Y50DY>.

12. Lyman & Smale, *supra* note 9.

13. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention]; *see also States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, U.N. HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (last updated Apr. 17, 2015) [hereinafter *States Parties*].

14. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]; *States Parties*, *supra* note 13.

15. Guy S. Goodwin-Gill, *Introductory Note*, U.N. AUDIOVISUAL LIBR. INT’L L., [http://legal.un.org/avl/pdf/ha/prsr/prsr\\_e.pdf](http://legal.un.org/avl/pdf/ha/prsr/prsr_e.pdf) (last visited Sept. 25, 2016).

16. U.N. High Commissioner for Refugees, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* 2 (2011), <http://www.unhcr.org/4ec262df9.pdf>.

17. *See id.*

TOCOL's removal of the temporal and geographical restrictions imposed on refugee status,<sup>18</sup> establishes bright-line qualifications that a refugee must possess before receiving refugee status internationally: mainly, a well-founded fear of persecution on account of one of the five protected grounds (race, religion, membership in a particular social group, nationality, or political opinion).<sup>19</sup> The 1951 Convention is also significant because it "contains a range of rights to which refugees are entitled,"<sup>20</sup> most importantly the prohibition on refoulement.<sup>21</sup> Article 33 contains the nonrefoulement clause, which today is a customary norm of international law that prohibits all states, including non-state parties to the 1951 Convention, from returning a refugee to their country of origin, where the refugee's life or freedom would be threatened on account of one of the five protected grounds.<sup>22</sup>

Although the provisions of the 1951 Convention and the 1967 Protocol are legally binding throughout the EU, it is evident that some EU Member States are ignoring their obligations in the wake of the recent migrant crisis.<sup>23</sup> As migrants arrive by the thousands on European shores, some EU Member States are neither acting in accordance with the spirit of international refugee law nor complying with either the EU's regional asylum laws, which incorporate the 1951 Convention and 1967 Protocol, or European human rights law.<sup>24</sup> Moreover, it is clear that one of the EU's main goals of promoting human rights regionally and internationally<sup>25</sup> has taken a backseat, as demonstrated by the harsh treatment of refugees at Member States' borders and in

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18. The 1967 Protocol expanded the scope of protection under the 1951 Convention by removing the temporal and geographical limitations imposed by the 1951 Convention's original definition, which only applied to events occurring in Europe as a result of World War II. 1967 Protocol, *supra* note 14, art. 1.

19. 1951 Convention, *supra* note 13, art. 1. This can also be viewed as a workable standard, as states parties are free to expand the scope of who qualifies for refugee protection (i.e., an individual fleeing an environmental disaster), as long as it falls within the limits of Article 1. *Id.* art. 5.

20. Alice Edwards, *International Refugee Law*, in INTERNATIONAL HUMAN RIGHTS LAW 521 (Daniel Moeckli et al. eds., 2d ed. 2014).

21. *See* 1951 Convention, *supra* note 13, art. 33.

22. *Id.*

23. *See infra* Part III.B.

24. *See infra* Parts I, II.

25. *The EU in Brief*, EUR. UNION, [http://europa.eu/about-eu/basic-information/about/index\\_en.htm](http://europa.eu/about-eu/basic-information/about/index_en.htm) (last updated Oct. 10, 2015) [hereinafter *EU in Brief*].

refugee camps.<sup>26</sup> Thus, in a hasty reaction to both the deluge of refugees and conflicting responses to the crisis by Member States, the EU, through acts of the EU's executive body (European Commission)<sup>27</sup> and EU's legislative body (the Council of the EU (the "Council")),<sup>28</sup> attempted to force uniformity throughout the Member States by implementing an "agreed" upon<sup>29</sup> temporary relocation mechanism: the quota system.

Based on a proposal from the European Commission, on September 14, 2015, the Council implemented the initial quota system, which was to relocate forty thousand persons in clear need of international protection from Italy and Greece<sup>30</sup> and disperse them throughout other EU Member States.<sup>31</sup> The Council, however, realized that Greece and Italy's asylum systems would continue to face heightened pressure and, as a result, approved a new plan that added an additional 120,000 persons to the original number of persons to be relocated, thereby totaling 160,000

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26. *See supra* Part III.B.

27. The European Commission is the EU's executive body. *About the European Commission*, EUR. COMMISSION, [http://ec.europa.eu/about/index\\_en.htm](http://ec.europa.eu/about/index_en.htm) (last visited Oct. 6, 2016). Among many other executory functions, it has the ability to propose legislation and enforce European law. *Id.*

28. The Council of the EU consists of "Government ministers from each EU country." *Council of the European Union*, EUR. UNION, [http://europa.eu/about-eu/institutions-bodies/council-eu/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/council-eu/index_en.htm) (last visited Mar. 22, 2016). The Council "negotiates and adopts EU laws, . . . coordinates member states' policies, . . . develops the EU's common foreign and security policy, . . . concludes international agreements, and . . . adopts the EU budget." *Id.* Furthermore, the Council ministers have the authority to commit their governments to the actions agreed on in Council meetings. *Id.* For more information about the Council, see *Council of the European Union*, COUNCIL EUR. UNION, <http://www.consilium.europa.eu/en/council-eu/> (last updated Jan. 28, 2015).

29. On the contrary, some Member States did not voluntarily agree to implement the quota system and take in refugees. The quota scheme, however, was approved, despite protests from the Czech Republic, Slovakia, Romania, and Hungary. Matthew Holehouse, *EU Quota Plan Forced Through Against Eastern European States' Wishes*, TELEGRAPH (Sept. 23, 2015), <http://www.telegraph.co.uk/news/worldnews/europe/11883024/Europe-ministers-agree-relocation-of-120000-refugees-by-large-majority.html>.

30. The Council of the EU recognized that Italy and Greece "have experienced unprecedented flows of migrants" as these countries continue to be hotspots for irregular border crossings because they lie along the Mediterranean Sea. Council Decision 2015/1523, 2015 O.J. (L 239) 147 (EU) [hereinafter Council Decision 2015/1523].

31. *Id.* at 146.

persons.<sup>32</sup> In implementing the quota system, the Council tried to ensure that Member States were acting in solidarity and fairly sharing the responsibility in regards to examining and processing applications for international protection.<sup>33</sup> Despite the EU's efforts, however, some countries have resisted opening their borders.<sup>34</sup> The discordance among Member States' responses demonstrates that piecemeal, reactionary solutions are ineffective for these types of crises, and more meaningful, proactive, and uniform actions are needed to both alleviate the current crisis and address future migrant exoduses.

Rather than continuing to adhere to obsolete and ineffective legislation, the EU should instead implement a regulation<sup>35</sup> that establishes a two-step permanent emergency framework for responding to refugee crises. Step 1 of this approach would provide the permanent framework that should be executed in the event of a migration crisis. This not only includes defining the criteria constituting a migration crisis but also elucidating who qualifies for international protection and the number of people to be relocated, among other factors. A permanent framework that explicitly delineates the scope of a migration crisis will provide Member States with uniform criteria and notice that when these criteria are met, each Member State will have certain legal obligations with respect to examining asylum applications and providing refugees with certain rights. Step 2 of this approach entails executing the emergency framework in the event of a migration crisis. The emergency framework this Note proposes would impose mandatory quotas on each Member State for the number of applications each state is responsible for examining; however, unlike the quota system in effect and the proposals floating

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32. Council Decision 2015/1601, 2015 O.J. (L 248) 82 (EU) [hereinafter Council Decision 2015/1601]; European Commission Press Release IP/15/5596, Refugee Crisis: European Commission Takes Decisive Action (Sept. 9, 2015).

33. Council Decision 2015/1601, *supra* note 32, at 80. The terms "solidarity" and "fair sharing of responsibility" are key terms comprising the EU's regional asylum treaties and legislation in the hopes of someday forming a regional common asylum policy. See Consolidated Version of the Treaty on the Functioning of the European Union arts. 67, 80, June 7, 2016, 2016 O.J. (C 202) [hereinafter TFEU].

34. See *How Is the Migrant Crisis Dividing EU Countries?*, BBC NEWS (Mar. 4, 2016), <http://www.bbc.com/news/world-europe-34278886>.

35. Regulations are legislative acts that are binding upon EU Member States. *Regulations, Directives, and Other Acts*, EUR. UNION, [https://europa.eu/european-union/law/legal-acts\\_en](https://europa.eu/european-union/law/legal-acts_en) (last visited Oct. 15, 2016).

around, the quotas advocated for in this Note will be enforceable by the European Commission. It is crucial that the quotas are mandatory and enforceable by the European Commission to ensure that each Member State is doing their share to alleviate the deluge of migrants coming to Europe and to avoid the issue of only a few Member States taking in a majority of applicants. The expanded permanent emergency framework and mandatory quotas this Note advocates for are in accordance with international refugee law and the regional asylum laws in force throughout the EU. The emergency mechanism will allow more individuals to be eligible for international protection in the event of a migration crisis and will not sacrifice refugees' right to asylum in the event of an emergency. Additionally, such a revised framework will allow the EU to be better prepared in handling both the current exodus of people and future exoduses, as there will already be procedures in place for determining how the EU should respond and disperse asylum applicants throughout the EU.

Part I of this Note will look at the major bodies of international refugee law, including a historical overview of its foundations, the 1951 Convention, and the 1967 Protocol. Part II will explore the specific legal mechanisms that are in effect throughout the EU, including the EU's asylum laws and European human rights law, which guide how Member States should treat refugees generally.<sup>36</sup> Part III will first provide an overview of the European refugee crisis by examining its root causes and the circumstances that led to the mass exodus of people in Europe's most prominent refugee-producing countries. Additionally, it will discuss Hungary and Germany's conflicting responses to the crisis, as these EU Member States have diverging views with respect to accepting refugees, and the EU's most recent agreed-upon solution to relocate refugees through a quota system. Finally, Part IV of this Note will first critique the current quota system and the proposal it was based upon and highlight their inefficiencies with respect to international refugee law and EU asylum law. It will then propose that the EU utilize a two-step

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36. These include the 1951 Convention and the 1967 Protocol, which all EU Member States have either ratified or acceded to, and regional asylum legislation in effect throughout the EU. Ultimately, this Note focuses on the EU's heightened role in resolving migration crises because of the vast scope of binding legislation in force throughout the EU with respect to refugee protection. See *infra* Parts I, II.



approach in establishing a permanent framework for addressing emergency migration crises. The first step of this approach, which must be implemented immediately, would delineate the scope of the emergency framework, including whom the emergency system applies to and the criteria for triggering the emergency mechanism—mainly, the conditions constituting an international migration crisis. The second part of this approach, which would come into effect if the criteria has been met for establishing a migration crisis, will provide the procedural framework to ensure Member States' responses to migration crises are uniform and that refugees' right to seek asylum is protected (i.e., through mandatory and enforceable quotas).

## I. INTERNATIONAL REFUGEE LAW

International refugee law “is the body of law that regulates the status and rights of refugees” and assists in providing lasting solutions to refugees' situations,<sup>37</sup> including prolonged statelessness and the uncertainty of their legal status. The crux of international refugee law is to “ensure that refugees who are outside their countries of origin or nationality receive protection of their basic rights,” which their own governments can no longer provide or fail to protect due to some extenuating circumstance.<sup>38</sup> Although refugees have existed throughout history, many assert that the current international refugee protection regime, which includes the 1951 Convention and the 1967 Protocol, was a post-World War II development.<sup>39</sup> It is important to understand the major components of the postwar global refugee protection regime, as these instruments have been incorporated into the EU's regional refugee protection laws and European human rights law. In order to better understand the current framework for international refugee law, this Part will first provide a brief historical overview of international refugee law. This Part will then provide an overview of the UNHCR, which is the predominate international agency charged with securing the welfare and protection of refugees.<sup>40</sup> Next, this Part will examine in detail the

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37. Edwards, *supra* note 20, at 514.

38. *Id.* at 513.

39. *Id.* at 516.

40. See generally *What We Do*, U.N. HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/pages/49c3646cbf.html> (last visited Jan. 9, 2016).

Universal Declaration of Human Rights (UDHR), which, although nonbinding, is integral to the foundation of international refugee law.<sup>41</sup> Finally, this Part will provide an overview of the two main legal resources in which refugees' rights are enshrined—the 1951 Convention and the 1967 Protocol—and will provide a detailed analysis of their relevant provisions.

A. *Historical Overview of International Refugee Law*

While refugees have existed throughout history, the international community only put provisions in place to aid refugees beginning in 1921 with the establishment of the League of Nations and the election of Dr. Fridtjof Nansen as the first High Commissioner for refugees, who assisted many groups displaced by World War I and the Russian revolution.<sup>42</sup> The League of Nations' international refugee protection regime was limited in scope because it defined a refugee in relation to his or her country of origin.<sup>43</sup> Post-World War I arrangements in respect to refugee protection were also deficient because they "contained only recommendations addressed to states parties for the treatment of refugees" instead of clear legal requirements.<sup>44</sup>

The lack of clear legal guidelines for international refugee protection had severe consequences in the aftermath of World War II, as an insurmountable number of individuals remained displaced from Nazi persecution.<sup>45</sup> Until 1950, "the League of Nations, and thereafter the U.N., established and dismantled several international institutes devoted to refugees in Europe," including the International Refugee Organization (IRO).<sup>46</sup> The IRO, whose chief purpose was to aid in large-scale resettlement

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41. Edwards, *supra* note 20, at 515.

42. Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 WASH. U. J.L. & POL'Y 129, 130 (2001); DAVID A. MARTIN ET AL., *FORCED MIGRATION LAW AND POLICY* 49 (2d ed. 2013).

43. Feller, *supra* note 42, at 129; MARTIN ET AL., *supra* note 42, at 50 ("This early international regime generally defined refugees in terms of specific political crises. Thus, international protection extended only to those who belonged to certain national groups and who no longer enjoyed the protection of their national government.").

44. MARTIN ET AL., *supra* note 42, at 50.

45. See generally Feller, *supra* note 42, at 131.

46. *Id.* at 130.

of refugees displaced by World War II, was established as a temporary agency<sup>47</sup> with a three-year mandate.<sup>48</sup> At the end of the three years, the international community proved unwilling to continue providing financial assistance for displaced persons and did not extend the IRO's mandate.<sup>49</sup> It was clear, however, that the postwar refugee problem was far from over, as people continued to flee Eastern Europe for resettlement in the West in the wake of World War II and the rise of Communism respectively.<sup>50</sup> Consequently, the U.N. General Assembly, the main deliberative and policymaking body of the U.N.,<sup>51</sup> decided to replace the IRO with the UNHCR as a subsidiary organ of the General Assembly.<sup>52</sup> Furthermore, and almost simultaneously with the establishment of the UNHCR, the international refugee protection regime was established, which includes the 1951 Convention and the 1967 Protocol.

#### B. UNHCR

The U.N. established the UNHCR after World War II to assist with the mass influx of Europeans displaced by the war.<sup>53</sup> The U.N. General Assembly appeared to have underestimated the extent of the migration flows, due to the fact it gave the program a three-year mandate to resolve the mass displacement of people resulting from World War II.<sup>54</sup> A few years into its existence, however, the UNHCR was tasked with responding to its first refugee crisis outside of World War II—the deluge of Hungarians fleeing Soviet forces after the Hungarian Revolution.<sup>55</sup> Shortly

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47. MARTIN ET AL., *supra* note 42, at 52 (“The IRO would repatriate [the refugees] that it could, seek resettlement for the rest, and then close its doors.”).

48. David Kennedy, *International Refugee Protection*, 8 HUM. RTS. Q. 1, 3 (1986).

49. *Id.* at 3.

50. *Id.*

51. For more information about the U.N. General Assembly, see *Functions and Powers of the General Assembly*, GEN. ASSEMBLY UNITED NATIONS, <http://www.un.org/en/ga/> (last visited Oct. 10, 2016).

52. Feller, *supra* note 42, at 130.

53. *History of the UNHCR*, U.N. HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/pages/49c3646cbc.html> (last visited Jan. 4, 2016).

54. *Id.*

55. *Id.*

thereafter, it became clear the need for the UNHCR's permanency in protecting refugees, and expectations about the agency's temporary nature dissipated.<sup>56</sup>

The role of the UNHCR, which exists to this day, is to "provide international protection for refugees and to seek permanent solutions to their problems" by assisting destination countries in facilitating refugees' repatriation back to their origin countries or assimilation within new national communities.<sup>57</sup> In contrast to the IRO, which provided a host of services for refugees, including managing temporary housing and issuing passports, the lynchpin of the UNHCR's authority is limited to providing refugees protection "normally accorded [to] a national by his sovereign at international law."<sup>58</sup> In other words, the UNHCR supplants national governments that are either unwilling or unable to protect their citizens until those governments regain the ability to do so by administering refugee protection.<sup>59</sup>

The 1951 Convention and the 1967 Protocol are the main legal instruments guiding the UNHCR's work.<sup>60</sup> The U.N. mandates that the UNHCR "provide international protection to refugees and, together with governments, . . . seek solutions" to refugees' unique situations, including statelessness and the uncertainty of their legal status.<sup>61</sup> A part of the U.N. mandate includes "supervising the application of international conventions" that provide for the protection of refugees.<sup>62</sup> Furthermore, "states parties to the Refugee Convention and/or 1967 Protocol are required to cooperate with UNHCR in the exercise of its functions" and must inform the UNHCR if any laws or regulations are enacted that relate to refugees.<sup>63</sup>

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56. *See id.* Furthermore, in 2004, the U.N. General Assembly extended the UNHCR's mandate to continue indefinitely "until the refugee problem is solved." G.A. Res. 58/153, ¶ 9 (Feb. 24, 2004).

57. *Id.* at 130–31.

58. Kennedy, *supra* note 48, at 4.

59. *Id.*

60. *1951 Refugee Convention*, U.N. HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/1951-refugee-convention.html> (last visited June 5, 2016).

61. *See* Edwards, *supra* note 20, at 514–15.

62. *See id.* at 515; G.A. Res. 428(V), ¶ 8 (Dec. 14, 1950).

63. *See* Edwards, *supra* note 20, at 515; 1951 Convention, *supra* note 13, art. 35.

### C. UDHR

The precepts of international refugee law are premised on human rights set forth in the UDHR.<sup>64</sup> Similar to most of the current refugee protection regime, the UDHR was also a response to the mass atrocities that occurred during World War II.<sup>65</sup> The UDHR was formulated to express certain inalienable rights of all people, including the right to a life of dignity and the right to be free from torture and cruel treatment.<sup>66</sup> The most important provision of the UDHR relating to the treatment of refugees, however, is Article 14, which recognizes the right of individuals “to seek and enjoy in other countries asylum from persecution” as a human right.<sup>67</sup> Although the UDHR is not binding on signatories, it “has inspired a rich body of legally binding international human rights treaties,” including the 1951 Convention and its 1967 Protocol.<sup>68</sup>

### D. The 1951 Convention

The 1951 Convention has been referred to as the “Magna Carta of international refugee law.”<sup>69</sup> Similar to the UDHR and the UNHCR, the Convention emerged as a response to the turmoil leftover from World War II.<sup>70</sup> At the end of the war, “hundreds of thousands of refugees wandered aimlessly across the European continent or squatted in makeshift camps.”<sup>71</sup> To assuage this problem, U.N. Member States came together and established the 1951 Convention.<sup>72</sup>

The 1951 Convention not only defines who qualifies as a refugee but “codifies the rights that refugees are to enjoy and the correlative obligations on states to respect, protect, and fulfill

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64. Edwards, *supra* note 20, at 31.

65. See Ed Bates, *History*, in INTERNATIONAL HUMAN RIGHTS LAW 30 (Moeckli et al., 2d ed. 2014).

66. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

67. *Id.* art. 14.

68. *The Foundation of International Human Rights Law*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (last visited Jan. 9, 2016).

69. Ray Wilkinson & Mountra Skandrani, *The Refugee Convention at 50*, in 2 REFUGEES 2 (UNHCR ed. 2001), <http://www.unhcr.org/3b5e90ea0.html>.

70. *Id.*

71. *Id.*

72. *Id.*

those rights.”<sup>73</sup> The generally accepted purpose of the 1951 Convention is that it lays out a framework whereby signatories are to provide protection to people that the convention recognizes as refugees.<sup>74</sup> Furthermore, the Convention is legally binding on signatories, which includes all EU Member States.<sup>75</sup>

One of the most significant aspects of the 1951 Convention is that it provides the groundwork for who classifies as a “refugee.”<sup>76</sup> Article 1 of the 1951 Convention states that the designation of “refugee” applies to

any person who as a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of the country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>77</sup>

Article 1 is notable because while it defines who qualifies as a refugee, it also limited the scope of the 1951 Convention to apply to events occurring in Europe because of World War II.<sup>78</sup> Consequently, the 1951 Convention severely limits refugee protection because it only applies to persons who are seeking protection as a result of World War II. Article 1 also elucidates the grounds excluding people from receiving international protection, including persons who are believed to have committed war crimes and

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73. Edwards, *supra* note 20, at 515. In respecting refugees’ rights, “states have a negative obligation not to take any measures that result in a violation of a given right.” Frédéric Mégret, *Nature of Obligations*, in INTERNATIONAL HUMAN RIGHTS LAW 102 (David Moeckli et al., 2d ed. 2014). In protecting refugees’ rights, “the state needs to proactively ensure that persons within its jurisdiction do not suffer from human rights violations at the hands of third parties.” *Id.* Furthermore, “the state is liable for those failures that can be traced to its shortcomings in protecting individuals from other individuals . . . or because it has failed to do something that would have prevented the violation from happening.” *Id.* The obligation to fulfill “involves an obligation on states to adopt appropriate laws that implement their international undertakings.” *Id.*

74. Edwards, *supra* note 20, at 515.

75. *States Parties*, *supra* note 13.

76. 1951 Convention, *supra* note 13, art. 1.

77. *Id.*

78. *Id.*

crimes against humanity.<sup>79</sup> Article 3, however, enhances the provisions of Article 1 and captures the principle of nondiscrimination, which obliges states to enforce the 1951 Convention in a nondiscriminatory manner as to a person's race, religion, or country of origin.<sup>80</sup>

Another important provision, which some scholars have deemed the "cardinal provision" of the 1951 Convention is "Article 33—the 'refugee nonrefoulement'" clause.<sup>81</sup> Article 33 prohibits states from returning "a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion."<sup>82</sup> The concept of nonrefoulement is so sacrosanct that the international community has recognized it as a norm of customary international law,<sup>83</sup> binding on all states whether or not they are parties to the 1951 Convention. Moreover, this provision has been incorporated in many states' domestic and regional asylum legislation, including the EU's asylum laws.<sup>84</sup> This obligation applies equally to refugees whose claims for international protection have been determined as well as asylum seekers whose status has not yet been determined.<sup>85</sup> Consequently, the practical implications of this provision are that refugees, including those applying for refugee protection, are guaranteed the right to not be returned to a place where their life or freedom would be threatened on account of one of the five grounds, unless they fall within one of the exceptions listed by Article 33.<sup>86</sup> Thus, while

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79. *Id.* art. 1(F). Such acts, however, may include nonviolent actions, like if the person has reavailed him or herself of the protection of their country of origin. *Id.* art. 1(C).

80. *Id.* art. 3.

81. Edwards, *supra* note 20, at 520.

82. 1951 Convention, *supra* note 13, art. 33.

83. See Edwards, *supra* note 20, at 512; see also Christine Chinkin, *Sources*, in INTERNATIONAL HUMAN RIGHTS LAW 81 (David Moeckli et al., 2d ed. 2014). Customary international law "comprises two components: an extensive and virtually uniform and consistent state practice and the belief that the practice is required by law (*opinio juris*) rather than some other reason." *Id.* at 81–82. Furthermore, compared to treaties, "customary international law may be accepted as the law of the land without any such act of a [state's] incorporation." *Id.* at 83.

84. See *infra* Part II.

85. Edwards, *supra* note 20, at 521.

86. 1951 Convention, *supra* note 13, art. 33 ("The benefit of the [nonrefoulement] provision may not, however, be claimed by a refugee whom there

individuals are not guaranteed the benefits of being granted refugee status, they are guaranteed the right of nonrefoulement.

Another important provision of the 1951 Convention is the nonpenalization clause. Article 31 “guarantee[s] nonpenalization of asylum seekers and refugees who show ‘good cause’ for illegal entry or stay.”<sup>87</sup> The drafters recognized that persons fleeing their home countries rarely are able to satisfy the requirements for legal entry in the country they are fleeing to because they are normally escaping their home country in haste and have little time to gather their belongings and documents. Consequently, the drafters observed that fleeing persecution would fall into the “good cause” exception for illegal entry.<sup>88</sup> The effects of this provision on refugees are limited because, while states are prohibited from penalizing refugees for being illegally present, states have the power to detain refugees and apply restrictions on their free movement as necessary.<sup>89</sup>

Finally, the 1951 Convention also sets out the protections and rights refugees should receive. The 1951 Convention recognizes that refugees lawfully present in a territory should enjoy a broad range of civil rights, including the freedoms of religion and association and the right to access judicial mechanisms, among many others.<sup>90</sup> The 1951 Convention also explicates certain economic, social, and cultural rights refugees lawfully present should enjoy, such as employment rights and certain welfare rights.<sup>91</sup>

The 1951 Convention is integral to refugee protection because it explicates the minimum obligations that states parties must provide to refugees and identifies refugees’ legal rights. In doing this, the 1951 Convention elucidates a uniform and internationally recognized definition of “refugee” and provides various rights that refugees are to receive and that states are to protect, including the right to nonrefoulement.

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are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”).

87. Edwards, *supra* note 20, at 516 (“Penalties in this sense include both criminal and administrative penalties such as fines or [certain forms of] detention.”); 1951 Convention, *supra* note 13, art. 31.

88. See Edwards, *supra* note 20, at 516.

89. 1951 Convention, *supra* note 13, art. 31(2).

90. *Id.* arts. 4–34.

91. *Id.*



*E. The 1967 Protocol*

Although the 1951 Convention marked a step in the right direction toward designing an international framework for refugee protection, the definition of "refugee" proved to be too restrictive as it only applied to events occurring in Europe as a result of World War II.<sup>92</sup> To eliminate this problem, countries that were parties to the 1951 Convention drafted the 1967 Protocol, which expanded the scope of who qualifies for refugee protection. The 1967 Protocol expanded the definition of "refugee" in two respects.<sup>93</sup> First, the 1967 Protocol removed the time limitation that the 1951 Convention's definition imposed by omitting the phrase "[a]s a result of events occurring before 1 January 1951."<sup>94</sup> Furthermore, the 1967 Protocol removed the geographical limitations by stating that the term "refugee" only applied to individuals who suffered during the prescribed time period and as a result of "events occurring in Europe."<sup>95</sup> Due to this expansion, more individuals could be classified as refugees and gain the protections and rights that refugee status provides.

**II. THE EU FRAMEWORK FOR REFUGEE PROTECTION**

Through the 1951 Convention and 1967 Protocol, international refugee law has paved the way for regional organizations, like the EU,<sup>96</sup> to formulate their own unique systems of refugee protection. The EU framework for refugee protection includes EU

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92. Wilkinson & Skandrani, *supra* note 69.

93. 1967 Protocol, *supra* note 14, art. 1.

94. *Id.*

95. *Id.*; see also 1951 Convention, *supra* note 13, art. 1.

96. In describing the EU's makeup, the European Commission states:

At the core of the EU are the Member States—the 28 countries that belong to the Union—and their citizens. The unique feature of the EU is that, although these are all sovereign, independent states, they have pooled some of their "sovereignty" in order to gain strength and the benefits of size. Pooling sovereignty means, in practice, that the Member States delegate some of their decision-making powers to the shared institutions they have created, so that decisions on specific matters of joint interest can be made democratically at European level. The EU thus sits between the fully federal system found in the United States and the loose, intergovernmental cooperation system seen in the United Nations.

asylum law, which incorporates the 1951 Convention and 1967 Protocol, and European human rights law. These bodies of law not only guide how Member States should assess stateless persons' claims for refugee protection but also elucidate rights that each Member State is obligated to provide to persons, including the prohibition against refoulement.

The EU has two regional treaties in force that influence the treatment of refugees—the Treaty on the Functioning of the European Union (TFEU) and the EU Charter of Fundamental Rights (“EU Charter”). These two regional treaties are integral to refugee protection as they both incorporate the 1951 Convention and the 1967 Protocol, which make them legally binding instruments of EU law.<sup>97</sup> Additionally, the EU Charter explicitly recognizes an individual's right to claim asylum and the protection against refoulement, which the EU is bound to respect when executing its regional asylum laws as prescribed under the TFEU. Besides these two regional treaties, the Common European Asylum System (CEAS), which is a combination of EU directives and regulations, attempts to coordinate Member States' asylum policies as required under the TFEU in order to ensure the rights granted under the EU Charter and international refugee law are applied uniformly throughout Member States.<sup>98</sup> Further, protection for refugees throughout the EU stems from European human rights law, namely through the European Convention on Human Rights, which prescribes the rights and protections that EU Member States<sup>99</sup> as well as nonmembers, must afford citizens and noncitizens, which include refugees.<sup>100</sup> Although an in-depth discussion of the enforcement mechanisms

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EUR. UNION, HOW THE EUROPEAN UNION WORKS 3 (2014), [http://www.gr2014parliament.eu/Portals/6/PDFFILES/NA0113090ENC\\_002.pdf](http://www.gr2014parliament.eu/Portals/6/PDFFILES/NA0113090ENC_002.pdf).

97. TFEU art. 78(1); Charter of Fundamental Rights of the European Union arts. 18, Oct. 26, 2012, 2012 O.J. (C 326) [hereinafter EU Charter].

98. *Common European Asylum System*, EUR. COMMISSION, [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm) (last updated June 23, 2015).

99. The Treaty of Lisbon Amending the Treaty on European and the Treaty Establishing the European Community art. 6(2), Dec. 13, 2007, 2007 O.J. (C 306) [hereinafter Treaty of Lisbon].

100. See generally MARTIN ET AL., *supra* note 42, at 985.

are outside the scope of this section, there are judicial mechanisms established by the TFEU<sup>101</sup> and the ECHR<sup>102</sup> to ensure that these conventions are properly enforced against noncompliant countries. This Part will explore the major facets of the EU's asylum laws and European human rights law and the impact they have on individual's right to claim asylum and seek international protection in the EU.

#### A. *EU's Asylum Laws*

EU asylum law is unique because, once it enters into force, it "becomes part of the legal system of each Member State."<sup>103</sup> In short, the legal bases for EU asylum law are the TFEU, the EU Charter, and the CEAS.<sup>104</sup> The TFEU sets in motion the goal for the EU to have uniform and harmonized asylum procedures that also comply with international refugee law.<sup>105</sup> Such procedures were promulgated "with a view to offering appropriate status to any third-country national requiring international protection."<sup>106</sup> The EU Charter furthers this goal of harmonization by ensuring the right to international protection and the prohibition against refoulement in EU asylum law, making these rights

101. The Court of Justice of the European Union (CJEU) has jurisdiction over EU law. *Court in Brief*, EUR. COURT HUMAN RIGHTS, [http://www.echr.coe.int/Documents/Court\\_in\\_brief\\_ENG.pdf](http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf) (last visited June 12, 2016). The CJEU's role is to "[e]nsure EU law is interpreted and applied the same in every EU country" and to "[e]nsure countries and EU institutions abide by EU law." *Court of Justice of the European Union*, EUR. UNION, [http://europa.eu/about-eu/institutions-bodies/court-justice/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm) (last visited Jan. 18, 2016). More specifically, the CJEU has jurisdiction to "determine whether a Member State has fulfilled its obligations under European Union law." *Court of Justice Presentation*, CURIA, [http://curia.europa.eu/jcms/jcms/Jo2\\_7024/](http://curia.europa.eu/jcms/jcms/Jo2_7024/) (last visited Jan. 18, 2016).

102. The European Court of Human Rights (ECtHR) has jurisdiction over violations of the ECHR. *Court in Brief*, *supra* note 101.

103. *Sources and Scope of European Union Law*, EUR. PARL. (June 2016), [http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_1.2.1.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf).

104. The Directives comprising the CEAS are not laws in the strict sense of the word, as compared to the TFEU and EU Charter, but will be treated as such for the purposes of this Note. *Regulations, Directives, and Other Acts*, *supra* note 35 ("A 'directive' is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals.").

105. In complying with international refugee law, this includes the principle of nonrefoulement. *Id.*

106. TFEU art. 78.

legally binding throughout all Member States.<sup>107</sup> The CEAS tries to further the TFEU's goal of establishing common asylum procedures throughout the EU through various directives and regulations, which attempt to harmonize Member States' asylum policies by setting uniform goals and standards in assessing claims for international protection.<sup>108</sup>

### 1. TFEU

The TFEU plays a key role in EU asylum law for three important reasons. First, the TFEU creates the framework for Member States to develop a common policy on asylum.<sup>109</sup> Second, while the TFEU is silent on the definition of "asylum" and "refugee," it incorporates the 1951 Convention and 1967 Protocol to fill in these gaps and to serve as limits as to the minimum obligations that Member States must provide refugees in formulating a common asylum policy.<sup>110</sup> Finally, the TFEU gives the Council the power to adopt provisional measures when Member States are confronted with emergency situations characterized by a sudden deluge of migrants.<sup>111</sup>

The TFEU, along with the Treaty on European Union (TEU),<sup>112</sup> are the core functional treaties of the EU. The TEU deals with the creation of the EU and its various governing bodies, including the European Commission and the Council of the EU. The TFEU articulates the EU's spheres of competence and establishes the areas in which the EU may act with binding authority for its Member States and/or on its Member States' behalf.<sup>113</sup> Occasionally, the TFEU has been expanded through amending treaties, the last of which was the Treaty of Lisbon,

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107. EU Charter, *supra* note 97, arts. 18–19.

108. *Common European Asylum System*, *supra* note 98.

109. TFEU art. 67.

110. *Id.* art. 78(1).

111. *Id.* art. 78(3).

112. See Consolidated Version of the Treaty on European Union, June 7, 2016, 2016 O.J. (C 202) [hereinafter TEU]. The TEU, however, is outside the scope of this Note and will only be discussed in terms of the Treaty of Lisbon's amendments, which amended Article 6 of the TEU to make the EU Charter legally binding throughout the EU and made the rights provided for in the ECHR general principles of EU law. *Id.* art. 6.

113. See generally TFEU.

which entered into force on December 1, 2009<sup>114</sup> to “make the EU more democratic, more efficient, and better able to address global problems with one voice.”<sup>115</sup> The Treaty of Lisbon significantly widened the EU’s authority in regards to asylum and immigration questions.<sup>116</sup> The Treaty of Lisbon switched the focus of EU asylum law from simply the “establishment of minimum standards” to the creation of a common system uniform in both status and procedures.<sup>117</sup>

Throughout the amended TFEU, it is clear that the intent of the document was to require Member States to act together in framing a uniform policy on asylum and immigration.<sup>118</sup> In fact, when asylum policy is mentioned throughout the TFEU, it is accompanied by the words “common” and “solidarity.”<sup>119</sup> Moreover, the TFEU actually articulates that the common system must include, *inter alia*, a uniform status of asylum and subsidiary protection, common procedures for granting or withdrawing uniform asylum or subsidiary protection status, and criteria for determining which Member State is responsible for assessing asylum applications.<sup>120</sup>

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114. *Treaty of Lisbon*, EUR. PARLIAMENT, [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_1.1.5.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.1.5.html) (last visited June 12, 2016).

115. *EU Treaties*, EUR. UNION, [https://europa.eu/european-union/eu-law/decision-making/treaties\\_en](https://europa.eu/european-union/eu-law/decision-making/treaties_en) (last updated Sept. 28, 2015); *see also Lisbon Treaty*, STREITCOUNCIL.ORG, <http://streitcouncil.org/index.php?page=the-lisbon-treaty> (last visited June 12, 2016) (The Treaty of Lisbon “introduce[d] significant institutional changes and [was] designed to streamline the decision-making process in the EU, which now has many more member states than when the institutions were created.”).

116. MIGRATION WATCH U.K., *THE LISBON EUROPEAN REFORM TREATY IMPACT ON ASYLUM AND IMMIGRATION POLICY 2* (2008), [http://www.migration-watchuk.org/pdfs/BP4\\_10.pdf](http://www.migration-watchuk.org/pdfs/BP4_10.pdf). For a more detailed discussion of the impacts of the Treaty of Lisbon on EU asylum law, see Helen Toner, *The Lisbon Treaty and the Future of European Immigration and Asylum Law*, in *EU MIGRATION LAW: LEGAL COMPLEXITIES AND POLITICAL RATIONALES* (2014).

117. *Asylum Policy*, EUR. PARLIAMENT (June 2016), [http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_5.12.2.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_5.12.2.pdf); *see also* Christian Kaunert & Sarah Léonard, *The European Union Asylum Policy After the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection*, 31 REFUGEE SURV. Q., Dec. 2012, at 15 (“[T]he Treaty of Amsterdam had only given the EU the competence to legislate on minimum standards with respect to several aspects of asylum.”).

118. TFEU art. 67(2).

119. *Id.* arts. 67(2), 80.

120. *Id.* art. 78(2).

In developing this common system, the TFEU explicitly states that the policy must comply with the “principle of nonrefoulement,”<sup>121</sup> but it does not explicitly define who cannot be refouled. Thus, the TFEU incorporates the 1951 Convention and 1967 Protocol as a gap-filler by stating that any “policy must be in accordance” with these two documents, which makes them legally binding throughout the EU. Thus, it can be inferred that one who is recognized as a “refugee” under international refugee law would be similarly recognized under the EU’s regional laws under the TFEU.

The TFEU is also silent about the appropriate course of action to take in the event that the EU is confronted with a sudden influx of refugees. The TFEU recognizes that mass migration crises are a possibility and gives the Council the authority to adopt provisional measures “in the event [a Member State faces an] emergency situation characterised by a sudden inflow of nationals of third countries” to alleviate the pressure on the Member State in question.<sup>122</sup> Yet, the TFEU provides no clear guidance on what constitutes an appropriate response to such an emergency. Nonetheless, this provision is still important, as it recognizes the potential for emergencies and delineates an authority who can enforce measures to address it.

## 2. EU Charter

When the Treaty of Lisbon amended the TFEU and TEU, it had the effect of making the EU Charter a primary legislative document binding throughout the EU.<sup>123</sup> The EU Charter’s goal is to “strengthen the protection of fundamental rights by making those rights more visible and more explicit for citizens.”<sup>124</sup> The EU Charter embodies

all the rights found in the case law of the Court of Justice of the EU; the rights and freedoms enshrined in the European Convention on Human Rights; [and] other rights and principles

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121. *Id.* art. 78(1).

122. *Id.* art. 78(3).

123. See Maria-Teresa Gil-Bazo, *The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law*, 27 REFUGEE SURV. Q., no. 3, 2008, at 34–36.

124. *Id.*

resulting from the common constitutional traditions of EU countries and other international instruments.<sup>125</sup>

The EU Charter represents a summation of all the rights guaranteed to citizens and noncitizens in the EU through EU case law, European human rights law, and international and regional treaties in force throughout the EU. Accordingly, when implementing EU asylum laws, Member States are bound to act in accordance with the rights granted to persons by the EU Charter.<sup>126</sup> The EU Charter is especially important for refugees, however, because of the protections provided under Articles 18 and 19.

Article 18<sup>127</sup> of the EU Charter not only recognizes an individual's right to asylum, but similar to the TFEU, this article incorporates both the 1951 Convention and the 1967 Protocol in guiding European states' treatment of asylum seekers and refugees. The incorporation of these documents is significant, as the EU Charter does not delineate who qualifies for refugee protection, but instead relies on the criteria set forth in the 1951 Convention and the 1967 Protocol. Furthermore, the EU Charter also explicitly codifies the principle of nonrefoulement in Article 19 by prohibiting states from "return[ing] a person to a situation where he or she has a well-founded fear of being persecuted or runs a real risk" of facing torture or some other form of inhumane and degrading treatment upon return.<sup>128</sup> In conclusion, the EU Charter is important for refugee protection throughout the EU because it further codifies an individual's right to seek asylum, reaffirms the protection against refoulement, and makes these rights legally enforceable throughout Member States.

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125. *EU Charter of Fundamental Rights*, EUR. COMMISSION, [http://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm) (last updated Nov. 12, 2015).

126. EU AGENCY FOR FUNDAMENTAL RIGHTS, *HANDBOOK ON EUROPEAN LAW RELATING TO ASYLUM, BORDERS, AND IMMIGRATION* 21 (2014) [hereinafter *HANDBOOK ON EUROPEAN ASYLUM LAW*], [http://www.echr.coe.int/Documents/Handbook\\_asylum\\_ENG.pdf](http://www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf) (citing EU Charter, *supra* note 97, art. 51).

127. EU Charter, *supra* note 97, art. 18 ("The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.").

128. *Id.* art. 19(2); *HANDBOOK ON EUROPEAN ASYLUM LAW*, *supra* note 126, at 21.

### 3. CEAS

The EU has been formulating the CEAS since 1999,<sup>129</sup> beginning with the Tampere Conclusions<sup>130</sup> and its “Common European Asylum System” subsection, which marked the first time that EU Member States declared their intention to develop a common asylum policy.<sup>131</sup> After the Tampere Conclusions, the EU subsequently implemented several legislative measures, including the CEAS, through regulations and directives to harmonize asylum policy throughout the region.<sup>132</sup>

The Tampere Conclusions subsection on formulating a common European asylum system led to the development of the CEAS. As a preface, and similar to the regional treaties in effect throughout the EU, all components of the CEAS incorporate the 1951 Convention and 1967 Protocol in their recitals, which are preambular text in EU legislation explaining the reasons for the contents of the legislative act in question.<sup>133</sup> One important component of the CEAS is the Asylum Procedures Directive. Enacted in 2005<sup>134</sup> and subsequently revised in 2013, it explains the minimum standards required for asylum procedures (e.g., who has access to the asylum procedures, the right to an interpreter, the right to a lawyer, the right to appeals, among other rights that are integral to a fair asylum determination).<sup>135</sup> Also adopted as a part of the CEAS was the Reception Conditions Directive. Implemented in 2003<sup>136</sup> and revised in 2013, this part of CEAS details the minimum reception conditions states must provide for asylum applicants who are waiting for their claim to be assessed, including access to information about their case and legal representation, food, and housing, among other criterion, to ensure a

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129. *Common European Asylum System*, *supra* note 98. This section contains only a brief overview of the elements comprising the CEAS, as it is only necessary to understand the fundamental components in assessing their impact on EU asylum law. For a more in-depth analysis of the CEAS, see Kaunert & Léonard, *supra* note 117.

130. Kaunert & Léonard, *supra* note 117, at 9.

131. *Id.*

132. *Common European Asylum System*, *supra* note 98.

133. *Preamble (Citations and Recitals)*, EUROPA.EU, <http://publications.europa.eu/code/en/en-120200.htm> (last updated Apr. 22, 2015).

134. Council Directive 2005/85/EC, 2005 O.J. (L 326) (EU).

135. Council Directive 2013/32/EU, 2013 O.J. (L 180) (EU).

136. Council Directive 2003/9/EC, 2003 O.J. (L 31) (EU).



dignified standard of living.<sup>137</sup> Another major component of the CEAS is the Asylum Qualification Directive. Implemented in 2004<sup>138</sup> and updated in 2011, this directive explicates the minimum requirements a stateless person must possess in order to qualify for refugee protection, namely persecution on account of one of the five protected grounds.<sup>139</sup> Another component of the CEAS is the Dublin III Regulation. The Dublin II Regulation<sup>140</sup> was initially implemented as part of the CEAS in 2003, but has now been replaced by the Dublin III Regulation.<sup>141</sup> The Dublin III regulation establishes which EU Member State is responsible for examining an asylum applicant's application (i.e., in the case of irregular arrivals,<sup>142</sup> the Member State of first entry).<sup>143</sup> Finally, in order to further the goals of the Dublin III Regulation, the EURODAC Regulation, which has been operating since 2003,<sup>144</sup> and subsequently updated in 2011, establishes an EU

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137. Council Directive 2013/33/EU, 2013 O.J. (L 31) (EU); *see also* Kaunert & Léonard, *supra* note 117, at 10.

138. Council Directive 2004/83/EC, 2004 O.J. (L 304) (EU).

139. Council Directive 2011/95/EU, 2011 O.J. (L 337) (EU).

140. Council Regulation 343/2003, 2003 O.J. (L 50) (EC); *see also* Kaunert & Léonard, *supra* note 117, at 11 (“[T]he main principle underpinning the system is that the State responsible for processing an application is the State responsible for the asylum-seeker’s presence in the EU, that is, the State through which an asylum-seeker has entered the EU.”).

141. Council Regulation 604/2013, 2013 O.J. (L 180) (EU).

142. The term “irregular” is preferred over the use of illegal when referring to migration, as illegal migration is usually used to describe cases of people-smuggling and trafficking of persons. *Key Migration Terms*, INT’L ORG. FOR MIGRATION, <https://www.iom.int/key-migration-terms#Irregular-migration> (last visited Oct. 16, 2016) (defining irregular migration as “[m]ovement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or universally accepted definition of irregular migration. From the perspective of destination countries, it is entry, stay or work in a country without the necessary authorization or documents required under immigration regulations. From the perspective of the sending country, the irregularity is for example seen in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfil the administrative requirements for leaving the country.”).

143. *Id.*; *Common European Asylum System*, *supra* note 98 (“The criteria for establishing responsibility run, in hierarchical order, from family considerations, to recent possession of [a] visa or residence permit in a Member State, to whether the applicant has entered EU irregularly, or regularly.”).

144. Council Regulation 2725/2000, 2000 O.J. (L 316) (EC).

asylum fingerprint database that takes the fingerprints of asylum seekers and transmits their information to the EURODAC database for all Member States to access.<sup>145</sup>

The EU's regional refugee protection regime is based off the TFEU, the EU Charter, and the CEAS. The TFEU and EU Charter are regional treaties in effect throughout the EU and are legally binding upon all Member States. The TFEU calls upon Member States to establish uniform and harmonized asylum procedures that are in accordance with international refugee law. In establishing these procedures, the provisions of EU Charter must also be applied, which recognize an individual's right to claim asylum and prohibit Member States from returning an individual to a place where they have a well-founded fear of persecution. Moreover, the CEAS, as a compilation of regulations and directives, tries to further the goals of the TFEU and EU Charter by formulating harmonized asylum procedures to be applied throughout the Member States, which take into account the rights granted to refugees by international refugee law and the EU Charter.

### *B. European Human Rights Law*

EU asylum laws and policies on refugees must also be in alignment and effectuated within the boundaries of European human rights law. This concept is embedded in the amended TEU, which requires all Member States to accede to the ECHR.<sup>146</sup> The ECHR "gave effect to certain rights stated in the UDHR and established an international judicial organ with jurisdiction to find against states that do not fulfill their undertakings" as provided by the ECHR.<sup>147</sup> European human rights law complements the EU's regional asylum legislation, as European human rights law does not explicitly recognize the right to claim asylum but reemphasizes the prohibition against nonrefoulement.

Although the ECHR does not explicitly address the issues of granting asylum or refugee status, the European Court of Human Rights (ECtHR)<sup>148</sup> has interpreted Article 3 of the Convention to include protection against refoulement.<sup>149</sup> Article 3 states

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145. Council Regulation 603/2013, 2013 O.J. (L 180) (EU).

146. TEU art. 6.

147. *ECHR in 50 Questions*, EUR. CT. HUM. RTS. 1, 3 (Feb. 2014), [http://www.echr.coe.int/Documents/50Questions\\_ENG.pdf](http://www.echr.coe.int/Documents/50Questions_ENG.pdf).

148. This court is the judicial mechanism in place to enforce the ECHR.

149. MARTIN ET AL., *supra* note 42, at 985.

that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>150</sup> The ECtHR has “interpreted [Article 3] not only to bar the infliction of torture and inhuman or degrading treatment by states parties but also to prohibit returning individuals to states where they would face such practices,”<sup>151</sup> thereby incorporating the international principle of nonrefoulement.<sup>152</sup> Furthermore, the ECHR forbids states from absconding their obligations under Article 3 in times of war or when faced with other public emergencies.<sup>153</sup>

### III. AN OVERVIEW OF THE EUROPEAN REFUGEE CRISIS

The ongoing refugee crisis in Europe, where over a million migrants flooded the borders in 2015,<sup>154</sup> has tested the EU's ability to respond to a migration crisis within the bounds of international and regional refugee law. Civil war, generalized violence and conflict, terrorism, and persecution by state and non-state actors in the Middle East and Africa have forced people to flee their homes and make the dangerous journey to Europe.<sup>155</sup> It is not surprising that Europe is a top destination for refugees, as relatively speaking, Europe provides a place of stability, is devoid of war, and accessible by land and sea. Unfortunately, this stability is but a mere mirage, as their status and protections as refugees remain in the hands of the EU Member State where they arrive. The disparity of the treatment of refugees and international protection claims between Member States is odd, given that all EU Member States are bound by the same international<sup>156</sup> and regional treaties pertaining to refugee protection.<sup>157</sup> In response to and out of frustration for the lack of coordination

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150. Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

151. MARTIN ET AL., *supra* note 42, at 985.

152. *Id.* (“The path-breaking case for the court was *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), which held that Article 3 prohibited the UK from extraditing Soering to the United States where he faced the risk of a prolonged period on ‘death row’ in Virginia—treatment that would be inhuman or degrading within the terms of the Convention.”).

153. ECHR, *supra* note 150, art. 15.

154. *Irregular Migrant Arrivals*, *supra* note 6.

155. See generally Jeanne Park, *Europe's Migration Crisis*, COUNCIL ON FOREIGN REL. BACKGROUNDEERS (Sept. 23, 2015), <http://www.cfr.org/migration/europes-migration-crisis/p32874>.

156. See *supra* Part I.

157. See *supra* Part II.

among Member States, the Council of the EU implemented a provisional measure—the quota system—to force Member States to act cohesively in alleviating the burden of the migrant crisis. This Part will first examine the refugees' countries of origin by looking at the factors present within the countries that have caused these individuals to flee. Next, this Part will briefly compare the conflicting nature of Member States' responses to the exodus, and will conclude with a discussion of the highly controversial quota system.

#### A. *Major Refugee-Producing Countries*

The current number of forcibly displaced people is the most since World War II.<sup>158</sup> As time has progressed and the reasons for displacement have expanded, it is important to understand the factors underlying the new spike of refugees by examining three of the highest refugee-producing countries: Syria, Afghanistan, and Eritrea. Syria, Afghanistan, and Eritrea have consistently ranked in the top ten with respect to the origins of people applying for refugee protection in the EU.<sup>159</sup> The news stories and reports, which describe these countries as politically unstable, rife with internal conflict, and abusers of human rights, depict the harsh reality of individuals living in those countries. Faced with few alternatives, refugees are often times forced to escape these grim realities by fleeing their home country to seek international protection from elsewhere, like the EU.

##### 1. Syria

A violent civil war has plagued Syria since 2011 and has taken an estimated 250,000 lives.<sup>160</sup> The conflict started when Syrian-

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158. U.N. HIGH COMMISSIONER FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015 (2016), <http://www.unhcr.org/576408cd7>.

159. Data available from 2015 and 2016 reveals that Syria, Afghanistan, and Eritrea were three of the largest refugee-producing countries during those years. See HUMAN RIGHTS WATCH, THE MEDITERRANEAN CRISIS: WHY PEOPLE FLEE, WHAT THE EU SHOULD DO (2015), [https://www.hrw.org/sites/default/files/report\\_pdf/eu0615\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/eu0615_web.pdf); *Migrant Crisis: Migration to Europe Explained in Seven Charts*, BBC NEWS (Mar. 4, 2016), <http://www.bbc.com/news/world-europe-34131911>; *Migration Flows - Europe*, INT'L ORG. FOR MIGRATION, <http://migration.iom.int/europe/> (last visited Oct. 3, 2016).

160. *Syria: The Story of the Conflict*, BBC NEWS (Mar. 11, 2016), <http://www.bbc.com/news/world-middle-east-26116868>.

government-supported security forces opened fire on peaceful prodemocracy protesters.<sup>161</sup> The Syrian government's hasty resort to use deadly force sparked "nationwide protests demanding Syrian President [Bashar] al-Assad"<sup>162</sup> to resign from office.<sup>163</sup> Shortly thereafter, anti-Assad supporters took up arms to defend themselves and to expel government security forces from local areas.<sup>164</sup>

By 2012, the fighting spiraled out of control and evolved from just a political mêlée between supporters and opponents of President Assad<sup>165</sup> into a widespread regional conflict.<sup>166</sup> One factor that led to the full-scale regional conflict was that major world powers "including Iran, Turkey, the Arab Gulf states, Russia, and the United States," responded to the clash by offering political support, money, or weapons to either the Assad presidency or the opposition fighters.<sup>167</sup> Further igniting the chaos was the ongoing sectarian battle between President Assad's minority Shia sect and the Syrian Sunni majority.<sup>168</sup>

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161. *Id.*

162. The al-Assad family has ruled Syria since 1970. Scholars have noted that the "A[s]sad regime's strict political controls prevented [ethnic and political] differences from playing an overtly divisive role in political or social life." CHRISTOPHER M. BLANCHARD ET AL., CONG. RES. SERV., RL33487, ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSE 7 (2015).

163. *Syria: The Story of the Conflict*, *supra* note 160.

164. *Id.*

165. *Id.*

166. BLANCHARD ET AL., *supra* note 162.

167. *Id.* at 10. Additionally, BBC News states:

Iran and Russia have propped up the Alawite-led government of President Assad and gradually increased their support, providing it with an edge that has helped it make significant gains against the rebels. The government has also enjoyed the support of Lebanon's Shia Islamist Hezbollah movement, whose fighters have provided important battle-field support since 2013. The Sunni-dominated opposition has, meanwhile, attracted varying degrees of support from its main backers—Turkey, Saudi Arabia, Qatar, and other Arab states along with the United States, United Kingdom, and France.

*Syria: The Story of the Conflict*, *supra* note 160.

168. *Syria: The Story of the Conflict*, *supra* note 160; BLANCHARD ET AL., *supra* note 162, at 7 ("In addition to the majority Sunni Muslims, who comprise over 70% of the population, Syria contains several religious sectarian minorities,

The conflict continued into August 2013, when “[h]undreds of people were killed . . . after rockets filled with the nerve agent sarin were fired” around the nation’s capital, Damascus.<sup>169</sup> There were allegations that only the Syrian government had the capability to carry out these civilian attacks, which prompted a threat of Western intervention.<sup>170</sup> With the threat of intervention looming, President Assad agreed to either completely remove or destroy Syria’s chemical weapons arsenal as part of a deal brokered by the United States and Russia.<sup>171</sup>

While Syria completed its destruction of chemical weapons in 2014,<sup>172</sup> long-term peace continues to be evasive. For instance, reports state that the government continues to use toxic chemicals, including chlorine, against civilians in attacks on opponent-held territory.<sup>173</sup> Furthermore, in 2014, the extremist Islamist group, the Islamic State (also known as “ISIS”), capitalized on Syria’s continuing chaos caused by the sectarian and political conflicts and conquered huge tracks of territory throughout the country,<sup>174</sup> which enabled the group to continuously commit flagrant human rights abuses against civilians.<sup>175</sup>

With no realistic possibility of imminent peace in Syria, major powers got involved by using airstrikes and other forceful means to affect change in the country.<sup>176</sup> The current situation in Syria remains dismal, as approximately five million<sup>177</sup> Syrians have fled the country since the start of the conflict and at least 6.5

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including three smaller Muslim sects (Alawites, Druze, and Ismailis) and several Christian denominations. The A[s]sad family are members of the minority Alawite sect (roughly 12% of the population), which has its roots in Shiite Islam.”).

169. *Syria: The Story of the Conflict*, *supra* note 160.

170. *Id.*

171. *Id.*; Alan Rappeport, *Syria’s Chemical Arsenal Fully Destroyed*, *U.S. Says*, N.Y. TIMES, Aug. 19, 2014, at A6.

172. *Id.*

173. *Syria: The Story of the Conflict*, *supra* note 160.

174. *Id.*

175. See *ISIS Fast Facts*, CNN, <http://www.cnn.com/2014/08/08/world/isis-fast-facts/index.html> (last visited Oct. 3, 2016).

176. See generally BLANCHARD ET AL., *supra* note 162.

177. This figure only includes registered Syrian refugees, which minimizes the perception of how serious the problem is because nonregistered refugees are not involved in the calculation. *Syria Regional Refugee Response*, U.N. HIGH COMMISSIONER FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/regional.php> (last visited Oct. 3, 2016).

million have been internally displaced within the country.<sup>178</sup> As the journey to Europe is extremely dangerous and costly, most Syrians have sought sanctuary in neighboring countries, such as Turkey and Lebanon. Over a million Syrians, however, have endured the arduous trek to Europe and at least eight hundred thousand have filed asylum applications in the EU since the conflict started in 2011, with over half of the total applications being filed in 2015 and 2016 alone.<sup>179</sup>

## 2. Afghanistan

The situation in Afghanistan is comparable to that of Syria due to the rampant instability and terror throughout the country. This period of conflict, however, is a relatively recent phenomenon, and the violence is mostly at the hands of rogue insurgent groups, such as the Taliban.<sup>180</sup> Further exacerbating the terror in Afghanistan is the fact that the government has proven itself incapable of controlling insurgent groups and at least 10 percent of the country is out of the government's control, meaning that rogue groups control the fate of many Afghani civilians.<sup>181</sup>

Insurgent groups have launched frequent attacks in traditionally secure provinces in Afghanistan, which has led to the displacement of at least one million civilians.<sup>182</sup> Insurgent groups frequently target civilians to use them as hostages in exchange for prisoners or ransom.<sup>183</sup> Besides civilians, those most at risk of attack are government employees, aid workers, and people affiliated with foreign organizations.<sup>184</sup> These individuals are likely victims of violence because insurgent groups view these

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178. *Syria: The Story of the Conflict*, *supra* note 160.

179. *Syria Regional Refugee Response*, U.N. HIGH COMMISSIONER FOR REFUGEES, <http://data.unhcr.org/syrianrefugees/asylum.php> (last visited Oct. 16, 2016).

180. HUMAN RIGHTS WATCH, *supra* note 159, at 8.

181. *US General: 10 Percent of Afghanistan Under Taliban Control*, ABC NEWS, <http://abcnews.go.com/Politics/wireStory/us-general-10-percent-afghanistan-taliban-control-42311475> (Sept. 23, 2016). <http://www.to-lonews.com/en/afghanistan/26518->

182. HUMAN RIGHTS WATCH, *supra* note 159, at 8. As of May 2016, there were at least 1.2 million Afghans internally displaced within Afghanistan. *Afghanistan: Number of People Internally Displaced by Conflict Doubled to 1.2 Million in Just Three Years*, AMNESTY INT'L (May 31, 2016), <https://www.amnesty.org/en/latest/news/2016/05/afghanistan-internally-displaced/>.

183. HUMAN RIGHTS WATCH, *supra* note 159, at 10.

184. *Id.*

individuals' involvement with the Afghani government or foreign organizations as a reflection of their ideologies and beliefs, which are in opposition to insurgent groups' mostly antigovernment and anti-Western dogmas.

Women and children also face a heightened threat of violence committed by insurgent groups. Women and children often endure the most "restrictions on freedom of movement," as fear-stricken families are hesitant to allow them to go outside on their own.<sup>185</sup> Women who defy the Taliban's norms, such as female schoolteachers, have come under direct threat of attack.<sup>186</sup> Furthermore, children face a heightened risk with insurgent groups because they represent a more impressionable faction of the Afghan population and are frequently recruited to serve as sex slaves, combatants, suicide bombers, or assemblers of dangerous weapons.<sup>187</sup>

The Afghan government is not blameless for the turmoil throughout Afghanistan. Government officials, including civilians in high-level positions and security forces, have participated in torture, rape, and extrajudicial and summary executions.<sup>188</sup> Additionally, Afghan national security forces prioritize the military over children's access to education and continue to take over schools for military uses, putting children at risk of attacks by armed groups.<sup>189</sup> Consequently, due to the government's past failures to provide protection from insurgent groups and its continued engagement in violent acts against civilians, it is not surprising that over 190,000 Afghanis have fled the country and headed toward Europe to claim asylum since 2015.<sup>190</sup>

### 3. Eritrea

Although Eritrea is in a relative period of peace compared to Syria and Afghanistan, the Eritrean government's continuous

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185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 11.

189. *Id.* at 10.

190. Phillip Connor, *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, PEWRESEARCHCENTER (Aug. 2, 2016), <http://www.pewglobal.org/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/>.



human rights abuses against its civilians have caused many Eritreans to make the dangerous journey to Europe.<sup>191</sup> Eritrea is considered one of the poorest countries in the world and its citizens are forced to live under a repressive, authoritarian government.<sup>192</sup> The government controls all features of life, even aspects of independent media and independent nongovernmental organizations,<sup>193</sup> which has the effect of silencing the voice of the population and keeping nongovernmental organizations out of the country.

Eritrean law, through a practice known as “conscription,” requires each citizen, whether male or female, to serve eighteen months in the national service starting at age eighteen.<sup>194</sup> Conscripts are subject to poor conditions, such as grossly inadequate pay and harsh military discipline that frequently amounts to torture.<sup>195</sup> Female conscripts, in particular, are subjected to sexual abuse and further ill-treatment by their commanders.<sup>196</sup> Thus, many Eritreans try to flee conscription because they view their military commitments as endless.<sup>197</sup>

Other violent forces driving Eritreans to flee their homes include the high risk of arbitrary arrest, enforced disappearance, and being tortured while in detention.<sup>198</sup> Other, less violent factors include the lack of many basic freedoms, such as freedom of expression, conscience (thought), movement, and religion.<sup>199</sup> Additionally, the rule of law is virtually nonexistent, as the government possesses secret detention facilities to jail thousands of Eritreans, who frequently are detained without a charge against

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191. HUMAN RIGHTS WATCH, *supra* note 159, at 13.

192. REGIONAL MIXED MIGRATION SECRETARIAT, GOING WEST: CONTEMPORARY MIXED MIGRATION TRENDS FROM THE HORN OF AFRICA TO LIBYA & EUROPE 17 (2014), [http://www.regionalmms.org/fileadmin/content/rmms\\_publications/Going\\_West\\_migration\\_trends\\_Libya\\_\\_\\_Europe\\_final.pdf](http://www.regionalmms.org/fileadmin/content/rmms_publications/Going_West_migration_trends_Libya___Europe_final.pdf).

193. HUMAN RIGHTS WATCH, *supra* note 159, at 13; *see also* FREEDOM HOUSE, FREEDOM IN THE WORLD 2015, at 20 (2015), [https://freedomhouse.org/sites/default/files/01152015\\_FIW\\_2015\\_final.pdf](https://freedomhouse.org/sites/default/files/01152015_FIW_2015_final.pdf) (ranking Eritrea as “not free” and one of the worst countries in the world in respect to its political rights and civil liberties in the 2015 Freedom in the World Report).

194. HUMAN RIGHTS WATCH, *supra* note 159, at 13; *see also* REGIONAL MIXED MIGRATION SECRETARIAT, *supra* note 192, at 17.

195. HUMAN RIGHTS WATCH, *supra* note 159, at 14.

196. *Id.*

197. *Id.* at 13.

198. *Id.*

199. *Id.*

them or given a fair trial.<sup>200</sup> In fact, most procedural safeguards are lacking because the country has failed to have a functioning legislature “or any semblance of civil society organizations” since 2001.<sup>201</sup> The lack of freedoms in many aspects of Eritreans’ lives and consistent human rights abuses committed by the government has led over forty-seven thousand Eritreans to make the dangerous trek across the Mediterranean Sea to Europe in order to apply for asylum in 2015 alone.<sup>202</sup>

### B. *Discordance Among the EU Member States*

The EU prides itself on being a political and economic union bound by common rules and values.<sup>203</sup> In the wake of the recent refugee crisis, however, the impact of the deluge has been disproportionate throughout Member States, as only a few Member States have received a majority of the applications for refugee protection and others have simply refused to take in any refugees.<sup>204</sup> While some Member States have promoted a “welcome-atmosphere”<sup>205</sup> to the refugees, others have erected barriers to prevent refugees from coming into their countries, which has had the effect of limiting the free-flowing movement of these individuals throughout the EU.<sup>206</sup>

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200. *Id.*

201. *Eritrea*, HUMAN RIGHTS WATCH, <https://www.hrw.org/africa/eritrea> (last visited on Feb. 16, 2016). For more information, see FREEDOM HOUSE, *supra* note 144, at 20.

202. *Diaspora Eritreans Protest Regime Human Rights Abuses*, ALJAZEERA (June 23, 2016), <http://www.aljazeera.com/news/2016/06/diaspora-eritreans-protest-regime-human-rights-abuses-160623210503792.html>.

203. *EU in Brief*, *supra* note 25.

204. See Griff Witte & Karla Adam, *Britain Takes In So Few Refugees From Syria They Would Fit on a Subway Train*, WASH. POST (Sept. 1, 2015), [https://www.washingtonpost.com/world/britain-takes-in-so-few-refugees-from-syria-they-would-fit-on-a-subway-train/2015/09/01/af427190-4b34-11e5-80c2-106ea7fb80d4\\_story.html](https://www.washingtonpost.com/world/britain-takes-in-so-few-refugees-from-syria-they-would-fit-on-a-subway-train/2015/09/01/af427190-4b34-11e5-80c2-106ea7fb80d4_story.html).

205. For example, despite the horrific terrorist attacks that occurred in Paris on November 13, 2015, French President Francois Hollande still pledged to allow thirty thousand refugees into France over the next two years. *French President Francois Hollande Welcomes Refugees Despite Paris Attack*, ABC NEWS (Nov. 18, 2015), <http://abcnews.go.com/International/french-president-francois-hollande-welcomes-refugees-paris-attack/story?id=35274658>.

206. See Marton Dunai & Aleksandar Vasovic, *Hungary Shuts Off Migrant Route From Croatia*, REUTERS (Oct. 16, 2015), <http://www.reuters.com/article/us-europe-migrants-hungary-croatia-idUSKCN0SA1P620151016>; *Hungary Says a Border Fence With Romania May Be Next*, ECONOMIST (Sept. 16,

Germany is at the forefront in shouldering the responsibility for the mass influx of migrants arriving in Europe.<sup>207</sup> The German Chancellor, Angela Merkel, has promoted an open-door refugee policy in the hopes that Germany will achieve a positive change in its society through the promotion of a receptive and welcoming environment to those seeking international protection.<sup>208</sup> As a result of this open-door policy, by the end of 2015, 890,000 persons entered the country to apply for refugee protection.<sup>209</sup> After crimes occurred, allegedly perpetrated by refugees, opponents of the open-door policy called for Chancellor Merkel

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2015), <http://www.economist.com/news/europe/21664902-fight-between-two-eastern-european-union-members-may-be-more-about-politics-about?zid=309&ah=80dcf288b8561b012f603b9fd9577f0e>.

207. Germany is not the only Member State that has been receptive to refugees, but it has employed the most prorefugee policies and has been able to withstand the pressure from opponents and the actual influx of migrants to keep its borders open. Sweden, for instance, was one of the most welcoming nations for refugees. Dan Bilefsky, *Sweden and Denmark Add Border Checks to Stem Flow of Migrants*, N.Y. TIMES, Jan. 5, 2016, at A10. But, Sweden has strained its resources, as it took in more asylum seekers per capita than any other nation in Europe and had to introduce measures, such as identity checks, to curb migrants from entering the country. Griff Witte & Anthony Faiola, *Even Europe's Humanitarian Superpower is Turning its Back on Refugees*, WASH. POST (Dec. 30, 2015), [https://www.washingtonpost.com/world/europe/even-sweden-is-turning-its-back-on-refugees/2015/12/30/6d7e8454-a405-11e5-8318-bd8caed8c588\\_story.html?hpid=hp\\_hp-top-table-main\\_sweden-740pm%3Ahomepage%2Fstory](https://www.washingtonpost.com/world/europe/even-sweden-is-turning-its-back-on-refugees/2015/12/30/6d7e8454-a405-11e5-8318-bd8caed8c588_story.html?hpid=hp_hp-top-table-main_sweden-740pm%3Ahomepage%2Fstory).

208. Justin Huggler, *Refugees Will Change Germany, Merkel Says, As Government Releases £4.4bn To Cope with Crisis*, TELEGRAPH (Sept. 7, 2015), <http://www.telegraph.co.uk/news/worldnews/europe/germany/11849468/Refugees-will-change-Germany-Merkel-says-as-government-releases-4.4bn-to-cope-with-crisis.html>.

209. Noack, *supra* note 10.

to tighten Germany's borders.<sup>210</sup> Despite the pressure,<sup>211</sup> Germany continues to keep its borders open and still receives a bulk of the EU's asylum applicants, but has pleaded for other Member States to take more responsibility in alleviating the refugee crisis.<sup>212</sup>

Compared to Germany, Hungary has taken the opposite approach with respect to welcoming refugees.<sup>213</sup> The Hungarian Parliament, led by anti-immigrant Prime Minister Viktor Orbán, has taken rigid measures to close off its borders and reject stateless persons, despite its location as a popular migration route to Western Europe.<sup>214</sup> At first, the Hungarian government appeared to be supportive of the refugees' plight by allowing persons already in Hungary to pass through to other countries.<sup>215</sup> Such supportive treatment, however, has disappeared in regards to new arrivals that are able to reach the country's borders.

Hungary's drastic shift in policy is evidenced by various measures the country implemented in its anti-immigrant campaign. For instance, the "holding camp" the Hungarian government opened for refugees in 2015 is comparable to a prison, as it is enclosed by razor wire and patrolled by police and guard

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210. Geir Moulson, *Germany: Nearly 1.1 Million People Registered as Asylum-Seekers in 2015; Syrians Biggest Group*, U.S. NEWS (Jan. 6, 2016), <http://www.usnews.com/news/world/articles/2016-01-06/germany-nearly-11-million-migrants-arrived-last-year>. Earlier in 2016, Chancellor Merkel's opponents called for her to tighten Germany's asylum laws in light of the attacks in the city of Cologne on New Year's Eve. Melissa Eddy, *Attacks on German Women Inflamm Debate on Migrants*, N.Y. TIMES, Jan. 6, 2016, at A1 ("Scores of young women in Cologne had been groped and robbed on New Year's Eve by gangs of men described by the authorities as having 'a North African or Arabic' appearance.").

211. Such resistance includes not only political pressure from opponents calling on Chancellor Merkel to close the borders but also the pressure of having to deal with an additional million people.

212. Jonathan Tirone & Arne Delfs, *Merkel Says Germans Fulfill Refugee Duty, Now Time for EU to Act*, BLOOMBERG (Sept. 24, 2016), <http://www.bloomberg.com/news/articles/2016-09-24/merkel-says-germans-fulfill-refugee-duty-now-time-for-eu-to-act>.

213. Hungary is not alone in erecting razor-wire fences to keep migrants out, but it has proven to be the staunchest opponent of allowing refugees into its country.

214. See Holly Yan et al., *Refugee Crisis: Hungary Uses Tear Gas, Water Cannons on Migrants at Border*, CNN (Sept. 16, 2015), <http://www.cnn.com/2015/09/16/world/europe-migrant-crisis/>.

215. Lyman & Smale, *supra* note 9.

dogs.<sup>216</sup> Furthermore, reports suggest that the Hungarian government used teargas and water cannons against refugees in order to ensure their control.<sup>217</sup> The country has also tried to keep refugees out completely by building a razor-wire fence along its southern border with Serbia and has “declared its southern border with Croatia closed to migrants.”<sup>218</sup> Furthermore, Hungary has also threatened to erect a fence along its border with Romania, but due to Romania’s objections,<sup>219</sup> these plans have stalled. Despite Hungary’s failed effort to close off its border with Romania, it has still made it nearly impossible for migrants to leave the Balkans for Western Europe.<sup>220</sup> This has not only prevented refugees currently in Hungary from leaving but also has prevented new refugees from entering the country who are trying to seek the country’s protections.

### C. *The Quota System and EU Member States’ Responses*

The EU was presented with two challenges that ultimately led to the quota system. The first challenge was the ongoing refugee crisis. The second challenge was coordinating a uniform solution among EU Member States whose current refugee policies were completely at odds with each other. To address both of these concerns, the Council implemented a mandatory quota system that was binding on all Member States.<sup>221</sup>

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216. *Id.*

217. *Hungary: New Border Regime Threatens Asylum Seekers*, HUM. RTS. WATCH (Sept. 19, 2015), <https://www.hrw.org/news/2015/09/19/hungary-new-border-regime-threatens-asylum-seekers>.

218. Dunai & Vasovic, *supra* note 206.

219. *Hungary Says a Border Fence With Romania May Be Next*, *supra* note 206.

220. Dunai & Vasovic, *supra* note 206.

221. Council Decision 2015/1523, *supra* note 30; Council Decision 2015/1601, *supra* note 32; *Migrant Crisis: EU’s Juncker Announces Refugee Quota Plan*, BBC NEWS (Sept. 9, 2015), <http://www.bbc.com/news/world-europe-34193568>. While the quota system is not the only measure the EU has taken to curb the flow of migrants, it is the only Union-wide approach the EU has adopted to internally address the crisis. Thus, other arrangements, like the EU-Turkey Deal, a joint agreement between the EU and Turkey to end irregular migration from Turkey to the EU, are outside the scope of this Note and will not be discussed. For information about the EU-Turkey Deal, however, see European Commission Fact Sheet MEMO/16/93, EU-Turkey Agreement: Questions and Answers (Mar. 19, 2016).

The idea for refugee quotas arose from the European Agenda on Migration, a measure adopted by the European Commission,<sup>222</sup> which outlines various methods that are required in order to respond appropriately to the refugee crisis.<sup>223</sup> Eventually, the European Commission morphed these outlines into a formal legislative proposal calling for the establishment of a regional crisis relocation mechanism and for an amendment to the Dublin III regulation.<sup>224</sup> The proposed relocation mechanism invariably derogates from the procedures set out by the Dublin III Regulation, which establishes that the Member State of first entry is responsible for examining the application for international protection.<sup>225</sup> The proposal states that in order to trigger the relocation mechanism in a Member State,

the Commission must establish, on the basis of substantiated information, in particular information gathered by EASO and Frontex, that a Member State is confronted with a crisis situation jeopardizing the application of Regulation (EU) No 604/2013 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. The crisis situation should be of such a magnitude as to place extreme pressure even on a well prepared and functioning asylum system, while also taking into account the size of the Member State concerned.<sup>226</sup>

Additionally, the proposal highlighted factors that the European Commission should look at in determining whether a Member State is facing extreme pressure, including the total number of asylum applications and the number of irregular entries in the six months preceding the adoption of the proposal, among other

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222. For more information about the European Commission, see *supra* note 27.

223. *A European Agenda on Migration*, COM (2015) 240 final (May 13, 2015).

224. *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 Lodge in One of the Member States by a Third Country National or a Stateless Person*, COM (2015) 450 final (Sept. 9, 2015) [hereinafter *EC Proposal*]. For information on the Dublin III Regulation, see *supra* notes 141–143.

225. See *supra* notes 141–143 and accompanying text.

226. *EC Proposal*, *supra* note 224, at 7.

factors.<sup>227</sup> Furthermore, the proposal states that the relocation mechanism will only apply to applicants whose refugee status would be recognized by 75 percent of Member States (in other words, applicants who the EU has determined are *prima facie* refugees for the context of applying the relocation mechanism).<sup>228</sup> The proposal also prescribes a method for setting the number of persons to be relocated, which takes into account “the number of applicants per capita in the Member State benefiting from relocation in the eighteen months, and in particular in the six months” preceding the proposal’s adoption compared to the EU’s average.<sup>229</sup> It also sets the maximum threshold for the amount of people to be relocated at 40 percent of the number of asylum applications the Member State received in the six months preceding the adoption of the proposal.<sup>230</sup> Lastly, it provides an intricate distribution key to be utilized for determining how many refugees each Member State will have to accept and relocate, which takes into account a Member State’s population, GDP, unemployment rate, and average amount of asylum applications for the preceding five years per one million inhabitants.<sup>231</sup>

The quota system the Council implemented cherry picks measures from the formal legislative proposal and adopts its methodologies in regards to the amount of people who are to be relocated, who the relocation affects, and how many people each Member State is responsible for relocating.<sup>232</sup> When the quota system was first announced in September 2015, the Council allocated for forty thousand individuals who were in clear need of international protection, i.e. who qualified as refugees under the 75 percent standard, to be relocated from Italy and Greece<sup>233</sup>

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227. *Id.* at 7–8.

228. *Id.* at 8.

229. *Id.*

230. *Id.*

231. The proposal lays out the mathematical equations for determining the number of applicants each Member State is responsible for relocating and accepting. *Id.* at 10–13. For more information about the distribution of applicants, see *id.*

232. See Council Decision 2015/1523, *supra* note 30; Council Decision 2015/1601, *supra* note 32.

233. Council Decision 2015/1523, *supra* note 30.

over a two-year period.<sup>234</sup> The Council singled out Greece and Italy because their location along the Mediterranean Sea provided the “easiest” route for refugees to access the EU. It was evident, however, that this amount paled in comparison to the 1,005,504 refugees that arrived in Europe by the end of 2015.<sup>235</sup> As a result, the Council increased the total amount to 160,000 a week later.<sup>236</sup>

Besides apportioning the total number of people that are to be relocated, the quota system allocates the number of applicants each EU Member State has to relocate based on the distribution key from the proposal.<sup>237</sup> Additionally, the quota system adopts the 75 percent recognition rate standard as to whom the relocation mechanism will benefit—nationals who have an average regional asylum recognition rate of at least 75 percent for the previous three months.<sup>238</sup> Furthermore, the quota system provides a financial benefit to the Member States that relocate pursuant to the provisions of the Council’s decision.<sup>239</sup> Member States also have the ability, in exceptional circumstances,<sup>240</sup> to notify the Council that they are unable to meet the quotas for up to 30 percent of the applicants allocated to that Member State and potentially be released from their obligations.<sup>241</sup>

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234. *Id.* This figure applies the proposal’s methodology and corresponds to 40 percent of the total number of people in clear need of international protection who irregularly entered Italy and Greece in 2014.

235. *Irregular Migrant Arrivals*, *supra* note 6.

236. Council Decision 2015/1601, *supra* note 32.

237. For a more detailed explanation on the distribution key for relocation, see European Commission Fact Sheet MEMO/15/5698, Refugee Crisis – Q & A on Emergency Relocation (Sept. 22, 2015) [hereinafter Refugee Crisis Fact Sheet]. For a more detailed description of each Member States’ quotas, see Council Decision 2015/1601, *supra* note 32.

238. Council Decision 2015/1601, *supra* note 32, art. 3; Refugee Crisis Fact Sheet, *supra* note 237 (“The 75% recognition rate threshold has two objectives: to ensure that all applicants who are in clear and urgent need of protection can enjoy their right of protection as soon as possible; and to prevent applicants who are unlikely to qualify for asylum from being relocated and unduly prolonging their stay in the EU.”).

239. Council Decision 2015/1601, *supra* note 32, art. 10 (declaring that Member States will receive a lump sum of € 6,000 for each relocation).

240. Refugee Crisis Fact Sheet, *supra* note 237 (“Such exceptional circumstances include, in particular, a situation characterised by a sudden and massive inflow of nationals of third countries of such a magnitude as to place extreme pressure even on a well prepared asylum system otherwise functioning in line with the relevant EU law on asylum.”).

241. *Id.*



The quota system, although legally binding throughout the EU, has proven inefficient in relocating refugees. First, in the year that the system has been in effect, approximately 5,651 out of the permitted 160,000 applicants<sup>242</sup> have been relocated.<sup>243</sup> Furthermore, some Member States are frustrating the relocation efforts by refusing to accept any quotas placed upon them. Hungary has been a staunch opponent of the refugee quotas since they were introduced last year.<sup>244</sup> In fact, Hungary has protested the relocation scheme on numerous occasions, including voting against the proposal addressing whether the EU should adopt the quota system.<sup>245</sup> Additionally, in October 2016, the Hungarian government held a referendum whereby 98 percent of the voters answered in the negative when asked whether they wanted the EU to be able to prescribe mandatory resettlement of refugees without the Hungarian government's consent.<sup>246</sup>

#### IV. SOLUTION: ESTABLISHING A PROACTIVE FRAMEWORK TO ADDRESS INTERNATIONAL MIGRATION CRISES

The quota system that the EU ultimately adopted to address the migrant crisis, which set out a plan to distribute asylum applicants from Italy and Greece across Member States, seemed like a small step in the right direction. In practice, however, it has proven to be problematic in alleviating the pressure on Member States to respond to the crisis. For instance, some Member States have refused to accept any refugee quotas and instead

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242. A mere 3 percent.

243. European Commission Press Release IP/16/3138, Delivering on Migration and Border Management: Commission Reports on Progress Made Under the European Agenda on Migration (Sept. 28, 2016) [hereinafter Press Release IP/16/3138].

244. Dan Nolan, *Refugee Crisis: EU Divided as Hungary Attacks Migrant Quota as "Unrealizable and Nonsense,"* TELEGRAPH (Sept. 23, 2015), <http://www.telegraph.co.uk/news/worldnews/europe/hungary/11884665/Refugee-crisis-EU-divided-as-Hungary-attacks-migrant-quota-as-unrealisable-and-nonsense.html>.

245. Michael Birnbaum, *E.U. Votes to Distribute 120,000 Asylum Seekers Across Europe*, WASH. POST (Sept. 22, 2015), [https://www.washingtonpost.com/world/europe/eu-ministers-seek-common-front-on-refugee-crisis/2015/09/22/34ad5a66-60a2-11e5-8475-781cc9851652\\_story.html](https://www.washingtonpost.com/world/europe/eu-ministers-seek-common-front-on-refugee-crisis/2015/09/22/34ad5a66-60a2-11e5-8475-781cc9851652_story.html).

246. This referendum was held to be invalid under Hungarian law, however, as voter turnout was too low. *Hungary Voters Reject EU Migrant-Resettlement Plan, but Low Turnout Invalidates Results*, CNN (Oct. 3, 2016), <http://www.cnn.com/2016/10/02/europe/hungary-migrant-referendum/>.

have constructed wire fences,<sup>247</sup> which partly explains why only three percent of the allocated number of refugees have been relocated.<sup>248</sup> Further, the quota system fails to have an enforcement mechanism in place to ensure that each Member State is sharing the burden in accepting refugees. With this in mind, this Part will critique the quota system and the proposal it relies upon, highlighting some of their major shortcomings.

This Part will then offer a two-step approach for implementing the permanent emergency mechanism for relocating refugees in the event of an international migration crisis. In order to confront the current migrant crisis and effectively address future crises, the EU should not waste its efforts on interim solutions that are vague, legally questionable, and distribute an insufficient number of refugees throughout Member States.<sup>249</sup> Instead, the EU, through acts of the European Commission and the Council, should create and implement a permanent emergency mechanism for addressing international migration crises. In establishing a permanent framework, the EU must first take immediate steps to define the scope of the emergency framework, including who the emergency system applies to and the criteria for triggering the emergency mechanism (chiefly, the conditions constituting an international migration crisis). Then, in the event the crisis criteria are met, the EU should enforce an emergency quota system that is mandatory, binding, and enforceable upon Member States.

#### A. *The Fault in the EU's Reactionary Response*

The quota system and the proposal it relies upon contravene the EU's legal obligations under international refugee law, EU asylum law, and European human rights law, as they hamper people's right to seek protection in the EU by placing limits on the type of people and the number of persons who are eligible to benefit from the region's protection. Additionally, the proposal is defective because, while it is supposed to put a permanent framework in place for the EU to handle migration crises, it does not take into account the fact that migration crises are bound to

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247. For example, smaller European countries, such as Slovakia and Hungary, not only voted against the quota system but also resorted to the ECJ and sued the Council of the EU. See Case C-643/15, *Slovakia v. Council* (pending case); Case C-647/15, *Hungary v. Council* (pending case).

248. Press Release IP/16/3138, *supra* note 243.

249. See *id.*

occur again in the future for reasons beyond persecution (i.e., environmental disasters). Further, the proposal is vague as to what constitutes the criteria for triggering the relocation mechanism. For example, it relies on the standard "extreme pressure" in determining when the relocation mechanism would be effectuated, but does not define what constitutes extreme pressure. Finally, the relocation mechanism is completely ineffective in accomplishing its goal of relocating refugees and distributing the burden of this crisis among Member States because it lacks an enforcement mechanism.

One overarching problem in both the implemented quota system and the proposal is that they are too limited in the scope of their application with respect to the refugees that are affected by the relocation mechanism. To begin with, the proposal and the resulting quota system are narrowly tailored to benefit specific Member States being confronted by a migration emergency<sup>250</sup> and not the EU as a whole. This is beneficial insofar as it assists Member States that are being unduly burdened by a high surge of refugee arrivals and their applications for international protection. Unfortunately, however, the narrow focus on individual Member States has limited the number of people that can be relocated, as only 40 to 43 percent of the asylum applications filed with the specific Member State benefiting from the relocation mechanism in the preceding six months are considered.<sup>251</sup> By focusing solely on the irregular migration flows in individual Member States versus the EU in total, the quota system and the proposal leave uncertain the fate of a majority stateless peoples seeking international protection.<sup>252</sup>

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250. See *EC Proposal*, *supra* note 224, at 9; Council Decision 2015/1523, *supra* note 30; Council Decision 2015/1601, *supra* note 32. Consequently, Italy and Greece were the major focus of the relocation scheme because they were being hit the hardest with refugee arrivals. See Council Decision 2015/1601, *supra* note 32.

251. *EC Proposal*, *supra* note 213, at 9; Council Decision 2015/1523, *supra* note 30; Council Decision 2015/1601, *supra* note 32. The amended relocation mechanism implemented a 43 percent threshold when it increased the number of persons to be relocated from 40,000 to 160,000. See Council Decision 2015/1601, *supra* note 32.

252. The quota system only allocated for 160,000 persons to be relocated from Italy and Greece within two years, which clearly did not alleviate the burden on Member States, as Europe had over a million arrivals by the end of 2015. See Council Decision 2015/1601, *supra* note 32; *Irregular Migrant Arrivals*, *supra* note 6.

Furthermore, the criteria for whom the relocation mechanism applies is too strict, as it only applies to individuals who would be recognized by 75 percent of Member States as refugees.<sup>253</sup> While this standard recognizes some groups who are in dire need of international protection, such as Syrians and Eritreans,<sup>254</sup> it leaves the fate of other nationalities in dire need of protection completely in the hands of Member States. It is clear that these measures are inconsistent with the core principles of international and regional refugee law, as they obstruct people's access to international protection and severely limit the eligibility of people qualifying for refugee status by placing an unreasonable burden on them to meet a 75 percent recognition rate. Refugees do not have a say in whether they are recognized as refugees by 75 percent of the EU. Rather, it is up to the individual Member States to make determinations as to whom they grant refugee status. Furthermore, a system that instills such a high recognition rate is irrational, as having 75 percent of Member States agree to anything is difficult, and their discordance in this regard affects refugees who are in need of international protection. Moreover, these measures are in opposition to the law of nonrefoulement, as an individual who would otherwise qualify for refugee status could potentially be sent back to a place where their life or freedom would be threatened simply because 75 percent of Member States do not agree on whether that individual is a refugee.

Another major flaw of the proposal is that it relies on a definition of refugee that is too limited for the purposes of creating a permanent framework that will address both the current and future migrant crises. The proposal, as well as the binding quota system, rely on the Asylum Qualification Directive's definition

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253. *EC Proposal*, *supra* note 224, at 8; Council Decision 2015/1601, *supra* note 32, art. 3. To put this standard in perspective and to demonstrate how unreasonable it is, a useful comparison is the U.S. legislative process, which requires a simple majority in both the U.S. House of Representatives and U.S. Senate to pass a law that affects the entire United States. *The Legislative Process*, U.S. HOUSE REPRESENTATIVES, [http://www.house.gov/content/learn/legislative\\_process/](http://www.house.gov/content/learn/legislative_process/) (last visited Oct. 21, 2016).

254. Afghanis, on the other hand, do not automatically qualify for relocation under this system because 75 percent of Member States do not recognize Afghanis as refugees. Refugee Crisis Fact Sheet, *supra* note 237.

of "refugee status,"<sup>255</sup> which is contingent upon an applicant having a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.<sup>256</sup> While persecution on account of one of the five protected grounds has been the lynchpin to international protection in the past, the causes of mass exoduses are going to expand in the future beyond these categories (i.e., climate change).<sup>257</sup> This leaves future stateless persons particularly vulnerable because the proposal and quota system limit the grounds for qualifying for refugee protection in the EU to those five categories.

Consequently, the proposal and the quota system in effect seem to be in opposition with the tenets of international refugee law and the EU's regional asylum laws. International refugee law, through the 1951 Convention and 1967 Protocol, defines who qualifies as a refugee and outlines the minimum rights states parties must offer to those who qualify as refugees, including the right of nonrefoulement.<sup>258</sup> The EU's asylum law and European human rights law also recognize the right of nonrefoulement,<sup>259</sup> and EU asylum law goes further in incorporating the 1951 Convention and 1967 Protocol through asylum legislation to make both treaties of international refugee law legally binding throughout the EU.<sup>260</sup> Thus, with these laws in force, it is unclear how the EU could have implemented a quota system based on a proposal whose provisions are anathema to the whole scheme of international protection.

The proposal is also deficient because it lacks defined criteria for what triggers the relocation mechanism, consequently making the implementation of permanent emergency quotas nearly impossible. According to the proposal, the relocation mechanism

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255. *EC Proposal*, *supra* note 224; Council Decision 2015/1601, *supra* note 32, art. 2(c).

256. Council Directive 2011/95/EU, *supra* note 139, art. 2(d), (e).

257. A full-blown discussion about the impacts of climate change and the controversies associated with climate change are outside the scope of this Note. Relevant here, however, is the fact that "climate refugees" have already been recognized as a group that is deserving of international protection. See Kenneth R. Weiss, *The Making of a Climate Refugee*, FOREIGN POL'Y (Jan. 28, 2015), <http://foreignpolicy.com/2015/01/28/the-making-of-a-climate-refugee-kiribati-tarawa-teitiota/>.

258. 1951 Convention, *supra* note 13, art. 33.

259. *Id.*; ECHR, *supra* note 150, art. 3.

260. *See supra* Part II.

will come into effect when a Member State faces “extreme pressure characterised by a large and disproportionate inflow of third-country nationals,” which places a significant burden on its asylum system.<sup>261</sup> This definition is too vague, as the terms “extreme pressure” and “large and disproportionate” can be interpreted differently amongst the Member States. Furthermore, while the proposal tries to limit the European Commission’s interpretation by prescribing certain criteria it must take into account in determining whether an emergency situation exists in a Member State,<sup>262</sup> it is still at the European Commission’s discretion to interpret the criteria as broadly or narrowly as the Commission pleases.

Finally, the relocation mechanism has proven itself ineffective in transferring refugees because it lacks an enforcement mechanism. There are no consequences in place if a Member State decides to ignore the quotas and instead erect walls to keep people out, as evidenced by actions of the Hungarian government.<sup>263</sup> The European Commission recognized this deficiency and formulated a new set of proposals,<sup>264</sup> which among other things, requires Member States to make a “solidarity contribution” of 250,000 euros per applicant that the Member State is assigned but neglects to accept.<sup>265</sup> It is unclear whether this penalty is enough of a deterrent to encourage Member States to accept the burden in taking in refugees. The fact that it is called a “solidarity contribution” versus a more punitive classification, such as a sanction, however, seems to downplay the disciplinary effect this provision will have on Member States.

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261. *EC Proposal*, *supra* note 224, at 7.

262. *Id.*

263. *See supra* notes 213–219 and accompanying text.

264. The European Commission’s 2016 proposal is similar in content to the 2015 Proposal, but no legally binding resolution has come about from it. Thus, the 2016 proposal will only be discussed here when its terms address a deficiency in the original proposal, from which the binding quota system was established. *See Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)*, COM (2016) 270 final (May 4, 2016) [2016 Proposal].

265. *Id.*

*B. Solution Part I: Defining the Scope of the Emergency Framework*

In order to respond to the most recent migration crisis and future crises within the bounds of international refugee law, EU asylum law, and European human rights law, the EU should immediately implement a permanent emergency framework that addresses the shortcomings of the original proposal and relocation mechanism. Defining the emergency quota system's scope is time sensitive because, in the event of a migration crisis, it is critical that Member States already have a method in place for responding, instead of scrambling to figure out how to act. In defining the scope of an emergency, this framework should 1) establish definitive criteria that, if met, would trigger the emergency quotas; 2) incorporate a more expansive definition of the term refugee so the solution not only applies to the current crisis but also to future migration crises that are caused by factors beyond persecution; 3) decrease the 75 percent recognition rate to expand the pool of applicants who would qualify for international protection; and 4) increase the 40 percent threshold for the amount of applicants to be relocated so more asylum seekers can be transferred.

1. Establishing Objective and Enhanced Crisis Criteria

The emergency framework should contain specific and objective criteria, chiefly in respect to what constitutes a migration crisis, so that all Member States are aware of the factors that will trigger their legal obligations under the relocation scheme. The standards the EU proposed and adopted in the quota system currently in force, including "extreme pressure," for triggering a relocation mechanism, are too vague and leave too much up for interpretation, most importantly when the relocation mechanism would come into effect. Furthermore, the conditions necessary to establish a migration crisis should not be narrowly tailored to a specific Member State but instead should apply to the EU generally because irregular migration patterns are a regional issue that Member States should collectively aim to solve.

Although it is difficult to define what constitutes a migration crisis, it is a necessary factor for implementing a durable, permanent emergency framework. Consequently, it is crucial to adopt a bright-line number for the amount of irregular arrivals

and asylum applications in the EU that will trigger the emergency relocation mechanism. A number is the clearest indicator that a crisis is occurring and is easy to obtain, as the EU has agencies in place, such as Eurostat<sup>266</sup> and Frontex,<sup>267</sup> which keep track of the number of asylum applications made in the EU, the number of irregular arrivals, among other types of information pertinent to migration in the EU. The defining number has to be a reasonable number in light of the fact that this framework is only for migration emergencies. Thus, the number cannot be so low that it falsely triggers the emergency mechanism with every spike in arrivals and asylum applications. On the opposite end, however, the number cannot be so high as to prevent the emergency relocation mechanism from ever being used. Based on these considerations, and looking at the number of irregular arrivals and asylum applications that triggered the current quota system to be implemented in Italy and Greece,<sup>268</sup> a reasonable number of refugees to trigger the crisis threshold would be 150,000 irregular arrivals in Europe. The 150,000 number would not be limited to the borders of one particular Member State, rather it represents the aggregate of irregular arrivals in all Member States. Once that quota has been met, the crisis criteria would come into effect to distribute the number of asylum applications amongst the Member States.

Additionally, the permanent relocation mechanism should include language that affects an EU-wide response even when one Member State is confronted by a migration crisis. The EU is a

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266. Eurostat is the “statistical office of the European Union . . . [whose] mission is to provide high quality statistics for Europe.” See *Overview*, EUROSTAT, <http://ec.europa.eu/eurostat/about/overview> (last visited Oct. 9, 2016).

267. Frontex is the agency charged with the EU’s border management. *Mission and Tasks*, FRONTEx, <http://frontex.europa.eu/about-frontex/mission-and-tasks/> (last visited Oct. 9, 2016).

268. Council Decision 2015/1601, *supra* note 32 (“According to data of the European Agency for the Management of Operational Cooperation at the External Borders (Frontex), the central and eastern Mediterranean routes were the main areas for irregular border crossing into the Union in the first 8 months of 2015. Since the beginning of 2015, . . . [a] strong increase was also witnessed by Greece in 2015, with more than 211,000 irregular migrants reaching the country (including approximately 28,000 irregular migrants who have been registered by local authorities, but have yet to be confirmed in Frontex data). During May and June 2015, 53,624 irregular border crossings were detected by Frontex and during July and August 137,000, an increase of 250%.”).



collective political and economic union<sup>269</sup> and when one Member State is suffering, it inherently affects all EU Member States.<sup>270</sup> By changing the language to reflect the EU as a region versus a specific Member State, it reinforces the idea of collective action and uniformity in addressing the needs of asylum seekers. Additionally, this language will hopefully help each Member State realize that it is within their best interest to not stall the relocation process, as each Member State's actions (or inactions) have a direct impact on the efficacy of the EU.<sup>271</sup>

Setting objective criteria for determining when a migration crisis is occurring and making it applicable to the whole EU versus individual Member States has various benefits. To begin with, each Member State will be on notice about when their legal obligations to accept and relocate refugees will come into effect, which helps them to better prepare when they receive their allocation of asylum seekers. Furthermore, by switching the focus from an individual Member State facing a migration emergency to the EU as a whole, it reinforces that core idea that the EU is a collective regional organization where each Member State's actions have an impact on the functioning of the EU.

## 2. Expansive Definition of Refugee

A permanent emergency framework must be proactive and forward-looking in delineating the qualifications for refugee status. Circumstances causing mass displacement have progressed significantly since the adoption of the 1951 Convention and 1967 Protocol, and persecution on account of one of the five protected grounds (race, religion, membership in a particular social group, nationality, and political opinion)<sup>272</sup> is not the sole factor causing persons to seek international protection. Consequently, the per-

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269. *EU in Brief*, *supra* note 25.

270. Take for example, the Eurozone debt crisis, where several Eurozone Member States, Greece, Portugal, Ireland, Spain, and Cyprus, were unable to repay their government debts or bail out overindebted banks without the assistance of third parties, such as other EU Member States and the International Monetary Fund, among others. See generally Christopher Alessi & James McBride, *The Eurozone in Crisis*, COUNCIL ON FOREIGN REL. BACKGROUNDS (Feb. 11, 2015), <http://www.cfr.org/eu/eurozone-crisis/p22055>.

271. The new permanent emergency framework should read: "When the EU is faced with an emergency migration situation, as defined by the criteria . . ."

272. 1951 Refugee Convention, *supra* note 13, art. 1.

manent framework should consider other causes of mass displacement in establishing who qualifies for international protection.

For a more robust definition of “refugee,” the EU should employ the definition utilized by the Organization of African Unity’s (OAU) Refugee Convention, the regional legal instrument governing refugee protection in Africa,<sup>273</sup> which provides a very comprehensive definition of “refugee.” This definition not only applies to individuals who have a well-founded fear of persecution on account of one of the five protected grounds but also to

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.<sup>274</sup>

As compared to the definition of “refugee” in the 1951 Convention and 1967 Protocol,<sup>275</sup> the OAU definition of “refugee” focuses on the objective circumstances that compel individuals to flee and includes situations not based on deliberate state action.<sup>276</sup> Moreover, the OAU’s definition is flexible and applicable to modern day factors causing displacement. It is crucial that the EU utilize a similar expanded definition in classifying who qualifies as a refugee under the emergency quotas since the framework for the emergency mechanism is being implemented far in advance of the crisis and the EU will not know the factors causing the influx until it happens. This expanded definition will also complement persecution as a ground for refugee status, as it will expand the eligibility of people who are able to seek international protection under the emergency quotas.

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273. Marina Sharpe, *African Union Refugee Definition*, RTS. IN EXILE PROGRAMME, <http://www.refugeelegalaidinformation.org/african-union-refugee-definition> (last visited Oct. 10, 2016).

274. Org. of African Unity [OAU] Convention Governing Specific Aspects of Refugee Problems in Africa art. 1.

275. *See supra* Part I.

276. *Alternative Standards Specific to Refugees – The Regional Level*, FORCED MIGRATION ONLINE, <http://forcedmigration.org/research-resources/expert-guides/international-law-and-legal-instruments/alternative-standards-specific-to-refugees-the> (last visited Oct. 10, 2016).

### 3. Decreasing the 75 Percent Recognition Rate

To limit the quota system's application, the EU adopted a 75 percent threshold, which meant that an applicant would have to be recognized as a refugee by three fourths of Member States to qualify for the relocation scheme.<sup>277</sup> This threshold is too high and arbitrary, as it only applies to a few nationalities, namely Syrians and Eritreans because they are recognized as refugees by three quarters of Member States, and leaves the rest of the people seeking international protection who do not meet this high burden in a state of flux. Thus, to address this issue, the EU can either reduce the threshold to a less burdensome number (i.e., at least to 55 percent,<sup>278</sup> which still qualifies as a majority of Member States) or remove the recognition rate completely. As the EU would be facing a crisis situation when the quotas come into effect, it is understandable why they would not want to remove the recognition threshold in total because, in such a case, applicants who are unlikely to qualify for asylum are incentivized to prolong their stay in the EU. Consequently, the best option for the emergency framework is to reduce the threshold amount to at least 55 percent. This option is a compromise but still requires a majority of the EU to recognize an applicant's claim for refugee status. On the other hand, however, the lower threshold allows more people to benefit from the emergency relocation mechanism and provides greater international protection in a timely manner.

Additionally, the 55 percent threshold seems to align more with international refugee law and the EU's asylum laws, as it allows more individuals to have access to asylum procedures. Moreover, the lower threshold promotes efficiency in a crisis situation as it weeds out applicants who are highly unlikely to qualify for asylum without completely sacrificing human rights, due to the fact that more nationalities would be eligible for the benefits of the relocation mechanism.

### 4. Increasing the Threshold Number of Applicants to be Relocated

To further limit the quota system's application, the EU set the number of people to be considered for relocation at 40 percent of

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277. Council Decision 2015/1601, *supra* note 32, art. 3.

278. A 55 percent recognition rate establishes a simple majority, as fifteen out of twenty-eight Member States must recognize an individual as a refugee in order to qualify under the framework this Note proposes.

the number of asylum applications lodged with the Member State in the six months preceding the adoption of the relocation mechanism.<sup>279</sup> This limitation clearly led to disproportionate results, as only 160,000 out of a million refugees that arrived in Europe in 2015<sup>280</sup> were allocated for the relocation mechanism by applying the 40 percent criteria to the number of asylum applications lodged in Greece and Italy in the preceding six months.<sup>281</sup> While it is difficult to determine a precise number of applicants to be relocated before the crises occur under the new framework, it is clear that the number of applicants to be transferred should reflect more than 3 percent of the actual arrivals coming to Europe. With this in mind, the permanent framework should set a limit of relocating at least 75 percent of the asylum applications lodged with the EU in total in the six months preceding the execution of the emergency framework—i.e., when the 150,000 figure is met, the relocation mechanism will come into force and distribute 75 percent of the asylum applicants lodged with the EU among the Member States. The 150,000 figure essentially sets a floor for the number of refugees that are needed to trigger the mechanism, however, thereafter the mechanism will be flexible in that, no matter how many refugees arrive, 75 percent of them will be redistributed.

It is important that the permanent emergency framework allocates a reasonable number of persons to be relocated with respect to the number of asylum applications received by the EU. It is superfluous to set rigid numbers based on the past number of asylum applications and not revisit the totals every few months to ensure the number of people being relocated matches up with actual number of people entering Europe. While the number of individuals to be relocated is a bright-line rule in proportion to the number of applications received, the number can be increased based on quarterly reviews—i.e., if in three months after the relocation scheme comes into effect 300,000 more applications are received, 75 percent of those applications will be distributed among Member States. Consequently, the proposed relocation mechanism will remain flexible as the crisis continues and will reflect the true number of individuals arriving in Europe.

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279. *EC Proposal*, *supra* note 224.

280. *Irregular Migrant Arrivals*, *supra* note 6.

281. *See generally EC Proposal*, *supra* note 224; Council Decision 2015/1601, *supra* note 32.

C. *Solution Part II: Mandatory Emergency Refugee Quotas and Enforcement*

The second part of the permanent framework involves executing and enforcing the emergency relocation mechanism when the crisis criteria are met. When it is established that a migration emergency is occurring, the mandatory quotas should come into effect. The quotas would be mandatory in the strict sense of the word and would not allow a Member State to avoid its responsibilities by making financial contributions. In determining how many refugees an individual Member State is responsible for relocating, the methodologies from the original proposal should be utilized, which take into account each Member State's population, gross domestic product (GDP), unemployment rate, and average number of asylum applications for the preceding five years per one million inhabitants.<sup>282</sup> The original proposal places greater emphasis on GDP and population,<sup>283</sup> which should remain heavily weighted in the new permanent emergency framework this Note proposes because they are clear objective criteria establishing how many people a Member State is physically and economically able to receive.

Once the numbers are established, the European Commission would be charged with executing the quotas and monitoring to ensure that each Member State is sharing the burden in relocating refugees. If a state is noncompliant in accepting refugees, various enforcement mechanisms would be available, including formal infringement proceedings, referral of the matter to the Court of Justice of the European Union (CJEU), or sanctions. Clearly, these enforcement mechanisms are severe, and the first step in addressing a noncompliant Member State would be to handle the matter informally through an early settlement mechanism whereby the European Commission notifies the Member State of the violation and the Member State attempts to address the violation.<sup>284</sup> If the Member State refuses to rectify their behavior, in this case not accepting refugees, the Commission

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282. *EC Proposal*, *supra* note 224, at 10–13.

283. *Id.* In fact, the 2016 proposal solely relies on GDP and population in determining how many refugees a Member State is responsible for accepting and relocating. *2016 Proposal*, *supra* note 264.

284. *See Infringement Procedure*, EUR. COMMISSION, [https://ec.europa.eu/info/infringement-procedure\\_en#formal-procedure](https://ec.europa.eu/info/infringement-procedure_en#formal-procedure) (last visited Oct. 10, 2016).

would have the authority to launch a formal infringement proceeding.<sup>285</sup>

In formal infringement proceedings, the European Commission sends a letter to the noncompliant Member State requesting further information about the infraction of EU law, to which the Member State usually has two months to respond.<sup>286</sup> If the European Commission ultimately finds that the Member State is failing to fulfill its obligations under EU law, it can send an opinion requesting the Member State in question to comply with the law.<sup>287</sup> If the Member State continues to be noncompliant, the European Commission has the power to refer the matter to the CJEU, which will issue a binding ruling.<sup>288</sup> If the CJEU finds that a Member State has violated EU law, the national authorities of that Member State must take action to comply with the CJEU's judgment.<sup>289</sup> If, despite the CJEU's decision, a Member State continues to breach EU law, the European Commission can refer the case back to the CJEU a second time, and the CJEU would then have the power to impose sanctions against the breaching Member State.<sup>290</sup>

It is crucial that the permanent emergency framework contain a stringent enforcement mechanism in order to deter Member States from breaching their legal obligations in accepting refugee quotas. Member States need to be held accountable for their actions, as there would be very little incentive for Member States to follow the laws if they would not be penalized for their defiance. It is especially important to set up an enforcement mechanism because some central authoritative body needs to be responsible for administering the quotas and making sure each Member State is acting for the collective benefit of the EU by doing their part to alleviate the crisis.

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285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*; see also *Financial Sanctions*, EUR. COMMISSION, [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/financial-sanctions/index\\_en.htm](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/financial-sanctions/index_en.htm) (last visited Oct. 10, 2016).

289. *Infringement Procedure*, *supra* note 284.

290. *Id.*

## CONCLUSION

The EU, as a microcosm of the global community, has demonstrated the deficiencies in responding to the current refugee crisis with reactionary and temporary solutions. These shortfalls demonstrate the need for vast reform in how the EU deals with international protection during migration emergencies. It is necessary to make these changes now, as migration crises will continue to occur for varying reasons beyond the five protected grounds of persecution. Thus, the EU needs to have permanent measures in place for dealing with sudden influxes of migrants. The EU should implement a permanent solution, which would take effect in the event Member States are being confronted by a migration crisis. The first part of this solution should be implemented immediately, as it establishes bright-line criteria for determining when a migration crisis is occurring and who qualifies for refugee protection, among other criteria. This will put Member States on notice that they will have certain legal obligations to undertake when these criteria are met. The second part of this solution will enter into force in the event the crisis criteria are met and will establish each Member States' legal obligations in alleviating the burden, i.e., through mandatory quotas, which are enforceable by the European Commission. This approach will humanely address refugees' rights and livelihoods since it will provide clear and enforceable guidelines for the EU on refugee protection during mass migration crises and the roles of each Member State in alleviating the crisis at hand.

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