

EDITORS: SERGIO CARRERA AND MELTEM INELI-CIGER

# EU RESPONSES TO THE LARGE-SCALE REFUGEE DISPLACEMENT FROM UKRAINE

AN ANALYSIS ON THE TEMPORARY PROTECTION  
DIRECTIVE AND ITS IMPLICATIONS FOR THE  
FUTURE EU ASYLUM POLICY

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# **EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy**

Editors Sergio Carrera and Meltem Ineli-Ciger

Migration Policy Centre, Robert Schuman Centre,  
European University Institute, Florence, Italy

# Abstract

This Book examines the European Union's policy responses to large-scale displacement of refugees fleeing the war in Ukraine and the activation and implementation of the Temporary Protection Directive from interdisciplinary perspectives. The activation of the EU's Temporary Protection Directive for the first time in European history to receive nearly 5 million people fleeing the war in Ukraine begs the following question: Does it represent a new era or a turning-point in EU asylum policy? The various chapter contributions assess this question by first analysing central issues related to the scope, implementation and debates raised by the Temporary Protection Directive. In particular, various chapters focus on the implementation of the Temporary Protection Directive across various European countries, its medium and long-term impacts, as well as 'lessons learned' from policies adopted by non-EU states hosting large-scale refugee communities. The Book then studies the extent to which the Temporary Protection Directive represents a game-changer in the wider EU asylum policies by comparing the EU's temporary protection policy covering Ukrainian refugees with the one driving the EU Pact on Migration and Asylum and Member States' asylum policies towards non-European refugees, which put especial emphasis on contained mobility, responsibility shifting and externalisation. This includes an assessment of the relationship and compatibility of EU asylum policies with international and EU rights and principles, with particular attention to those related to non-discrimination, solidarity, and justice.

## Key words

Temporary protection, solidarity, mass influx, war in Ukraine, mass displacement from Ukraine, registration, exclusion, data protection, asylum, discrimination

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# Preface

## Dr Sergio Carrera and Dr Meltem Ineli-Ciger

The full-scale Russian invasion of Ukraine began on 24 February 2022 and led to a large-scale cross-borders human displacement. To protect Ukrainians fleeing the invasion, the European Council unanimously adopted the Council Implementing Decision (EU) 2022/382 of 4 March 2022<sup>1</sup>, giving those fleeing war in Ukraine the right to temporary protection. This was the first time the Council Directive 2001/55/EC<sup>2</sup> (Temporary Protection Directive) had been activated or, in other words, implemented to respond to the large-scale arrival of displaced persons fleeing a conflict zone and seeking international protection in the EU.

The activation of the Temporary Protection Directive, which has long been assumed to be obsolete, in 2022, has been presented as the beginning of a new era in the EU asylum policy. Yet is this really the case? Following the activation of the Directive, Member States developed swift responses to the refugee movements from Ukraine in line with the Council's Implementing Decision 2022/382 of 4 March 2022. According to EU Agency for Asylum (EUAA)<sup>3</sup>, more than 4,7 million persons forcibly displaced from Ukraine are holding temporary protection status in the Union, as of November 2022.

Although the EU's decision to open its borders to refugees fleeing Ukraine

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- 1 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, SI/6846/2022/INIT OJ L 71, 4.3.2022. (*hereinafter* Council Implementing Decision (EU) 2022/382 of 4 March 2022).
  - 2 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof OJ L 212, 7.8.2001.
  - 3 EUAA, Ukraine Crisis: Data and Analysis, as of 6 November 2022, <<https://euaa.europa.eu/ukraine-crisis-data-and-analysis>> accessed 10 January 2023.

and grant them immediate access to rights and services is commendable, offering temporary protection to nearly 5 million displaced persons has proved to be challenging for many Member States and revealed far-reaching gaps in both law and policy. Many Member States were forced to adopt new national laws and policies on different aspects relating to temporary protection incorporating the Council Implementing Decision 2022/382 of 4 March 2022, in a quite hasty way. Moreover, the EU's 'protection friendly' response to the Ukrainian displacement is at odds with its highly restrictive containment-driven asylum policies towards non-European asylum seekers, which has become evident in the context of EU-third country cooperation agreements and arrangements such as for instance the EU-Turkey Statement that seeks to contain refugees (coming not from Ukraine but from countries like Syria and Afghanistan) in countries of transit and 'externalise' asylum and migration management to third countries. Furthermore, the question can be raised as to whether the EU's activation of the Temporary Protection Directive hides in fact a logic of 'hidden containment' or protracted temporariness instead of one giving preference to medium and longer-term responses favouring automatic/immediate refugee protection and/or regularisation.

The EU responses to the large-scale displacement from Ukraine and Europe's temporary protection laws and policies should be therefore closely scrutinised and analysed not just because temporary protection as a status today affects nearly five million Ukrainians but, in many respects, it also presents a clear departure from EU's recent asylum policies that are based on contained mobility, responsibility shifting, and externalisation.

This edited volume examines from an interdisciplinary perspective the EU's response to large scale displacement of refugees fleeing the war in Ukraine and the activation and implementation of the Temporary Protection Directive. The book includes updated and revised versions of the contributions published as part of the second ASILE H2020 Project Forum titled '*EU Temporary Protection Responses to the Ukraine War and the Future of the EU Asylum System*'<sup>4</sup> that ran between April and October 2022.

The book consists of five different Sections, each exploring a different aspect relating to the EU response to the Ukrainian displacement. Section I, titled '*The Activation of the Temporary Protection Directive in 2022: A Turning Point in EU Asylum Law and Policy?*' assesses the activation of the Temporary Protection Directive in March 2022, and it studies what this means more gen-

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4 For ASILE Forum '*EU Temporary Protection Responses to the Ukraine War and the Future of the EU Asylum System*' (2022) <<https://www.asileproject.eu/eu-temporary-protection-responses-to-the-ukraine-war-and-the-future-of-the-eu-asylum-system/>> accessed 10 January 2023.

erally for the current and future shapes of EU asylum law and policy. Chapter 1, authored by Sergio Carrera, Meltem Ineli-Ciger, Lina Vosyliute and Leiza Brumat, provides an analysis of the immediate EU policy responses to people fleeing the war in Ukraine, with particular attention given to the activation of the Temporary Protection Directive. The Chapter, which constituted the kick-off piece of the ASILE project Forum, engages in a comparative analysis of the policy responses to large-scale refugee movements in non-EU countries like Colombia, Brazil, and Turkey, and it identifies ‘lessons learned’ from these examples for the EU.

Meltem Ineli-Ciger takes a look in Chapter 2 at instances where the Directive was not implemented in previous instances to respond to large scale arrivals from Northern Africa (following the Arab spring), Syria and Afghanistan and questions why this time in 2022 the Directive is activated as opposed to its two-decade long existence. Moreover, Chapter 3, written by Nuria Arenas, examines the definition of the ‘mass influx’ in the Directive and how this concept is and should be interpreted. Hugo Storey examines in Chapter 4 whether Ukrainians fleeing the Russian Aggression can be qualified as ‘refugees’ following the definition provided by the 1951 Convention and answers in the positive. This is followed by Chapter 5, where Gamze Ovacık explores the implications of the activation of the Temporary Protection Directive for the right to choose the country of asylum.

Section II of the book titled ‘*Responses of the EU+ Countries to the Ukrainian Displacement*’ examines national responses by European countries to the Ukrainian refugee displacement. The Section starts with a Chapter 6, co-authored by Lenka Dražanová and Andrew Geddes, which analyses the results of a survey on public attitudes to Ukrainian displacement in eight Member States (Austria, Czechia, Germany, Hungary, Italy, Poland, Romania, Slovakia). Whereas Chapter 7, by Boldizsár Nagy, examines how Hungary has responded to the arrival of displaced persons from Ukraine and concludes that the Hungarian government policy is in fact camouflaging a discriminatory and racist stance towards non-European refugees in an act of political opportunism; a similar kind of analysis is conducted by Marta Jaroszewicz and Mateusz Krępa in respect of Poland in Chapter 8. Their analysis highlights some of the key factors behind the fact that Poland is the largest host country to Ukrainian refugees. It also highlights how one of the key challenges has been the status and access to rights by non-Ukrainian nationals, especially those of African and Asian origins.

This is then followed by Chapter 9, written by Alan Desmond, which looks at the UK response to the arrival of displaced persons from Ukraine and compares it with the EU response, in particular as regards the negative impacts of UK's restrictive visa and family reunification policies. Chapter 10, authored by Daniela Vitiello, asks whether the Temporary Protection Directive's activation will remain as *lex specialis* and how national courts – in particular Italian Courts – may play a role in preserving asylum and establishing better protection responses to forced displacement.

Section III of the book, titled '*Procedures, Reception, Rights, and Agencies*', covers the extent to which Ukrainians have effective access to procedures, reception, and rights in the EU, and how EU agencies such as Frontex and EU large-scale databases such as Eurodac come into play in this response. The Section begins with Chapter 11, by Georgios Milios, which compares the right to family unification under the Council's Implementing Decision and the Temporary Protection Directive, and the EU Family Reunification Directive, and concludes that the former doesn't provide a narrower or more restrictive concept of what qualifies as 'family'. This is followed by Sarah Singer's Chapter 12, which focuses on a very under-researched but highly important procedure namely, the exclusion from temporary protection. Niovi Vavoula's Chapter 13 takes a look at the registration of temporary protection beneficiaries' data and criticises the expansion of Eurodac's scope to include personal data collected by beneficiaries of temporary protection which has not proved to be necessary and justified. Chapter 14, by Julian Lehman and Angeliki Dimitriadi, provides an examination of the reception of displaced persons from Ukraine in Europe and the possible policy challenges that may arise in the future in relation to reception conditions. In a very striking analysis, Mariana Gkliati examines the EU agency Frontex's role in the reception of displaced persons from Ukraine in Chapter 15. Based on analysis of Frontex language and differentiate messaging when comparing Ukrainian and non-Ukrainian refugees, Gkliati highlights the existence of a 'racialised passage' at EU external borders which highlight systematic discrimination in the workings of the Frontex agency. Chapter 16 authored by Iuliia Lashchuk criticises the fact that the Temporary Protection Directive and its implementation do not include a much-needed gender focus and notes that this is an important shortcoming considering a majority of persons fleeing Ukraine are women and girls.

Section IV of the volume is titled '*Lessons Learned from Türkiye's Response to Syrian Influx*'. It focuses on the lessons that can be drawn from Türkiye's experience with managing the Syrian large-scale arrivals in the past 11 years

for improving the EU's response to the Ukrainian influx. Chapter 17 by Yigit Kader deals with Türkiye's experience with the registration of Syrian temporary protection status holders and highlights the importance of accurate data registration and privacy. Onur Ariner's Chapter 18 focuses on 'integration' and draws lessons for the inclusion policy efforts of Member States receiving forcibly displaced persons from Ukraine. Finally, Ayse Dicle Ergin examines in Chapter 19 what happens once the temporary protection policy is over and addresses how the transition to Refugee Status Determination (RSD) procedures should be operationalized.

The final part of the book, Section V, covers '*The EU response to Ukrainian displacement in light of the principles of non-discrimination, solidarity and justice*'. Chapter 20, authored by Joanne van Selm, compares the context that the Temporary Protection Directive's activation to European practices of temporary protection in the 1990s, and challenges the view that the EU's response has been discriminatory based on arguments such as the so-called 'geographic proximity' and wider foreign affairs considerations. This is followed by Chapter 21, written by Julia Kienast, Nikolas Feith Tan, and Jens Vedsted-Hansen, which discusses whether EU protection arrangements for persons displaced from Ukraine are preferential, differential, or discriminatory and concludes that EU Member States must provide objective justifications behind the distinctions made between Ukrainian and non-Ukrainian nationals. Whereas Gregor Noll and Eleni Karageorgiou challenge in Chapter 22 the view that EU and Member State cooperation to receive and protect refugees from the armed conflict in Ukraine should be called 'solidarity' but rather a state-centric 'alliance logic' aimed at deterring asylum seekers mobility.

Achilles Skordas, in a thought-provoking Chapter 23, questions whether the decision to invoke the Temporary Protection Directive in 2022, in view of its absence of implementation in the past two decades, is a result of a racist double standard and he argues that this is not the case. Opposing this view, Dora Kostakolopoulou's Chapter 24 highlights the discriminatory nature of the EU's responses. She concludes that the solidarity towards those fleeing the invaded Ukraine can only be ethically – not ethnically or racially – grounded, and that foreign affairs considerations in EU asylum policy are incompatible with the EU Treaties.

Contributing to the said discussion, in Chapter 25, Henk van Houtum and Rodrigo Bueno Lacy conclude that the EU's differentiation between Ukrainian and non-Ukrainian asylum seekers constitutes immoral discrimination and structural racism, and provide a critical outlook at the so-called

‘geographical proximity’ argument and conclude that geographical proximity should not be understood as mere territorial contiguity, for this amounts to scientific ignorance at best and geopolitical mystification at worst. In a concluding contribution to the volume, Sergio Carrera and Roberto Cortinovis examine in Chapter 26 the Declaration on a Voluntary Solidarity Mechanism adopted by a group of Member States in June 2022 against the backdrop of recent EU responses to the Ukrainian displacement, and in particular activation of the Temporary Protection Directive. Carrera and Cortinovis call for an EU Charter of Fundamental Rights-proof version of the EU solidarity principle, which subordinates solidarity to justice.

We owe many thanks to a lot of people. First, we would like to express our gratitude to all the contributors to this volume for their excellent analysis and their respective chapters. Special thanks go to Özgenur Yiğit (Research Assistant, Suleyman Demirel University Faculty of Law) and Ayşegül Dursun (Research Assistant, Suleyman Demirel University Faculty of Law) that helped us immensely in the editing and formatting processes. We also wish to thank Miriam Mir (Project Officer, CEPS) and Marita Schaaser (Admin Officer, EUI MPC) for their support and help in the ASILE Forum and book publication processes. Finally, we are grateful to Andrew Geddes (MPC Director) for his support to publishing this book as part of the EUI publications series.

# Section I

The Activation of  
the Temporary  
Protection

Directive in 2022:

A Turning Point in  
EU Asylum Law and  
Policy

# Chapter 1

## The EU Grants Temporary Protection for People Fleeing War in Ukraine: Time to Rethink Unequal Solidarity in EU Asylum Policy\*

Dr Sergio Carrera\*\*, Dr Meltem Ineli-Ciger\*\*\*,  
Lina Vosyliute\*\*\*\*, Dr Leiza Brumat\*\*\*\*\*

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\* An earlier version of this chapter has been published previously as the kick-off paper for the ASILE Forum EU Temporary Protection Responses to the Ukraine War and the Future of the EU Asylum System: Sergio Carrera, Meltem Ineli-Ciger, Lina Vosyliute, Leiza Brumat, The EU grants temporary protection for people fleeing war in Ukraine, CEPS Policy Insights No 2022-09/ March 2022, [https://www.ceps.eu/download/publication/?id=35838&pdf=CEPS-PI2022-09\\_ASILE\\_EU-grants-temporary-protection-for-people-fleeing-war-in-Ukraine-1.pdf](https://www.ceps.eu/download/publication/?id=35838&pdf=CEPS-PI2022-09_ASILE_EU-grants-temporary-protection-for-people-fleeing-war-in-Ukraine-1.pdf), accessed 1 December 2022. Senior Research Fellow and Head of the Justice and Home Affairs Unit, CEPS.

\*\* Senior Research Fellow and Head of the Justice and Home Affairs Unit, CEPS.

\*\*\* Jean Monnet Fellow, EUI; Associate Professor, Suleyman Demirel University Faculty of Law.

\*\*\*\* Research Fellow, CEPS.

\*\*\*\*\* Senior Researcher, Institute for Minority Rights-Euroac.



# 1. Introduction

Russia's violent invasion of Ukraine is bringing back the human horrors of armed conflict and people forced to flee seeking asylum. The situation in Ukraine brings to the forefront as to what it means to be human with equal dignity, and the crucial role that upholding human rights – and their interconnectedness with the rule of law and democratic principles – have for safeguarding peace.

The invasion commenced on 24 February 2022. In the following days, large numbers of Ukrainians and others previously resident in Ukraine fled directly to various European states. In an unprecedented move, the European Commission proposed the activation of the 2001 Temporary Protection Directive (TP Directive)<sup>1</sup>, with EU Member States formally adopting it on 4 March 2022<sup>1</sup>. This is a much-welcomed step to ensuring that those escaping war are facilitated safe access to the EU's territory without needing lengthy individual asylum determination status procedures. The activation of the TP Directive sends a clear message of a common EU commitment to implement a coordinated response, avoiding *ad hoc*/unilateral Member States measures, easing pressures on national asylum systems and ensuring a common level playing field of rights for potential beneficiaries fleeing the war.

That notwithstanding, the immediate activation of this EU temporary protection regime brings a series of open question and challenges. This is so in relation to the limited personal scope of beneficiaries which have been envisaged in the final text of the agreed Council Decision, which grants Member States the option not to apply the TP Directive regime to all third country nationals – including permanent residents - and asylum seekers residing in Ukraine. It also relates how EU Member States will implement the directive, as well as the policies which will be devised to address the medium and long-term implications for affected individuals.

The swift agreement to activate the TP Directive also stands in stark contradiction with the political blockage by EU Member States over proposals for reforming the EU asylum system which have been on the table since the 2015/2016 so-called 'European Refugee Humanitarian Crisis'. This political blockage is due in large part to the government positions of states that have an external border with Ukraine, in particular Hungary, Poland and Slovakia.

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1 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

These governments have consistently refused a revamped responsibility distribution model establishing a permanent relocation mechanism and moving beyond the EU Dublin Regulation. These same governments have also been explicit in their refusal to share equal responsibility with other EU Member States in southern Europe and uphold their legal commitments as regards asylum seekers and refugees coming from African and certain Asian countries, and the Middle East.

While the capacity to reach a common EU response is certainly to be praised, this same response raises a critical question: Why is the current situation so different from other recent or still ongoing large-scale forced displacements that the activation of the TP Directive is immediately justified? Or, to put it more bluntly, why is the conflict in Ukraine different from the recent conflicts in non-European countries, such as Libya, Afghanistan, and Syria?

The TP Directive has existed since 2001. Despite the many voices calling for its activation to deal with large numbers of refugees arriving to the EU from countries like Syria<sup>2</sup>, it has never been applied in practice as it was deemed as too ‘politically unrealistic’. The question regarding ‘the novelty’ or specificity of the current situation is truly pertinent. This is so in a context where the responses by some EU Member States possessing EU external borders with Ukraine have shown that the right to leave and to cross borders has not been open for *everybody* fleeing Ukraine.

Instead, the discriminatory and xenophobic life-threatening treatment of non-white third country nationals and asylum seekers from African, Asian and Middle East countries has been documented when exercising the right to flee the violence in Ukraine and to seek asylum in the EU. This shows the persistence of *systemic unequal solidarity* in the EU and Member States’ asylum systems which needs to be understood as a threat to the rule of law enshrined in Article 2 Treaty on European Union (TEU).

So, what are the underlying issues at stake behind the unequal treatment given to Ukrainian nationals in comparison to third country nationals from non-European countries with respect to the newly adopted EU temporary protection regime? The answers to this question are of central relevance when analysing the compatibility of the EU’s responses to forced displacement from Ukraine with the legal human rights and refugee protection standards and the

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2 “In February 2015, Member of the European People’s Party Elisabetta Gardini urged the Commission to draft a proposal for the activation of the Temporary Protection Directive as part of a response to the migration crisis in Europe.” LIBE Newsletter Issue 7 (20 February 2015); Meltem Ineli-Ciger, ‘Time to Activate the Temporary Protection Directive’ [2016] 8 European Journal of Migration and Law p.13.

political commitments enshrined in the UN Global Compacts on Refugees (GCR) and Migration (GCM).

This chapter argues that the legal foundations of both UN Global Compacts lay an unequivocal obligation by all UN states to respect, safeguard and promote the rule of law and its intersection with fundamental rights and refugee protection. International and EU human rights standards envisage the absolute prohibition of institutionalised forms of discrimination on the basis of race, ethnicity, origin, religion or other related grounds when managing borders and ensuring access to international protection or asylum for *every person* in need.

While the increasing number of people fleeing the war in Ukraine are attracting high political and media attention, it is a crucial time to rethink the structural foundations and concepts underpinning the Union's asylum policy. This is particularly so in respect of the EU solidarity principle enshrined in Article 80 of the Treaty on the Functioning of the European Union (TFEU) and the specific ways in which it can be designed, tailored and implemented in a way which fully upholds and promotes the notion of *equal solidarity*<sup>3</sup>.

This concept not only invites us to reflect on ways in which to ensure inter-state equality in regard to the sharing of responsibility for every person seeking asylum – irrespective of their origin or any other personal characteristic. It also calls for a *human-centric approach* putting individuals' dignity, agency and the prohibition of non-discrimination and racism in EU asylum policies at its heart. While EU Member States possessing EU external borders with Ukraine have showed clear signs of openness and compassion towards Ukrainian nationals, such openness *must not be 'a la carte'* depending on the attributed cultural or racial affinities of the people fleeing war. It must apply to *all* people equally.

The chapter examines the immediate EU policy responses to people fleeing the war in Ukraine<sup>4</sup>, with particular attention given to the specific shapes of the adopted TP Directive. It starts by providing a 'what we know so far'<sup>5</sup> analysis regarding the scale and key issues pertaining to people trying to leave

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3 On the concept of 'equal solidarity' refer to Sergio Carrera and Roberto Cortinovis, 'The Malta declaration on SAR and relocation: A predictable EU solidarity mechanism?' (CEPS, October 2019) <[https://www.ceps.eu/wp-content/uploads/2019/10/PI2019\\_14\\_SCRRC\\_Malta-Declaration-1.pdf](https://www.ceps.eu/wp-content/uploads/2019/10/PI2019_14_SCRRC_Malta-Declaration-1.pdf)> accessed 1 December 2022.

4 While there are many crucial challenges related to the basic human right to leave Ukraine, this chapter focuses exclusively on the EU responses.

5 Please note that this chapter examines the events as of 14 March 2022.

Ukraine in search of international protection in the EU. The assessment then moves into a study of the EU Temporary Protection regime, comparing the European Commission's proposal with the finally adopted text by the Council of the EU, as well as the Commission's guidelines on easing external border controls. Next, the chapter engages in a comparative analysis of the policy responses and 'lessons learned' – or 'not to be learned' or replicated – by South American countries to the many Venezuelans who have sought asylum within their borders, in particular those from Colombia and Brazil, as well as those from Turkey. Based on this analysis, we recommend a set of standards aimed at recalibrating the EU's asylum policy towards a model of equal solidarity and then the chapter's conclusions.

## 2. A quick recap on people fleeing Ukraine to the EU: Numbers, humanitarianism, ad hoc responses and discrimination

The Russian invasion of Ukraine that began during the early morning of 24 February 2022 has shocked the World. The collective empathy, relatedness and guilt for not being able to defend Ukraine or implement a 'no fly zone' has led European countries to resist with economic sanctions on Russia and embrace humanitarianism towards Ukraine. After initial hesitation, EU Member States found a 'common ground' on a large set of sanctions. Self-interested calculations and positions within the EU were successfully overcome, even in countries such as Cyprus, Germany, Hungary and Italy, who initially blocked<sup>6</sup> the Russian lock-out from SWIFT among other harsher economic penalties.

In addition, within neighbouring and post-Soviet countries there is a very deep understanding that if Ukraine falls – 'we're next'.<sup>7</sup> For western Europe there is also a sense of guilt as wealthy and powerful countries watch how Ukrainian cities are being bombed from the comfort of their homes, all the

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6 Kyiv Independent, 'Cyprus and Italy change their position and support cutting Russia off SWIFT' *Kyiv Independent* (26 February 2022) <<https://kyivindependent.com/uncategorized/cyprus-and-italy-change-their-position-and-support-cutting-russia-off-swift>> accessed 1 December 2022.

7 Rachel Obordo and Caroline Bannock, 'I'm afraid Russia will invade us next': alarm among Ukraine's neighbours' *The Guardian* (1 March 2022) <<https://www.theguardian.com/world/2022/mar/01/ukraine-neighbours-nato-lithuania-poland-slovakia-latvia-estonia-romania>> accessed 1 December 2022.

while with NATO's hands tied and unable to go to Ukraine's defence. So, humanitarianism is only the second-best option on offer, as the first one – going to Ukraine's defence – is hindered by the fear caused by President Putin's nuclear threats.

People fleeing war-torn Ukraine prompted immediate responses by all relevant European institutions and EU Member States' representatives. President of the Commission Ursula von der Leyen said in a press statement that Ukrainians will be met 'with open arms'.<sup>8</sup> The common European response has been recognised and praised<sup>9</sup> by President of the European Parliament Roberta Metsola in her opening speech on 1 March 2022 during the Parliament's Extraordinary Plenary Session on the crisis.

Individuals across several countries have shown compassion and wave of protests '*In Solidarity with Ukraine*' demanding to a stop to the war, the imposition of sanctions on Putin's regime and to protect civilians. The protests have been impressive, with for instance more than 100 000 people protesting in Berlin<sup>10</sup> and more than 119 protests organised<sup>11</sup> across France, as of 6 March 2022. In Lithuania,<sup>12</sup> protests in front of the Russian embassy have been ongoing for a week.

Civil society and ordinary citizens have been actively volunteering and responding to the needs of fleeing people, from providing blankets, hot meals at the borders, to offering their own homes as a temporary shelter. Humanitarian aid, humanitarian evacuations, the protection of civilians and the creation of 'safe corridors' have become 'no brainers' and 'must does' for many European governments, especially those that share borders with Ukraine. For instance,

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8 European Commission, 'Statement by President von der Leyen on further measures to respond to the Russian invasion of Ukraine' (Brussels, 27 February 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/statement\\_22\\_1441](https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1441)> accessed 1 December 2022.

9 European Parliament, 'Metsola to Zelenskyy: "We must face the future together"' (1 March 2022) <<https://www.europarl.europa.eu/news/en/press-room/20220301IPR24303/metsola-to-zelenskyy-we-must-face-the-future-together>> accessed 1 December 2022.

10 Al Jazeera, 'Huge crowds in Europe, US march in solidarity with Ukraine' *Al Jazeera* (27 February 2022) <<https://www.aljazeera.com/news/2022/2/27/thousands-attend-ukraine-solidarity-march-in-berlin>> accessed 1 December 2022.

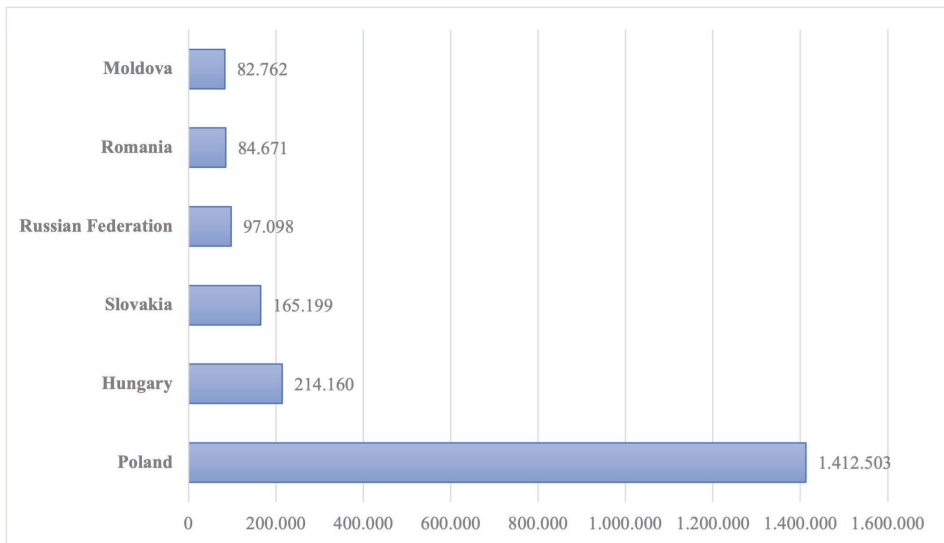
11 Agence France-Presse, 'Tens of thousands join rallies around the world in support of Ukraine' *The Guardian* (6 March 2022) <<https://www.theguardian.com/world/2022/mar/06/tens-of-thousands-join-rallies-around-the-world-in-support-of-ukraine>> accessed 1 December 2022.

12 Ed Cunningham, 'How this tiny country in Eastern Europe is sticking two fingers up to Vladimir Putin' (Time Out, 7 March 2022) <<https://www.timeout.com/news/how-this-tiny-country-in-eastern-europe-is-sticking-two-fingers-up-to-vladimir-putin-030722>> accessed 1 December 2022.

the Lithuanian Interior Minister has called<sup>13</sup> for a ‘fixed resettlement mechanism’ accompanied with mandatory inter-Member States relocation.

According to UNHCR statistics, see *Figure 1* below, more than 2.3 million people had left Ukraine as of 9 March 2022. 1 400 000 of all the people fleeing the Ukraine arrived into Poland, followed by Hungary (214 160), Slovakia (165 199), Moldova (82 762), and Romania (84 671). Some of them also headed to Russia (97 098).

**Figure 1. Number of people fleeing Ukraine by country (as of 9 March 2022)**



*Source: Authors' own elaboration based on UNHCR statistics.*

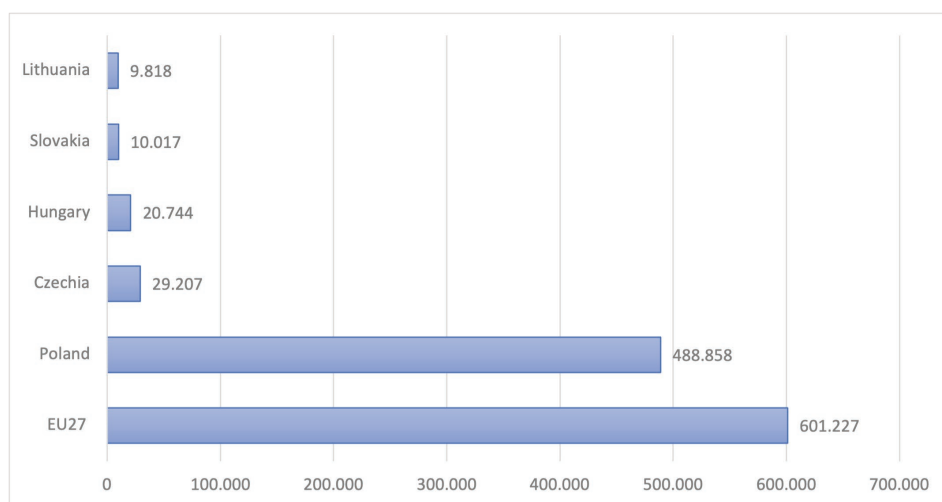
The actual number of people who will be displaced is currently uncertain. It will ultimately depend on the escalation and duration of the war. The global UNHCR asylum statistics show that 75 % of people leaving home due to armed conflicts stay in their own country (thus being internally displaced) or flee to neighbouring countries. Despite the large numbers arriving at the EU, a majority of them, at least during the first few days, were not staying in gov-

13 Bernd Riegert 'EU prepares for millions of Ukrainian refugees DW, 28 February 2022, <<https://www.dw.com/en/the-european-union-prepares-for-millions-of-refugees-from-ukraine/a-60939993>> accessed 1 December 2022.

ernment camps but with friends, relatives or with other ordinary citizens who offered their homes as a safe refuge. For instance, Polish authorities declared on 28 February that special accommodation arranged specifically for fleeing Ukrainians had hardly been tapped.

However, the situation may change rapidly as 60% of people fleeing Ukraine have thus far arrived in Poland<sup>14</sup>, thus schools and other public facilities may be needed for temporary housing as number of displaced people continues to rise. As *Figure 2* below shows, it is interesting to note that the Polish authorities had been issuing the most of residence permits for Ukrainian citizens in the EU27 before the war in Ukraine had even started. As of 2020, there were in total of 600 000 first residence permits issued to Ukrainians for various family reunification, employment and other reasons in the EU, with Poland alone issuing around 489 000, followed by Czechia, Hungary, Slovakia and Lithuania.

**Figure 2. Number of first residence permits issued to citizens of Ukraine in top 5 EU MS and EU27 – in 2020**



*Source: Authors' own elaboration, based on Eurostat, MIGR\_RESFIRST.*

Several issues have emerged in the public eye in respect of the implementation of EU Member States' responses to the number of attempted entries into the Schengen Area by land. Various media sources have reported, for instance, that EU external border controls aim to confirm everyone's identity quickly and to run the necessary security checks, and that there were about 70-hour

14 Refer to UNHCR, 'Ukraine Refugee Situation' <<https://data.unhcr.org/en/situations/ukraine>> accessed 1 December 2022.



queues to enter Poland, seven hours to cross into Slovakia,<sup>15</sup> 20 to 30 hours to get into Romania<sup>16</sup> and also 24 hours queues to enter Moldova and varying degrees of queues to Hungary.<sup>17</sup>

The UN High Commissioner for Refugees (UNHCR) is assisting in varying ways at different border crossings and on arrival. The Inter-Agency Regional Response Plan (RRP)<sup>18</sup> has been swiftly devised by UNHCR and, in line with the UN Global Compact on Refugees foresees as ‘partnership approach’ by engaging the International Organisation for Migration (IOM), together with other UN agencies and international organisations such as the Norwegian Refugee Council and Save the Children. They are preparing to meet the needs of an estimated 2.4 to 4 million arrivals by operating on the ground with emergency teams and by providing technical support, including the monitoring of reception capacities, and ensuring the most basic and urgent needs of the arrivals.

Along with the involvement of international organisations, there have been various mobilisations of family, friends, diaspora communities, citizens, various local NGOs, local authorities, companies and even celebrities who are seeking ways to help the numerous civil society organisations operating in Ukraine and at the EU’s external borders to ensure the smooth and dignified reception of people. In Poland, just like in other neighbouring countries people and public transport companies are giving free rides<sup>19</sup> from the border. Those who have been allowed to leave the country have been met with open arms, for instance

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15 Kate Connolly and Jennifer Rankin, ‘More than 360,000 people have fled war in Ukraine so far, says UN’ *The Guardian* (27 February 2022) <<https://www.theguardian.com/world/2022/feb/27/more-than-360000-people-fled-war-ukraine-so-far-un>> accessed 1 December 2022.

16 Ingrid Melander, ‘EU plans to grant Ukrainians right to stay for up to 3 years’ (28 February 2022) *Reuters* <<https://www.reuters.com/world/europe/eu-plans-grant-ukrainians-right-stay-up-3-years-2022-02-28/>> accessed 1 December 2022.

17 UNHCR, ‘UNHCR mobilizing to aid forcibly displaced in Ukraine and neighbouring countries’ (1 March 2022) <<https://www.unhcr.org/news/briefing/2022/3/621deda74/unhcr-mobilizing-aid-forcibly-displaced-ukraine-neighbouring-countries.html>> accessed 1 December 2022.

18 UNHCR, ‘Ukraine Situation: Regional Refugee Response Plan’ (1 March 2022) <<https://data.unhcr.org/en/documents/details/91114>> accessed 1 December 2022.

19 Johanna Chisholm, ‘At a border town, Ukrainians arrive by train, and Poles rush to give them shelter and clothes’ *Toronto Star* (28 February 2022) <<https://www.thestar.com/news/world/2022/02/28/at-a-border-town-ukrainians-arrive-by-train-and-poles-rush-to-give-them-shelter-and-clothes.html>> accessed 1 December 2022.



in Berlin railway stations where people have been openly offering<sup>20</sup> rooms so that people have homes instead of being resigned to live in state-run reception camps. In Romania, local authorities, companies and celebrities joined forces<sup>21</sup> to collect donations to welcome arrivals. AirBnB announced<sup>22</sup> a campaign to house at least 100 000 refugees for at least 14 days.

A UNHCR briefing<sup>23</sup> published on 2 March 2022 shows that relevant EU Member States are, for the moment, offering various unilateral or ad hoc ‘solutions’, from temporary permits to wider possibilities to seek asylum. In Poland, new arrivals have 15 days to regulate their status and to apply for temporary protection or to ask officially for asylum. In Hungary, the Hungarian Helsinki Committee has confirmed<sup>24</sup> that temporary protection is applicable until 1 June 2022. However this decree was pronounced prior to the official triggering of the TP Directive.

Ethnic Hungarians residing in Ukraine have also been issued<sup>25</sup> with Hungarian cards. In Romania, authorities have been accommodating towards civic hospitality, while prior to the triggering of the TP Directive, they seemed to be following an ordinary asylum approach,<sup>26</sup> providing reception within the major regional asylum reception centres.

Despite the rapidly growing number of arrivals, it seems that only a few official asylum applications have actually been submitted. According to the

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20 Philip Oltermann, ‘Tip of the iceberg’: Berliners rally to welcome refugees from Ukraine’ *The Guardian* (Berlin, 4 March 2022) <<https://www.theguardian.com/world/2022/mar/04/berliners-rally-to-support-ukraine-refugees-germany>> accessed 1 December 2022.

21 Irina Marica, ‘Solidarity with Ukraine: NGOs, companies and individuals unite to offer help to Ukrainian refugees arriving in Romania’ *Romania Insider* (25 February 2022) <<https://www.romania-insider.com/solidarity-ukraine-romania-refugees-2022>> accessed 1 December 2022.

22 Kate Gibson, ‘Airbnb setting up free housing for up to 100,000 Ukraine refugees’ *Money Watch* (1 March 2022) <<https://www.cbsnews.com/news/russia-ukraine-war-refugees-airbnb/>> accessed 1 December 2022.

23 UNHCR, ‘UNHCR mobilizing to aid forcibly displaced in Ukraine and neighbouring countries’.

24 The Hungarian Helsinki Committee, ‘Information for people fleeing from Ukraine’ (25 February 2022) <<https://helsinki.hu/en/information-for-people-fleeing-from-ukraine/?fbclid=IwAR2W9aM2zuXOzsfuiyrcuX1BlbXOL64J3Y5vBYdvLnMKMokp2WEGgFJquIc>> accessed 1 December 2022.

25 France 24, ‘By car and foot, Ukraine refugees start flowing into Hungary’ *France 24* (24 February 2022) <<https://www.france24.com/en/live-news/20220224-by-car-and-foot-ukraine-refugees-start-flowing-into-hungary>> accessed 1 December 2022.

26 Schengen Visa, ‘Romania Takes All Necessary Measures to Accommodate Ukrainians Fleeing War’ *Schengen Visa* (3 March 2022) <<https://www.schengenvisa.info.com/news/romania-takes-all-necessary-measures-to-accommodate-ukrainians-fleeing-war/>> accessed 1 December 2022.

media (as of 27 February), only 10 people have asked for asylum<sup>27</sup> in Hungary and 35 in Slovakia.

In Ukraine, and at the EU's borders, numerous racist and xenophobic incidents have been reported by media and civil society actors due to racial profiling experienced by individuals of colour when attempting to leave the country and enter the EU. Media sources have detailed and provided numerous other accounts from people of colour being subjected to separate queues and longer waiting periods<sup>28</sup>. A Lighthouse Report<sup>29</sup> shared numerous incidents that occurred in Ukraine when boarding evacuation trains or trying to flee the country by other ways.

For instance, South African students<sup>30</sup> fleeing the country have not been allowed to leave the country and enter the EU alongside other people fleeing Ukraine. At least 1 200 foreign students have been reported to be stranded<sup>31</sup> in the country. Similar discriminatory treatment has been reported by African

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27 Anita Komuves and Andrew R.c. Marshall, 'Thousands fleeing Ukraine queue at central Europe border crossings' *Reuters* (27 February 2022) <<https://www.reuters.com/world/europe/long-queues-form-central-europe-border-crossings-people-flee-ukraine-2022-02-27/>> accessed 1 December 2022.

28 See for instance Lorenzo Tondo in Przemysł and Emmanuel Akinwotu, 'People of colour fleeing Ukraine attacked by Polish nationalists' *The Guardian* (2 March 2022) <<https://www.theguardian.com/global-development/2022/mar/02/people-of-colour-fleeing-ukraine-attacked-by-polish-nationalists>> accessed 1 December 2022. See also Moustafa Bayoumi, 'They are 'civilised' and 'look like us': the racist coverage of Ukraine' *The Guardian* (2 March 2022) <<https://www.theguardian.com/commentisfree/2022/mar/02/civilised-european-look-like-us-racist-coverage-ukraine>> accessed 1 December 2022.; Lorenzo Tondo, 'Embraced or pushed back: on the Polish border, sadly, not all refugees are welcome' *The Guardian* (4 March 2022) <<https://www.theguardian.com/global-development/commentisfree/2022/mar/04/embraced-or-pushed-back-on-the-polish-border-sadly-not-all-refugees-are-welcome>> accessed 1 December 2022. See also Human Rights Watch, 'Ukraine: Unequal Treatment for Foreigners Attempting to Flee: Pattern of Blocking, Delaying Non-Ukrainians' (4 March 2022) <<https://www.hrw.org/news/2022/03/04/ukraine-unequal-treatment-foreigners-attempting-flee>> accessed 1 December 2022.

29 Lighthouse Reports (Twitter) <<https://twitter.com/LHreports>> accessed 1 December 2022.

30 Bernd Riegert 'EU prepares for millions of Ukrainian refugees DW, 28 February 2022, <<https://www.dw.com/en/the-european-union-prepares-for-millions-of-refugees-from-ukraine/a-60939993>> accessed 1 December 2022.

31 Lisa O'Carroll, Emmanuel Akinwotu and Julian Borger, 'International students trapped in Ukraine appeal for urgent evacuation' *The Guardian* (4 March 2022) <<https://www.theguardian.com/world/2022/mar/04/international-students-trapped-ukraine-appeal-urgent-evacuation>> accessed 1 December 2022.

students upon their arrival at the Polish border.<sup>32</sup> Aljazeera has reported<sup>33</sup> that despite numerous volunteers offering free rides, people of colour have been cheated by taxis charging exorbitant prices. Besides these incidents, there have been further challenges<sup>34</sup> with regard to the evacuation and reception of Ukrainian minorities, such as the Roma. Those who do not have biometric passports, or even lack any documentation, are likely to experience difficulties as well, for instance older people, unaccompanied children,<sup>35</sup> in particular those living in the state-run orphanages or persons with disabilities assigned to legal guardians.

Some EU government leaders have also issued discriminatory statements concerning the ‘specificity’ of the people fleeing the war in Ukraine in comparison to asylum seekers from other African and Asian regions and countries, which illustrates institutionalised manifestations of racism. For instance, the Bulgarian Prime Minister Kiril Petkov declared that ‘These [Ukrainians] are not the refugees we are used to... these people are Europeans... These people are intelligent, they are educated people.... This is not the refugee wave we have been used to ...there is not a single European country now which is afraid of the current wave of refugees.’

This has led some actors, such as the African Union to issue a statement<sup>36</sup> on 28 February 2022 ‘on the reported ill treatment of Africans trying to leave

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32 Africanews, ‘Russia-Ukraine conflict: Africans face racial discrimination in Ukraine’ *Africanews* (28 February 2022) <[https://www.africanews.com/2022/02/28/russia-ukraine-conflict-africans-face-racial-discrimination-in-ukraine/?utm\\_term=Autofeed&utm\\_medium=AfricanewsEN&utm\\_source=Twitter#Echobox=1646055917](https://www.africanews.com/2022/02/28/russia-ukraine-conflict-africans-face-racial-discrimination-in-ukraine/?utm_term=Autofeed&utm_medium=AfricanewsEN&utm_source=Twitter#Echobox=1646055917)> accessed 14 March 2022. This report includes a testimony by a Ghanaian student fleeing Ukraine who said that ‘My Nigerian friend told me before I got here; armed guards had ordered us to wait as Ukrainians had to be let through first... Right in front of me, I saw a few buses, which were full of white people’. In addition, a student from Somalia said that ‘When she finally reached Poland, she said she was told, “Accommodation at the hotel was only for Ukrainians”’.

33 Amanda Coakley, ‘People of colour struggle to escape Russian invasion of Ukraine’ *Al Jazeera* (2 March 2022) <<https://www.aljazeera.com/news/2022/3/2/people-of-colour-struggle-to-escape-russian-invasion-of-ukraine>> accessed 1 December 2022.

34 Zdeněk Ryšavý, ‘Roma and other people of color fleeing war in Ukraine face discrimination and racism, Jaroslav Miko tells ROMEA TV that volunteers are refusing to help Romani families’ *Romea* (3 March 2022) <<https://romea.cz/en/news/world/roma-and-other-people-of-color-fleeing-war-in-ukraine-face-discrimination-and-racism-jaroslav-miko-tells-romea-tv-that>> accessed 1 December 2022.

35 BBC News, ‘Ukraine conflict: Children on their own, parents stay behind’ *BBC News* (26 February 2022) <<https://www.bbc.com/news/world-europe-60539104>> accessed 1 December 2022.

36 African Union, ‘Statement of the African Union on the reported ill treatment of Africans trying to leave Ukraine’ (28 February 2022) <<https://au.int/en/pressreleases/20220228/statement-ill-treatment-africans-trying-leave-ukraine>> accessed 1 December 2022.

Ukraine' where it declared itself to be disturbed by reports that African citizens on the Ukrainian side of the border are being refused the right to cross into the EU. The African Union called for equality of treatment and no discrimination regarding the right to leave Ukraine on the basis of nationality or racial identity, as 'unacceptable dissimilar treatment would be shockingly racist and in breach of international law'.

In the same vein, United Nations Special Rapporteurs condemned<sup>37</sup> the aggression of Putin's regime on 28 February 2022 and highlighted that people are now fleeing to safety due to a 'well founded-fear' of persecution, ill treatment or other atrocities resulting in the need for international protection. In addition, UN Special Rapporteurs issued a Joint Statement on 3 March 2022 expressing their concerns about the treatment of people of African descent and recalled that 'racial preferences in the administration of life-saving services, racial restrictions on freedom of movement, racial differentiation in access to immigration status - violates the prohibition on racial discrimination. This prohibition extends to any treatment, whether it is formal, informal, or *ad hoc*.'

The UN Special Rapporteur on contemporary forms of racism, Tendayi Achiume, also<sup>38</sup> published a statement condemning racist threats and xenophobia experienced at the EU's external borders and called all relevant government authorities and international organisations 'to ensure safe passage and life-saving protections for *all* people affected by the conflict.'

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37 UN, 'Council establishes mandate on Côte d'Ivoire, adopts protocol to child rights treaty, requests study on discrimination and sexual orientation' (17 June 2011) <<https://www.ohchr.org/en/press-releases/2011/06/council-establishes-mandate-cote-divoire-adopts-protocol-child-rights-treaty?LangID=E&NewsID=11167>> accessed 1 December 2022.

38 UN, 'Ukraine: UN expert condemns racist threats, xenophobia at border' (3 March 2022) <<https://www.ohchr.org/en/press-releases/2022/03/ukraine-un-expert-condemns-racist-threats-xenophobia-border>> accessed 1 December 2022.

### 3. Immediate EU policy responses: Activating the Temporary Protection Directive and easing external border checks

The war in Ukraine gave new political momentum<sup>39</sup> for the European Commission to propose the activation of the 2001 TP Directive for the very first time. The directive was originally designed in response to the forced displacement following the 1998-99 Kosovo War. The directive has never been put into practice or activated by the EU institutions despite reiterated calls to put it in use in human displacement situations resulting from the so-called ‘Arab Spring’ in the early 2010s, or conflicts in countries like Afghanistan, Libya or Syria.<sup>40</sup>

The TP Directive provides an EU-wide model of temporary protection in the event of a large number of entries of displaced people from third countries – which is labelled by the directive as a ‘mass influx’ of individuals who cannot return to their countries of origin due to armed conflict or systematic/generalised violations of human rights. It foresees an immediate group-based protection status granting residence permits to beneficiaries. The protection is time-bound for an initial period of one year, which may be extended in six-month periods up to two years, and which can be prolonged up to three years in cases where the reasons behind temporary protection persist.

Importantly, Member States cannot offer a lower set of rights in comparison to those foreseen by the directive to the temporary protection beneficiaries. These rights include, among others, immediate access to employment and self-employment activities, housing and suitable accommodation, social welfare and subsistence means, equal access to education by minors and family reunification rights (Arts. 12-15).

Moreover, the Directive included an *inter-state solidarity regime* under Chapter VI (Arts. 24-26), envisaging a quasi-relocation scheme including the transferal of persons enjoying temporary protection residence status from one Member State to another ‘subject to the consent of the persons concerned’, and in cooperation with the UNHCR.

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39 Jacopo Barigazzi and Suzanne Lynch, ‘EU debates granting temporary protection to refugees from Ukraine’ *Politico* (27 February 2022) <<https://www.politico.eu/article/ukraine-refugees-european-union-war-russia-temporary-protection-debate/>> accessed 1 December 2022.

40 Meltem Ineli-Ciger, ‘Time to Activate the Temporary Protection Directive’.

The stringent, while at the same time unclear, conditions for activating this directive have constituted crucial reasons behind its non-use. These have included the lack of clear and sound qualitative criteria regarding what qualifies as a ‘mass influx’, or the ultimate decision not trigger the temporary protection mechanism being put in the exclusive hands of EU Member States.<sup>41</sup> This has come alongside an increasing role granted to a consensus-building (*de facto* unanimity) approach inside the European Council in an area where the correct decision-making rule is Qualified Majority Voting (QMV) by the Council – on the initiative of the Commission.<sup>42</sup> The European Parliament is only ‘to be informed’ about the Decision. To this we need to add that its protection-driven logic has until now directly collided with the ‘*contained mobility*’ *rationale* by both the EU and Member States policy responses to similar refugee, humanitarian and armed conflict situations in non-European countries.<sup>43</sup>

The Commission’s 2020 EU Pact on Migration and Asylum<sup>44</sup> came along a legislative proposal<sup>45</sup> addressing situation of crisis and *force majeure* in the fields of migration and asylum which has called for repealing the TP Directive, which according to the Pact, ‘no longer responds to Member States’ current reality and needs’. The crisis proposal aimed at tackling some of the above obstacles

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41 Hanne Beirens and others, ‘Study on the Temporary Protection Directive’ (European Commission DG Home Affairs, January 2016, Brussels) <[https://home-affairs.ec.europa.eu/system/files/2020-09/final\\_report\\_evaluation\\_tpd\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/final_report_evaluation_tpd_en.pdf)> accessed 1 December 2022.

42 Sergio Carrera, ‘Tampere Programme 20 Years On: Putting EU Principles and Individuals First’ in Sergio Carrera, Deirdre Curtin, Andrew Geddes (eds) *20 years anniversary of the Tampere Programme: Europeanisation dynamics of the EU area of freedom, security and justice* (European University Institute, 2020) <<http://hdl.handle.net/1814/66986>> accessed 1 December 2022.

43 Sergio Carrera and Roberto Cortinovis, ‘The EU’s Role in Implementing the UN Global Compact on Refugees: Contained Mobility vs. International Protection’ (CEPS, April 2019) <[https://www.ceps.eu/wp-content/uploads/2019/04/LSE-04\\_ReSOMA\\_ImplementingGCR.pdf](https://www.ceps.eu/wp-content/uploads/2019/04/LSE-04_ReSOMA_ImplementingGCR.pdf)> accessed 1 December 2022.

44 European Commission, ‘New Pact on Migration and Asylum’ <[https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en)> accessed 1 December 2022.

45 European Commission, ‘Proposal for a Regulation of The European Parliament and of The Council addressing situations of crisis and force majeure in the field of migration and asylum’ COM(2020) 613 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020P-C0613&from=en>> accessed 1 December 2022.

by introducing an ‘immediate protection status’<sup>46</sup> shifting the activating role from the Council to the European Commission’s hands<sup>47</sup>. Furthermore, while the crisis proposal provides more details as regards what constitutes ‘crisis’, this concept still remains largely uncertain and ambiguous in scope and fundamentals.<sup>48</sup>

The European Parliament’s LIBE Committee 2021 Report<sup>49</sup> on the crisis proposal, with MEP Fernando Lopez Aguilar as Rapporteur, called for replacing ‘immediate protection status’ by *prima facie* international protection recognition following the EU Qualifications Directive, and the establishment of a mandatory relocation mechanism. Indeed, the Pact failed to prove<sup>50</sup> the necessity and value added of this new proposal in comparison to the TP Directive. Surprisingly, the Commission has done a full 360 on its own opinion about the use and validity of the TP Directive when it comes to European asylum seekers.

EU interior ministers dealt with the EU’s response to forced displacements from Ukraine at the Extraordinary Justice and Home Affairs (JHA) Council Meeting<sup>51</sup> of 27 February 2022, where the Commission’s idea to activate the TP Directive found ‘broad support’ among EU home affairs representatives. Interestingly, Agence Europe reported<sup>52</sup> on 28 February 2022 that the Polish government representatives originally considered it unnecessary to activate the directive. This was followed by the publication of the Commission’s formal

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46 Meltem Ineli-Ciger, ‘What a difference two decades make? The shift from temporary to immediate protection in the new European Pact on Asylum and Migration’ (EU Immigration and Asylum Law and Policy, 11 November 2020) <<https://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/>> accessed 1 December 2022.

47 *ibid.*

48 Evelien Brouwer and others, ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’ (30 June 2021) <[https://www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2021\)697130](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)697130)> accessed 1 December 2022.

49 European Parliament, ‘Draft Report’ 2020/0277(COD) <[https://www.europarl.europa.eu/doceo/document/LIBE-PR-697631\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/LIBE-PR-697631_EN.pdf)> accessed 1 December 2022.

50 ECRE, ‘Alleviating or Exacerbating Crises? The Regulation on Crisis And Force Majeure’ (2021) <<https://www.ecre.org/wp-content/uploads/2021/03/ECRE-Policy-Note-32-Crisis-February-2021.pdf>> accessed 1 December 2022.

51 European Council, ‘Extraordinary Justice and Home Affairs Council’ (27 February 2022) <<https://www.consilium.europa.eu/en/meetings/jha/2022/02/27/>> accessed 1 December 2022.

52 Agence Europe, ‘Ukrainian refugees, EU could activate 2001 directive on immediate temporary protection for first time’ (Brussels, 28 February 2022) <<https://agenceurope.eu/en/bulletin/article/12900/5>> accessed 1 December 2022.



proposal<sup>53</sup> to trigger the EU Temporary Protection regime envisaged in the TP Directive), which was accompanied by a Communication<sup>54</sup> providing guidelines to EU Member States on external border controls. These were followed by another Communication<sup>55</sup> entitled ‘European solidarity with refugees and those fleeing war in Ukraine’ published on 8 March 2022, which synthesises the range of EU lines of action so far adopted, including humanitarian support through emergency macro-financial assistance.<sup>56</sup>

The Commission proposal was approved by EU Member States on 3 March 2022 in record time, and it was formally adopted<sup>57</sup> on 4 March 2022. It was reported that few expected the proposal to be adopted so quickly. EU interior ministers were expected to give it the preliminary green light during the morning of 3 March, while Member States officials were supposed to work on the various provisions subsequently. Surprisingly, however, Politico highlighted<sup>58</sup> on 3 March 2022 how ‘EU ambassadors held an emergency meeting on Thursday afternoon where they worked through differences in the text’, reaching a finished political compromise steered by the French Presidency of the Council, which was later ‘signed off’ by the interior ministers.

The decision-making strategy followed a long-standing malpractice in EU

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- 53 Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection [2022] 2022/0069 (NLE) <<https://eur-lex.europa.eu/legal-content/DE/TXT/HTML/?uri=CELEX:52022PC0091&from=EN>> accessed 1 December 2022.
- 54 Commission Communication Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders (2022/C 104 I/01) <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0304\(10\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0304(10)&from=EN)> 1 December 2022.
- 55 Communication from The Commission to The European Parliament The European Economic and Social Committee and The Committee of The Regions (Strasbourg, 8 March 2022) COM(2022) 107 final <[https://ec.europa.eu/info/sites/default/files/com\\_2022\\_107\\_1\\_en\\_act\\_part1\\_v4.pdf](https://ec.europa.eu/info/sites/default/files/com_2022_107_1_en_act_part1_v4.pdf)> accessed 1 December 2022.
- 56 European Commission, ‘Ukraine: EU steps up solidarity with those fleeing war’ (Strasbourg, 8 March 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1610](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1610)> accessed 1 December 2022.
- 57 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.
- 58 Jacopo Barigazzi, ‘EU hails ‘historic’ deal to protect Ukrainian refugees’ *Politico* (3 March 2022) <<https://www.politico.eu/article/eu-ministers-historical-deal-protect-ukraine-refugees/>> accessed 1 December 2022.



migration/asylum policy<sup>59</sup> by both the previous and current European Commission which seeks to achieve an artificial need for a unanimous vote or ‘consensus’ among all EU Member States in this policy area.<sup>60</sup> The decision was taken by unanimity voting, even though the text of the directive clearly states that its adoption should be through Qualified Majority Voting (QMV). This chapter argues that having all EU governments concerned on board, including countries such as Poland, Hungary and Slovakia, is optimal but this has also meant that important concessions widening Member States’ discretion to choose to exclude all third country nationals - including permanent residents - among the beneficiaries of the TP mechanism have been unfortunately included in the final shape of the adopted text.

### **3.1 The Commission Temporary Protection proposal and the Council Decision compared**

The Commission Temporary Protection proposal starts by confirming the existence of a ‘mass influx’ as a result of the armed conflict in Ukraine (Art. 1). This is based on UNHCR data showing that more than 660 000 people have fled Ukraine to neighbouring countries including not only four EU Member States (Poland, Hungary, Romania and Slovakia) but also Moldova. The Commission, however, also makes reference to estimates which have been advanced by UNHCR of a ‘projected’ total refugee population of 4 million or a reference to other ‘estimates’ alluding to a figure between 2.5 million to 6.5 million of possibly displaced persons, based on data used by the so-called EU Migration Preparedness and Crisis Management Network.

The Commission now considers the TP Directive to be the ‘most appropriate’ instrument in the current context so as to ensure a common approach for granting a harmonised set of rights offering an adequate level of protection across the EU and - by limiting the need for potential beneficiaries to apply for asylum – reducing the risks of national asylum processing and reception systems becoming inefficient or ‘overwhelmed’ (Points 7 and 13 of Proposal Preamble).

Ukrainian nationals are visa-free travellers in the EU – on the basis of the

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59 Sergio Carrera, ‘An Appraisal of the European Commission of Crisis’ (CEPS, 21 January 2019) <<https://www.ceps.eu/ceps-publications/appraisal-european-commission-crisis/>> accessed 1 December 2022.

60 *ibid.*

2017 EU-Ukraine visa liberalisation<sup>61</sup> and therefore benefit from free movement rights after being admitted into the Schengen area for a 90-day period. Therefore, the Commission proposal emphasises that this regime allows them to freely choose the Member State where they want to pursue their temporary protection application and join their families, friends, and networks across the EU. The Commission expressly acknowledges that the individuals' agency emerging from these free movement or self-relocation rights have the positive result of lifting pressure on national asylum and reception systems (Point 14 of the Preamble).

The proposal's personal scope of beneficiaries included Ukrainian nationals displaced outside Ukraine as of 24 February 2022, third country nationals who are 'unable to return in safe and durable conditions to their country or region of origin' and long-term residents in Ukraine, as well as their family members (Art. 1.1.). It proposed to leave it to Member States over whether to consider including people holding refugee status or a pending asylum application in Ukraine. The Commission's initiative left out other third country nationals residing in Ukraine with 'the ability to return in safe and durable conditions' to their country or region of origin.

Groups excluded from the TP Directive would have included, according to the Commission's initiative, third country nationals 'who were studying or working in Ukraine on a short-term basis'. The Commission proposed that they should be admitted on 'humanitarian grounds', without Member States requiring travel documents and ensuring 'safe passage' to their country or region of origin. Furthermore, third country nationals fall squarely within the scope of the accompanying Commission Guidelines for 'border checks' outlined below. This strict personal scope came despite a clear call<sup>62</sup> by the European Parliament's LIBE Committee to ensure a wider range of beneficiaries and guarantee non-discrimination and equal treatment for *everyone* fleeing Ukraine.

Unlike the Commission Proposal, the personal scope foreseen in the Council Decision leaves a wider room of manoeuvre for Member States concerning the applicability of the TP Directive. The Council Decision has posi-

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61 Regulation (EU) 2017/850 of The European Parliament and of The Council of 17 May 2017 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Ukraine) [2017] OJ L 133/1.

62 Nikolaj Nielsen, 'EU protection for all nationalities fleeing Ukraine, say MEPs' EU Observer (Brussels, 28 February 2022) <<https://euobserver.com/migration/154451>> accessed 1 December 2022.

tively extended the personal scope of the TP Directive to non-Ukrainian third country nationals who benefit from international protection or ‘equivalent national protection’ in Ukraine. Individuals having presented an asylum application in the country or under asylum procedures remain excluded from its scope.

Importantly, as *Table 1* below shows, when comparing the Commission’s proposal with the final text adopted by the Council, the final Decision puts additional emphasis on leaving a wide room of manoeuvre in the hands of the Member States over whether or not to exclude all non-Ukrainian displaced persons from EU temporary protection, including long-term residents, giving the possibility to instead apply another ‘adequate protection under their national law’. This ‘adequate status’ would probably be ‘international protection applicant’ or national humanitarian statuses, with no clear reference to the 2011 Qualifications Directive.<sup>63</sup>

In the Decision (preamble para 12), the Council recommends the Member States ‘to provide for the protection of stateless persons, and nationals of third countries other than Ukraine, who can prove that they were legally residing in Ukraine before 24 February 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law, and who are unable to return in safe and durable conditions to their country or region of origin.’ The Council adds that this protection could be either temporary protection or another form of adequate protection under national law. Since many asylum seekers, stateless persons, and third country nationals staying legally in Ukraine are missing from the scope of temporary protection, this chapter accepts this and sometimes refer to this as ‘exclusion’. This is because although the Member States are encouraged to expand temporary protection to stateless persons, asylum seekers, and other third country nationals residing legally in Ukraine who are unable to return in safe and durable conditions to their country or region of origin, there is no obligation to do so and Member States can thus freely exclude third country nationals who have fled Ukraine from the scope of temporary protection.

The resulting picture is one leaving a high degree of legal uncertainty concerning the obligations of relevant Member States possessing an EU external border with Ukraine towards non-Ukrainian third country nationals, which

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63 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337.

can be expected to lead to inconsistent and potentially discriminatory national approaches.

**Table 1. The Personal Scope of the Commission Proposal and Council Decision**

	<b>European Commission Proposal COM(2022) 91</b>	<b>Council Decision 2022/382</b>
<b>Personal Scope</b>	<p><i>Art. 2.1:</i></p> <ul style="list-style-type: none"> <li>□ Ukrainian nationals residing in Ukraine displaced as of 24 February 2022</li> <li>□ persons enjoying refugee status or equivalent protection, or who were asylum seekers in Ukraine at the time of the events</li> </ul> <p><i>Art. 2.1.b:</i></p> <ul style="list-style-type: none"> <li>□ Third country nationals or stateless persons residing legally in Ukraine and ‘unable to return in safe and durable conditions to their country or region of origin’. This requirement not applicable to third country nationals who are long-term residents (‘persons who have been legally residing on a long-term basis in Ukraine’) who would directly benefit from temporary protection</li> <li>□ Preamble 12 ‘However, non-Ukrainian third country nationals or stateless persons who are able to return to their country of origin in safe and durable conditions and who cannot be considered as long-term residents in Ukraine and their family members should not fall under the scope of this Decision...Such persons could include third country nationals who were studying or working in Ukraine on short-term basis...’</li> </ul>	<p><i>Art. 2.1:</i></p> <ul style="list-style-type: none"> <li>□ Ukrainian nationals displaced from Ukraine on or after 24 February 2022, and residing in Ukraine as of 24 February 2022 (a)</li> <li>□ Non-Ukrainian third country nationals with international protection status or equivalent national protection in Ukraine (b)</li> <li>□ Family members</li> </ul> <p><i>Art. 2.2:</i></p> <ul style="list-style-type: none"> <li>□ It leaves the option or discretion in hands of Member States as to whether to apply the TP Directive or “adequate protection under their national law” in respect of all categories of third country nationals, including long term residents, in particular to those ‘who can prove that they were legally residing in Ukraine before 24 February 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law, and who are unable to return in safe and durable conditions to their country or region of origin.’</li> </ul> <p><i>Art. 2.3:</i></p> <ul style="list-style-type: none"> <li>□ It provides an option to Member States to apply the TP Directive (in accordance to Art. 7) to other persons – including third country nationals other than Ukrainians – ‘who were residing legally in Ukraine and who are unable to return in safe and durable conditions to their country or region of origin.’</li> </ul>

*Source: Authors’ own elaboration.*

This means that EU Member States can now choose to exclude all third country nationals and asylum seekers in Ukraine from the finally agreed TPD mechanism and it is ‘optional’ for them to grant temporary protection. In any case, Art. 7 of the TP Directive gives discretion to Member States to extend the temporary protection regime to any person displaced from Ukraine due to the conflict irrespective of what the Council decision stipulates.

Furthermore, and importantly, those EU Member States which eventually decide not to apply the TP regime to third country nationals are in any case bound by the Qualifications Directive<sup>64</sup> which expressly includes ‘internal conflict’ within the definition of serious harm for Member States to grant subsidiary protection status. Furthermore, in a welcomed step, the Commission underlined in its 8 March 2022 Communication<sup>65</sup> that ‘it is of paramount importance that those fleeing from Russia’s aggression in Ukraine without exception, are treated with full respect and care’.

It has been reported that the personal scope of the TP Directive constituted a decisive issue for reaching unanimous voting inside the Council. According to Politico, the changes on the personal scope were expressly asked for<sup>66</sup> by Polish authorities and other Member States’ representatives.

Concerning family members, the proposal follows the definition of what constitutes ‘family’ outlined in the TP Directive. The family members mentioned in Art. 15 of the directive actually includes<sup>67</sup> ‘core family members’ consisting of spouses or unmarried partners in stable relationships (subject to the national legislation of the Member State concerned), minor unmarried children (with no distinction as to whether they were born in or out of wedlock or adopted), and ‘other close relatives’ living together with the family and dependent on the sponsor (Art.1.2).<sup>68</sup> The directive’s definition of family is sig-

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64 Refer to Arts. 15 and 18 of the EU Qualifications Directive. According to Art.15.c serious harm consists of ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal conflict’.

65 Communication from The Commission to The European Parliament, European solidarity with refugees and those fleeing war in Ukraine (Strasbourg, 8 March 2022) COM(2022) 107 final <[https://ec.europa.eu/info/sites/default/files/com\\_2022\\_107\\_1\\_en\\_act\\_part1\\_v4.pdf](https://ec.europa.eu/info/sites/default/files/com_2022_107_1_en_act_part1_v4.pdf)> accessed 1 December 2022.

66 Jacopo Barigazzi, ‘EU hails ‘historic’ deal to protect Ukrainian refugees’.

67 Steve Peers, ‘Temporary Protection for Ukrainians in the EU? Q and A’ (EU Law Analysis, 27 February 2022) <<https://eulawanalysis.blogspot.com/2022/02/temporary-protection-for-ukrainians-in.html>> accessed 1 December 2022.

68 *ibid.*

nificantly narrower than the definition of ‘family members’ provided under Art. 4 of the Family Reunification Directive.<sup>69</sup> It should be also noted that this excludes temporary protection beneficiaries as sponsors (Art. 3.2.b), and this means temporary protection beneficiaries do not have the right to family reunification under the Family Reunification Directive.

The TP Directive’s narrow definition of family is one of the Directive’s many peculiarities and weaknesses. For instance, it allows Member States to give priority to EU citizens, EEA citizens, and legally resident third country nationals who receive unemployment benefits over temporary protection beneficiaries in terms of access to the labour market. Moreover, the directive also does not clarify which procedures will apply in relation to granting of temporary protection status and includes phrases such as ‘mount a legal challenge’ instead of the ‘right to appeal’ in the context of appealing an exclusion decision.

These peculiarities are a result of the directive belonging to a different era where the EU had different legal competences in the Treaties and migration policy priorities. The TP Directive pursues ‘minimum standards’ at a time when certain rights were not recognised as relevant for the protection of displaced persons in ‘mass influx situations’. The TP Directive being the first EU Directive adopted on asylum matters means that there are significant gaps which need to be filled in by the EU and the Member States. However, this does not lower the value of the directive as a key instrument to deal effectively with the current large-scale displacement from Ukraine.

Furthermore, and importantly, Point 15 of the Commission Decision proposal stipulated that while TP status is complementary with national temporary protection schemes, national schemes must not be ‘less favourable’ with regard to the set of rights foreseen in the directive. The Commission Temporary Protection Proposal also envisaged provisions calling for the exchange of information and the coordination and monitoring of Member States’ reception capacities through a so-called ‘Solidarity Platform’ coordinated by the Commission (Art. 3). This is now enshrined in Paragraph 20 of the Council Decision Preamble<sup>70</sup>. A key role is also envisaged for EU agencies Frontex (the European Border and Coast Guard), the European Union Asylum Agency (EUAA) and

69 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251.

70 Paragraph 20 of the Council Decision states that, as of 4 March 2022, ‘based on the information reported by a few Member States in the context of the EU Migration Preparedness and Crisis Management Network, reception capacities, over and above the absorption capacity of the Ukrainian diaspora residing in the Union, exceed 310 000 places.’

Europol, with the possibility to provide operational support to those Member States which request it.

According to information provided by the Commission, as of 8 March 2022, a first group of 49 Frontex staff were deployed to EU-Ukraine borders and 162 staff to Romania. Europol seems to already be present in Slovakia and Poland. Similarly, the EU Fundamental Rights Agency (FRA) has been visiting external border crossing points and reception centres in Member States responsible for border management at the EU external frontiers with Ukraine.

Before the publication of the Council Decision in the EU's Official Journal, Agence Europe reported<sup>71</sup> on 3 March 2022 that other additional agreements between Member States included the non-application of Art. 11 of the TP Directive, so as to allow people to move freely within the EU. This is indeed reflected in paragraph 15 of the Council Decision Preamble which stipulates Member States' agreement not to apply this provision and allow individuals' agency in exercising intra-EU mobility. Art. 11 stipulates that 'a Member State shall take back a person enjoying temporary protection on its territory if the said person remains on, or, seeks to enter without authorisation onto, the territory of another Member State during the period covered by the Council Decision'.

Agence Europe additionally reported in the same article that the Polish and Hungarian authorities had chosen not to activate the above-mentioned *inter-state solidarity regime* under Chapter VI (Arts. 24-26) of the TP Directive and 'to ask for help from their partners in hosting refugees for the time being, a situation that has also puzzled some delegations.' This shows a consistent and persistent opposition of these governments to the wider idea of intra-EU 'relocation' of TP beneficiaries and asylum seekers more generally.

### 3.2 EU external border checks

UNHCR has documented how people fleeing Ukraine have experienced long queues at several EU external borders. Overall, however, the response until now by relevant EU Member States (Poland, Hungary, Romania and Slovakia) has been one of, according to UNHCR, 'open and welcoming borders' for Ukrainian nationals and their families. A border control and security rationale is still

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71 Agence Europe, 'EU interior ministers unanimously agree to activate directive on immediate protection of Ukrainian refugees' (Brussels, 3 March 2022) <<https://agenceurope.eu/en/bulletin/article/12903/1#:~:text=On%20Thursday%203%20March%2C%20EU,Ukrainian%20refugees%20and%20their%20families>> accessed 1 December 2022.



present in the above-mentioned Communication providing guidelines to EU Member States on external border controls.

The Guidelines aim to assist Member States possessing an EU external border with Ukraine (Poland, Slovakia, Hungary and Romania) to facilitate ‘flexibility’ when conducting external border controls under the Schengen Borders Code (SBC). The Commission Guidelines do not provide however any substantive justification concerning the actual necessity and proportionality of ‘external border controls’ when dealing with the situation in Ukraine. It also doesn’t refer to Member States’ fundamental rights obligations under EU borders and asylum law to ensure access to protection and to not expel anyone coming from Ukraine.

As a list of possible measures to be taken, the Guidelines propose, for instance, simplifying border controls for only certain categories of persons. They ‘strongly recommend’ however the concerned Member States to make use of EU agencies (Frontex, EUAA and Europol) in the identification (including nationality screening) and checks of travel documents and Covid-19 vaccination certificates. It also envisaged the use of EU databases, such as Eurodac and SIS II for registration and fingerprinting. The Guidelines even provide for the possibility for Europol to engage in ‘second-line checks’. The negative practical repercussions concerning simplifying border checks through the involvement of EU agencies, checks on vaccination certificates and the use of EU databases have not been duly considered or evaluated.

The Commission puts national border guards and authorities in a rather difficult position by calling them to consider relaxing ‘border controls’ to certain groups of travellers depending on their citizenship or residence status of an EU Member State, the nationality of the traveller or residence status in Ukraine, the ‘vulnerability’ of individuals, as well as information on ‘security threats’, the possession of a biometric passport and a valid travel document, or the status of the person concerned as a ‘key worker’ (e.g. a transport worker proving their profession). In cases of doubt regarding a person’s identity, the Commission recommends border guards to carry out regular border checks.

This may lead to a situation of discrimination and fragmentation of national border practices and the application of different understandings of these criteria depending on which border people find themselves at, which can be expected to not necessarily reduce queues and the time for border checks to take place



in practice<sup>72</sup>. Moreover, the Commission Guidelines forget to mention that the SBC is clear with regard to the point that borders controls must be exercised without prejudice to refugees and people requesting for international protection (Art. 3.b SBC), and that Member States have an unequivocal obligation to carry out EU border controls and surveillance in full compliance with international protection and *the non-refoulement* principle.

There is a sound risk that non-Ukrainian third country nationals residing in Ukraine will be disproportionality targeted by these checks. The Commission's TP Proposal and the finally adopted text of the Council Decision examined above leave too much discretion to national authorities to assess the extent to which third country nationals 'are unable to return in safe and durable conditions to their country or region of origin'. The Guidelines provide no specifications concerning the exact ways in which national authorities are or will be checking the existence of this criterion, thus unlocking the possibility to apply the TP regime or not. Concerning the implementation of returns, the Commission reports that countries such as India, Morocco, Tunisia and Egypt 'have already worked with Member States to support repatriation of their nationals'.

In particular it is concerning how the specific ways in which 'safety' and 'durability' will be properly and fairly examined on an individual basis in a manner which is not discriminatory and fully complies with the right to seek to asylum by halting illegal push backs<sup>73</sup> to countries like Belarus<sup>74</sup>. It is indeed also concerning that the Guidelines leave it 'optional' to Member States to provide asylum ('humanitarian protection' in the Commission's words) to non-Ukrainian third country nationals fleeing from Ukraine but not fulfilling the conditions laid down in Art. 6.1 SBC.

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72 Furthermore, in the name of 'potential security issues created at the border by a mass influx of Ukrainians', the Commission's Guidelines recommend Member States to 'alternatively or cumulatively' carrying out these border checks not at external border crossing points, but at a 'safe location away from the border'.

73 Sergio Carrera, 'Walling off Responsibility? The Pushbacks at the EU's External Borders with Belarus' (CEPS, 25 November 2021) <<https://www.ceps.eu/ceps-publications/walling-off-responsibility/>> accessed 1 December 2022.

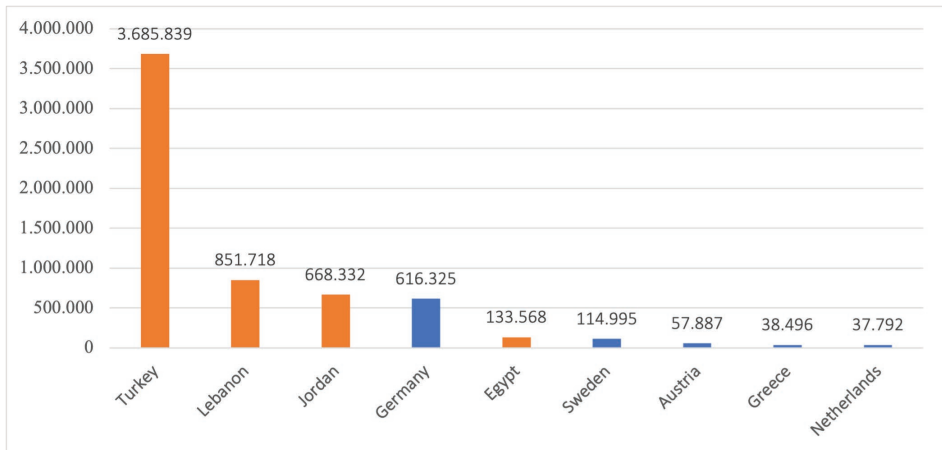
74 *ibid.*

## 4. What lessons can be learned from Venezuela’s large-scale displacement?

The way South American countries have responded to Venezuelan displacement may give hope and inspiration for the EU when looking ahead on how to handle arrival of asylum seekers from neighbouring Ukraine. The EU should also not repeat the mistakes we have witnessed since 2015, especially the overwhelming focus of EU and Member States’ policies on containment, externalisation and the criminalisation of solidarity.

UNHCR statistics visualised in *Figure 3* below show that the majority of Syrians were also mainly hosted in four neighbouring countries: Turkey (3.7 million), Lebanon (0.9 million), Jordan (0.7 million) and Egypt (0.1 million). As of 2021, all 27 EU Member States are hosting only a bit more than one million Syrian refugees. In the EU as of mid-2021, the three major hosting countries for Syrian refugees were: Germany (0.7 million), Sweden (0.1 million) and Austria (0.06) million as shown in *Figure 3* below. These numbers put current estimations or projections of people fleeing Ukraine into stark perspective.

**Figure 3. Distribution of Syrian refugees under the UNHCR mandate in the top five EU countries and top four in the Middle East**



*Source. Authors’ own elaboration based on selected UNHCR data [here](#) as of mid-2021.*

Some of the EU Member States with external borders with Ukraine have been persistently unwilling to provide access to asylum to refugees and asylum seekers from non-European countries such as Syria, Afghanistan, Iraq and elsewhere. Previous EU responses to asylum seeking mobility from African and Asian countries has shown that a ‘closed borders’ policy, mandatory waiting periods within massive state-run asylum reception centres hidden from the public, *de facto* detention and limiting and criminalising the free movement of asylum seekers and refugees within the EU are not and should not be seen as dignified and human-centric options in EU asylum policies.

Some South American countries have shown that another policy is indeed possible: one embedded in keeping borders open, ensuring free movement within the country, granting agency to individuals and granting the immediate right to work. As of mid-2021, more than 4.7 million Venezuelans were being hosted by neighbouring countries in South America. There has been a high variation in state responses across South America, however, often due to political relations with the Maduro regime.

While at the beginning of the humanitarian crisis, the immediate responses by most South American countries were welcoming and adopted an open-door approach<sup>75</sup>, these policy responses started changing when it became clear that Venezuelan forced displacement was not ‘temporary’ and then the region was badly hit by the Covid-19 crisis,<sup>76</sup> fuelling concerns about the distribution of limited resources. The result of these ‘mixed’ policies is that currently most Venezuelan nationals residing in other South American countries have an irregular status or are on temporary visas and residence permits.<sup>77</sup>

However, and even in the midst of the pandemic, some of the main receiving countries, such as Colombia and Brazil, kept their borders largely open and adopted medium and longer-term regularisation schemes. This sends a clear message to EU policymakers to waste no time in making medium and long-term plans for a post-TP Directive phase, where allowing equal and fair

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75 Andrew Selee and Jessica Bolter, ‘An Uneven Welcome: Latin American and Caribbean Responses to Venezuelan and Nicaraguan Migration’ (MPI, February 2020) <<https://www.migrationpolicy.org/research/latam-caribbean-responses-venezuelan-nicaraguan-migration>> accessed 1 December 2022.

76 Diego Acosta and Leiza Brumat, ‘Political and Legal Responses to Human Mobility in South America in the Context of the Covid-19 Crisis. More Fuel for the Fire?’ [2020] 2 *Frontiers in Human Dynamics*.

77 Leiza Brumat, ‘Migrants or refugees? ‘Let’s do both’. Brazil’s response to Venezuelan displacement challenges legal definitions’ (MPC, 11 January 2022) <<https://blogs.eui.eu/migrationpolicycentre/migrants-or-refugees-lets-do-both-brazils-response-to-venezuelan-displacement-challenges-legal-definitions/>> accessed 1 December 2022.

access to asylum procedures and/or regularisation will have to be central policy options.

Despite these ‘uneven’ policy responses, South America has some of the most progressive and liberal migration and refugee legislation in the world,<sup>78</sup> as is explored below through the cases of Colombia and Brazil. This progressive legislation and policies partly explain the initial ‘welcoming’ response and the persistence of an open-door approach in some of the countries. In comparison with Europe, South American countries have agreed on a more generous and broader definition of ‘who qualifies as a refugee’, and recognised that due to generalised conflicts, including political, economic and social instability, people may also have refugee protection needs. Article 1.2 of the 1951 Refugee Convention, which guides the EU legal asylum and refuge regime, provides a rather narrow definition of ‘refugee’ as individuals fleeing the ‘well-founded fear of persecution on the basis of race, religion, nationality, political opinion or a being part of a particular social group’.

The Cartagena Declaration on Refugees signed in 1984<sup>79</sup> responded to persistent economic crisis, poverty and insecurity that had arisen in Central America, as well as the longer-term experience with forcibly displaced persons and the adoption of political asylum as a response<sup>80</sup>. The Cartagena Declaration, Conclusion No. 3, thus extended the definition of refugee to those who ‘who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.’

=The Cartagena Declaration was supplemented by a series of declarations and action plans including: the San Jose Declaration on Refugees and Displaced Persons (1994), the Mexico Plan of Action (2004), the Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas (2010), and the Brazil Declaration (2014). Today, more than 15 Latin American states have transposed the broad refugee definition as provided in the Cartagena Declara-

78 Lilita Lyra Jubilit, Marcia Vera Espinoza and Gabriela Mezzanotti (eds) ‘Latin America and Refugee Protection: Regimes, Logics and Challenges’ (Forced Migration, 2021).

79 See Gilberto M. A. Rodrigues, ‘South America and The Cartagena Regime: A Comprehensive Approach to Forced Migration Responses’ in Carrera, S. and Geddes, A. (eds.) *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees: International Experiences on Containment and Mobility and their Impacts on Trust and Rights*, pp. 1157-169.

80 Luisa Feline Freier, ‘A Liberal Paradigm Shift?: A Critical Appraisal of Recent Trends in Latin American Asylum Legislation’ [2015] *International Refugee Law Series*, Brill Nijhoff.

tion into their national legislations.

The incorporation of the expanded refugee definition into the national legislation of so many countries in the region illustrates the relevance and importance of the Cartagena Declaration in leading a progressive development of international refugee law in Latin America. An *inclusionary understanding of refugeehood* is also secured in the Cartagena Declaration by covering situations such as foreign aggression and internal conflicts, both of which are of central relevance to Ukraine.

Brumat and Freier have noted that in comparison with the EU, South American countries ‘on average are more progressive regarding the scope of protection and the socio-economic integration of both asylum seekers and refugees’.<sup>81</sup> They quote the findings of Freier and Gauci highlighting that ‘Argentina, Brazil, Costa Rica, Ecuador, Nicaragua, and Mexico surpass EU protection standards’.<sup>82</sup> In the case of Venezuelan large-scale displacement, Brazil is the only South American country that has applied the Cartagena definition to significant numbers of Venezuelan nationals.<sup>83</sup>

When presented with the large-scale displacement of Venezuelans fleeing massive violations of human rights, serious limitations in the provision of social services, economic insecurity and poverty created by Maduro’s regime, the neighbouring South American countries became even more creative and adopted several different policy responses to large-scale Venezuelan displacement. Policy responses can be classified into two groups: ‘Atlantic+Colombia’ and ‘Andean’.<sup>84</sup> The first group has adopted more ‘creative’ policy approaches, including the use of the MERCOSUR Residence Agreement (MRA) to provide two-year residence permits (by Argentina, Brazil and Uruguay), while, as explained below, Colombia adopted a 10-year residence permit. The neighbouring Latin American countries provided safe and orderly avenues for Venezuelans to come into the region by keeping their own borders open. The

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81 Leiza Brumat and Luisa Feline Freier, ‘South American De Jure and De Facto Refugee Protection: Lessons From The South’ in Sergio Carrera and Andrew Geddes (eds.) *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees: International Experiences on Containment and Mobility and their Impacts on Trust and Rights*, pp. 134-143.

82 Luisa Feline Freier and Jean-Pierre Gauci, ‘Refugee Rights Across Regions: A Comparative Overview of Legislative Good Practices in Latin America and the EU’ [2020] 39(3) *Refugee Survey Quarterly* pp. 321–362.

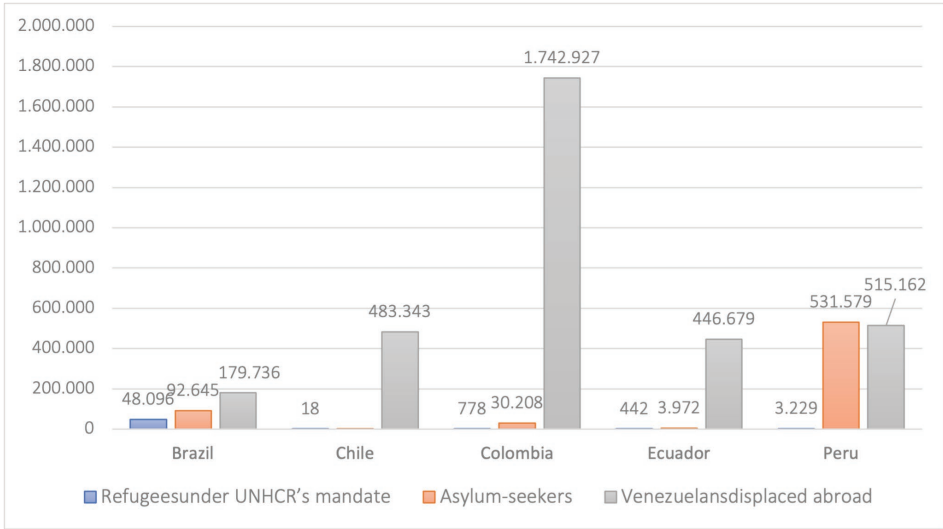
83 Brumat, ‘Migrants or refugees? ‘Let’s do both’. Brazil’s response to Venezuelan displacement challenges legal definitions’.

84 Brumat, ‘Gobernanza migratoria en Suramérica en 2021: respuestas a la emigración venezolana durante la pandemia’ [2022] *Análisis Carolina*.

Inter-Agency Co-Ordination Platform for Refugees and Migrants from Venezuela<sup>85</sup> has been created to coordinate the different practices, approaches and statistics across South and Central America and the Caribbean.

UNHCR statistics outlined in *Figure 4* below show the distribution among the five major hosting countries in the region. 1.7 million Venezuelans are hosted by Colombia alone, making Colombia the second biggest host country of forcibly displaced persons in the world after Turkey. It also shows that the overall distribution, including other asylum seekers and refugees, that Colombia is followed by Peru, Chile, Ecuador, Brazil and others.

**Figure 4. Statistics for Venezuelans only in five major hosting countries in South America by type of protection**



*Source. Authors' own elaboration based on selected UNHCR Statistics of mid-2021.*

85 RMRP 2022, 'Regional Refugee and Migrant Response Plan' (7 December 21) <<https://www.r4v.info/en/document/rmrp-2022>> accessed 1 December 2022.

## 4.1 What has Colombia done differently?

Colombia, a country with a population of 50.6 million, thus similar to the population of Spain, has been hosting around two million Venezuelans.<sup>86</sup> This puts the current statistics and estimated projections of people fleeing the war in Ukraine into stark perspective. Initially, Venezuelans who arrived in Colombia were admitted on a Special Stay Permit (*Permiso Especial de Permanencia*) for two years. Among other considerations, the limited period had the effect of leaving many Venezuelan nationals undocumented. Banulescu-Bogdan and Chaves-González (2021) comment,<sup>87</sup> ‘by the end of 2020, 56 % of Venezuelan arrivals were in irregular status, limiting their access to services such as education, health care, and banking and crucially, keeping them out of the formal labour market.’

Current estimates<sup>88</sup> talk about two million Venezuelans that have arrived and/ or continue to reside in the country. The Colombian government reconsidered regularisation and moved from an *ad hoc* or temporary solution to a longer term and strategic approach due to human rights and also pragmatic considerations. Following this reasoning, Venezuelan nationals would keep crossing the borders and given humanitarian and geographical considerations, it would not be realistic to try to stop them. Consequently, regularisation would enable Venezuelans to contribute to the receiving society, while at the same time, it expands their rights and reduces their precariousness.

To achieve this aim, the Colombian government launched the Temporary Protection Statue for Venezuelan migrants (TPSV) in February 2021. Colombian President Ivan Duque announced that ‘this mechanism allows us to have information to grant them immigration status and, in 10 years, the possibility of a resident visa.’ It set the precedent by providing Venezuelans with a long-term perspective to rebuild their livelihoods and to avoid the pitfalls of administrative limbo or legal uncertainty and, crucially, gave them access to the formal labour market. In addition, the ‘protective’ status came along with the equal access to healthcare, social assistance and other essential services.

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86 Refugiados Y Migrantes De Venezuela (5 September 2022) <<https://www.r4v.info/es/refugiadosy-migrantes>> accessed 1 December 2022.

87 Natalia Banulescu-Bogdan and Diego Chaves-González, ‘What Comes Next Now that Colombia Has Taken a Historic Step on Migration?’ (MPI, February 2021) <<https://www.migrationpolicy.org/news/colombia-historic-legalization-what-next>> accessed 1 December 2022.

88 Migración Colombia, ‘Estatuto Temporal de Protección - Prerregistros’ (27 October 2021) <<https://public.tableau.com/app/profile/migraci.n.colombia/viz/EstatutoTemporaldeProteccion-Prerregistros/Pre-registrosPublic>> accessed 1 December 2022.



However, concerns have been raised regarding the meaning and content of ‘protection’ in the TPSV and Colombia’s resources to provide effective access to social services. Such an approach, however, promotes human rights while also stressing state control. The Colombian Temporary Protection Statute, if successful, ‘can extend access to rights to hundreds of thousands (if not millions) of people<sup>89</sup>’. And indeed, it can serve as guidance for the EU when choosing between *enforced temporality and precarity*, or opening up possibilities for medium and long-term planning and meaningful socio-economic inclusion and security of residence. As the Colombian approach acknowledges, people will keep crossing borders and look for protection abroad. Providing them with a regular status that increases their access to rights is therefore the most feasible policy choice.

## 4.2 Lessons learned from Brazil: Conditional residence rights vs. protection needs?

Brazil is the country that has the highest regularisation rate of Venezuelan nationals in South America (74% compared to an average of 45%). This is because Brazil currently provides migratory and refugee status as venues for regularisation, independent from the reasons that motivated people to leave Venezuela. The Brazilian case shows that, in a context of limited capacities to deal with the large-scale arrival of displaced individuals, the reasons why these people fled their country became less relevant and providing them with a regular status was the priority. This policy approach has been the result of a combination of factors including structural conditions, mainly bureaucratic capacities for processing large numbers of asylum applications, as well as the influence of actors such as UNHCR and the United States.

In 2017, the National Immigration Council (CNIg) presented an *ad hoc* solution for Venezuelans who arrived in Brazil by adopting Resolution No. 126, which extended *de facto*, the provisions of the Mercosur Residence Agreement to Venezuelan nationals (despite the fact that Venezuela did not ratify the Agreement). In this way, Venezuelans were issued temporary residence cards. In 2019, the National Committee for Refugees (CONARE), the state, civil society and international organisations closely cooperated and managed to fast-track and expand the recognition of being refugees and asylum seekers to large numbers of Venezuelans. In this way, a significant number of Venezuelan

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89 Brumat, ‘Migrants or refugees? ‘Let’s do both’. Brazil’s response to Venezuelan displacement challenges legal definitions’.



nationals obtained access to protection from subsequent expulsions and were granted rights to access public services and social assistance.

The residence permit has both its upsides and downsides. On the upside, the issuance of the card was swift and it gave the right to seek employment immediately. On the downside, those permits are valid for only two years and subsequent prolongation is dependent on finding employment or proving a means of subsistence. This means that longer-term regular status in Brazil is dependent on individuals' economic and labour situation. The second 'option' is to apply for refugee status. Medina Araujo (2021), alongside numerous Brazilian scholars, has criticised that such *ad hoc* solution fails to offer '...a path to regularisation'.<sup>90</sup>

Thus, after a two-year period people could potentially be deported. This regularisation procedure is not *complementary*, but rather substituting or replacing the asylum procedure. This means that the individuals who opted for a residence permit through the Mercosur Agreement cannot apply for asylum. ASILE project research<sup>91</sup> has shown that this choice often depends on the willingness to be able to travel back to Venezuela more freely, as individuals holding refugee status must ask for a special permit to do so. The length of the refugee admission process is another influencing factor. At the same time, the residence card has an economic cost that can be too high for most individuals, whereas the process for refugee status is free.

Despite the progressive character of the migration and refugee policies, there are many implementation challenges. Leitaó, working in Sao Paulo with displaced Venezuelans and other refugees, has explained<sup>92</sup> that the right to work may not necessarily lead to *actual and decent work*, as there are a number of practical obstacles. ASILE project research has shown that most policymakers regard socio-economic inclusion as the main implementation challenge. For instance, many people are still expected to learn Portuguese, or struggle to get their diplomas and professional qualifications legally recognised. Some of them are under precarious labour contracts, and need social assistance, due to, for

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90 Natália Medina Araújo, 'ASILE Country Fiche Brazil' (ASILE, January 2021) <[https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche\\_BRAZIL\\_Final\\_Pub.pdf](https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_BRAZIL_Final_Pub.pdf)> accessed 1 December 2022.

91 Brumat, 'Migrants or refugees? 'Let's do both'. Brazil's response to Venezuelan displacement challenges legal definitions'.

92 CEPS, 'Bridging the gap: what role should civil society play in supporting refugees and migrants?' (28 February 2022)<[https://www.youtube.com/watch?v=nXq9MVNv\\_PY](https://www.youtube.com/watch?v=nXq9MVNv_PY)> accessed 1 December 2022.

example, difficulties in finding or paying for housing due to increased prices or they have encountered difficulties to find available places in the education system.

## 5. Lessons Learned from Turkiye

Turkey currently hosts the largest refugee population in the world,<sup>93</sup> including 3.7 million Syrians under temporary protection and over 330 000 international protection status holders and asylum-seekers of other nationalities. Turkey has been implementing a temporary protection policy since 2011 to protect Syrian refugees, and over time has developed its own national legislative framework regulating different aspects of temporary protection. There are crucial lessons that can be drawn from Turkey's experience.

The first lesson relates to the right to work of temporary protection beneficiaries. Although the Syrian influx began in 2011, Turkey introduced the right to work for temporary protection beneficiaries in January 2016.<sup>94</sup> The 2016 Regulation on Work Permit for Foreigners under Temporary Protection, adopted on 15 January 2016, allowed temporary protection beneficiaries access to the Turkish labour market, and Syrians who are working as seasonal workers in agriculture and livestock businesses became exempted from having to apply for a work permit. Prior to the adoption of the 2016 Regulation, Syrians working illegally as low-skilled labourers were paid well below the Turkish minimum wage, thus the introduction of the right to work and the stipulation in the new legislation that Syrians should be paid at least the minimum wage in Turkey signified a change for the better.<sup>95</sup>

Nevertheless, the work permits issued to Syrians remain quite low; for instance, according to the Turkish government between 2016 and 2019, only

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93 UNHCR, 'Türkiye Operational Update' (November-December 2021) <<https://reporting.unhcr.org/document/1303>> accessed 1 December 2022.

94 UNHCR, 'Livelihoods and Economic Inclusion Programmes' <<https://help.unhcr.org/turkiye/information-for-syrians/livelihoods/>> accessed 1 December 2022.

95 Amnesty International, 'No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey' (3 June 2016) <<https://www.amnesty.org/en/documents/eur44/3825/2016/en/>> accessed 1 December 2022.

a total of 132 497 work permits<sup>96</sup> were issued to Syrians in Turkey.<sup>97</sup> There are many reasons as to why the number of issued work permits to Syrians remains low however, that being the fact that only employers can apply for work permits on behalf of Syrian employees, as well as difficult and prolonged procedures and additional fees exacerbating the problem<sup>98</sup>. The lesson which can be drawn from here is that although granting the right to work to temporarily protected persons is crucial, it is also necessary to make sure this right can be accessed in practice.

Turkey was too late in introducing a right to work for temporarily protected persons and consequently, Syrians were unable to legally work for five years and many high skilled Syrians left Turkey.<sup>99</sup> Art. 12 of the TP Directive obliges EU Member States to authorise ‘persons enjoying temporary protection to engage in employed or self-employed activities.’ However, the Turkish case shows that the sooner the temporary protection beneficiaries are given access to the labour market and can obtain work permits without complicated procedures and additional fees, the better.

The second lesson relates to ‘thinking ahead’ and being prepared for the possibility that the armed conflict that created the displacement continues for longer than expected. Turkey opened its borders to Syrians fleeing the war in 2011 and pursued an ‘open-door policy’ for many years. However, many Turkish government officials including the Turkish Prime Minister at the time, Ahmet Davutoğlu, thought the war in Syria would end and Syrians would be able to return to Syria after a few months if not weeks.<sup>100</sup>

Therefore, temporary protection regimes should be time-limited and ideally, they should not continue more than three years.<sup>101</sup> Turkish temporary protection is now going on for nearly 11 years. The Turkish government

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96 UNHCR, ‘Turkey: DRC - Syrian Refugees’ Perception of the (Formal) Labour Market in South East Turkey’ (2021) <<https://data.unhcr.org/en/documents/details/88119>> accessed 1 December 2022.

97 Meltem Ineli-Ciger, ‘Protecting Syrians in Turkey: A Legal Analysis’ [2017] 29 *International Journal of Refugee Law* pp. 555-579.

98 *ibid*, pp. 561, 562.

99 Ineli-Ciger, ‘Protecting Syrians in Turkey: A Legal Analysis’.

100 Semih Idiz, ‘Davutoglu’s wishful thinking’ *Al Monitor* (19 November 2014) <<https://www.al-monitor.com/originals/2014/11/turkey-united-states-davutoglu-wishful-thinking.html>> accessed 1 December 2022.

101 Meltem Ineli-Ciger, ‘EU Temporary Protection Directive’, *International Refugee Law Series*, Vol. 10, (Brill Nijhoff, 2018).

did not have a long-term plan when the Syrian displacement began, and it still grants Syrians ‘temporary protection status’. Although the rights and entitlements of the temporary protection beneficiaries expanded over the years, the Turkish temporary protection policy should have been terminated long before 2022. Considering this, a second lesson that can be drawn from the Turkish example is temporary protection is a time-limited response, and it should not continue for more than a reasonable period of time.

It is crucial for the EU to have a long-term plan to be ready to terminate temporary protection and ensure full socio-economic inclusion of TP beneficiaries. The TP Directive foresees temporary protection to continue for a year and a maximum of three years if the Council decides to prolong it. The EU should have a plan where durable solutions would be available to Ukrainian asylum seekers and refugees if the war continues for a prolonged period.

Art. 3(2)(b) of the Long-term Residents Directive<sup>102</sup> clarifies that this Directive does not apply to third-country nationals who: ‘*are authorised to reside in a Member State on the basis of temporary protection or have applied for authorisation to reside on that basis and are awaiting a decision on their status*’. Considering the temporary protection beneficiaries fall outside the scope of the directive, the EU should tailor long-term policies on how durable solutions can be achieved for Ukrainian refugees in case of a long-lasting conflict.

The third lesson is the need for and importance of responsibility sharing<sup>103</sup>. Turkey, by hosting nearly 4 million refugees and asylum seekers, shouldered the most responsibility in relation to the protection of Syrian refugees throughout the years. It has spent, according to the Turkish Presidency,<sup>104</sup> more than USD 40 billion for the protection of Syrian refugees and in giving Syrians access to education, healthcare, and housing. Although Turkey’s effort to improve the protection of Syrians is commendable, many Syrians face serious challenges accessing education, adequate housing, and even minimum basic treatment in

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102 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44.

103 Meltem Ineli-Ciger, ‘The Global Compact on Refugees and Burden Sharing: Will the Compact Address the Normative Gap Concerning Burden Sharing?’ [2019] 38 Refugee Survey Quarterly pp. 115–138.

104 The Republic of Türkiye Directorate of Communications, ‘Erdoğan: Türkiye is Stepping Up Where Others Fail to Act’ (14 October 2019) <[https://www.iletisim.gov.tr/english/cumhurbaskanimizin\\_kaleminden/detay/erdogan-turkey-is-stepping-up-where-others-fail-to-act](https://www.iletisim.gov.tr/english/cumhurbaskanimizin_kaleminden/detay/erdogan-turkey-is-stepping-up-where-others-fail-to-act)> accessed 1 December 2022.

the country.<sup>105</sup> Responsibility-sharing first helps hosting countries to respond better to large scale human displacements and leads to the overall better protection of people in need.

Several EU-funded projects through Facility for Refugees in Turkey and implemented together with Turkish authorities such as ESSN, the SIHHAT project and PIKTES have made a visible impact on the protection of Syrians in Turkey and improved their access to social aid, education, and healthcare. That notwithstanding, it is unfortunate that in the case of Turkey, the EU's financial assistance was conditioned to the 2016 EU-Turkey Statement and a clear containment agenda by the EU. Due to the increasing externalisation of EU migration policy, the EU has become more dependent on the cooperation of third country actors, which in turn nurtures its dependency and vulnerability towards the interests of these regimes. A crucial lesson learned is that EU financial assistance on temporary and international protection must not be part of an unfair and inhumane contained mobility approach pursuing migration management goals.

## 6. Implementing Equal Solidarity

Based on the analysis and lessons learned examined above, this chapter calls for the EU to fundamentally rethink the *unequal solidarity paradigm* characterising its asylum and border policies<sup>106</sup> and proposes two key standards for EU coordinated action based on equal solidarity<sup>107</sup>: first, a protection-driven and regularisation standard; and a non-discrimination standard. These standards, which draw from international refugee law and human rights law, as well as political commitments in the UN Global Compact on Refugees (GCR) and UN Global Compact on Migration (GCM), and the EU Treaty and secondary legislation obligations, include:

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105 Meltem Ineli-Ciger and Özgenur Yiğit, 'ASILE Country Fiche Turkey' (ASILE, October 2020) <[https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche\\_Turkey\\_Final\\_Pub.pdf](https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_Turkey_Final_Pub.pdf)> accessed 1 December 2022.

106 Carrera et al. have argued that 'While solidarity is one of these often-quoted concepts, this notion sometimes pursues or conveys "inter-state responsibility sharing", a "responsibility shifting" agenda and a state-centric understanding and framing of responsibility in relation to international protection". See Sergio Carrera and others, 'Implementing the United Nations Global Compact on Refugees? Global Asylum Governance and the Role of the European Union' (MPC, 2021) p. 5.

107 Sergio Carrera and Roberto Cortinovis, 'The Malta declaration on SAR and relocation: A predictable EU solidarity mechanism?' (CEPS, October 2019) <[https://www.ceps.eu/wp-content/uploads/2019/10/PI2019\\_14\\_SCRC\\_Malta-Declaration-1.pdf](https://www.ceps.eu/wp-content/uploads/2019/10/PI2019_14_SCRC_Malta-Declaration-1.pdf)> accessed 1 December 2022.

## 6.1 A protection-driven standard

Temporary protection status should not be substitute or replace the right of beneficiaries to apply for asylum or be regularised in the EU. Therefore, when the time limit of the envisaged EU temporary protection regime ends, it will be crucially important that temporarily protected persons are given the option to choose between access to Refugee Status Determination (RSD) or regularisation, and to envisage the possibility, as enshrined in Objective 7 of the GCM, to ‘to facilitate access for migrants in an irregular status to an individual assessment that may lead to regular status’. Moreover, as the Turkish case suggests, it is crucial for the EU to develop a medium and long-term plan to offer Ukrainians and non-Ukrainian nationals fleeing the war durable temporary protection solutions in addition to access to RSD if the war does not end in the near future.

For instance, one possible solution might be to amend the Long-term Residents Directive to include previous temporary protection beneficiaries to its scope (by amending Art 3.2 and 4 of this directive) and include ‘the time spent on temporary protection’ as ‘duration of residence’ required under Art. 4 of the Directive. Another option might be to grant *prima facie* refugee/subsidiary protection status to those who are previously protected as temporary protection beneficiaries in addition to amending the Long-term Residents Directive. These are just examples of different mid- and long-term ways forward that can be designed. However, it is crucial that the EU plans ahead and devises different options which do not undermine the 1951 Geneva Convention, preserves the fundamental right to seek asylum and offers temporarily protected persons tangible solutions.

The triggering of the TP Directive also shows that the prevailing EU asylum policy principle where asylum seekers and refugees are excluded from the right to freely move inside the Schengen Area must be reconsidered. The agreed Council Decision expressly allows potential applicants to choose their country of destination to join their families, friends or networks in specific EU Member States. The Commission’s proposal has expressly recognised that granting agency to TP potential applicants can be expected to have a positive impact by not overwhelming Member States’ asylum systems and reduce pressures on national reception systems. Therefore, the currently applicable EU Dublin Regulation restrictions and criminalisation of so-called ‘secondary movements’ of asylum seekers and refugees from non-European countries inside the EU should be seriously reconsidered and fully liberalised so as to achieve the same policy goals as the TP Council Decision objectives.

EU Member States that share an EU external border with Ukraine must be supported to ensure they can offer the rights and entitlements foreseen under the TP Directive in an effective and timely manner. Any potential involvement of EU agencies should be mainly focused on a prevailing *asylum-driven approach*, and not one related to border management and policing. In the case that EU agencies' operational support and if deployment by the EUAA or Frontex takes place, a more robust independent fundamental rights monitoring, and complaint mechanism of their activities should be ensured and closely monitored during all the implementation phases. EU agencies should be exclusively deployed *as long as* relevant EU Member States duly comply with their obligations under EU law and towards the fundamental rights of each person. This should be accompanied by an independent evaluation of the experiences emerging from the implementation of the TP Directive.

## 6.2 A non-discrimination standard

The EU and Member States' responses must fully comply with the prohibition of racial and ethnic discrimination in their borders and asylum policies. Art. 2(2) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides that the States parties should 'undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Art. 1.2 of the ICERD does not in principle apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

However, the Committee on the Elimination of Racial Discrimination (CERD) has confirmed that this provision must not be interpreted narrowly and interpreted as to also protect non-citizens, including asylum seekers and refugees.<sup>108</sup> The CERD General Recommendation XI noted 'among non-citizens, States parties may not discriminate against any particular nationality'.<sup>109</sup> The CERD General Recommendation XXII emphasised that, within the general obligation to prohibit and eliminate racial discrimination, States

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108 Achilles Skordas and Meltem Ineli-Ciger, 'Article 7 1951 Convention' in: Zimmermann, A. and Einarsson, T. (eds) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol A Commentary* (2nd edn, OUP forthcoming) para. 96.

109 CERD, General Recommendation XI on non-citizens, 2003, para. 1. This decision was replaced by CERD Conclusion XXX.



parties should respect the principle of *non-refoulement* – the rights of refugees and displaced persons to return to their homes under conditions of safety.<sup>110</sup> The CERD General Recommendation XXX ‘considered that differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim’.<sup>111</sup> The Committee also mentioned that states should ‘*ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin*’. Moreover, it is noted in General Recommendation XXX that;

Although some of [the rights listed in Art. 5 of CERD], such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. *States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.* (Emphasis added).

The outlined progressive interpretation of the CERD was not followed by the 2021 International Court of Justice (ICJ) judgment *Qatar v. United Arab Emirates*<sup>112</sup> where the Court decided that the term ‘national origin’ in the ICERD did not include ‘nationality’ and distinctions between citizens and non-citizens did not necessarily violate ICERD. However, this narrow interpretation of the term ‘national origin’ and the Court’s reasoning has been highly criticised. Chiefly, the Court failed to offer any sound reasons why the CERD’s interpretation was not particularly followed.<sup>113</sup> Furthermore the ICJ completely missed the point that ‘nationality-based discrimination’ often hides or serves as a vessel for racial and religious discrimination and prejudice. While in international law, states are not prohibited from making certain distinctions

110 CERD, *General Recommendation No XXII: Article 5 and refugees and displaced persons*, 1996, para 2; Achilles Skordas and Meltem Ineli-Ciger, ‘Article 7 1951 Convention’ para 96.

111 CERD, *General Recommendation XXX on discrimination against non-citizens*, 2004.

112 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* Preliminary Objections (Judgment) [2021] ICJ Reports.

113 Cathryn Costello and Michelle Foster, ‘Race Discrimination Effaced at the International Court of Justice’ [2021] *AJIL Unbound* pp. 339-344.



based on ‘nationality’ however, as noted by Human Rights Committee and cited by Judge Iwasawa in his separate opinion;<sup>114</sup>

a differentiation of treatment is considered to constitute discrimination, unless the criteria for such a differentiation are reasonable and objective; in other words, unless it pursues a *legitimate aim* and there is a *reasonable relationship of proportionality* between the means employed and the aim sought to be achieved.<sup>115</sup> (Emphasis added).

As the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has underlined how the most ‘obvious driver and facilitator of racial discrimination’ in migration and asylum policies is ‘ethno-nationalism’.<sup>116</sup> The UN Special Rapporteur has also confirmed that laws and policies on migration and asylum ‘must not discriminate, in purpose or effect, on the basis of race, colour, national or ethnic origin’. Although there is no right to be admitted to the territories of a state for asylum seekers under international law, the right to seek asylum is recognised under several human rights treaties as well, as Art. 18 of the EU Charter of Fundamental Rights. The EU’s double standards in observing the right to seek asylum and granting international protection indeed breaches the principle of non-discrimination. Thus, there is no place for racial, ethnic or other discrimination, when people are seeking asylum. Any difference in treatment in the context of asylum policies must be reasonable and objective and, more importantly, justified by states on legitimate grounds, otherwise it amounts to arbitrary discrimination.

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114 Separate Opinion of Judge Iwasawa <<https://www.icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-05-EN.pdf>> accessed 1 December 2022.

115 Human Rights Committee, ‘General Comment No. 18 on non-discrimination’ (9 November 1989) para. 13; *Biao v. Denmark* App no 38590/10 (ECHR, 24 May 2016) supra note 5, para. 90; *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* [1984] IACtHR OC-4/84 para. 57.

116 Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (2018), Racial discrimination in the context of citizenship, nationality and immigration status, 25 April 2018, A/HRC/38/52. In paragraph 40 the Report emphasises that “Ethno-nationalism views the nation as “defined in terms of assumed blood ties and ethnicity”. It has also evolved in the “normalisation and mainstreaming of racist and xenophobic discourse in public discourse...Political parties and leaders have shown increasing and disturbing tolerance for ethno-nationalist messages of hatred and intolerance...”.

The finally adopted text of the Council Decision unlocking the TP regime (in particular its differentiation between Ukrainian nationals and non-nationals) does not seem objective, legally certain and does not apply consistent EU-wide treatment of non-Ukrainian nationals and asylum seekers fleeing Ukraine. This opens up a clear risk of discriminatory treatment during its implementation phases by Member States' authorities.

A comparison between the EU and Member States' responses to the large scale number of entries resulting from the Ukraine War with recent past policies and debates dealing with people fleeing conflicts in Libya, Syria or Afghanistan reveals a stark contradiction with the lack of political support by some EU Member States over the Commission and European Parliament's proposals for reforming the EU asylum system in 2015/2016.<sup>117</sup> They also show the existence of latent structural discrimination as a key factor characterising what is 'realistic' or not in EU asylum and migration policies. The extreme right narrative and anti-migration agenda have made their way for far too long in both national and EU mainstream policy debates on refugees and migration policies, as well as what is deemed as politically 'realistic' or not.

For instance, the question of discrimination behind the Polish and Hungarian governments' opposition to the 2015 Council Decision on relocation quotas<sup>118</sup> was part of the Court of Justice of the European Union's (CJEU) reasoning which found them in violation of their obligations under EU law. In the Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary (supported by Poland) v. Council of the EU* of September 2017,<sup>119</sup> the Polish and Hungarian governments challenged the legality of the 2015 Relocation Decision on the basis that binding quotas would have 'disproportionate effects' as they conceived themselves as 'Member States which are "virtually ethnically homogeneous, like Poland" and whose populations are different, from a cultural and linguistic point of view, from the migrants to be relocated on their territory'.<sup>120</sup>

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117 For a similar argument refer to Meltem Ineli-Ciger, '5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022' (EU Immigration and Asylum Law and Policy, 7 March 2022) <<https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>> accessed 1 December 2022.

118 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L 248/80.

119 Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* [2017] ECLI:EU:C:2017:631

120 Para. 302 of the ruling.

The Court rejected their argument on the basis of two main grounds: first, making conditional relocation based on ‘the existence of cultural or linguistic ties between each applicant for international protection and the Member State’ would make it impossible to work in practice; and secondly, crucially, ‘considerations relating to the ethnic origin of applicants for international protection cannot be taken into account since they are clearly contrary to EU law and, in particular, to Art. 21 of the Charter of Fundamental Rights of the European Union’. Therefore, the CJEU confirmed that discriminatory or racist asylum policies by EU Member States are contrary to EU law and are unacceptable in the Union’s legal system. It is therefore of central importance for EU asylum policy to consider institutionalised forms of discrimination or racism towards some asylum seekers not originating from European countries as clear examples of threats to the rule of law as enshrined in Article 2 TEU.

## 7. Conclusions: Equal solidarity in EU asylum policy

The immediate activation of the Temporary Protection (TP) Directive regime for dealing with the large-scale movement of people fleeing the war in Ukraine is a very positive step to ensuring solidarity and compassion towards those who are suffering and in need of protection. The finally agreed EU temporary protection regime however raises key questions which call for careful consideration and reflection, and which bring us back to the very foundations and working parameters of the EU’s asylum policy, chiefly the so-called EU solidarity principle.

The EU and Member States’ responses to the people escaping from violence in Ukraine have made the flaws characterising the unequal solidarity paradigm of current and previous policies covering non-European third country nationals seeking asylum and refugeehood in the Union plainly clear for all to see. The documented cases of discrimination, racism and xenophobia experienced by black Africans, Indian nationals, Pakistani nationals, people of Middle Eastern descent and others, and the statements by some EU national leaders, reveal the existence of structural or institutionalised forms of discrimination concerning the fundamental right to seek asylum and receive protection in the EU.

This can be expected to be exacerbated by the way in which the TP Council Decision follows the consistent approach defended by Member States’ governments in countries such as Poland and Hungary to not accept people seeking

asylum who are deemed as not ‘culturally or ethnically’ similar to their own nationals. The Council Decision leaves ample room of manoeuvre for Member States possessing an EU external border to consistently not apply the TP regime and instead provide other ‘national responses’ which may not ensure equal rights and dignity in comparison to those granted to Ukrainian nationals, people with refugee status and their families. Furthermore, the envisaged TP model does not ensure equal inter-state solidarity either due to not unlocking the inter-state solidarity or quasi-relocation regime of transfers of applicants envisaged in the TP Directive.

Once the EU temporary protection regime is over and temporary protection beneficiaries are given access to RSD, provided that the conflict in Ukraine is still ongoing, most temporary protection beneficiaries would likely qualify for international protection, if not through refugee status, then through subsidiary protection status. The implementation phases of the newly established TP regime will be of central importance for ensuring Member States respect their legal commitments under the directive, as well as other relevant pieces of EU asylum law, including the EU Qualifications Directive and every person’s right to seek asylum without discrimination and irrespective of status. It will be equally important to monitor the reception conditions and practical access to rights by TP beneficiaries, and the existence of meaningful and effective ways for them to later choose to apply for asylum and/or regularisation of their status in the medium and longer term.

The EU responses to the war in Ukraine and the refugees fleeing the country show the need to rethink the EU concept of ‘solidarity’ to address the endemic racism and discrimination that characterises the migration and asylum debate in the EU. It is time to rethink solidarity, from a notion which has been mainly informed for too long by nationalistic and discriminatory government agendas and understood as inter-state responsibility shifting, towards one which places the intersection between fundamental rights, the rule of law and democracy at its centre, and where individuals or a human-centric approach prevails for the sake of decent humanity and justice.

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UNHCR, ‘UNHCR mobilizing to aid forcibly displaced in Ukraine and neighbouring countries’ ( 1 March 2022) <<https://www.unhcr.org/news/briefing/2022/3/621deda74/unhcr-mobilizing-aid-forcibly-displaced-ukraine-neighbouring-countries.html>> accessed 1 December 2022

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# Chapter 2

## Reasons for the Activation of the Temporary Protection Directive in 2022: A Tale of Double Standards

Dr Meltem Ineli-Ciger\*

### 1. Introduction

The Russian invasion of Ukraine began on 24 February 2022 and led to large-scale displaced persons. To protect Ukrainians fleeing the invasion, the Council unanimously adopted the Council Implementing Decision (EU) 2022/382 of 4 March 2022<sup>1</sup> giving those fleeing war in Ukraine the right to temporary protection. This was the first time the Council Directive 2001/55/EC<sup>2</sup> (Tem-

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\* Jean Monnet Fellow, Migration Policy Centre, EU; Associate Professor, Suleyman Demirel University Faculty of Law.

- 1 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.
- 2 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.

porary Protection Directive) has been activated, in other words, implemented to respond to the large-scale arrival of displaced persons fleeing a conflict zone. The Temporary Protection Directive applies to all EU Member States except Denmark, which has nevertheless introduced a similar national temporary protection scheme<sup>3</sup> by adopting the Special Act on Temporary Residence Permit for Persons Displaced from Ukraine. Iceland, Norway, and Switzerland have introduced similar national temporary protection schemes<sup>4</sup> as well. As of 1 December 2022, according to the European Union Agency for Asylum (EUAA)<sup>5</sup>, almost 4,7 million persons fleeing Ukraine have registered for temporary protection in the 29 EU+ countries since the beginning of the Russian invasion in Ukraine.

In this chapter, I update my analysis and findings in an earlier contribution published in *EU Immigration and Asylum Law and Policy*<sup>6</sup> in light of recent developments and figures and attempt to elaborate on reasons that the Temporary Protection Directive, as opposed to its two-decade of existence, implemented for the first time in 2022 to respond to large scale displacement from Ukraine.

## 2. The Temporary Protection Directive and Its Non-Implementation Until 2022

When I published my monograph, which was a revised version of my Ph.D. thesis, ‘Temporary Protection in Law and Practice’<sup>7</sup> in 2017, I was confident

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- 3 Michala Clante Bendixen, ‘New Danish law for those fleeing Ukraine mirrors EU Temporary Protection Directive’ (*European Commission*, 16 March 2022) <[https://ec.europa.eu/migrant-integration/news/new-danish-law-those-fleeing-ukraine-mirrors-eu-temporary-protection-directive\\_en#:~:text=Instead%2C%20the%20Danish%20government%20has,and%20until%2024%20February%202022](https://ec.europa.eu/migrant-integration/news/new-danish-law-those-fleeing-ukraine-mirrors-eu-temporary-protection-directive_en#:~:text=Instead%2C%20the%20Danish%20government%20has,and%20until%2024%20February%202022)> accessed 1 December 2022.
  - 4 European Union Agency for Asylum (EUAA), ‘Analysis of Measures to Provide Protection to Displaced Persons from Ukraine Situational Report’ (July 2022) <[https://euaa.europa.eu/sites/default/files/publications/2022-07/2022\\_temporary\\_protection\\_Ukraine.pdf](https://euaa.europa.eu/sites/default/files/publications/2022-07/2022_temporary_protection_Ukraine.pdf)> accessed 1 December 2022.
  - 5 European Union Agency for Asylum, <<https://euaa.europa.eu/ukraine-crisis-data-and-analysis> https://euaa.europa.eu/ukraine-crisis-data-and-analysis> accessed 1 December 2022.
  - 6 Meltem Ineli-Ciger, ‘5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022’ (*EU Immigration and Asylum Law and Policy*, 7 March 2022) <<https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>> accessed 1 December 2022.
  - 7 Meltem Ineli-Ciger, *Temporary Protection in Law and Practise* (Brill 2017).

that there were six reasons behind the non-implementation of the Directive<sup>8</sup>, I will examine these in detail below and explain why I was wrong to assume these reasons were valid.

## 2.1 Mass influx was defined quite vaguely in the Temporary Protection Directive and there were no clear objective indicators of a mass influx situation

Temporary Protection Directive defines mass influx as: “arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme”. This is indeed a vague and flexible definition. Skordas notes that this definition requires the number of displaced persons to be ‘substantial’ and this assessment to be made by the Council and the Commission.<sup>9</sup> According to Arenas,<sup>10</sup> “The lack of definition of the concept (mass influx) is no anomaly but a conscious decision on the part of the Directive”. I previously argued that the absence of clear objective indicators of a mass influx is one of the reasons that can be accounted for the non-implementation of the Directive and that introduction of clear and objective criteria to define mass influx situations in the Directive can facilitate the Temporary Protection Directive’s implementation. Perhaps agreeing with this view, the Commission proposed new indicators to guide activation of the ‘immediate protection’<sup>11</sup> which was foreseen to replace temporary protection in the Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum.<sup>12</sup> The Commission’s proposal

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8 *ibid*, ch 5.

9 Achilles Skordas, ‘Temporary Protection Directive 2001/55/EC’ in Daniel Thym and Kay Halbrunner (eds), *EU Immigration and Asylum Law* (C.H. Beck/Hart/Nomos 2022) 1177-1228.

10 See Arenas, ‘The eternal question: What does “mass influx” really mean? Reflections after the first activation of the Temporary Protection Directive 2001/55’ in this collection.

11 Meltem Ineli-Ciger, ‘Immediate Protection in the New Pact on Migration and Asylum: A Viable Substitute for Temporary Protection?’ in Daniel Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System* (Nomos 2022). ; See also for a similar conclusion, Hanne Beirens and others, ‘Study on the Temporary Protection Directive’ (2016) < [https://home-affairs.ec.europa.eu/system/files/2020-09/final\\_report\\_evaluation\\_tpd\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/final_report_evaluation_tpd_en.pdf) > accessed 1 December 2022.

12 Commission, ‘Proposal for a Regulation of The European Parliament And of The Council addressing situations of crisis and force majeure in the field of migration and asylum’ COM (2020) 613 final.

required “an exceptional situation of mass influx of third-country nationals or stateless persons being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State’s asylum, reception or return system non-functional and can have serious consequences for the functioning the Common European Asylum System or the Common Framework as set out in Regulation (EU) XXX/XXX [Asylum and Migration Management], or (b) an imminent risk of such a situation” to activate immediate protection. I also previously concluded that for immediate protection to be activated/implemented:<sup>13</sup> a) the number of arrivals should be disproportionate to the population and GDP of the Member State and the nature and scale of the arrivals should make the Member State’s asylum, reception, or return system non-functional (though I also questioned the relevance of a functioning return system as a consideration for determining the existence of a mass influx/crisis situation).

However, it seems the lack of indicators of a mass influx was not a real issue obscuring the activation of the Temporary Protection Directive. Only three days after the Russian invasion began the Justice and Home Affairs ministers indicated ‘broad support’ during their extraordinary meeting for the idea of activating the Temporary Protection Directive<sup>14</sup> whereas, activation of the Directive was proposed by the Commission on 2 March 2022. Considering the Council decided to activate the Directive on 4 March, the lack of indicators for determining a mass influx situation proved not to be an issue. However, one can also argue arrivals from Ukraine to the Member States were on such a scale that the European authorities had no doubt that this situation qualified as a mass influx.

## 2.2 The activation mechanism of the Temporary Protection Directive required lengthy procedures and was quite complex

The activation process of the Temporary Protection Directive can be triggered by a Member State. Upon a State’s request or ex officio, the Commission must propose activating the Directive. Nonetheless, such a proposal must be

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13 Ineli-Ciger, ‘Immediate Protection in the New Pact on Migration and Asylum: A Viable Substitute for Temporary Protection?’.

14 Katrien Luyten, ‘Temporary Protection Directive’ (PE 729.331) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729331/EPRS\\_BRI\(2022\)729331\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729331/EPRS_BRI(2022)729331_EN.pdf)> accessed 1 December 2022.

adopted by the Council with a qualified majority vote. While the Commission is the only EU organ that can submit such a proposal and is the only organ that has the right to suggest specific groups that will receive temporary protection, the Council has the exclusive authority to determine these groups. I previously argued<sup>15</sup> that the activation mechanism of the Directive requires lengthy procedures and is quite complex; for instance, Member States cannot directly ask activation of the Temporary Protection Directive from the Council, only the Commission can do so. However, this, in the end, proved not to be an issue as well since the Council adopted the Commission's proposal to activate the Directive unanimously just in 2 days (this is despite the fact that only a qualified majority decision would have been enough to activate the Temporary Protection Directive).

### **2.3 It was difficult to secure a qualified majority vote in the Council in the face of an influx situation, which only seriously affected a limited number of Member States**

When displacement from Ukraine began, most displaced persons fled to four Member States namely, Poland (756,000), Hungary (157,000), Slovakia (101,000) and Romania (63,000) but this did not prevent the activation of the Temporary Protection Directive (these numbers were as of 5 March 2022<sup>16</sup>). Although the displacement initially affected four Member States this did not preclude activation of the Temporary Protection Directive as the decision to activate the Directive was unanimous. Nevertheless, as a result of the Council's decision not to implement article 11 of the Temporary Protection Directive and to give persons eligible for temporary protection freedom to choose the Member State in which they wish to register for temporary protection, other Member States now host large number of temporary protection beneficiaries<sup>17</sup> as well. As of 1 October 2022, the number of temporary protection beneficiaries in the Member States bordering Ukraine is as follows: Hungary (30,000), Romania (67,064), Slovakia (95,179), Poland (1,409,39) whilst, according to UNHCR<sup>18</sup>, Germany hosts more than 709,000 whereas, Italy and

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15 Ineli-Ciger, *Temporary Protection in Law and Practise*, ch 5.

16 UNHCR, 'Ukraine Refugee Situation'. <[https://data.unhcr.org/en/situations/ukraine#\\_ga=2.68602455.758864911.1646377487-1625719621.1638102309](https://data.unhcr.org/en/situations/ukraine#_ga=2.68602455.758864911.1646377487-1625719621.1638102309)> accessed 5 March 2022.

17 *ibid.*

18 *ibid.*

Spain host more than 157,000 and 144,000 temporary protection beneficiaries from Ukraine.

## 2.4 Many Member States believed that activation of the Temporary Protection Directive may create a ‘pull factor’ for migrants seeking entry to the EU

Push–pull model offers a conceptual framework that foresees there are push factors in countries of origin that cause people to leave their country, and pull factors that attract migrant to certain receiving countries.<sup>19</sup> Pull factors are perceived to affect a person’s decision to choose his/her destination country hence, some Member States might have been reluctant to support the activation of the Directive due to the belief that activation of the Directive may create a ‘pull factor’<sup>20</sup> and attract more migrants and refugees to the EU. However, this was not a consideration when the Temporary Protection Directive was activated. I argue that because the Commission expressly mentions that all EU countries bordering Ukraine should allow entry of all people fleeing the war in Ukraine to the Union territories.<sup>21</sup> This is a stark contrast with what is happening on the Southern borders of the EU where Frontex acts as a complicit in the push-backs in the Aegean.<sup>22</sup> If the Commission and Council were to be afraid of any kind of pull factor, it would not have instructed the Member States to keep their borders open to those fleeing Ukraine.

## 2.5 Some Member States found the level of rights of temporary protection beneficiaries quite high

Temporary protection beneficiaries are to enjoy the following rights and entitlements in the EU: a) a residence permit for the entire duration of the pro-

19 For pull-push factors see Sergio Carrera and others, ‘European Union Policies on Onward and Secondary

Movements of Asylum-seekers and Refugees: A Critical Overview of the EU’s Migration Management Complex’ (2022) <[https://www.ceps.eu/wp-content/uploads/2022/03/ITFLOWS-report\\_Movements-of-Asylum-seekers-and-Refugees.pdf](https://www.ceps.eu/wp-content/uploads/2022/03/ITFLOWS-report_Movements-of-Asylum-seekers-and-Refugees.pdf)> accessed 1 December 2022.

20 Ineli-Ciger, *Temporary Protection in Law and Practise*, ch 5.

21 European Commission, ‘Information for people fleeing the war in Ukraine’ <[https://eu-solidarity-ukraine.ec.europa.eu/information-people-fleeing-war-ukraine\\_en](https://eu-solidarity-ukraine.ec.europa.eu/information-people-fleeing-war-ukraine_en)> accessed 1 December 2022.

22 Katy Fallon, ‘Revealed: EU border agency involved in hundreds of refugee pushbacks’ *The Guardian* (Europe, 28 April 2022) <<https://www.theguardian.com/global-development/2022/apr/28/revealed-eu-border-agency-involved-in-hundreds-of-refugee-pushbacks>> accessed 1 December 2022.

tection, b) access to information on temporary protection, c) access to employment (subject to a number of rules and restrictions such as those that are applicable to the profession and to national labour market policies), d) access to suitable accommodation, social welfare and means of subsistence (if necessary), e) access to medical care, f) access to education for children and g) a limited right to family unification (Chapter III of the Temporary Protection Directive). Temporary protection beneficiaries may also apply for international protection, although the Member States can postpone the processing of asylum applications until the end of temporary protection. Although the outlined are only minimum rights and entitlements that the Member States are required to provide to the temporary protection beneficiaries under EU law, Member States are free to extend the rights and/or remove any restrictions on the outlined rights and entitlements in the Temporary Protection Directive.

According to the Study on the Temporary Protection Directive<sup>23</sup>, one of the reasons for the non-implementation of the Temporary Protection Directive could be identified as the adequate and fair level of rights, which the Directive provides to its beneficiaries. In the Ukrainian context, this was also not an issue since Member States have been offering these rights and entitlements since the beginning of March although according to reports by EUAA<sup>24</sup> and ECRE<sup>25</sup>, there are differences between practices of the Member States in terms of services relating to the provision of information, registration, consultation on access to rights, counselling, referrals to accommodation, basic care, documenting biometric data and security screening. Registration period can range from a few hours to a few weeks in different Member States whereas, the amount of social assistance and shelter options<sup>26</sup> including reception centres and private housing also vary among host states.

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23 Hanne Beirens and others, 'Study on the Temporary Protection Directive' (2016) < [https://home-affairs.ec.europa.eu/system/files/2020-09/final\\_report\\_evaluation\\_tpd\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/final_report_evaluation_tpd_en.pdf) > accessed 1 December 2022.

24 European Union Agency for Asylum (EUAA), 'Analysis of Measures to Provide Protection to Displaced Persons from Ukraine Situational Report'.

25 European Council on Refugees and Exiles (ECRE), 'Updated Information Sheet: Measures in Response to the Arrival of Displaced People Fleeing the War in Ukraine' (*ECRE*, 25 April 2022) < <https://ecre.org/updated-information-sheet-measures-in-response-to-the-arrival-of-displaced-people-fleeing-the-war-in-ukraine/> > accessed 1 December 2022.

26 European Union Agency for Asylum (EUAA), 'EU+ countries continue to address the protection needs of displaced persons from Ukraine' (15, 21 April 2022) < <https://euaa.europa.eu/publications/eu-countries-continue-address-protection-needs-displaced-persons-ukraine> > accessed 1 December 2022.



## 2.6 Many Member States believed that national asylum systems can handle the arrival of a significant number of refugees without activating the Temporary Protection Directive

One of the reasons suggested for the non-activation of the Temporary Protection Directive was the belief that asylum systems of the Member States can handle large scale arrival of refugees and migrants<sup>27</sup> and their asylum systems can function as they should with the support of the EU institutions. In the case of displacement from Ukraine, it was clear in view of the rate and scale of arrivals, especially in Member States such as Poland, that national asylum systems would not be able to cope. However, to what extent this criterion played a role in the activation of the Directive cannot be known, it is clear that if the Directive was not activated, Poland may have forced to process asylum applications of millions of displaced persons from Ukraine.

In light of these six reasons I came up with over the years on why the Temporary Protection Directive has never been implemented, it was not a surprise when the Commission<sup>28</sup> concluded in 2020 that “*Council Directive 2001/55/EC no longer responds to the current reality of Member States and needs to be repealed*” and proposed as part of its New Pact on Migration<sup>29</sup> to introduce ‘immediate protection’<sup>30</sup> in the Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum, instead.<sup>31</sup> Once, I was nearly sure that the fate of the Temporary Protection Directive was sealed. How wrong I was. The events of late February and early March 2022 showed one thing: the six reasons I came up with over the years, and listed above, all boiled down to one reasoning: the Temporary Protection Directive

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27 European Commission (n 24).

28 Commission staff working document accompanying the document proposal for a regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund] [2020] SWD/2020/207 final.

29 Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum’ COM/2020/609 final.

30 Ineli-Ciger, ‘Immediate Protection in the New Pact on Migration and Asylum: A Viable Substitute for Temporary Protection?’.

31 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum’ COM/2020/613 final.



was not implemented before 2022 because the Commission and the Council simply had no political will to activate it.

### **3. Activation of the Temporary Protection Directive In 2022. An Unexpected Turn of Events**

I argued previously<sup>32</sup> that “The Temporary Protection Directive has introduced a practical and efficient framework to deal with mass influx situations. Refugees and persons fleeing armed conflict, violence, and human rights violations can be protected within the Directive’s framework for up to three years. The Directive provides a temporary protection status that confers temporary residence permits, emergency health care, shelter, social benefits, education for minors as well as limited access to the labour market and a limited right to family reunification.” For these reasons, due to its flexible eligibility criteria and its broad personal scope, its fine harmonisation and formalisation of the protection standards to be offered to temporarily protected persons, as well as its voluntary-based burden-sharing mechanism, that the Temporary Protection Directive is the right framework to respond to the mass displacements from Ukraine. But the question is not why the Temporary Protection Directive is activated within the context of the displacement from Ukraine, but why the Temporary Protection Directive was not activated before.

#### **3.1 Ukrainians are Europeans but Syrians, Afghans, Tunisians, Libyans and Iraqis were not**

In 2011, the violence and conflicts which followed the fall of former President Zine el-Abidine Ben Ali compelled many Tunisians to flee.<sup>33</sup> The fall of the Qaddafi regime in Libya and the NATO intervention also increased the number of asylum-seekers arriving at European shores; according to the Commission, 650,000 persons had fled Libya<sup>34</sup> due to armed conflict and violence.

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32 Ineli-Ciger, *Temporary Protection in Law and Practise*, ch 5.

33 Simon McMahon, ‘North African Migration and Europe’s Contextual Mediterranean Border in Light of the Lampedusa Migrant Crisis of 2011’ (2012) European University Institute (EUI) Working Paper, EUI SPS, 2012/07 < <https://cadmus.eui.eu/handle/1814/24754> > accessed 1 December 2022.

34 Commission, ‘Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions’ COM(2011) 248 final.

Alarmed at the number of persons arriving in Italy, MEPs called on the Commission<sup>35</sup> to propose activating the Temporary Protection Directive in 2011, but the requests made by the Italian and Maltese governments were rejected in the Justice and Home Affairs Council meeting on the basis that the conditions for activation were not met.<sup>36</sup>

In 2015, nearly one million refugees and migrants arrived irregularly in Europe by sea whereas according to UNHCR<sup>37</sup> more than 4,000 people have lost their lives while trying to reach the European shores. In 2015, MP Elisabetta Gardini asked the Commission whether it agreed that the legal conditions for triggering the Temporary Protection Directive<sup>38</sup> had been met in view of the Syrian conflict and ensuing crisis in the Mediterranean and, hence, a proposal to the Council had to be submitted. However, once again, the Directive was not implemented. Europe's double standard<sup>39</sup> for the treatment of asylum seekers and refugees depending on where they come from is well-documented.<sup>40</sup>

In the weeks following the Russian invasion, third country nationals and stateless persons faced serious difficulties leaving Ukraine and being admitted to the Member States. The African Union released a declaration noting *"African citizens on the Ukrainian side of the border are being refused the right to cross*

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35 Bruno Nascimbene and Alessia Di Pascale, 'The 'Arab Spring' and the Extraordinary Influx of People who Arrived in Italy from North Africa' (2011) *European Journal of Migration and Law* 341.

36 Ibid.

37 Jonathan Clayton and Hereward Holland, 'Over one million sea arrivals reach Europe in 2015' (*UNHCR*, 30 December 2015) <<https://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>> accessed 1 December 2022.

38 Meltem Ineli-Ciger, 'Has the Temporary Protection Directive become obsolete? An examination of the Directive and its lack of implementation in view of the recent asylum crisis in Mediterranean' in Celine Bauloz, Meltem Ineli-Ciger, Sarah Singer, Vladislava Stoyanova (eds.), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill 2015) pp. 225-247.

39 Hassan Hankir and Hams Rabah, 'Arab refugees see double standards in Europe's embrace of Ukrainians' *SWI* (2 March 2022) <<https://www.swissinfo.ch/eng/arab-refugees-see-double-standards-in-europe-s-embrace-of-ukrainians/47395932>> accessed 1 December 2022.

40 NPR, 'Europe welcomes Ukrainian refugees but others, less so' *NPR* (Europe, 28 February 2022) <<https://www.npr.org/2022/02/28/1083423348/europe-welcomes-ukrainian-refugees-but-others-less-so>> accessed 1 December 2022; Sarah Ellison and Travis M. Andrews, "They seem so like us': In depicting Ukraine's plight, some in media use offensive comparisons' *The Washington Post* (27 February 2022) <<https://www.washingtonpost.com/media/2022/02/27/media-ukraine-offensive-comparisons/>> accessed 1 December 2022.

*the border to safety.*"<sup>41</sup> The different treatment of Ukrainians and persons from other nationalities at the Polish Border in the weeks following the Russian invasion is an example showing how the treatment of persons seeking refuge at the European borders is discriminative. In the words of Lorenzo Tondo<sup>42</sup>, a journalist reporting on the Ukraine Border:

"I look on as the soldiers help Ukrainian women and children with their heavy luggage. I watch as they play with the children and caress their faces. As the scene unfolds, I can't help but think that this is the same border force which, for months, a short distance north, along the same eastern border, has been violently pushing back asylum seekers from Syria, Iraq and Afghanistan who attempt to cross the frontier from Belarus. It is the same border force which, instead of offering a caring touch and a comforting smile, brutally beat the refugees from Aleppo, who are also victims of Vladimir Putin's bombardments. In Przemyśl, the Ukrainians are served hot drinks. At the Belarusian border, at least 19 migrants have died in the frigid forests."

Not very different from views expressed by Amnesty International<sup>43</sup>, Global Detention Project<sup>44</sup>, and Peers<sup>45</sup>, I suggest here that the Temporary Protection Directive is activated unanimously because Ukraine is acknowledged as a European country and the Ukrainians are white Christian Europeans. This is

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41 African Union, Statement of the African Union on the reported ill treatment of Africans trying to leave Ukraine, 28 February 2022, < <https://au.int/sites/default/files/pressreleases/41534-pr-english.pdf> > accessed 1 December 2022.

42 Lorenzo Tondo, 'Embraced or pushed back: on the Polish border, sadly, not all refugees are welcome' *The Guardian* (Europe, 4 March 2022) < <https://www.theguardian.com/global-development/commentisfree/2022/mar/04/embraced-or-pushed-back-on-the-polish-border-sadly-not-all-refugees-are-welcome> > accessed 1 December 2022.

43 Amnesty International, 'EU: Temporary protection is needed for everyone fleeing Ukraine' (*Amnesty International*, 3 March 2022) < <https://www.amnesty.org/en/latest/news/2022/03/eu-temporary-protection-is-needed-for-everyone-fleeing-ukraine/> > accessed 1 December 2022.

44 Global Detention Project, 'The Ukrainian Crisis: Double Standards: Has Europe's Response to Refugees Changed?' (2022) < <https://reliefweb.int/report/ukraine/ukraine-crisis-double-standards-has-europe-s-response-refugees-changed> > accessed 1 December 2022.

45 Steve Peers, 'Temporary Protection for Ukrainians in the EU? Q and A' (*EU Law Analysis*, 27 February 2022) < <http://eulawanalysis.blogspot.com/2022/02/temporary-protection-for-ukrainians-in.html> > accessed 1 December 2022.

also reflected, to an extent, in the Council Implementing Decision 2022/382<sup>46</sup> and the designation of the temporary protection beneficiaries by the Council.

The Temporary Protection Directive allows the Council to designate any group of third countries nationals who had to flee their country or region of origin including refugees, persons fleeing armed conflict and violence, and victims of systematic or generalised human rights violations, as eligible for temporary protection. On 4 March 2022, the Council decided the following groups to enjoy temporary protection in the EU: a) Ukrainian nationals residing in Ukraine who have been displaced on or after 24 February 2022 and their family members and b) stateless persons, and third-country nationals who benefitted from international protection or equivalent national protection in Ukraine before 24 February 2022 and who have been displaced from Ukraine on or after 24 February 2022, and their family members.<sup>47</sup> Besides these groups, the Council noted that temporary protection or adequate protection under national laws of Member States should be provided to stateless persons and third-country nationals who were holding valid permanent residence permits in Ukraine and who are unable to return in safe and durable conditions to their country or region of origin. According to the Commission, ‘adequate protection’ mentioned here should secure a dignified standard of living such as residency rights, access to means of subsistence and accommodation, emergency care and adequate care for minors.<sup>48</sup>

Member States are free to extend temporary protection to other than those identified in the Council Implementing Decision (EU) 2022/382 of 4 March 2022, given that they flee Ukraine and need protection. Several Member States have indeed enacted legislation<sup>49</sup> to provide temporary protection status to a broader category of displaced persons from Ukraine compared to those indicated in the Council Implementing Decision (EU) 2022/382 of 4 March

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46 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

47 Ibid; Peers, ‘Temporary Protection for Ukrainians in the EU? Q and A’.

48 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01 [2022] OJ CI 126/1.

49 FRA, ‘National legislation implementing the EU Temporary Protection Directive in selected EU Member States (August 2022 update)’ (FRA, 3 August 2022) <<https://fra.europa.eu/en/publication/2022/national-legislation-implementing-eu-temporary-protection-directive-selected-eu>> accessed 1 December 2022.

2022 however, these groups are usually nationals of Ukraine either who were already present in the host state on 24 February 2022 provided that their respective permits were about to expire (e.g. Finland, Austria, Germany, Netherlands, Estonia, Lithuania and Poland) or Ukrainian nationals who left Ukraine before 24 February 2022 (e.g. Romania, Germany, Spain and Sweden). Only a few Member States grant temporary protection to third country nationals and stateless persons who did not hold an international protection status or were holding permanent residence in Ukraine. For instance, Spain extended the scope of temporary protection to also persons of other nationalities or stateless persons who were legally residing in Ukraine before 24 February 2022 and Ukrainian citizens in Spain.<sup>50</sup> In Portugal, temporary protection is extended to persons fleeing Ukraine who had temporary stay or a long-stay visa in Ukraine and are unable to return to a country or region of origin.<sup>51</sup> Moreover, Germany extended temporary protection to non-Ukrainian third-country nationals who were legally residing in Ukraine on 24 February 2022 for more than a temporary short stay and whose return to the country of origin is unsafe.<sup>52</sup> Whilst, Finland extends temporary protection to third country nationals who were residing legally in Ukraine, even if that was on a short-term basis, if they cannot return to their countries of origin.<sup>53</sup> However, these states are the exception not the rule since most Member States follow the Council Implementing Decision 2022/382 and only a few Member States grant temporary protection to third country nationals and stateless persons who did not hold an international protection status. This leaves a considerable number of third country nationals and stateless persons fleeing Ukraine out of the Temporary Protection Directive's scope.<sup>54</sup>

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50 UNHCR, 'UNHCR welcomes Spain's swift and broad implementation of Temporary Protection Directive for refugees from Ukraine in Spain' (*UNHCR*, 17 March 2022) <<https://www.acnur.org/noticias/press/2022/3/62330b684/unhcr-welcomes-spains-swift-and-broad-implementation-of-temporary-protection.html>> accessed 1 December 2022.

51 European Network on Statelessness, 'Protection gaps for stateless refugees from Ukraine' (23 June 2022) <[https://www.statelessness.eu/sites/default/files/2022-06/ENS\\_BRIEFING\\_3-Protection-gaps-for-stateless\\_June-2022.pdf](https://www.statelessness.eu/sites/default/files/2022-06/ENS_BRIEFING_3-Protection-gaps-for-stateless_June-2022.pdf)> accessed 1 December 2022.

52 FRA, 'National legislation implementing the EU Temporary Protection Directive in selected EU Member States (August 2022 update)'.

53 ECRE, 'Information Sheet – Measures in response to the arrival of displaced people fleeing the war in Ukraine' (17 June 2022) <<https://ecre.org/wp-content/uploads/2022/06/ECRE-Update-30-May-2022-Implementation-of-the-TPD.pdf>> accessed 1 December 2022.

54 European Network on Statelessness, 'Protection gaps for stateless refugees from Ukraine'.

The Council's decision not to include all third country nationals and stateless persons who were staying in Ukraine (legally or otherwise) but cannot return to the country of origin in safe and durable conditions especially asylum seekers in Ukraine fleeing the war, as persons eligible for temporary protection is unfortunate. I argue that this reflects the double standards which were at play during the non-implementation of the Temporary Protection Directive for the past two decades.

### 3.2 Ukrainian displacement is a result of Russia's unjustified aggression

*“Europe stands by those in need of protection. All those fleeing Putin's bombs are welcome in Europe. We will provide protection to those seeking shelter and we will help those looking for a safe way home.”*

Ursula von der Leyen<sup>55</sup>

The mass displacement from Ukraine is a result of Russia's unjustified aggression.<sup>56</sup> Russia's invasion has harmed civilians, women, and children<sup>57</sup> and displaced more than a million Ukrainians in less than two weeks and violated Art. 2(4) of the UN Charter. Russia invaded Ukraine due to “Ukraine's move towards the European Union and the West's defensive military alliance, NATO”.<sup>58</sup> Thus, the EU has a direct interest in this conflict and sympathy for the Ukrainians and their fight against the aggressor.

In the Commission Proposal<sup>59</sup>, one of the reasons given to prove that temporary protection is the appropriate instrument to respond to the Ukrainian

55 European Commission, ‘Ukraine: Commission proposes temporary protection for people fleeing war in Ukraine and guidelines for border checks’ (2 March 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1469](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1469)> accessed 1 December 2022.

56 United Nations, ‘As Russian Federation's Invasion of Ukraine Creates New Global Era, Member States Must Take Sides, Choose between Peace, Aggression, General Assembly Hears’ (2022) GA/12406 <<https://press.un.org/en/2022/ga12406.doc.htm>> accessed 1 December 2022.

57 AOAV, ‘Ukraine: AOAV explosive violence data on harm to civilians’ (2022) <<https://reliefweb.int/report/ukraine/ukraine-casualty-monitor-aoav-data-harm-civilians-explosive-weapons>> accessed 1 December 2022.

58 Paul Kirby, ‘Why has Russia invaded Ukraine and what does Putin want?’ *BBC NEWS* (Europe, 9 May 2022) <<https://www.bbc.com/news/world-europe-56720589>> accessed 1 December 2022.

59 Commission, ‘Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection’ COM/2022/91 final.

displacement was the extraordinary and exceptional nature of the military invasion of Ukraine by Russia. Similar statements can be found in the Council Implementing Decision 2022/382<sup>60</sup> (Preamble para 3 and 4) which notes:

“Following the invasion, which seeks to undermine European and global security and stability, the European Council, condemned Russia’s unprovoked and unjustified military aggression against Ukraine in the strongest possible terms, underlining the gross violation of international law and the principles of the United Nations Charter. The Union has shown, and will continue to show, its resolute support for Ukraine and its citizens, faced with an unprecedented act of aggression by the Russian Federation. This Decision forms part of the Union’s response to the migratory pressure resulting from the Russian military invasion of Ukraine.”

These references imply that activating the Temporary Protection Directive was a response to the Russian invasion of Ukraine. If the aggressor was a state other than Russia, it is doubtful whether the EU would have activated the Temporary Protection Directive.

### 3.3 The speed and scale of arrivals justified activation of the Temporary Protection Directive

Article 2 (d) of the Temporary Protection Directive defines mass influx means “*arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme*”. There is no clear indication in Article 2 or in the Temporary Protection Directive of what constitutes a mass influx. A number of indicators have been put forward. For instance, Skordas argued that the change in the absolute number of arrivals over a certain time period, the number of Member States affected by the arrivals as well as the ratio between the number of arrivals, the population, and resources of the Member States were among these indicators.<sup>61</sup> Similarly, the Study on the Temporary Protection Directive proposed the following

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60 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

61 Skordas, ‘Temporary Protection Directive 2001/55/EC’ 1177-1228.



indicators to be taken into account:<sup>62</sup> an absolute number of asylum applicants arriving per day/week/month; increase in arrival as opposed to previous periods; the number of applications to be processed vs the number of case workers in function; the occupancy rate of reception facilities in the Member States as well as population, GDP, and the unemployment rate of the Member States receiving the arrivals.

In the context of displacement from Northern Africa in 2011, UNHCR declared the number of refugees and migrants who had arrived in Lampedusa by sea between 29 January and 21 September 2011 as 55,298<sup>63</sup> (27,315 from Tunisia and 27,983 from Libya). Although at the time, Italy's asylum and reception capacity was clearly overwhelmed, perhaps the number of arrivals in 2011 did not warrant activation of the Temporary Protection Directive. In 2015, the number of asylum seekers and migrants crossing the Mediterranean increased steadily from around 5,500 in January to reach a monthly peak in October of over 221,000. One million persons have fled to the EU<sup>64</sup> irregularly by sea that year whereas, according to EASO<sup>65</sup>, in 2015, EU+ countries registered 369 871 applications lodged by Syrians, 190,013 applications lodged by Afghans, 125 529 applications lodged by Iraqi citizens. I have previously argued that these figures have easily justified activation of the Temporary Protection Directive in 2015 for the protection of Syrians fleeing civil war. However, there is no denying that compared to the arrival of Syrians to the EU in 2015, displacement from Ukraine was and still is much more rapid and the number of displaced persons is much higher.

Russia's invasion of Ukraine began on 24 February and 2 March 2022, more than 650 000 displaced persons arrived in the Union through Poland, Slovakia, Hungary, and Romania.<sup>66</sup> According to UNHCR more than 1,2

62 Beirens H and others, 'Study on the Temporary Protection Directive'.

63 Parliamentary Assembly Committee on Migration, Refugees and Population, 'Report on the visit to Lampedusa (Italy) 1' (2011) AS/MIG/AHLARG (2011) 03 REV 2 <[http://assembly.coe.int/committeedocs/2011/amahlarg03\\_rev2\\_2011.pdf](http://assembly.coe.int/committeedocs/2011/amahlarg03_rev2_2011.pdf)> accessed 1 December 2022.

64 UNHCR, 'Refugee Situations' <<https://data.unhcr.org/en/situations/mediterranean>> accessed 1 December 2022.

65 European Asylum Support Office (EASO), 'Latest asylum trends – 2015 overview' (2015) <<https://euaa.europa.eu/sites/default/files/public/LatestAsylumTrends20151.pdf>> accessed 1 December 2022.

66 Commission, 'Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection' COM/2022/91 final.



million people have left Ukraine to seek refuge in other countries between 24 February 2022 and over a 10-day period. The speed and scale of arrivals have been indeed significant. Although the Council Implementing Decision 2022/382<sup>67</sup> does not exactly provide clearly decisive elements for identifying the mass influx situation, when one reads along the lines, especially para 1-10 of this Decision, the following elements can be identified as decisive in determining the existence of the mass influx situation:

- arrival of more than 650 000 displaced persons in the Union from Ukraine through Poland, Slovakia, Hungary, and Romania by 1 March 2022
- the likelihood of high migratory pressure on EU's Eastern borders (The Decision notes that *"the Union is likely to be faced with a very large number of displaced persons, potentially between 2,5 million and 6,5 million as a consequence of the armed conflict, of whom it is anticipated that between 1,2 and 3,2 million would be persons seeking international protection"*)
- estimation that half of the Ukrainians coming to the Union benefitting from visa-free travel for short-stays would join family members or seek employment in the Union, whilst the other half could request international protection
- a clear risk that the Member States' asylum systems will be unable to process the arrivals without adverse effects on their efficient operation and on the interests of the persons concerned and on those of other persons requesting protection.

By reviewing the Council Implementing Decision 2022/382<sup>68</sup> and other relevant documents, I hereby conclude that the Commission and the Council when determining the existence of a mass influx situation took into account: a) the scale of arrivals, b) the rate of arrivals, c) potential and the actual migratory pressures on Member States, d) Ukrainians not needing a visa to arrive in the EU, d) potential and actual inability of asylum and reception systems of Member States such as Poland to cope with the mass arrivals.

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67 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

68 *ibid.*

### 3.4 Ukrainians can enter the EU territories to seek refuge

It is quite difficult for persons fleeing conflict and violence to enter the EU territories legally: the Member States often close down their diplomatic representations in war-torn countries and “*for nationals of these countries, obtaining a visa to enter the EU is nearly impossible*”.<sup>69</sup> Moreover, the EU law and/or the ECHR does not oblige Member States to grant a visa to third country nationals and stateless persons fleeing conflict or violence in view of applying for asylum upon their arrival in the Member State.<sup>70</sup>

Although third country nationals can apply for protection at the external borders, it is well known that the EU’s attempts to externalise its asylum policy to third states such as Turkey<sup>71</sup> and the well-documented pushback practices<sup>72</sup> make it difficult to seek asylum in the EU.<sup>73</sup> Thus, for a Syrian, Afghan or Iraqi asylum seeker entering the Union territories legally or even approaching the EU border is very difficult and this lessens the number of displaced persons arriving in the EU and makes the activation of the Temporary Protection Directive more difficult.

As opposed to this, both the Commission Proposal<sup>74</sup> and the Council Im-

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69 FRA, ‘Legal entry channels to the EU for persons in need of international protection: a toolbox’ (2015) <[https://fra.europa.eu/sites/default/files/fra-focus\\_02-2015\\_legal-entry-to-the-eu.pdf](https://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf)> accessed 1 December 2022.

70 C-638/16 PPU *X and X v État belge* [2017] ECLI:EU:C:2017:173.; M.N. and others v. Belgium, App no 3599/18 (ECHR, 5 May 2020).

71 Kyilah Terry, ‘The EU-Turkey Deal, Five Years On: A Frayed and Controversial but Enduring Blueprint’ (*MPI*, 8 April 2022) <<https://www.migrationpolicy.org/article/eu-turkey-deal-five-years-on>> accessed 1 December 2022.

72 Parliamentary Assembly, ‘Pushback policies and practice in Council of Europe member States’ Resolution 2299 (2019) <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?file-id=28074>> accessed 1 December 2022.

73 Roberto Cortinovis, ‘Pushbacks and lack of accountability at the Greek-Turkish borders’ (2021) CEPS Paper in Liberty and Security in Europe 2021-01 <[https://www.ceps.eu/wp-content/uploads/2021/02/LSE2021-01\\_Pushbacks-and-lack-of-accountability-at-the-Greek-Turkish-border.pdf](https://www.ceps.eu/wp-content/uploads/2021/02/LSE2021-01_Pushbacks-and-lack-of-accountability-at-the-Greek-Turkish-border.pdf)> accessed 1 December 2022.

74 Commission, ‘Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection’ COM/2022/91 final.

plementing Decision<sup>75</sup> make many references to the fact that “Ukraine is a visa-free country for entry into the EU.” Ukrainian nationals are free to cross the Union’s external borders for stays of no more than 90 days in any 180-day period. The EU opened their borders to those fleeing the conflict in Ukraine<sup>76</sup>, not implemented pushback or non-entrée policies, and/or concluded a deal with a third country to stop new arrivals and this meant more Ukrainians could seek protection in the EU (as it should be) and this facilitated the activation of the Temporary Protection Directive.

### 3.5 No third country to stop arrival of displaced persons from Ukraine

When more than one million refugees and migrants arrived irregularly in Europe by sea in 2015<sup>77</sup>, the EU’s response was not to open borders or to activate the Temporary Protection Directive but to conclude a non-binding declaration with Turkey to stop arrivals.<sup>78</sup> On 18 March 2016, the EU and Turkey adopted the EU-Turkey Statement<sup>79</sup> that had the purpose to end irregular migration from Turkey to the EU. In particular, the EU and Turkey agreed that all ‘*new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey.*’ According to the Statement, Turkey will take any necessary measures to prevent the opening of any new sea or land routes for illegal migration from Turkey to the EU<sup>80</sup>, and would

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75 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

76 Lara Jakes, ‘For Ukraine’s Refugees, Europe Opens Doors That Were Shut to Others’ *The New York Times* (26 February 2022) <<https://www.nytimes.com/2022/02/26/us/politics/ukraine-europe-refugees.html>> accessed 1 December 2022.

77 Jonathan Clayton, Hereward Holland and Tim Gaynor(ed), ‘Over one million sea arrivals reach Europe in 2015’ (*UNHCR*, 30 December 2015) <<https://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>> accessed 1 December 2022.

78 Meltem Ineli-Ciger and Orçun Ulusoy, ‘Why the EU-Turkey Statement should never serve as a blueprint’ (*ASILE*, 7 October 2020) <<https://www.asileproject.eu/why-the-eu-turkey-statement-should-never-serve-as-a-blueprint/>> accessed 1 December 2022.

79 European Council, ‘EU-Turkey statement, 18 March 2016’ (18 March 2016) <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>> accessed 1 December 2022.

80 Gamze Ovacik and others, ‘Country Report Turkey’ (2022) WP5. Country Reports <[https://www.asileproject.eu/wp-content/uploads/2022/08/D5.2\\_WP5-Turkey-Country-Report-Final.pdf](https://www.asileproject.eu/wp-content/uploads/2022/08/D5.2_WP5-Turkey-Country-Report-Final.pdf)> accessed 1 December 2022.

cooperate with neighbouring states as well as the EU to this effect. In return for Turkey's efforts to stop irregular migration, the EU agreed to allocate € 6 billion under the EU Facility for Refugees in Turkey.

When faced with the large-scale arrival of third country nationals, most of them coming from refugee-producing countries such as Syria in 2015<sup>81</sup>, the EU's response was not to open borders but to close them. The EU managed the so-called 2015 migrant crisis by adopting a migration deal with a third country namely, Turkey which hosts more than 4 million refugees and asylum seekers.<sup>82</sup> In the case of Ukraine, the country has a direct land border with Romania, Poland, Slovakia, and Hungary and there is no third country where the EU can make a migration deal to stop the arrival of asylum seekers and/or return them.

## 4. Conclusions

Activation of the Temporary Protection Directive to respond to the large-scale influx from Ukraine was the right move, and it has provided and will continue to offer many benefits to those seeking refuge as well as the Member States. This is also confirmed by the EUAA<sup>83</sup> which not surprisingly concluded that *“temporary protection averted extreme pressure on asylum case processing.”* One only hopes that Russia's invasion of Ukraine ends soon, it becomes safe for Ukrainians to return to their homes and the time comes to terminate temporary protection. Yet, one only hopes that refugees coming from countries such as Syria, Afghanistan and Iraq would also be protected in a similar manner without pushbacks, barbed wires and with open borders and access to immediate protection and dignified treatment in the Union.

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81 Meltem Ineli-Ciger, 'Time to Activate the Temporary Protection Directive' (2016) 18.1 European Journal of Migration and Law pp 1-33.

82 UNHCR, 'Refugees and Asylum Seekers in Turkey' < <https://www.unhcr.org/tr/en/refugees-and-asylum-seekers-in-turkey>> accessed 1 December 2022.

83 European Union Agency for Asylum (EUAA), 'Temporary protection has averted extreme pressure on EU asylum system EUAA (28 July 2022) < <https://euaa.europa.eu/news-events/temporary-protection-has-averted-extreme-pressure-eu-asylum-system>> accessed 1 December 2022.

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# Chapter 3

## The Eternal Question: What Does “Mass Influx” Really Mean? Reflections After the First Activation of the Temporary Protection Directive 2001/55

Prof Nuria Arenas-Hidalgo\*

### 1. Introduction

The unprecedented activation of Directive 2001/55 (TPD) has reopened the debate on the real meaning of mass influx, especially as its aim is to provide protection when human mobility on a large scale occurs. The interest in defining this phenomenon as precisely as possible, in terms of when exile is deemed to be occurring on a huge scale, is nothing new; it is a concern that is consubstantial to the adoption of the legal norm. The aim of this scholarly interest in the subject has changed over time. In the historical context of the adoption of the Directive, research on mass influx coalesced around concern that the temporary protection scheme could be used to the detriment of international obliga-

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\* Professor of International Law and International Relations, University of Huelva, Spain.

tions of asylum. A definition of “mass” that was too flexible could lead to the application of an instrument that implied temporary suspension of the right to asylum. The application of temporary protection was welcome, provided it was used only in exceptional cases. Some of us were concerned about the arbitrary use of the procedure, and we sought legal instruments that would enable this discretionary aspect to be controlled.<sup>1</sup>

We were still far from the reality that would later erupt in which the application of temporary protection was non-existent, even in cases of clear necessity. Despite successive surges in migratory flows since 2014 in Europe<sup>2</sup>, thus far the procedure that allows the Common European Asylum System (CEAS) to move towards completion (Opinion Advocate General Mengozzi<sup>3</sup>, case *Diakité*, para. 60) and covering any situation in which a third-country national or a stateless person who cannot obtain protection in his or her country of origin requests international protection in the territory of the European Union, has failed to materialize. With the lack of political will to apply this instrument in the past, it was not expected to be used even when one million citizens crossed the Ukrainian border. All hope had been lost that Institutions and Member States (MS) would at least respond logically and inspired by the desire to offer secure protection.

The fact that the numbers of migrants required for the surge to be classified as a mass influx had not been reached was a reason that had been aired in the past. For example, at the start of 2015, EU Commissioner Avramopoulos stated<sup>4</sup> that in view of the scale of the influx and the manner in which these persons’ asylum applications have been handled, a proposal to trigger the EU-wide temporary protection regime provided by the TPD would not be justified (this despite the fact that more than 170,000 migrants had arrived in Italy alone, representing an increase of 277% compared to 2013: recital 10, Council Decision [EU] 2015/1523). However, shortly afterwards we were faced with the biggest migration crisis ever to hit the EU (in 2015, the number of irregular entries by nationals of third countries at the external borders of the

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1 Nuria Arenas, ‘The Concept of Mass Influx of Displaced Persons in the European Directive Establishing Temporary protection’ (2005) 7 EJML, pp. 435-450.

2 Joined Cases C-643/15 and C-647/15 *Slovakia v Council* [2017] ECLI:EU:C:2017:63.

3 Case 285/12 *Aboubacar Diakité v. Commissaire general aux réfugiés et aux apatrides* [2014] ECLI:EU:C:2014:39.

4 Answer given by Mr Avramopoulos on behalf of the Commission (28 January 2015) <[https://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/libe/dv/10\\_e\\_008507\\_2014\\_answer/10\\_e\\_008507\\_2014\\_answer\\_en.pdf](https://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/10_e_008507_2014_answer/10_e_008507_2014_answer_en.pdf)> accessed 1 December 2022.

EU reached more than 1.8 million, whereas that number had been 285,532 in 2014, representing an increase of 546% in 2015), and the European Court of Justice (ECJ) did not demur in classifying it as “a mass influx of migrants” (judgment of 6 September 2017, *Slovakia and Hungary v Council*,<sup>5</sup> expressly described as “mass influx” in paras. 115, 117, 123, 218, 235). When the Slovak Republic, supported by Poland, cynically questioned the need to adopt the Relocation Council Decision (EU) 2015/1601 of 22 September 2015, instead of less burdensome measures within the framework of existing instruments, including Directive 2001/55, the ECJ focused on the difficulties inherent in the mechanism of solidarity in the system of temporary protection, which the ECJ deemed to be incapable of providing an effective response, in this case to the complete saturation of reception facilities and the need to relieve MS as quickly as possible (para. 256).

## 2. What can we deduce from the Directive? In support of an indeterminate legal concept

There are other weightier reasons why this instrument has not previously been activated, although the lack of definition of the mass influx concept has always been considered one of the main handicaps for its implementation.<sup>6</sup> Even though the Directive dedicates a specific article to the definition of mass influx, the truth is that it is an indeterminate legal concept whose application to a specific case adds to the margin of appreciation enjoyed by the Council. In effect, article 2 d), indicates that it will only refer to “a *large number* of displaced persons who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation program”. Three aspects stand out. What is striking is the mass influx does not need to have already occurred, but that it is seen to be a possibility in the near future (art. 2 a: mass influx or *imminent* mass influx). On the other hand, mass displacements that are *spontaneous or controlled* are also considered, as in evacuation programs. And the influx must be from the *same country or geographical area*. Cases of “cumulative influx” from different geo-

5 Joined Cases C-643/15 and C-647/15 *Slovakia v Council* [2017] ECLI:EU:C:2017:63.

6 Meltem Ineli-Ciger, ‘*Temporary Protection in Law and Practice*’ (Brill 2018); Hanne Beirens and others, ‘Study on the Temporary Protection Directive’ (2016), p. 35 <[https://home-affairs.ec.europa.eu/system/files/2020-09/final\\_report\\_evaluation\\_tpd\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/final_report_evaluation_tpd_en.pdf)> accessed 1 December 2022.

graphical regions should not fall under the TPD. The Directive does not restrict geographic origin to the European setting, although the reluctance to initiate the instrument in previous crises, and that the fact the first case of activation of the norm was Ukraine, could lead to this conclusion. During the drafting of the Directive, the Economic and Social Committee<sup>7</sup> already warned that the norm should not be a “Balkan Directive”, but a *geographically neutral* instrument, to be deployed as and when it is needed. The TPD was not conceived as an urgent protection response for direct neighbours. The “proximity argument” has no legal basis in the regulations. As other chapters to this collection have indicated, the EU’s double standards in applying the TPD could be considered an institutionalized form of discrimination and racism towards non-European asylum seekers and refugees.<sup>8</sup> The so-called proximity trap would conceal differential treatment based on geography that would, in reality, amount to global apartheid<sup>9</sup>, contrary to European and international obligations.

But apart from these questions, the Directive does not define large numbers. The problem is that it is not impossible to define. The lack of definition of the concept is no anomaly but a conscious decision on the part of the Directive. There is an express renunciation to establish in precise quantitative terms, or any reference threshold, of how large or sudden a mass exile must be in order to be characterized as a “mass influx”. There is neither a minimum number, nor speed of arrival for a mass influx. Some authors have defended the definition that refers to certain numbers of persons.<sup>10</sup> Yet the flexibility of the concept

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7 Economic and Social Committee, ‘Opinion of the Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council modifying Directive 94/25/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft’ [2001] OJ C 155/01, p. 24.

8 Sergio Carrera and Others, ‘the EU Grants Temporary Protection for people Fleeing War in Ukraine: Time to rethink unequal solidarity in EU asylum policy’ (CEPS 2022-09), p. 32 <<https://www.ceps.eu/ceps-publications/eu-grants-temporary-protection-for-people-fleeing-war-in-ukraine/>> accessed 1 December 2022.

9 Rodrigo Bueno Lacy and Henk Van Houtum, ‘The proximity trap: how geography is misused in the differential treatment of Ukrainian refugees to hide for the underlying global apartheid in the EUropean border regime’ in this collection.

10 Meltem Ineli-Ciger, ‘Has the Temporary Protection Directive Become Obsolete?: An Examination of the Directive and its Lack of Implementation in view of the Recent Asylum Crisis in the Mediterranean’ in Céline Bauloz, Meltem Ineli-Ciger, Sarah Singer, and Vladislava Stoyanova (eds), *Seeking Asylum in the European Union* (Brill 2015), p. 245.



could actually be its strength<sup>11</sup>, enabling it to adapt to different circumstances (sudden influx, gradual rise, in the wake of an evacuation program or a combination of both), although this will depend on the political will to stretch this instrument as far as possible. At least there should be parameters to enable an evaluation of what “massive” means (such as absolute numbers of asylum applications, relative increases in asylum applications, the ratio of total asylum applications to MS population size, unemployment rate or GDP, etc).<sup>12</sup>

All this points to the circumstances in which this call to activate temporary protection occurs, as being in wholly exceptional situations (as the ECJ observed in its judgment of 21 December 2011, *N. S. and others*, para. 93).<sup>13</sup> On the one hand, we observe that it aims to tackle a situation that is so serious that it requires EU attention. The Directive does not override national regimens of temporary protection but rather creates one that is different and complementary, specifically designed for situations that make action on a supranational level essential. On the other hand, and in reference to art. 5.4.b), the Council must base its decision to activate TPD on the potential for emergency aid and action on the ground, or the inadequacy of such measures. Consequently, it is an instrument subsidiary to preventive initiatives.

Aside from these variables, what needs to be considered is that the Directive also refers to the *consequences* of mass influx. Article 2 a) establishes that immediate and temporary protection is guaranteed to such persons, *in particular* if there is also a risk that the asylum system will be unable to process this influx without *adverse effects* for its efficient operation, in the interests of the persons concerned and other persons requesting protection. During the drafting of the Directive, various institutions requested that the European Commission consider that temporary reception be used exclusively in cases in which the capacity of the asylum system to cope with the sheer size of the influx

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11 Hanne Beirens and others, ‘Study on the Temporary Protection Directive’ (2016) p. 15 < [https://home-affairs.ec.europa.eu/system/files/2020-09/final\\_report\\_evaluation\\_tpd\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/final_report_evaluation_tpd_en.pdf) > accessed 1 December 2022.

12 Beirens and others, ‘Study on the Temporary Protection Directive’, pp. 38-50.

13 Case 411/10 *N. S. and Others* [2011] I-13905.



would be overwhelmed (UNHCR<sup>14</sup>, ECRE<sup>15</sup> ). This request was coherent with the bases of this instrument. Temporary protection enables the system to operate smoothly and not collapse under a mass influx.<sup>16</sup> Finally, considering that certain governments (France, Germany, Austria, Italy, and the United Kingdom)<sup>17</sup> were against the establishment of an absolute dependence between the activation of temporary protection and the adverse effects on national asylum procedures, a consensus formula was reached that included the words “in particular”, thus enabling initiation, especially in these cases, but which is not a requirement *sine qua non*, rather one more indicator of the magnitude of the displacement. In my opinion, this link will inexorably reduce the potential of the instrument to be at the service of those asylum crises that occur in places that are geographically remote from Europe, by means of evacuation programs (a good thing but quite unrealistic based on recent years’ experience, imagining that the EU could adopt such a possibility), and would not, in principle, affect national protection systems.

In addition, it is unclear what adverse effects really means in terms of the asylum system, nor how many states’ national asylum systems must be overburdened for a mass influx situation to exist. Nothing in the Directive suggest that MS asylum capacity should be unable to absorb the flow.<sup>18</sup> In view of the responsibility-sharing aspects, it would seem logical that it is sufficient that *one* MS is particularly affected.<sup>19</sup>

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14 UNHCR, UNHCR Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx (2000) < <https://www.refworld.org/docid/437c5ca74.html#:~:text=Accordinging%20to%20the%20draft%20Directive,return%20in%20safe%20and%20humane> > accessed 1 December 2022.

15 European Council on Refugees and Exiles, ‘Observations of the European Council on Refugees and Exiles on the European Commission’s draft directive on temporary protection and responsibility sharing.’ (2001) < <http://briguglio.asgi.it/immigrazione-e-asilo/2001/febbraio/ecre-protez.-temporanea.html> > accessed 1 December 2022.

16 Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2000] OJ C 311E.

17 Beirens and others, ‘Study on the Temporary Protection Directive’.

18 Meltem Ineli-Ciger, ‘Time to activate the Temporary Protection Directive: Why the Directive can play a key role in solving the migration crisis in Europe’ (2016) 18(1) EJML 1, p. 15 < [https://brill.com/view/journals/emil/18/1/article-p1\\_1.xml?language=en](https://brill.com/view/journals/emil/18/1/article-p1_1.xml?language=en) > accessed 1 December 2022.

19 Danielle Gluns and Janna Wessels, ‘Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current “Refugee Crisis” (2017) 36 RSQ, p. 63.

If we definitively pursue the case for maintaining a flexible definition of mass influx, there is no doubt that certain indicators are needed to help evaluate the different concepts, as well as consultation of a range of contrasted sources. It is important to recall that the Directive establishes a duty to consult the UNHCR and other relevant international organizations (art. 3.3) and that the Council Decision shall be based on the information received from the MS, the Commission, UNHCR and other relevant international organizations (art. 5.4). The duty to consult the UNHCR, though its opinion is not binding, is especially important in terms of controlling the discretion that institutions can exercise in this context.

### 3. What conclusions can be drawn from the initial experience of TPD application?

The Council Implementing Decision (EU) 2022/382<sup>20</sup> establishes, for the first time, the existence of a mass influx into the Union of displaced persons (art. 1) in order to provide temporary protection for them (recital 10). As we have observed, although the Directive does not provide specific elements for measuring migrant flows, it does contain some defining ideas (large numbers, exceptional situation, subsidiary character, adverse effects) which, following the initial experience of the activation of the instrument, can be assessed to see whether they have been truly determinant or whether they provide others.

The numbers are incontestable. The displacement of migrants from Ukraine has been the biggest and fastest since the register began. In just 10 days following the 24 February 2022 invasion, 1.8 million people had fled the war in Ukraine.<sup>21</sup> Firstly, the Council Implementing Decision was armed with facts on the ground. Since the Russian invasion began, more than 650,000 displaced persons had arrived in the Union from Ukraine through Poland, Slovakia, Hungary and Romania (recital 5). Some 100,000 arrivals were counted daily just at Polish border crossings.<sup>22</sup>

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20 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

21 Commission, 'Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions European solidarity with refugees and those fleeing war in Ukraine' COM/2022/107 final, p. 2.

22 *ibid.*

This was the starting point for estimates to be made. Depending on how the conflict evolves, the Council states that the Union is likely to be faced with a very large number of displaced persons, potentially between 2.5 million and 6.5 million, of whom it is anticipated that between 1.2 and 3.2 million would be persons seeking international protection. With these data in hand, the Council concluded that the Union is likely to be faced with a situation characterized by a mass influx of displaced persons (recital 7). Reality confirmed the predications. By 17 August, 6,657,918 refugees from Ukraine had been recorded across Europe; 3,840,568 had been registered for TP or a similar national protection scheme in Europe.<sup>23</sup>

The Decision reflects UNCHR estimates (4 million, recital 6), and the numbers provided by the UN’s Regional Refugee Response Plan for Ukraine (recital 8), complying with the mandate set out in art. 5.4, by which the Council Decision shall be based on information received from UNHCR and other relevant organizations.

Possessing effective means for making an up-to-date evaluation of migratory crisis situations that enables the EU to provide an adequate response, and in accordance with the principles of good governance, has handicapped the CEAS, as the crisis in 2015 clearly highlighted. Twenty years after the adoption of the first CEAS Directive, the system now has risk analysis mechanisms in place that have been rolled out in the case of displacement from Ukraine. The framework of the New Pact on Migration and Asylum includes a Commission Recommendation (EU) 2020/1366 on a Migration Preparedness and Crisis Blueprint that establishes how one of its priorities is to contribute to more efficient migration management by monitoring and anticipating migration flows, building resilience and preparedness as well as organizing a response to a migration crisis (recommendation 1). It has set up an EU Migration Preparedness and Crisis Management Mechanism Network, which has been the body responsible for providing data on the potential magnitude of displacements from Ukraine. Likewise, the predictions issued by the UN agencies on internal displacements and the information gathered on movements that have occurred since 2014, as well as the size and composition (Russian / non-Russian) of the population affected, are all examples of evidence-based policy making.

Both the Commission and Council have emphasized the reasons that underlie mass displacements. For the Commission, the probability that the Union faces a mass influx is not only based on figures but also on the gravity of

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23 UNHCR, ‘Ukraine Refugee Situation’ <<https://data.unhcr.org/en/situations/ukraine>> accessed 4 October 2022.

the war and its proximity to EU external borders (p. 2). The Council has insisted that the decision to activate temporary protection is based on the extraordinary and exceptional situation produced by the scale of mass influx *and* the military invasion of Ukraine by the Russian Federation (recital 16). Some authors state that if the aggressor was a State other than Russia, it is doubtful whether the EU would have activated the TPD.<sup>24</sup>

In terms of the adverse effects requirement, the Council, to justify implementation of the instrument, alludes to the fact that the influx will probably be of such a magnitude that there “also” exists a clear risk that the MS asylum systems will be unable to process the arrivals without adverse effects on their efficient operation and on the interests of the persons concerned, and on those of other persons requesting protection (recital 7 practically reproduces art. 2 a) of the TPD). More specifically, it establishes that introducing temporary protection is also expected to benefit MS, as the rights accompanying temporary protection limit the need for displaced persons to immediately seek international protection and thus the risk of overwhelming their asylum systems, as they reduce formalities to a minimum because of the urgency of the situation (recital 16). In these circumstances, it seems that risk has nothing to do with reception capacity when it is stated that it has not been compromised. To 8 March 2022, reception capacity was adequate, given that many arriving move on swiftly to join family or friends. Poland, Romania, Hungary and Slovakia continue to report available capacity.<sup>25</sup> The idea is that thanks to the activation of TPD the asylum system remains unaffected. A reading of the Decision shows that the adverse effects variable has acquired a certain singularity. It has become an indicator that must be checked when contrasting migration data in order to justify activating the instrument.

To sum up, one may conclude that the Council, when determining the existence of a mass influx situation, took into account: a) the number and rate of arrivals, b) the potential migratory pressures, c) Ukrainians not needing a visa to arrive in the MS, d) the potential inability of MS asylum systems to cope

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24 See Meltem Ineli-Ciger, ‘5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022’ (*EU Immigration and Asylum Law and Policy*, 7 March 2022) <<https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>> accessed 1 December 2022.

25 European Commission, ‘Communication from the Commission to the European Parliament, The European Council, The Council, The European Economic and Social Committee and the Committee of the Regions European solidarity with refugees and those fleeing war in Ukraine’ COM(2022) 107 final.

with the mass arrivals.<sup>26</sup> And all this, with special emphasis on specifying the sources consulted, which is especially important in motivating the decision.

## 4. The New Pact on Migration and Asylum proposal. Adverse effects cease to be an option and are broadened

In the *fresh start* framework of the New Pact on Migration and Asylum<sup>27</sup> presented in 2020, it was proposed to adopt a Regulation addressing situations of crisis and force majeure in the field of migration and asylum<sup>28</sup>, which assumed the repeal of Directive 2001/55. In its place, this crisis instrument is expected to confront exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State. We do not believe that the current experience following TPD implementation signifies any change in the need to substitute the Directive or, at least, modify it. So, it is interesting to check how this proposal treats the concept of mass influx.

From art. 1.2.a), which defines what is understood as a “crisis situation”, we deduce that there are three elements that the Commission has to consider in its evaluation, and which could reduce the broad margin of discretion that it holds: a) the exceptional situation of mass influx or an imminent risk of such a situation must be of a specific “scale and nature” that will be identified in proportion to the population and GDP of the MS concerned; b) the mass influx must affect the MS’s asylum, reception or return system in such a way that it ceases to function; c) it can have serious consequences for the functioning the CEAS or the Common Framework, due to unauthorized movements and the lack of capacity in the MS of first entry to process the applications for international protection of such third-country nationals (recital 6). Some ideas on these three variables.

As in the TPD, a merely quantitative measurement would be avoided in order to continue vouching for a subjective evaluation in accordance with the

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26 Ineli-Ciger, ‘5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022’.

27 European Commission, ‘A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity’ (2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1706](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706)> accessed 1 December 2022.

28 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum’ COM/2020/613 final.

particularities of the MS affected, but now with the specific understanding that this evaluation must respect two variables that relate directly to the States' wealth and health: the population and GDP of the MS (the LIBE Committee<sup>29</sup> has proposed including the rate of unemployment in the MS concerned). Ineli-Ciger states that this means clearer and more precise indicators compared to the vague definition of mass influx in the TPD, which will make it easier to determine the existence of a crisis.<sup>30</sup>

Regarding the “adverse effects” requirement, this is no longer a preferred indicator –as in the TPD– but compulsory and broader in two senses. One the one hand, it has now become clear that a mass influx of persons may lead to a situation of crisis in a particular MS (recital 6), although, according to the European Commission, such situations are covered by the proposal *only* if it is demonstrated that they would have serious consequences for the functioning of the CEAS or the Common Framework (p. 13). Thus, the scope of adverse effects is broadened in a way that a mass influx must have consequences for the functioning of the asylum and migration system not only in that MS but in the Union as a whole. On the other hand, adverse effects can influence not only a *MS's asylum and reception system*, but also its *return system*. Some authors have questioned why a dysfunction in the return system must be accepted as a relevant factor.<sup>31</sup> It is worrying that, when assessing the strength of a system of international protection, they give similar importance to the potential faults in the asylum and reception system to capacity for returning people. Incorporating this variable undermines the true meaning of adverse effects and the objective to activate a crisis response mechanism in asylum that ought to help MS ensure compliance with the principle of non-refoulement (see the mandate in art. 78.1 TFEU) and protect the rights of applicants and beneficiaries of international protection. In addition, the solidarity principle (art. 80 TFEU) requires a reading of the expression “mass influx” that is informed, in particular, by the capacity of states to host refugees more than other variables.<sup>32</sup> The

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29 Crisis and force majeure Regulation 2020/0277(COD).

30 Meltem Ineli-Ciger, ‘What a difference two decades make? The shift from ‘temporary to immediate protection in the new European Pact on Asylum and Migration’ (*EU Immigration and Asylum Law and Policy*, 11 November 2020) <<https://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/>> accessed 1 December 2022.

31 *ibid.*

32 Esin Küçük, ‘The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?’ (2016) 22 EULJ 465.

adverse effects requirement should focus on the aspects that affect the interests of the persons concerned and other persons requesting protection (art. 2 a TPD). From this perspective, dysfunction in the return system should not be considered a variable. The Directive does not provide the key parameters for identifying these situations, as occurs in cases of migratory pressure.<sup>33</sup> The two conditions, “rendering a system non-functional” and “serious consequences”, are too vague and allow (again) ample discretion to remain in the hands of the Commission and EU Agencies<sup>34</sup>, in a context that would permit the lowering or derogation of protection standards.

However, it is important that it includes the sources on which the decision is to be based (art. 3.8). The Commission shall determine whether there is a situation of crisis based on *substantiated information*, in particular the information gathered by the Commission pursuant to the EU mechanism for Preparedness and Management of Crises related to Migration, by EASO, FRONTEX, and the Migration Management report referred to in the RAMM Proposal. The decision taken by the Commission will have to cite the sources consulted, though it would have been preferable to also include the obligation to consult data provided by UN agencies and in particular the UNHCR, as expressly mentioned in the TPD (art. 5.4.c, art. 3.3).

## 5. Conclusion

The concept of the mass influx of displaced persons is an indeterminate legal concept that is within the margin of appreciation exercised by Institutions. In these times, there is no consensus on establishing an objective concept that could potentially cause automatic activation of the Directive. Neither do I believe this to be desirable, for automatic activation could well limit the different situations to which the instrument could be applied. However, I believe it is important to incorporate indicators and contrasting sources of information that must be consulted in any decision. A list of indicators will not diminish the politicization of the decision to grant or withhold protection in the case of mass influxes, but I believe that incorporating some variables would force the Institutions to adopt a “motivated” decision, and this would assist future

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33 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]’ COM/2020/610 final art. 50.3.

34 Sergio Carrera, ‘Whose Pact?’ (CEPS, 25 September 2020) < <https://www.ceps.eu/ceps-publications/whose-pact/> > accessed 1 December 2022.



judicial control. I realize that this might disappoint some readers, but I do not have my own list of indicators. I have always trusted (albeit illusory) in the benefits of maintaining a flexible concept of mass influx that could be applied to providing protection (temporary, immediate or, better still, automatic group protection that avoids the devaluation of persons' rights) in diverse crisis situations. The absence of political will to exploit to the maximum the advantages of temporary protection in the past has inclined me to favor the adoption of risk assessments –agreed upon by the Council and the European Parliament– in any future regulation, but more than the types of risk assessment adopted, what interests me is their precise nature and the obligation that they must be consulted by entities outside the EU. Such indicators, among which would be adverse effects as one of the key elements, must be coherent with this instrument's protection objectives, and benefit the interests of the persons concerned and other persons requesting protection. What is needed is a protection-driven approach to “adverse effects”.

I think it is unfeasible to strike out concepts such as “mass influx” or “crisis” from the regulations in these times when the CEAS is evolving. While the Dublin allocation system, and its inequity, continues to be the corner stone of the CEAS, what is required is the definition of situations in which solidarity can become an obligation, as automatic as possible. The opposite would require a complete (and wholly desirable) change of paradigm that I think is unlikely in the short term.

Finally, it is important that the definition of mass influx is not necessarily linked to direct entry into European territory; instead, protection could also be activated when evacuation programs are in operation. This is a potential benefit of the TPD that has vanished in the new crisis regulation proposal, with the loss of an instrument that could be used for international solidarity.



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# Chapter 4

## Are Those Fleeing Ukraine Refugees?

Dr Hugo Storey\*

### 1. Introduction

The question posed in this article is intentionally limited. Are those fleeing Ukraine refugees within the meaning of Article 1A(2) of the 1951 Refugee Convention? Whether they are eligible for other forms of protection is not explored. In principle, such eligibility should not be considered anyway until after a decision has been made on whether someone is a refugee.

For most Ukrainians who have fled the war, actual decisions by host states on whether they are refugees are not imminent. That is a consequence of the fact that most host countries have granted them some form or other of temporary

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\* Retired judge of the Upper Tribunal, UK; immediate past president IARMJ-Europe. The views expressed herein are the author's own views.

protection and have in effect put any asylum applications made on hold.<sup>1</sup> Host countries have also heeded UNHCR advice<sup>2</sup> to avoid any forcible returns for the present.<sup>3</sup> But to try to assess what will be the situation of those who have fled when host countries do eventually make decisions on their refugee status would be an unduly speculative exercise. Would we be looking at a Ukraine restored to its pre-2014 or pre-2022 war boundaries? A Ukraine with peace and security restored? A Ukraine with some territory still under the control of the Russian forces? A Ukraine largely under direct Russia control or exercised through puppet administrations? A Ukraine still experiencing ongoing armed conflict? God only knows. But whatever the real situation then, the crux would remain whether applicants had a well-founded fear of being persecuted at that point in time. All we can do realistically at this point in time is make a forward-looking assessment of their situation as it is now. For such assessment, this piece offers only first thoughts.

The war in Ukraine is casting disquieting light on Western double standards. A Syrian sitting in a western country's reception centre still waiting to be processed years after being assailed by the same Russian bombs as are now striking Ukraine might wonder why s/he cannot work or bring children

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- 1 Within the EU, which has activated the Temporary Protection Directive (TPD) (see Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71), member states must grant a residence permit for at least one year but with scope for extension for a further two years. Whilst Article 17 TPD ensures access to asylum procedures, it does not guarantee the examination of any asylum application before the end of the period of temporary protection. (Despite Article 19(1) giving states discretion to exclude anyone who has applied for asylum as an asylum seeker from concurrently enjoying temporary protection, it appears that the majority have not done so.) According to the EUAA, 'Analysis on Asylum and Temporary Protection in the EU+ in the Context of the Ukraine Crisis Week 23 (6 – 12 June) 2022', 'in week 23, Ukrainians lodged just 317 applications for international protection in the EU+, while at the same time at least 65 099 persons were registered for temporary protection in 28 reporting countries, and 60 811 of them were Ukrainians.' (15 June 2022) < <https://euaa.europa.eu/publications/analysis-asylum-and-temporary-protection-eu-context-ukraine-crisis-9>> accessed 1 December 2022.
  - 2 UNHCR, 'UNHCR Position on Returns to Ukraine' (2022) < <https://www.refworld.org/docid/621de9894.html>> accessed 1 December 2022.
  - 3 In March 2022 (hereafter 'UNHCR Position') UNHCR issued a 'non-return advisory' stating: 'As the situation in Ukraine is volatile and may remain uncertain for some time to come, UNHCR calls on States to suspend the forcible return of nationals and former habitual residents of Ukraine, including those who have had their asylum claims rejected. The bar on forcible return serves as a minimum standard and needs to remain in place until such time as the security situation in Ukraine has significantly improved to permit a safe and dignified return of those determined not to be in need of international protection.'

whereas those fleeing Ukraine can. An Afghan interpreter who fled after the fall of Kabul to the Taliban and is still stuck in the asylum process might similarly wish their persecutor had been Russian. An Iranian might wonder why s/he faces removal to a purportedly safe country, whilst their Ukrainian counterpart is offered housing, work and accommodation. On social media, a tweet by Ayo Sogunro, a Nigerian human rights lawyer, has been shared many times: ‘Can’t get it out of my head that Europe cried about a ‘migrant crisis’ in 2015 against 1.4m refugees fleeing war in Syria and yet quickly absorbed some two million Ukrainians within days, complete with flags and piano music. Europe never had a migrant crisis. It has a racism crisis.’<sup>4</sup>

But legitimate concerns about double standards cannot gainsay the magnitude of the crisis. Its scale is unprecedented since World War II. UNHCR has said it expects 8.3 million people to flee from Ukraine this year.<sup>5</sup> More than 12.7 million people have already been displaced by the war there, with 7.7 million internally displaced and more than 5 million fleeing to other countries. More than 7.5 million refugee movements out of Ukraine have been recorded since 24 February.<sup>6</sup>

Considering the situation of those fleeing Ukraine at a general level is not the same as examining the particular circumstances of any individual case. Further, in any real-life examination it would be essential to have regard to a comprehensive set of up to date country of origin (COI) materials. Whilst there is probably more day-to-day data sources and information to hand than for any other war in world history, there are still few comprehensive reports on country conditions. So, it only makes sense to apply a broad brush approach that seeks to identify the main issues as they appear at the moment, drawing ad hoc on the most readily accessible sources.

One would hope that refugee law is in principle better placed than in past times to approach the definitional problems arising from large scale influxes of persons fleeing war. After myriad debates over the years about whether those

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4 See evaluation by Mona Charen, ‘Is It Racist to Help Ukraine? Of course not!’ *The Bulwark* (30 March 2022) < <https://www.thebulwark.com/is-it-racist-to-help-ukraine-putin-russia-refugees/?amp>> accessed 1 December 2022.

5 Emma Farge and Catherine Evans, ‘U.N. expecting 8.3 mln refugees from Ukraine this year’ *Reuters* (Geneva, 26 April 2022) < [https://www.reuters.com/world/europe/un-expecting-83-mln-refugees-ukraine-this-year-2022-04-26/?mc\\_cid=e21c5fb146&mc\\_eid=826cbaad5a](https://www.reuters.com/world/europe/un-expecting-83-mln-refugees-ukraine-this-year-2022-04-26/?mc_cid=e21c5fb146&mc_eid=826cbaad5a)> accessed 1 December 2022.

6 see also IOM, ‘Ukraine Internal Displacement Report: General Population Survey’ (2022) <[https://migration.iom.int/sites/g/files/tmzbd11461/files/reports/IOM\\_Gen%20Pop%20Report\\_R5\\_final%20ENG%20%281%29.pdf](https://migration.iom.int/sites/g/files/tmzbd11461/files/reports/IOM_Gen%20Pop%20Report_R5_final%20ENG%20%281%29.pdf)> accessed 1 December 2022.

fleeing armed conflicts can be refugees, etc there is now a robust, coherent and still relatively up to date set of UNHCR guidelines<sup>7</sup> (hereafter ‘UNHCR Guidelines No.12’) addressing such situations. However, there are worrying early signs regarding state practice, at least in EU member states, that Article 15(c) of the Refugee Qualification Directive (recast), which concerns eligibility for subsidiary protection, is (still) being construed as a form of international protection *lex specialis* to be applied in armed conflict situations despite this same directive obliging them not to apply it until a decision has first been made that applicants are not refugees.<sup>8</sup>

## 2. Country conditions

In any assessment of refugee eligibility for those fleeing Ukraine, it is the country conditions that will be front and centre. It doesn’t take an expert to see how dire they are.

The country was already war-torn. Russia’s February 24, 2022, invasion came on the heels of the Russo-Ukraine War which began in 2014, which saw the annexation of Crimea and ongoing conflict in Donbas between government forces and Russia-backed armed groups and has resulted in self-proclaimed republics (the Donetsk People’s Republic (‘DPR’) and the Luhansk People’s Republic (‘LPR’) in Russian-controlled areas and mass passportisation by Russia of these regions’ pro-Russian residents. This earlier war, ongoing for almost 8 years, extracted a heavy toll on civilians in eastern Ukraine. Over 16,000 people were killed, including both combatants and civilians, close to 1.5 million displaced. Multiple reports suggest that it featured enforced dis-

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7 UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions [2016] HCR/GIP/16/12

8 E.g. *In Applicant v Ministry of Interior* (Territorial Commission Torino), 4 May 2022, a Turin tribunal granted subsidiary protection because ‘[t]he exceptional level of violence against civilians throughout Ukraine (general risk) makes it unnecessary to analyse the applicant’s personal situation, as it can also be considered a ‘serious and individual threat’: see <<https://caselaw.easo.europa.eu/Pages/default.aspx>>. UNHCR has discerned a similar pattern of approach by EU member states to Syrian cases: see M. Garlick, ‘Subsidiary Protection’ in V. Türk, A. Edwards and C. Wouters (eds), *In Flight from Conflict and Violence: UNHCR’s Consultations on Refugee Status and Other Forms of International Protection*, (CUP 2017) 249, states: ‘Predominant use of Article 15(c) for Syrian claims in some states is occurring despite the acknowledged primacy in law of refugee status and the procedural safeguards designed to ensure its grant to those who qualify, as well as clear country of origin and interpretive guidance.’

appearances, torture, rape and other forms of conflict-related sexual violence, unlawful detentions, sham trials, appropriation of private and public property, violations against cultural heritage, persecution on political grounds, deportations and forced conscription to the enemy armed forces.<sup>9</sup> Largely as a result, the country was experiencing a protracted humanitarian crisis. According to UNHCR, there was ‘an estimated 2.9 million persons in need of humanitarian assistance mostly in the eastern oblasts.’<sup>10</sup> Additionally, there were almost 1.5 million internally displaced persons (IDPs) registered in Ukraine.<sup>11</sup>

Not to be forgotten either is that whilst Ukraine was a functioning democracy when Russia invaded in February 2022, country reports immediately prior to that time identified quite significant failures in securing human rights.

Turning to the current war, the Office of the UN High Commissioner for Human Rights (OHCHR), as of 14 June, recorded 9,931 civilian casualties in the country: 4,432 killed – including 277 children – and 5,499 injured. OHCHR notes that the actual figures are likely to be considerably higher. Heavy fighting persists in several areas of eastern and southern Ukraine. Daily strikes also continue in Donetsk and Kherson oblasts.<sup>12</sup> Inside Ukraine, many people are trapped and unable to meet their basic needs including for food, water and medicines. There is a lack of safe humanitarian access in areas where intense fighting is ongoing. UNHCR and international aid agencies are struggling to reach hard-hit areas with life-saving assistance as part of inter-agency humanitarian convoys.

At the same time, it would appear that significant parts of the country have not as yet been attacked or bombed and, with the Russian retreat from the outskirts of Kiev, the invader’s military aims appear to have become less terri-

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9 See e.g. Office of the United Nations High Commissioner for Human Rights, ‘Report on the human rights situation in Ukraine 16 August to 15 November 2017’ <[https://www.ohchr.org/sites/default/files/Documents/Countries/UA/UARreport20th\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Countries/UA/UARreport20th_EN.pdf)> accessed 1 December 2022.; Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine : resolution / adopted by the General Assembly, UN. General Assembly (75th sess. : 2020-2021) <<https://digitallibrary.un.org/record/3896447#record-files-collapse-header>> accessed 1 December 2022. There is a pending interstate application brought by Ukraine against Russia regarding Crimea before the ECtHR (Grand Chamber of the ECtHR (no. 20958/14). After the Russian invasion in February 2022 the Council of Europe (CoE) excluded Russia in accordance with Art. 8 of its Statute. Accordingly, Russia will cease to be a member of the ECHR in September 2022, whereinafter the ECtHR will not accept new cases against Russia.

10 UNHCR, ‘Ukraine Situation: Flash Update #17’ <<https://data.unhcr.org/en/documents/details/93659>> accessed 28 June 2022.

11 UNHCR, ‘UNHCR Position on Returns to Ukraine’.

12 UNHCR, ‘Ukraine Situation: Flash Update #17’.



torially ambitious. Nearly 2.5 million movements back into the country have been recorded since 28 February.<sup>13</sup> So there would appear to be geographical variations which may mean that statements about exceptionally high levels of indiscriminate violence may only hold true in certain parts of the country. That might suggest that refugee assessment will be somewhat akin to that undertaken in the past in relation to Iraq and Afghanistan where at different points in time UNHCR among others, only considered certain provinces or regions to be at an exceptionally high level of violence so as to give rise to a general risk. At all events, evidence of country conditions is going to heavily affect assessment of all elements of the refugee definition.

Undoubtedly most of those fleeing Ukraine are Ukrainian nationals, but their numbers include stateless persons. UNHCR has estimated there were more than 35,000 stateless persons and persons with undetermined nationality in the country.<sup>14</sup> Persons who were either stateless, at risk of statelessness, or with undetermined nationality included Roma, homeless persons, current and former prisoners, as well as nationals of the former USSR who resided in Ukraine in 1991 but never obtained an endorsement in their Soviet passport indicating they were citizens of Ukraine. Whilst, therefore, this analysis covers those for whom Ukraine is their country of nationality or former habitual residence, it will not cover dual nationals where they will have available protection in their other country(ies) of nationality. Nor will it cover Russian nationals, for example, Russian soldiers who have deserted whilst in Ukraine and seek protection in other countries, even though there may well be many such cases.

Brief consideration will now be given to the different elements of the refugee definition, omitting only the 'outside the country' element as that is likely in almost all cases to be uncontroversial.

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13 Although this includes back and forth movements: see information from State Border Guard Service of Ukraine cited by UNHCR, 'Ukraine Refugee situation' < <https://data.unhcr.org/en/situations/ukraine> > last updated 9 June 2022.

14 Bureau of Democracy, Human Rights and Labour, '2021 Country Reports on Human Rights Practices: Ukraine' (*U.S. Department of State*, 2021) < <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/ukraine/> > accessed 1 December 2022.

## 3. Being persecuted

Terminologies differ, but if a human rights approach is taken to this element of the definition (as is reflected in Article 9 QD(recast)), among the issues of particular importance in any assessment of it will be: the intensity of the harm; the extent to which it is or has to be actualised; and whether the harm must be individualised.

### 3.1 Intensity of harm

As regards the intensity of the harm, mere exposure to an armed conflict does not constitute persecution. But at least so far as civilians are concerned, there would appear to be strong indications that the violence concerned constitutes severe violations of human rights. There are at least three features pointing in this direction. One is that to all intents and purposes, it is not simply an international armed conflict but one in which Russia has engaged in a war of aggression, in contravention of the UN Charter which requires non-intervention in the territorial integrity of an independent state.<sup>15</sup> A second feature is that the Russian army, in contravention of international humanitarian law (IHL) and international human rights law (IHRL)<sup>16</sup>, has often deliberately targeted civilian areas and indeed in Mariupol and some other cities the strategy appears to be to raze to the ground all civilian infrastructure and dwellings, i.e. deliberate targeting of civilians and civilian objects (homes, hospitals schools).<sup>17</sup> Third, there is mounting evidence that, also in contravention of IHL and IHRL, the Russian forces are deploying unlawful means and methods of warfare by use of explosive weapons in populated areas, often referred to as EWIPA heavy artillery and aerial bombs (weapons with a wide blast radius) and other indirect-fire artillery without adequate spotting (weapons for which the target is wholly

15 Article 2(4) of the Charter prohibits aggressive use of force subject to exceptions for 'self-defence' under Article 51 and UN Security Council authorised interventions under Chapter VII. Few legal scholars consider that Ukraine would fall under the Article 51 exception. Manifestly the Chapter VII exception has not arisen.

16 OSCE, 'Report of the OSCE Moscow Mechanism's mission of experts entitled 'Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022'' (2022) < <https://www.osce.org/odihr/515868>> accessed 1 December 2022.

17 OCHR Ukraine Situation, 25 March 2022: 'Private houses, multi-storey residential buildings, administrative buildings, medical and education facilities, water stations, electricity systems have been destroyed on a massive scale, with disastrous effects on civilians and their human rights, including their rights to health, food, water, education and housing.'

unseen) and featuring use of cluster munitions attacks. Compounding such features is the fact that Russia has failed to comply with the legally binding order of the International Court of Justice of 16 March 2022 and to abide by the relevant resolutions of the UN General Assembly (In particular see UNGA Resolution ES 11/1 (2022)) and stop its military aggression – to cease fire, and immediately and unconditionally withdraw its troops from the entire territory of Ukraine within its internationally recognised borders.

In addition, there are numerous reports of unlawful killing of civilians and mass graves. Serious violations of international humanitarian law committed with criminal intent—that is, deliberately or recklessly—are war crimes. War crimes are ‘grave breaches’ of the Geneva Conventions. Both under customary law and the International Criminal Court (ICC) Statute and other sources, they include a wide array of offenses—deliberate, indiscriminate, and disproportionate attacks harming civilians; hostage taking; using human shields; rape; imposition of collective punishment, forcible enlisting of young men in the separatist republics and forcing them to commit war crimes, among others. The ICC has formally begun an investigation into war crimes in Ukraine.<sup>18</sup> (It would appear that Ukrainian forces, albeit on a lesser scale, may also sometimes have acted contrary to IHL norms.<sup>19</sup> Such conduct may be relevant in cases where, for example, pro-Russian Ukrainians have fled to other countries and are claiming international protection).

One significant feature, not as yet documented as much as others, is the forcible transfer of Ukrainian civilians to Russia and subsequent relocation to abusive conditions. There are reports of civilians being sent to ‘filtration camps’ on the Russian or pro-Russian territory ‘to investigate’ their political identity<sup>20</sup> (pro-Ukrainian or pro-Russian).

These features, if confirmed, compound the severity and systematic nature of the violations of basic human rights<sup>21</sup>. As stated by the ECtHR in *Sufi and Elmi*<sup>22</sup>: Although the Court has previously indicated that it would only

18 UNHCR, ‘Ukraine Situation: Flash Update #17’.

19 OSCE, ‘Report of the OSCE Moscow Mechanism’s mission of experts entitled ‘Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022’.

20 BBC, ‘The Documentary Podcast: Evacuated to Russia’ (9 June 2022) < <https://www.bbc.co.uk/sounds/play/p0ccs7qw> > accessed 1 December 2022.

21 see *N v UK* App no 25904/07 (ECtHR, 17 July 2008) para. 115.

22 *Sufi and Elmi v. the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011) para 241.

be “in the most extreme cases” that a situation of general violence would be of sufficient intensity to pose such a risk, it has not provided any further guidance on how the intensity of a conflict is to be assessed. However, the Court recalls that the Asylum and Immigration Tribunal had to conduct a similar assessment in *AM and AM (Somalia)* (cited above), and in doing so it identified the following criteria: first, whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting. While these criteria were not seen as an exhaustive list to be applied in all future cases, in the context of the present case the Court considered that they formed an appropriate yardstick by which to assess the level of violence in Mogadishu.

Such features strongly point to understanding the nature of the harm facing those who have fled Ukraine, were they to return, as persecutory.

Strasbourg jurisprudence also offers guidance on how to approach cases where, even if the decision maker does not consider that the applicant’s home area is one characterised by indiscriminate violence at an exceptionally high level, lesser levels of violence may still give rise to a real risk of being persecuted where the applicant has particular risk characteristics. For example, In *LM and Others v Russia*, which concerned applicants from Syria in 2015, the Court concluded that the applicants could establish a violation of Article 3 ECHR by virtue of the general situation of violence taken together with the fact that they were stateless Palestinians originating from Aleppo and Damascus, where particularly heavy fighting has been raging and that they were ‘young men who, in the view of the Human Rights Watch, were in particular danger of detention and ill-treatment’.<sup>23</sup>

In terms of assessing violations of human rights, IHRL, of course, permits restrictions on certain rights during wartime or officially proclaimed public emergency threatening the life of the nation.<sup>24</sup> But any reduction in rights during such a situation must be of an exceptional and temporary nature ‘strictly required by the exigencies of the situation’ and cannot involve impairment of

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23 See *L.M. and Others v Russia* App nos 40081/14, 40088/14 and 40127/14 (ECtHR, 15 October 2015) paras. 123-124.

24 See e.g. Council of Europe (ECtHR), ‘Guide on Article 15 of the European Convention on Human Rights: Derogation in Time of Emergency’ (2022) < [https://www.echr.coe.int/Documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf) > accessed 1 December 2022.

non-derogable rights, which include the right to life and the prohibition of ill treatment. This is highly relevant in the Ukraine context to the issue of protection (see below) because in June 2015 Ukraine formally derogated from the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

### 3.2 Extent to which persecution is or has to be actualised

It may be of particular salience in the context of Ukraine that well-founded fear of being persecuted includes the *threat* of being persecuted, not just the actuality<sup>25</sup>. Of the 10 million people who have fled, a significant number have left areas which at the time when they left had not been the subject of attack. It seems reasonable to assume they left in anticipation of an attack in the foreseeable future. The objective content of such apprehension is supported by what we see on our screens as well as by reputable sources.<sup>26</sup> Additionally, many left behind family members involved in the fighting and live in fear of what will happen to them.<sup>27</sup> Furthermore, there have been certain statements made by Putin and the Russian media that explicitly or implicitly conjure up far worse harm than ordinary military attacks – including existential harm such as the use of tactical nuclear weapons and chemical and biological warfare. The threat is also one that emanates from the world’s second most powerful superpower

25 Andreas Zimmermann, Felix Machts and Jonas Dörschner, ‘*The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*’ (OUP 2011) 348-349 and see C-652/1, *Nigyar Rauf Kaza Ahmedbekova, Rauf Emin Oglu Ahmedbekov v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite* [2018] EU:C:2018:801, para 51.

26 See Amnesty International, ‘Soaring concern for human rights and human lives as Russia invades Ukraine’ *Amnesty International* (24 February 2022) <<https://www.amnesty.org/en/latest/news/2022/02/soaring-concern-for-human-rights-and-human-lives-as-russia-invades-ukraine/>> accessed 1 December 2022.; See, also other sources cited by UNHCR, fn 6: UNHR Office of the High Commissioner, ‘UN Human Rights Chief urges an immediate halt to the Russian Federation’s military action against Ukraine’ (*OHCHR*, 24 February 2022) <<https://www.ohchr.org/en/press-releases/2022/02/un-human-rights-chief-urges-immediate-halt-russian-federations-military>> accessed 1 December 2022.; Human Rights Watch, ‘Russia, Ukraine & International Law: On Occupation, Armed Conflict and Human Rights: Questions and Answers’ *Human Rights Watch* (23 February 2022) <<https://www.hrw.org/news/2022/02/23/russia-ukraine-international-law-occupation-armed-conflict-and-human-rights>> accessed 1 December 2022.

27 ‘How does anyone feel being forced out of their country, being made to leave loved ones behind? Or being exhausted waking up to sirens, taking our children to the shelter at night?’ quoted in Rescue, ‘In their own words: Refugees flee Ukraine’ *Rescue* (18 March 2022) <<https://www.rescue.org/article/their-own-words-refugees-flee-ukraine>> accessed 1 December 2022.

ruled by an autocrat not subject to any rule of law restraints. In these circumstances threat, objectively considered, may well be enough.

When assessing the threat of persecution, one must bear in mind that it has to be established that a person has a well-founded fear of being persecuted, but this does not mean that the threat must be ‘imminent’; it suffices if it is reasonably foreseeable: see below on Well-founded fear).

### 3.2.1 Individualisation

There may be a temptation on the part of some tackling Ukrainian cases to repeat past errors – assuming that a person cannot establish persecution unless able to show that they will be individually targeted. The fact that an individual may not have experienced harm prior to departure and may come from a region of origin that has not been subject to Russian attacks, does not necessarily mean that they do not face persecution. To qualify for refugee status there is no requirement that an individual be known personally to the actors of persecution. Further, the refugee definition encompasses group persecution. If a group faces a real risk of serious harm, then it is not necessary for an individual to establish that they will be targeted individually or suffer a degree of harm above that suffered by other individuals with the same profile.<sup>28</sup>

However, if the objective evidence does not establish that those fleeing Ukraine will face group persecution, it will still be necessary to consider whether there are specific risk categories – eg Ukrainian soldiers and volunteer fighters, local mayors, judicial and prosecution staff, former and off-duty police officers, teachers and other civilian government workers, civilians perceived to oppose Russian occupation, human rights activists, humanitarian and development aid workers, those involved in active social media efforts to combat Russian coverage of the war – and perhaps family members of all of the foregoing. In this context it is relevant that background reports indicate that the practices of the Russian invasion forces are very chaotic but, in some places, (not only in Bucha and other places around Kyiv in March) they have killed or at least detained local Ukrainians that they regard as having any connection with the Ukrainian defence forces or public authorities or have even shown sympathies to them (searching people’s mobile phones for that purpose).

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28 UNHCR Guidelines on International Protection No. 12 on claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions [2016] HCR/GIP/16/12 paras 22-23.

### 3.3 Protection

Perhaps the most difficult issue may prove to be that of protection. Going by country reports on Ukraine prior to February 2022, its state authorities had been able in general, at least in areas other than eastern Ukraine, to provide effective protection, although not so for a number of specific categories. In relation to Russian-occupied areas of eastern Ukraine as things stood in 2018, the ECHR has acknowledged that the Ukrainian authorities might sometimes experience certain difficulties in ensuring the proper functioning of the judicial system in certain regions in view of ongoing hostilities in those regions. Even so, the Court stated that, the State authorities are expected to take certain steps to resolve the problem by, for instance, specifically authorizing claims to be filed in courts in another region of the State<sup>29</sup>. But since February 2022, the situation is that there is an invading army threatening the country as a whole and hence issues of protection have to be considered in a different light. One complicating factor, in cases where the issue is the adequacy and effectiveness of protection by the Ukrainian authorities, is that on 10 June 2015 Ukraine formally derogated from the International Covenant on Civil and Political Rights and the European Convention on Human Rights.<sup>30</sup> Does this mean that protection standards in this context must only concern violations of non-derogable rights (together with any qualified rights not covered by the specific derogation)?<sup>31</sup> Or does it mean that this derogation suggests that there is less chance for the Ukrainian authorities to provide sufficient protection?

In eastern Ukraine the situation clearly requires a different analysis since Ukrainian authorities have plainly not been able to provide protection in the areas taken over by Russia, directly or indirectly. At least under Article 6(b) QD(recast), Russian forces are ‘parties or organisations controlling ... a substantial part of the State’, and so are actors of persecution as a category in their own right. Where a party or organisation control a substantial part of the territory of the State, by definition the State cannot provide ‘[p]rotection against [their] persecution’ pursuant to Article 7(1). However, it is observable that the

29 see *Tsezar and Others v. Ukraine* App nos 73590/14, 73593/14, 73820/14, 4635/15, 5200/15, 5206/15 and 7289/15 (ECtHR, 13 February 2018) para 58.

30 See UN, ‘Declaration contained in a Note verbale from the Permanent Representation of Ukraine’ (2021) UNGA A/75/857-S/2021/377 – Or. Engl. Ukraine’s derogations are limited to Articles 9, 12, 17 ICCPR and 5, 8 ECHR, Article 2, Protocol No. 4 ECHR. They do not include Article 14 and 6 ECHR.

31 UNHCR Guidelines No. 12, para 16 states that ‘[w]here a lawful state of emergency exists, non-securement of derogable rights may not necessarily constitute persecution if the adopted measures are strictly required by the exigencies of the situation.’



situation in eastern Ukraine is having a negative impact on conditions in some parts of Western Ukraine affected by fighting earlier on, where protection may be hampered by destroyed infrastructure, dangerous areas where one cannot go because of landmines or where internal displacements from the east may be placing a strain on resources, eg local orphanages.

### 3.4 Internal protection

UNHCR's position is that: '[i]n view of the volatility of the situation in the entire territory of Ukraine, UNHCR does not consider it appropriate to deny international protection to Ukrainians and former habitual residents of Ukraine on the basis of an internal flight or relocation alternative.<sup>32</sup>' Judging by the reaction of courts and tribunals over recent years to similar statements by UNHCR regarding armed conflict situations in Iraq and Afghanistan, there may be disagreement about that. However, as already noted, it may be that the specific context of existential threat from a neighbouring superpower ruled by an arbitrary autocracy which has stated, without geographical limitations, that its objective is to 'de-Ukrainise' Ukraine, makes the UNHCR position more compelling. For those emanating from eastern Ukraine, any question as to whether they could internally relocate to western Ukraine would have to bear in mind the adverse impact of the war on conditions in Ukraine (to which reference was made earlier).

## 4. Convention reasons and causal nexus

To qualify as a refugee, the feared persecution flowing from the armed conflict must be for reason of a 1951 Convention ground. Here it might be argued against there being any reason engaged that, even if it is accepted that civilians are being targeted, that is simply because they are civilians and not because of their specific ethnic, political or religious profiles. Possibly, under this argument, there might be exceptions for particular type of cases – eg civilians in areas seen to have been particularly involved in opposing and discriminating against Russian nationalists. This line of argument has seemingly been advanced by at least one prominent refugee law academic, James Hathaway.<sup>33</sup>

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32 UNHCR, 'UNHCR Position on Returns to Ukraine' para 8.

33 James Hathaway (*Twitter*, 3 April 2022) [https://twitter.com/JC\\_Hathaway/status/1510391348402159616](https://twitter.com/JC_Hathaway/status/1510391348402159616) accessed 1 December 2022.; see also Naoko Hashimoto-Scalise (*Twitter*, 3 April 2022) <<https://twitter.com/NaokoScalise/status/1510641126234943488>> accessed 1 December 2022.

Counterposed to this perspective, it might well be argued that there are two reasons that have particular traction: nationality and political opinion. In order to decide whether a Convention reason is engaged, it is always necessary to have close regard to the historical context.<sup>34</sup>

The nationality reason may prove the most apposite, at least drawing a line through studies that have been done of its role in previous contexts. Fripp<sup>35</sup> usefully identifies a number of scenarios where possession of a nationality in the formal sense could give rise to persecution by reason of nationality, including where the country is dominated by non-nationals, where military occupation or political domination by a foreign state occurs, where a state has more than one class of national, and where oppression occurs in the context of an attempt to remove rights by the creation of a false situation of state succession. As publicly declared, Putin's argument is that Ukraine is not a genuine state, but comprises a government effectively established by the West and used by Western 'Nazis' and American 'imperialists' as a way of threatening Russia.<sup>36</sup> Such posturing appears to amount to denial of nationality not dissimilar to that which the Nazi regime used in relation to Austria in World War II. What is seen as meriting persecution is the insistence by Ukraine that it is an independent state with its own nationals. According to a senior military expert, 'his ultimate aim is that Russia should simply take over Ukrainian territory as if it were the old Soviet Union and Ukraine was just one region within the old Soviet Union.' There is a real threat of denationalisation.

Whether on its own or in combination with the political opinion reason, nationality might seem an effective reason for Russian persecution. Political opinion comes into it because it would appear that all Ukrainians perceived as loyal to their government are being classified as anti-Russian. Evidence pointing in that direction includes the fact (already mentioned) that there are reports of

34 see e.g. political opinion Andreas Zimmermann and Claudia Mahler, 'Article 1A, para 2' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 399.

35 Alfred M Boll, 'Nationality and Statelessness in the International Law of Refugee Status' (2019) 31/1 *International Journal of Refugee Law* 169.

36 In remarks on February 24, 2022 Putin declared that Russia would press for the "de-Nazification" of Ukraine. In an earlier July 12, 2021 piece titled "On The Historical Unity Of Russians And Ukrainians" published on the Kremlin website in Russian, Ukrainian, and later English, Putin casts doubt on the legitimacy of the Ukrainian state and the nation itself, asserting that Ukraine and Russians are 'one people', dismissing the country of 44 million as a 'spawn of the Soviet period', claiming that it is now run by the West, and suggesting that its borders should be subject to negotiation. Vladimir Putin, 'On the Historical Unity of Russians and Ukrainians' (*Official Internet Resources of the President of Russia*, 12 July 2021) < <http://www.en.kremlin.ru/misc/66182> > accessed 1 December 2022.

civilians being sent to ‘filtration camps’ on the Russian or pro-Russian territory ‘to investigate’ their political identity (pro-Ukrainian or pro-Russian).

Hence, it might be considered that a combination of their nationality and support of their government means that a political opinion is imputed to those who have fled Ukraine. In this regard, it is important to recall that political opinion is not limited to opinions about the state (in this context the Ukrainian government,) but can also encompass non-state actors or quasi-state actors, including occupiers/invasers.<sup>37</sup>

## 5. Well-founded fear

This remaining element of the definition is primarily about forward-looking risk assessment and as such will turn heavily on assessment of the general situation and the applicant’s particular circumstances. Whilst forward-looking, the risk assessment needs only to consider what is reasonably foreseeable; it is not necessary to show that there is an imminent threat of persecution.<sup>38</sup>

It may be relevant in quite a number of cases to bear in mind that ‘past persecution’ is a ‘serious indication of the applicant’s well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated’ (at least under Article 4(4) QD (recast)). As regards the standard of proof to be applied, this should not be different to that ordinarily applied – often dubbed the ‘lower standard’ – just because a case involves situations of armed conflict. The refugee definition, does not distinguish between peacetime and armed conflict situations. In particular, as already indicated, it would be wrong to require an applicant to show a ‘differential risk’ or impact over and above that normally faced in such situations.<sup>39</sup>

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37 A “political” opinion is an opinion about the nature, policies, or practices of a state or of an entity that has the capacity, legitimately or otherwise, to exercise societal power or authority. A relevant non-state entity is one that is institutionalized, formalized, or informally systematized and which is shown by evidence of pattern or practice to exercise de facto societal power or authority’ (see The Michigan Guidelines on Risk for Reasons of Political Opinion (2016) 37 MICH. J. INT’L L. 234 para 8).

38 Adrienne Anderson and others, ‘Imminence in Refugee and Human Rights Law: Misplaced Notion for International Protection’ (2019) 68(1) *International and Comparative Law Quarterly* 111.

39 UNHCR Guidelines on International Protection No. 12 on claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions [2016] HCR/GIP/16/12.

## 6. Conclusion

From what has been said above, there are no easy answers to the question which is the subject of this article. Lack of a full set of COI and related materials about the current situation in Ukraine prevents the kind of full examination that any court or tribunal would need to undertake. However, taking a broad-brush approach based on materials to hand presently, there would appear to be valid reasons for considering the current position to be that many of those fleeing Ukraine meet the essential requirements of the refugee definition.

### Postscript

Whilst no attempt is made to update this article to take account of the myriad changes in the situation in Ukraine since it was written, two matters touching on its main themes bear mention.

First, even though the numbers of Ukrainians who have fled Ukraine continue to rise-being now over 4 million - there has also been a relatively small but significant number going back.<sup>40</sup> It is likely therefore that among those who have applied or will apply for asylum there will be some who have left Ukraine more than once. This feature may well prompt the question of whether their act of voluntary return indicates that they are no longer refugees. It may be relevant to establish the reasons for return, which may range from seeking to extract trapped loved ones through to inability to find work in another country. But in broad terms, going back into a situation in which Russia continues to target civilians and civilian infrastructure across the country- and then leaving again - does not negate well founded fear of persecution.

Second, other countries are beginning to receive applications from Russians fleeing the draft or deserting the Russian army. This topic was not covered in my article, but is discussed in a valuable piece written by Eric Fripp.<sup>41</sup>

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40 Lauren Egan, 'As millions of Ukrainians flee war, hundreds are heading back home in spite of violence' NBC News (7 April 2022).

41 Eric Fripp, 'Draft Evaders and Refugee Protection' (Refugee Law Initiative, 19 October 2022) <<https://rli.blogs.sas.ac.uk/2022/10/19/draft-evaders-and-refugee-protection/>> accessed 1 December 2022.

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*Tsezar and Others v. Ukraine* App nos 73590/14, 73593/14, 73820/14, 4635/15, 5200/15, 5206/15 and 7289/15 (ECtHR, 13 February 2018)

*Ukraine v. Russia (Re Crimea)* App nos. 20958/14 and 38334/18 (ECtHR, 14 July 2021)

# Chapter 5

## The Right to Choose Country of Asylum: The 1951 Convention and the EU's Temporary Protection Directive

Dr Gamze Ovacık\*

### 1. Introduction

Whether asylum seekers have the right to choose the country in which they seek asylum has been a controversial issue among prominent international law scholars.<sup>1</sup> The activation of the EU's Temporary Protection (TP) Directive has

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\* Post-doc, Gothenburg Law School/Assistant Professor, Başkent Law School.

1 James C. Hathaway, 'A Global Solution to a Global Refugee Crisis' (*Verfassungs Blog*, 1 March 2016) <<https://verfassungsblog.de/a-global-solution-to-a-global-refugee-crisis/>> accessed 1 December 2022.; James C. Hathaway, 'Three legal requirements for the EU-Turkey deal: An interview with JAMES HATHAWAY' (*Verfassungs Blog*, 9 March 2016) <<https://verfassungsblog.de/three-legal-requirements-for-the-eu-turkey-deal-an-interview-with-james-hathaway/>> accessed 1 December 2022.; Kay Hailbronner, 'Legal Requirements for the EU-Turkey Refugee Agreement: A Reply to J. Hathaway' (*Verfassungs Blog*, 11 March 2016) <<https://verfassungsblog.de/legal-requirements-for-the-eu-turkey-refugee-agreement-a-reply-to-j-hathaway/v>> accessed 1 December 2022. and, in the context of the war in Ukraine see Daniel Thym, 'Temporary Protection for Ukrainians: the Unexpected Renaissance of 'Free Choice'' (*EU Immigration and Asylum Law and Policy*, 7 March 2022) <<https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/>> accessed 1 December 2022.

the potential to revive this debate because those fleeing from Ukraine to the EU have the right in practice – they can choose which Member State they wish to travel to and seek temporary protection in. Building on an overview of the legal arguments for and against the right to choose the country of asylum under the 1951 Convention Relating to the Status of Refugees, this chapter to the ASILE Forum discusses whether Ukrainians' right to choose their country of asylum in the EU is a step towards the formation of a regional customary norm.

## 2. The right to choose the country of asylum for people fleeing the war

When exploring the possible development of the right to choose your country of asylum as a regional norm in Europe beyond the Ukrainian context, it should be remembered that the Schengen regional free movement space excludes asylum seekers who reach the EU. Against this background, as agreed between EU and Ukraine<sup>2</sup>, Ukrainian citizens can travel to and within the EU without a visa for a period of up to 90 days. Thus, they are free to enter the EU and specifically choose the Member State where they want to seek temporary protection.

This is recognised in paragraph 14 of the preamble of the European Commission's March proposal for introducing temporary protection<sup>3</sup>, emphasising that the balancing efforts between the Member States would be facilitated and pressure on national systems would be reduced if Ukrainians fleeing the war were able to join their family and friends within the existing Ukrainian diaspora across the EU. Additionally, the operational guidelines to facilitate border crossings at the EU-Ukraine borders<sup>4</sup> that accompanied the Commission proposal, encourage flexibility and the non-application of sanctions to carriers that transport Ukrainian passengers who lack adequate documentation, allowing them to travel within the EU to reunite with family and/or friends.

This understanding was further reinstated with paragraph 15 of the preamble of the ensuing Council Decision introducing temporary pro-

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2 Agreement between the European Union and Ukraine amending the Agreement between the European Community and Ukraine on the facilitation of the issuance of visas [2013] OJ L168/11.

3 Commission, 'Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection' COM (2022) 91 final.

4 Commission, 'Communication from the Commission Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders' C (2022) 1404 final.

tection<sup>5</sup> which provides that article 11 of the TP Directive<sup>6</sup> would not be implemented to enable free movement within the EU. This article limits the mobility of temporary protection beneficiaries within the EU by creating a readmission obligation for the Member State which granted temporary protection, in the case of an unauthorised stay in or entry attempt into another Member State.

Some discussions on the freedom to choose the country of asylum point to a distinction between the right to choose where one *seeks* asylum and the right to choose where one *enjoys* asylum.<sup>7</sup> This is largely disregarded for the purposes of this chapter, because with the deactivation of article 11, both rights are applicable to asylum seekers from Ukraine.

Another point of discussion is whether it is possible for a person who has been granted temporary protection in one Member State to re-apply for temporary protection in another for any reason, such as joining family members or for employment purposes. This relates to the right to choose the country of asylum for people who have already achieved protection and to the overall concept of freedom of movement in asylum context.

According to article 15 of the TP Directive, changing countries is possible for family reunification purposes. However, the choice of where it would take place is left to the Member States and not to the individuals concerned.

Notwithstanding the explicit denial of the individual's choice in the context of family reunification, there is no 'first country of temporary protection' rule adopted in the TP Directive. Article 11 creates the basis for being sent back to the initial country providing temporary protection but only in the case of an unauthorised stay or entry into another Member State.

Although this article was waived for Ukraine, the current policy paradigm does not favour the secondary movement of people who have already achieved protection. However, the option of re-applying for temporary protection in another Member State cannot be ruled out due to the lack of an explicit legal

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5 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71/1.

6 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.

7 James C. Hathaway, 'Three legal requirements for the EU-Turkey deal: An interview with JAMES HATHAWAY' (*VerfBlog*, 9 March 2016) < <https://verfassungsblog.de/three-legal-requirements-for-the-eu-turkey-deal-an-interview-with-james-hathaway/> > accessed 1 December 2022.

basis.

As for the relevance of temporary protection in the context of the right to choose the country of asylum, admittedly, those who fall under the TP regime are not technically referred to as asylum seekers or refugees *per se*. However, this distinction mainly comes from the impossibility of operating regular asylum procedures based on individual assessment in the case of a mass influx.

The TP regime was developed as a means to guarantee protection in such a situation through the categorical recognition of protection needs. This assumes that people who fall under this regime are in need of international protection and that they would most likely receive international protection status if they were subject to individual assessment. The close connection between temporary protection and asylum is also recognised in the TP Directive, starting with the specific definition of temporary protection in article 2. Thus, the right to choose the country of asylum is construed in a wider conceptual scope here to entail right to choose the country for seeking protection, covering people under temporary protection as well as those within asylum procedures.

### 3. Uncertainty under international law

The right to choose the country of asylum is neither openly provided for nor denied under international law. Although some of its provisions are used as a justification to support or refute the existence of such a right, as explained further below, the 1951 Convention does not contain an explicit provision on this issue.

In the decades following the 1951 Convention, the general practice was based on the assumption that the country responsible for providing asylum is the one receiving the asylum claim, leaving a margin of choice to the asylum seeker. The emergence of the concept of a safe third country in the early 1990s triggered an understanding that the right to seek and enjoy asylum does not necessarily include a right to choose *where* to enjoy asylum.<sup>8</sup>

This shift is also reflected in the transformation of the UNHCR EXCOM Conclusions. As principles for determining the country responsible for hearing an asylum claim, Conclusion 15<sup>9</sup> from 1979 identifies that an asylum seeker's

8 Gamze Ovacik, 'Turkish Judicial Practices on International Protection, Removal and Administrative Detention in Connection With the Safe Third Country Concept' (Oniki Levha Publications 2021).

9 UNHCR, 'Executive Committee of the High Commissioner's Programme, 'Refugees Without an Asylum Country No. 15 (XXX) – 1979'' (UNHCR, 16 October 1979) UN Doc. 12A(A/34/12/Add.1) < <https://www.unhcr.org/excom/exconc/3ae68c960/refugees-asylum-country.html> > accessed 1 December 2022.

intentions as to where he/she wishes to seek asylum should be considered and asylum should not be refused only because it could be sought elsewhere. Ten years later however, Conclusion 58<sup>10</sup> took a step backwards from prioritising the asylum seeker's agency of and denounced irregular movement from a country where protection has already been found. Together with certain provisions of the 1951 Convention analysed below, the defence of the safe third country notion and criticism of the right to choose the country of asylum often rests on this evolution.<sup>11</sup>

The argument against the right to choose the country of asylum rests on the presumption that the choice is arbitrary, based on socio-economic conditions rather than protection-related reasons, implying an abuse of the asylum system.<sup>12</sup> On the other hand, proponents of this right point to legitimate reasons for being given a choice, such as reuniting with family, existing networks, knowledge of the protection system and further social, institutional and economic conditions as described here.<sup>13</sup>

Denying the right to choose the country of asylum also creates social cohesion problems and potentially triggers further irregular movements.

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10 UNHCR, 'Executive Committee of the High Commissioner's Programme, 'Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection\* No. 58 (XL) – 1989'' (13 October 1989) UN Doc. 12A(A/44/12/Add.1) <<https://www.unhcr.org/excom/exconc/3ae68c4380/problem-refugees-asylum-seekers-move-irregular-manner-country-already-found.html>> accessed 1 December 2022.

11 A further discussion over the legality of the safe third country concept can be found Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested : Insights from the Law of Treaties' in G. S. Goodwin-Gill and P. Weckel (eds), *Migration & Refugee Protection in the 21st Century: Legal Aspects* The Hague Academy of International Law Centre for Research (Martinus Nijhoff 2015).

12 John van Selm, 'Access to Procedures: 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits 2001'' (2001) <<https://www.unhcr.org/protection/globalconsult/3b39a2403/access-procedures-safe-third-countries-safe-countries-origin-time-limits.html>> accessed 1 December 2022.

13 Sergio Carrera and others, 'When mobility is not a choice: Problematising asylum seekers' secondary movements and their criminalisation in the EU' (CEPS 2019-11) <<https://www.ceps.eu/wp-content/uploads/2019/12/LSE2019-11-RESOMA-Policing-secondary-movements-in-the-EU.pdf>> accessed 1 December 2022.

## 4. A case for the right to choose the country of asylum

Legal principles dictate that freedom prevails in the case of a lack of explicit limitation. The limitation of a right is an exception and exceptions must be interpreted narrowly. Thus, the existence of a right to choose the country of asylum should be accepted if there is no rule explicitly prohibiting it. Relying on the lack of an explicit right to choose the country of asylum as a means to refuse it showcases a fantastic display of reverse logic – it is the *lack* of a right that needs justification, not the presence of it.

The 1951 Convention does not require the right to seek asylum to be used in a specific country. Moreno-Lax suggests<sup>14</sup> that, as the conception of a right inherently consists of the negative right *not* to use it and a degree of freedom of choice as to *how* to use it, it naturally follows that an asylum seeker cannot be forced to exercise their right to seek asylum in a particular country.

Article 31 of the 1951 Convention reserving impunity for illegal travel to refugees coming *directly* from a state of persecution is often presented as proof of the existence of a rule on determining the country of asylum, requiring it to be sought as soon as arriving into a country where persecution is no longer likely. This interpretation isolates the reference to direct arrival from the much more obvious narrow context of penalisation due to illegal travel and stretches it further to provide a ground for refusing asylum.

This contradicts the general rule on interpretation in the Vienna Convention on the Law of Treaties, which requires article 31 to be interpreted in its particular context and in light of the object and purpose of the 1951 Convention. Indeed, if anything, as Costello and Ioffe have pointed out<sup>15</sup>, the reference to direct arrival recognises that refugees often have to travel through several countries before finding protection.

Moreover, there is one step missing in transforming a legal condition merely allocated for non-culpability of illegal entry into a basis for refusing the right to choose the country of asylum. Thus, the lack of an explicit obligation under international law requiring individuals to seek protection as soon as they are safe means that there is no legal basis to deny refugees the right to seek asylum

14 Moreno-Lax, The Legality of the “Safe Third Country” Notion Contested.

15 Cathryn Costello and Yulia Ioffe, ‘Refugee Rights and Realities, Ch.51 Nonpenalization and Non-Criminalization’ in Cathryn Costello, Michelle Foster and Jane Mcadam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) pt IV.



in the country of their choice.

From a larger perspective presented more comprehensively<sup>16</sup>, mobility rights for refugees is supported by the spirit of the 1951 Convention which provides freedom of movement to asylum seekers once they are within the asylum system. Thus, some states' refusal to grant such rights merely appears as a deliberate strategy to stop asylum seekers entering their territory.

Beyond legal arguments, the freedom to choose the country of asylum is also praised as a policy preference<sup>17</sup> by Francesco Maiani, as it would constitute an incentive to apply for asylum as soon as possible by ruling out the motivation to refrain coerced third country transfers.

Advocates for refugee rights underline the difficulty of justifying a policy that denies asylum seekers the right to choose the place where they believe they would have the best chance of protection and the best access to support from their communities.<sup>18</sup> On top of this, it needs to be recognised that likelihood of recognition of protection need within an asylum system, cultural and social factors that reduce barriers to integration, combined with a desire to be with family or within particular social networks, are legitimate reasons for granting the right to choose the country of asylum. Allowing this freedom to the asylum seeker is also likely to increase their cooperation within asylum procedures and reduce the likelihood of irregular movements.

All in all, the points explained in detail above have been summarised perfectly by Hathaway and Neve:<sup>19</sup> *'The right of the asylum seeker to choose the state in which to solicit recognition of refugee status is a critical, if modest, compensation for the failure of governments to ensure a uniformly inclusive understanding both of the refugee definition and of legally mandated standards of protection across states'*.

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16 James C. Hathaway, 'A Global Solution to a Global Refugee Crisis' (*Verfassungsblog*, 1 March 2016) < <https://verfassungsblog.de/a-global-solution-to-a-global-refugee-crisis/>> accessed 1 December 2022.

17 Francesco Maiani, 'Responsibility allocation and solidarity' in Philippe De Bruycker, Marie De Somer and Jean-Louis De Brouwer (eds), *From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration* (EPC 2019).

18 PRO ASYL and others, 'Memorandum for a free choice of host country in the EU: Respecting refugees' interests' (2015) <[https://www.proasyl.de/wp-content/uploads/2015/12/PRO\\_ASYL\\_Memorandum\\_free\\_choice\\_english\\_June\\_2015.pdf](https://www.proasyl.de/wp-content/uploads/2015/12/PRO_ASYL_Memorandum_free_choice_english_June_2015.pdf)> accessed 1 December 2022.

19 James C. Hathaway and R. Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 Harv. Hum. Rts. J. 115.

## 5. Rejecting the right to choose the country of asylum

Despite arguments in favour of the right to choose the country of asylum, the current policy paradigm is obviously against any recognition of such a right, as clearly expressed in the Commission's 2018 paper 'Managing migration in all its aspects: progress under the European Agenda on Migration'<sup>20</sup>, with the proposition that '[asylum] applicants should not have a free choice as to the Member State in which they apply for international protection.'

In fact, since EU Dublin system and the Schengen regime were established in early 1990s, it appears to be a deliberate policy choice by the EU to deny such a right to asylum seekers. As noted above, the legal argumentation against the right to choose the country of asylum relies largely on a lack of explicit recognition of such a right in refugee law and the formulation of article 31 of the 1951 Convention. It is argued that, as per the 1951 Convention, an asylum seekers' only individual right in this context is the right not to be subject to a transfer contrary to the non-refoulement principle and the derivative right of admission to a country is dependent on the purpose of seeking protection<sup>21</sup>.

On a similar note, in one case before the Irish Court of Appeal<sup>22</sup>, while the element of choice embodied in the 1951 Convention as to the country of asylum was recognised, the verdict ultimately reduced it to simply protecting the asylum seeker against being forced to make an asylum application in a country of mere transit.

From a policy perspective, it has been argued that allowing the free choice of country of asylum would motivate asylum seekers to travel to countries with better living conditions and economic prospects, creating an imbalanced

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20 Commission, 'Communication from the Commission to the European Parliament, the European Council And The Council Managing Migration in all its Aspects: Progress under the European Agenda on Migration' COM/2018/798 final.

21 Kay Hailbronner, 'Legal Requirements for the EU-Turkey Refugee Agreement: A Reply to J. Hathaway' (*Verfassungsblog*, 11 March 2016) < <https://verfassungsblog.de/legal-requirements-for-the-eu-turkey-refugee-agreement-a-reply-to-j-hathaway/> > accessed 1 December 2022.

22 M.I.F. and The International Protection Appeals Tribunal, The Minister For Justice And Equality, Ireland and The Attorney General [2018] IECA 36.

burden on asylum systems.<sup>23</sup> This argument disregards a lack of evidence as to how rational choice logic based on cost-benefit analysis helps to determine people's movements, as explained more fully.<sup>24</sup>

In current practice, contested protection elsewhere notions – namely the 'safe third country' and 'first country of asylum' concepts – mainly rely on the presumption that asylum seekers are required to seek refuge at the first instance possible based on the implication that asylum seekers do not have the freedom to choose their country of asylum.

## 6. Conclusion: Are we seeing the emergence of a new norm that grants the right to choose the country of asylum?

Admittedly, many causes célèbres of international refugee law point to the fact that the relatively limited horizon of the 1951 Convention falls short of responding to today's intricacies, leaving us with the struggle to fill the gaps.

Being one of the notions of refugee law without specific regulation, the right to choose the country of asylum leaves much to the art of legal interpretation. This exercise of constructing the law is inevitably inspired, at least a little bit, by our vision of what kind of a world we want to live in.

Hence, it is possible to interpret the recognition of the right granted to Ukrainians to choose the country they wish to seek protection in as a step towards the recognition of this right as a regional customary norm reflecting state practice and the conviction of legal bindingness.

However, contradicting practices of protection elsewhere concepts that deny asylum seekers the choice also still stand. Consequently, the combination of Ukrainians' visa-free status and the formulation of the Council Decision introducing temporary protection, although applicable to millions of refugees, could still be argued to indicate a specific practice rather than a general affirmation of the right.

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23 Daniel Thym, 'Temporary Protection for Ukrainians: the Unexpected Renaissance of 'Free Choice'' (*EU Immigration and Asylum Law and Policy*, 7 March 2022) < <https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/> > accessed 1 December 2022.

24 Sergio Carrera and others, 'European Union Policies on Onward and Secondary Movements of Asylum-seekers and Refugees: A Critical Overview of the EU's Migration Management Complex' (*CEPS*, 8 March 2022) pp 11-12 < <https://www.ceps.eu/ceps-publications/european-union-policies-on-onward-and-secondary-movements-of-asylum-seekers-and-refugees/> > accessed 1 December 2022.



Still, particularly in light of the fact that both the Commission and the Council have for the first time agreed that lifting intra-EU mobility restrictions helps Member States share responsibility for protecting asylum seekers, its potential to reignite a wider discussion on the right to choose country of asylum is undeniable.

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# **Section II**

Responses of the  
EU+ Countries to  
the Ukrainian  
Displacement

# Chapter 6

## Attitudes towards Ukrainian Refugees and Governmental Responses in 8 European Countries

Dr Lenka Dražanová\* and Prof Andrew Geddes\*\*

### 1. Introduction

This article uses new survey data gathered in late May and early June 2022 by the Observatory for Public Attitudes to Migration (OPAM)<sup>1</sup> at the European University Institute (EUI) to explore public attitudes to Ukrainian displacement in eight EU member states (Austria, Czechia, Germany, Hungary, Italy, Poland, Romania, Slovakia). We show attitudes towards Ukrainian refugees and to actions of governments, explore variation between the eight countries and also compare attitudes towards Ukrainian refugees with those toward Syrian refugees. We do so because public attitudes are likely to be an important

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\* Research Fellow, Migration Policy Centre, European University Institute.

\*\* Professor of Migration Studies/Director of the Migration Policy Centre, European University Institute.

1 Migration Policy Centre (EUI), ‘Observatory of Public Attitudes to Migration’ <<https://migrationpolicycentre.eu/opam/about/>> accessed 1 December 2022.

facilitator or constraint of government actions. This is not to say that there is a simple transmission mechanism whereby politicians respond to public sentiment. The relationship is clearly far more complex than that; not least, because political elites through their actions and words about migration and refugees do influence and shape public attitudes as too can media representations of migration and refugee flows. So, while there is a complex debate about the relationship between attitudes and policy<sup>2</sup>, we assume that attitudes matter; not least, because ‘responding to the public’ is an important source of legitimation for political elites.

## 2. Understanding attitudes

There is a rich literature on attitudes to migration, asylum and refugees from which we can extract five points that inform our analysis. First, attitudes to migration are formed in the same way as attitudes to other issues. By this, we mean that people’s attitudes and world views are formed early in life and shaped by key early life experiences<sup>3</sup>, particularly education. Second, once established world views and attitudes are difficult to shift and are thus relatively stable over time.<sup>4</sup> Third, events or crises are likely to increase the salience – or level of public attention – to the issues of migration and refugees<sup>5</sup> and activate pre-existing dispositions rather than prompt people to change their underlying attitudes. Fourth, attitudes to migration have become more favourable over time across Europe.<sup>6</sup> This does not mean that there is a wave of pro-migration sentiment, but it does suggest that there has been a growth in support for migration over the last 20 years or so that is most likely linked to generational change. Finally, and very relevant for this chapter, there is variation across countries within the

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- 2 Martin Ruths, ‘Who cares what the people think? Public attitudes and refugee protection in Europe’ (2022) 21 *Politics, Philosophy & Economics*.
  - 3 Lenka Dražanová, ‘Sometimes it is the little things: A meta-analysis of individual and contextual determinants of attitudes toward immigration (2009–2019)’ (2022) 87 *International Journal of Intercultural Relations*.
  - 4 Anne-Marie Jeannet and Lenka Dražanová, ‘Cast in the Same Mould: How Politics During the Impressionable Years Shapes Attitudes Towards Immigration in Later Life (2019) Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2019/79 < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3489216](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3489216)> accessed 1 December 2022.
  - 5 James Dennison, ‘A Review of Public Issue Salience: Concepts, Determinants and Effects on Voting’ (2019) 17 *Political Studies Review* 436.
  - 6 James Dennison and Andrew Geddes, ‘A Rising Tide? The Salience of Immigration and the Rise of Anti-Immigration Political Parties in Western Europe’ (2018) 90 *The Political Quarterly* 107.

EU in attitudes to migration and refugees. Countries in Central Europe have been more sceptical about or opposed to migration and refugee inflows in the past, but differences across CEE and Western Europe appear less pronounced with regard to Ukrainian refugees. To explore these country differences further, we analyse public attitudes in selected Western European countries as well as all of the Visegrad countries, plus Romania.

By now it is well known that more than 6 million<sup>7</sup> have been displaced by the war in Ukraine. Potentially, this kind of mass displacement could be politically destabilizing, but what we actually have seen is a wave of support from governments and the public. Key contrasts are the supportive responses of EU governments and the ways that Ukrainian displacement has been covered in the media compared to other refugees. The media coverage for Ukrainian refugees has tended to be very positive and to focus on the ‘human’ side of displacement whereas the coverage of Syrian displacement was dominated by scenes of chaos and disorder at sea and land borders in the face of large-scale arrivals, albeit nowhere near the scale of Ukrainian arrivals. This is significant because many people have ‘conservative’ value orientations meaning that they value order and stability<sup>8</sup> and that scenes of apparent chaos are likely to trigger concern. Clearly, the fact that Ukrainians were also represented as fellow Europeans played a key role too and there can be little doubt that media coverage, compared to Syrians, has been racialized.<sup>9</sup>

### 3. Attitudes to Ukrainian displacement

Given that the situation for Ukrainian refugees seems likely to be protracted, it is important to understand how citizens in key hosting states have responded to the situation and also think about how attitudes could evolve in the future. For this, we surveyed a combined total of 8525 respondents in the eight countries between 25<sup>th</sup> May and June 6<sup>th</sup> 2022 with nationally representative samples of approximately 1000 respondents. In this article, we report the top-line data by

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7 UNHCR, ‘Ukraine Situation Flash Update #24’ <<https://data.unhcr.org/en/documents/details/94640>> accessed 1 December 2022.

8 Eldad Davidov and others, ‘Values and Support for Immigration: A Cross-Country Comparison’ (2008) 24 *European Sociological Review* 583.

9 Asylum Access, ‘How US and European Media Language Used to Describe the Ukrainian Crisis Reflect Deeply Rooted Racism Against Non-European Refugees’ (*Asylum Access*, 13 May 2022) <<https://reliefweb.int/report/world/how-us-and-european-media-language-used-describe-ukrainian-crisis-reflect-deeply-rooted>> accessed 1 December 2022.

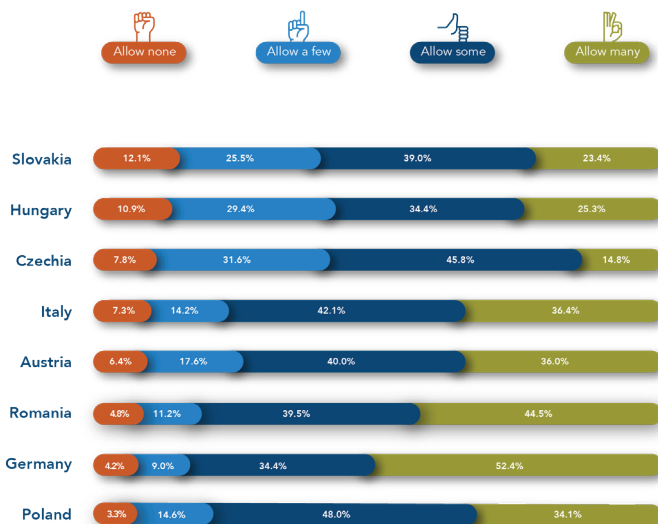
which we mean the overall findings. In later work, we will be able to dig more deeply into the data to look at the influence of, for example, socio-demographic factors such as age, gender and education.

We began by asking respondents to what extent they think their country should allow refugees to move and live in their country. Respondents could choose between allowing none at all; allowing a few; allowing some; and, allowing many. Figure 1 shows that in all eight countries respondents are strongly supportive of welcoming Ukrainian refugees. Even in the most negative countries such as Slovakia and Hungary, respondents who would allow no Ukrainian refugees at all amount to only around 10 per cent. Germany and Romania are among the most positive, more than half of the respondents in these two countries would support allowing many Ukrainian refugees to come to their country.

It is worth highlighting that what we observe is that the debate is not a simple binary between those who oppose entry for refugees from Ukraine and those who favour their free unconditional entry. The overwhelming majority in all of the surveyed countries would allow at least a few Ukrainian refugees to move and live in their countries, but we find that strong support also brings with it some preference that numbers be regulated or controlled. This could suggest that the powerful emotional response to mass Ukrainian displacement also brings with it a concern that the relevant authorities, particularly national governments, are seen as being able to effectively manage the situation.

**Figure 1: Attitudes to the admission of Ukrainian refugees**

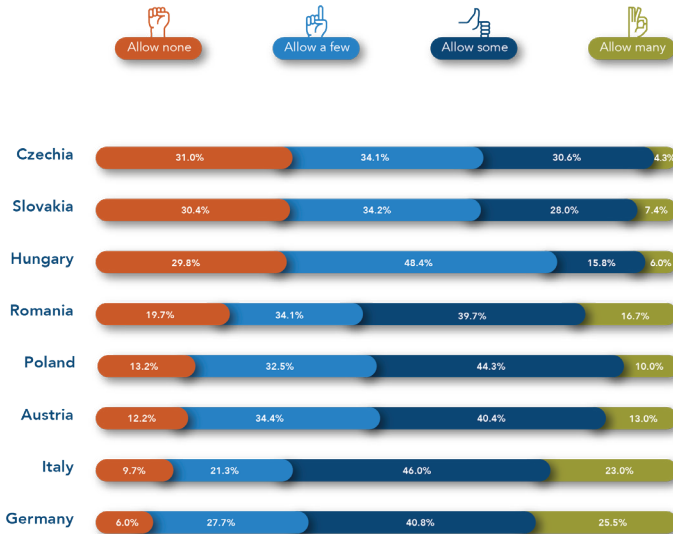
### Allow Ukrainian Refugees



As we were interested in whether there might be differences between the acceptance of Ukrainian refugees compared to refugees from other countries, we also conducted a survey experiment in each country. We randomly split the sample into two with half of the respondents being asked explicitly about the acceptance of Ukrainian refugees, while the other half was asked about Syrian refugees. Randomization ensures that subjects are expected to be identical in all other (un)observed characteristics that may confound a comparison across groups.

**Figure 2: Attitudes to the admission of Syrian refugees**

### Allow Syrian Refugees



Our survey experiment is an opportunity to test the validity of in-group favouritism in explaining public attitudes towards immigration and refugees based on the perceived ethnic and cultural threat posed by culturally more distant refugee groups as compared to refugees perceived as being culturally closer. The results in Figures 1 and 2 confirm previous research findings in the European context that attitudes toward immigrants vary across groups<sup>10</sup>, being more negative toward ethnic minorities and especially pronounced in the case

<sup>10</sup> Kirk Bansak, Jens Hainmueller and Dominik Hangartner, 'Europeans support a proportional allocation of asylum seekers' (2017) 1 Nature Human Behaviour.

of Muslims. While our analysis shows that participants in the survey experiment in all European countries generally favour Ukrainians over Syrians, the differences are much more pronounced in Central and Eastern Europe.

We suggest two reasons for this difference. First, in CEE countries where historical processes have seen ethnic minorities turned into majorities and vice-versa, the (re)established post-communist states are based on an ethnocultural national identity and a political project that centres on the creation of a culturally stable and ethnically homogeneous majority within the new sovereign borders. From this perspective, the arrival of ethnically and culturally diverse groups such as Syrian asylum seekers can be perceived as threatening already vulnerable national identities. Particularly in countries such as Czechia, Slovakia and Hungary which are relatively small in terms of population size and area, the arrival of ethnically and culturally diverse groups can be represented as a ‘cultural’ threat.<sup>11</sup>

Second, CEE countries had only small numbers of asylum applications before 2022. Although the causal relations between contact and attitudes are not fully established, a large body of research lends firm support to the thesis that contact is likely to decrease negative attitudes and reduce hostility toward other groups’ populations.<sup>12</sup> Using insights from contact theory, it is possible to say that respondents in Western European countries have had more chances of personal experience with Syrian refugees and thus more opportunities for intergroup contact. That said, positive contact is more successful when Allport’s (1954) optimal contact conditions are met: equal status, common goals, cooperation and support from authority figures. As, over time, Ukrainians have been one of the largest minorities in CEE, citizens in these countries have had more opportunities to have contact with Ukrainians rather than Syrians.

We also wanted to try to understand attitudes toward governments’ responses to the Ukrainian crisis. In 2015 it was divisions and disunity between EU governments that were integral to the crisis of displacement and led to the subsequent political and institutional crisis with a breakdown of European cooperation. It is thus crucial to monitor the satisfaction with government responses to the current situation. Figure 3 shows that the majority of respondents in the eight European countries are satisfied with their governments’

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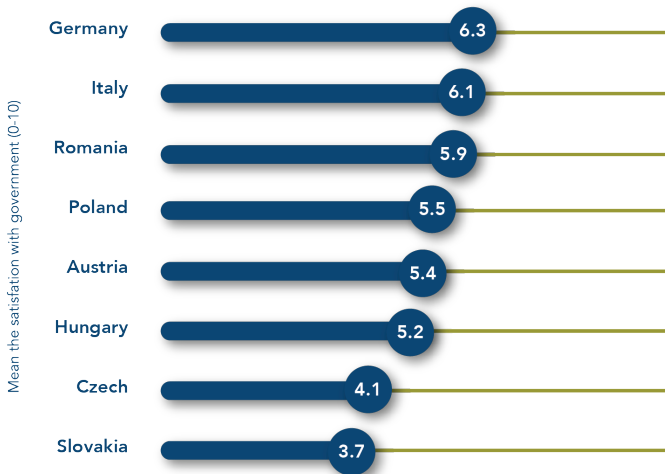
11 Lenka Dražanová, ‘Why are Ukrainian refugees welcomed in Central and Eastern Europe?’ (*MPC Blog – Debate Migration*, 23 March 2022) < <https://blogs.eui.eu/migrationpolicycentre/why-are-ukrainian-refugees-welcomed-in-central-and-eastern-europe/> > accessed 1 December 2022.

12 Thomas F. Pettigrew and Linda R. Tropp, ‘A meta-analytic test of intergroup contact theory’ (2006) *Journal of Personality and Social Psychology* 751.



actions towards Ukrainian refugees and only Slovakia and the Czech Republic have satisfaction levels below the average. On the other hand, it is important to highlight that while we asked specifically about the governments' actions towards refugees from Ukraine, it can be difficult to disentangle responses from more general levels of satisfaction with the government. Moreover, responses provided quite early after the conflict's eruption might also reflect the so-called 'rally round the flag effect' that describes an increased short-run popular support of a country's government or political leaders during periods of international crisis and war.<sup>13</sup>

**Figure 3: Satisfaction with government actions towards Ukrainian refugees**



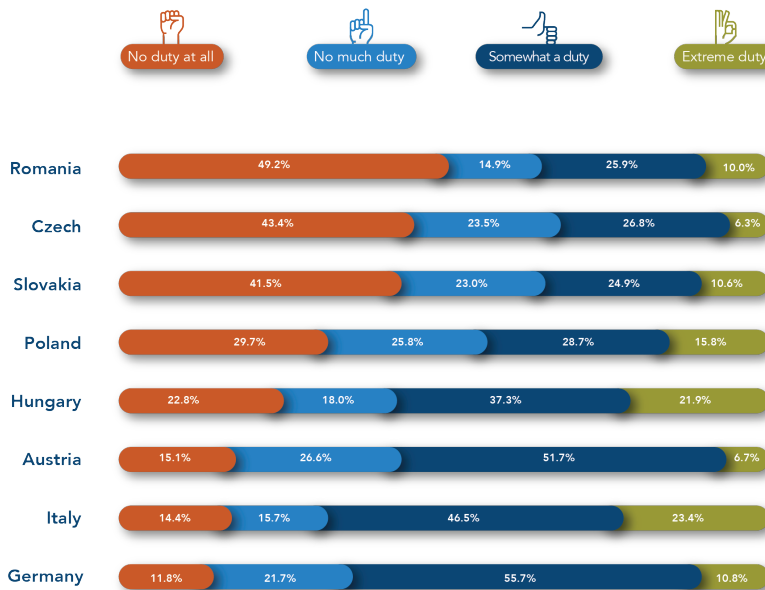
We were also interested in understanding whether respondents were satisfied with their governments' specific actions toward Ukrainian refugees. We found that, in each of the eight countries surveyed, respondents who are satisfied with their government's actions are also much more likely to be supportive of their country allowing refugees from Ukraine to come. Of course, the direction of causality is difficult to disentangle, but it is likely that if support for Ukrainian refugees from the public fades away in time, then levels of satisfaction in government would also be likely to fall. Since these levels of satisfaction are far from overwhelming, the support for governments' actions is potentially fragile.

13 John E. Mueller, 'Presidential Popularity from Truman to Johnson1' (2014) 64 *American Political Science Review* 18.

European countries have been contributing to the defence of Ukraine via financial, humanitarian and military aid with CEE states among those contributing the most in relative terms.<sup>14</sup> Figure 4 shows that the majority of respondents in CEE see their country as having no duty at all or not much duty towards Ukraine and Ukrainians. Perhaps surprisingly, the majority of Hungarians feel they have somewhat or extreme duty toward Ukraine. These results contrast with respondents from Austria, Italy and Germany, where the majority in each country believes their country has an extreme or at least a somewhat duty towards Ukraine.

**Figure 4: Attitudes towards duty to Ukraine/Ukrainian refugees**

To what extent do you think your country has a duty to Ukrainian refugees/Ukraine?

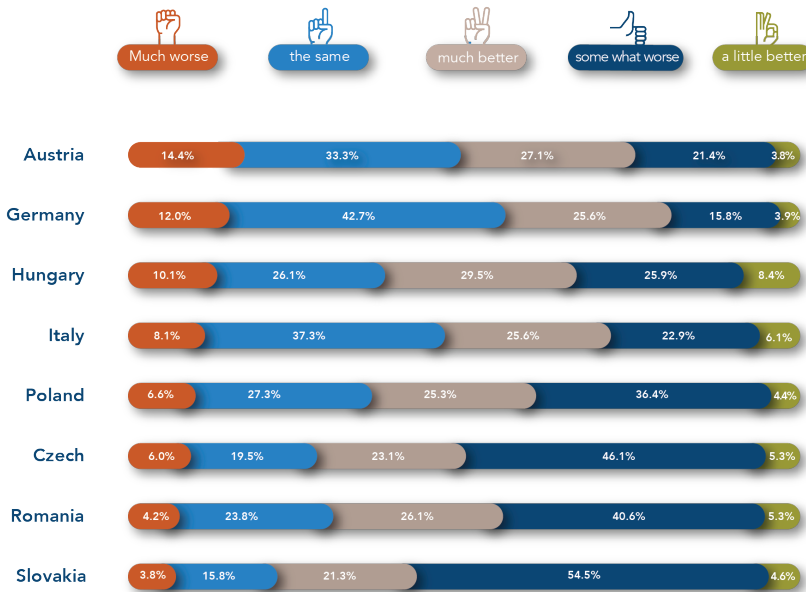


14 Arianna Antezza and others, 'A Database of Military, Financial and Humanitarian Aid to Ukraine' (*KIEL INSTITUTE FOR THE WORLD ECONOMY*, 6 September 2022) <<https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/?cookieLevel=not-set>> accessed 1 December 2022.

Responses to migration and refugees are powerfully driven by perceptions of fairness. When asked whether their government treats Ukrainian refugees better or worse than themselves, Figure 5 shows that more than half of German respondents think that their government treats Ukrainian refugees much or somewhat worse than themselves, while more than half of Slovaks and Czechs think that their government treats Ukrainian refugees much or little better than themselves. Nevertheless, causality can be difficult to disentangle as governments in Slovakia and Czechia did in fact introduce free public transport and other services for Ukrainian refugees. Nevertheless, irrespective of objective better or worse treatment, subjective perceptions of fairness and unfairness can have very powerful effects on attitudes towards refugees.

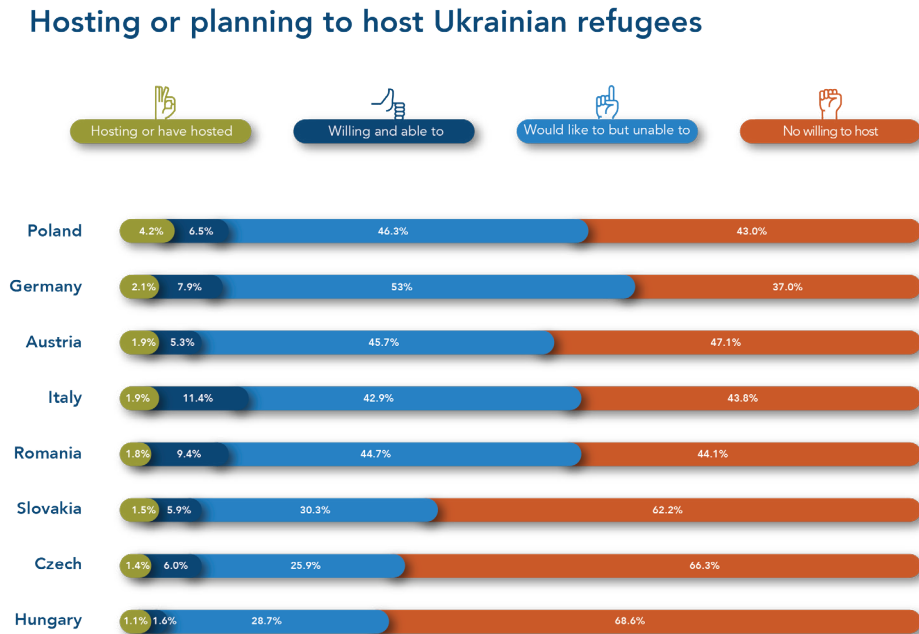
**Figure 5: Attitudes towards the treatment of Ukrainian refugees**

**How do you think government treats Ukrainian refugees compared to yourself?**



Especially in the early days of the conflict, private citizens' humanitarian efforts such as providing free accommodation have been highlighted by media and politicians alike. Figure 6 shows that only a small proportion of respondents in each country have, in fact, either hosted or are willing and able to host Ukrainian refugees. Moreover, clear majorities of citizens in Hungary, Czechia and Slovakia are not willing to host Ukrainian refugees at all. This suggests that in order to diminish potential conflicts in the long run, governments should not rely on private citizens' initiatives, but address the current situation in a systematic manner at the local and national institutional levels.

**Figure 6: Attitudes to hosting Ukrainian refugees**



## 4. Conclusion

Effective policy responses to displacement from Ukraine that are also seen as being fair by citizens are likely to require an informed understanding of the causes and effects of public attitudes. A few months after the full-scale Russian invasion of Ukraine we can see strong support for Ukrainian refugees among all of the eight European countries that were surveyed. This support far exceeds that of other refugee groups as shown by contrasting attitudes towards Syrian refugees. Nevertheless, we also find a preference that even Ukrainian numbers be regulated or controlled.

A key difference from previous large-scale influxes such as the so-called “migration crisis” in 2015-16 is the much more favourable governmental and media responses, notably in CEE countries. At least so far, there seems to be general satisfaction with how things are being handled in all countries surveyed. On the other hand, we also detected some underlying fragility linked to peoples’ need to see that the situation is properly managed which could become more pronounced if the situation is protracted, as seems likely. If the conflict persists and mass displacement becomes a long-term issue, citizens are likely to want to know that there is a plan and that it is being implemented. Otherwise, there is a risk that EU member states could once again turn a crisis of displacement into a political and institutional crisis.

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# Chapter 7

## About-face or Camouflage? Hungary and the Refugees from Ukraine

Prof Boldizsár Nagy\*

### 1. Introduction

In wartime, use war metaphors. The question raised in the title to this piece invites readers to look deeper into the reactions to the consequences of the Russian invasion of Ukraine within Hungary. Has the Hungarian Government truly abandoned its totalising anti-refugee policy and law<sup>1</sup> or is it just camouflaging its xenophobic and racist attitude<sup>2</sup> in an act of political opportunism? Does civil society rescue the prestige of the country? To answer these questions, this chapter will report the facts, the legal developments and then offer an early evaluation.

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\* Associate Professor, Central European University.

1 Boldizsár Nagy, 'Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation' [2019] German Law Journal 1033.

2 Ildikó Barna and Júlia Koltai, 'Attitude Changes towards Immigrants in the Turbulent Years of the 'Migrant Crisis' and Anti-Immigrant Campaign in Hungary' [2019] Intersections 48.



## 2. The facts

We all hope that this will soon be history. Therefore, let us pinpoint the facts working on the assumption that the tragic details of the Russian aggression and its devastation within Ukraine are well known by the reader.

Hungary is one of the four EU Member States bordering Ukraine, sharing a similarly short border with its neighbour, alongside Slovakia (137 and 98 km /rounded/, respectively). Poland and Romania have much longer frontiers (542 and 614 km), as well as the non-EU member Moldova (1 222 km). The table reflecting UNHCR data<sup>3</sup> below shows the number of arrivals to these five countries between 24 February 2022 and 1 April 2022.

State (in the geographic sequence)	Number of persons
Poland	2,405,703
Slovakia	294,885
Hungary	379,988
Romania	629,917
Moldova	391,592

The figures should be treated with caution for two reasons. First, double counting is not excluded (for example, arriving first in Moldova, then moving on to Romania, Hungary and then possibly even further afield.) Secondly, these are accumulated flow data. Nobody knows how many people are actually in the listed countries (stock data) and how many traveled to yet another (further west) country not listed in the table. But it is certain that those who actually

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3 UNHCR, 'Ukraine Refugee Situation' <<https://data.unhcr.org/en/situations/ukraine>> accessed 11 April 2022.

receive assistance and stay in Hungary constitute a much, much smaller group.<sup>4</sup>

These uncertainties notwithstanding, it is beyond doubt that this is the largest outflow of refugees within Europe since World War Two, in the first month exceeding four times the overall figure of refugees from the cruel war in Bosnia-Herzegovina.<sup>5</sup>

Most of those, who arrived in Hungary moved on. This was the experience of those civilians who hosted Ukrainians for one or two nights, and this may be reflected by the fact that the state authorities had only provided 8,644 persons<sup>6</sup> with accommodation by 1 April 2022 at 173 different *ad hoc* shelters. On top of this, only 7,947 applications<sup>7</sup> for temporary protection have been registered since 29 March.

Views may be divided on how unexpected the invasion of Ukraine was<sup>8</sup>, but it is certain that the Hungarian Government was unprepared for the arrival and reception of large numbers of people seeking protection.

The measures offered by the state were/are varied. As already mentioned, a fragment of those who arrived were accommodated in shelters, usually provided by municipalities. The government was slow in its reaction and essentially outsourced the task to five Church-based organisations and the Red Cross and to the National Directorate-General for Disaster Management. This had to be done as Hungary today has no functioning asylum system. It has been eradicated. All reception centres were closed down and the non-entrée

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4 Robert Tait, 'Hungary accused of inflating number of Ukrainian arrivals to seek EU funds' *The Guardian* (Hungary, 31 March 2022) <<https://www.theguardian.com/world/2022/mar/30/hungary-accused-of-inflating-number-of-ukrainian-arrivals-to-seek-eu-funds>> accessed 1 December 2022. At the time of proofreading, end of November 2022, the number of border crossings into Hungary stood at 1 812 974, but the number of persons registered for protection amounted only to 32 271 <<https://data.unhcr.org/en/situations/ukraine>> accessed 11 April 2022.

5 UNHCR, 'Refugee Data Finder' <<https://www.unhcr.org/refugee-statistics/download/?url=N-g0yd5>> accessed 11 April 2022.

6 Belügyminisztérium Országos Katasztrófavédelmi Főigazgatóság, 'Továbbra is szerteágazó feladatokat végez a katasztrófavédelem a menekültekkel kapcsolatban' (01 April 2022) <<https://www.katasztrofavedelem.hu/197/kozlemenyek/262940/tovabbra-is-szerteagazo-feladatokat-vegez-a-katasztrofavedelem-a-menekultekkel-kapcsolatban>> accessed 1 December 2022.

7 About Hungary, 'Hungary receives highest number of refugees per capita from Ukraine' *About Hungary* ( 29 March 2022) <<https://abouthungary.hu/news-in-brief/hungary-receives-highest-number-of-refugees-per-capita-from-ukraine>> accessed 1 December 2022.

8 Andrew Roth and others, 'Russia's war in Ukraine: complete guide in maps, video and pictures' *The Guardian* (15 May 2022) <<https://www.theguardian.com/world/2022/mar/17/russias-war-in-ukraine-complete-guide-in-maps-video-and-pictures>> accessed 1 December 2022.

to Hungary's territory and non-access to procedure policy<sup>9</sup> was introduced in 2015-2016, followed in 2020 by the closure of the two remaining transit zones at the border.

The latter (and not the moribund refugee authorities) actually organised the provision of food, assistance, transport and shelter through local 'defence committees'<sup>10</sup> for those who were not being taken care of by civil society organisations. It is symptomatic that on 25 March the webpage of the Directorate-General for Aliens Policing (to which asylum matters belong) still advised those fleeing from Ukraine to turn to civil society organisations 'in case you need accommodation, food, medicine or other types of help and care'. It took almost a month for the government to set up a transit reception hub in a sports-centre<sup>11</sup> and thereby end the daily reception of thousands of forced migrants at the railway stations, with people sleeping on the floor and relying on the goodwill of private individuals and charity organisations.

Civil society organisations sprang to the scene from the very first moment. A simple comparison of their joint website<sup>12</sup> with that<sup>13</sup> of the responsible government agency tells all. Civil society organisations revived their 2015 memories and utilised their experience<sup>14</sup> to provide professional assistance right at the entry points on the frontier, as well as at Budapest's main railway stations and, essentially, nationwide. Volunteers offered accommodation, transportation, food, clothes, childcare, interpretation, psychological treatment, medical care, travel arrangements and financial assistance at such a scale that the hundreds of thousands transiting Hungary could do so without additional trauma or being forced to use up the remnants of their resources.

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9 Case C-808/18 *Commission v Hungary* [2020].

10 95/2022. (III. 10.) Korm. rendelet a megyei, fővárosi védelmi bizottságok humanitárius feladatai ellátásáról.

11 Hungary Today, 'New Humanitarian Transit Point: "This is the coordination we've been waiting for for three weeks"' *Hungary Today* (22 March 2022) <<https://hungarytoday.hu/new-humanitarian-transit-refugee-asylum-ukraine-war-budapest-bok-hall/>> accessed 1 December 2022.

12 For those in need of help in Hungary <<https://ukrainehelp.hu/en/>> accessed 1 December 2022.

13 National Directorate-General for Aliens Policing, 'Information for Ukrainian nationals fleeing from Ukraine' (30 March 2022) <[http://www.bmbah.hu/index.php?option=com\\_k2&view=item&layout=item&id=1753&Itemid=2124&lang=en](http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=1753&Itemid=2124&lang=en)> accessed 1 December 2022.

14 Bori Simonovits and others, *The Social Aspects of the 2015 Migration Crisis in Hungary* (TÁRKI Social Research Institute, 2016).

### 3. The law

The legal regime applicable to asylum seekers has had two phases thus far. The first<sup>15</sup> was in force between 10 pm on 24 February 2022, that is the day of the attack against Ukraine, until 8 March, when a new government decree<sup>16</sup> (unofficial English translation here)<sup>17</sup> was published that aimed at harmonisation with the EU Council implementing decision<sup>18</sup> establishing the existence of a mass influx of displaced persons from Ukraine, adopted on 4 March 2022.

#### 3.1 The right to enter and stay

Ukrainian nationals with a biometric passport had the right to enter Hungary as a consequence of the relevant EU rules<sup>19</sup> since 2017. Practically, the border crossing points were opened to everyone coming from Ukraine already on 24 February, but individual checks were (and still are) in place. People could come even if they only had identity documents but no passports. This is especially relevant in the case of the children, few of whom possess a travel document. According to non-official accounts<sup>20</sup>, Ukrainians who cross the Romanian-Hungarian border (so do not come directly from Ukraine) are also permitted to

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15 Government Decree 56/2022 (24 February) providing for derogations from the transitional rules relating to asylum procedure laid down in Act LVIII of 2020 on transitional rules relating to the termination of state of danger and on the state of epidemiological preparedness.

16 86/2022. (III. 7.) Korm. rendelet az ideiglenes védelemre jogosultként elismert személyekkel kapcsolatos veszélyhelyzeti szabályokról, továbbá a közfoglalkoztatásról és a közfoglalkoztatáshoz kapcsolódó, valamint egyéb törvények módosításáról szóló 2011. évi CVI. törvény szabályainak eltérő alkalmazásáról.

17 Government Decree No. 86/2022. (III. 7.) on rules applicable in state of danger and related to persons recognized as eligible for temporary protection, and on derogations from the rules of Act CVI. of 2011 on public employment and on the amendment of acts related to public employment and of other acts.

18 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

19 Regulation (EU) 2017/850 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Ukraine) [2017] OJ L 133/1.

20 Hungarian Helsinki Committee, ‘Frequently Asked Questions with Answers’ <[https://helsinki.hu/en/wp-content/uploads/sites/2/2022/03/FAQ\\_EN\\_new.pdf](https://helsinki.hu/en/wp-content/uploads/sites/2/2022/03/FAQ_EN_new.pdf)> accessed 1 December 2022

enter if they have a travel document. However, third country nationals coming from Ukraine but trying to enter from Romania seem to be stopped at the border,<sup>21</sup> unless they meet the Schengen Border Code's criteria for entry.

The circle of beneficiaries has differed in the two phases. The government decree adopted in the wake of the implementing decision with a retroactive effect narrowed the beneficiaries of temporary protection (TP), excluding third country nationals who had legally resided in Ukraine. Whereas until 8 March they could also apply for TP, after that date they were only entitled to a Certificate of Temporary Residence valid for 30 days.<sup>22</sup> Only those third country nationals remained entitled to TP, who had benefited from international protection or equivalent national protection in Ukraine before 24 February 2022 – as prescribed in Article 2 (1) b) of the Council decision or who constitute family members of a Ukrainian citizen.

A particularly Hungarian problem emerged in relation to those dual nationals, who were beneficiaries of the large-scale naturalisation of persons,<sup>23</sup> and lived outside of Hungary but according to a special rule on naturalisation could acquire Hungarian citizenship without having to move to Hungary. In late February for a few days they were excluded from all benefits as they were considered 'normal' Hungarian citizens, but then, following an outcry by civil society, the rules in force since 8 March now prescribe that 'Hungarian nationals with permanent residence in Ukraine and arriving from Ukraine on 24 February 2022 or on a later date shall be granted all the benefits and advantages provided to beneficiaries of temporary protection unless they enjoy more favourable treatment with regard to their Hungarian nationality.' (Section 8 of Gov. Decree 86/2022)

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21 Hungarian Helsinki Committee, 'War in Ukraine: Protection Situation in Hungary'(16 March 2022) <[https://helsinki.hu/en/wp-content/uploads/sites/2/2022/03/War-in-Ukraine\\_1603update.pdf](https://helsinki.hu/en/wp-content/uploads/sites/2/2022/03/War-in-Ukraine_1603update.pdf)> accessed 1 December 2022.

22 National Directorate-General for Aliens Policing, 'Information for diplomatic missions accredited to Hungary' (25 March 2022) <[http://www.bmbah.hu/index.php?option=com\\_k2&view=item&layout=item&id=1750&Itemid=2122&lang=en#\\_ftn1](http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=1750&Itemid=2122&lang=en#_ftn1)> accessed 1 December 2022.

23 Szabolcs Pogonyi, 'The passport as means of identity management: making and unmaking ethnic boundaries through citizenship' [2019] 45:6 *Journal of Ethnic and Migration Studies* 975.

## 3.2 Procedure of recognition

Being recognised as a temporarily protected person occurs through a procedure that is based on the Asylum Act (Act LXXX of 2007<sup>24</sup> – a somewhat dated translation, here<sup>25</sup>), its implementing Government decree (301/2007) and the specific rules promulgated in Government decree 86/2022. Consequently, no personal interview is required, and no means-testing is demanded, thus reception conditions are provided even in the case that the person would be in a position to personally finance them.

However, there is an important difference between the ordinary regime and the one applied as a consequence of the 2022 Government decree. Whereas the Act speaks of a duty to ‘certify or substantiate’ the fact of belonging to the protected group (Section 20 of the Act), the new decree raises the bar: it prescribes that the applicant must ‘prove’ that link.

This is a much higher burden of proof, especially as not only the nationality or the family link has to be confirmed but also the fact that the person was ‘residing’ in Ukraine before 24 February, which may be difficult in the case of refugees who had to depart under duress and in a rush, so may not have documentary evidence with them that confirms their address. At the time of writing, this text provides no information on addressing this difference, as the procedure conducted by the Asylum Directorate of the National Directorate-General for Alien Policing may last for 45 days and no public accounts of the specific details have surfaced or been released.

## 3.3 Work

Laudably, the administration made early steps to provide access to the labour market. On 7 March, Government Decree 86/2022<sup>26</sup> rendered certain jobs accessible without a labour permit (list at pp 5854–57)<sup>27</sup>, others with a labour permit, but without ascertaining first if there is a shortage of labour for that

24 2007. évi LXXX. törvény a menedékjogról.

25 Act LXXX of 2007 on Asylum. < <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5773d2594> > accessed 1 December 2022.

26 86/2022. (III. 7.) Korm. rendelet az ideiglenes védelemre jogosultként elismert személyekkel kapcsolatos veszélyhelyzeti szabályokról, továbbá a közfoglalkoztatásról és a közfoglalkoztatáshoz kapcsolódó, valamint egyéb törvények módosításáról szóló 2011. évi CVI. törvény szabályainak eltérő alkalmazásáról.

27 Hivatalos Értesítő 62. szám (22 December 2021).

specific job – in other words, without giving preference to Hungarian and other EU citizens

On 10 March, a government decree<sup>28</sup> offered support to future employers of a temporary protected person by covering 50 % of the employee's monthly accommodation and travel expenses (maximum to the value of EUR 162) and EUR 32 per child living in the same household. The employer may claim this support for the duration of the employment, but for no longer than 12 months. This support does not include any Ukrainian employed before the war.

A balancing factor is that beneficiaries of temporary protection who are unable to find a job may be called upon to do 'public /community employment'.<sup>29</sup> Both taking and rejecting this offer entails the loss of the general monthly subsidy that amounts to roughly one fifth of the pay offered for public employment.

### 3.4 Reception Conditions and Rights

Beneficiaries of temporary protection are entitled to:<sup>30</sup>

- An ID card and residence permit for a year;
- Being united, either in Hungary or another Member State, with other family members who had been recognised as beneficiaries of temporary protection in another EU Member State. Family unification with persons not enjoying temporary protection in another EU Member State is subject to the general rules. The preferences offered to refugees and persons enjoying subsidiary protection in the Hungarian Asylum Act are not extended to temporarily protected persons, nor is Para-

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28 96/2022. (III. 10.) Korm. rendelet az Ukrajna területéről érkezett, ukrán állampolgársággal rendelkező személyek munkavállalásának támogatásáról.

29 106/2022. (III. 12.) Korm. rendelet a veszélyhelyzet ideje alatt szomszédos országban fennálló humanitárius katasztrófára tekintettel, az ideiglenes védelemre jogosultként elismert személyek foglalkoztatásával és juttatásaival kapcsolatos egyes szabályokról, valamint a menedéjogról szóló 2007. évi LXXX. törvény végrehajtásáról szóló 301/2007. (XI. 9.) Korm. rendelet módosításáról.

30 Menedék Association, 'What Will Happen to People Fleeing Ukraine?' (25 February 2022) <<https://menedek.hu/en/news/what-will-happen-people-fleeing-ukraine-last-update-10052022>> accessed 1 December 2022.

graph 3 of Article 15 of the Directive<sup>31</sup> allowing unification with family members who ‘are not yet in a Member State’ transposed;

- Accommodation at a reception centre run by the asylum authority, with reception services available during the entire period of temporary protection. They may also choose private accommodation;
- Childcare and tuition-free schooling until the age of 18;
- Healthcare that extends to primary care, specialised medical care or hospital care in cases of urgent need, prenatal care, obstetric care, the provision of certain medicines, oncology patient care and other types of care for chronic patients, emergency dental care;
- Reimbursement for costs connected to primary and secondary education (including travel costs);
- Reimbursement for travel costs (for purposes connected to administrative procedures, health care, integration services, job seeking, trips connected to employment);
- Reimbursement for the translation costs of their documents;
- Free participation in a Hungarian language course (520 lessons);
- A monthly subsistence allowance of approximately EUR 75 per adults and EUR 35-45 per child;
- Since 27 February, travel free of charge<sup>32</sup> on any line of the Hungarian Railways;
- Those recognised as beneficiaries are also entitled to financial support when leaving Hungary for good.

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31 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.

32 Travel from Ukraine to Hungary <<https://www.mavcsoport.hu/en/mav-start/international-travels/travel-ukraine-hungary>> accessed 1 December 2022.



## 4. Conclusion and Evaluation

Hungary has not closed its borders to the refugees coming directly or indirectly from Ukraine. In the context of Hungary's refusal to allow the transit of weapons to support the self-defence of Ukraine, and in light of its government-controlled press essentially avoiding blaming Putin and Russia<sup>33</sup> as aggressors, this is a welcome measure. More or less the requirements of the Council Directive 2001/55/EC on temporary protection and its implementing decision (EU) 2022/382 are being complied with.

Why can one not welcome the end of Hungary's dark period of total denial of international protection, condemned by both the ECtHR and the CJEU several times?<sup>34</sup> Because it hasn't happened.

Except for those who come from Ukraine, it is still the case that nobody has access to Hungary and its asylum procedure. All others who would apply for asylum are still treated as 'illegal migrants' who are mercilessly pushed over the border fence into Serbia,<sup>35</sup> even if they originally came from another country, for example from Romania. The insistence on not providing access to Hungary's territory and the asylum procedure is in flagrant opposition to the judgment resulting from the infringement case C-808/18 *Commission v Hungary*. This has led the Commission to take the rare measure of starting a procedure under Article 260 TFEU, seeking the imposition of financial sanctions on Hungary<sup>36</sup> for non-compliance with the December 2020 judgment.

Therefore, the belated, half-hearted actions of the Hungarian Government do not represent an about face of their asylum policy. It is simply camouflage, with the government trying to hide the underlying total denial of solidarity with the persecuted and threatened of the world, especially those who are not Christian and may have a different skin colour or culture. It is a good

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33 Michelle Goldberg, 'Dispatch from Hungary: The Man Trying to Return His Country to the Free World' *The New York Times* (18 March 2022).

34 Boldizsar Nagy, 'Hungary, In Front of Her Judges' in Paul Minderhoud and others (eds), *Caught In Between Borders: Citizens, Migrants and Humans* (WLP 2019). 251

35 Hungary Today, 'FM Szijjártó to UN Human Rights Council: Hungary Accepts Ukraine Refugees but Rejects Illegal Immigrants' *Hungary Today* (23 March 2022) <<https://hungarytoday.hu/szijjar-to-un-human-rights-council-ukraine-refugees/>> accessed 1 December 2022.

36 European Commission, 'Migration: Commission refers HUNGARY to the Court of Justice of the European Union over its failure to comply with Court judgment' (Brussels 12 November 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_5801](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5801)> accessed 1 December 2022.

excuse to demand solidarity and financial support from the EU<sup>37</sup>, by a prime minister who vociferously denied and refused exactly these two contributions<sup>38</sup> when other Member States expected them from Hungary.

The grim picture has a silver lining: Hungarian civil society has stepped in and either with the resources and labour of the volunteers or – in the case of the Church-based organisations and the Red Cross – with the help of an enormous government subsidy of almost EUR 1.5 million.<sup>39</sup> Their efforts have helped preserve the honour of Hungarian society.

But it is clear that in the longer term and with the arrival of the harder cases who cannot move on to other members of the Ukrainian diaspora further to the west or in North America, the size of the tasks will increase with one or two orders of magnitude. That will be a task requiring substantive, coordinated and professional state intervention and sacrifice.

That is, a real about face, a true U-turn on the road to Damascus.

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37 Letter from Viktor Orbán to President of the European Commission (18 March 2022) <<https://cdn.kormany.hu/uploads/sheets/8/86/86a/86ade12ca394e1244d5ea5dd51e1b85.pdf>> accessed 1 December 2022.

38 Miniszterelnök, 'Prime Minister expresses outrage at European Commission's proposal' (6 May 2016) <<https://miniszterelnok.hu/prime-minister-expresses-outrage-at-european-commissions-proposal/>> accessed 1 December 2022.

39 1119/2022. (III. 5.) Korm. Határozat a szomszédos országokban felmerülő humanitárius katasztrófa kezelésének támogatásáról.

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- 1119/2022. (III. 5.) Korm. Határozat a szomszédos országokban felmerülő humanitárius katasztrófa kezelésének támogatásáról 2007. évi LXXX. törvény a menedéjogról
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# Chapter 8

## Stabilisation of Emergency Measures: Poland's Refugee Reception System One Month After the Russian Attack on Ukraine

Dr Marta Jaroszewicz\* and Mateusz Krępa\*\*

### 1. Introduction

On 24 February 2022, by invading Ukraine, Russia started the biggest war of one state against another in Europe since 1945.<sup>1</sup> Through indiscriminate attacks by the Russian forces on civilian areas and infrastructure, strikes on protected buildings such as hospitals and schools, and the use of ballistic missiles and banned weapons, we are witnessing an unprecedented escalation in violations of humanitarian and human rights laws, including cases of execution, kidnap-

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\* Assistant Professor, Centre of Migration Research, University of Warsaw.

\*\* Affiliate Researcher, Centre of Migration Research, University of Warsaw.

1 Michael Hirsh, 'Why Putin's War Is the West's Biggest Test Since World War II' *Foreign Policy* (24 February 2022) <<https://foreignpolicy.com/2022/02/24/russia-ukraine-war-west-world-war-2/>> accessed 1 December 2022.

ping and rape in the localities occupied by the Russian army.<sup>2</sup> On 2 April, mass graves in the vicinity of Kyiv were revealed,<sup>3</sup> demonstrating how dangerous it is for civilians to remain on the territories occupied by Russia.

In these tragic circumstances, as of 18 April Poland has accepted 2.8 million refugees<sup>4</sup> of a total of 4.98 million people fleeing Ukraine, comprising both Ukrainian citizens and third-country nationals (a phenomenon of global importance, considering its scale and rapidity). It is estimated that as many as half of that number may have gone on to other EU countries.<sup>5</sup> The current phase of Poland's crisis response can be referred to as one of stabilisation, which began around mid-March after the more improvised emergency phase seen at the outset of the war. In this chapter we explain why Poland became a shelter for refugees from Ukraine fleeing war and how the country's reaction evolved over the five weeks that followed.

## 2. Why Poland?

Poland's land border with Ukraine is the second longest western border of Ukraine (after the Ukrainian-Romanian border, which partially stretches across the Carpathian Mountains and is therefore less accessible). Despite the relatively small number of border crossing points (eight by road and six by rail), even prior to the war the Polish-Ukrainian border was one of the most heavily used border crossings in the European Union.<sup>6</sup> The choice of the Polish border crossings by those fleeing the war was also facilitated by the quick decision of the Polish government to transform its border crossing points into pedestrian

2 Halya Coynash, 'Almost 400 Russian war crimes already documented in Ukraine' (Kharkiv Human Rights Protection Group, 29 March 2022) <<https://khp.org/en/1608810304>> accessed 1 December 2022.

3 RFE/RL's Ukrainian Service, 'Horror, Outrage Grow As Scenes Of Carnage Emerge In Ukraine's Bucha' (3 April 2022) <<https://www.rferl.org/a/bucha-atrocities-eu-sanctions-russia/31783571.html>> accessed 1 December 2022.

4 UNHCR, 'Ukraine Refugee Situation' <<https://data.unhcr.org/en/situations/ukraine>> accessed 1 December 2022.

5 Katarzyna Mokrzycka, 'Liczba uchodźców z Ukrainy przekroczyła właśnie 4,5 mln' *300gospodarka* (11 April 2022) <<https://300gospodarka.pl/news/liczba-uchodzcow-z-ukrainy>> accessed 1 December 2022. As of 23 November 2022, the number of Ukrainian citizens registered for temporary protection in Poland totaled 1,5 million – UNHCR, 'Ukraine Refugee Situation' <<https://data.unhcr.org/en/situations/ukraine>> accessed 1 December 2022.

6 Marta Jaroszewicz and Krzysztof Mrozek, *Granica nowoczesnego sąsiedztwa. Jak ją zbudować?* (Fundacja im. Stefana Batorego 2020).



ones.<sup>7</sup>

Though this has not been examined in depth so far, it appears that the existence of Ukrainian migration networks in Poland<sup>8</sup> could be one of the main reasons why the majority of Ukrainians fleeing Russian invasion chose Poland. Before 24 February 2022, there was already a sizeable community of Ukrainian migrants in Poland (the statistics differ depending on category, and it should also be taken into account that many of those were circular migrants). The number of declarations of intent to employ (de facto short-term labour permits) issued to Ukrainian citizens in 2021 amounted to 1.6 million.<sup>9</sup>

In summary, Ukrainian migrants are generally selecting Poland as their destination for the following reasons: the low travel costs, ability to maintain family ties in Ukraine, extensive migration networks, similarities of language and cultural proximity.<sup>10</sup> In particular, the ability to maintain family ties and return to Ukraine if needed is very important, since most of the refugees are women with children, while the men and many elderly people have stayed in Ukraine.

### 3. Initial response to the emergency

The organisation of reception<sup>11</sup> of refugees from Ukraine in Poland, understood as a single system consisting of the legal instruments based on the Geneva Convention of 1951, subsidiary and temporary protection and national forms of protection, can be divided into two phases: the emergency phase of relatively high influx from the beginning of the war until mid-March 2022, and the stabilisation phase in the second half of March until mid-April 2022.

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7 Marta Jaroszewicz and others, 'Russian aggression on Ukraine and forced migrations: the role of Poland in the first days of the crisis - and is also counted as Spotlight 3/37.' [2022] CMR Spotlight 3/37.

8 Sabina Toruńczyk-Ruiz, 'Neighbourhood Ties and Migrant Networks: The Case of Circular Ukrainian Migrants in Warsaw, Poland' [2014] 3(1) Central and Eastern European Migration Review 41.

9 Departament Rynku Pracy, 'Oświadczenia o powierzeniu wykonywania pracy cudzoziemcowi, wpisane do ewidencji oświadczeń (obowiązujące od 2018 r.)' (10 November 2018) <<https://psz.praca.gov.pl/-/8180211-oswiadczenia-o-powierzeniu-wykonywania-pracy-cudzoziemcowi-wpisane-do-ewidencji-oswiadczen-obowiazujace-od-2018-r->> accessed 1 December 2022.

10 Marta Jaroszewicz, 'Migration from Ukraine to Poland the trend stabilises' (OSW, November 2018).

11 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L 180/96.

The high number of daily crossings in the first stage (up to 200 000 daily) was possible due to both legal and procedural measures to facilitate the crossings (simplified border control, no visa requirements in the case of Ukrainian citizens, and the possibility to cross the border without international travel documents), as well as logistical support ensured by individuals, civil society, local authorities and the Polish government. Thus, this first response, which took the form of multi-actor improvisation, turned out to be a success thanks to the emergence of numerous grassroots initiatives, including the accommodation of refugees in private houses.

According to Council of the EU decision introducing temporary protection,<sup>12</sup> Ukrainian citizens, their family members and recognised refugees in Ukraine who came to the EU Member States after 24 February 2022 can stay legally for up to 18 months upon simplified registration, and can obtain access to the labour market, education for children, healthcare and social assistance (national laws regulate how this access is guaranteed). Simultaneously, the decision states that Member States may apply temporary protection to third-country nationals who hold a residence permit in Ukraine and are unable to return to their country of origin. In this case, it is up to the Member States whether to apply temporary protection or so-called ‘adequate protection under national law’.<sup>13</sup> Finally, Member States can decide whether to grant temporary protection to individuals who were staying legally in Ukraine but did not possess a Ukrainian residence permit. These provisions have been assessed by some scholars as potentially discriminatory<sup>14</sup> in the context of the non-discrimination principle enshrined by EU legislation.

At the national level, Poland’s refugee reception system is based on the Act on granting protection to foreigners on the territory of the Republic of Poland<sup>15</sup> as a whole, and specifically on the Law on assistance to Ukrainian

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12 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

13 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01 OJ C 126I.

14 Sergio Carrera and others, ‘The EU grants temporary protection for people fleeing war in Ukraine: Time to rethink unequal solidarity in EU asylum policy’ in this collection.

15 Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej.

citizens in relation to armed conflict.<sup>16</sup> While the rudiments transposing the Temporary Protection Directive were already in place before 24 February, the Polish government decided to pass a special bill, which to a certain extent operationalised temporary protection. However, it is more complex since it also touches upon issues of financing the reception system, the return to Poland of Polish nationals residing in Ukraine before 24 February, and others.

In line with this legislation, Ukrainian citizens and members of their families were provided with a facilitated registration system and access to social assistance, which had previously only been available to Polish citizens or permanent residents (in the case of medical assistance it is even more favourable, as it releases Ukrainian refugees of the need to obtain social security rights). Non-Ukrainians who meet the criteria for the temporary protection measure are also entitled to temporary protection status, but their registration process differs and is more centralised. Thus, two procedural pathways to grant temporary protection have in fact been envisaged by the legislation.

The more problematic issue is the legal status of third-country nationals who came from Ukraine after 24 February but did not possess a Ukrainian residence permit, and thus were not entitled to temporary protection. Since many of them were granted only 15 days' stay in Poland, many risked becoming irregular migrants. Recently the parliament adopted changes allowing certain categories of those people to apply for humanitarian visas,<sup>17</sup> but it is not clear whether this change pertains to all third-country nationals in that situation. Specific regulations allowing for smooth change of legal status from humanitarian visa into temporary stay permit were adopted in the case of Belarusian citizens<sup>18</sup>. According to the media,<sup>19</sup> foreigners of African or Asian origin faced

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16 Ustawa z dnia 12 marca 2022 r. o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa.

17 Ustawa z dnia 8 kwietnia 2022 r. o zmianie ustawy o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa oraz niektórych innych ustaw.

18 Regulation of the Minister of the Interior and Administration of June 14, 2022 on citizenships the possession of which entitles foreigners to apply for a temporary residence permit referred to in art. 186 sec. 1 point 9 of the Act of 12 December 2013 on foreigners <<https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20220001335>> accessed 1 December 2022.

19 Benjamin Bathke, 'IOM takes stance against discrimination of non-Ukrainian refugees' (Info Migrants, 12 April 2022) <<https://www.infomigrants.net/en/post/39741/iom-takes-stance-against-discrimination-of-nonukrainian-refugees>> accessed 1 December 2022.

discrimination<sup>20</sup> when crossing the border, particularly in the first stage of the war, for instance being asked to join the queue at the border crossing point after Ukrainian nationals. This requires further examination, in particular investigation into whether this phenomenon was systemic in character.

Immediately upon crossing the border, war refugees received assistance (food, clothes, equipment for babies, medical help and transport, etc.) provided by many different actors: governmental services, local authorities, international organisations, Polish non-governmental organisations (NGOs) and private individuals. Next, for people deciding to stay in Poland there were three opportunities.

First, the government set around 30 reception points in different regions, where temporary accommodation was available to all war refugees. Second, dedicated reception points were established by numerous municipalities. However, these were dedicated to Ukrainian citizens, while third-country nationals were referred to points organised by the voivodes (governors of the regions). Third, another option was to be offered help from family, friends or even strangers, who often came to border crossings to propose free accommodation or transport. In this case, it appears that women and children were more likely to find private help than elderly people or non-Ukrainian male refugees. It should be mentioned that there is a risk of human trafficking, labour and sexual exploitation of migrants fleeing the war, yet no comprehensive data assessing the phenomenon is available.<sup>21</sup>

When it comes to food and other essential goods, not to mention cash assistance, these were mainly provided by private individuals, local authorities, civil society and the business sector. Besides acting as volunteers, ordinary people on a mass scale (as many as two to three million Poles and Polish residents offered

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20 Rédaction Africanews with AFP, 'Russia-Ukraine conflict: Africans face racial discrimination in Ukraine' *Africanews* (28 February 2022) <<https://www.africanews.com/2022/02/28/russia-ukraine-conflict-africans-face-racial-discrimination-in-ukraine/>> accessed 1 December 2022.

21 Wion News, 'Ukraine refugee crisis raises other concerns; fleeing women & minors may be targeted for trafficking' *Wion* (16 March 2022) <<https://www.wionews.com/photos/ukraine-refugee-crisis-raises-other-concerns-feeling-women-minors-may-be-targetted-for-trafficking-462747#trafficking-risks-462735>> accessed 1 December 2022.

help)<sup>22</sup> provided support in the form of food packages, clothes and personal hygiene products. Several GSM companies offered refugees free SIM cards, and in general many businesses supported the reception system with their products.

Significant engagement was observed among various social actors: NGOs, religious organisations or even those not specialised in providing assistance (such as hobby groups). People organised grassroots assistance by means of social media (for instance, among neighbourhood groups), which was initially carried out in a rather chaotic manner due to the difficulty in coordinating so many disparate requests for aid and offers of help. Thanks to the widespread use of social media, it was possible to meet most needs immediately. For instance, various Facebook groups served to search flats and different equipment for the refugees and, later, also job offers.

## 4. Emergency reception stabilisation

After the initial period, some challenges diminished while new ones emerged. When the number of arrivals decreased, the reception points had less work to do, yet it was now time to start developing more durable solutions and establishing coordination mechanisms.

The first important challenge was the actual operation of the registration process as envisaged by the special bill. Without substantial strengthening of their capacities, municipal authorities were supposed to organise the process to enable all refugees to meet the deadline of final registration 60 days after arrival. In reality, the system did not function properly, with long queues forming in front of municipal offices and long waiting times for the final registration necessary to obtain the requisite social and financial assistance. In such circumstances, according to our initial information, some refugees decide not to register and instead to rely on cash assistance provided by international organisations. Simultaneously, while in the legalisation process, many refugees were

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22 Redakcja Polska Społeczeństwo, 'Polacy pomagają uchodźcom z Ukrainy. Skala zaangażowania robi wrażenie' (10 March 2022) <<https://www.polskieradio.pl/399/7977/Artykul/2917378,Polacy-pomagaja-uchodzcom-z-Ukrainy-Skala-zaangazowania-robi-wrazenie>> accessed 1 December 2022. The Polish Economic Institute (PIE) has calculated that from the beginning of the war until August 2022, Poles (the individual households) have spent about 2,13 billion euro for aid for Ukrainians compared to 3,38 billion euro spent by the authorities. 77% of Polish people have engaged in any kind of help for refugees – B. Ciepiewski, '77 proc. Polaków pomogło Ukraińcom. Zaangażowali się zarówno młodzi, jak i osoby starsze. Wydali kilka miliardów złotych' *Strefa Biznesu* (12 August 2022) <<https://strefabiznesu.pl/77-proc-polakow-pomoglo-ukraincom-zaangazowali-sie-zarowno-mlodzi-jak-i-osoby-starsze-wydali-kilka-miliardow-zlotych/ar/c3-16650529>> accessed 1 December 2022.

dependent upon families or the collective centres they are staying at, with no access to individual financial assistance. This heavily undermined their agency and opportunities to make independent life decisions.

Another important challenge emerging during the stabilisation phase was the schooling of children. There is a significant problem with reliable statistics, due in part to the fact that refugees can travel freely within the Schengen zone. According to data from the Ministry of Education and Science, in April 2022 there are at least 160 000 Ukrainian children in the Polish education system.<sup>23</sup>

At that moment, there were discussions among teachers' associations and the Ministry of Education and Science about the best solution for handling underage refugees. In principle, all of them are provided with the possibility and duty to attend school. However, there are various logistical and linguistic challenges to confront, in addition to determining what kind of assessments and exams they should be obliged to undertake<sup>24</sup>. There is also a need for psychological support, as many children have been traumatised by the war and are missing their fathers, who stayed in Ukraine to fight.

The third serious difficulty was connected to the transition from temporary to long-term accommodation. This relates both to those staying in provisional facilities (sports halls, cultural institutions, warehouses, etc.) and to those sharing living space with strangers who offered lodgings in their houses. According to the special bill, people hosting refugees in their own houses or flats were entitled, until 25 June 2022, to receive PLN 40 per person per day. Longer-term support was guaranteed only to those individuals that were hosting handicapped persons, older people and families with many children or infants<sup>25</sup>. There is also a psychological challenge as to how long people would be ready to share their living place with strangers. Moving out of temporary accommodation would be possible upon satisfying two conditions stemming from the labour and housing markets.

Housing opportunities in Poland are not the most favourable. For instance, the percentage of people aged 25 to 34 living with their parents in

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23 A. Chelstowski, 'SzeF MEiN: w polskich szkołach i przedszkolach jest blisko 160 tys. dzieci z Ukrainy' *Jedynka* (4 April 2022) <<https://jedynka.polskieradio.pl/artykul/2932936>> accessed 1 December 2022.

24 Finally the pupils from Ukraine were obliged to pass the same exams as Polish children, however, they were provided with extended time of the exam, instructions and commands in Ukrainian and possibility to use dictionaries.

25 K. Wójcik, 'Przedłużenie wypłat 40 zł za gościnę uchodźców, ale pod pewnymi warunkami' *Rzeczpospolita* (23 June 2022) <<https://www.rp.pl/cudzoziemcy/art36563971-przedluzenie-wyp-lat-40-zl-za-goscine-uchodzcow-ale-pod-pewnymi-warunkami>> accessed 1 December 2022.

2019 was higher than 40% in Poland, the ninth highest in the EU.<sup>26</sup> Additionally, the quandary is that most refugees head to the big cities in search of job opportunities, while at the same time the demand for apartments in the major cities is most acute. Therefore, both the government and the representatives of the biggest municipalities are appealing<sup>27</sup> for incentives for refugees to move to smaller cities and towns, as this would alleviate the burden on the larger cities.

Likewise, there is a question concerning how many job opportunities will be available to the refugees, considering their qualifications. Ideally, a lasting solution seems to rely mainly on the inclusion of refugees in the labour market. At the end of March 2022, around 30 000 refugees from Ukraine were registered to work, according to information received from the Ministry of Family and Social Policy<sup>28</sup>. The majority of these were employed on short-term contracts, which constitutes a somewhat moderate success. Furthermore, the structure of the labour market provides more opportunities in sectors typically chosen by male workers, such as construction and transport.

## 5. Conclusions and future challenges

The grassroots reception system, together with the governmental facilitating measures and the great efforts made by the municipalities, is in our opinion the main reason underlying Poland's success in providing help for such a huge number of people, which may be regarded as a phenomenon with global implications in terms of its sheer scale. Despite the current stabilisation in terms of the volume of new arrivals, estimates show<sup>29</sup> that in the case of Russian assaults on Dnipro, Poltava, Odessa and other cities in central Ukraine, the number of

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26 European Commission, Eurostat, 'When are they ready to leave the nest?' (12 August 2020) <<https://ec.europa.eu/eurostat/web/products-eurostat-news/-/edn-20200812-1>> accessed 1 December 2022.

27 Piotr Toborek, 'Uchodźcy jadą głównie do większych miast. Potrzebna lepsza koordynacja' (PORTALSAMORZĄDOWY.PL, 9 March 2022) <<https://www.portalsamorzadowy.pl/komunikacja-spoleczna/uchodzcy-jada-glownie-do-wiekszych-miast-potrzebna-lepsza-koordynacja,359019.html>> accessed 1 December 2022.

28 As of 3 August 2022, this number reached 380 000 – Ministry of Family and Social Policy, 'Blisko 380 tys. obywateli Ukrainy znalazło pracę' (3 August 2022) <<https://www.gov.pl/web/rodzina/blisko-380-tys-obywateli-ukrainy-znalazlo-prace>> accessed 1 December 2022.

29 Franck Düvell and Iryna Lapshyna, 'The Russian Invasion of Ukraine: Scope, Patterns and Future Development of Displacement' (2022) IMIS Working Paper 14/2022 <[https://www.imis.uni-osnabrueck.de/fileadmin/4\\_Publikationen/PDFs/Duvell\\_Lapshyna\\_Ukraine\\_Russia\\_Short\\_Analysis\\_2022.pdf](https://www.imis.uni-osnabrueck.de/fileadmin/4_Publikationen/PDFs/Duvell_Lapshyna_Ukraine_Russia_Short_Analysis_2022.pdf)> accessed 1 December 2022.



refugees fleeing to the EU might grow by two to three million people.

Looking at the transition from the emergency to the stabilisation phase, it seems that the main challenges for durable solutions are linked to accommodation and schooling, and possibly in the long-term healthcare<sup>30</sup> (many refugees are still using the medicines they brought from Ukraine, while the most heavily ill have received assistance in other EU Member States within the framework of the EU civil protection mechanism). Most of the refugees are women with children, who are willing to work but not always able to do so because of having to care for their children. The system of care for preschool children is therefore of great importance. Ensuring that refugees have the possibility both to maintain links with their own culture and to engage in cultural exchange with their host society is also highly important in providing assistance. Finding durable solutions is crucial, since social solidarity and private individuals' financial resources have their limits. Moreover, the assistance system should rely more on state agencies and NGOs instead of a workforce of volunteers, and NGOs should be supported financially. Finally, the system should integrate measures dedicated towards both Ukrainian citizens and third-country nationals, there is no argument to justify two-track policy. These solutions could enable Poland to cope with the challenges of refugee reception for a longer period of time.

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30 As of 1 September 2022 (the beginning of the schooling year), there were more than 700 000 pupils from Ukraine in Polish schools – J. Potocka, 'Ukraińskie dzieci w polskich szkołach. Minister podał liczbę' *RMF FM* (2 September 2022) <[https://www.rmf24.pl/fakty/polska/news-ukrainskie-dzieci-w-polskich-szkolach-minister-podal-liczbe,nId,6260249#crp\\_state=1](https://www.rmf24.pl/fakty/polska/news-ukrainskie-dzieci-w-polskich-szkolach-minister-podal-liczbe,nId,6260249#crp_state=1)> accessed 1 December 2022.



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- Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej
- Ustawa z dnia 8 kwietnia 2022 r. o zmianie ustawy o pomocy obywatelom



Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa oraz niektórych innych ustaw

Wion News, 'Ukraine refugee crisis raises other concerns; fleeing women & minors may be targetted for trafficking' *Wion* (16 March 2022) <<https://www.wionews.com/photos/ukraine-refugee-crisis-raises-other-concerns-feeling-women-minors-may-be-targetted-for-trafficking-462747#trafficking-risks-462735>> accessed 1 December 2022

# Chapter 9

## Visas Still Required: The UK Response to the Protection Needs Generated by Russian Aggression in Ukraine

Dr Alan Desmond\*

### 1. Introduction

As of 11 April 2022, the UK has in place three fee-free visa schemes to assist persons affected by the conflict in Ukraine. The Ukraine Extension Scheme caters for Ukrainians already present in the UK, while the Ukraine Family Scheme and the Homes for Ukraine Sponsorship Scheme are aimed at Ukrainians outside of the UK. All three schemes have been included as an Appendix<sup>1</sup> to the UK's labyrinthine Immigration Rules, a regularly revised document that sets out the criteria for granting or refusing permission to enter and remain in the UK which the Secretary of State for the Home Department is empowered to make under the Immigration Act 1971. The three schemes offer protection that is somewhat analogous to that provided by EU member states under

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\* Lecturer, Leicester Law School, University of Leicester.

1 Home Office, 'Immigration Rules' (25 February 2016) <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-ukraine-scheme>> accessed 1 December 2022.

the Temporary Protection Directive (TPD),<sup>2</sup> as implemented by the 4 March 2022 Decision<sup>3</sup> of the Council of the EU.

The initial response of the UK government to people fleeing Ukraine following the Russian invasion on 24 February 2022 contrasts sharply with the reaction of the EU and its member states. While the EU decided with lightning-speed<sup>4</sup> to make temporary protection available for most people fleeing Russian aggression in Ukraine, the UK came in for criticism<sup>5</sup> for dragging its feet<sup>6</sup> in reducing bureaucratic obstacles<sup>7</sup> to entry for Ukrainians and, crucially, it continues to treat Ukrainians as visa nationals. Moreover, the UK initially made visas available only for Ukrainian citizens with family ties to the UK. At the beginning of March, however, the government announced plans for an “uncapped sponsored humanitarian visa route”<sup>8</sup> to facilitate entry to the UK for Ukrainians with no ties to the country. This has crystallised as the Homes for Ukraine Sponsorship Scheme.

In this chapter, I begin by examining the protection available for Ukrainians present in the UK at the time of the Russian invasion (the Ukraine Extension Scheme) before going on to identify the steps taken by the UK to assist persons fleeing Ukraine as a result of Russian aggression (the Ukraine Family Scheme and the Homes for Ukraine Sponsorship Scheme). I illustrate how the

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- 2 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.
  - 3 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.
  - 4 Sophie Magennis and others, ‘Briefing on Ukraine: Avenues to Safety and Meeting Immediate Needs’ (MPI Webinar, 8 March 2022) <<https://www.migrationpolicy.org/events/ukraine-avenues-safety-meeting-immediate-needs>> accessed 1 December 2022.
  - 5 Nando Sigona, ‘UK government’s response to refugee crisis is too little, too confused, too slow’ (10 March 2022) <<https://www.birmingham.ac.uk/news/2022/uk-governments-response-to-refugee-crisis-is-too-little-too-confused-too-slow>> accessed 13 April 2022.
  - 6 Rajeev Syal and Jessica Elgot, ‘Priti Patel accused of misleading MPs over Ukrainian refugees’ (*The Guardian*, 8 March 2022) <<https://www.theguardian.com/world/2022/mar/08/ukrainian-refugees-uk-ben-wallace>> accessed 1 December 2022.
  - 7 Home Office, ‘New measures to support Ukrainians’ (10 March 2022) <<https://www.gov.uk/government/news/new-measures-to-support-ukrainians>> accessed 13 April 2022.
  - 8 Home Office, ‘Further support for Ukrainians fleeing Russia invasion’ (1 March 2022) <<https://www.gov.uk/government/news/further-support-for-ukrainians-fleeing-russia-invasion>> accessed 1 December 2022.

initial highly restrictive approach adopted by the UK has been relaxed to facilitate entry of a wider pool of Ukrainians. Despite this relaxation, Ukrainians who were present in the UK prior to the Russian invasion continue to be in an unsatisfactory situation vis-à-vis family reunification, and all Ukrainians seeking entry are required to apply for visas.

## 2. Avenues of Protection for Ukrainians in the UK

The general approach of the UK to Ukrainians present on its territory, as articulated on 16 March by the Parliamentary Under-Secretary of State for Safe and Legal Migration, is that “no one will need to return to Ukraine for immigration reasons. They will return only if they choose to return.”<sup>9</sup> A number of piecemeal policy changes were made in the immediate aftermath of the Russian invasion of Ukraine to allow specific categories of Ukrainian already lawfully present in the UK, including those on skilled worker, student, seasonal worker and visitor visas, to extend their permissions to remain<sup>10</sup> or switch<sup>11</sup> to another visa. These policy changes were consolidated and streamlined in the Ukraine Extension Scheme which was announced on 29 March 2022 and is scheduled to open on 3 May.

The Ukraine Extension Scheme is open to Ukrainians lawfully present in the UK on or before 18 March 2022; Ukrainians lawfully present in the UK immediately before 1 January 2022 whose permission has since expired; and children born to Ukrainian citizens in the UK after 18 March 2022. Such persons will be granted access to the labour market, study, and welfare assistance for a maximum of three years and their partners and children, if already present in the UK as dependants, may also apply. There is no provision for beneficiaries of the Extension Scheme to apply to bring family members from Ukraine or other countries to the UK. A practical means of overcoming this obstacle is presented by the Homes for Ukraine Sponsorship Scheme discussed

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9 Home Affairs Committee, *Oral evidence: Policy on Ukrainian refugees* (HC 1193) <<https://committees.parliament.uk/oralevidence/9908/pdf/>> accessed 1 December 2022.

10 Home Office, ‘Ukrainian nationals in the UK: visa support’ (8 March 2022) <<https://www.gov.uk/guidance/ukrainian-nationals-in-the-uk-visa-support>> accessed 1 December 2022.

11 Home Office, ‘UK visa support for Ukrainian nationals’ (17 February 2022) <<https://www.gov.uk/guidance/support-for-family-members-of-british-nationals-in-ukraine-and-ukrainian-nationals-in-ukraine-and-the-uk#if-youre-ukrainian-and-are-already-in-the-uk>> accessed 1 December 2022.

below. As noted by Georgios Milios<sup>12</sup> in his chapter to this Forum, failure to facilitate family reunification for Ukrainians may raise an issue under Article 8 ECHR. Under the Human Rights Act 1998<sup>13</sup> public authorities in the UK are prohibited from acting in a way that is incompatible with an ECHR right, and courts and tribunals are obliged to take into account any relevant Strasbourg jurisprudence when determining a question concerning a Convention right.

Ukrainians who have been unlawfully present in the UK since before 1 January 2022 are excluded from the scope of the Extension Scheme. There is, however, nothing to prevent such persons from applying for asylum<sup>14</sup> which, given the ongoing situation of armed conflict in Ukraine, is likely to lead to a grant of refugee status<sup>15</sup> or humanitarian protection,<sup>16</sup> the equivalent of subsidiary protection<sup>17</sup> under EU law. Asylum seekers are not, however, entitled to work while awaiting the outcome of their asylum application, and may not apply for family re-unification prior to a protection status being granted.

Persons who fall for exclusion from international protection are also ineligible for the Extension Scheme. The Scheme operates the wider grounds for refusal set out in Part 9 of the UK Immigration Rules,<sup>18</sup> including where an individual's presence in the UK is not conducive to the public good because of their conduct, character, associations or other reasons (including convictions which do not fall within the criminality grounds).

Ukrainians precluded from refugee status, humanitarian protection and the Extension Scheme may rely on more than the general assertion that Ukrai-

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12 Georgios Milios, 'The right to family reunification under the Temporary Protection Directive and Council Decision 2022/382: Preserving family unity for the beneficiaries of temporary protection' in this collection.

13 Human Rights Act 1998.

14 Home Office, Immigration Rules part 11: asylum.

15 *ibid.*

16 Home Office, 'Humanitarian protection in asylum claims lodged before 28 June 2022' (28 June 2022) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1085511/Humanitarian\\_Protection\\_-\\_claims\\_made\\_before\\_28\\_June\\_2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1085511/Humanitarian_Protection_-_claims_made_before_28_June_2022.pdf)> accessed 1 December 2022.

17 European Commission Migration and Home Affairs, 'subsidiary protection definitions' <[https://home-affairs.ec.europa.eu/pages/glossary/subsidiary-protection\\_en](https://home-affairs.ec.europa.eu/pages/glossary/subsidiary-protection_en)> accessed 1 December 2022.

18 Home Office, 'Immigration Rules part 9: grounds for refusal' <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-9-grounds-for-refusal#:~:text=9.3.1.-,An%20applicati%20for%20entry%20clearance%2C%20permission%20to%20enter%20or%20permission,fall%20within%20the%20criminality%20grounds.>> accessed 1 December 2022.



nians will return to Ukraine “only if they choose to return”<sup>19</sup> for protection against expulsion. They may make an Article 3 ECHR-based challenge to removal which may result in a grant of restricted leave.<sup>20</sup>

## 3. Support for persons fleeing Ukraine since 24 February

The UK has put in place two fee-free special visa schemes<sup>21</sup> for Ukrainians, the Ukraine Family Scheme<sup>22</sup> and the Homes for Ukraine Sponsorship Scheme,<sup>23</sup> both of which were incorporated<sup>24</sup> into the UK Immigration Rules on 29 March.

### 3.1 The Ukraine Family Scheme

The Ukraine Family Scheme, launched on 4 March, allows UK citizens and certain immigrants (those with permanent residence; refugee status; humanitarian protection; EU settled status or pre-settled status) to sponsor family members to join them in the UK if those family members were ordinarily resident in Ukraine on or immediately before 1 January 2022. Family members who are already present in the UK may also be sponsored as long as they were resident in Ukraine prior to 1 January 2022. Ukrainians present in the UK on work or student visas are, however, unable to act as sponsors for their family members. Similarly, beneficiaries of the Ukraine Extension Scheme (discussed

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19 Home Affairs Committee, *Oral evidence: Policy on Ukrainian refugees* (HC 1193).

20 Home Office, ‘Restricted leave’ (19 July 2022) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1092616/Restricted\\_leave.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092616/Restricted_leave.pdf)> accessed 1 December 2022.

21 Alex Piletska and Katherine Soroya, ‘Can Ukrainians take refuge in the UK? The Ukraine Family Scheme and other routes’ (Free Movement, 23 February 2022) <[https://freemovement.org.uk/can-ukrainians-take-refuge-in-the-uk-immigration-concessions-and-asylum-policy/#Can\\_Ukrainians\\_claim\\_asylum](https://freemovement.org.uk/can-ukrainians-take-refuge-in-the-uk-immigration-concessions-and-asylum-policy/#Can_Ukrainians_claim_asylum)> accessed 1 December 2022.

22 Home Office, ‘Apply for a Ukraine Family Scheme visa’ (4 March 2022) <<https://www.gov.uk/guidance/apply-for-a-ukraine-family-scheme-visa>> accessed 1 December 2022.

23 Home Office, ‘Apply for a visa under the Ukraine Sponsorship Scheme (Homes for Ukraine)’ (18 March 2022) <<https://www.gov.uk/guidance/apply-for-a-visa-under-the-ukraine-sponsorship-scheme>> accessed 1 December 2022.

24 Home Office, ‘Statement of changes to the Immigration Rules: HC 1220, 29 March 2022’ (29 March 2022) <<https://www.gov.uk/government/publications/statement-of-changes-to-the-immigration-rules-hc-1220-29-march-2022>> accessed 1 December 2022.

above) may not sponsor family members under the Family Scheme.

The Ukraine Family Scheme operates a very broad definition of family member.<sup>25</sup> It includes the UK-based sponsor's immediate family which covers his or her partner and any minor children of the sponsor or the sponsor's partner. The fiancé(e) or proposed civil partner of the UK-based sponsor is also eligible to apply for a visa. Extended family members who may be sponsored include the parents, grandparents, grandchildren, adult children, siblings, nieces, uncles, aunts and cousins of the UK-based sponsor. The grandchildren, grandparents, parents or siblings of the UK-based sponsor's partner may also apply for a visa under the Ukraine Family Scheme. Furthermore, extended family members can also sponsor their own immediate family members. Applicants to the Ukraine Family Scheme must be either Ukrainian citizens or, if not Ukrainian, must be part of a family group that includes an immediate family member who is Ukrainian.

Ukrainian international passport holders may apply to the Scheme online without having to attend a biometrics appointment at a Visa Application Centre (VAC). On the other hand, non-Ukrainians, and Ukrainian citizens who cannot provide a scanned copy of their international Ukrainian passport, are required to present at a VAC to provide biometrics as part of the application. As VACs in Ukraine are currently closed, individuals may present at a VAC in the capital cities of neighbouring countries such as Poland, Moldova and Hungary. To be granted entry clearance to travel to the UK, or permission to stay if already present in the UK, applicants must have provided any required biometrics; and a passport or other document establishing their identity and nationality. The grounds for refusal<sup>26</sup> under Part 9 of the Immigration Rules mean that people with criminal records are ineligible to apply to the Ukraine Family Scheme.

Successful applicants are not required to apply for police registration or to pay the Immigration Health Surcharge.<sup>27</sup> They will be given access to educa-

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25 Home Office, 'Ukraine Scheme' (11 March 2022) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1060447/ukraine-scheme-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1060447/ukraine-scheme-guidance.pdf)> accessed 1 December 2022.

26 Home Office, 'Immigration Rules part 9: grounds for refusal' (25 February 2016) <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-9-grounds-for-refusal#:~:text=9.3.1.-,An%20application%20for%20entry%20clearance%2C%20permission%20to%20enter%20or%20permission,fall%20within%20the%20criminality%20grounds.>>> accessed 1 December 2022.

27 Home Office, 'Pay for UK healthcare as part of your immigration application' <<https://www.gov.uk/healthcare-immigration-application>> accessed 1 December 2022.

tion, the labour market and public funds for a maximum of three years. For unsuccessful applicants, there is no right of appeal or right to an administrative review. Instead, an individual may re-apply under the Scheme.

As of 7 April,<sup>28</sup> 36,300 applications to the Ukraine Family Scheme had been received with 28,500 visas being issued. However, only 10,800<sup>29</sup> holders of visas under this Scheme have so far arrived in the UK.

## 3.2 Homes for Ukraine Sponsorship Scheme

Ukrainians with no ties in the UK may, since 18 March,<sup>30</sup> apply for a visa under the Homes for Ukraine Sponsorship Scheme,<sup>31</sup> also known as Homes for Ukraine.<sup>32</sup> An absence of ties to the UK is not, however, an eligibility criterion for this Scheme so that Ukrainians with family members in the UK may also apply. An applicant under this Scheme must have been ordinarily resident in Ukraine immediately before 1 January 2022, unless they are a child born on or after that date and must be a Ukrainian citizen. Non-Ukrainians are eligible only if they are immediate family members of a Ukrainian national applying to the scheme. By contrast with the relatively generous approach taken under the Ukraine Family Scheme, holders of visas under the Ukraine Sponsorship Scheme may only be accompanied by immediate family members. The grounds

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28 Home Office, 'Ukraine Family Scheme, Ukraine Sponsorship Scheme (Homes for Ukraine) and Ukraine Extension Scheme visa data' (6 October 2022) <<https://www.gov.uk/government/publications/ukraine-family-scheme-application-data/ukraine-family-scheme-and-ukraine-sponsorship-scheme-homes-for-ukraine-visa-data--2>> accessed 1 December 2022.

29 Rajeev Syal and Amelia Gentleman, 'Priti Patel apologises for low number of Ukraine refugees arriving in UK' (*The Guardian*, 8 April 2022) <<https://www.theguardian.com/uk-news/2022/apr/08/ukraine-refugees-uk-12000-arrived-visa-schemes>> accessed 1 December 2022.

30 Home Office, 'Apply for a visa under the Ukraine Sponsorship Scheme (Homes for Ukraine)' (18 March 2022) <<https://www.gov.uk/guidance/apply-for-a-visa-under-the-ukraine-sponsorship-scheme>> accessed 1 December 2022.

31 Home Office, 'Immigration Rules Appendix Ukraine Scheme' <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-ukraine-scheme>> accessed 1 December 2022.

32 Alex Piletska and Katherine Soroya, 'Can Ukrainians take refuge in the UK? The Ukraine Family Scheme and other routes' (Free Movement, 23 February 2022) <[https://freemovement.org.uk/can-ukrainians-take-refuge-in-the-uk-immigration-concessions-and-asylum-policy/#Can\\_Ukrainians\\_claim\\_asylum](https://freemovement.org.uk/can-ukrainians-take-refuge-in-the-uk-immigration-concessions-and-asylum-policy/#Can_Ukrainians_claim_asylum)> accessed 1 December 2022.

for refusal<sup>33</sup> under Part 9 of the Immigration Rules also apply to applicants under this Scheme.

Applicants to the Scheme must have been granted entry clearance to travel to the UK. They must therefore apply for entry clearance online from outside the UK by providing required biometrics; a passport or other document establishing their identity and nationality; and the name of a UK sponsor who has offered them accommodation in the UK.

To be approved as a sponsor<sup>34</sup> under this Scheme, an individual must be based, and have at least 6 months permission to be, in the UK. They must be in a position to provide accommodation for a period of at least six months. Approval as a sponsor will be contingent upon satisfaction of suitability requirements. This will involve standard security checks made by the Home Office in respect of all adults who will be living in the same household as the visa holders. After the Ukrainian individual or family arrives, the relevant local authority will also complete checks on the accommodation and living arrangements. Approved sponsors will have the option of receiving monthly ‘thank you’ payments of £350.

As is the case for successful applicants to the Ukraine Extension Scheme and the Ukraine Family Scheme, holders of visas under the Homes for Ukraine Sponsorship Scheme are provided with access to education, the labour market and public funds for a maximum of three years.

As of 7 April,<sup>35</sup> 43,600 applications to the Ukraine Sponsorship Scheme had been received. While 12,500 visas had been issued, only about 1,200<sup>36</sup> people had so far arrived in the UK under this Scheme.

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33 Home Office, ‘Immigration Rules part 9: grounds for refusal’ (25 February 2016) <[34 Home Office, ‘Homes for Ukraine: sponsor guidance’ \(25 March 2022\) <<https://www.gov.uk/guidance/homes-for-ukraine-sponsor-guidance>> accessed 1 December 2022.](https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-9-grounds-for-refusal#:~:text=9.3.1.-,An%20application%20for%20entry%20clearance%2C%20permission%20to%20enter%20or%20permission,fall%20within%20the%20criminality%20grounds).> accessed 1 December 2022.</a></p>
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35 Home Office, ‘Ukraine Family Scheme, Ukraine Sponsorship Scheme (Homes for Ukraine) and Ukraine Extension Scheme visa data’ (6 October 2022) <<https://www.gov.uk/government/publications/ukraine-family-scheme-application-data/ukraine-family-scheme-and-ukraine-sponsorship-scheme-homes-for-ukraine-visa-data--2>> accessed 1 December 2022.

36 Rajeev Syal and Amelia Gentleman, ‘Priti Patel apologises for low number of Ukraine refugees arriving in UK’ (*The Guardian*, 8 April 2022) <<https://www.theguardian.com/uk-news/2022/apr/08/ukraine-refugees-uk-12000-arrived-visa-schemes>> accessed 1 December 2022.

### 3.3 Practical Obstacles to Effective Implementation of the Schemes

As of 7 April, a combined total of 41,000 visas had been issued under the Ukraine Family and Sponsorship Schemes, just over half of the total number applied for (79,900). Given the 4 million-plus Ukrainians who have already been displaced from their home country following the Russian invasion, the relatively slow rate of processing visa applications has drawn criticism,<sup>37</sup> particularly<sup>38</sup> in respect of the Homes for Ukraine Scheme. The delay, characterised as unacceptable<sup>39</sup> by the Minister of State for Refugees,<sup>40</sup> is reported<sup>41</sup> to be due in part to a lack of adequately trained Home Office staff and their use of outdated technology in the visa processing offices.

Of equal concern is the fact that despite the processing and approval of 41,000 visa applications, only 12,000 visa holders had reached the UK<sup>42</sup> as of 7 April. The disjuncture between visas issued and entries effected, for which the Home Secretary has apologised,<sup>43</sup> is potentially a consequence of the issuing of visas to individuals rather than to family units, meaning that a family unit will

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37 Amelia Gentleman and Josh Halliday, 'UK visa rule leaving refugees stranded in war-torn Ukraine, say charities' (*The Guardian*, 28 March 2022) <<https://www.theguardian.com/world/2022/mar/28/uk-visa-rule-is-leaving-refugees-stranded-in-war-torn-ukraine-say-charities>> accessed 1 December 2022. For sustained critique of the operation of the Ukraine Family and Sponsorship Schemes in their first months, see Joe Tomlinson, 'Bureaucratic Warfare: Administrative Justice and the Crisis of the "New Bespokism"' (2022) 36(3) *Journal of Immigration, Asylum and Nationality Law* 178.

38 Harry Taylor, 'False hope': refugee charity attacks UK's Homes for Ukraine scheme' (*The Guardian*, 27 March 2022) <<https://www.theguardian.com/world/2022/mar/27/false-hope-refugee-charity-attacks-uks-homes-for-ukraine-scheme>> accessed 1 December 2022.

39 Matt Dathan, 'Fear of "Windrush on steroids" holds back help for Ukrainian refugees' (*The Times*, 1 April 2022) <<https://www.thetimes.co.uk/article/8d30add2-b1b3-11ec-8570-b43daaf58ea1?share-Token>> accessed 1 December 2022.

40 Home Office, 'Minister of State (Minister for Refugees)' <<https://www.gov.uk/government/ministers/minister-of-state-minister-for-refugees#current-role-holder>> accessed 1 December 2022.

41 Matt Dathan, 'Fear of "Windrush on steroids" holds back help for Ukrainian refugees' (*The Times*, 1 April 2022) <<https://www.thetimes.co.uk/article/8d30add2-b1b3-11ec-8570-b43daaf58ea1?share-Token>> accessed 1 December 2022.

42 Rajeev Syal and Amelia Gentleman, 'Priti Patel apologises for low number of Ukraine refugees arriving in UK' (*The Guardian*, 8 April 2022) <<https://www.theguardian.com/uk-news/2022/apr/08/ukraine-refugees-uk-12000-arrived-visa-schemes>> accessed 1 December 2022.

43 Mark Easton and Callum May, 'Ukraine refugees: Patel apologises for UK visa delays' (*BBC News*, 8 April 2022) <<https://www.bbc.com/news/uk-61028712>> accessed 1 December 2022.

not travel to the UK until all members have received a visa.<sup>44</sup> Such obstacles would be largely removed if visa requirements were waived, a step called for by charities<sup>45</sup> and by some in government.<sup>46</sup>

### 3.4 Ukrainian surrogate mothers and their families

Separately from the three schemes discussed above, it has also recently been announced that the UK will provide visas to Ukrainian surrogate mothers and their families,<sup>47</sup> but it is so far unclear if this discretionary scheme will extend on an equal basis in the case of babies born to Ukrainian mothers outside Ukraine.

## 4. Conclusion

Despite the lethargy and confusion that characterised the initial response of the UK to the displacement of people from Ukraine following the Russian invasion on 24 February, the UK government has now put in place three fee-free schemes for those affected by the ongoing conflict in Ukraine. All three replicate much of the core protection content afforded by the EU's implementation of the TPD. They provide beneficiaries with access to education, employment and social assistance for a maximum of three years. Given that they apply to individuals ordinarily resident in Ukraine before 1 January 2022, the Ukraine Family and Sponsorship Schemes might be said to have a more generous temporal scope than the TPD which, as implemented, places obligations on member states only in respect of individuals who fled Ukraine on or after 24 February. EU member states are not obliged to extend the benefit of the TPD to Ukrainians who were outside Ukraine before 24 February, but such Ukrainians may successfully apply to the UK's Homes for Ukraine Spon-

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44 Rajeev Syal and Amelia Gentleman, 'Priti Patel apologises for low number of Ukraine refugees arriving in UK' (*The Guardian*, 8 April 2022) <<https://www.theguardian.com/uk-news/2022/apr/08/ukraine-refugees-uk-12000-arrived-visa-schemes>> accessed 1 December 2022.

45 Refugee Council, 'Latest data on Ukrainian arrivals – Refugee Council response' (8 April 2022) <<https://www.refugeecouncil.org.uk/latest/news/latest-data-on-ukrainian-arrivals-refugee-council-response/>> accessed 1 December 2022.

46 Matt Dathan, 'Fear of 'Windrush on steroids' holds back help for Ukrainian refugees' (*The Times*, 1 April 2022) <<https://www.thetimes.co.uk/article/8d30add2-b1b3-11ec-8570-b43daaf58ea1?share-Token>> accessed 1 December 2022.

47 Karma Hickman, 'Intended parents can bring Ukrainian surrogate mothers to the UK' (Free Movement, 21 March 2022) <<https://freemovement.org.uk/intended-parents-can-bring-ukrainian-surrogate-mothers-to-the-uk/>> accessed 1 December 2022.

sorship Scheme if they were ordinarily resident in Ukraine immediately before 1 January 2022 and satisfy the remaining eligibility criteria.

On the other hand, however, the personal scope of both the Extension Scheme and the Homes for Ukraine Sponsorship Scheme is more restrictive than that of the TPD. Ukrainians who benefit from the Extension Scheme are not entitled to apply for family reunification (though they may use the Homes for Ukraine Sponsorship Scheme to achieve family reunification in practice), and holders of visas under the Sponsorship Scheme may only be accompanied by immediate family members.

The most glaring deficiency in the UK's response to the Ukraine crisis, by comparison to that of the EU, is the continuing treatment of Ukrainians as visa nationals for the purposes of entry to the UK. Even before the current conflict, Ukrainians could travel visa free to EU member states in Schengen. A final criticism that may be levelled at the UK protection framework for Ukrainians is its silence on what is to happen at the end of the three-year period currently prescribed for beneficiaries under all three visa schemes.

In addition to the three bespoke schemes described above, the UK has also announced plans to allow entry of Ukrainian surrogate mothers and their families. Similar policy measures, tailored to discrete categories of Ukrainian, may be announced as the number of people displaced by the conflict in Ukraine increases on a daily basis.<sup>48</sup>

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48 UNHCR, 'Ukraine Refugee Situation' <<https://data.unhcr.org/en/situations/ukraine>> accessed 13 April 2022.



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# Chapter 10

## Asylum in Europe at the Time of the Temporary Protection for Ukrainians and Beyond – Conflicting Models and the Potential Role of Domestic Courts

Dr Daniela Vitiello\*

### 1. Introduction

The Temporary Protection Directive<sup>1</sup> (TPD) and its implementing framework for refugees from Ukraine<sup>2</sup> are likely to remain *lex specialis* which will co-exist

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\* Tenure-Track Assistant Professor of EU Law, University of Tuscia, Italy

1 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.

2 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

with the old “deterrence paradigm”<sup>3</sup> applicable to other refugees.

On the one hand, the unique political landscape in which the activation of the TPD was agreed, along with the distinctive features of its implementing framework, render the temporary protection for Ukrainians a somewhat unrepeatable experiment.<sup>4</sup> On the other, reform of the CEAS proposed under the New Pact on Migration and Asylum<sup>5</sup> does not seem to prompt a paradigm shift.

Indeed, rapid progress on the proposal to introduce a new Eurodac category<sup>6</sup> to fingerprint people who are given temporary protection clearly militates in favour of the old paradigm. In addition, the exclusion of the beneficiaries of the Implementing Decision (EU) 2022/382 from the scope of this proposal<sup>7</sup> may further advance the “bifurcation” of the CEAS along the North-South axis.<sup>8</sup> Similarly, the swift progress on the screening “file”, including its extensive

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3 Thomas Gammeltoft-Hansen and James C. Hathaway, ‘Non-Refoulement in a World of Cooperative Deterrence’ [2015] 53(2) *Columbia Journal of Transnational Law* 235.

4 Similarly, Thomas Gammeltoft-Hansen and Florian Hoffmann, ‘Mobility and Legal Infrastructure for Ukrainian Refugees’ [2022] 60(4) *International Migration* 213, and the scholarship cited therein.

5 Migration and Asylum Package: New Pact on Migration and Asylum, adopted on 23 September 2020.

6 Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ for the comparison of biometric data for the effective application of Regulation (EU) No 604/2013 and Directive 2001/55/EC, for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240, (EU) 2019/818 and (EU) 2017/2226 – Mandate for negotiations with the European Parliament (Council doc. 10583/22, 22 June 2022).

7 On the scope of this proposal, refer to Niovi Vavoula, ‘The Registration of Beneficiaries of Temporary Protection: Eurodac to the Rescue?’ in this collection.

8 On the contribution of the TPD for Ukrainians to the strengthening of “a stark divide between white Europeans and non-white non-Europeans”, see Ralph Wilde, ‘Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, and Sociopathic, Racist Gaslighting’ (Opinio Juris, 17 March 2022) <<http://opiniojuris.org/2022/03/17/hamster-in-a-wheel-international-law-crisis-exceptionalism-whataboutery-speaking-truth-to-power-and-sociopathic-racist-gaslighting/>> accessed 1 December 2022. On the bifurcation of EU migration and asylum law and jurisprudence along the North/South axis, refer to Thomas Spijkerboer, ‘Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice’ [2018] 31(2) *Journal of Refugee Studies* 216.

focus on the legal fiction of “non-entry”,<sup>9</sup> confirms and strengthens the traditional security-driven approach to migration and asylum matters.<sup>10</sup>

At the same time, the European Union is stuck at a crossroad, where “the old is dying and the new cannot be born”<sup>11</sup> – to use an illuminating definition of what a crisis is in essence. Wide recourse to border securitisation and enhanced informalisation of external action on migration containment<sup>12</sup> carry the risk of exacerbating the irrationality in the EU asylum system.<sup>13</sup> The very same rationale of “consensual containment”,<sup>14</sup> which underpins the EU’s external migration policy, is in crisis. This model is not only challenged from a human rights perspective, but by its inefficiency in curbing secondary movements and restoring mutual trust within the Schengen area as well.<sup>15</sup>

This reality provides the momentum for a thorough reflection on alternative models. Such a reflection cannot help but consider the laboratory offered by the implementing framework of the TPD for Ukraine, especially in light of its emphasis on access to protection and mobility rights.

This analysis contributes to such a reflection by focusing on two different options to restore asylum in Europe: (*i*) reconnecting asylum to mobility rights through the interaction of different legal regimes (directly or indirect-

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9 Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 – mandate for negotiations with the European Parliament (Council doc. 10585/22, 22 June 2022), Arts 4 and 6.

10 On the “security paradigm” steering EU migration and asylum policies in the aftermath of the war in Ukraine, see Frontex Strategic Risk Analysis 2022, Warsaw, July 2022, 6-7 <[https://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Risk\\_Analysis/strategic-risk-analysis-2022.pdf](https://frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/strategic-risk-analysis-2022.pdf)> accessed 1 December 2022.

11 Antonio Gramsci, ‘Quaderni del carcere’ in Quintin Hoare and Geoffrey Nowell-Smith (eds and trans), *Selections from the Prison Notebooks* (Lawrence & Wishart, 1971) 276.

12 See, e.g., Council Implementing Decision (EU) 2022/60 of 12 January 2022 on the Operational Coordination Mechanism for the External Dimension of Migration [2022] OJ L 10.

13 For a comprehensive analysis and critical appraisal of the Pact, refer to Daniel Thym (ed), ‘Special Collection on the “New” Migration and Asylum Pact’ (EU Immigration and Asylum Law and Policy, 28 September 2020) <<https://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-daniel-thym/>> accessed 1 December 2022.

14 Mariagiulia Giuffré and Violeta Moreno-Lax, ‘The Rise of Consensual Containment: From Contactless Control to Contactless Responsibility for Migratory Flows’ in Satvinder S. Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar, 2019) 82.

15 On this paradigm and its downward trend, see, among others, Thomas Gammeltoft-Hansen and Nikolas F. Tan, ‘The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy’ [2017] 5(1) *Journal on Migration and Human Security* 28.

ly) affecting the right to flee and seek protection in cases of mass displacement; and (ii) recurring to regime interaction to firm up extraterritorial access to asylum in individual cases. More precisely, the recourse to regime interaction *sub(i)* is examined in light of the TPD scheme and the proposed reform of the CEAS. While regime interaction *sub(ii)* is explored from the viewpoint of domestic litigation, considering recent case law by Italian courts as illustrative of the challenges it may pose to the very premises of the deterrence paradigm.

## 2. Temporary protection and mobility rights at the crossroads of different legal regimes

As underlined by van Selm,<sup>16</sup> the TPD is not about restricting asylum; rather, it is about channelling large numbers of asylum seekers towards an immediate protection status with a view to preserving the functioning of the CEAS. In doing so, this form of immediate protection recognises the relevance of mobility rights on two different levels.

First, at the level of inter-state cooperation, mobility rights have been framed as essential for the spontaneous relocation of refugees *within* the European Union. They lessen the burden on the most affected Member States while satisfying the so-called principle of dual voluntarism (Arts 25(2) and 26 TPD).<sup>17</sup> The statement attached to the Implementing Decision, through which the Member States incidentally renounce initiating take-back procedures in case of protection holders' unauthorised secondary movements, is eloquent in this

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16 Joanne van Selm, 'Temporary Protection for Ukrainians: Learning the Lessons of the 1990s?' in this collection.

17 For which see Daniela Vitiello, 'The Nansen Passport and the EU Temporary Protection Directive: Reflections on Solidarity, Mobility Rights and the Future of Asylum in Europe' [2022] 7(1) *European Papers* 15, 21.

regard.<sup>18</sup>

Second, at the individual level, the recognition of mobility rights *as a means* to flee Ukraine and enjoy protection in Europe creates an alternative pathway for admission, which supersedes the containment model of “asylum management” taking place at the EU’s external borders.<sup>19</sup> By bolstering the right to flee and seek temporary protection *at* the Union’s external borders and *across* Schengen internal ones, the Implementing Decision also suggests that the issue of secondary movements has been overstated. In doing so, it additionally points out that abandoning the “single jurisdiction” rule underpinning Dublin Regulation<sup>20</sup> may pave the way for a more effective balance between solidarity and responsibility.<sup>21</sup>

At both levels, the setback of the rationale behind the CEAS – an asylum system premised upon a non-mobility regime – is noticeable. It has been attained through the interaction of different legal regimes, concurring in two distinguishable but intertwined outcomes: (*a*) a regular (though temporary) status recognised to all persons eligible for temporary protection *on entry* and

18 On the ground-breaking potential of this statement on non-application of Art. 11 TPD, along with the weaknesses of the *ad hoc* approach adopted for Ukrainians, see Sergio Carrera and others, ‘The EU Grants Temporary Protection for People Fleeing War in Ukraine: Time to Rethink Unequal Solidarity in EU Asylum Policy’ in this collection; Meltem Ineli-Ciger, ‘What a Difference Two Decades Make? The Shift from Temporary to Immediate Protection in the New European Pact on Asylum and Migration’ (EU Immigration and Asylum Law and Policy, 11 November 2020) <<https://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/>>; Julian Lehman and Angeliki Dimitriadi, ‘Temporary Protection: The Ukrainian Field Trial’ in this collection; Steve Peers, ‘Temporary Protection for Ukrainians in the EU? Q and A’ (EU Law Analysis, 27 February 2022) <<https://eulawanalysis.blogspot.com/2022/02/temporary-protection-for-ukrainians-in.html>>; Mario Savino and Francesco L. Gatta, ‘On the Brink of a New Refugee Crisis. Temporary Protection as a Paradigm Shift?’ (Verfassungsblog, 10 March 2022) <<https://verfassungsblog.de/on-the-brink-of-a-new-refugee-crisis/>>; Daniel Thym, ‘Temporary Protection for Ukrainians: The Unexpected Renaissance of “Free Choice”’ (EU Immigration and Asylum Law and Policy, 7 March 2022) <<https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/>> all accessed 1 December 2022.

19 On the concept of “asylum management”, which embeds individual protection claims within the remit of travel and border security policies, see among many Martin Geiger and Antoine Pécoud, *The Politics of International Migration Management* (Palgrave Macmillan, 2010).

20 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180 (Dublin Regulation).

21 Amended proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending the Regulation (EU) 2021/1147 (Council doc. 5165/23, LIMITE, 11 January 2023), Arts 21 and 57 <<https://aeur.eu/f/4y7>> accessed 12 January 2023.



triggering freedom of circulation within the EU; (b) an unconditional authorisation to enter the EU Member States' territory for evacuation purposes, applicable to anyone fleeing Ukraine and based on the relaxation of border controls in exceptional circumstances.

## 2.1 Regular status on entry, triggering mobility rights within the EU

The contours and contents of the temporary protection status for Ukrainian nationals are first and foremost shaped by the 2017 agreement on visa liberalisation,<sup>22</sup> according to which they enjoy free entry and a right to stay for 90 days in any 180-day period.<sup>23</sup> For this reason, their access to protection (and to the territory of the Union) cannot technically qualify as irregular.<sup>24</sup>

In addition, the Implementing Decision 2022/382 grants a right to enter the EU territory, and choose the country of destination in light of Art. 8(3) TPD, to all those who are eligible for temporary protection. Since the right to move is construed as a derivative right triggered by the Implementing Decision, it shall not be conflated with the visa-free regime for Ukrainians. Indeed, its scope is broader with regards to two dimensions: *ratione personarum* as it also applies to non-visa-free travellers who qualify as recognised refugees or permanent residents in Ukraine; and *ratione temporis* as it is not reserved

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22 Council of the European Union, 'Visas: Council confirms agreement on visa liberalisation for Ukrainians' (Press Release 98/17, 2 March 2017).

23 Nonetheless, the social and economic rights derived from their legal status shall be enjoyed in the Member State that issues the residence permit (according to Arts 15(6) and 26(4) TPD and recital 16 of the Implementing Decision), while from November 2023 Ukrainians will have to apply for an ETIAS travel authorisation to enjoy free circulation in Europe (see 'ETIAS for Ukrainians. The European Travel Authorisation for Ukrainian citizens' <<https://www.etiasvisa.com/etias-requirements/ukrainians>> accessed 1 December 2022).

24 Their situation is thus inherently different from that of typical asylum seekers, whose unauthorised entry triggers specific consequences for the allocation of asylum responsibilities. Indeed, the Dublin system has been inspired by the "idea that each Member State is answerable to all the other Member States for its actions concerning the entry and residence of third-country nationals and must bear the consequences thereof" (Case C-646/16 *Jafari* [2017] ECLI:EU:C:2017:586, para. 88). In light of this, the Commission's recommendation, which invites the Member States to make use of the so-called "sovereignty clause" to avoid potential clashes of the temporary protection for Ukrainians with Dublin Regulation, is remarkable. See Communication from the Commission on Operational guidelines for the implementation of Council Implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01 [2022] OJ C 126I, para. 7.

for *holders* of a residence permit for temporary protection only, but extends to all persons *entitled* to temporary protection, even before the formal recognition of this status.

Therefore, all categories of persons covered by the measure enjoy freedom to choose the destination Member State, thus allowing for spontaneous redistribution according to meaningful links and diasporas. The EU visa legislation assists in the pursuit of this goal. If a person entitled to protection intends to avail herself of the temporary protection status in a Member State other than the Member State of first entry, the latter must provide a transit visa to allow circulation within the Schengen area, in accordance with Art. 35(3) of the Visa Code.<sup>25</sup> Should the person enter the EU territory via a Member State which does not apply the Schengen *acquis* in full – and which, therefore, does not issue Schengen visas – two further options have been envisaged: the issuance of a transit visa at the consulate of the Member State of destination in the Member State of first entry, or the issuance of a travel document, drafted on the model transfer form included in Annex I TPD, by the Member State of first entry.<sup>26</sup>

Furthermore, even when all these options are lacking, the journey of persons entitled to temporary protection, who are not in possession of the required documentation to enter the Member State of destination, may not be stopped. Given that the objective is to reduce formalities, they should in fact be allowed transit through the Schengen area and obtain a Schengen visa upon arrival in the Member State concerned. That is also why the Commission, in its operational guidelines on external border management, recommended that Member States withdraw carrier sanctions for transporting persons entitled to temporary protection, who are not in possession of a valid travel document, and to inform airlines thereof.<sup>27</sup>

Therefore, within the TPD's implementing framework, the interaction between different EU legal sources – including those regulating asylum, visa, and carrier sanctions – is intended to ensure the *effet utile* of temporary protection for people fleeing Ukraine, “in a spirit of Community solidarity” and sincere cooperation, as requested by Art. 25(1) TPD.

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25 Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243.

26 Communication from the Commission on Operational guidelines for the implementation of Council Implementing Decision 2022/382, para. 2.

27 Commission Communication Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders 2022/C 104 I/01 [2022] OJ C 104I.

## 2.2 Relaxation of border controls for evacuees

Entry and mobility rights for those fleeing Ukraine, who fall outside of the personal remit of the TPD's implementing framework, present a different rationale: *i.e.* ensuring that people escaping war will not end up trapped in legal limbo at external borders. This goal is achieved by the entanglement of the TPD with the Schengen Border Code (SBC),<sup>28</sup> aimed at ensuring safe passage to third country nationals who run no risk of *refoulement* upon return,<sup>29</sup> or, eventually, for regularisation purposes under Art. 7 TPD, if they have no prospects of safe return.<sup>30</sup>

More precisely, SBC provisions, which set derogations to the ordinary modalities of border surveillance in exceptional circumstances,<sup>31</sup> have been recalled justifying the non-penalisation of unauthorised entry for all third country nationals escaping the war in Ukraine, including those categories of foreigners who are excluded from the personal scope of the temporary protection scheme (e.g. temporary residents, students, seasonal workers, etc.). In addition, an extensive reading of the standard conditions authorising third-country nationals' entry into the Schengen area for humanitarian purposes<sup>32</sup> has been put forward by the Commission to prevent abusive repatriation of people who are at real risk of suffering serious harm if returned to the country of origin.<sup>33</sup>

The Commission has clarified that fulfilment of certain administrative requirements in the proximity of external borders, such as the registration of personal data *ex* Art. 10 TPD, shall not impinge in any manner upon the enjoyment of the right to flee and seek asylum or temporary protection in the Member States.<sup>34</sup> A centralised EU platform for registration has been activated by the Commission, and implemented by EU-LISA, to ensure the smooth registration and transit of protection seekers across the EU, while preventing

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28 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77.

29 Implementing Decision 2022/382, recital 13.

30 *ibid.*, Art. 2(3).

31 Regulation (EU) 2016/399, Arts 9 and 5(2)(b).

32 *ibid.*, Art. 6(5)(c).

33 Commission Communication Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders, para. 2.

34 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382, para. 3.

abuses.<sup>35</sup>

The “big picture” sketched out by the combined reading of these measures and provisions is quite divergent from the typical image of the EU border regime as governed through the state of exception and frequent recourse to the suspension of rule of law. Indeed, within the implementing framework of the TPD, the interaction between different EU and domestic sources on asylum and border management does not pursue, at least in principle, goals of general prevention, nor does it embed individual protection claims within the remit of travel and border security policies.<sup>36</sup> Rather, complementarity between the provisions of the TPD and the SBC is enhanced to foster access to a safe passage and eventually for the protection of persons fleeing the war in Ukraine.

### 3. Access to asylum and mobility rights: from temporary to long-term perspectives

The activation of the TPD for refugees from Ukraine brought to the fore, once more, the irremediable weakness of the CEAS. By offering a laboratory to test a less coercive and more incentive-based refugee governance, it showed that there may be technically feasible alternatives to the blurring of asylum responsibility. In this section, the prime obstacles to such a paradigm shift are considered by taking into account: (a) the general trends of “rule of law backsliding”<sup>37</sup> affecting the CEAS and (b) the potential implications of the proposed reform under the New Pact.

#### 3.1 General trends obstructing a paradigm shift

The road from implementing a temporary protection scheme for Ukrain-

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35 European Commission, ‘The 10-Point Plan: For stronger European coordination on welcoming people fleeing the war from Ukraine’ (Brussels, 12 May 2022) <[https://home-affairs.ec.europa.eu/10-point-plan-stronger-european-coordination-welcoming-people-fleeing-war-ukraine\\_en](https://home-affairs.ec.europa.eu/10-point-plan-stronger-european-coordination-welcoming-people-fleeing-war-ukraine_en)> accessed 1 December 2022. The Plan was adopted by the extraordinary Justice and Home Affairs Council of 28 March 2022. See also Commission Communication on the Report on Migration and Asylum COM(2022) 740 final [2022].

36 For a critical appraisal of the overlapping between the refugee and border regimes, refer among many to Alexander Betts, ‘The Refugee Regime Complex’ [2010] 29(1) *Refugee Survey Quarterly* 12.

37 Evangelia L. Tsourdi, ‘Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?’ [2021] 17(3) *European Constitutional Law Review* 471.

ians to creating feasible alternatives to the deterrence paradigm is fraught with procedural obstacles and operational barriers. While restricting access to asylum in Europe, they also raise fundamental rights concerns due to the militarisation of migration management,<sup>38</sup> the proliferation of border violence<sup>39</sup> and the de-humanisation of people-on-the-move.<sup>40</sup>

These obstacles and barriers can be framed within two parallel trends, which affect both the external and internal dimension of EU asylum policy and together produce a backsliding of refugee protection.<sup>41</sup>

The first trend is characterised by the externalisation of asylum responsibilities to neighbouring countries through advanced techniques of de-territorialised surveillance<sup>42</sup> and contactless control.<sup>43</sup> These techniques are primarily premised upon bilateral cooperation between the frontline Member States and third countries (e.g., Italy-Libya, Spain-Morocco; Greece-Turkey), in some cases with an explicit endorsement of the EU<sup>44</sup> and the active support of the

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38 Valsamis Mitsilegas, 'Extraterritorial Immigration Control, Preventive Justice and the Rule of Law in Turbulent Times: Lessons from the Anti-Smuggling Crusade' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimension of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar, 2019) 290.

39 Elif Kuskonmaz and Elspeth Guild, 'Deniability? Frontex and Border Violence in the EU' (Refugee Law Initiative, 19 January 2022) <<https://rli.blogs.sas.ac.uk/2022/01/19/deniability-frontex-and-border-violence-in-the-eu/>> accessed 1 December 2022.

40 Violeta Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The "Rescue-Through Interdiction/Rescue Without Protection" Paradigm' [2018] 56(1) *Journal of Common Market Studies* 119.

41 Evangelia L. Tsourdi, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?', cit., 3.

42 David Cantor and others, 'Externalisation, Access to Territorial Asylum, and International Law' [2022] 34(1) *International Journal of Refugee Law* 120.

43 Among many, Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' [2020] 21(3) *German Law Journal* 385.

44 Refer, for instance, to the EU Commission's support for the conclusion of the Memorandum of Understanding of 2 February 2017 between Italy and Libya ('Joint Statement by Commissioner Dimitris Avramopoulos and Italian Minister for the Interior Marco Minniti following their meeting in Rome', Statement/17/56, 12 January 2017) <<https://avramopoulos.gr/en/content/joint-statement-commissioner-dimitris-avramopoulos-and-italian-minister-interior-marco-minniti-following-their>> accessed 1 December 2022.

Frontex Agency.<sup>45</sup> They complement the EU's "informalised" external action in the field of immigration and asylum, which is largely based on compacts, common agendas, joint declarations, exchanges of letters, and operational protocols,<sup>46</sup> whose enforcement is premised upon bilateral partnerships between the Member States and third countries.<sup>47</sup> Thus, the adoption of these "flanking measures" by Member States allows the Union to expand the spectrum of its external action on migration and asylum when cooperation through regular measures (e.g. readmission agreements) is hindered by political or legal constraints.<sup>48</sup>

Another layer of "informal" externalisation is provided by cooperation among Member States within the framework of the so-called "informal readmissions", such as those implemented by Italy, Slovenia and Croatia on the Balkan route.<sup>49</sup> This pushback technique has led to chain *refoulement* while depriving asylum seekers of any legal standing (see below, section 4), as was also

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45 On the conclusion of status agreements between the EU and Balkan countries to allow extraterritorial exercise of executive powers by Frontex, see the EU Action Plan on the Western Balkans of 5 December 2022 <[https://home-affairs.ec.europa.eu/system/files/2022-12/Western%20Balkans\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2022-12/Western%20Balkans_en.pdf)> accessed 12 January 2023.

46 Recent examples are provided by the informal arrangements between the EU and The Gambia (Good Practices on Identification and Return, which entered into force on 16 November 2018), Bangladesh (Standard Operating Procedures, agreed in September 2017), Ethiopia (Admission Procedures, agreed on 5 February 2018), Guinea (Good Practices, in force since July 2017) and Côte d'Ivoire (Good Practices, in force since October 2018), which are also recalled in the European Parliament Resolution of 19 May 2021 on human rights protection and the EU external migration policy 2020/2116(INI) [2022] OJ C 15. The operational pillar of this "informalised" external action is supported by a coordination mechanism known as "MOCADDEM", established by Council Implementing Decision (EU) 2022/60 of 12 January 2022 on the Operational Coordination Mechanism for the External Dimension of Migration [2022] OJ L10.

47 As in the case of the EU-Afghanistan Joint Way Forward on migration of 2 October 2016 <[https://www.eeas.europa.eu/sites/default/files/eu\\_afghanistan\\_joint\\_way\\_forward\\_on\\_migration\\_issues.pdf](https://www.eeas.europa.eu/sites/default/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf)> accessed 1 December 2022. Its enforcement leverages on bilateral soft law instruments adopted by some Member States (namely Sweden, Germany, and Finland), which serve to detail the administrative procedures for readmission and document exchange. See Andrea Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' [2020] 39(1) *Yearbook of European Law* 569, 598.

48 Daniela Vitiello, 'Legal Narratives of the EU External Action in the Field of Migration and Asylum: From the EU-Turkey Statement to the Migration Partnership Framework and Beyond' in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows. Deflection, Criminalisation and Challenges for Human Rights* (Brill-Nijhoff, 2020) 130, 155.

49 On the practice of "informal readmission" see Matteo Astuti and others, 'Per quanto voi vi crediate assolti siete per sempre coinvolti'. I diritti umani fondamentali alla prova delle frontiere interne ed esterne dell'Unione europea' [2022] (1) *Diritto, Immigrazione e Cittadinanza* 1, 8.

concluded by the ECtHR in *M.H. et al. v Croatia*.<sup>50</sup>

The second trend, affecting the internal dimension of the EU asylum policy, is characterised by the establishment of jurisdictional “black holes” in the proximity of Member States’ external borders. These gaps in the jurisdictional *continuum* of domestic legal orders are geographically located within the EU territory, but functionally governed by a special border regime applicable to irregular migrants and asylum seekers only. This regime is framed by two interrelated legal machineries: the legal fiction of non-entry and a generalised application of border procedures<sup>51</sup> based on an extensive reading of Art. 43 of the Asylum Procedures Directive<sup>52</sup> by the Member States. As demonstrated by the CJEU in its case law on transit zones,<sup>53</sup> the combined effect of these machineries may thwart the act of making an asylum application or render it extremely complicated, thus hindering the enjoyment of the legal status of “applicant for international protection” within the EU.<sup>54</sup>

### 3.2 Why the New Pact will not change the rules of the game

EU secondary legislation on asylum mirrors these trends through a “downward harmonisation” of national standards,<sup>55</sup> calling into question respect of the

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50 *M.H. and others v Croatia* App nos 15670/18 and 43115/18 (ECHR, 4 April 2022). For a comment, refer to Joyce de Coninck, ‘MH and Others v. Croatia: Resolving the Jurisdictional and Evidentiary Black Hole for Expulsion Cases?’ (Strasbourg Observers, 14 January 2022) < <https://strasbourgobservers.com/2022/01/14/mh-and-others-v-croatia-resolving-the-jurisdictional-and-evidentiary-black-hole-for-expulsion-cases/> > accessed 1 December 2022.

51 See the European Parliament Resolution on the implementation of Article 43 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection 2020/2047(INI) [2021] OJ C 465. Additionally, refer to Maarten den Heijer, ‘The Pitfalls of Border Procedures’ [2022] 59(3) *Common Market Law Review* 641.

52 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180.

53 For which see Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* [2020] ECLI:EU:C:2020:367.

54 C-36/20 PPU *Ministerio Fiscal (Authority likely to receive an application for international protection)* [2020] ECLI:EU:C:2020:495, paras 92-94.

55 Chiara Favilli, ‘The Standard of Fundamental Rights Protection in the Field of Asylum: The Case of the Right to an Effective Remedy between EU Law and the Italian Constitution’ [2019] 12(2) *Review of European Administrative Law* 167.



rule of law in both intra-Schengen relations<sup>56</sup> and EU external action.<sup>57</sup> This type of harmonisation represents a “legacy” of the former third pillar,<sup>58</sup> which embedded the design of the CEAS with structural tensions that constantly re-surface in the solidarity *versus* responsibility dilemma.<sup>59</sup> In addition, the embeddedness of the CEAS within the broader architecture of EU’s internal security policies has contributed to the blurring of the legal status of asylum seekers and irregular migrants, allowing Member States to downgrade the claim of asylum to a mere *wish* to enter a territory.<sup>60</sup>

The proposals set forth in the New Pact on Migration and Asylum add to this complexity without shifting the focus from the deterrence paradigm. In fact, the combined reading of the proposals for regulation on pre-entry screening,<sup>61</sup> asylum procedures<sup>62</sup> and asylum and migration management,<sup>63</sup> seems to expand the legal fiction of extraterritoriality in the governance of territorial asylum in Europe, while fostering a further expansion of informal externalisation

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56 Violeta Moreno-Lax, ‘Mutual (Dis-)Trust in EU Migration and Asylum Law: The Exceptionalisation of Fundamental Rights’ in González Pascual and Iglesias Sánchez (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press, 2020) 77.

57 Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimension of EU Migration Policies in Times of Crisis*, cit.

58 Satvinder S. Juss, ‘The Decline and Decay of European Refugee Policy’ [2005] 25(4) *Oxford Journal of Legal Studies* 749, 754-756.

59 For which see, among many, Francesco Maiani, ‘The Reform of the Dublin System and the Dystopia of “Sharing People”’ [2017] 24(5) *Maastricht Journal of European and Comparative Law* 622.

60 This position has been endorsed by the ECtHR in *Ilias and Ahmed*, App no 47287/15 (ECHR, 21 November 2019), para. 225, where it affirmed that the situation of an asylum seeker being kept in a transit zone “for the verification of his or her right to enter cannot be described as deprivation of liberty imputable to the State, since in such cases the State authorities have undertaken vis-à-vis the individual no other steps than reacting to his or her *wish to enter*” (emphasis added). Similarly, *R.R. and others v Hungary*, App no 36037/17 (ECHR, 2 March 2021), para. 77; *H.M. and others v Hungary*, App no 38967/17 (2 June 2022), para. 30.

61 Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 – mandate for negotiations with the European Parliament.

62 Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU – Mandate for negotiations with the European parliament (partial) (Council doc. 16261/22, 20 December 2022).

63 Amended proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending the Regulation (EU) 2021/1147.



in the EU's external migration policy.<sup>64</sup>

This picture is completed by the reform of the SBC<sup>65</sup> to respond to unscrupulous recourse to the clauses for the temporary reintroduction of border controls by Member States.<sup>66</sup> While attempting to restore the smooth functioning of the Schengen area, it may problematically endorse bilateral cooperation on informal readmission with a view to allowing the removal of irregular aliens that are detected “outside of the vicinity of internal borders” – as duly noted by the European Parliament Rapporteur on the reform of Schengen.<sup>67</sup>

It is quite telling that, in light of the ECtHR's recent case law on unauthorised border crossings,<sup>68</sup> these developments may not raise human rights concerns as long as they impede aliens' entry to the territory, including potential asylum-seekers, who have failed to seek entry at a regular check point or comply with a procedure for legal entry. This expanded procedural leeway as recognised to national authorities in the management of immigration and asylum at the borders seems to be affected by long-lasting claims advanced by

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64 Jean-Pierre Cassarino and Luisa Marin, ‘The Pact on Migration and Asylum: Turning the European Territory into a Non-Territory?’ [2022] 24 *European Journal of Migration and Law* 1.

65 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders – General approach (Council doc. 9937/22, 9 June 2022).

66 On these practices, see Case C-368/20 *NW v Landespolizeidirektion Steiermark* [2022] ECLI:EU:C:2022:298. For a critical appraisal of this state practice, refer to Elspeth Guild, ‘Schengen Borders and Multiple National States of Emergency: From Refugees to Terrorism to COVID-19’ [2021] 23(4) *European Journal of Migration and Law* 385; Pola Cebulak and Marta Morvillo, ‘The Writing is on the Wall Proportionality of Border Controls within the Schengen Area’ (Verfassungsblog, 11 October 2021) <<https://verfassungsblog.de/the-writing-is-on-the-wall/>> accessed 1 December 2022.

67 ‘Schengen reform — European Parliament rapporteur deletes section related to instrumentalisation of migrants and internal procedures for returning migrants’ (Agence Europe Europe Daily Bulletin No. 13063, 16 November 2022) <<https://agenceurope.eu/en/bulletin/article/13063/10>> accessed 1 December 2022. For a first appraisal of Schengen reform, see Vasiliki Apatzidou, ‘Schengen Reform: “Alternatives” to Border Control to Curb “Secondary Movements”’ [2022] 7(2) *European Papers* 573.

68 *A.A. and others v North Macedonia* App nos 55798/16 and 4 others (ECHR, 5 June 2022), paras 112-123. For a comment, see Dana Schmalz, ‘Enlarging the Hole in the Fence of Migrants’ Rights *A.A. and others v. North Macedonia*’ (Verfassungsblog, 6 April 2022) <<https://verfassungsblog.de/enlarging-the-hole-in-the-fence-of-migrants-rights/>> accessed 1 December 2022.

the States Parties within the Council of Europe.<sup>69</sup> Its major legal consequence – from a human rights perspective – is that of disconnecting the physical crossing of an international border in search of asylum from procedural obligations on States Parties to assessing the individual situation of the applicant. At least in the very specific and limited cases in which the exceptions linked to the applicant’s own conduct and to the availability of effective means of legal entry shall apply, this assessment will place a reverse burden of proof on applicants regarding compliance with administrative requirements.<sup>70</sup>

## 4. What is the role for domestic courts in restoring asylum in Europe? Insights from Italian case law

The reform of the CEAS may further restrict “jurisdictional gateways” to protection, prompting a complete disconnection of EU asylum policy from its protection rationale. This rationale, however, resurfaces from the activation of the TPD, through which the EU and its Member States have (*de facto*) recognised people fleeing the war in Ukraine as “*prima facie* refugees”.<sup>71</sup>

This development opens a window of opportunity for change, which is likely to remain fictional in light of the designated path followed by the New Pact and the reluctance of the European Commission<sup>72</sup> to engage in the promotion of legal pathways.<sup>73</sup> Nor can challenges to this conservative approach

69 It is worth recalling the High-Level Conference of Izmir, where the States Parties openly invited the Court to apply self-containment on asylum and migration matters, when domestic procedures are seen to operate fairly. See the Final Declaration of the High-Level Conference on the Future of the European Court of Human Rights, organised within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe (Izmir, 26-27 April 2011) <[https://www.echr.coe.int/documents/2011\\_izmir\\_finaldeclaration\\_eng.pdf](https://www.echr.coe.int/documents/2011_izmir_finaldeclaration_eng.pdf)> accessed 1 December 2022.

70 See also *N.D. and N.T. v Spain* App nos 8675/15 and 8697/15 (ECHR, 13 February 2020), paras 209-211.

71 On the idea to *formally* grant a *prima facie* refugee status *in lieu* of temporary protection, in situations of large displacement, see the European Parliament’s Draft Report on the proposal for a regulation of the European Parliament and of the Council addressing situations of crisis in the field of migration and asylum (COM(2020)0613 – C9-0308/2020 – 2020/0277(COD)) [2020].

72 See the European Commission’s response to the European Parliament’s initiative for an EU humanitarian visa scheme, as reported in ‘European Commission follow-up to European Parliament requests 2017-2019’ (PE 642.838, June 2020) 1190.

73 As suggested by the European Parliament Resolution of 16 September 2021 on the situation in Afghanistan 2021/2877(RSP) [2022] OJ C 117, para. 41.

be expected from the case law of both the CJEU<sup>74</sup> and the ECtHR,<sup>75</sup> taking into account these Courts' stance on humanitarian visa.

At this juncture, the role of domestic courts in envisaging safe pathways to asylum, at least in individual cases, may be noteworthy. By shifting the focus from a non-existent right to immigrate to the well-entrenched right to asylum, as enshrined in most national legal systems, they may help strengthen the asylum-mobility nexus and, thus, contribute to overcoming the deterrence paradigm in the long run.<sup>76</sup> However, this would require a creative and consistent approach to the identification of connecting ties and jurisdictional gateways to protection.<sup>77</sup>

This seems to be suggested by some Italian case law that deals with extraterritorial access to asylum by applicants who were prevented from availing themselves of constitutional asylum on Italian soil by the active conduct of Italian authorities. This case law is connected to the very nature of the right set forth in Art. 10(3) of the Italian Constitution, which – in the absence of an organic law on asylum – has been defined by the Italian Supreme Court of Cassation as a full substantive right to be admitted to the “territory of the Republic”.<sup>78</sup> The personal scope of this right, importantly, extends to shipwrecked persons who are rescued at sea in the context of SAR operations.<sup>79</sup>

Therefore, in principle all aliens who are denied (at home) the effective exercise of the democratic liberties (guaranteed on the territory of the Republic) are entitled to constitutional asylum.<sup>80</sup> However, the core peremptory content

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74 C-638/16 PPU *X and X v État belge* [2017] ECLI:EU:C:2017:173.

75 *M.N. and others v Belgium* App no 3599/18 (ECHR, 5 May 2020).

76 For an analysis of Italian legislation on asylum, in light of the constitutional parameter, refer to Cecilia Corsi, 'The Twist and Turns of Asylum Laws in Italy' (MPC Blog, 28 February 2019) <<https://blogs.eu.eu/migrationpolicycentre/twist-turns-asylum-laws-italy/>> accessed 1 December 2022.

77 For a comprehensive appraisal of Italian case law on constitutional rights of people-on-the-move, refer to Cecilia Siccardi, *I diritti costituzionali dei migranti in viaggio. Sulle rotte del Mediterraneo* (Editoriale Scientifica, 2021).

78 For a thorough analysis of Art. 10(3) of the Italian Constitution, refer to Antonio Cassese, *Art. 10*, in Giuseppe Branca (ed), *Commentario della Costituzione* (Zanichelli, 1975) 534; Marco Benvenuti, *Il diritto d'asilo nell'ordinamento costituzionale italiano. Un'introduzione* (Cedam, 2007).

79 Italian Supreme Court of Cassation (Criminal Section III), judgment n. 6626/2020 <<https://www.giurisprudenzapenale.com/wp-content/uploads/2020/02/Cass-6626-2020.pdf>> accessed 1 December 2022.

80 Italian Supreme Court of Cassation (Civil Joint Sections), judgment n. 4674/1997 <[https://www.meltingpot.org/app/uploads/1997/05/01\\_all\\_cass\\_1997\\_4674.pdf](https://www.meltingpot.org/app/uploads/1997/05/01_all_cass_1997_4674.pdf)> accessed 1 December 2022.

of this constitutional right has been further specified by the Supreme Court,<sup>81</sup> which placed emphasis on its procedural dimension, triggering a right not to be refused entry and the connected right to remain pending asylum procedures.<sup>82</sup>

The key unanswered question, for which some guidance has been provided by the Civil Court of Rome, is whether and how the effective enjoyment of the constitutional right to asylum triggers a corresponding duty on Italian authorities to avoid any hindrances to material access to the Italian territory for asylum purposes.<sup>83</sup>

The following analysis outlines three different scenarios in which Italian judges have provided guidance on this issue: (a) maritime interdiction of irregular migration; (b) informal readmission at a land border; (c) denial of a humanitarian visa.

## 4.1 Access to asylum following illegal pushbacks at sea

The first ruling regards a case of direct *refoulement* on the high seas, in which the Italian navy rescued and embarked 14 Eritrean citizens before handing them over to the Libyan coastguard, in the framework of the Italy-Libya cooperation on joint sea patrolling.<sup>84</sup> Drawing on the ECtHR landmark ruling in *Hirsi*,<sup>85</sup> the Civil Court of Rome sanctioned the extraterritorial violation of the principle of *non-refoulement* by Italian authorities.

However, from this violation it did not just infer a right to damage com-

81 Italian Supreme Court of Cassation (Civil Section I), judgment n. 25028/2005 <[https://www.meltingpot.org/app/uploads/2005/11/Cass\\_25028\\_25\\_11\\_2005\\_su\\_distinzione\\_fra\\_asilato\\_e\\_rifugiato.pdf](https://www.meltingpot.org/app/uploads/2005/11/Cass_25028_25_11_2005_su_distinzione_fra_asilato_e_rifugiato.pdf)> accessed 1 December 2022.

82 Based on this understanding of constitutional asylum, the Italian asylum system has been designed after secondary legislation of the CEAS, including the territorial reach of asylum processing (see, e.g., Art. 3 Asylum Procedures Directive and Art. 20 Dublin Regulation). Such a reading of the Italian constitutional asylum restricts the margin of judicial appreciation in extraterritorial asylum cases, deviating from earlier case law in which the presence of an asylum seeker on Italian soil at the material time of the proceedings was not deemed necessary precondition for status recognition. See, eloquently, the decision of the Court of Rome (Civil Section II) n. 49565/1999, in the Öcalan case.

83 On this issue, refer to Paolo Bonetti, 'L'evoluzione delle norme e delle politiche del diritto di asilo in Italia e in Europa tra protezione internazionale e asilo costituzionale' in Monia Giovannetti and Nazarena Zorzella (eds), *Ius migrandi, Trent'anni di politiche e legislazione sull'immigrazione in Italia* (FrancoAngeli, 2020) 784.

84 Court of Rome (Civil Section I), judgment n. 22917/2019 <<https://sciabacaoruka.asgi.it/wp-content/uploads/2020/01/sentenza-22917.pdf>> accessed 1 December 2022.

85 *Hirsi Jamaa and others v Italy* App no 27765/09 (ECHR, 23 February 2012).

pensation<sup>86</sup> as the ECtHR also did in the *Hirsi* case. It went further,<sup>87</sup> by considering the illicit pushback at sea as directly impinging on the constitutional right to asylum, interpreted as a fully actionable “right to have rights”. Thus, such a conclusion was reached on the basis of the effective control exercised by the Italian navy over the applicants in distress at sea. By making express reference to the consolidated case law of the Italian Court of Cassation, which has construed the right to asylum in Art. 10(3) Const. as an expression of the broad openness of the legal system to the fundamental rights of all human beings,<sup>88</sup> the Court of Rome imposed positive obligations on state authorities to restore the right infringed by allowing the applicants’ access to the Italian territory in order to submit an asylum claim. Hence, it envisaged the issuance of an entry visa *ex* Art. 25 of the Visa Code as a possible avenue to ensuring compliance with the constitutional right to asylum.

In this sense, the illegal conduct of the intercepting authorities was framed as a “jurisdictional gateway” to gain access to territorial asylum in Italy. This reasoning seems to trigger an evolutive interpretation of Art. 10(3) Const., according to which its direct applicability may extend to all cases in which a causal link can be established between an illicit public conduct and the non-arrival of an asylum seeker.<sup>89</sup>

It remains uncertain, though, whether a similar reasoning could addition-

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86 The case was a civil litigation for damages caused by the illegal pushback of the applicants at sea. For an analysis, refer to Loredana Leo, ‘European Externalization Policies and the Denial of the Right to Asylum: Focus on Ruling no. 22917/2019 of the Civil Court of Rome’ (ASGI, 25-26 February 2020) <[https://sciabacaoruka.asgi.it/wp-content/uploads/2020/10/Intervento-Lagos-finale-LEO\\_-ENG.pdf](https://sciabacaoruka.asgi.it/wp-content/uploads/2020/10/Intervento-Lagos-finale-LEO_-ENG.pdf)> ; Giulia Del Turco and Mario Savino, ‘Chi è stato illegittimamente respinto ha diritto di rientrare in Italia?’ (ADiM Blog, 31 January 2020) <<https://www.adimblog.com/2020/01/31/chi-e-stato-illegittimamente-respinto-ha-diritto-di-rientrare-in-italia/>> both accessed 1 December 2022.

87 It is worth recalling that in the *Hirsi* case the ECtHR did not impose on Italian authorities any concrete measures for execution of the judgment other than just satisfaction, along with diplomatic assurances to be obtained from the Libyan authorities that successful applicants would not have been exposed to treatments contrary to Art. 3 ECHR. *Contra*, see the Concurring Opinion of Judge Pinto De Albuquerque, according to which the Court should have imposed on Italian Government “a positive obligation to provide the applicants with practical and effective access to an asylum procedure in Italy” (*Hirsi Jamaa and others v Italy*, para. 79).

88 Italian Supreme Court of Cassation (Civil Joint Sections), judgment n. 29460/19, 13 <[https://www.asgi.it/wp-content/uploads/2019/11/2019\\_cassazione\\_29460.pdf](https://www.asgi.it/wp-content/uploads/2019/11/2019_cassazione_29460.pdf)> accessed 1 December 2022.

89 In this sense, Mariagiulia Giuffrè, ‘Esternalizzazione delle frontiere e non-refoulement: accesso al territorio e alla procedura di asilo alla luce della sentenza n. 22917/2019’ [2020] (1) *Questione giustizia* 190.

ally cover forms of “interdiction by omission”,<sup>90</sup> in which state responsibility *primarily* – though not *exclusively* – pivots on public authorities’ capacity to uphold human rights.<sup>91</sup> Even endorsing a functional model of extraterritorial jurisdiction,<sup>92</sup> some “connecting ties” would be required to trigger positive obligations,<sup>93</sup> and such a requirement would apply both in case of “decisive influence” exercised on the responsible authorities and in case of the establishment of a “special relationship of dependency”, or even in cases of effective control over the applicants’ “enjoyment of rights”.<sup>94</sup>

At any rate, what seems salient, from the perspective of the present analysis, is the emphasis on mobility rights to better substantiate the extraterritorial reach of the right to asylum. In the case in comment, those rights have been framed as an inherent built-in component of Art. 10(3) Const., which may be attained through different legal pathways, including (but not limited to) the issuance of a humanitarian visa.<sup>95</sup>

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90 Violeta Moreno-Lax, ‘Protection at Sea and the Denial of Asylum’ in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 483.

91 Human Rights Committee, views of 27 January 2021, comm. No 3042/2017, *S.A. and others v Italy* <[https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ITA/CCPR\\_C\\_130\\_DR\\_3042\\_2017\\_32338\\_E.docx](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ITA/CCPR_C_130_DR_3042_2017_32338_E.docx)>; Committee on the Rights of the Child, decision of 2 November 2020, comm. Nos 79 and 109/2019, *L.H. and others v France* <[https://www.ejiltalk.org/wp-content/uploads/2020/12/CRC\\_C\\_85\\_D\\_79\\_2019\\_E-1.pdf](https://www.ejiltalk.org/wp-content/uploads/2020/12/CRC_C_85_D_79_2019_E-1.pdf)> both accessed 1 December 2022.

92 For which, refer to Samantha Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ [2012] 25(4) *Leiden Journal of International Law* 857, 863-864.

93 On the legal uncertainties surrounding the application of the causal link doctrine to positive obligations, refer to Marko Milanovic, ‘Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations’ (EJIL:Talk!, 16 March 2021) <<https://www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/>> accessed 1 December 2022. On the relationship between jurisdiction, attribution and positive obligations, see Alice Ollino, ‘The ‘Capacity-Impact’ Model of Jurisdiction and its Implications for States’ Positive Human Rights Obligations’ [2021] 82 *Questions of International Law* 81.

94 *Carter v Russia* App no 20914/07 (ECHR, 21 September 2021). For a comment, refer to Marko Milanovic, ‘European Court Finds Russia Assassinated Alexander Litvinenko’ (EJIL:Talk!, 23 September 2021) <<https://www.ejiltalk.org/european-court-finds-russia-assassinated-alexander-litvinenko/>> accessed 1 December 2022.

95 In the same vein, Cecilia Siccardi, ‘Quali vie di ingresso legale per i richiedenti protezione in Europa? Contesto europeo e costituzionale’ [2022] (2) *Diritto, Immigrazione e Cittadinanza* 74, 105.

## 4.2 Access to asylum in case of “informal” readmission

Informal readmission from Italy to Slovenia, on the basis of the 1996 bilateral agreement between these two Member States,<sup>96</sup> is another case in which mobility rights have been recognised by the judiciary to allow the enjoyment of the constitutional right to asylum *vis-à-vis* an abusive non-arrival policy. This policy has been implemented from spring 2020 and has led to chain removals of some 1.300 migrants<sup>97</sup> to Slovenia, and then from Slovenia to Croatia and, finally, to Serbia and Bosnia Herzegovina – a practice which has subsequently been found in violation of the ECHR in *M.H. et al. v Croatia*.<sup>98</sup>

The legal basis for this cooperation can be found in Art. 6(3) of the EU Return Directive<sup>99</sup> and Art. 13(14-ter) of the Italian Legislative Decree 286/98,<sup>100</sup> which, on paper, shall apply in full compliance with the right to asylum and the principle of *non-refoulement*. In practice, the application of the readmission agreement between Italy and Slovenia also affected asylum seekers, who were denied leave to enter based on the assumption that they had not technically exited Slovenian “sovereignty sphere”.<sup>101</sup>

The Ordinary Court of Rome departed from acknowledging that, in light of both Art. 10(3) of the Italian Constitution and Art. 19 of the EU Charter of Fundamental Rights (EUCFR), “once the foreigner has expressed her will to apply for asylum, the entry into the territory of the State cannot be considered

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96 Accordo in forma semplificata fra il Governo della Repubblica italiana e il Governo della Repubblica slovena (Roma, 3 September 1996) <[https://www.migrationtreaties.unito.it/slovenia/accordo-tra-italia-e-slovenia-sulla-riammissione-delle-persone-alla-frontiera.html#Casi%20e%20norme%20secondarie%20\(di%20applicazione\)](https://www.migrationtreaties.unito.it/slovenia/accordo-tra-italia-e-slovenia-sulla-riammissione-delle-persone-alla-frontiera.html#Casi%20e%20norme%20secondarie%20(di%20applicazione))> accessed 1 December 2022.

97 AIDA, ‘Access to the Territory and Push Backs Italy’ (20 May 2022) <<https://asylumineurope.org/reports/country/italy/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/>> accessed 1 December 2022.

98 *supra*, section 3.1

99 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348.

100 Italian Legislative Decree No 286 of 1998 (Testo Unico sull’Immigrazione).

101 Matteo Astuti and others, ‘Per quanto voi vi crediate assolti siete per sempre coinvolti’. I diritti umani fondamentali alla prova delle frontiere interne ed esterne dell’Unione europea’, cit., 15.



irregular either, even if it happened irregularly”.<sup>102</sup> Then, it declared that immediate deportation, which hindered access to a judge, had been in violation of Art. 24 Const. and Art. 47 EUCFR. Moreover, the Rome Court recalled that the sovereign right to control entry to the territory is subject to the rule of law, which shall be restored by removing the legal consequences of *ultra vires* public conduct impacting the enjoyment of the applicant’s rights.

On this basis, the Court ordered the Italian authorities to authorise entry of a Pakistani asylum seeker, who had been informally readmitted from Trieste to Slovenia and then swiftly pushed back to Bosnia across the Croatian border. Later, the same Court accepted the appeal submitted by the Ministry of the Interior due to a lack of documental evidence of the applicant’s legal standing<sup>103</sup>, though such a situation was directly dependent upon the informality of the chain *refoulement* in place on the Balkan route. Nonetheless, the Rome Court did not refute its previous findings on the direct applicability of Art. 10(3) Const., in connection with the substantive and procedural unlawfulness of Italian conduct.

The two cases analysed above have been criticised in scholarship from opposite poles. On the one hand, the nexus established by the judiciary between the extraterritorial reach of the constitutional right to asylum and the wilful conduct of public authorities has been deemed to introduce an unforeseen condition in Art. 10(3) Const., which should have instead been determined by the law.<sup>104</sup> Indeed, access to asylum from abroad would only be granted when the deprivation of the Italian Constitutional freedoms suffered by the alien at home matched the illegitimate attempt by Italian authorities to impede her access to the territory of the Republic.<sup>105</sup>

On the other hand, the judicial attempt to better outline the contours of

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102 Ordinary Court of Rome (Personal Rights and Immigration Section), order of 18 January 2021, app. n. 56420/2020 (on application for interim measures *ex* Art. 700 of the Italian Code of Civil Procedure) <[https://www.asgi.it/wp-content/uploads/2021/01/Tribunale-Roma\\_RG-564202020.pdf](https://www.asgi.it/wp-content/uploads/2021/01/Tribunale-Roma_RG-564202020.pdf)> accessed 1 December 2022. Following this order, informal readmission along the border between Italy and Slovenia were suspended. However, since December 2022, this partnership has been reactivated and informal readmissions have been carried out in Trieste, Gorizia and Udine. See Chiara Cardinali, ‘Riflessioni sulla illegittimità delle riammissioni informali in Slovenia alla luce di una loro possibile riattivazione’ [2023] (1) *Questione giustizia* 1.

103 Ordinary Court of Rome (Personal Rights and Immigration Section), order of 3 May 2021, app. n. 7045/2021 (appeal against the decision to impose interim measures *ex* Art. 700 of the Italian Code of Civil Procedure) <[https://www.asgi.it/wp-content/uploads/2021/05/2021\\_Tribunale\\_Roma\\_rotta\\_balkanica\\_10630266s-2.pdf](https://www.asgi.it/wp-content/uploads/2021/05/2021_Tribunale_Roma_rotta_balkanica_10630266s-2.pdf)> accessed 1 December 2022.

104 See, e.g., Cecilia Siccardi, ‘Quali vie di ingresso legale per i richiedenti protezione in Europa? Contesto europeo e costituzionale’, *cit.*, 105.

105 Claudio Panzera, *Il diritto all’asilo. Profili costituzionali* (Editoriale Scientifica, 2020) 132.



the extraterritorial applicability of the constitutional right to asylum, by reference to “jurisdictional gateways” such as the exercise of public authority and control over the asylum seeker – or even the existence of “meaningful links” between the applicant and the Italian legal order –<sup>106</sup> has been supported to circumvent the indeterminacy of the constitutional parameter.<sup>107</sup>

From our stance, what seems key to the effective enforcement of the right to asylum from abroad is the identification of jurisdictional gateways, which allows a twofold result. First, it avoids the so-called “paradox of universality”,<sup>108</sup> in light of which the constitutional right to asylum – though universal, directly applicable and inherently non-territorial *on paper* – falls short of protecting aliens who do not make it to the Italian territory. Second, it enables domestic judges to react to illegitimate policies and practices of non-arrival by deriving entry rights from the very same public conduct aiming to impede access to the territory.

### 4.3 Access to asylum through humanitarian visa: a slippery though promising path?

The two cases analysed above deal with extraterritorial access to asylum by applicants who were apprehended and illegally pushed back while striving to reach Italy to seek asylum. However, the Court of Rome also ventured into the slippery terrain of access to asylum through a humanitarian visa, in cases in which national authorities had no direct responsibility for the extraterritorial nature of the claim.

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106 See, e.g., Ordinary Court of Rome (Personal Rights and Immigration Section), order of 21 February 2019 (on application for interim measures *ex Art. 700* of the Italian Code of Civil Procedure) <<https://www.asgi.it/wp-content/uploads/2019/05/Tribunale-di-Roma-visto-umanitario-per-ms-na-in-Libia.pdf>> accessed 1 December 2022. In this case, the Rome Court did not refer directly to Art. 10(3) Const., but read Art. 25 Visa Code in compliance with the provision on constitutional asylum, with a view to deriving an obligation on the Italian Foreign Ministry to issue a humanitarian visa for family reunification of a Nigerian unaccompanied minor with his mother, who was in Italy. The presence of a solid family link, together with the risk of irreparable harm suffered by the minor in Libya, were decisive elements in determining his access to the territory. For a comment, refer to Eleonora Frasca, ‘L’ordinanza del Tribunale di Roma del 21 febbraio 2019 che obbliga il ministero degli Esteri all’immediato rilascio di un visto per motivi umanitari restituisce un senso all’articolo 25 del codice dei visti europeo: politiche del diritto ed esigenze di tutela a confronto’ [2019] (3) *Diritto Immigrazione e Cittadinanza* 206.

107 Paolo Morozzo della Rocca and Mirko Sossai, ‘Chiedere asilo da lontano’ [2022] (2-3) *Questione giustizia* 1.

108 On the paradox of universality of human rights, see, among others, Steve J. Stern and Scott Straus (eds), *The Human Rights Paradox: Universality and Its Discontents* (University of Wisconsin Press, 2014).

The first case concerns two Afghan journalists, who failed to obtain a humanitarian visa *ex Art. 25* of the Visa Code at the Italian Embassy of Islamabad, and thus applied for interim measures to be granted access to asylum procedures in Italy.<sup>109</sup> Here, the connecting tie was (implicitly) identified in an Italian private sponsor (a citizen), who offered accommodation and means of integration to the two journalists upon arrival in Italy. In addition, the applicants could demonstrate a serious and imminent risk of irreparable harm deriving from their political activism, adding to the war risks that were already being faced by other Afghans. In this highly qualified situation, the Rome Court held that the State's margin of appreciation concerning the decision to issue a humanitarian visa pursuant to Art. 25(1)(a) of the Visa Code, read in conjunction with the constitutional right to asylum, would impose on domestic judges (but not on public administrations) a duty to adopt any urgent measures to avoid irreparable harm, including leave to enter the Italian territory.<sup>110</sup>

The decision to grant interim measures to the applicants was revoked on appeal a few days after the material arrival of the applicants in Italy through a humanitarian corridor.<sup>111</sup> Despite this, its relevance for legal scholarship is connected to the idea that territoriality is the primary rule triggering the *enjoyment* of protection in territorial asylum systems, but not the only one prompting *access* to the system and legal redress.<sup>112</sup> This might be especially relevant in cases in which the risks of irreparable harm are well substantiated and aggravated by a general situation of mass violation of human rights in the country of origin.<sup>113</sup>

Nonetheless, by imposing a duty on Italian judges to order administrative authorities to grant access to Italian soil though a mandatory reading of Art. 25 Visa Code, which leverages primarily on the situation of immediate danger in which the applicants found themselves, the Rome Court seemed to exceed its powers. This is probably why the following litigation concerning Afghan

109 Ordinary Court of Rome (Personal Rights and Immigration Section), order of 21 December 2021 n. 62652 (on application for interim measures *ex Art. 700* of the Italian Code of Civil Procedure) <<https://www.asgi.it/wp-content/uploads/2022/01/Tribunale-Roma-ord.-21.12.2021.pdf>> accessed 1 December 2022.

110 For a critical appraisal of this conclusion, see Paolo Morozzo della Rocca and Mirko Sossai, 'Chiedere asilo da lontano', cit., 9.

111 Court of Rome (Civil Section XVIII), order n. 75658 of 25 February 2022 (on file with the author).

112 See, *mutatis mutandis*, Thomas Gammeltoft-Hansen and Nikolas F. Tan, 'A Topographical Approach to Accountability for Human Rights Violations in Migration Control' [2020] 21(3) *German Law Journal* 335.

113 In the same vein, Paolo Bonetti, 'Editoriale. La crisi afghana come spunto per risolvere i nodi strutturali del diritto di asilo' [2021] (3) *Diritto Immigrazione e Cittadinanza* 1.

citizens who were denied leave to enter *ex Art. 25* of the Visa Code placed emphasis on the establishment of Italian jurisdiction in the relevant cases, in order to trigger the extraterritorial application of Art. 10(3) Const.<sup>114</sup> As a result, by application of the spatial and personal models of extraterritorial effective control developed by the ECtHR, the direct applicability of the constitutional right to asylum has been excluded in cases of a mere request for a humanitarian visa submitted at Italian embassies (or consulates).

In other cases, the justiciability of Art. 10(3) Const. from abroad has been made contingent on the establishment of a “genuine link” between the asylum seeker and the Italian State, by reference to the solidity of existing connecting ties, such as family, social and professional links. In this vein, the Rome Court allowed entry of a Moroccan human rights activist, who had been the victim of persecution in his own country and could demonstrate a solid link with the State.<sup>115</sup>

Such a decision by the judiciary may be criticised because the identification of the meaningful links which may trigger an extraterritorial application of Art. 10(3) Const. should be determined by the law. Nonetheless, it seems relevant from our perspective because it applies a functional understanding of state jurisdiction, in light of which the existence of factual connecting ties is ancillary to an autonomous “jurisdictional gateway” for accessing asylum procedures in Italy. This gateway is represented by the reiterated decision by the Italian administrative authorities to deny leave to enter the territory of the Republic through a humanitarian visa, which was justified by a wrongful alert that was entered into the Schengen Information System<sup>116</sup> by the country of persecution.

Thus, in the Rome Court’s understanding, the reiterated (and illegitimate) denial of a visa by Italian authorities may create a jurisdictional gateway to access Italian territory due to the exercise of effective control over the applicant’s *enjoyment* of the right to constitutional asylum. This reading seems to be confirmed by the Court’s statement that “the reference made in Art. 10(3)

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114 See, e.g., Ordinary Court of Rome (Personal Rights and Immigration Section), order of 24 June 2022, app. n. 23824 (appeal against the first instance decision to refuse interim measures *ex Art. 700* of the Italian Code of Civil Procedure) <<https://www.dirittoimmigrazionecittadinanza.it/allegati/fascicolo-3-2022/umanitaria-varie-dublinko/994-1-trib-roma-24-6-2022>> accessed 1 December 2022.

115 Ordinary Court of Rome (Personal Rights and Immigration Section), order of 24 May 2022, app. n. 15094 <<https://www.dirittoimmigrazionecittadinanza.it/allegati/fascicolo-3-2022/umanitaria-varie-dublinko/995-2-trib-roma-24-5-2022>> accessed 1 December 2022.

116 Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) [2006] OJ L 381.

Const. to the ‘territory of the Republic’ indicates the place where the alien will effectively enjoy the right to asylum, and does not correspond to the place where the asylum seeker has to be physically present in order to seek asylum”.<sup>117</sup> Similarly, the existence of meaningful links between the asylum seeker and the territory of the Republic may not *per se* trigger the enjoyment of the constitutional right to asylum, but they might be used *ad abundantiam* to substantiate the claim that an administrative decision to deny a humanitarian visa breaches the right to asylum.

## 5. Conclusion

Taking the right to asylum seriously may foster an evolutive interpretation of the notion of jurisdiction by domestic courts, which may help make room for legal pathways to protection, at least in specific individual cases. Unlike protection against *refoulement*, which “cannot avail the appellants, who have not (...) presented themselves, save in a highly metaphorical sense, at the frontier”<sup>118</sup>, such an evolution may reduce the gaps and inconsistencies that underpin asylum policies at the national level. In addition, the positive impact of such a domestic trend on the CEAS cannot be completely excluded as Art. 78(2)(d) TFEU does not expressly outlaw – as the former Art. 63(1)(d) TEC did – extraterritorial asylum processing for the purposes of humanitarian admission to the EU territory.<sup>119</sup> Of course, these developments, like the decision to recognise protection and mobility rights to Ukrainian refugees, would be dependent upon strong political will, at the national and supranational level.<sup>120</sup> However, a path has been traced and the courage to walk it may come.

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117 Ordinary Court of Rome (Personal Rights and Immigration Section), order of 24 May 2022, app. n. 15094 (unofficial translation).

118 *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55, para. 26.

119 See, on this point, Janine Prantl, ‘Shaping the Future towards a Solidary Refugee Resettlement in the European Union’ [2021] 6(2) *European Papers* 1027, 1036.

120 As in the case of resettlement and humanitarian admission, on which see the proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Admission Framework and amending Regulation (EU) N0 2021/1147 of the European Parliament and the Council – Amended mandate for negotiations with the European Parliament (Council doc. 16281/22, 20 December 2022).

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# **Section III**

Procedures,  
Reception, Rights,  
and Agencies

# Chapter 11

## The Right to Family Reunification under the Temporary Protection Directive and Council Decision 2022/382: Preserving Family Unity for the Beneficiaries of Temporary Protection

Dr Georgios Milios\*

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\* Assistant Professor (Serra Hünter fellow) of Constitutional Law, University of Barcelona.

# 1. Introduction

With Decision 2022/382 of 4 March 2022,<sup>1</sup> the Council of the EU activated for the first time the Temporary Protection Directive (TP Directive)<sup>2</sup> for persons displaced from Ukraine as a result of the military invasion by Russian armed forces. Article 2 of the Decision provides that the protection is meant to cover Ukrainian nationals residing in Ukraine before 24 February 2022, stateless persons (or persons) who benefited from international or equivalent protection in Ukraine before the same date and finally, their family members.

The Decision or adequate protection under national law should also apply to foreigners holding a permanent residence permit and may optionally apply to other foreigners legally residing in Ukraine before the date stated above. In these cases, the Decision states that beneficiaries should be unable to return to their country of origin, while their family members are not covered by the scope of the Decision. All the above is without prejudice to the fact that family members may benefit from other EU legislation such as the Family Reunification Directive<sup>3</sup> or the Citizenship Directive<sup>4</sup> in the case they are family members of third-country nationals or EU citizens already residing in the EU.

The present chapter will deal with the family reunification regime set out in the Council Decision and the TP Directive, focusing on the definition of family and the applicable rules to reunify separated families. It will also consider the Commission Guidelines for the implementation of the Council Decision,<sup>5</sup>

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- 1 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.
  - 2 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.
  - 3 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251.
  - 4 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.
  - 5 Commission, 'Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection' (2022/C 126 I/01).

especially concerning issues related to documentary evidence of a family relationship. Given the absence of case law regarding the TP Directive, some reference to the family reunification of third country nationals or refugees under EU law is necessary for a better understanding of the scope and limits of family reunification in the framework of the TP Directive. Lastly, the chapter will approach the issue from a human rights perspective, explaining briefly the main principles applied by the European Court of Human Rights in family reunification cases.

It is important to have in mind that even though the Decision also activates protection for family members, the reference to the family reunification regime under the TP Directive is still relevant, especially with regard to family members of third country nationals residing in Ukraine who, according to the Decision, may not qualify for protection individually. Indeed, even though the Decision does not include those family members in its scope, Member States should consider granting them temporary protection considering that the Directive guarantees a right to family reunification to all beneficiaries of temporary protection without any distinction on the basis of migration or other status.

## 2. The definition of 'family'

The Council Decision defines the concept of family in the same way as the TP Directive. The relevant provisions regarding family members of beneficiaries of temporary protection are Art. 2.4 of the Decision and Art. 15 of the TP Directive. According to these provisions, the term 'family' refers to: a) the spouse of the sponsor or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to foreigners, b) the minor unmarried children of the sponsor or of his/her spouse, without distinction as to whether they were born in or out of wedlock or adopted and c) other close relatives who lived together as part of the family unit at the time of the events leading to the mass influx, and who were wholly or mainly dependent on the sponsor at the time. Family ties should already exist in Ukraine before the beginning of the 'mass influx' set out on 24 February 2022.

There are several comments that should be made regarding the family relations that are included in the scope of the Decision and TP Directive. First, the requirement that the family relationship already existed in the country of origin is rather problematic and disregards the reality regarding the formation

of family in the area of international protection. Indeed, persons in need of protection may spend a considerable amount of time in transit zones and/or camps before arriving at their final destination. According to the EU regulation applicable in international and temporary protection, family relations created after the departure from the country of origin and during the refugee journey are excluded from protection or reunification. It is true that this consideration might be less relevant for the case of Ukraine due to its geographical proximity with the EU. Nevertheless, it is still likely that this policy will affect certain family relations in practice. Indeed, family relationships formed, for instance, in neighbouring countries, such as Poland or Romania, after 24 February 2022 are excluded from the scope of the Council Decision.

Second, the fact that the unmarried partner is included in the concept of family only if the legislation or practice of the concerned Member States treats unmarried couples in a comparable way to married couples under its migration legislation is likely to hinder reunification and protection for unmarried partners. Indeed, the treatment of unmarried couples may differ among Member States, while same-sex partners may face additional obstacles. In light of current policies in countries like Poland or Hungary against LGBTIQ+ people, the fact that the treatment of unmarried couples depends on each individual Member State becomes particularly worrying.

Third, the TP Directive does not define the term ‘other close relatives’ that constitute family members in case they had lived together as part of a family unit at the time of the events leading to mass influx. This term is also used in the Dublin III Regulation<sup>6</sup> to refer to the applicant’s adult aunt, uncle or grandparent. Given the absence of a concrete definition in the context of temporary protection, we believe that an expansive interpretation that would cover relationships beyond those referred to in Dublin III would be the most adequate. It is worth mentioning that the Regulation on Asylum and Migration Management proposal (RAMM)<sup>7</sup> in the EU Pact on Migration and Asylum includes the idea to extend the definition of ‘family’ to siblings of the applicant and families created in transit zones.

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6 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180, art 2(h).

7 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]’ COM(2020) 610 final.



Fourth, the requirement that close relatives should be ‘wholly or mainly dependent’ implies an economic dependence and not merely dependence based on health problems or disability. Although the Directive also does not contain a definition of this term, case law from the Court of Justice of the European Union (CJEU) already exists, interpreting this term in the context of other EU Directives in a rather broad manner.<sup>8</sup> Indeed, the CJEU has clarified that a situation of dependence should exist in the country of origin whereas Member States cannot require the dependent family member to have unsuccessfully sought employment in the country of origin. In addition, the fact that a family member may, due to their education or age, be able to find employment in the host EU country is an irrelevant fact for their consideration as a dependant.

Another relevant issue in the field of family reunification is the required documentation to prove the existence of the family link. The Commission, in its Guidelines for the implementation of the Council Decision,<sup>9</sup> specifies that the existence of marriage or a partnership can be proven by ‘relevant registry documents and certificates or by any other document issued by the Ukrainian authorities, even attestations provided by the country’s representation in that Member State’. According to the same document, the parent-child relationship could be proven ‘by birth certificates or similar’, while the existence of ‘other close relatives’ could be proven by ‘residence documents, family register and proof of relevant payments of care’.

Given the circumstances and practical difficulties that persons fleeing from conflict zones face, it is important that Member State administrations adopt flexible practices in this respect. That being said, Member States should consider accepting any and all available evidence, including declarations, in the case that beneficiaries of temporary protection were not in a position to apply for or take with them the official certificates due to the circumstances that led them to flee.

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8 The concept has been mainly interpreted in the framework of the Citizenship Directive. See Case C-1/05 *Jia v Migrationsverket* [2007] ECLI:EU:C:2007:1 and Case C-423/12 *Reyes v Migrationsverket* [2014] ECLI:EU:C:2014:16.

9 Commission, ‘Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection’ (2022/C 126 I/01).

### 3. The comparison with the definition of 'family' contained in the Family Reunification Directive

To have a clearer understanding of the definition of family in the framework of the temporary protection system, a comparison with the same concept in other EU legal instruments is necessary. As previously noted, the definition of 'family members' presents important differences among EU Directives.<sup>10</sup>

Leaving special regimes on family reunification aside, in 2003 the EU adopted the Family Reunification Directive (FR Directive)<sup>11</sup> that regulates the right to family reunification of third country nationals in the EU, while it also contains a specific Chapter regarding the reunification regime applicable to refugees. The Directive explicitly excludes beneficiaries of temporary protection from its scope<sup>12</sup> and it also does not apply to beneficiaries of subsidiary protection.<sup>13</sup>

Regarding the concept of family, the FR Directive provides for a restrictive definition that includes merely the sponsor's spouse and the unmarried dependent children which the sponsor or the spouse has custody over. The already restrictive definition may be further limited as according to Art. 4.6, Member States may request that applications for family reunification with minor children have to be submitted before they reach the age of 15. Regardless of the fact that none of the Member States actually implements this derogation,<sup>14</sup> it is representative of the restrictive perception regarding family in the migration management context.

According to optional provisions of the FR Directive, Member States may authorise the entry and residence of first-degree dependent relatives in

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10 See Georgios Milios, *El derecho a la vida familiar de los extranjeros* (Comares, 2021).

11 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251.

12 Article 3.2 (b) of the Family Reunification Directive.

13 For a criticism regarding the absence of guarantees at EU level for beneficiaries of subsidiary protection see Georgios Milios, 'Family Unity and International Protection – EU Regulation and its Compatibility with the ECHR', 90 [2001] *Nordic Journal of International Law* 161.

14 See Commission, 'Report from the Commission to the European Parliament and the Council on the implementation of Directive 2003/86/EC on the right to family reunification' COM (2019) 162 final.

the direct ascending line,<sup>15</sup> adult unmarried children, where they are objectively unable to provide for their own needs due to their state of health<sup>16</sup> and unmarried registered or unregistered partners.<sup>17</sup> Regarding refugees, the definition of family contained in Art. 4 is still applicable, although Art. 10 of the FR Directive provides that if the refugee is an unaccompanied minor, Member States shall authorise the entry and residence of their first-degree relatives in the direct ascending line. Not least, Member States may optionally authorise family reunification of other family members not referred to in Art. 4, if they are dependent on the refugee<sup>18</sup> and the legal guardian or any other member of the family, where the refugee is an unaccompanied minor and has no relatives in the direct ascending line or such relatives cannot be traced.<sup>19</sup>

Given the restrictive definition of family contained in the FR Directive, especially regarding obligatory provisions, it cannot be concluded that the TP Directive and the Council Decision provide for a narrower concept.

As seen above, Art. 15 of the TP Directive states that, in addition to the spouse and minor unmarried children, other wholly or mainly dependent relatives shall be considered as family, a situation that is only optionally provided for in the case of refugees. The above-mentioned conclusion is without prejudice to the fact that the FR Directive provides for a number of ‘may-provisions’ regarding family relations that are not explicitly included in the definition of family adopted by the TP Directive. It is important to have in mind that these may-provisions have been implemented in part by the EU Member States in both the immigration and the refugee context.

Regardless of the above considerations, the critique regarding the absence of a more *de facto* approach on what constitutes family and the importance of taking into account cultural elements, as well as the sociological evolution of family models in recent years is present in all EU legislation on family reunification, including the TP Directive.

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15 Article 4.2 (a) of the Family Reunification Directive.

16 Article 4.2 (b) of the Family Reunification Directive.

17 Article 4.3 of the Family Reunification Directive.

18 Article 10.2 of the Family Reunification Directive.

19 Article 10.3 (b) of the Family Reunification Directive.

## 4. Family members present in different Member States or third countries

In addition to the definition of family, Art. 15 of the TP Directive provides some applicable rules in the case of family members being present in different Member States or third countries. In that respect, the Directive introduces the wishes of family members and what is in the best interest of the child as the main criterion. At the same time, the provision places spouses, partners and minor unmarried children in a better position than ‘other close relatives’ as Member States are only obliged to bring family members together in the former case.

In particular, Art. 15.2 provides that in the case of family members enjoying temporary protection in different Member States, Member States shall reunify members of the core family, taking their wishes into consideration. Similarly, Art. 15.3 provides that in case the sponsor enjoys temporary protection in one Member State and one or some of their core family members are not yet present in any Member State, the Member State where the sponsor enjoys temporary protection is responsible for reuniting the separated family.

On the contrary, both of the above-described actions remain optional in the case of ‘other close relatives’, although the provision calls for a case-by-case consideration of the extreme hardship that family members are likely to face if family reunification does not take place. Not least, the same provision calls for the application of the principle of solidarity regarding the transfers between Member States for the purpose of family reunification<sup>20</sup> and regulates the issuance and withdrawal of residence permits and other documents.<sup>21</sup>

In any event, it should be noted that according to Art. 29 of the TP Directive: ‘Persons who have been excluded from the benefit of temporary protection or family reunification by a Member State shall be entitled to mount a legal challenge in the Member State concerned’.

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20 Article 15.5 of the Temporary Protection Directive.

21 Article 15.6 of the Temporary Protection Directive.

## 5. Conclusion: Member States' human rights obligations implementing temporary protection

As a concluding remark, it should be highlighted that Member States should implement any EU or national legislation regarding family unification, taking into account their obligations deriving from international law. In that respect, it should be stated that the European Court of Human Rights (ECtHR) applies the so-called elsewhere approach in its case law regarding family reunification. According to this approach, a denial of family reunification may violate Art. 8 of the ECHR in the scenario that a family reunification cannot take place in another country, normally the country origin. Although I have previously criticised this principal for being rather restrictive in a migration context,<sup>22</sup> the truth is that it may become directly applicable in a refugee context, including for those benefitting from temporary protection.

Indeed, in a refugee context, the ECtHR normally considers that there are insurmountable obstacles to establishing family life in the country of origin due to persecution and consequently declares a violation of Art. 8 in the case of a denial of family reunification.<sup>23</sup> It is highly likely that the same consideration applies in the case of a beneficiary of temporary protection due to the circumstances in Ukraine that led to the activation of the TP Directive. Therefore, a denial of family reunification to a beneficiary of temporary protection that may not exactly fall within the scope of the TP Directive, or a deficient implementation of the family rules described above, may lead to a violation of the ECtHR's Art. This concern becomes more relevant if we take into consideration that the definition of 'family' adopted by the ECtHR is more *de facto* than the one referred to in the EU TP Directive and therefore certain relations are considered as family in the framework of the ECtHR's case law but are not included in the scope of the TP Directive.

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22 Georgios Milios, 'The Immigrants and Refugees' Right to "Family Life": How Relevant are the Principles Applied by the European Court of Human Rights?', 25 [2018] *International Journal of Minority and Group Rights* 401.

23 On the insurmountable obstacles see, among others, *Mengesha Kimfe v Switzerland* App no 24404/05 (ECHR, 29 October 2010); Council of Europe Commissioner for Human Rights, 'Realising the right to family reunification of refugees in Europe' (2017) <<https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0>> accessed 1 December 2022.

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- Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC,

68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77

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Case C-423/12 *Reyes v Migrationsverket* [2014] ECLI:EU:C:2014:16

*Mengesha Kimfe v Switzerland* App no 24404/05 (ECHR, 29 October 2010)

# Chapter 12

## Addressing Security and Criminality Concerns: The Temporary Protection Directive's 'Exclusion Clauses' Unpacked

Dr Sarah Singer\*

### 1. Introduction

The Russian invasion of Ukraine has rightly given rise to an outpouring of support across the continent. The European Council has, for the first time, activated<sup>2</sup> the Temporary Protection Directive, granting protection across its Member States to Ukrainians and their family members who have

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\* Senior Lecturer in Refugee Law, Refugee Law Initiative, School of Advanced Study, University of London.

2 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.



fled the conflict. Although questions have been raised<sup>3</sup> about the differential treatment of this wave of refugees compared to those similarly fleeing conflict in Afghanistan or Syria, the fact that European States have acted as they have done is commendable.

However, the response across the continent has not been unanimous. In particular, the UK government has been criticised<sup>4</sup> for its inflexible visa policy towards those fleeing Ukraine. This, it argues, is due to the security risks entailed in unmanaged migration flows. It alleges fears that refugee routes could be abused by Russian spies,<sup>5</sup> criminal drug gangs,<sup>6</sup> or indeed pose a health risk<sup>7</sup> to the local population.

Clearly, the UK has been increasingly isolated politically from Europe in recent years, and its position appears particularly influenced by Russian influence on the country and the nerve agent attack in Salisbury, UK, in 2018<sup>8</sup> allegedly committed by Russian agents. Nonetheless, given the increasing predominance of the linkage between refugee flows and security risks in Europe's political rhetoric in recent years, these are concerns which could spread among EU Member States as the conflict progresses.

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- 3 Meltem Ineli-Ciger, '5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022' (EU Immigration and Asylum Law and Policy, 7 March 2022) <<https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>> accessed 1 December 2022.
  - 4 Ruairi Casey, "Shameful": UK's response to Ukraine refugee crisis criticised' *Aljazeera* (13 March 2022) <<https://www.aljazeera.com/news/2022/3/13/shameful-uks-ukraine-policy-criticised-amid-russian-invasion>> accessed 1 December 2022.
  - 5 David Wilcock and Rory Tingle, 'Priti Patel refuses to allow Ukrainian refugees visa-free entry to Britain over fears Russian soldiers and TERRORISTS could infiltrate groups seeking refuge- but insists official 'humanitarian route' into UK will help thousands' *Mail Online* (28 February 2022) <<https://www.dailymail.co.uk/news/article-10559657/Furious-calls-Britain-help-Ukrainian-refugees.html>> accessed 1 December 2022.
  - 6 Andrew Madden, 'Home Office slammed for 'dirty propaganda' over claims Ireland's Ukrainian refugee policy is security risk to UK' *Belfast Telegraph* (8 March 2022) <<https://www.belfasttelegraph.co.uk/news/northern-ireland/home-office-slammed-for-dirty-propaganda-over-claims-irelands-ukrainian-refugee-policy-is-security-risk-to-uk-41423133.html>> accessed 1 December 2022.
  - 7 Chloe Davies, 'Security expert backs Patel over Ukraine refugees 'Don't forget other elements'' *Express* (9 March 2022) <<https://www.express.co.uk/news/politics/1577786/priti-patel-news-ukraine-visa-delay-refugees-home-secretary-immigration-update>> accessed 1 December 2022.
  - 8 Andrew Macaskill and Michael Holden, 'UK says refugee security checks needed as Ukraine calls for visa relaxation' *Reuters* (9 March 2022) <<https://www.reuters.com/world/europe/ukraine-calls-uk-relax-visa-requirements-fleeing-refugees-2022-03-09/>> accessed 1 December 2022.

The Temporary Protection Directive<sup>9</sup> does however have inbuilt mechanisms to protect the security interests of States. Mirroring equivalent provisions in the 1951 Refugee Convention and the EU Qualification Directive, under the Temporary Protection Directive States can deny protection to those considered to have committed serious crimes and/or to pose a security threat to the host State. The purpose of this chapter is to unpack these provisions and demonstrate that the Temporary Protection Directive has adequate tools to address security and criminality concerns such as those raised by the UK. The activation of the Directive is rightly focused on providing protection to those fleeing Ukraine, and this should not be called into question by unwarranted linkages between those seeking safety and serious criminality. Where legitimate concerns are raised, the tools are in place to ensure that those who are considered underserving of protection under the Temporary Protection Directive do not benefit from the Directive's protection.

It is argued here that these 'exclusion' provisions of the Temporary Protection Directive require States to consider exclusion from protection only in respect of those considered to have personally committed the most serious (international) crimes. This is not only the most feasible approach in contexts of mass influx, but could also help to re-orient the focus of exclusion provisions more appropriately to those considered guilty of the most serious crimes, rather than the trend witnessed in recent years in certain Western countries to focus on increasingly minor alleged offences to justify exclusion from protection.

## 2. What security concerns might arise?

Recent decades have seen increasing conflation between refugees seeking international protection and potential security or terrorist threats<sup>10</sup> to host States. We have seen this nexus develop in the political rhetoric following the 9/11 terrorist attacks<sup>11</sup> on the United States, in the context of the European refugee

9 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.

10 Jeff Crisp, 'Refugees: the Trojan horse of terrorism?' (*Open Democracy*, 5 June 2017) <<https://www.opendemocracy.net/en/can-europe-make-it/refugees-trojan-horse-of-terrorism/>> accessed 1 December 2022.

11 The White House, 'Address to a Joint Session of Congress and the American People' (September 2001) <<https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>> accessed 1 December 2022.

'crisis'<sup>12</sup> and in relation to refugees from specific countries who have alleged membership or affiliation with the activities of terrorist, criminal or military groups.

Aside from the isolated position taken by the UK, the refugee movement from Ukraine has not attracted similar concerns. This may be because such movement is at present predominantly limited to women and children (Ukrainian men between the ages of 18-60 being prohibited from leaving the country).<sup>13</sup> There may also be a racial aspect to the criminal characterisation (or not) of refugee flows: the predominantly white, Christian demographic of those fleeing Ukraine does not fit the typical image of a 'terrorist' (a Western stereotype which persists despite it being shown that, for example, in the United States the most significant terrorist threat is posed by White supremacists).<sup>14</sup>

However, the conflict in Ukraine has been beset with atrocities. The Implementing Decision<sup>15</sup> of the Temporary Protection Directive itself describes the Russian aggression as a gross violation of international law and the UN Charter, and refers to allegations of war crimes and crimes against humanity committed by Russian forces in the country. While allegations of such atrocities have been directed towards Russian military forces, one must remember that Ukrainians are not an homogenous group and significant pro-Russian groups and individuals<sup>16</sup> exist in the country who have been taking part in hostilities (indeed, the conflict has been typified by support for 'volunteer' fighters on both sides).<sup>17</sup> The actions of such groups may warrant particular attention as

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12 Jamie Grierson, 'Isis recruiters targeting refugees in Europe, say counter-terror experts' *The Guardian* (2 December 2016 <<https://www.theguardian.com/uk-news/2016/dec/02/islamic-state-recruiters-targeting-refugees-in-europe-counter-terror-experts-warn>> accessed 1 December 2022.

13 Molly Blackall, 'Ukrainian men banned from leaving the country and urged to join the army as Russian troops advance on Kyiv' *Inews* (25 February 2022) <<https://inews.co.uk/news/ukrainian-men-banned-leaving-country-urged-join-army-russian-troops-kyiv-1483245>> accessed 1 December 2022.

14 Joanna Walters and Alvin Chang, 'Far-right terror poses bigger threat to US than Islamist extremism post-9/11' *The Guardian* (New York, 8 September 2021) <<https://www.theguardian.com/us-news/2021/sep/08/post-911-domestic-terror>> accessed 1 December 2022.

15 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

16 Niko Vorobyov, 'Ukraine crisis: Who are the Russia-backed separatists?' *Aljazeera* (4 February 2022) <<https://www.aljazeera.com/news/2022/2/4/ukraine-crisis-who-are-the-russia-backed-separatists>> accessed 1 December 2022.

17 Al Jazeera and News Agencies, 'Russia-Ukraine war: Putin greenlights letting volunteers fight' *Aljazeera* (11 March 2022) <<https://www.aljazeera.com/news/2022/3/11/putin-green-lights-plan-to-let-volunteers-fight-in-ukraine>> 1 December 2022.

the conflict progresses, as such individuals may seek to flee the conflict towards Europe. Equally, legitimate concerns may be raised about Ukrainian residents who, although not involved in the conflict itself, have a serious criminal history. As the situation progresses, we may therefore see more attention by EU Member States focused on security and criminality concerns.

### **3. How does the Temporary Protection Directive address criminality and security concerns?**

The implementation of the Temporary Protection Directive provides protection to Ukrainian nationals and refugees residing in Ukraine, though Member States ‘may’ also grant protection under the Directive to stateless persons and third country nationals (TCNs) residing legally in Ukraine. The focus of the implementation of the Directive is therefore on Ukrainian nationals and those legally resident in Ukraine, rather than Russian military forces or Russian or TCN volunteers who may be involved in the conflict.

As noted above, the Temporary Protection Directive contains adequate tools to address concerns Member States may have surrounding criminality or threats to host State security. This is acknowledged in preambular role 18 of the Implementation Decision, which notes that:

Directive 2001/55/EC takes duly into account the responsibilities incumbent on Member States with regard to the maintenance of law and order and the safeguarding of internal security, as it allows Member States to exclude a displaced person from temporary protection where there are serious reasons for considering that the person: has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; has committed a serious non-political crime outside the Member State of reception prior to admission to that Member State as a person enjoying temporary protection; or has been found guilty of acts contrary to the purposes and principles of the UN. The Directive also allows Member States to exclude a displaced person from temporary protection where there are reasonable grounds for regarding that person as a danger to the security of the host Member State or a danger to the community of the host Member State.

The provision of the Temporary Protection Directive referred to in this preambular role is Article 28, which essentially mirrors the ‘exclusion’ clauses found

in the 1951 Refugee Convention<sup>18</sup> (Article 1F) and the 2011 EU Qualification Directive<sup>19</sup> (Article 12). The rationale<sup>20</sup> being twofold: to exclude those who has committed acts so grave and heinous as to be considered 'undeserving' of protection, and to ensure such persons do not misuse the institution of asylum to evade legitimate prosecution for their actions. Most immediately, we may think of those taking part in the Ukrainian conflict who have committed war crimes or crimes against humanity as referred to in sub-provision 28(1)(a)(i). This may be applicable to Ukrainian pro-Russian groups taking part in the conflict and involved in attacks on Ukrainian civilians. Importantly, Article 28(2) provides that a decision to exclude from protection under the Directive 'should be based solely on the personal conduct of the person concerned', so an individual should not be excluded from protection merely for membership of an armed group. Rather, such a decision should be based on their personal conduct and individual responsibility for the commission of crimes in the context of the armed conflict.

Article 28(1)(a)(i) of the Temporary Protection Directive also makes reference to a 'crime against peace', now more commonly known as the crime of aggression (see Article 8*bis* of the Rome Statute).<sup>21</sup> This would apply to those involved in the 'planning, preparation, initiation or waging of a war of aggression', responsibility for which would be limited to the Russian head of State or high-ranking Russian State officials who do not fall within the scope of the Implementing Decision, rather than those fleeing Ukraine whether or not they have taken part in the conflict.

Article 28(1)(a)(iii) also makes reference to those 'guilty of acts contrary to the purposes and principles of the United Nations'. This is a curious phrase which has evaded precise definition, but has been applied to cases of *international* terrorism (see preambular role 31 to the EU Qualification Directive and

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18 Convention Relating to the Status of Refugees 1951.

19 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2001] OJ L 337/9.

20 UNHCR, 'Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees', (HCR/GIP/03/05) (4 September 2003), para 3 <<https://www.unhcr.org/uk/publications/legal/3f7d48514/guidelines-international-protection-5-application-exclusion-clauses-article.html>> accessed 1 December 2022.

21 The Rome Statute of the International Criminal Court 1998.

the decision of the CJEU in *Bundesrepublik Deutschland v B and D*),<sup>22</sup> drug trafficking,<sup>23</sup> and attacks on UN peacekeeping forces.<sup>24</sup> I have argued elsewhere<sup>25</sup> that, as the purposes and principles of the United Nations are inherently international in nature, application of the provision should be limited to senior State officials or high-ranking members of an organisation that are capable of implementing policies and large-scale actions that threaten international peace and security, rather than low ranking members in a State-controlled or rebel organisation. Again, reference here would primarily be towards high-ranking Russian officials or the Russian head of State who do not fall within the scope of the Implementing Decision, rather than those fleeing the conflict.

The second sub-provision of Article 28(1) refers to those for whom there are ‘serious reasons for considering’ have ‘committed a serious non-political crime outside the Member State of reception prior to his or her admission to that Member State as a person enjoying temporary protection’. This provision, as reflected in Article 1F(b) of the 1951 Refugee Convention and Article 12(2) (b) of the EU Qualification Directive, has typically been more widely used in refugee exclusion decisions outside the context of temporary protection. It has been suggested that examples of ‘serious crimes’ include murder, rape, arson and armed robbery.<sup>26</sup>

However, we have seen instances where a particularly low bar has been set for what constitutes a ‘serious crime’. For example, UK Home Office guidance<sup>27</sup> suggests that a ‘particularly serious crime’ is one for which a custodial sentence of 12 months or more would be applied if convicted in the UK. This is in marked contrast to the position of Canada, for example, which applies a presumption of exclusion for a crime which would attract a 10 year custodial

22 Joined Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v B and D* [2010] ECR I-10979.

23 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982.

24 *Al-Sirri (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2009] EWCA Civ 222; [2010] EWCA Civ 1407.

25 Sarah Singer, ‘Exclusion from Refugee Status: Asylum Seekers and Terrorism in the UK’ (2012) UCC Legal Research Series Working Paper No.1 <<https://www.ucc.ie/en/media/academic/law/ccjhr/publicationsseptember2018/CCJHRWPSNo1SarahSingerRefugeeExclusionClausesandTerrorismDec2012.pdf>> accessed 1 December 2022.

26 UNHCR, ‘Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees’, (HCR/GIP/03/05), p.5.

27 Home Office, ‘Exclusion (Article 1F) and Article 33(2) of the Refugee Convention’ (28 June 2022), pp.35-36 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1083105/Exclusion\\_under\\_Articles\\_1F\\_and\\_33\\_2\\_of\\_the\\_Refugee\\_Convention.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1083105/Exclusion_under_Articles_1F_and_33_2_of_the_Refugee_Convention.pdf)> accessed 1 December 2022.

sentence (see s.101(2) of the Immigration and Refugee Protection Act).<sup>28</sup> Indeed, the CJEU has criticised<sup>29</sup> attempts to automatically exclude individuals from protection based on the length of custodial sentence prescribed in national law, rather stressing the need for an individual assessment into all the circumstances of the case.

The need for a uniform application of this provision among Member States would necessarily exclude from the definition of 'serious crime' acts which are classified as such only as a result of particularly stringent legislation in a Member State, such as the UK's recent proposal to criminalise irregular asylum seeker arrivals.<sup>30</sup> Rather, the notion of 'serious crime' should be more properly limited to a capital crime or a very grave punishable act (see UNHCR Handbook, para 155).<sup>31</sup> In the current context one might think of the potential applicability of this provision to those fleeing Ukraine who have a (serious) criminal history. It must be noted however that this sub-provision provides that 'The severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected.' This qualifier is not present in parallel provision in EU Qualification Directive, and indeed this 'balancing' or proportionality exercise has been explicitly rejected<sup>32</sup> by the CJEU.

For present purposes this would suggest that States should carefully consider the severity of the humanitarian situation being faced in Ukraine before considering exclusion from protection on the basis of past 'common' (non-international) crimes. This approach is buttressed by Article 28(2) which provides: 'Exclusion decisions or measures shall be based on the principle of proportionality.' Again, this proportionality approach requires States to take into account the severity of harm being faced when considering the appropri-

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28 Immigration and Refugee Protection Act (IRPA), SC 2001, c. 27, 1 November 2001

29 Case 369/17 *Shajin Ahmed v Bevándorlási és Menekültügyi Hivatal* [2018] ECLI:EU:C:2018:713, para 55.

30 UNHCR, 'Summary Observations on the Nationality and Borders Bill, Bill 141, 2021-22' (September 2021) <<https://www.unhcr.org/6149d3484/unhcr-summary-observations-on-the-nationality-and-borders-bill-bill-141>> accessed 1 December 2022.

31 UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1' (Geneva, January 1992) <<https://www.unhcr.org/4d93528a9.pdf>> accessed 1 December 2022.

32 Joined Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v B and D* [2010] ECR I-10979, paras 106-111.



ateness (or not) of exclusion from protection. This accords with the strict,<sup>33</sup> or restrictive,<sup>34</sup> approach which should be taken to the interpretation of the exclusion provisions, as exceptions to a humanitarian instrument. The principle of restrictive interpretation entails that in the case of any ambiguity, the narrower, stricter sense which favours non-exclusion is to be preferred. The exceptional nature of the exclusion provisions also requires that the burden of proof rests on the State<sup>35</sup> to justify a decision to exclude an individual from international protection. It should furthermore be noted that the reference in Article 28(1)(a)(ii) is to serious ‘non-political’ crimes. This suggests that crimes committed in context of Ukrainian resistance against the Russian invasion should not fall within the scope of this provision unless they are considered to be ‘particularly cruel actions’ (as per Article 28(1)(a)(ii)).

Sub provision (b) of Article 28 moves the focus away from the past acts of individuals in and of themselves and focuses more squarely on the security concerns of the host State. Here an individual may be excluded from protection where: ‘there are reasonable grounds for regarding him or her as a danger to the security of the host Member State or, having been convicted by a final judgment of a particularly serious crime, he or she is a danger to the community of the host Member State’. Firstly, it must be noted that, in the same vein as its parallel provision in the EU Qualification Directive, this is an incorrect transposition of Article 33(2) of the 1951 Refugee Convention under which an individual loses protection against *refoulement* rather than status as a refugee (and such persons would likely benefit from protection against *refoulement* under human rights law).<sup>36</sup>

It is not immediately apparent that persons fleeing Ukraine will be considered a security threat to an EU Member State. Russian ‘spies’ or infiltrators would not fall within the scope of the Implementing Decision itself and so the question of exclusion from protection would not arise. However, for any

33 Case 369/17 *Shajin Ahmed v Bevándorlási és Menekültügyi Hivatal* [2018] ECLI:EU:C:2018:713, para 52.

34 UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1’, para 149.

35 UNHCR, ‘Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees’ (4 September 2003), para 105 <<https://www.refworld.org/docid/3f5857d24.html>> accessed 1 December 2022.

36 Tilman Rodenhäuser, ‘The principle of non-refoulement in the migration context: 5 key points’ (ICRC Blog, 30 March 2018) <<https://blogs.icrc.org/law-and-policy/2018/03/30/principle-of-non-refoulement-migration-context-5-key-points/>> accessed 1 December 2022.



persons falling within the scope of the Directive for whom host State security concerns are raised, a decision to exclude must be based on the principle of proportionality in light of the humanitarian situation and consequence of exclusion from protection, and be based on the personal conduct of the individual, rather than mere membership of a group or organisation (Article 28(2)). Furthermore, an assessment must be made establishing that the individual conduct of the person in question represents a genuine, present and sufficiently serious threat<sup>37</sup> to the Member State. Again, as an exception to a humanitarian instrument the provision is subject to strict interpretation and the burden of proof rests on the State.

## 4. Conclusions

We have seen that the Temporary Protection Directive has appropriate tools to address criminality and/or security concerns raised by States and maintain the integrity of the protection regime. Throughout, the emphasis must be on the proportionality of such a decision in light of the severity of the humanitarian situation in Ukraine, to ensure that only those considered to have personally committed the most serious crimes fall within the scope of the 'exclusion' clauses. In this respect it is also notable that exclusion provisions of the Temporary Protection Directive are framed in the non-mandatory 'may' rather than the mandatory formulations employed in the 1951 Refugee Convention and the EU Qualification Directive.

The Temporary Protection Directive's focus on proportionality and personal responsibility for the commission of crimes is a welcome check on developments in this area of law. Once temporary protection status ceases, those who have fled the Ukraine conflict may apply for refugee status under the EU Qualification Directive, and questions of exclusion may arise.

In contrast to the Temporary Protection Directive, the provisions on exclusion from refugee status under Article 12(2) of the EU Qualification Directive (and Article 1F of the 1951 Refugee Convention) employ a mandatory formulation. States are therefore *required* to exclude from protection those who fall within the scope of the provision. Although similar to the exclusion provisions which appear in the Temporary Protection Directive, the references to the principle of proportionality and weighing the severity of the expected persecution against the nature of the criminal offence which appear in the

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37 Case C-808/18 *European Commission v Hungary* [2020] ECLI:EU:C:2020:1029, para 221.

Temporary Protection Directive are absent from the Qualification Directive's equivalent provisions.

The provisions on individual responsibility also differ. The Qualification Directive takes a rather wide formulation of personal conduct which 'applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein'. This has led to some expansive interpretations of the Qualification Directive's exclusion provisions,<sup>38</sup> applying exclusion to a broader range of acts than may originally have been envisaged, including in instances where no crime has taken place at all. For example, in the *Lounani*<sup>39</sup> decision the CJEU held that:

'acts constituting participation in the activities of a terrorist group, such as those of which the defendant in the main proceedings was convicted, may justify exclusion of refugee status, even though it is not established that the person concerned committed, attempted to commit or threatened to commit a terrorist act.'

This is a concerning development given the need to approach the interpretation and application of the exclusion clause restrictively and with caution.

It is suggested that future developments in this area of law should draw on the positive explicit formulations on proportionality and personal conduct encompassed in the Temporary Protection Directive. Exclusion from protection is the most severe sanction that can be imposed in the international protection framework. Provisions which serve to 'exclude' persons from this protection should therefore be based on the personal conduct of the individual concerned (rather than mere membership of a group) and be reserved for those that commit crimes so serious as to attract the condemnation of the international community.

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38 European Database of Asylum Law, 'Exclusion from International Protection for Terrorist Activities under EU Law: from B & D to Lounani' (3 February 2017) <<https://www.asylumlawdatabase.eu/en/journal/exclusion-international-protection-terrorist-activities-under-eu-law-b-d-lounani>> accessed 1 December 2022.

39 Case 573/14 *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani* [2017] ECLI:EU:C:2017:71, para 62.

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*Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982

# Chapter 13

## Processing Personal Data of Beneficiaries of Temporary Protection: An Analysis on the Expansion of the Eurodac Scope

Dr Niovi Vavoula\*

### 1. Introduction

The Russian invasion in Ukraine has brought to the fore numerous legal issues regarding the protection of Ukrainian nationals, but an aspect that has gone (almost) under the radar is whether Ukrainians as beneficiaries of temporary protection should have their personal data collected and stored at supranational level in an EU large-scale information system, namely Eurodac. This chapter aims to critically appraise this expansion of the Eurodac scope to include personal data collected by beneficiaries of temporary protection. I will do so by first providing a concise overview of the existing Eurodac rules and those under negotiations, via two Commission proposals in 2016 and then in 2020. Then, I will provide the context within which Eurodac's scope will be extended and the corresponding revisions proposed by the Council following by critical reflections on this reform.

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\* Senior Lecturer (Associate Professor) in Migration and Security, Queen Mary, University of London.

## 2. Eurodac in a Nutshell

Operational in 31 countries<sup>1</sup> since 2003, Eurodac is an EU-wide information system that primarily processes the fingerprints of asylum seekers and certain categories of irregular migrants, namely irregular migrants apprehended in connection with their irregular border crossing and migrants found irregularly staying on national territory.<sup>2</sup> Eurodac constitutes the EU's first experiment with biometric identifiers, initially designed to assist in the implementation of the Dublin system<sup>3</sup> for the determination of the Member State responsible for examining an application for international protection. In what has been one of the thorniest issues regarding the operation of Eurodac, in 2013 a recast Eurodac Regulation (Regulation (EU) 2013/603)<sup>4</sup> was adopted (and remains applicable to date), the aim of which was mainly to allow law enforcement authorities and Europol to conduct comparisons of their data with Eurodac fingerprints under specific conditions, for the purpose of preventing, detecting, and investigating terrorist offences and other serious crimes.<sup>5</sup>

In the asylum context, Eurodac's aim is to track potential secondary movement in the EU by obliging Member States to collect the fingerprints of every asylum seeker over the age of 14 when they apply for international pro-

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- 1 These are the 27 Member States and four Associated Countries (Iceland, Norway, Switzerland and Liechtenstein).
  - 2 Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316.
  - 3 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180.
  - 4 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L 180 (Recast Eurodac Regulation).
  - 5 For further information see Niovi Vavoula, 'The Recast Eurodac Regulation – Are Asylum-Seekers Treated as Suspected Criminals?' in Céline Bauloz and others (eds), *Seeking Asylum in the European Union - Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill 2015).



tection (Category 1).<sup>6</sup> These are compared with fingerprints already transmitted and stored by other participating countries. A match is presumed to mean that another Member State has already recorded the applicant's fingerprints and that state could be requested to take back the asylum applicant or take charge of that person on the basis of Dublin rules. Furthermore, under the Eurodac rules, Member States must collect the fingerprints of all third-country nationals apprehended in connection with the irregular crossing by land, sea or air (Category 2).<sup>7</sup> These are stored in Eurodac for comparison in case an irregular migrant moves to another Member State and applies for international protection there. In addition, third-country nationals who are found irregularly present on national territory, their fingerprints can also be collected and checked against Eurodac to determine whether they have previously applied for international protection in another Member State (Category 3).<sup>8</sup> However, under the current rules, there is no obligation for Member States to undertake this procedure and the data must not be stored within the system.

Eurodac fingerprinting does not determine the identity of a person *per se*, though it does contribute to their identification, because a link may be established between an applicant and a past Eurodac entry, which is verifiable through information sharing between the state that conducts the check and the state that made a past Eurodac entry (through the DubliNet network). The retention period of asylum seekers' fingerprints is 10 years.<sup>9</sup> The retention period for storing the data of irregular border-crossers is eighteen months, given that according to the Dublin rules the time period for which a Member State is responsible for dealing with an asylum application is one year.<sup>10</sup> Fingerprints collected from beneficiaries of international protection are neither automatically blocked nor deleted, but 'marked' for a period of three years.<sup>11</sup> This means that these data must remain at the disposal of national authorities for both asylum and law enforcement purposes and, upon the expiry of the three-year period they are blocked until their erasure.

When the recast Eurodac Regulation came into effect, the influx of refugees and migrants into the EU was increasing. Certain Member States, particular-

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6 Recast Eurodac Regulation, articles 9-11.

7 *ibid*, articles 14-15.

8 *ibid*, article 17.

9 *ibid*, article 12.

10 *ibid*, article 16.

11 *ibid*, article 18.

ly those at the periphery of the EU, became overwhelmed with the obligation of fingerprinting those that arrived at the external borders; these individuals then further transited through the EU *en route* to their preferred destination.<sup>12</sup> Another source of deficiencies in registration was the lack of cooperation from refugees and migrants, who refused to have their fingerprints collected and stored. This issue, which must be seen as a collateral effect of Dublin's coercive rules, resulted in diverging registration practices at the national level, spanning from coercion to detention. On 4 May 2016, the Commission adopted a recast proposal,<sup>13</sup> which formed part of the broader reform of CEAS, essentially detaching Eurodac from its asylum framework and repackaging it as a tool to pursue 'wider immigration purposes', including the return of irregular migrants.<sup>14</sup>

Eurodac was considered by the Commission to be potentially useful in situations where Member States face problems in identifying irregular migrants found on national territory who use deceptive means to avoid identification and to frustrate the procedures for re-documentation in view of their return and re-admission.<sup>15</sup> The proposal marked a landmark change in Eurodac's purpose, based on a deflection continuum, whereby the expulsion and non-protection of third-country nationals who may seek international protection is not only undesired, but more worryingly pre-empted. The transformation of Eurodac has been sweeping, including adding categories of personal data such as a facial image, lowering the fingerprinting age to six years, increasing in the retention of irregular border crossers' data from 18 months to 5 years and allowing under certain conditions for transfers of Eurodac data for return purposes. These reforms have been criticised about their necessity and proportionality, in view

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12 For an overview see European Parliament, 'Fingerprinting migrants: Eurodac Regulation' (PE571.346, 2015).

13 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast)' COM/2016/0272 final.

14 This was due to a disappointing number of effectuated returns of irregular migrants pursuant to the Return Directive. See European Commission, 'EU Action Plan on return' (Communication) COM/2015/453 final, 1.

15 *Ibid.*

of the detachment of Eurodac from its asylum context to pursue wider migration purposes and the potential that asylum seekers' data will be used essentially 'against' them in order to prove their identity for the purposes of removal.<sup>16</sup> This further sustains the divide between the state and asylum seekers.

The negotiations on that proposal led to an interinstitutional agreement<sup>17</sup> between the co-legislators in 2018. During the negotiations additional aspects were agreed: increased safeguards for the capturing of minors' biometric data, lowering certain standards for law enforcement access and inserting within the scope of Eurodac beneficiaries of humanitarian admission or national resettlement schemes. Due to the deadlock in reaching an agreement to the whole package of legislative measures, no revised Regulation was formally adopted.

Then, on 23 September 2020, the Commission proposed further amendments to the Eurodac regime,<sup>18</sup> in the framework of the New Pact on Migration and Asylum,<sup>19</sup> which essentially will transform the system from a digital sidekick of the Dublin system into a tool in support of EU policies on asylum, resettlement and irregular migration. Following the sweeping overhaul of the Eurodac changes via the 2016 proposal, the proposed changes have been rather modest here and essentially aim to ensure consistency between Eurodac and the pre-entry screening rules in accordance with the Proposal for a Screening Regulation; and the addition of information as to whether the individual in question is a rejected asylum applicant, a visa holder, a voluntary return and re-

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16 Niovi Vavoula, 'Transforming Eurodac from 2016 to the New Pact From the Dublin System's Sidekick to a Database in Support of EU Policies on Asylum, Resettlement and Irregular Migration' (2020) ECRE Working Paper 13/2020 <<https://ecre.org/wp-content/uploads/2021/01/ECRE-Working-Paper-Transforming-Eurodac-from-2016-to-the-New-Pact-January-2021.pdf>> accessed 1 December 2022.

17 The interinstitutional agreement may be found here: <[https://www.europarl.europa.eu/RegData/publications/divers/2016/0132/NEGO\\_CT\(2016\)0132\(2018-06-21\)\\_XL.pdf](https://www.europarl.europa.eu/RegData/publications/divers/2016/0132/NEGO_CT(2016)0132(2018-06-21)_XL.pdf)>, accessed 1 December 2022.

18 Commission, 'Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818' COM/2020/614 final.

19 European Commission, 'A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity' (23 September 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1706](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706)> accessed 1 December 2022.

integration assistance (AVRR) grantee or an internal security threat. Also, it is proposed that individuals who have been rescued following a Search and Rescue (SAR) operation will be registered under a different category.<sup>20</sup> On 22<sup>nd</sup> June 2022, the Council approved negotiating mandate on the Eurodac dossier with the aim for interinstitutional negotiations to take place soon afterwards.<sup>21</sup>

Following the disconnection of the Eurodac dossier from the 'package approach' to the CEAS measures, the negotiations are foreseen for early 2023.

### 3. The Inclusion of (Ukrainian) Beneficiaries of Temporary Protection within the Scope of Eurodac

Amidst the negotiations of the revised Eurodac proposal, the war in Ukraine started, necessitating speedy response to the displacement crisis. Following the activation of the Council Directive 2001/55/EC (Temporary Protection Directive),<sup>22</sup> in accordance with Council Implementing Decision 2022/382<sup>23</sup> establishing the existence of a mass influx of displaced persons from Ukraine, the Commission published Guidelines<sup>24</sup> on the implementation of the Decision.

The Guidelines focused among others on the registration of personal data

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20 For an analysis see Vavoula, *Transforming Eurodac from 2016 to the New Pact From the Dublin System's Sidekick to a Database in Support of EU Policies on Asylum, Resettlement and Irregular Migration*.

21 European Council, 'Asylum and migration: the Council approves negotiating mandates on the Eurodac and screening regulations and 21 states adopt a declaration on solidarity' (22 June 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/06/22/migration-and-asylum-pact-council-adopts-negotiating-mandates-on-the-eurodac-and-screening-regulations/>> accessed 1 December 2022.

22 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.

23 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

24 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01 [2022] OJ C 126I.

under Article 10 of the Temporary Protection Directive which obliges Member States to register the personal data (name, nationality, date and place of birth, marital status, and family relationship) of the persons enjoying temporary protection on their territory laid down in Annex II. The Commission explained that in this process Member States should consult relevant international, EU and national databases during their checks and investigations, and in particular the alerts on persons and documents in the Schengen Information System (SIS).

As there is no legal basis for registering beneficiaries of temporary protection in any EU large-scale information system, the Commission advised Member States to register these persons in their national registers for foreigners or other national registers. Member States should not register any other personal data than those covered by Annex II, which, as it will be explained later, does not offer much guidance due to the vague and contradictory wording of the Temporary Protection Directive. Already at this stage, the Commission recognised this arrangement as a challenge, because it limits the capacity of exchanging information among Member States. Such exchanges can only take place bilaterally via DubliNet, for example, to trace and detect if the same person is benefiting from the rights attached to temporary protection in more than one Member State.

In the extraordinary Justice and Home Affairs Council of 28 March 2022, a 10-Point-Plan for stronger European coordination on welcoming people fleeing the war from Ukraine,<sup>25</sup> was agreed. Among its priorities was the establishment of an EU platform for registration to enable Member States to exchange information so as to ensure that people enjoying temporary protection or adequate protection under national law can effectively benefit from their rights in all Member States, while addressing instances of double or multiple registrations and limiting possible abuse. This technical solution, which was developed by the Commission and implemented by eu-LISA, the EU Agency which is responsible for the operational management of large-scale IT systems,

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25 European Commission, 'The 10-Point Plan For stronger European coordination on welcoming people fleeing the war from Ukraine' <[https://home-affairs.ec.europa.eu/10-point-plan-stronger-european-coordination-welcoming-people-fleeing-war-ukraine\\_en](https://home-affairs.ec.europa.eu/10-point-plan-stronger-european-coordination-welcoming-people-fleeing-war-ukraine_en)> accessed 1 December 2022.

was launched<sup>26</sup> on 31 May 2022.

Adapting Eurodac by adding within its personal scope beneficiaries of temporary protection as a new category takes cue from the efforts to ensure registration of Ukrainians fleeing the war. The expansion of the Eurodac scope signifies that beneficiary of temporary protection will be subject to the same (revised) requirements of collection and storage of personal data. The idea behind this reform has been presented as directly linked to Article 10 of the Temporary Protection Directive according to which Member States must register a series of personal data referred to in Annex II of the Directive with respect to the persons enjoying temporary protection on their territory. Articles 26 and 27 of the Temporary Protection Directive specify the purposes of this registration obligation, in particular the exchange of information between Member States, including in view of the transfer of a beneficiary of temporary protection from one Member State to another. Besides, relocation perhaps seeks to detect and prevent further secondary movements.

As revealed by Statewatch, the French Presidency proposed<sup>27</sup> expanding the Eurodac database even further, to include beneficiaries of temporary protection on 29 April 2022 and received explicit support<sup>28</sup> by a number of Member States (Austria, Bulgaria and Germany). Others, notably Hungary and Poland, strongly opposed this extension because the universal application of the registration requirement would precisely cover Ukrainian beneficiaries of temporary protection and thus, they requested an exemption of the personal scope. Another source of concern involved the 72-hour timeframe for transmitting the collected personal data to the Central System of Eurodac<sup>29</sup> and to the Common Identity Repository (CIR) – a new database under the

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26 European Commission, ‘Solidarity with Ukraine: Commission launches an EU platform for registration of people enjoying temporary protection or adequate protection under national law’ (*EU Debates, News & Opinions*, 31 May 2022) <<https://www.pubaffairsbruxelles.eu/eu-institution-news/solidarity-with-ukraine-commission-launches-an-eu-platform-for-registration-of-people-enjoying-temporary-protection-or-adequate-protection-under-national-law/>> accessed 1 December 2022.

27 Statewatch, ‘EU: Ukraine: New proposal to add temporary protection beneficiaries to Eurodac database’ *Statewatch* (Europe, 16 May 2022) <<https://www.statewatch.org/news/2022/may/eu-ukraine-new-proposal-to-add-temporary-protection-beneficiaries-to-eurodac-database/>> accessed 1 December 2022.

28 Statewatch, ‘EU: Tracking the Pact: Plan for biometric registration of Ukrainian refugees “unrealistic”’ *Statewatch* (Ukraine, 23 May 2022) <<https://www.statewatch.org/news/2022/may/eu-tracking-the-pact-plan-for-biometric-registration-of-ukrainian-refugees-unrealistic/>> accessed 1 December 2022.

29 Recast Eurodac Regulation, articles 9(2) and 14(2).

interoperability framework with certain personal data from all the underlying systems except the SIS.<sup>30</sup> The Polish representation, which has received almost two million Ukrainian refugees,<sup>31</sup> took the view<sup>32</sup> that in the context of the experience resulting from Russia's aggression against Ukraine and the flow of people to countries bordering Ukraine, the proposal should be considered as 'unrealistic'. This is because the introduction of a new category of persons to be registered in Eurodac within the same deadline as that applicable for asylum seekers and irregular migrants is 'impossible to be performed due to the limited human resources and the Automated Fingerprint Identification System (AFIS) under which the Eurodac Interface operates, which is not intended to allow such volume of data to flow'.<sup>33</sup> This view is in striking contrast with their persisting position requiring EU Member States such as Greece to do precisely what they deem unrealistic to do.

In the end, the Council General Approach<sup>34</sup> of 22 June 2022 to a large extent addresses these concerns: the new category of beneficiaries of temporary protection was included, with the understanding that this reform will not apply to persons displaced by the war in Ukraine, given that their registration is in any case handled by the technical platform designed by the Commission and eu-LISA. In that regard, a last sentence in Article 47 of the revised Eurodac Regulation explains that the Eurodac rules 'will not apply to those persons benefiting from temporary protection pursuant to Council Implementing Decision 2022/382, and any other equivalent national protection taken pursuant thereto, any future amendments to Council Implementing Decision 2022/382, and any extensions thereto'. Beneficiaries of temporary protection

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30 Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816 [2019] OJ L 135.

31 BBC News, 'How many Ukrainian refugees are there and where have they gone?' *BBC News* (4 July 2022) <<https://www.bbc.com/news/world-60555472>> accessed 1 December 2022.

32 Statewatch, 'EU: Tracking the Pact: Plan for biometric registration of Ukrainian refugees "unrealistic".'

33 Ibid.

34 Commission, 'Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) No 604/2013 and Directive 2001/55/EC [...], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240, (EU) 2019/818 and (EU) 2017/2226' 2016/0132(COD).



are not limited to those defined in the Temporary Protection Directive, but it will include those benefiting from any other equivalent national protection introduced in response to the same event in the future.

To curb concerns about the feasibility of these registration requirements, Article 14c(2) of the General Approach introduces a 10-day deadline for submission of the relevant data to the Central System of Eurodac and CIR. The registration as a beneficiary of temporary protection will follow the possible apprehension of the person in connection with the irregular crossing of the external borders, irregularly staying on national territory or disembarkation following a search and rescue operation, which are the other categories under which third-country nationals are recorded under Eurodac rules. This means that in the future the registration of a beneficiary of temporary protection – except Ukrainians who are, as mentioned above, excluded – does not exempt Member States to register those persons first under those other categories, depending on which it will apply. The proposed retention period of those data is three years from the date of the entry into force of the relevant Council Implementing Decision activating the Temporary Protection Directive rules.

## 4. Critical Reflections on Eurodac's Expansion

The rationale behind this expansion is very unclear and does not sit well with the Temporary Protection Directive with which it is linked. Article 10 of the latter indeed stipulates that in order to enable the effective application of the Council Decision recognising the existence of a mass influx of displaced persons, Member States must register *the* personal data referred to in Annex II with respect to the persons enjoying temporary protection on their territory. Annex II confusingly states that the information 'includes to the extent necessary *one or more* of the following documents or data' (emphasis added):

- a. personal data on the person concerned (name, nationality, date and place of birth, marital status, family relationship);
- b. identity documents and travel documents of the person concerned;
- c. documents concerning evidence of family ties (marriage certificate, birth certificate, certificate of adoption);
- d. other information essential to establish the person's identity or family relationship;



- e. residence permits, visas or residence permit refusal decisions issued to the person concerned by the Member State, and documents forming the basis of decisions;
- f. residence permit and visa applications lodged by the person concerned and pending in the Member State, and the stage reached in the processing of these. Annex II therefore does not provide a fixed, exhaustive list of information to be collected at the national level, but leaves discretion to the Member States to decide what is necessary (and also available). In turn, according to the proposed rules, in relation to beneficiaries of temporary protection Eurodac will store very similar categories of personal data, namely:
  - a. fingerprints;
  - b. a facial image;
  - c. surname(s) and forename(s), name(s) at birth and previously used names and any aliases, which may be entered separately;
  - d. nationality(ies);
  - e. date of birth;
  - f. place of birth;
  - g. Member State of origin, place and date of registration as beneficiary of temporary protection;
  - h. sex;
  - i. where available, the type and number of identity or travel document, the three letter code of the issuing country and expiry date;
  - j. where available, a scanned colour copy of an identity or travel document along with an indication of its authenticity or, where unavailable, another document
  - k. reference number used by the Member State of origin;
  - l. date on which the biometric data were taken;
  - m. date on which the data were transmitted to the Central System and to the CIR as appropriate;

- n. operator user ID;
- o. where relevant, the fact that the person previously registered as beneficiary of temporary protection falls under one of the exclusion grounds pursuant to Article 28 of Directive 2001/55/CE;
- p. reference of the relevant Council Implementing Decision.

Juxtaposing the two lists demonstrates that the categories of personal data only partly correspond to one another; this disconnection though may be forgiven considering that Annex II does not provide fixed categories of personal data that should be collected at national level and that in any case Eurodac does not store some categories of personal data, such as family relationship, or other documents. The collection of biometric data is also not mandated under the Temporary Protection Directive, although one might counter argue that ‘other information essential to establish the person’s identity’ may include biometric identifies such as fingerprints and facial images.

The disconnect between Eurodac and the Temporary Protection Directive is also evident from the fact that the purpose of collection of personal data under Article 10 relates to exchanges of personal data among Member States in the context of transfers of beneficiaries of temporary protection in accordance with Article 26. Facilitating the exchanges of information for the purposes of detecting temporary protection shopping is not among the objectives of data exchanges. Consequently, to use Article 10 as a justification for expanding the Eurodac scope and inserting the implementation of the Temporary Protection Directive as one of the objectives of Eurodac sits at odds with the wording and the spirit of the Directive.

Besides, evidence about beneficiaries of temporary protection moving across EU Member States is scarce and it could be argued that Ukrainian refugees could perhaps be more interested in remaining in neighbouring countries in anticipation that the war is over and return to their homes. Furthermore, to maintain a balance of responsibility among EU Member States free onward movement of Ukrainian refugees could actually be an ideal solution<sup>35</sup>, which was what the Commission argued in its proposal to activate the Temporary Protection Directive. It appears that this is a pre-emptive approach of future-proofing the legislation as ‘further issues of registration of potential

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35 Lucas Rasche, ‘Ukraine’s refugee plight A paradigm shift for the EU’s asylum policy?’ (2022) Hertie School Jacques Delors Centre <<https://www.delorscentre.eu/en/publications/detail/publication/ukraine-a-paradigm-shift-for-the-eus-asylum-policy>> accessed 1 December 2022.

beneficiaries of temporary protection should be anticipated' without any discussion as to what these can be and who the beneficiaries of temporary protection whose registration is necessary could be.

Furthermore, the Temporary Protection Directive was adopted in 2001, at the time when the original Eurodac Regulation had already been adopted; however, there was a distinct period where the negotiations for the two instruments were overlapping. To the best of my knowledge there had not been any discussion to include third-country nationals who are beneficiaries of temporary protection within the scope of Eurodac, which was at the time only to serve Dublin-related purposes. The disentanglement of Eurodac from its Dublin origins and its rebranding as a multi-purpose tool has allowed to bring those individuals who have evaded having their personal data collected and stored at EU level within the Eurodac scope, in the rather uneasy manner that was explained above. Even so, it could be inferred that Eurodac was never meant to cover this group of people.

As explained by Ineli-Ciger,<sup>36</sup> until this year the Temporary Protection Directive had not been activated; even the Commission had proposed to replace it and proposed as part of its New Pact on Migration and Asylum to introduce 'immediate protection'<sup>37</sup> in the Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum,<sup>38</sup> instead. However, beneficiaries of such immediate protection were not to be registered in Eurodac under a separate category. This is presumably because the applicants would first have to apply for international protection, and thus be registered in accordance with the Eurodac rules as applicants for international protection (Category 1) anyway, and then the Member States could apply the asylum crisis management procedure. This presumption though is rather weak; as explained earlier, the fact that individuals will be registered under the category of beneficiaries of temporary protection does not mean that they will also not be registered under another category. The 2020 Eurodac proposal did not even foresee

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36 Meltem Ineli-Ciger, 'What a difference two decades make? The shift from temporary to immediate protection in the new European Pact on Asylum and Migration' (*EU Migration and Asylum Law and Policy*, 11 November 2022) <<https://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/?print=print>> accessed 1 December 2022.

37 Meltem Ineli-Ciger, 'Immediate Protection in the New Pact on Migration and Asylum: A Viable Substitute for Temporary Protection?' in Daniel Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System* (Nomos 2022).

38 Commission, 'Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum' COM/2020/613 final.

that in connection with individuals who would be offered immediate protection an indication or a reference in the system would be included.

In addition, one could also wonder whether the expansion of the Eurodac scope is necessary considering that Ukrainian nationals – the only beneficiaries of temporary protection in the 20 years of the Temporary Protection Directive's life – will actually be excluded from its scope owing to the creation of the technical platform. In other words, the displacement in Ukraine has been simply an excuse for further expanding Eurodac's scope. Eventually the Polish and Hungarian governments won leaving behind an uneven and unequal model of responsibility regarding the new Eurodac obligations among EU Member States. Reading between the lines it could also be interpreted as meaning that there is potential for another activation of the Temporary Protection Directive in the future. However, future-proofing the legislation about issues that may arise in connection with beneficiaries of temporary protection seems a rather remote and vague justification given the unwillingness of Member States to activate the Directive, for example in relation to arrivals in the Mediterranean. The solution that was found through the technical platform has proved to be good enough and if in the future another such occasion would arise, a similar approach could be taken as well.

Finally, from a positive perspective, excluding Ukrainian nationals from Eurodac's scope seems to break a long-standing pattern of surveillance of movement of nearly the entire non-EU population with an administrative or criminal law link with the EU.<sup>39</sup> Ukraine is a visa-free country for entry into the EU, which means that Ukrainian nationals are free to cross the Union's external borders for stays of no more than 90 days in any 180-day period. It does however raise further questions about possible discrimination among different groups of third-country nationals considering that Ukrainians seem to benefit from a higher degree of privacy protection compared to other groups of people. One should be cautious though, because this argument is applicable now that there is no centralised information system that contains personal data of visa free travellers. This will change by next year, as both the Entry/Exit System (EES) and the European Travel Information and Authorisation Systems (ETIAS) are set to become operational, both of which are aimed at processing personal data of visa free travellers.

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39 See Niovi Vavoula, *Immigration and Privacy in the Law of the European Union – The Case of Information Systems* (Brill 2022).

## 5. Conclusion and Final Remarks

Overall, the relationship between the two pieces of legislation is rather uneasy with no alignment between the legislative instruments. Should this unnecessary and poorly justified revision be here to stay a number of unanswered questions must be settled during the negotiations: For example, how do the personal data collected under the Eurodac rules connect with those prescribed in Annex II; Is the three-year retention period proportionate? How do the different retention periods (e.g. as an irregular migrant and as a beneficiary of temporary protection) fit together? These issues are bound to pre-occupy the Parliament in the negotiations. In line with past efforts (already since the Slovenian Presidency of the second half of 2021) to speed up<sup>40</sup> Eurodac negotiations, the Council General Approach essentially delinked the Eurodac dossier for the rest of the asylum reform in order to make it possible to start gathering more data on extended categories of people (in particular, undocumented migrants) without other new legislation being in place. It remains to be seen how the negotiations will progress in the near future.

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40 Statewatch, 'EU: Tracking the Pact: Limited enthusiasm for plan to speed up Eurodac negotiations' *Statewatch* (Europe, 14 October 2021) <<https://www.statewatch.org/news/2021/october/eu-tracking-the-pact-limited-enthusiasm-for-plan-to-speed-up-eurodac-negotiations/>> accessed 1 December 2022.

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# Chapter 14

## Temporary Protection: The Ukrainian Field Trial

Dr Julian Lehman\* and Dr Angeliki Dimitriadi\*\*

### 1. Introduction

In April 2022, two months into the Russian invasion of Ukraine<sup>1</sup>, the reception of displaced people under the Temporary Protection Directive started to show political cracks.

Only two months into Russia's invasion of Ukraine, the armed conflict has already catalyzed one of the largest and quickest humanitarian exoduses within Europe. On 4 March 2022, the European Council introduced temporary protection<sup>2</sup> for the majority of people fleeing Ukraine, including Ukrainian nationals, stateless persons and protection recipients within Ukraine. As of early April 2022, nearly 5 million people<sup>3</sup> who have arrived in the European Union could be eligible to benefit from the measure. Temporary protection

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\* GPPI.

\*\* GPPI.

1 Data and analysis reflects information accurate in April 2022.

2 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

3 UNHCR, 'Ukraine Refugee Situation' <<https://data.unhcr.org/en/situations/ukraine>> accessed 25 April 2022.

under the Temporary Protection Directive (TPD)<sup>4</sup> ensures the right of Ukrainians to stay within the EU, as well as to access accommodations, health care, education, and guarantees the right to employment. Alongside temporary protection measures, the European Commission presented a 10-Point Plan<sup>5</sup> in late March on coordinating the EU's response to displacement from Ukraine.

In this chapter, we offered reflections on some of the themes that we believed would be crucial in April 2022, for the weeks and months to follow, focusing on the bottlenecks in the EU's reception capacities and the political arguments around them.

## 2. Disruption vs. Continuity: Lack of Harmonization Meets "Free Choice"

The introduction of temporary protection is not only unprecedented, but also stands in stark contrast to previous EU policy responses to forced displacement. A long-dormant emergency instrument, the TPD was unanimously approved in the case of Ukraine by the EU Member States – a step that was unthinkable in relation to the displacement of Syrians in 2015.<sup>6</sup> However, beyond the more obvious contrasts with Syrian and other displacement situations (e.g., the continuing crackdown on migrants near the Belarus border and the Hungarian Prime Minister Viktor Orban's policy shift ahead of the April elections),<sup>7</sup> there are also some continuities in the EU's response.

The scope of the Ukrainian displacement will bring any state's reception arrangement to its limits. However, past failures to provide adequate reception may also contribute to the current state of affairs. While not all EU Member States report statistics on their accommodation offerings, multiple Member

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4 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.

5 European Commission Migration and Home Affairs, 'The 10-Point Plan: For stronger European coordination on welcoming people fleeing the war from Ukraine' <[https://home-affairs.ec.europa.eu/10-point-plan-stronger-european-coordination-welcoming-people-fleeing-war-ukraine\\_en](https://home-affairs.ec.europa.eu/10-point-plan-stronger-european-coordination-welcoming-people-fleeing-war-ukraine_en)> accessed 1 December 2022.

6 Carrera et al. 'The EU grants temporary protection for people fleeing war in Ukraine: Time to rethink unequal solidarity in EU asylum policy' in this collection.

7 InfoMigrants, '140,000 Ukrainian refugees in Hungary, Orban changes stance' (9 March 2022) <<https://www.infomigrants.net/fr/post/39059/140000-ukrainian-refugees-in-hungary-orban-changes-stance>> accessed 1 December 2022.

States (including those in western Europe) have “systematically failed to secure sufficient reception capacity for their asylum-seeking population.”<sup>8</sup> In 2015, this situation resulted in a quick saturation of reception systems that led to the placement of people in emergency accommodation for the long term. And this is likely to happen again. In Greece, for example, over 19,000 Ukrainians<sup>9</sup> that arrived in the first few weeks were almost all hosted by families and friends. As the number of displaced Ukrainians will likely only increase, the Greek Government intends to place those in need of housing in camps left over from 2015-2016, which are unsuitable for long-term accommodation.

Unlike asylum seekers who are subject to strict rules set by the country responsible for their asylum application, people who fall under the scope of temporary protection enjoy freedom of movement and relocation within the EU. This means that the most controversial aspect of asylum policy, assuming responsibility for hosting a third-country national, – is decided primarily by the displaced people themselves, rather than by the criteria laid out in the Dublin Regulation. However, differences in the reception practices and conditions in host countries will likely encourage people to move to places perceived as more inviting after an initial stay period in a country. In addition to issues with initial reception arrangements and accommodation, EU countries are still far away from adequately providing for displaced people’s other basic needs. The reception of asylum seekers fuses together specific services and policies regarding the integration of social assistance, education for children and health care. Research has shown that practices across EU Member States concerning access to basic needs have diverged significantly,<sup>10</sup> and in many cases served as a driver for onward movement.

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8 AIDA, ‘Housing out of reach? The reception of refugees and asylum seekers in Europe’ (2020) <[https://asylumineurope.org/wp-content/uploads/2020/11/aida\\_housing\\_out\\_of\\_reach.pdf](https://asylumineurope.org/wp-content/uploads/2020/11/aida_housing_out_of_reach.pdf)> accessed 1 December 2022.

9 UNHCR, ‘Ukraine Situation Greece Update’ (13 April 2022) <<https://reliefweb.int/report/greece/ukraine-situation-greece-update-1-13-april-2022>> accessed 1 December 2022.

10 Tiziana Caponio and Irene Ponzio (ed), *Coping with Migrants and Refugees, Multilevel Governance across the EU* (Routledge 2022).

### 3. Projecting the Intra-EU Movement of Ukrainians

In this complex situation, it is hard to predict how the intra-EU mobility of Ukrainians will develop – the activation of the TPD is best understood as a field trial without pre-existing pilots. However, we submit that two characteristics of displacement and reception in Central EU Member States (e.g., Poland) are likely to create a sense of urgency in responsibility sharing and more controversial politics concerning the admission of Ukrainian people.

First, a very significant share of those who have fled Ukraine (the EU Commission estimates 50 percent)<sup>11</sup> possess extended social networks within EU countries. There is a significant Ukrainian diaspora across Europe, with the largest number in Poland and then followed by Germany, Czech Republic, Hungary, Spain, and Italy. The geographical spread of their diasporic networks partly explains the swift movement of Ukrainians and their access to private accommodations. Further into the crisis, however, the demographics of those moving from Ukraine may change. Already, the share of people without personal networks is increasing,<sup>12</sup> and is likely to go up even further in the coming months. Not only will this likely increase dependency on state assistance, but may also mean that Ukrainian people will move to countries where reception conditions are – in perception or fact – more favorable.

Second, the differences in reception conditions between Member States are likely to become more apparent over time. As with asylum seekers, the reception of Ukrainians will unfold in two stages: first, at the time of their arrival, at which point emergency assistance is prioritized, and then at a later stage of settlement, when access to services and integration (whether short or long term) will depend on the level of national and local support. Under Chapter 3 of the TPD, states retain significant discretion in determining how they organise and provide for specific services, including for key needs like accommodation, health care, social welfare, and other means of subsistence.

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11 Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection [2022] 2022/0069 (NLE) <<https://eur-lex.europa.eu/legal-content/DE/TXT/HTML/?uri=CELEX:52022PC0091&from=EN>> accessed 1 December 2022.

12 ICMPD, ‘Europe’s Ukrainian refugee crisis: What we know so far’ (Ukraine, 28 February 2022) <<https://www.icmpd.org/news/europe-s-ukrainian-refugee-crisis-what-we-know-so-far>> accessed 1 December 2022.

In the current context, onward movement to neighbouring states is likely to significantly increase over time. In particular, Germany could see a further influx of Ukrainian people in the coming months. The Polish Government may also be aware of this likelihood. So far, Poland has allowed freedom of movement for Ukrainians seeking to leave Poland, but has also facilitated the stay of those who wish to remain in the country. The Polish Government opposes creating more formal relocation mechanisms, potentially because it could leave the government vulnerable against leverage on other, more controversial stances in asylum policy – in particular, the reform of the Dublin Regulation. This take also reinforces the Polish Government’s previous position against intra-EU relocation. As the TPD does not automatically activate mandatory relocation mechanisms (meaning that their adoption would be a political decision made by the European Council), to avoid an uneven distribution, the worst case scenario would involve: 1) large-scale secondary movements with a race to the bottom on reception quality; 2) the “freeing” of reception capacity through a policy of evicting other asylum seekers;<sup>13</sup> 3) further restrictions on access to asylum for refugees of other nationalities; and 4) political campaigns to seize EU funding opportunities from reception, even if the numbers do not add up.<sup>14</sup> The appealingly straightforward policies in place at the moment, whereby all Ukrainians can receive a residence permit in any EU state, may also give way to legal debates on whether temporary protection should be granted after a residence permit has been obtained elsewhere.<sup>15</sup>

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13 Brendan McClintock-Ryan and Alannah Meyrath, ‘Asylum seeker claims refugees evicted to make way for Ukrainians’ *RTL Today* (13.03.2022) <<https://today.rtl.lu/news/luxembourg/a/1879320.html>> accessed 1 December 2022.

14 Robert Tait, ‘Hungary accused of inflating number of Ukrainian arrivals to seek EU funds’ *The Guardian* (Budapest, 31 March 2022) <<https://www.theguardian.com/world/2022/mar/30/hungary-accused-of-inflating-number-of-ukrainian-arrivals-to-seek-eu-funds>> accessed 1 December 2022.

15 Daniel Thym, ‘Temporary Protection for Ukrainians The Unexpected Renaissance of ‘Free Choice’ (Verfassung Blog, 5 March 2022) <<https://verfassungsblog.de/temporary-protection-for-ukrainians/>> accessed 1 December 2022.

## 4. Opportunities to Build National Reception Systems and Additional Solidarity Measures

What is the most tenable way forward for reception in the current intra-EU political context? EU states and institutions should use the current window of opportunity created by high levels of political support to build reception capacities throughout Europe. This is an enormous task that spans across many areas, including housing, health care and psychosocial support, education, social protection, and labour market integration. In the following paragraphs, we will highlight one short-term and one longer-term challenge to the reception of persons displaced – housing and labour market integration.

*Housing:* Housing will be a key challenge going forward for any EU country with a sizeable population of people that have fled Ukraine who cannot stay with relatives or friends in the medium-to-long term. The European Commission announced the “Safe Homes” initiative,<sup>16</sup> which is a positive step toward supporting those who volunteer to host displaced Ukrainians. The Asylum Migration and Integration Fund (AMIF) will be utilised to fund the scheme. However, a persistent problem with AMIF is the extended duration of the project cycles and the long waiting time between submitting and distributing the funds in the public reception system.

During Europe’s so-called ‘refugee crisis’ in 2015, various best practices<sup>17</sup> emerged for addressing housing shortages for beneficiaries of international protection. A recent UNHCR study<sup>18</sup> identified successful cases in the Netherlands, Belgium and Poland, among others, where offering low-cost rentals or rent-free apartments that were subsidized by the state (at times, in partnership with private donors) paved the way for long-term housing options for beneficiaries. Non-governmental organisations can play a leading role in identifying suitable accommodations that are managed by the private housing

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16 European Commission, ‘Fleeing Ukraine: access to accommodation and housing’ <[https://eu-solidarity-ukraine.ec.europa.eu/information-people-fleeing-war-ukraine/fleeing-ukraine-access-accommodation-and-housing\\_en](https://eu-solidarity-ukraine.ec.europa.eu/information-people-fleeing-war-ukraine/fleeing-ukraine-access-accommodation-and-housing_en)> accessed 1 December 2022.

17 UNHCR, ‘Good Practices for Migrant and Refugee Housing in Europe’ (2020) <<https://www.unhcr.org/bg/wp-content/uploads/sites/18/2020/10/Good-practices-housing-FINAL-EN.pdf>> accessed 1 December 2022.

18 *ibid.*

sector. The ESTIA program<sup>19</sup> in Greece, which was initiated by UNHCR in partnership with local municipalities and NGOs in 2015, succeeded in offering long-term housing options to international protection recipients and vulnerable individuals. Research has also highlighted the role that local authorities can play in the accommodation<sup>20</sup> – and, by extension, integration – of new arrivals, be they beneficiaries of international protection or Ukrainian people protected under the TPD. The common theme in all these practices is long-term funding options, which focused (partly or fully) on subsidizing rents. This funding model will be crucial in determining how quickly and at what scale existing best practices can be adjusted and applied to displaced Ukrainians in Europe. Large-scale private sponsorship programs that are co-financed through state funding can be important tools not only for housing, but also for other aspects of integration.

*Labour integration and socio-economic inclusion:* Integration is intrinsically linked with access to employment: the ability to work increases migrants' self-sufficiency and socioeconomic participation, standard of living, the number of interactions with host-country nationals,<sup>21</sup> and the overall outcome of their inclusion in the host society. However, labour integration requires a clear legal framework and the capacity to absorb pre-existing skills as well as to address skillset shortages. Thus far, the case of Ukrainians in Poland shows divergent experiences. Since 2014, displaced Ukrainians have had access to employment opportunities in Poland and helped to facilitate the growth of the Polish economy. However, their position in the country remains precarious,<sup>22</sup> as their skillsets often do not match the available jobs and most employers only offer short-term contracts without social security benefits. One of the best examples in this area is Sweden, which invests in adult education to address skill short-

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19 The Emergency Support to Integration and Accommodation <<http://estia.unhcr.gr/en/home/>> accessed 1 December 2022.

20 Nasar Meer and others, 'Governing displaced migration in Europe: housing and the role of the "local"' [2021] 9 *Comparative Migration Studies*.

21 OECD, *Working Together for Local Integration of Migrants and Refugees*, OECD Regional Development Studies (OECD Publishing 2018).

22 Claudia Ciobanu, 'Poland's Tepid Welcome to Ukrainians Leaves Economy Vulnerable' (Reporting Democracy, 3 March 2020) <<https://balkaninsight.com/2020/03/03/polands-tepid-welcome-to-ukrainians-leaves-economy-vulnerable/>> accessed 1 December 2022.



ages while also deploying ‘Fast Tracks’ programmes<sup>23</sup> to encourage the labour market integration of newly arrived immigrants in industries with labour shortages. Since 2017, the European Commission has also offered the EU Skills Profile Tool,<sup>24</sup> which is designed to assist authorities and actors involved in the reception and integration of third-country nationals trying to enter the EU labour market. In this process, private companies can be instrumental in facilitating labour market inclusion for those with skills in the different industries. Some Member States have already indicated labour market shortages<sup>25</sup> in certain industries (e.g., Greece).

*Additional measures of solidarity:* “Free choice” under the TPD is arguably the most important measure of solidarity that the EU has ever undertaken on asylum. However – given that full harmonization of reception conditions will not be achievable in the medium term and that, going forward, “free choice” without further incentives is unlikely to evenly distribute Ukrainians among Member States – it is essential for EU members to invest in additional measures of solidarity. In this regard, the solidarity platform mentioned in the European Commission’s 10-Point Plan is a welcome first step. In addition to providing information on reception, EU countries will also need to proactively facilitate the movement of people fleeing, concentrating on those who have particular needs and vulnerabilities (e.g., people with medical conditions, unaccompanied minors) for whom more specialized reception capacity is needed. The European Commission is setting up centres on the borders<sup>26</sup> with Ukraine to identify individuals in need of specialized health care with the aim of distributing them among Member States with the capacity to adequately treat them. A similar process is required for unaccompanied minors, which sets out specific services to cater to their needs.

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23 European Commission, ‘Swedish Public Employment Service’s status report of the work with ‘fast tracks’ (24 May 2017) <[https://ec.europa.eu/migrant-integration/library-document/swedish-public-employment-services-status-report-work-fast-tracks\\_en](https://ec.europa.eu/migrant-integration/library-document/swedish-public-employment-services-status-report-work-fast-tracks_en)> accessed 1 December 2022.

24 European Commission, ‘EU Skills Profile Tool for Third Country Nationals’ <<https://ec.europa.eu/social/main.jsp?catId=1412&langId=en>> accessed 1 December 2022.

25 The Local, ‘Danish support not moved by new Russian attacks on Ukraine’ *The Local* (11 October 2022) <<https://www.thelocal.dk/20220328/denmark-creates-jobs-website-for-ukraine-refugees/>> accessed 1 December 2022.

26 Ludwig Burger, ‘EU sets up distribution centres on Ukraine border for refugees needing care’ *Reuters* (29 March 2022) <<https://www.reuters.com/world/europe/eu-sets-up-distribution-centres-ukraine-border-refugees-needing-care-2022-03-29/>> accessed 1 December 2022.

## 5. Conclusion: A Potential Watershed Moment for the Common European Asylum System

The displacement of Ukrainians may become the Common European Asylum System's largest test case yet. Solidarity is likely to continue, but local and national backlashes may also emerge and could lead to more restrictive practices (including for non-Ukrainians), particularly if secondary movement increases. The fact that people fleeing Ukraine have more personal agency in deciding where to settle than other displaced people will be flagged as a positive model by proponents of more "free choice" for all asylum seekers.<sup>27</sup> However, whether this model can be both politically tenable and create better reception and integration outcomes than the Dublin Regulation's default "first country of arrival" criterion will depend on how Member States and EU institutions will make "free choice" workable in practice. To make "free choice" a viable solution, these actors must support and build national reception capacity, inclusion and service provision, as well as pro-actively facilitate the movement of people fleeing. Doing so will require a paradigm shift: a concerted, collaborative engagement of both government and private actors, including citizens' initiatives and aid groups whose work has so far been hindered in many EU countries.

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27 Joel Hernández, "The EU should treat all refugees like it is treating Ukrainians" *The New Humanitarian* (23 March 2022) <<https://www.thenewhumanitarian.org/opinion/2022/03/23/eu-should-treat-all-refugees-like-it-is-treating-ukrainians>> accessed 1 December 2022.

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# Chapter 15

## Frontex Assisting in the Ukrainian Displacement – A Welcoming Committee at Racialised Passage?

Dr Mariana Gkliati\*

### 1. Introduction

Frontex, the European Border and Coast Guard Agency, has been in the centre of multiple investigations<sup>1</sup> for its involvement in human rights violations at the EU borders. In fact, the agency's Executive Director, Fabrice Leggeri, resigned<sup>2</sup> last week over allegations of misconduct related to pushbacks. The Agency is a

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\* Assistant Professor of International and European Law, Radboud University.

1 Statewatch, 'Frontex investigations: what changes in the EU border agency's accountability?' (30 March 2021) <<https://www.statewatch.org/analyses/2021/frontex-investigations-what-changes-in-the-eu-border-agency-s-accountability/>> accessed 1 December 2022.

2 Jennifer Rankin, 'Head of EU border agency Frontex resigns amid criticisms' *The Guardian* (Brussels, 29 April 2022) <<https://www.theguardian.com/world/2022/apr/29/head-of-eu-border-agency-frontex-resigns-amid-criticisms-fabrice-leggeri>> accessed 1 December 2022.

central securitising agent<sup>3</sup> in EU migration policy and is strongly associated with the policies of non-entrée,<sup>4</sup> while its fundamental rights protection mechanisms have been deemed greatly ineffective. Most recently, the Greek Minister of Migration and Asylum stated in a public meeting with the Frontex Executive Director, that ‘Frontex is a security force not a welcoming committee’.<sup>5</sup> Nevertheless, in response to the Ukrainian displacement, Frontex shows a diametrically opposite face.

A lot has been written and discussed so far regarding the asylum law and protection angle of the Ukrainian displacement crisis. Far less attention has been paid to the border management aspects of this crisis. The EU has adopted an open borders policy with respect to Ukrainian refugees. But does this mean that a border control agency, such as Frontex, does not have a role in this? And is this role completely distinct from ‘security’, in particular as regards non-Ukrainian nationals fleeing the war and the agency’s involvement in returns? Does the differential treatment of displaced non-Ukrainian nationals raise legal concerns?

## 2. Commission Guidelines – General policy on border management

On 04 March 2022 the Council adopted the historical implementing Decision<sup>6</sup> to activate the Temporary Protection Directive (TPD)<sup>7</sup>, as an exceptional measure to provide immediate and temporary protection. The Commission followed issuing Operational Guidelines for external border

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3 Mariana Gkliati and Jane Kilpatrick, ‘Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in FRONTEX Joint Operations’ [2021] 17(4) Utrecht Law Review 59.

4 James C. Hathaway and R. Alexander Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’ [1997] 10 Harv. Hum. Rts. J. 115.

5 Tweet from Giorgos Christides (8 April 2022) <[https://twitter.com/g\\_christides/status/1512358854293655553](https://twitter.com/g_christides/status/1512358854293655553)> accessed 1 December 2022.

6 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

7 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.

management<sup>8</sup> to facilitate border crossings at the EU-Ukraine borders and Operational guidelines<sup>9</sup> to clarify the scope and provisions of the Directive and the Council Decision. These guidelines are not legally binding but should provide the appropriate guidance for the uniform implementation of the Directive across the EU.

With respect to the management of borders and the movement of persons fleeing Ukraine, the Commission prompts member states to relax border checks as a result of exceptional and unforeseen circumstances, an option already available under the Schengen Borders Code<sup>10</sup> (Articles 5(2)(b) and 9). The Commission notably remarks that ‘formalities must be reduced to a minimum because of the urgency of the situation’.

In fact, Ukrainians were already exempt from the requirement to be in possession of a short-stay visa for entering the Union on the basis of the 2017 visa liberalisation agreement<sup>11</sup> between Ukraine and the EU. Amongst the rights for beneficiaries of temporary protection is also the right to move to another EU country, prior to the issuance of a residence permit, and also to travel freely to another EU country after the residence permit is issued for 90 days within a 180-day period.

The Commission in its Guidelines advises member states to adopt facilitation measures for border management, including simplifying controls for certain categories of persons, such as vulnerable persons, and organising controls outside of border crossing points.

It further strongly recommends that the affected states make use of the support of Frontex in all activities carried out at their borders. In particular, technical and operational reinforcement by Frontex migration management support teams can be requested to reduce congestion and increase the fluidity of the traffic at the border.

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8 Commission Communication Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders [2022] CI 104/1.

9 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01 [2022] OJ C 126I.

10 Regulation (EU) 2016/399 of The European Parliament and of The Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77/1.

11 European Commission, ‘European Commission welcomes the Council adoption of visa liberalisation for the citizens of Ukraine’ (Brussels, 11 May 2017) <[https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_17\\_1270](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_1270)> accessed 6 May 2022.



Member States can ask for Frontex to support in the identification of the persons, including nationality screening and travel documents and COVID-certificate checks, and their registration and fingerprinting. The Commission also encourages member states to make use of the operational and logistical support of Frontex for the return of third country nationals that do not have a right to stay on the basis of the Temporary Protection Directive, which can, as the Commission notes, book seats on commercial flights or organise charter flights.

Frontex was also directed to give priority to requests of the affected member states to the Eurosur Fusion Services.<sup>12</sup> EUROSUR<sup>13</sup> is a pan-European surveillance system coordinated by Frontex, which integrates all border surveillance facilities of the member states. The aim is to improve coordination in existing infrastructures, and extend their reach, in order to provide a more complete picture of the situation in real-time, and thus increase situational awareness and reaction capability. Information from all national state of the art technologies, including radar satellite imagery and drone mapping are collected in the Eurosur Fusion Services and processed to enhance detection capabilities, including predicting vessel positions. Frontex is now directing its attention to Ukraine as a priority, providing regular monitoring with tailored aerial surveillance, as well as satellite and other tailor-made imagery services of the frontier and pre-frontier areas of Ukraine to assist member states to assess the situation in real time.

### 3. Frontex at the Ukrainian borders

Frontex announced its readiness to provide its support from the first days of the conflict. It noted that it monitors the situation and it is ready to deploy<sup>14</sup> standing corps officers within days in response to possible requests for support.

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12 Frontex, 'Situational awareness and monitoring' <<https://frontex.europa.eu/we-know/situational-awareness-and-monitoring/information-management/>> accessed 1 December 2022.

13 Communication From The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions Examining the creation of a European Border Surveillance System (EUROSUR) (Brussels, 13 February 2008) <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0068:FIN:EN:PDF>> accessed 1 December 2022.

14 Frontex, 'Frontex ready to support Member States in light of situation in Ukraine'(25 February 2022) <<https://frontex.europa.eu/media-centre/news/news-release/frontex-ready-to-support-member-states-in-light-of-situation-in-ukraine-kZGGwq>> accessed 1 December 2022.

The first deployment of Frontex migration management support teams at the Ukrainian borders was decided even prior to the activation of the Temporary Protection Directive. Upon Romania's request, the agency announced the deployment<sup>15</sup> in the country of 150 officers with 45 patrol cars and other equipment. According to the communication of the Commission, the Parliament and the Council on the European solidarity with refugees and those fleeing war in Ukraine,<sup>16</sup> the first group of 49 Frontex staff was deployed at EU-Ukraine borders and the border with Moldova was supplemented by 162 staff. This reinforcement<sup>17</sup> was part of land border surveillance operation Terra which takes place at the external borders of Romania and eleven other EU member states. In particular, border control officers and document experts were deployed to assist the Romanian authorities in the processing of migrants, including assisting in registration, identification and fingerprinting, and carry out border surveillance tasks. The agency stated that it also holds talks with other member states offering its deployment at other EU borders with Ukraine.

The agency has expanded its deployment in third countries neighbouring Ukraine. The Commission and the Council promptly concluded a status agreement with Moldova<sup>18</sup> and launched its first joint operation in the country. Similarly to the joint operation in Romania, the aim of the operation<sup>19</sup> is first of all, to provide technical and operational support to Moldova in the processing of persons, but also to perform other border-control tasks 'if needed'. The potential target of these additional border measures could conceivably be non-

15 Schengen Visa Information, 'Frontex to Support Romania by Sending 150 Officers at the Border With Ukraine' (3 March 2022) <<https://www.schengenvisainfo.com/news/frontex-to-support-romania-by-sending-150-officers-at-the-border-with-ukraine/>> accessed 1 December 2022.

16 Communication from The Commission to The European Parliament, The European Council, The Council, The European Economic And Social Committee And The Committee Of The Regions European solidarity with refugees and those fleeing war in Ukraine (Strasbourg, 8 March 2022) COM (2022) 107 final.

17 Frontex, 'Frontex to send additional officers to Romania' (2 March 2022) <<https://frontex.europa.eu/media-centre/news/news-release/frontex-to-send-additional-officers-to-romania-B4Nl2h>> accessed 1 December 2022.

18 Council of the European Union, 'Moldova: Council adopts decision to sign agreement for Frontex operational support in light of Russia's invasion of Ukraine' (17 March 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/03/17/moldova-council-adopts-decision-to-sign-agreement-for-frontex-operational-support-in-light-of-russia-s-invasion-of-ukraine/>> accessed 1 December 2022.

19 Frontex, 'Frontex sending standing corps officers to Moldova' (21 March 2022) <<https://frontex.europa.eu/media-centre/news/news-release/frontex-sending-standing-corps-officers-to-moldova-8KKC9T>> accessed 1 December 2022.

Ukrainians crossing the border, as discussed in the following sections.

According to the latest available information at the time of writing, 18 standing corps officers are deployed in Moldova. The deployment will expand to 84 standing corps officers and document inspection devices. It can be noted that Frontex had been cooperating with Moldova since 2008 in information exchange, risk analysis, research and development, training and operational coordination on the basis of a working arrangement.<sup>20</sup> Moldova already also takes part at the Frontex Risk Analysis Network (FRAN),<sup>21</sup> which provides a platform for sharing knowledge, and carrying out joint risk analysis and intelligence activities.

According to the latest developments, the agency reached an agreement in April 2022 with the states neighbouring Ukraine for the activation of a VEGA project<sup>22</sup> regarding the role of border guards at airports in detecting children at risk. The project aims at spotting children who may be victims of trafficking. In this framework, Frontex migration control teams apply standard operational procedures based on the VEGA Handbook,<sup>23</sup> which also provides useful guidelines on how to treat children at borders. Such guidelines include how to make a child feel ‘comfortable’ during an identification interview, spotting trouble signs during documents control and other border checks and noticing and communicating unusual behaviour of children and adults accompanying them.

The first Joint Operation VEGA Children was launched in 2015 and aimed at ‘Combating child trafficking and detection of children at risk on the move at air borders’ at nine European airports. More such operations have since taken place at airports around Europe also in collaboration with the International Organisation on Migration.<sup>24</sup> At its initial stage, the VEGA project

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20 Frontex, ‘Moldova Working Arrangement’ (12 August 2008) <link> accessed 1 December 2022.

21 Frontex, ‘Situational awareness and monitoring’ <<https://frontex.europa.eu/we-know/situational-awareness-and-monitoring/strategic-analysis/>> accessed 1 December 2022.

22 Frontex, ‘Frontex publishes VEGA Handbook: Children at airports’ (28 August 2015) <<https://frontex.europa.eu/media-centre/news/news-release/frontex-publishes-vega-handbook-children-at-airports-bvtPly>> accessed 1 December 2022.

23 Frontex, *VEGA Handbook: Children at airports Children at risk on the move Guidelines for border guards* (Frontex 2015) <[https://frontex.europa.eu/assets/Publications/Operations/VEGA\\_Children\\_Handbook.pdf](https://frontex.europa.eu/assets/Publications/Operations/VEGA_Children_Handbook.pdf)> accessed 1 December 2022.

24 IOM, ‘IOM Joins Frontex Operation to Counter Child Trafficking’ (22 November 2021) <<https://georgia.iom.int/news/iom-joins-frontex-operation-counter-child-trafficking>> accessed 1 December 2022.

was focused on air border crossing points, but the intention of the agency has, since the beginning been to streamline similar projects at land and sea border surveillance operations. Today VEGA is not a stand-alone project anymore, but VEGA components can be activated in all Frontex operations.

Given that the majority of the population leaving Ukraine are women and children, the agency, following consultations with the relevant member states, decided to activate the VEGA components at the border crossing points across the Ukrainian borders with Slovakia, Romania, Moldova and Poland, as well as a few airports until the end of 2022. On 20 April Frontex deployed the first members of its own staff in a variety of locations as part of the VEGA component. Member Organisations of the Frontex Consultative Forum on Fundamental Rights have joined Frontex teams in the past to advise on the identification of vulnerable persons and potential victims of trafficking including children. The Consultative Forum chairs have recently announced a call for expression of interest to the member organisations for future cooperation with Frontex under the VEGA project.

Moreover, Frontex assists with the voluntary repatriation of third country nationals fleeing Ukraine. This concerns non-Ukrainians fleeing the war in Ukraine, which are not covered by temporary protection and are able and willing to return to their countries of origin. On 11 March Frontex announced that it had assisted with the return of roughly 400 people,<sup>25</sup> mainly families with children, to Tajikistan and Kyrgyzstan with two charter flights from Poland.

Finally, with respect to data management, it can be noted that Member states cannot use Eurodac and other EU large-scale databases for the registration of the personal data of beneficiaries of temporary protection (unless they apply for asylum), which has to be processed only through national data bases. This does not allow for interoperability, which the Commission views as a challenge. The Commission proposed to address this with the help of the European Asylum Agency (EUAA), ‘by for instance providing a platform for exchange of information’.<sup>26</sup> The proportionality of this measure should certainly be examined. There is no role explicitly envisaged for Frontex in this

25 Frontex, ‘First humanitarian return flights by Frontex’ (11 March 2022 <<https://frontex.europa.eu/media-centre/news/news-release/first-humanitarian-return-flights-by-frontex-r3mnqc>> accessed 6 May 2022.

26 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01 [2022] OJ C 126I.

regard.

## 4. A shift towards humanitarisation in language and policies

The agency seems to be adopting a more constructive role in dealing with the Ukrainian displacement, which is also vividly represented in the use of corresponding language in its communication.

No concerns have been expressed by observers so far regarding the direct or indirect involvement of the agency in any violations of the EU Charter with respect to persons fleeing the war in Ukraine, while there are no indications of its involvement in blocking the right to leave<sup>27</sup> for Ukrainian men. To the contrary, Frontex officers are giving out teddy bears<sup>28</sup> to Ukrainian children crossing the borders, as part of the “Secret Teddies Mission”.

The purpose of what would have otherwise been border surveillance operations is now to help ‘in processing the massive number of people’.<sup>29</sup> The objective of ‘combating irregular migration’ has morphed into ensuring ‘the effective and efficient management of the crossing<sup>30</sup> (...) and to avoid congestions at and around the borders, while maintaining a high level of security for the entire Schengen area.’

While press releases and Frontex reports, until now have been referring to ‘irregular migrants’ and ‘illegal border crossings’, the agency now refers to ‘people fleeing the conflict zone’.<sup>31</sup> Finally, while the role of Frontex in forced

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27 Pia Lotta Storf, ‘Ukraine’s Travel Ban, Gender and Human Rights Gendered Impacts of Conflict and the Right to Leave’ (Völkerrechtsblog, 18 March 2022) <<https://voelkerrechtsblog.org/ukraines-travel-ban-gender-and-human-rights/>> accessed 1 December 2022.

28 Frontex, ‘Teddy bears for Ukrainian children’ (20 March 2022) <<https://frontex.europa.eu/media-centre/news/news-release/teddy-bears-for-ukrainian-children-wcKMm4>> accessed 1 December 2022.

29 Frontex, ‘Frontex sending standing corps officers to Moldova’ (21 March 2022) <<https://frontex.europa.eu/media-centre/news/news-release/frontex-sending-standing-corps-officers-to-moldova-8KKC9T>> accessed 1 December 2022.

30 Commission Communication Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders [2022] CI 104/1.

31 Frontex, ‘Frontex ready to support Member States in light of situation in Ukraine’ (25 February 2022) <<https://frontex.europa.eu/media-centre/news/news-release/frontex-ready-to-support-member-states-in-light-of-situation-in-ukraine-kZGGwq>> accessed 1 December 2022.

removals has been heavily criticised,<sup>32</sup> the returns that have been carried out so far in relation to the Ukrainian displacement are voluntary. “Return operations’ of ‘illegally residing third country nationals’ are renamed ‘humanitarian return flights’<sup>33</sup> for ‘people who have fled the war zone and wish to return to their countries of origin’ by Frontex and ‘repatriation’<sup>34</sup> and ‘assisted departures’ by the Commission.

## 5. Racialised border controls remain for non-Ukrainians

While we can safely speak of a relaxation of border controls, the EU has not adopted a fully open borders and protection policy. Pursuant to the Council Decision (Article 2(1)), the TPD applies to Ukrainian nationals and their family members, as well as nationals of other third countries and stateless persons who had received international or equivalent national protection in Ukraine before the invasion and their family members. It should be noted that the definition of family members is interpreted rather broadly including also unmarried partners in a stable relationship and dependent close relatives who lived together as part of the family unit, while the Commission calls upon the member states to ‘use their margin of appreciation in the most humanitarian way’.<sup>35</sup>

Member states may extend the scope of protection to other categories of persons fleeing the war in Ukraine (Article 7(1) TPD), such as nationals of other third countries and stateless persons without a valid permanent residence permit. Member States receive encouragement<sup>36</sup> by the Commission to this

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32 Statewatch, ‘Deportation Union: Rights, accountability and the EU’s push to increase forced removals’ (19 August 2020) <<https://www.statewatch.org/deportation-union-rights-accountability-and-the-eu-s-push-to-increase-forced-removals/>> accessed 1 December 2022.

33 Frontex, ‘First humanitarian return flights by Frontex’ (11 March 2022) <<https://frontex.europa.eu/media-centre/news/news-release/first-humanitarian-return-flights-by-frontex-r3mnqc>> accessed 1 December 2022.

34 Commission Communication Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders [2022] CI 104/1.

35 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ C 126I.

36 *ibid*

end.

Stateless persons and nationals of other third countries who can prove their valid permanent residence in Ukraine and who are unable to return in safe and durable conditions to their country of origin shall also benefit from temporary protection (Article 2(2)).

This differentiation is also reflected in the plethora of reports<sup>37</sup> from the Ukrainian borders that shows discriminatory treatment of non-white people attempting to flee. According to Human Rights Watch,<sup>38</sup> black and Asian people were at various instances prevented from boarding trains and buses. Multiple accounts are reported of students and migrants from Africa, the Middle East, and Asia who face such racist, sometimes even violent, treatment in their attempt to flee. These challenges were also acknowledged by UNCHR,<sup>39</sup> that has appealed for access to protection to be afforded to everyone indiscriminately, while they have also been condemned by African leaders<sup>40</sup> and the African Union.<sup>41</sup> The International Organisation for Migration and other UN bodies<sup>42</sup> have called for the end of ‘discrimination and

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37 ECRE, ‘EU Ukraine Response: EU Steps Up With Temporary Protection, Border Management Guidelines, Humanitarian Aid, and Support to Member States’ (11 March 2022) <<https://ecre.org/eu-ukraine-response-eu-steps-up-temporary-protection-border-management-guidelines-humanitarian-aid-and-support-to-member-states/>> accessed 1 December 2022.

38 Human Rights Watch, ‘Ukraine: Unequal Treatment for Foreigners Attempting to Flee Pattern of Blocking, Delaying Non-Ukrainians’ (4 March 2022) <<https://www.hrw.org/news/2022/03/04/ukraine-unequal-treatment-foreigners-attempting-flee>> accessed 1 December 2022.

39 UNHCR, ‘UNHCR mobilizing to aid forcibly displaced in Ukraine and neighbouring countries’ (1 March 2022) <<https://www.unhcr.org/news/briefing/2022/3/621deda74/unhcr-mobilizing-aid-forcibly-displaced-ukraine-neighbouring-countries.html>> accessed 1 December 2022.

40 Emmanuel Akinwotu and Weronika Strzyżyńska, ‘Nigeria condemns treatment of Africans trying to flee Ukraine’ *The Guardian* (28 February 2022) <<https://www.theguardian.com/world/2022/feb/28/nigeria-condemns-treatment-africans-trying-to-flee-ukraine-government-poland-discrimination>> accessed 1 December 2022.

41 Renata Brito, ‘Europe welcomes Ukrainian refugees — others, less so’ *Ap News* (28 February 2022) <<https://apnews.com/article/russia-ukraine-war-refugees-diversity-230b0cc790820b9bf8883f918fc8e313>> accessed 1 December 2022.

42 Rachael Reilly and Michael Flynn, ‘The Ukraine Crisis Double Standards: Has Europe’s Response to Refugees Changed?’ (Global Detention Project, 2 March 2022) <<https://www.globaldetentionproject.org/the-ukraine-crisis-double-standards-has-europes-response-to-refugees-changed>> accessed 1 December 2022.



racism against third country nationals fleeing Ukraine'.<sup>43</sup>

While the control of identification, residence permits, and travel documents can be conceivable for non-Ukrainian third country nationals, the double standards<sup>44</sup> of the TPD cannot result in violations of human rights and exclusion from international protection all together. Even though students and other foreigners without a valid permanent residence permit do not fall in the scope of the TPD (Article 2(3)), their entitlements under the Refugee Convention and human rights law remain in effect.

Non-beneficiaries of temporary protection should be afforded entry to the territory pursuant the EU member states' obligation of *refoulement* under the EU Charter (Article 19), the ECHR (Article 3), the Refugee Convention (Article 33), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), and customary international law, and pursuant the obligation to provide access to asylum under the EU Charter (Article 18), and the Universal Declaration of Human Rights (Article 14). The Schengen Borders Code makes clear that border controls must be exercised without prejudice to refugees and people seeking international protection (Article 3(b)), while the European Border and Coast Guard Regulation repeatedly states that Frontex operations should be conducted in full respect of human and refugee rights.

All fleeing Ukraine should in fact be recognised as *prima facie* refugees<sup>45</sup> and be allowed access to protection, given that the objective circumstances in Ukraine, including carpet bombings and widespread targeting of civilian population, do not leave doubt as to the refugee character of the group.

The examples of exclusion that have been reported can also be in violation of the prohibition of discrimination included in Article 3 of the Refugee Convention, according to which, all provisions of the Convention shall apply without discrimination as to race, religion or country of origin. EU member states are also bound by the obligation of non-discrimination, as enshrined in

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43 IOM, 'Discrimination and Racism Against Third Country Nationals Fleeing Ukraine Must End: IOM Director General' (3 March 2022) <<https://www.iom.int/news/discrimination-and-racism-against-third-country-nationals-fleeing-ukraine-must-end-iom-director-general>> accessed 1 December 2022.

44 Steve Peers, 'Temporary Protection for Ukrainians in the EU? Q and A' (EU Law Analysis, 27 February 2022) <<https://eulawanalysis.blogspot.com/2022/02/temporary-protection-for-ukrainians-in.html>> accessed 1 December 2022.

45 UNHCR, 'Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status' (5 June 2015) <<https://reliefweb.int/report/world/guidelines-international-protection-no-11-prima-facie-recognition-refugee-status>> accessed 1 December 2022.



the ICCPR (Articles 2(1) and 26), the ICESCR (Article 2(2)), the ICERD (Article 1(1)), the Charter of the United Nations (Articles 1(2) and 1(3)), the ECHR (Article 14 and Protocol 12), and the EU Charter (Article 21). The principle of non-discrimination under human rights law can be prohibited in such circumstances when other substantive rights are impaired in connection to the discriminatory treatment, such as the right to physical integrity or the right to non-refoulement.

Refugees from Ukraine that are not beneficiaries of temporary protection are being refused entry due to lack of the necessary documentation, most importantly a Schengen visa. Such visa requirements can more generally qualify as discrimination on the basis of nationality prohibited under human rights law, as has been argued by several authors including Mau,<sup>46</sup> Cholewinski,<sup>47</sup> van Houtum,<sup>48</sup> den Heijer<sup>49</sup>.

Moreover, a compelling argument has been made that while nationality-based distinctions are not generally prohibited in the Refugee Convention, a differentiated visa requirement for different groups of refugees can be in breach of Article 7(1) read together with Article 3 of the Refugee Convention. By approaching visa requirements as a ‘treatment accorded to aliens generally’, subjection to such racialised admissions, which frustrates access to protection, can constitute discrimination either directly, on grounds of nationality, or indirectly on grounds of race or religion.<sup>50</sup> These arguments can apply by analogy to all border management authorities, including Frontex.

In practice member states can choose to extend the application of temporary protection or adequate protection under national law to additional categories of displaced persons not covered by the Council Decision, which are

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46 Steffen Mau, ‘Mobility Citizenship, Inequality, and the Liberal State: The Case of Visa Policies’ [2010] 4(4) *International Political Sociology* 339.

47 Ryszard Cholewinski, ‘Borders and Discrimination in the European Union’ (Immigration Law Practitioners’ Association (ILPA) 2002) <[https://www.antigone.gr/wp-content/uploads/library/selected-publications-on-migration-and-asylum/eu/en/borders\\_and\\_discrimination.pdf](https://www.antigone.gr/wp-content/uploads/library/selected-publications-on-migration-and-asylum/eu/en/borders_and_discrimination.pdf)> accessed 6 May 2022 39-50, 65.

48 Henk van Houtum, ‘Human Blacklisting: The Global Apartheid of the EU’s External Border Regime’ [2010] 28(6) *Environment and Planning D: Society and Space* 957.

49 Maarten den Heijer, ‘Visas and Non-discrimination’ [2018] 20(4) *European Journal of Migration and Law* 470.

50 Maja Grundler, ‘Treatment Accorded to Aliens Generally’: Article 7(1) of the 1951 Refugee Convention as a Basis for Visa-Free Access to States Parties’ Territory? An Examination of the Prohibition of Nationality Discrimination in the Refugee Convention’ [2021] 33(3) *International Journal of Refugee Law* 469.

displaced for the same reasons and from the same country, upon immediate notification to the Council and the Commission.<sup>51</sup>

The Commission also sees this need for protection of the whole group fleeing Ukraine, strongly encouraging member states to extend temporary protection. Alternatively, the Commission, suggests that member states provide them immediate access to asylum procedures for the determination of their claims, and that they prioritise their cases. Accordingly, member states should make use of the possibility offered by the Schengen Borders Code (Article 6(1)) to authorise entry to third country nationals fleeing Ukraine who do not fulfil the entry conditions on humanitarian grounds, on grounds of national interest, as well as based on their international obligations stated above. This analysis is also supported by the Commission that explicitly states that ‘This wide derogation may be applied in the current crisis to allow entry to all those fleeing the conflict in Ukraine’.

## 6. Conclusion: remaining questions and future directions

The above analysis has shown that the incidents of discrimination at the borders cannot so much be attributed to poorly trained border guards. They reveal instead systemic problems related to the discriminatory application of the TPD. As pointed out, the differentiated treatment in the TPD and the Commission’s guidelines can lead to fragmentation<sup>52</sup> of protection and discrimination, as well as practical difficulties at the borders that can affect the rights of individuals seeking international protection. As a result, member states can be held liable for violations of human rights and refugee law. Frontex faces similar risks to the extent that racialised passage can be connected to its obligations under the EU Charter and international customary law.

It can be specifically pointed out that the sharp differences in the language used by the agency in its communication of the Ukrainian crisis vis-à-vis other border emergencies, can act as an indication of discrimination in the work of the agency and the underlying assumptions that determine it. If the agency cannot provide a sound justification for this differentiation in language and message, as well as the differential treatment afforded to non-European nation-

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51 Article 7 Temporary Protection Directive.

52 Sergio Carrera and others, ‘The EU grants temporary protection for people fleeing war in Ukraine: Time to rethink unequal solidarity in EU asylum policy’ in this collection.

als fleeing Ukraine, its actions cannot be considered neutral, and can, thus, be discriminatory in nature.

Even though the Commission encourages member states to relax border controls for everyone leaving Ukraine, the guidelines should be amended to include clear statements of the legal obligations of states under the Refugee Convention, the ECHR, the EU Charter, and other human rights instruments, and stress that member states must ensure safe passage and access to its territory for all refugees leaving Ukraine.

What has also been noted in this chapter is the constructive role of Frontex in assisting member states in the screening and registration of refugees, instead of blocking access to the territory. Even though, this is undoubtedly a positive development compared to the agency's prior record, one may not help but wonder why the assistance of the European Border Agency was called in in this regard rather than that of the EUAA, which is well-placed to reinforce the capacity of member states due to its specialised expertise. This is especially so, since the EUAA since early on announced that it has 130 experts<sup>53</sup> on stand-by to assist with screening, registration, information provision and asylum processing, if requested.

Focusing on Frontex, it should be highlighted that the primary stated aim of its operations at the Ukrainian borders is to help with processing and registration, while border control activities would be carried out if necessary. A child protection element is now streamlined in its operations in the region. The agency still carries out returns, which is in line with the securitisation orientation of the agency. However, in sharp contrast with its practice until now<sup>54</sup> the returns carried out in the Ukrainian context are (so far) voluntary in nature. Still, based on a case submitted<sup>55</sup> before the CJEU last year, concerning the treatment of minors during a Frontex return operation, doubts are conceivable as to whether all guarantees are being respected.

This is vastly distinct from the approach of 'combating irregular migration' and the agency's conduct in other parts of the EU border. While Frontex has,

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53 Communication From The Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions European solidarity with refugees and those fleeing war in Ukraine (Strasbourg, 8 March 2022) COM(2022) 107 final.

54 Statewatch, 'Deportation Union: Rights, accountability and the EU's push to increase forced removals' (19 August 2020).

55 Not on our border watch, 'Stop border atrocities by the EU and Frontex: Stop illegal pushbacks. Not on our border watch!' <<https://www.notonourborderwatch.com/>> accessed 1 December 2022.

especially in the last years, become the symbol of securitisation and its operations raise serious human rights concerns, with respect to the Ukrainian displacement, the agency spreads the “message of warm welcome in the EU and of hope for a better future”.<sup>56</sup>

It becomes apparent that the misorientation of the agency until now has not actually been the result of legal gaps or unclear obligations,<sup>57</sup> as has been argued by the Frontex Executive Director, but is rather a matter of political will and the direction given by the Commission and the Council. This shows that a change in the direction and the practices of the agency is indeed possible. The agency’s legal obligations are clear and the EBCG Regulation allows for a mandate to undertake such border management operations.

The last months have shown the potential of Frontex to evolve into a reliable border management actor that operates with efficiency, transparency, and full respect for human rights. Drawing from its experiences from dealing with the Ukrainian crisis, the agency can now borrow best practices from its own toolkit for other operations at the EU external borders at the Mediterranean and the Balkans. Concretely, we can expect a future role for the agency in the voluntary return of beneficiaries of temporary protection in dignity and safety, at the end of the temporary protection, unless refugee status has already been issued.

Even, in this new approach towards border management, the need for independent monitoring to ensure the principle of non-discrimination and the rights related to access to protection at the borders, and the rights of returnees during (even voluntary) returns remain acute.

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Brito R, ‘Europe welcomes Ukrainian refugees — others, less so’ *Ap News*

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56 Frontex, ‘Teddy bears for Ukrainian children’ (20 March 2022).

57 La Croix, ‘Frontex:Nous ne voulons pas construire une Europe forteresse’ (21 February) <<https://www.la-croix.com/Monde/Frontex-Nous-voulons-pas-construire-Europe-forteresse-2022-02-21-1201201439>> accessed 1 December 2022.

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# Chapter 16

## Time to Address the Absence of 'Gender' in the Temporary Protection Directive and its Recent Implementation

Dr Iuliia Lashchuk\*

### 1. Introduction

Russia first attacked Ukraine and violated its sovereignty in 2014.<sup>1</sup> Since then, the number of displaced persons from Ukraine in the EU has increased and the threat of a large-scale influx was constantly felt. Yet, it was difficult to predict that by the end of February 2022 millions of Ukrainians would be forced to leave their homes and seek refuge in the west of the country or abroad, with many of them experiencing this for the second time. The scale of the migration crisis caused by Russian aggression is unprecedented in Europe and such levels

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\* Max Weber Fellow, EUI.

1 Elizabeth Wood et al., 'Chronology: The War in Crimea and Ukraine' in: *Roots of Russia's War in Ukraine* (Columbia University Press 2016), xi, <<http://www.jstor.org/stable/10.7312/wood70453.4>> accessed 15 December 2022.

of migration have not been seen since World War 2. Such an influx of people fleeing the war in Ukraine has even become a challenge for experienced EU migration countries, let alone those that can hardly be called immigration countries, such as Poland.<sup>2</sup>

According to data from the EUAA, more than 4,7 million registrations<sup>3</sup> for the temporary protection of people fleeing the war in Ukraine have been made in EU countries between February and November 2022. According to United Nations High Commissioner for Refugees, around 86% of them are women and children.<sup>4</sup> The martial law<sup>5</sup> that was first declared by the President of Ukraine, Volodymyr Zelenskyy, after Russia's full-scale attack, prohibits Ukrainian men aged 18-60 from leaving the country. Ukrainian men are required to remain on Ukrainian territory even if they are not directly engaged in military activities. There are some exceptions to this rule including men exempted from military service for health reasons; fathers of three or more children under the age of 18; single fathers of children under the age of 18; fathers of children with disabilities under the age of 23; caregivers of persons with disabilities; and other categories designated by Ukrainian law.<sup>6</sup> Due to this law, displacement from Ukraine is mainly dominated by “women-headed households, single women, adolescent girls, and elderly women”.<sup>7</sup> However, the EU's response to Ukrainian displacement, in particular the Temporary Protection Directive and its implementation, mostly disregards this unique aspect so far and lacks a gender perspective.

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- 2 Maciej Bukowski, Maciej Duszczyk, eds., *Hospitable Poland 2022+*, (WiseEuropa, June 2022) <<https://wise-europa.eu/wp-content/uploads/2022/08/Hospitable-Poland-2022.pdf>> accessed 4 December 2022.
  - 3 EUAA, *Asylum and Temporary Protection in the EU+ in the Context of the Russian Invasion of Ukraine*, Week (EUAA 6 November 2022), <<https://euaa.europa.eu/publications/analysis-asylum-and-temporary-protection-eu-context-ukraine-crisis-29>> accessed 19 December 2022.
  - 4 UNHCR, *Ukraine Refugee Situation*, (UNHCR Operational Data Portal 2022) <<https://data.unhcr.org/en/situations/ukraine/>> accessed 4 December 2022.
  - 5 Decree № 64/2022 “On the imposition of martial law in Ukraine” (President of Ukraine 2022) <<https://rm.coe.int/1680a5b041>> accessed 4 December 2022.
  - 6 *Law of Ukraine “About mobilization preparation and mobilization”* (in Ukrainian). (Verkhovna Rada 21 October 1993), art 23.
  - 7 UNHCR, *Regional Ukraine refugee response gender-based violence sub-working group* (UNHCR 21 June 2022) <<https://reliefweb.int/report/poland/regional-ukraine-refugee-response-gender-based-violence-sub-working-group-terms-reference>> accessed 4 December 2022.

The Temporary Protection Directive<sup>8</sup> (hereinafter TPD) was activated in response to the Russian attack on Ukraine that has caused a mass influx of people fleeing the war to the EU. It was not only a part of the “Union’s response to the migratory pressure resulting from the Russian military invasion of Ukraine”<sup>9</sup> but also became an act of solidarity towards Ukraine and its people, and between the EU Member States.<sup>10</sup> Such a fast response was followed by the simplification of border control and increased flexibility with regards to entry conditions, which made it possible for millions of people, mostly women, to flee the war without obstacles (at least legally) to reach the EU and more easily settle into a new place. Obtaining security by crossing the border between Ukraine and the EU, however, does not insure these women and girls against the risks and dangers that they may face while traveling or in their new destination.

Article 1 of the Directive defines the purpose of the TPD:

[...] to establish *minimum standards* [emphasis added] for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons.<sup>11</sup>

The “minimum standards” promised to persons enjoying temporary protection do not include gender equality as a fundamental human right, and the gender needs of the people fleeing the war in Ukraine are not addressed in this document. According to the UNHCR report that examined the intentions and perspectives of refugees from Ukraine, safety concerns are the main reasons why

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8 Council Directive (EC) 2001/55 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [20 July 2001] OJ L 212, 7.8.2001 (Temporary Protection Directive).

9 Council Implementing Decision (EU) 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [4 March 2022].

10 See Carrera et al., ‘*The EU grants temporary protection for people fleeing war in Ukraine: Time to rethink unequal solidarity in EU asylum policy*’ in this collection.

11 Temporary Protection Directive, article 1.

individuals remain in the EU instead of going back to Ukraine.<sup>12</sup> However, is the EU able to provide these people with the protection that they need? Or will they become completely vulnerable and exposed to the gender-based violence and exploitation in the countries they considered to be safe after escaping the war in their own country? This chapter seeks to answer these questions by analysing the Temporary Protection Directive and its implementation in the EU and by drawing upon the theory of intersectional discrimination.

## 2. Why does gender matter?

Wars, military conflicts and various crises are never gender neutral as they concern the whole society that is not gender neutral itself. However, in some cases, such as the mass influx of people from Ukraine to the EU, the majority of people fleeing the war are women. Support measures and strategies to help those fleeing Ukraine, including the law, must be appropriately tailored to the needs of this specific group. I argue that migrant women, especially women fleeing war (in this case, Ukrainian women) are subjected to intersectional discrimination due to their gender, ethnic background, and precarious economic situation. This manifests itself on various levels that are, however, closely interrelated and which can affect a woman's well-being in her new country of residence. This feature therefore should be considered when developing and implementing migration policies.

Intersectionality theory emerged in the 1980s as an attempt to analyse the variety of interconnections between different forms of women's oppression.<sup>13</sup> It aimed to highlight the intersection of various social categories that intermingle and affect women's lives, create various forms of discrimination, and therefore cannot be analysed separately. Such categories according to Kimberle Crenshaw, a civil rights advocate who introduced intersectionality to a feminist theory, mainly included gender, race and social class. Later this theory was expanded by Patricia Hill Collins, who also added nationality, sexuality, age,

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12 UNHCR, *Lives on hold: intentions and perspectives of refugees from Ukraine*, Regional intentions report (UNHCR September 2022) <<https://data.unhcr.org/en/documents/details/95767>> accessed 4 December 2022.

13 Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* (University of Chicago Legal Forum 1989), 1, 139; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity, Politics, and Violence against Women of Color* (1991) 43 (6) *Stanford Law Review* 1241.

and ethnicity to the exclusionary categories listed.<sup>14</sup> In the case of women fleeing the war in Ukraine, Roma women, Black women, women with disabilities, and other marginalised categories are subjected to the most extreme form of intersectional discrimination, as they encompass social categories beyond just gender or the refugee experience. Hence:

[...] special attention should be paid to the situation of women refugees experiencing intersecting discrimination, such as Roma women, Black women, stateless women, women with disabilities, migrant women, racialised women and LGBTIQ+ people, including transgender women whose identity may not be recognised, especially in Poland and Hungary, where measures have been taken against LGBTIQ+ people; whereas special attention should also be paid to the racialised women of African descent and third country nationals at border crossings; whereas the discrimination and gender based violence these groups of women are experiencing at the borders is often unreported and not documented, meaning it remains invisible.<sup>15</sup>

Intersectional discrimination does not only affect refugee women. Even in instances of voluntary migration, women and girls also face additional challenges when integrating compared to migrant men and boys. They are often perceived according to gender stereotypes and burdened with domestic responsibilities primarily related to caregiving. This makes it impossible for them to integrate socially, seek employment, or build social networks.<sup>16</sup> Moreover, when it comes to working women, migrant women are more likely to be overqualified for their jobs when compared to local women.<sup>17</sup> Taking into consideration that the general gender employment gap in the EU was 13% in 2022, which means that women must work 1.5 extra months to make up the differ-

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14 Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*, (Routledge 2000).

15 European Parliament resolution 2022/2633 (RSP) on the impact of the war against Ukraine on women (5 May 2022) <[https://www.europarl.europa.eu/doceo/document/TA-9-2022-0206\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0206_EN.html)> accessed 4 December 2022.

16 Commission, *Action plan on Integration and Inclusion 2021-2027*, COM/2020/758 (24 November 2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0758&qid=1632299185798>> accessed 4 December 2022

17 Ibid.

ence<sup>18</sup>, migrant women, and especially refugee women, are in the least fortunate position.

As pointed out above, intersectional discrimination manifests itself on different levels and affects female migrants in different ways. It often reaches its most extreme form by placing woman, an already marginalised unit, within even more marginalised group. Particular attention should be given, for instance, to the age of the women, as older women, especially those travelling alone, are often at risk of isolation due to language barriers, a lack of social networks which result in a lack of access to support and social services.<sup>19</sup> Women with children also face difficult situations as “their opportunities for labour activation are limited by the need to provide childcare”<sup>20</sup>. In some countries they cannot start looking for the job or attend language courses due to the inaccessibility and unaffordability of childcare.<sup>21</sup> According to research conducted by the International Committee of the Red Cross on women in war, the vulnerability of women depends on many factors including “labour (income); human capital (access to education, health); housing; intrahousehold relations; and social capital (solidarity networks and a relationship of reciprocity between households and with State and private institutions)”<sup>22</sup>. Various reports examining the position of women fleeing the war in Ukraine show that the greatest difficulties arise in areas such as housing, labour, health, education and integration.<sup>23</sup> In other words, they concern issues that are supposed to be guaranteed by the TPD as basic rights. Moreover, the UNHCR report, which analysed the practical implementation of the TPD in 26 countries, shows that the rights guaranteed under the TPD are interdependent. This means that the inability of refugees to exercise one right often negatively impacts their ability to exercise

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18 Commission, *Equal pay? Time to close the gap!*, factsheet (European Union 2022) <[https://commission.europa.eu/system/files/2022-11/equal\\_pay\\_day\\_factsheet\\_2022\\_en\\_1.pdf](https://commission.europa.eu/system/files/2022-11/equal_pay_day_factsheet_2022_en_1.pdf)> accessed 4 December 2022.

19 Ibid.

20 Bukowski and Duszczyk eds., *Hospitable Poland 2022+*, p. 37.

21 Miranda Bryant, “Ukrainian women fear childcare issues will affect their ability to work in UK” (The Guardian, 22 May 2022) <<https://www.theguardian.com/world/2022/may/22/ukrainian-women-fear-childcare-issues-will-affect-their-ability-to-work-in-uk>> accessed 19 December 2022.

22 Charlotte Lindsay, *Women facing war* (ICRC October 2001), p. 30 <[https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0798\\_women\\_facing\\_war.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0798_women_facing_war.pdf)> accessed 4 December 2022.

23 *Hopitable Poland 2022+*.



other rights.<sup>24</sup> Therefore, preventing various forms of gender-based violence and exploitation, and thus reducing the levels of gender inequalities and intersectional discrimination that affect different groups of women, should be a key component of the European Union's migration policies.

### 3. Gender-based violence and human trafficking

78% of people fleeing the war in Ukraine claimed to be separated from their immediate family members.<sup>25</sup> This means that they not only constantly experience fear for their loved ones who stayed in Ukraine for different reasons, but also often lack any support (such as economic, psychological) and cannot ask for help in case of emergency.<sup>26</sup> Even before February 2022, Ukrainian women were among the most at risk nationalities of becoming victims of human trafficking.<sup>27</sup> Hence, it is unsurprising that the risk of human trafficking has increased due to the war in Ukraine.

Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in persons defines trafficking as:

recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude

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24 UNHCR, *The implementation of the temporary protection directive: six months on* (UNHCR October 2022) <<https://data.unhcr.org/en/documents/details/96266>> accessed 4 December 2022.

25 UNHCR, *Profiles, Needs & Intentions of Refugees from Ukraine*, Regional protection profiling & monitoring factsheet (UNHCR October 2022) <<https://data.unhcr.org/en/documents/details/96445>> accessed 4 December 2022.

26 UNHCR, *Displacement patterns, protection risks and needs of refugees from Ukraine*, Regional protection analysis (UNHCR October 2022) <<https://data.unhcr.org/en/documents/details/96447>> accessed 4 December 2022.

27 Clara Bauer-Babef, *Trafficking and sexual exploitation of Ukrainian refugees on the rise* (Euractiv 30 November 2022) <<https://www.euractiv.com/section/europe-s-east/news/trafficking-and-sexual-exploitation-of-ukrainian-refugees-on-the-rise>> accessed 4 December 2022.

or the removal of organs.<sup>28</sup>

One of the biggest concerns is housing. According to the OHCHR, limited access to a safe housing increases the vulnerability of women and girls to domestic violence and sexual abuse.<sup>29</sup> Only 32% of the refugees that fled the war in Ukraine live in rented accommodation, 34% are staying in hosted accommodation, and the rest are staying in collective sites or reception centres<sup>30</sup> where they do not have any privacy and are constantly exposed to gender-based violence. Womens' rights advocates report that sexual exploitation occurs both in refugee camps and host homes, but Ukrainian women often do not report sexual violence against them because of the potential of victim-blaming and stigmatisation.<sup>31</sup>

The text of the European Parliament resolution on the impact of the war against Ukraine on women which was published in May 2022 claims:

whereas women without contacts in countries such as Poland are accommodated in public dormitories and sports halls; whereas there is a need to move beyond these temporary solutions and develop systemic solutions to ensure that women will not stay in public shelters facing poverty and further trauma; whereas there is an urgent need for safe accommodation for women, particularly pregnant women, elderly women and victims of sexual violence”.<sup>32</sup>

This shows that the “minimum standards” that are supposed to be secured by Member States in line with the TPD are simply not enough. Access to safe and affordable accommodation must therefore be one of the key requirements for gender-sensitive asylum and migration policies and one of its basic standards.

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28 General Assembly resolution 55/25 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime [15 November 2000] Article 3(a).

29 UN Office of the High Commissioner for Human Rights, *Women and the Right to Adequate Housing*, (OHCHR 2012) <<https://www.refworld.org/docid/5289e87b4.html>> accessed 19 December 2022.

30 UNHCR, *Profiles, Needs & Intentions of Refugees from Ukraine*.

31 Leah Rodriguez, *Why Do Refugee Women from Ukraine Face Unique Risks of Violence and Exploitation?* (Global citizen 7 April 2022) <<https://www.globalcitizen.org/en/content/ukrainian-refugee-women-exploitation-violence>> accessed 4 December 2022.

32 European Parliament resolution 2022/2633 (RSP) on the impact of the war against Ukraine on women.

## 4. Exploitation at work

Women fleeing the war in Ukraine have good levels of education (46% of them hold university or post-university degrees and 29% had vocational training) and significant professional experience (73% of them were employed before leaving Ukraine, mainly in education, wholesale and retail, as well as healthcare).<sup>33</sup> However, this does not protect them from being exploited due to their vulnerability and often poor language proficiency.

The access granted to temporary protection beneficiaries to the EU labour market does not eliminate gender-based inequalities that were observed before the war. Across the EU, displaced persons are exposed to a higher risk of poverty and social exclusion compared to the EU citizens.<sup>34</sup> In addition, migrant women and men are not equal in their social involvement, economic independence, labour market, caregiving responsibilities, or in their experiences of discrimination<sup>35</sup>. The situation of migrant women is different to the situation of women fleeing the war, since the possibility of return in case of emergency is not available. Many female refugees mention forms of exploitation, such as unfair pay or informal cash-in-hand, especially when undertaking so-called “simple works” such as catering, hospitality, and agricultural work. Some female refugees also faced verbal abuse, racism and harassment.<sup>36</sup>

## 5. Sexual and reproductive health services and rights

Article 13(4) of the Temporary Protection Directive obliges Member states “to provide necessary medical or other assistance to persons enjoying temporary protection who have special needs, such as unaccompanied minors or persons who have undergone torture, rape or other serious forms of psychological,

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33 UNHCR, *Profiles, Needs & Intentions of Refugees from Ukraine*.

34 World Bank, *Forcibly Displaced: Toward a Development Approach Supporting Refugees, the Internally Displaced, and Their Hosts* (Washington 2017) <<https://www.unhcr.org/5975a93e7.pdf>> accessed 19 December 2022.

35 EIGE, *Poverty, gender and intersecting inequalities in the EU. Review of the implementation of Area A: women and poverty of the Beijing Platform for Action* (Publications Office of the European Union 2016).

36 Sandra Pertek, Irina Kuznetsova, Malgorzata Kot, “*Not a single safe place*”: *The Ukrainian refugees at risk: violence, trafficking and exploitation. Findings from Poland and Ukraine*, research report (University of Birmingham 2022).

physical or sexual violence.” This, however, does not guarantee that women have access to a full range of sexual and reproductive health services and rights (SRHR). This applies especially in case of Poland, where a near-total abortion ban has taken effect, or in other countries where such services are not covered by national health insurance and must be paid for by the patient. This is not always possible for women fleeing war who are often in situations of economic precarity.<sup>37</sup>

Respect for human dignity seems to be one of the important values for the TPD as it is mentioned a few times in the document.<sup>38</sup> Despite this, some of the Directive’s articles mention general human rights but there is no emphasis on the need to take the gendered dimensions of the current displacement crisis into consideration, or the need to address this dimension.

As the ICRC emphasises in their report on women facing war:

Women need to be protected from all forms of sexual violence, or threats thereof. While both men and women can be subjected to sexual violence, it is women and girls who are predominantly affected by rape, forced prostitution and sexual slavery. Forced impregnation, forced maternity and forced termination of pregnancy are specific violations that uniquely affect women and girls. Women may also be forcibly sterilized.<sup>39</sup>

This is also the reason why the systematic grouping of women and children as a homogenous vulnerable group should be avoided as their experiences are obviously not the same and they have different needs and rights.

## 6. Conclusions

The mass influx of people from Ukraine to the EU has not only triggered a need to activate the Temporary Protection Directive but also to review the EU *asylum acquis* and its gender appropriateness, especially the TPD. The gender imbalances among those who are forced to flee Ukraine cannot be ignored and the visibility of migrant women and refugees, and a consideration of their needs, should be taken into account by not only academics or civil society, but

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37 European Parliament resolution 2022/2633 (RSP) on the impact of the war against Ukraine on women

38 See art 21 and art 22 of Temporary Protection Directive.

39 Lindsay, *Women facing war*, p. 51.

should also be addressed at the EU legislation level. The Ukrainian case has the potential to not only lead to the creation and implementation of simplified and more inclusive migration and asylum policies, but also to provoke discussion on the need for a gender-sensitive law.

Leaving the gender dimensions out of TPD's scope and relying on the policies of Member States to fill this gap results in the risk that a) the issue will never be addressed properly; b) there will be no single legal or ethical standard and possible solutions will vary from country to country, and c) actions will be fragmented and it will be difficult to monitor their effectiveness. Thus, there is a need for gender sensitive temporary protection legislation, both on the EU and national level, that takes the short term and long term needs of displaced women and girls into account. Gender sensitive temporary protection legislation must therefore include articles on:

1. The prevention of human trafficking and gender-based violence.
2. The prevention of gender discrimination at work and intersectional discrimination.
3. Healthcare regulations that guarantee of full range of sexual and reproductive services and rights.

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# **Section IV**

Lessons Learned  
from Türkiye's  
Response to Syrian  
Influx

# Chapter 17

## Registration Insights from Türkiye's Temporary Protection Experience

Yigit Kader\*

### 1. Introduction

As a result of Russia's war against Ukraine, more than a quarter of Ukraine's population has been displaced.<sup>1</sup> Based on data from multiple sources, UNHCR estimates<sup>2</sup> that as of 21 June 2022 more than 5.2 million people have fled Ukraine to find protection.

This constitutes the fastest growing refugee<sup>3</sup> influx since the Second World

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\* Independent Consultant.

1 UNHCR, 'Ukraine Situation Flash Update #7' (6 April 2022) <<https://data2.unhcr.org/en/documents/download/91900>> accessed 22 June 2022.

2 UNHCR, 'Ukraine Refugee Situation' <[https://data.unhcr.org/en/situations/ukraine#\\_ga=2.102919752.976326725.1649059844-1158439311.1599737261](https://data.unhcr.org/en/situations/ukraine#_ga=2.102919752.976326725.1649059844-1158439311.1599737261)> accessed 22 June 2022.

3 This article uses the term 'refugee' in a broad sense, including all persons who have fled Ukraine and Syria to find protection due to the war in Ukraine and the Syrian civil war. These persons have various legal statuses such as asylum seekers, refugees, beneficiaries of subsidiary protection or persons under temporary protection based on the national legislations of the countries they are in and the applicable standards in international refugee law.

War. In just a month, millions of refugees crossed into countries bordering Ukraine, mainly to Poland, Romania, Hungary and Moldova. In the following two months, a large number of these refugees have moved onwards to other countries<sup>4</sup>, specifically EU Member States (EU MS) where they have family members or other connections.

What these numbers show is not only the large scale of the humanitarian tragedy but also the rapidly growing resource and capacity needs for a proper protection response. To facilitate this response and institute a union-wide co-ordination mechanism, on 4 March 2022 the EU officially recognised the situation as a mass influx and declared temporary protection<sup>5</sup> by activating Council Directive 2001/55/EC<sup>6</sup> (the Temporary Protection Directive).

The EU Temporary Protection Directive is not a new instrument as it was developed in the late 1990s following refugee movements from the Balkans, but it has never been used up until now. However, it may be argued that it was, in a sense, tested by Türkiye as the country utilised a temporary protection instrument since 2014 that is inspired by the EU's Temporary Protection Directive,<sup>7</sup> in its response to the mass influx from Syria.

The specifications of the temporary protection instrument and the general international protection framework in Türkiye have similarities but also significant differences<sup>8</sup> when compared to those of the EU. The processes that led to the crises in Ukraine and Syria, the nature of the conflicts and the profile of refugees in the two situations are also considerably different.

A basic example in this regard is the relatively high number of Syrians who did not hold any national identification documentation even before fleeing to Türkiye. Despite these differences, it is still extremely important to properly analyse the Turkish experience to prevent a repeat of the most significant chal-

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4 UNHCR, 'Ukraine Refugee Situation'. <[https://data.unhcr.org/en/situations/ukraine#\\_ga=2.102919752.976326725.1649059844-1158439311.1599737261](https://data.unhcr.org/en/situations/ukraine#_ga=2.102919752.976326725.1649059844-1158439311.1599737261)> accessed 22 June 2022

5 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71/1.

6 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.

7 Republic of Türkiye, Temporary Protection Regulation of 2014 <<https://www.refworld.org/docid/56572fd74.html>> accessed 1 December 2022.

8 Meltem Ineli-Ciger, 'Protecting Syrians in Turkey: A Legal Analysis' (2017) 29 International Journal of Refugee Law 555, 567.

allenges faced when responding to a mass-influx situation.

This chapter specifically focuses on one part of this response, namely the procedural step of registration, due to its high relevancy in the immediate term and its far-reaching impact on the later stages of the protection response. The chapter will first present information on registration and the refugee situation in Türkiye as a brief background. Then it will move on to a discussion of the problems faced by Türkiye related to the registration of Syrian refugees, the costly solutions to these problems, and finally the lessons that can be drawn from this experience.

## 2. Registration's function and role in the international protection context

Refugee registration may seem like a straightforward initial step of the protection response. It does, however, contain various unique challenges, especially in an emergency context. Moreover, shortcomings in the registration procedure led to substantial barriers to the effective provision of protection and assistance. Registration, as defined by UNHCR<sup>9</sup>, is 'the recording, verifying, and updating of information on persons of concern with the aim of protecting and documenting them and of implementing durable solutions.'

Accurate registration data is a must for the identification of protection needs and any effective planning on addressing them. In other words, information obtained, and documentation provided through registration constitute the necessary basis for ensuring the legal protection of refugees, understanding the composition and specific needs of the refugee population, planning and the delivery of assistance, the referral of vulnerable refugees to available services, and, especially in cases of unaccompanied minors, the tracking of family members.

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9 UNHCR, 'Operational Standards for Registration and Documentation' (2007) 4 <<https://www.refworld.org/pdfid/4ae9ac8f0.pdf>> accessed 1 December 2022.

### 3. A brief chronological look at Türkiye's temporary protection experience

The first group of refugees, consisting of 252 people fleeing the conflict in Syria arrived in Türkiye in 2011.<sup>10</sup> By the end of 2012 the number of registered Syrian refugees in Türkiye reached 14 237 and by the end of 2013 it had exceeded 220 000. In 2014<sup>11</sup>, Türkiye was hosting more than 1.5 million Syrian refugees and became the largest refugee hosting country in the world. The steady increase in the number of Syrian refugees continued until 2017 when it reached 3.4 million. Today this number is around 3.7 million and the vast majority of Syrians in Türkiye have been covered under the temporary protection regime since October 2014. The total number of asylum seekers and refugees (Syrian and non-Syrian) is estimated to be around 4 million.<sup>12</sup>

While these figures show that Türkiye has been dealing with an unprecedented refugee crisis, they also show that the Syrian civil war allowed a significantly more forgiving time window to prepare for the reception of refugees compared to the war in Ukraine.

Türkiye has put this window of time to good use in terms of the preparation of the physical facilities<sup>13</sup> used to accommodate the initial groups of displaced Syrians and their reception conditions. However, Türkiye's performance in terms of registration has not been as positive. It has taken many years for Türkiye to establish a centralised database with accurate registration information, including the necessary vulnerability data for effective planning and the provision of protection services. This was mainly due to the lack of a uniform approach up until late 2016.

Türkiye's central migration authority is the Presidency of Migration Management (PMM) (formerly known as the Turkish DGMM) which is responsible for the conduct and coordination of all processes and procedures related to

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10 Republic of Türkiye Ministry of Interior Presidency of Migration Management (PMM), '2013 Türkiye Göç Raporu' [2013 Türkiye Migration Report] (2015) 76 <[https://www.goc.gov.tr/kurumlar/goc.gov.tr/YillikGocRaporlari/2013\\_yillik\\_goc\\_raporu.pdf](https://www.goc.gov.tr/kurumlar/goc.gov.tr/YillikGocRaporlari/2013_yillik_goc_raporu.pdf)> accessed 1 December 2022.

11 PMM, 'Temporary Protection' <<https://en.goc.gov.tr/temporary-protection27>> accessed 1 December 2022.

12 UNHCR, 'Turkey Stats' <<https://www.unhcr.org/tr/en/unhcr-turkey-stats>> accessed 1 December 2022.

13 Mac McClelland, 'How to Build a Perfect Refugee Camp' *The New York Times* (13 February 2014) <<https://www.nytimes.com/2014/02/16/magazine/how-to-build-a-perfect-refugee-camp.html>> accessed 1 December 2022.

refugees (as well as most other foreigners) in Türkiye. Before the establishment of the PMM asylum procedures fell under the responsibility of the Foreigners' Branch of the Turkish National Police (TNP). UNHCR also conducted registration and refugee status determination procedures in Türkiye until September 2018.<sup>14</sup> Today, all registration procedures are undertaken by PMM through its extensive network of field branches in 81 Turkish cities and more than 35 districts.

However, PMM is a relatively young institution which was established in 2013 through a comprehensive legal and institutional reform<sup>15</sup> of the migration system in Türkiye. It became officially functional in 2014 and only fully operational with its field branches in mid-2015.<sup>16</sup> Even then, temporary assignment of TNP staff in PMM branches continued for several years to compensate for a staff shortage.

Following the start of the mass-influx from Syria, another Turkish institution, namely the Disaster and Emergency Management Presidency<sup>17</sup> (AFAD), also became involved in the refugee response to establish and manage the temporary camps where a proportion of the Syrian refugees were accommodated and to coordinate the services for Syrian refugees who resided outside the camps.

## 4. Registration-related problems

Until the completion of the PMM's establishment process (including the recruitment and training of staff, the development of a centralised case management system and the creation of the physical capacity necessary to tackle all asylum procedures), the registration of Syrian refugees was undertaken by both the TNP and AFAD, with operational support from agencies such as the Turkish Red Crescent. There was no central coordinating authority.

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14 UNHCR, 'Registration and RSD with UNHCR' <<https://help.unhcr.org/turkiye/information-for-non-syrians/registration-rsd-with-unhcr/>> accessed 1 December 2022.

15 Republic of Türkiye, Law No 6458 of 2013 on Foreigners and International Protection 2013 (4 April 2013) <<https://www.mevzuat.gov.tr/mevzuatmetin/1.5.6458.pdf>> accessed 1 December 2022.

16 European Commission, 'Commission Staff Working Document Turkey 2015 Report Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Enlargement Strategy' SWD(2015) 216 final (10 November 2015) 70.

17 AFAD, 'Turkey Response To Syria Crisis' (August 2017) <<https://en.afad.gov.tr/turkey-response-to-syria-crisis>> accessed 1 December 2022.

While a multi-institutional approach is only natural in responding to a mass-influx situation, the utilisation of different systems and databases which were not integrated, in some cases not even fully digitised, and the lack of a uniform template for the data to be registered inevitably led to crucial shortcomings. These shortcomings ranged from large number of duplicate registrations to inconsistent datasets, inaccurate information (especially in relation to places of residence and vulnerabilities) and many unregistered refugees. AFAD's official estimate<sup>18</sup> in 2014 was that at least 31 % of Syrian refugees in Türkiye were unregistered.

These issues could not be solved even by the establishment of the PMM and its central case management system. Contrary to the occasional argument, the new Turkish legal and institutional migration management structure was not a direct response to the Syria crisis. Its development started well before the first conflict in Syria<sup>19</sup>, with the main aim of improving Türkiye's EU accession process and complying with the ECtHR judgements in relation to migration and refugee law.

In light of the significantly lower number of asylum applications<sup>20</sup> and refugees in Türkiye prior to the Syrian crisis, this also meant that the new institutional structure was designed to process a much smaller caseload compared to the millions of refugees when PMM became operational. The newly established institution had the ambitious tasks of adjusting its structure in the face of a colossal caseload and consolidating millions of registration entries of inconsistent formats and subpar accuracy. Initial attempts at merging and updating registration data did not yield the desired results and inaccurate data remained a problem for the PMM and other service providers in Türkiye for several years after its formation.

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18 AFAD, 'Population Influx from Syria to Turkey: Life in Turkey as a Syrian Guest' (2014) 53 <[https://www.afad.gov.tr/kurumlar/afad.gov.tr/17933/xfiles/population\\_influx\\_1\\_.pdf](https://www.afad.gov.tr/kurumlar/afad.gov.tr/17933/xfiles/population_influx_1_.pdf)> accessed 1 December 2022.

19 Meral Açıkgöz and Hakkı Onur Ariner, 'Turkey's new law on foreigners and international protection: An introduction' (2014) Turkish Migration Studies Group at Oxford (TurkMIS) Centre on Migration, Policy and Society Briefing Paper 2, 5-6 <[https://www.compas.ox.ac.uk/wp-content/uploads/BP-2014-TurkMis-Turkey\\_New\\_Law\\_Foreigners-1.pdf](https://www.compas.ox.ac.uk/wp-content/uploads/BP-2014-TurkMis-Turkey_New_Law_Foreigners-1.pdf)> accessed 1 December 2022.

20 PMM, 'International Protection' <<https://en.goc.gov.tr/international-protection17>> accessed 1 December 2022.

## 5. The costly solution

The actual solution came in the form of a massive registration verification initiative in active cooperation with the UNHCR in late 2016.<sup>21</sup> The initiative was in fact a series of projects spanning five years, where the initial phase of 2017-2018 was mainly spent on consolidating and updating the existing registration data. After this first phase the initiative gradually transformed into a continuous registration process for maintaining the accuracy of the collected information.

In this initial two-year period 2.7 million Syrian refugees' registrations were verified<sup>22</sup> and the registration system was revised for the better collection of vulnerability information. This effort included 914 000 new registrations,<sup>23</sup> the removal of duplicate entries<sup>24</sup>, 55 data lines used in registrations being increased to 99<sup>25</sup> with the addition of new vulnerability sections, the identification of a large number of vulnerable refugees and the establishment of protection desks in provincial PMM branches to enable the referral of vulnerable refugees to appropriate services. PMM was able to identify 45 000 new vulnerable refugees in 2018<sup>26</sup> through this revised registration modality. The annual number of identifications increased to 183 444 in 2019.<sup>27</sup>

The verification initiative was successful, but it was also costly. On top of

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- 21 UNHCR, 'Verification of Syrian nationals under temporary protection' <<https://help.unhcr.org/turkiye/information-for-syrians/verification-of-syrian-nationals-under-temporary-protection/>> accessed 1 December 2022.
- 22 UNHCR, 'Turkey Operational Update February 2019' (2019) 1 <<https://www.unhcr.org/tr/wp-content/uploads/sites/14/2019/07/UNHCR-Turkey-Operational-Update-February-2019.pdf>> accessed 1 December 2022.
- 23 M. Murat Erdoğan, 'Syrians Barometer 2020: A Framework for Achieving Social Cohesion with Syrians in Turkey' (2021) 58-59 <<https://data2.unhcr.org/en/documents/download/91511>> accessed 1 December 2022.
- 24 The number of removed duplicate entries is estimated to be around 100 000 based on the difference between 914 000 new registrations and the increase of 788 751 in the total Syrian refugee population in the same period.
- 25 Republic of Türkiye the Ombudsman Institution, 'Syrians in Turkey: Special Report' (2018) 54 <[https://www.ombudsman.gov.tr/syrians/special\\_report.pdf](https://www.ombudsman.gov.tr/syrians/special_report.pdf)> accessed 1 December 2022.
- 26 PMM, '2018 yılı Faaliyet Raporu' ['2018 Activity Report'] (February 2019) 28 <<https://www.goc.gov.tr/kurumlar/goc.gov.tr/evraklar/Stratejik-Yonetim/Faaliyet-Raporlari/2018-Yili-Faaliyet-Raporu.pdf>> accessed 1 December 2022.
- 27 PMM, '2019 yılı Faaliyet Raporu' ['2019 Activity Report'] (February 2020) 35 <<https://www.goc.gov.tr/kurumlar/goc.gov.tr/Mali-Tablolar/FAALIYET-RAPORU/yeni/2019-Faaliyet-Raporu.pdf>> accessed 1 December 2022.



the impressive internal resources mobilised by the PMM, the external support received through UNHCR<sup>28</sup> was USD 43.8 million, including the temporary assignment of around 900 staff for the first two years. However, to fully understand the actual cost, one should also look at the entirety of the Turkish asylum system in the given period. Türkiye received 112 415 asylum applications (non-Syrians)<sup>29</sup> in 2017 and 114 537 applications in 2018. These are still the highest numbers of annual asylum applications in Türkiye's history. On the other hand, the number of asylum decisions issued by PMM<sup>30</sup> in those years were only 3 258 and 2 734, respectively. This is a significant drop compared to the 66 167 applications and 30 380 decisions made in 2016.<sup>31</sup>

This severe inefficiency in processing asylum applications was arguably the most important negative consequence of allocating substantial institutional resources to re-register millions of Syrian refugees who could have been properly registered years ago. The stretched resources were not sufficient to address the past shortcomings and the emergent challenges simultaneously. The effects of the resulting backlog of non-Syrian asylum applications remain an issue even today.

## 6. Lessons learned

Following the activation of the EU's Temporary Protection Directive, the European Commission issued two operational guidelines and a 10-Point Plan to assist the EU MS respond to the mass-influx and apply the relevant EU law. The first guideline<sup>32</sup> was on external border management and the second

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28 OIOS, 'Final Report on an Audit of the Operations in Turkey for the Office of the United Nations High Commissioner for Refugees Report 2019/142' (24 December 2019) 6 <<https://oios.un.org/fr/file/8459/download?token=7TeOUDAM>> accessed 1 December 2022.

29 Republic of Türkiye Ministry of Interior Presidency of Migration Management, 'International Protection' <<https://en.goc.gov.tr/international-protection17>> accessed 1 December 2022.

30 Republic of Türkiye Ministry of Interior Presidency of Migration Management, '2018 yılı Faaliyet Raporu' 26.

31 PMM, 'International Protection' <[https://web.archive.org/web/20170709111149/http://www.goc.gov.tr/icerik3/uluslararasi-koruma\\_363\\_378\\_4712](https://web.archive.org/web/20170709111149/http://www.goc.gov.tr/icerik3/uluslararasi-koruma_363_378_4712)> accessed 1 December 2022.

32 European Commission, 'Commission Communication Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders' 2022/C 104 I/01 [2022] OJ C 104I.

one<sup>33</sup> was on the implementation of the Temporary Protection Directive.

Similar to the activation of the Temporary Protection Directive<sup>34</sup>, the guidelines were welcomed<sup>35</sup> by the international community<sup>36</sup>. The guidelines foresee, among other things, simplified border controls and the maintenance of freedom of movement for Ukrainian refugees, reflecting an unusual protection-centred<sup>37</sup> approach taken by the EU. Registration procedures are also among the various subjects which the guidelines aim to clarify. The 10-Point Plan<sup>38</sup>, first presented at the extraordinary Justice and Home Affairs Council of 28 March 2022, called for the development of a technical solution to enable the EU MS exchange information on registered beneficiaries of temporary protection or adequate protection under national law (i.e. an EU platform for registration). However, the guidance in this regard and the Turkish experience shares some concerning similarities, and the expected specific function and capabilities of the registration platform are not clear.

One of the most important lessons to be drawn from the shortcomings in the Turkish response to the mass-influx from Syria was that the absence of a central registration system and uniform approach to registration. This rendered the ability to achieve accurate registration data and avoid duplications extremely challenging, if not impossible. This risk is significantly exacerbated where

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- 33 European Commission, ‘Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection’ 2022/C 126 I/01 [2022] OJ C 126I.
- 34 UNHCR, ‘Statement to European Parliament on the Ukraine refugee situation and the EU’s response’ (*UNHCR*, 4 April 2022) <<https://www.unhcr.org/events/conferences/624b48854/statement-european-parliament-ukraine-refugee-situation-eus-response.html>> accessed 1 December 2022.
- 35 Catherine Woollard, ‘Editorial: Ten Points for Ten Point Ukraine Plan – Let’s Make it Count!’ (*ECRE*, 8 April 2022) <<https://ecre.org/editorial-ten-points-for-ten-point-ukraine-plan-lets-make-it-count/>> accessed 1 December 2022.
- 36 Human Rights Watch and others, ‘Ukraine Crisis: The EU and Member States Must Now Work Together to Put Commitments into Practice’ *Human Rights Watch* (Europe, 14 April 2022) <<https://www.hrw.org/news/2022/04/14/ukraine-crisis-eu-and-member-states-must-now-work-together-put-commitments-practice>> accessed 1 December 2022.
- 37 DW, ‘Ukraine war forces EU refugee policy reversal’ (3 May 2022) <<https://webcache.googleusercontent.com/search?q=cache:enFIG0BotzWJ:https://www.dw.com/en/ukraine-russia-war-forces-eu-refugee-policy-reversal/a-61028152&cd=1&hl=en&ct=clnk&gl=tr>> accessed 1 December 2022.
- 38 European Commission, ‘Home Affairs Council: 10-Point Plan on stronger European coordination on welcoming people fleeing the war against Ukraine’ (28 March 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_2152](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2152)> accessed 1 December 2022.

multiple institutions are simultaneously responsible for registration.

The abovementioned guidelines and the 10-Point Plan foresee a coordination mechanism by the Solidarity Platform that utilises the EU Migration Preparedness and Crisis Management Network. Aggregate data are planned to be regularly shared between the EU and the EU MS to ensure the availability of reception capacity. Moreover, the guidelines<sup>39</sup> explicitly state that Eurodac or other union-wide systems cannot be used to register beneficiaries of temporary protection due to a lack of legal basis, and that EU MS should use their own national systems for registration.

The Turkish case shows that maintaining coordination, even between national institutions, proved to be a challenge. In the current case it is not only different institutions but multiple EU MS without integrated systems for registration that need to be coordinated. The Commission appears to be aware of the issue, indicated especially by the first point in the 10-Point Plan, but does not propose a solid measure within the guidelines. It should be noted, however, that during the editing of this chapter, the Commission announced the launch of the 'EU platform for registration'<sup>40</sup>, as foreseen by the 10-Point Plan.

Based on the limited information available, the platform appears to be a tool for exchanging information between the MS, but it is not clear whether this tool will be able to ensure uniform registration by the MS or what safeguards it contains relating to data protection and vulnerabilities. Insights from the Turkish experience indicate that the shortcomings in coordinating registration among different national asylum institutions may result in a situation where the EU and the EU MS will need to deal with similar wide-spread inconsistencies and duplications in the registration data, as well as large numbers of unregistered refugees in the years to come.

Another hard-learned lesson from the Turkish experience is that detailed information on refugees' vulnerabilities should be registered as early as possible. This is a prerequisite for the proper provision of protection services and for avoiding potential human rights violations that may arise due to barriers in ac-

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39 European Commission, 'Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection' 2022/C 126 I/01 [2022] OJ C 126I.

40 Directorate-General for Neighbourhood and Enlargement Negotiations, 'Solidarity with Ukraine: Commission launches an EU platform for registration of people enjoying temporary protection or adequate protection under national law' (31 May 2022) <[https://neighbourhood-enlargement.ec.europa.eu/news/solidarity-ukraine-commission-launches-eu-platform-registration-people-enjoying-temporary-protection-2022-05-31\\_en](https://neighbourhood-enlargement.ec.europa.eu/news/solidarity-ukraine-commission-launches-eu-platform-registration-people-enjoying-temporary-protection-2022-05-31_en)> accessed 1 December 2022.

cessing rights and services. The identification of vulnerable refugees is critical for prioritising the best procedures for them, ensuring their referrals to service providers, and planning future services provision. If not guaranteed from the outset, missing vulnerability data will cause immediate and long-term gaps in the protection framework.

Türkiye has had to deal with the issue of inadequate vulnerability data five years after the beginning of the mass-influx and the process proved to be very costly in multiple aspects. The EU still has the chance to ensure the proper identification of vulnerable refugees during the current early stages of the crisis. However, the Commission's guidance does not focus on the issue, with the exception of measures addressing unaccompanied minors and (potential) victims of human trafficking.

In fact, the guidelines limit the EU MS by explicitly stating that they 'should not register any other personal data than that covered by Annex II of the Temporary Protection Directive'<sup>41</sup>. Annex II does not include any information related to vulnerabilities or special needs. Neither does the rest of the EU Temporary Protection Directive guarantee the proper registration of vulnerability data. It obliges the EU MS to 'provide necessary medical or other assistance to persons enjoying temporary protection who have special needs' but does not include any obligations, measures or tools relating to the identification and registration of these needs. To avoid challenges similar to the ones Türkiye has faced concerning vulnerable refugees, the EU should revise its current guidance and adopt a more hands-on approach to ensure the proper and consistent identification and registration of vulnerabilities.

The final lesson is related to the congestion of Türkiye's asylum procedures during 2017-2018 when a substantial part of the institutional resources had to be allocated exclusively for the re-registration of Syrian refugees. If the abovementioned risks are realised, the EU and the EU MS may find themselves in a similar situation. Eastern<sup>42</sup>, Central<sup>43</sup> and Western<sup>44</sup> Mediterranean,

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41 Temporary Protection Directive.

42 Frontex, 'Migratory Rules: Eastern Mediterranean Route' <<https://frontex.europa.eu/we-know/migratory-routes/eastern-mediterranean-route/>> accessed 1 December 2022.

43 Frontex, 'Migratory Rules: Central Mediterranean Route' <<https://frontex.europa.eu/we-know/migratory-routes/central-mediterranean-route/>> accessed 1 December 2022.

44 Frontex, 'Migratory Rules: Western Mediterranean Route' <<https://frontex.europa.eu/we-know/migratory-routes/western-mediterranean-route/>> accessed 1 December 2022.

and the Western Balkans<sup>45</sup> migration routes are still quite active. The ongoing situation in Afghanistan, Syria and northern Africa also do not give any reason to expect an improvement in the overall refugee situation in the short term.

The 2015 'refugee crisis'<sup>46</sup> showed how migratory pressures<sup>47</sup> through these routes can cause critical bottlenecks in the EU MS asylum systems<sup>48</sup>, even without a sudden mass-influx from a neighbouring country. Therefore, the EU and the EU MS should realistically estimate the actual cost of shortcomings in the registration of Ukrainian refugees, i.e. by factoring in the additional pressure of potential refugee movements they may face in future when they are trying to address these various shortcomings.

## 7. Conclusion

This chapter focused only on a single aspect of the Turkish temporary protection experience, namely the challenges faced in the process of registering Syrians under temporary protection. Due to the shortcomings in this registration process, it is crucial to note that the lessons covered in this chapter are generally connected to the processing of personal data which carries significant 'inherent risks such as accidental or unauthorised loss or disclosure'.<sup>49</sup>

Therefore, all lessons and recommendations in this chapter should be read in light of the fact that compliance with data protection legislation and the principle of confidentiality in the asylum procedures are crucial for the provision of effective protection. In addition to MS national legislation, the EU's

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45 Frontex, 'Migratory Rules: Western Balkan Route' <<https://frontex.europa.eu/we-know/migratory-routes/western-balkan-route/>> accessed 1 December 2022.

46 William Spindler, '2015: The year of Europe's refugee crisis' (*UNHCR*, 8 December 2015) <<https://www.unhcr.org/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html>> accessed 1 December 2022.

47 Elspeth Guild and others, 'The 2015 Refugee Crisis in the European Union' (2015) CEPS Policy Brief 332 <[https://www.ceps.eu/wp-content/uploads/2015/09/CEPS%20PB332%20Refugee%20Crisis%20in%20EU\\_0.pdf](https://www.ceps.eu/wp-content/uploads/2015/09/CEPS%20PB332%20Refugee%20Crisis%20in%20EU_0.pdf)> accessed 1 December 2022.

48 AIDA, 'Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis' (2014/2015) Annual Report <[https://asylumineurope.org/wp-content/uploads/2020/11/shadow-reports\\_aida\\_annualreport\\_2014-2015\\_0.pdf](https://asylumineurope.org/wp-content/uploads/2020/11/shadow-reports_aida_annualreport_2014-2015_0.pdf)> accessed 1 December 2022.

49 UNHCR, 'Policy on the Protection of Personal Data of Persons of Concern to UNHCR' (May 2015) 7 <[https://help.unhcr.org/turkiye/wp-content/uploads/sites/11/2018/12/DataProtectionPolicy\\_ENG.pdf](https://help.unhcr.org/turkiye/wp-content/uploads/sites/11/2018/12/DataProtectionPolicy_ENG.pdf)> accessed 1 December 2022.

data protection legislation<sup>50</sup> and international standards<sup>51</sup> developed by the leading actors in the field of asylum offer the most importance guidance.

Overall, the specific recommendation of this piece is that the EU should approach the issue of registering Ukrainian refugees under temporary protection with the aim of ensuring a uniform and centralised registration practice with a specific focus on the early identification of vulnerable refugees. And of course, this must be in accordance with the principle of confidentiality and data protection standards as foreseen by international and EU law.

Türkiye's last decade is ripe with even more valuable lessons related to issues beyond registration and vulnerability screening, such as the challenges in providing public services, language barriers, and security and social tensions in the mass-influx context.

Therefore, the general recommendation of this chapter is that the EU and the EU MS should properly analyse the recent history of the Turkish refugee response and make good use of the lessons learned to avoid complex issues which can be, in many cases, easily prevented through early precautions and effective coordination.

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50 European Commission, 'EU data protection rules' <[https://ec.europa.eu/info/law/law-topic/data-protection/eu-data-protection-rules\\_en](https://ec.europa.eu/info/law/law-topic/data-protection/eu-data-protection-rules_en)> accessed 22 June 2022.

51 UNHCR, 'Policy on the Protection of Personal Data of Persons of Concern to UNHCR'.

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# Chapter 18

## The Importance of Early, Proactive, and Transparent Measures for a Successful Local Integration Process

Dr Hakkı Onur Arıner\*

### 1. Introduction

The Turkish experience with providing temporary protection status for a large number of people fleeing from civil war has generated important lessons relevant to the integration efforts of European Union Member States receiving forcibly displaced persons from Ukraine: 1) protracted conflicts can exceed the maximum period envisaged for ‘temporary’ protection by policymakers; 2) measures supporting local integration should be planned and implemented as early as possible in receiving countries in anticipation of a prolonged conflict that could make it impossible for temporary protection beneficiaries (TPBs) to return to their countries of origin; 3) policies promoting the local integration of TPBs should be transparent and open to public debate and deliberation from day one; 4) a concerted communication strategy should be implemented by a range of stakeholders including public institutions, NGOs, municipalities, etc. at various levels (national, regional, local) to consistently combat

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\* Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH. *Disclaimer: The views expressed in this article are the opinions of its author and do not reflect the views of GIZ.*

hate speech and misconceptions that may be fueled by political actors for short-term political gain.

## 2. When to initiate integration measures for temporary protection beneficiaries?

Temporary protection is succinctly defined as a ‘time limited response to mass influx situations’.<sup>1</sup> The added value of this status, which is not stipulated in the Refugee Convention,<sup>2</sup> is that it provides States with the ability to provide protection to individuals who are forcibly displaced from their countries in large numbers, generally due to armed conflict. States are thereby able to provide protection to large numbers of individuals without having to immediately assess whether each individual seeking asylum has well founded reasons of being persecuted (i.e. a claim to refugee status) or being subjected to serious violations of human rights (i.e. a claim to subsidiary protection). It is a practical solution that alleviates the bureaucratic burden on receiving States while providing protection to a large number of people who need it. However, the fact that temporary protection status is not codified in international refugee law has meant that there is no single standard for the time limits placed on the duration of this protection status by regional or national authorities. Following the large scale exodus from Venezuela to various countries in South America, Colombia has set the limit at 10 years,<sup>3</sup> while Brazil offers temporary residence cards valid for only 2 years.<sup>4</sup> The EU’s Temporary Protection Directive (Council Directive 2001/55/EC)<sup>5</sup> has in turn set the maximum limit at 3 years for individuals forcibly displaced from Ukraine. Türkiye’s Temporary Protection

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1 Meltem Ineli-Ciger, *Temporary Protection in Law and Practise* (Brill 2017) 261.

2 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention).

3 UNHCR, ‘Temporary Protection Status in Colombia’ <<https://data.unhcr.org/en/documents/details/89943>> accessed 1 December 2022.

4 Sergio Carrera and others, ‘The EU Grants Temporary Protection for people Fleeing War in Ukraine: Time to rethink unequal solidarity in EU asylum policy’ in this collection.

5 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.

Regulation<sup>6</sup> does not stipulate a time limit as such, but grants authority to the President to terminate Temporary Protection based on a proposal by the Ministry of Interior.

Leaving aside the advantages and disadvantages of clearly stipulating a time-limit in legislation, according to a status on the basis of temporary protection begs the question of how to reconcile the temporary nature of the status with local integration efforts. In the Global Compact on Refugees<sup>7</sup> (GCR) durable solutions are listed as voluntary repatriation, resettlement, local integration, and what is called ‘other solutions’. Voluntary repatriation may be an option where the conditions that necessitated forced displacement have ended and a safe and dignified return to the country of origin is possible. Waiting for temporary protection to end in order to initiate local integration measures, however, may be too late to contribute to the long-term acceptance of refugees and other beneficiaries of international and temporary protection. This is why one of the primary objectives of the GCR is stated as facilitating access to durable solutions, ‘including by planning for solutions from the outset of refugee situations’.<sup>8</sup>

### 3. Promoting inclusive and welcoming societies for temporary protection beneficiaries

To plan for local integration from the outset, it is necessary to clarify what is meant by local integration. A clear, practical definition of what local integration means is somewhat elusive. Access to health services, education, and the labour market are human rights that are seen as important preconditions for integration. The academic literature on integration presents it as a gradual and multi-faceted process with different implications depending on the legal-political, socio-economic, and cultural-religious dimensions.<sup>9</sup>

6 Turkey: Temporary Protection Regulation (2014) <<https://www.refworld.org/docid/56572fd74.html>> accessed 1 December 2022.

7 Global Compact on Refugees, UN doc A/73/12 (Part II) (2 August 2018) (GCR) <<https://www.unhcr.org/5c658aed4.pdf>> accessed 1 December 2022.

8 *ibid* para 85.

9 Rinus Penninx and Garcés-Masareñas, ‘The Concept of Integration as an Analytical Tool and as a Policy Concept’ in Blanca Garcés-Masareñas and Rinus Penninx (eds), *Integration Processes and Policies in Europe* (Springer 2016).

The European Commission defined integration in its 2005 Communication ‘A Common Agenda for Integration Framework for the Integration of Third Country Nationals in The European Union’ as ‘a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States’.<sup>10</sup> Similarly, the GCR states that local integration is a ‘dynamic and two-way process’,<sup>11</sup> meaning that refugees need to be prepared to adapt to the host society and host communities need to be ready to welcome refugees. Crucially, in practice, the two-way process alluded to in the definition provided by the Commission and the GCR is unidirectional; migrants are expected to conform to the norms and values of the dominant majority.

This is not to say that no guidance has been provided regarding how to increase host societies’ acceptance of migrants and refugees. In the above-mentioned Communication, the Commission mentions awareness-raising campaigns, exhibitions, intercultural events, etc. along with voluntary codes of practice for journalists at the national level. In addition, campaigns or intercultural events and the projection of accurate information about immigrants’ cultures, religions, and social and economic contributions at the EU level are mentioned as concrete suggestions.

Another practical guideline is provided as part of UNHCR’s Three Year strategy (2019-2021) on Resettlement and Complementary Pathways.<sup>12</sup> The UNHCR states that an environment that promotes solidarity, diversity, and openness is essential for the sustainability of resettlement and complementary pathways. These include community sponsorship programmes, humanitarian visas and admission programmes, educational opportunities, etc. Incidentally, the Global Compact for Safe, Orderly and Regular Migration<sup>13</sup> also provides alternative options for regular stay beyond international protection or temporary protection status. These include stays ‘of appropriate duration based on compassionate, humanitarian or other considerations’ strengthened by the

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10 Commission, ‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions - A Common Agenda for Integration - Framework for the Integration of Third-Country Nationals in the European Union’ COM/2005/0389 final.

11 GCR para 98.

12 UNHCR, ‘The Three-Year Strategy (2019-2021) on Resettlement and Complementary Pathways’ (2019) <<https://www.unhcr.org/5d15db254.pdf>> accessed 1 December 2022.

13 Global Compact for Safe, Orderly and Regular Migration, UN doc A/RES/73/195 (19 December 2018) (GCM) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/451/99/PDF/N1845199.pdf?OpenElement>> accessed 1 December 2022.

commitment of States' Parties to develop procedures facilitating transitions from one status to another in order to prevent irregularity.<sup>14</sup> Therefore, the early and proactive engagement with receiving societies to promote inclusiveness will allow the initial goodwill that exists in the receiving communities towards TPBs to be sustained, and will ensure greater support to policies that may in the future transition TPBs to alternative and even permanent statuses.

While each strategic priority and enabling action set out in the Three-Year Strategy is equally significant towards the fulfillment of the goal of promoting welcoming and inclusive societies, for the purposes of this brief article, the following are highlighted:

1. Local strategies and programmes for integrating refugees and other beneficiaries of international and temporary protection should be fully inclusive (i.e. reflect a genuine understanding of the special needs that accompany age, gender and diversity, and promote freedom from racism and discrimination)<sup>15</sup> and co-designed by authorities, civil society, refugees, local communities, and the private sector;
2. Evidence based narratives on refugees should be used in communication materials that effectively convey the contributions of refugees to different sections of the host community, including political groups, policy-makers, and key influencers.

## **4. Sustaining the welcoming attitude for temporary protection beneficiaries from Ukraine**

Early insights by the International Centre for Migration Policy Development (ICMPD) into the necessary steps to ensure the integration of refugees from Ukraine have pointed to the express need to provide housing, physical and mental care, access to the education system, language classes, and access to the labour markets, as well as the various measures taken by EU Member States in

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14 *ibid* para 21(g)

15 UNHCR, 'Promoting welcoming and inclusive societies' <<https://www.unhcr.org/handbooks/ih/welcoming-inclusive-societies/promoting-welcoming-and-inclusive-societies>> accessed 1 December 2022.



these areas.<sup>16</sup> These correspond to the rights dimension of integration. From a rights-based approach, therefore, there is no question as to the urgent need to allow access to shelter, education, health, and the labour market to those forcibly displaced from Ukraine.

The creation of a welcoming and inclusive society should be equally emphasized as an integral part of the ‘dynamic two-way process’ of integration. The current positive welcome from host communities of the EU Member States towards Ukrainians has been attributed to a shared notion of ‘Europeanness’<sup>17</sup> based on geographic proximity, similar skin colour, shared religion, and socio-economic ties. Yet, the ICMPD piece warns that the welcoming attitude<sup>18</sup> of the host communities of EU Member States may wane as conflict is prolonged and numbers of arrivals increase,<sup>19</sup> and cites the head of the UNHCR<sup>20</sup> as saying the same. This warning should be coupled with the prognosis from a number of western leaders that the Russia-Ukraine war could last for several years.<sup>21</sup>

For the benefit of social cohesion between the receiving communities and persons forcibly displaced from Ukraine, preparation for the long haul should mean the formulation of a clear, transparent, and long-term integration and communication strategy with a strong emphasis on supporting initiatives to promote inclusive and welcoming societies as soon as possible. This should include a strong, sustained and multi-stakeholder focus on combating xenophobia, racism, and discrimination. The Turkish example demonstrates how the initial goodwill and welcome can denigrate into anti-refugee sentiment in

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16 Caitlin Katsiaticas and Justyna Segeš Frelak, ‘Integration of Ukrainian refugees: The road ahead’ (*ICMPD*, 8 March 2022) <<https://www.icmpd.org/blog/2022/integration-of-ukrainian-refugees-the-road-ahead#:~:text=Over%202%20million%20people%20have,help%20these%20newcomers%20settle%20in.>> accessed 1 December 2022.

17 Youyou Zhou, Nicole Narea, and Christina Animashaun, ‘Europe’s embrace of Ukrainian refugees, explained in six charts and one map’ (*Vox*, 19 March 2022) <<https://www.vox.com/22983230/europe-ukraine-refugees-charts-map>> accessed 1 December 2022.

18 Schengenvisa, ‘Over 90% of Poles Welcome Ukrainian Refugees in Poland, Survey Reveals’ (*Schengenvisa* (4 March 2022) <<https://www.schengenvisainfo.com/news/over-90-of-poles-welcome-ukrainian-refugees-in-poland-survey-reveals/>> accessed 1 December 2022.

19 Katsiaticas and Segeš Frelak, ‘Integration of Ukrainian refugees: The road ahead’

20 Nikolay Nielsen, ‘Risk that EU hospitality ‘wears out’ warns UN refugee chief’ (*Euobserver* (Brussels 1 March 2022) <<https://euobserver.com/migration/154463>> accessed 1 December 2022.

21 Raag Mathur Ramdev, ‘Russia-Ukraine War Could Last 10 Years: UK Foreign Secretary’ (*NDTV* (28 April 2022) <<https://www.ndtv.com/world-news/russia-ukraine-war-could-last-10-years-uk-foreign-secretary-2927511>> accessed 1 December 2022.

the absence of such an approach.

## 5. Lessons from Türkiye

The Turkish experience has shown that lacking a clear and transparent strategy for the promotion of inclusive and welcoming societies from the outset and expecting the initial goodwill and acceptance of the host community to continue is not plausible. Coupled with the negative effects of an economic downturn and the Covid-19 pandemic (which has disproportionately affected disadvantaged groups including refugees<sup>22</sup> in the country), misconceptions about refugees, conspiracy theories, unjustified alarmism,<sup>23</sup> xenophobia, and hate speech<sup>24</sup> have run rampant. Indeed, national surveys implemented or commissioned by the United Nations World Food Programme (WFP)<sup>25</sup>, the International Organisation for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR)<sup>26</sup> have consistently shown an increase in social distance between the host community in Türkiye and Syrians under Temporary Protection (SuTPs).

To be sure, several factors have contributed to this situation.<sup>27</sup> The Turkish Government, having miscalculated the potential duration of the conflict in

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- 22 IFRC and Turkish Red Crescent, 'Impact of COVID-19 on Daily Life of Refugees In Turkey' (2020) <<https://reliefweb.int/report/turkey/impact-covid-19-daily-life-refugees-turkey#:~:text=According%20to%20the%20report%3A,increased%20participants%27%20level%20of%20indebtedness.>> accessed 1 December 2022.
- 23 KAM, 'Sessiz İstila' (3 May 2022) <<https://www.youtube.com/watch?v=EpPo5vjC2bE>> accessed 1 December 2022.
- 24 Soner Cagaptay, 'Growing Anti-Syrian Sentiment in Turkey' (The Washington Institute for Near East Policy, 5 August 2019) <<https://www.washingtoninstitute.org/policy-analysis/growing-anti-syrian-sentiment-turkey>> accessed 1 December 2022.
- 25 Meryem Ay Kesgin, Edgar Wabyona and Basak Bercin Dogan, 'Social cohesion in Turkey: refugees and the host community Online survey findings rounds 1–5' (2020) <<https://www.wfp.org/publications/social-cohesion-turkey-refugees-and-host-community-online-survey-findings>> accessed 1 December 2022.
- 26 M. Murat Erdoğan, 'Syrians Barometer 2020: A Framework for Achieving Social Cohesion with Syrians in Turkey' (2021) <[https://reliefweb.int/report/turkey/syrians-barometer-2020-framework-achieving-social-cohesion-syrians-turkey-entr?gclid=Cj0KCQJwnbmaBhD-ARIsAGTPcfUrtHC-LgJWF6kdH\\_BAf5z\\_Gc2ePqm67ypRJDef6cZfsyVmMoeELMV4aAlrIEALw\\_wcB](https://reliefweb.int/report/turkey/syrians-barometer-2020-framework-achieving-social-cohesion-syrians-turkey-entr?gclid=Cj0KCQJwnbmaBhD-ARIsAGTPcfUrtHC-LgJWF6kdH_BAf5z_Gc2ePqm67ypRJDef6cZfsyVmMoeELMV4aAlrIEALw_wcB)> accessed 1 December 2022.
- 27 For a sectoral breakdown see: H. Onur Arıner, 'Social Cohesion Roundtables: Contextualizing Social Cohesion for Different Sectors and Actors in the Refugee Response in Turkey' (2022) <<https://reliefweb.int/report/turkey/social-cohesion-roundtables-contextualizing-social-cohesion-different-sectors-and>> accessed 1 December 2022.

Syria,<sup>28</sup> initially allowed for the creation of a parallel education system whereby Temporary Education Centres (TECs) were established (both within and outside refugee camps) providing Syrian children education in Arabic based on a Syrian curriculum at the start of the arrivals from Syria in 2011. The Regulation on Temporary Protection that gave SuTPs the right to access to education came into force in 2014, three years after forcibly displaced persons started arriving in Türkiye. TECs were eventually shut down in 2016, which corresponded with the launch of the EU funded Project on Promoting Integration of Syrian Children into the Turkish Education System (PICTES). Surveys still show that Syrian children experience exclusion at schools by peers and teachers as well as bullying.<sup>29</sup> While a majority of students have belatedly learned Turkish, the language barrier continues to come up as a major challenge in front of integration for Syrian adults, and more so for Syrian women. One reason is that the quality of teaching Turkish as a foreign language is not standardized across the country. An A2 level of Turkish competency is not sufficient to enable SuTPs to know about and access services, seek and find employment, and navigate the bureaucratic systems in Türkiye. In addition, while SuTPs have been granted access to the labour market in January 2016 with the adoption of the ‘Work Permit Regulation for Foreigners under Temporary Protection’,<sup>30</sup> many work informally, meaning with low pay and no security.<sup>31</sup> This is in large part due to the fact that informal employment was already very high in Türkiye prior to the arrival of Syrians. Additionally, the cash support provided by the European Union (EU) in the form of the Emergency Social Safety Net (ESSN) acts as a disincentive for refugees to find formal work as it is withdrawn from the whole household once someone in that household finds formal employment. Added to this are unscrupulous employers, the lack of state enforcement/inspection, and the fact that vocational trainings have not

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28 Kemal Kirişçi and Elizabeth Ferris, ‘Not Likely to Go Home: Syrian Refugees and the Challenges to Turkey-and the International Community’ (2015) Turkey Project Policy Paper 7/2015 <<https://www.brookings.edu/wp-content/uploads/2016/06/Turkey-Policy-Paper-web.pdf>> accessed 1 December 2022.

29 Necmettin Doğan and others, ‘İstanbul Göç Araştırması’ (Istanbul Metropolitan Municipality 2020) <<https://www.ibb.istanbul/Uploads/2021/3/goc-arastirmalari-24.03.2021.pdf>> accessed 1 December 2022.

30 Turkey: Regulation on Work Permits of Foreigners under Temporary Protection (11 January 2016) <<https://www.refworld.org/docid/582c71464.html>> accessed 1 December 2022.

31 Luis Pinedo Caro, ‘Syrian Refugees in the Turkish Labour Market’ (2020) <[https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-ankara/documents/publication/wcms\\_738602.pdf](https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-ankara/documents/publication/wcms_738602.pdf)> accessed 1 December 2022.

been designed according to the needs of the market.

Alongside all of these factors, arguably the most important lesson learnt from the Turkish experience should be the effects of a failure to generate a reasoned debate and an acceptable consensus among the Turkish public as regards the situation of Syrians under Temporary Protection in Türkiye from the start. Consider the development and implementation of the main policy document for the integration of foreigners, namely the Harmonization Strategy and National Action Plan (HSNAP).<sup>32</sup> The HSNAP was drafted following an inclusive process in which relevant state and non-state stakeholders were indeed consulted. The contents of the HSNAP are indicative of the benefits of this process, with strategic priorities set out in the areas of social cohesion, information sharing, education, health, and the labour market. Under each section various stakeholders are apportioned duties based on detailed activities set out towards the fulfilment of these priorities. To illustrate with a relevant example, and one which shows the awareness of the importance given to creating an inclusive and welcoming society, consider the following chain of action stated in the HSNAP:

- Strategic Priority 1: Social Cohesion
- Strategic Objective 1: Managing the social perception and attitudes towards migration and migrants in a way that contributes to social cohesion
- Strategic Aim 1.1: Strengthening the level of social acceptance towards migrants
- Activity 1.1.3: Researching society's perception towards migrants and conducting awareness-raising to support a positive perception
- Activity 1.1.4: Establishing an effective intercultural communication strategy, regularly informing media organizations, and preparing innovative programs for all visual and print media.
- Activity 1.1.7: Emphasizing the richness brought about by cultural diversity through the work conducted by the media, NGOs, municipalities and public institutions working on migration.

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32 Republic of Turkey Ministry of Interior Presidency of Migration Management, 'Uyum Strateji Belgesi ve Ulusal Eylem Planı 2018-2023' [Harmonization Strategy and National Action Plan] (2020) <<https://www.goc.gov.tr/uyum-strateji-belgesi-ve-ulusal-eylem-planı>> accessed 1 December 2022.

These points seem to be very much in line with the European Commission Communication and the guidelines provided by UNHCR's 3-year strategy in promoting inclusive and welcoming societies. Yet the HSNAP was only drafted in 2018, seven years after the start of the arrival of Syrians into Türkiye. Moreover, it was only made public only in 2020 through publication in the Presidency of Migration Management's (at the time called the Directorate General of Migration Management) website, after being leaked in 2019 by a newspaper<sup>33</sup> which pointedly headlined the article 'we are announcing the harmonization strategy of the government that concedes nearly 4 million Syrians are here to stay'. The article quotes the Director General of the then Directorate General of Migration Management as saying that the decision to delay the publication of the document was that of political will (a euphemism for the Government).

In the end, we are faced with a situation where now almost every opposition party in Türkiye is calling for the repatriation of Syrians to Syria. Some note that this should be voluntary,<sup>34</sup> while others say it can be forced if necessary.<sup>35</sup> The President has also recently announced a plan<sup>36</sup> to enable the voluntary return of 1 million Syrians to the Northwest region of Syria that has been under the control of opposition groups with the support of the Turkish military. The goal of an inclusive and welcoming society does not seem to figure as an option in the public debate in Türkiye today and the window of opportunity to adopt practical measures that may have made this possible seems lost.

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33 Sertaç Eş, '4 milyona yakın Suriyelinin kalıcı olduğunu kabullenen iktidarın uyum stratejisini açıklıyoruz' [we are announcing the harmonization strategy of the government that concedes nearly 4 million Syrians are here to stay] *Cumhuriyet* (6 Kasım 2019) <<https://www.cumhuriyet.com.tr/haber/4-milyona-yakin-suriyelinin-kalici-oldugunu-kabullenen-iktidarin-uyum-stratejisini-acikliyoruz-1700567>> accessed 1 December 2022.

34 Hürriyet Daily News, 'CHP chair vows return of Syrian refugees in 2 years once in power' *Hürriyet Daily News* (Ankara, 17 January 2022) <<https://www.hurriyetdailynews.com/chp-leader-vows-to-create-climate-ministry-to-tackle-environmental-problems-170825>> accessed 1 December 2022.

35 Laura Pitel, 'Tension over Turkey's 4mn refugees nears boiling point' *Financial Times* (9 May 2022) <<https://www.ft.com/content/06890cb5-db99-4eb6-b42d-75253e547d42>> accessed 1 December 2022.

36 Aljazeera and News Agencies, 'President Erdogan pledges Turkey will 'not expel' Syrian refugees' *Aljazeera* (9 May 2022) <<https://www.aljazeera.com/news/2022/5/9/president-erdogan-pledges-turkey-will-not-expel-syrian-refugees>> accessed 1 December 2022.



## 6. Conclusion

The temporary protection experience of Türkiye should serve as an important lesson for EU Member States on the significance of early measures of promoting welcoming and inclusive societies, especially through the adoption of integration and communication strategies that target host communities. This calls for a proactive approach with the participation of all relevant actors including public institutions, municipalities, NGOs, chambers of industry and commerce, and the media at the local, regional and national levels, and in the spirit of the GCR, refugees themselves. Furthermore, integration policies should be transparent and openly debated in the public eye to ensure that necessary measures are lent legitimacy and ownership in the eyes of host communities in Europe.

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# Chapter 19

## Next Step after the Termination of Temporary Protection Regime: Transition to Refugee Status Determination (RSD) Procedures?

Dr Ayse-Dicle Ergin\*

### 1. Introduction

According to the UNHCR statistics<sup>1</sup> as of 17 August 2022, around 6.6 million people have left Ukraine for Europe since the beginning of Russia's attacks on 24 February 2022. Among these people over 3.8 million have been registered for temporary protection (TP) or similar national protection schemes in Europe.<sup>2</sup>

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\* Assistant Professor, Bilkent University, Faculty of Law.

1 UNHCR, 'Ukraine Refugee Situation' (17 August 2022) <<https://data.unhcr.org/en/situations/ukraine>> accessed 21 September 2022.

2 *ibid.*

They included a large number of Ukrainians and others who were residing in Ukraine.

The Ukrainian situation opened up a new chapter in the EU migration history. Two decades after its adoption, the European Commission for the first time proposed the activation of the 2001 EU TP Directive (EU TPD)<sup>3</sup>, and the Directive was officially activated on 4 March 2022 to respond to the mass influx from Ukraine<sup>4</sup>. The EU TPD sets out the European TP model applicable in the event of mass arrival of third country nationals who are unable to return to their countries of origin due to armed conflict or generalised situations of violence. It also entails that an immediate protection is offered to beneficiaries on group-basis without pressuring the Member States' asylum systems.

The circumstances leading to the declaration of TP regimes naturally require the host states to focus on covering the immediate needs of the displaced persons. However, the dynamics of the regime also necessitates the planning for the post-TP period, which is often neglected by the host states in their haste. The EU is not an exception to this trend. Currently, potential steps after the termination of the TP regime are not discussed – at least vocally – at the EU level. The present chapter aims to focus on the next steps after the termination of the TP regime by the EU, particularly the possibility of initiating refugee status determination (RSD) procedures. To this aim, the chapter will first give a brief description of the TP; it will then highlight the changing focus of the TP regime and explore possible scenarios as ways out of the regime; finally, it will present some lessons learned from Türkiye's experience and discuss some of the options available to the EU.

## 2. Temporary Protection Regime

TP is a regime typically implemented as an emergency response to mass influx situations by states that are unable to cope with the large size of arrivals through implementing individual RSD procedures and it also addresses the protection gap by offering basic minimum rights and protection from refoulement to the

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3 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212, (EU Temporary Protection Directive).

4 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

persons fleeing armed conflict.<sup>5</sup>

Under the TP regime, protection is granted to both refugees within the meaning of 1951 Convention, Article 1A (2)<sup>6</sup> and the broader category of forced migrants who would qualify for subsidiary protection. While serving for the effective use of host state's resources, it prevents the perception that TP beneficiaries in principle won't return but stay permanently.<sup>7</sup> In general, the expectation – and often the preferred durable solution – is repatriation.<sup>8</sup> Thus its application puts limits to integration.<sup>9</sup>

As its name indicates, the protection provided under the TP regime is intended for a predetermined temporary duration. It is not always easy to determine the exact duration of the temporary regime needed while it has been acknowledged that it should not become a long-term solution<sup>10</sup> for the host state with an upper limit of five years in the 1990s<sup>11</sup> and currently of three years.<sup>12</sup>

The protection offered by the EU TPD is also limited to a maximum period of three years if the reason for TP continues to exist (EU TPD, Article 4)<sup>13</sup>. Moreover, notwithstanding the size and unexpectedness of the influx, the EU TPD also affirms the applicability of the 1951 Convention protection as it allows TP beneficiaries' application for asylum anytime (EU TPD, Article 17).

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5 Meltem Ineli-Ciger, *Temporary Protection in Law and Practise* (Brill Nijhoff 2017) 40-42, 165.

6 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention).

7 Manuel A. Castillo and James C. Hathaway "Temporary Protection" in James C. Hathaway (ed), *Reconceiving International Refugee Law*, (Martinus Nijhoff 1997) 1, 17; Ineli-Ciger, *Temporary Protection in Law and Practise* 94.

8 Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime', (2000) 94 *The American Journal of International Law* 279 & 304.

9 Jean-François Durieux, '*Temporary Protection: Hovering at the Edges of Refugee Law*' (2014) 45 *Netherlands Yearbook of International Law* 221, 221.

10 UNHCR, 'Roundtable on Temporary Protection 19-20 July 2012, International Institute of Humanitarian Law, San Remo, Italy: Summary Conclusions on Temporary Protection' (20 July 2012) 4 <<https://www.refworld.org/docid/506d908a2.html>> accessed 1 December 2022.

11 UNHCR Standing Committee, 'Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It' (EC/47/SC/CRP.27, 30 May 1997) <<https://www.unhcr.org/excom/standcom/3ae68cfc0/progress-report-informal-consultations-provision-international-protection.html>> accessed 1 December 2022.

12 UNHCR, 'Roundtable on Temporary Protection 19-20 July 2012, International Institute of Humanitarian Law, San Remo, Italy: Summary Conclusions on Temporary Protection' 5.

13 EU Temporary Protection Directive.

On the other hand, it does not guarantee that Member States would process asylum applications during the TP period.<sup>14</sup> When the relevant provisions of the EU TPD (Recital 10, 18, Article 3, 17, 18, 19) are read all together, transition to regular asylum procedures is clearly envisaged.

Besides, the EU TPD includes provisions concerning return, yet this is subject to certain conditions under Articles 6 and 21. The Council may decide at any time by qualified majority that the TP shall come to an end as the situation in the country of origin permits “the safe and durable return of those granted TP”.

A parallel logic is also implicitly embedded into the TP Regulation of Türkiye (TR TPR)<sup>15</sup>. TP is defined as an exceptional procedure applicable in mass influx situations during which the application of individual RSD is suspended (TR TPR, Article 2/1/f). Unlike the EU TPD, a maximum time limit to the TP regime has not been set out in the TR TPR, Article 10. Syrians and other groups covered under TP are barred from making individual applications for RSD and the applications of those who already lodged an application before the introduction of the TR TPR are not processed during the implementation of the TP regime (TR TPR, Article 16 and Provisional Article 1).

In Türkiye both the Law on Foreigners and International Protection (LFIP)<sup>16</sup> and TR TPR offer safeguards against refoulement. However, the way out from the TP regime is not clearly defined. Under the TR TPR, Article 11, the President<sup>17</sup> has the authority to decide on the termination of the TP regime based on the proposal of the Ministry of Interior<sup>18</sup>. Under the same article, the President is also entitled to decide which durable solution would be applicable for the TP beneficiaries following the termination decision (i.e., to order “voluntary” return of TP beneficiaries or the initiation of individual

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14 Article 19/1 gives the discretion to states to exclude asylum applicants from concurrently enjoying TP.

15 Republic of Türkiye, Temporary Protection Regulation 2014 (22 October 2014) <<https://www.refworld.org/docid/56572fd74.html>> accessed 1 December 2022.

16 Republic of Türkiye, Law No. 6458 of 2013 on Foreigners and International Protection (4 April 2013) <<https://www.refworld.org/docid/5167fbb20.html>> accessed 1 December 2022.

17 Due to the change of the governmental system of the Republic of Türkiye from parliamentary to presidential system, the term “the Council of Ministers” was amended as “the President” with Decree 703 of 9 July 2018, Article 71.

18 No criteria have been set for the President to consider such termination. Obviously, such a formulation offers the President full discretion to decide about the end of the TP regime but such discretion lacks objective criteria.

or group/prima facie RSD procedure or other legal basis for stay). At the same time TR TPR, Article 14 implicitly accepts repatriation as the main solution for the TP beneficiaries when TP is terminated. In this regard, TR TPR, Article 42 specifically gives the possibility to the Turkish authorities to facilitate and support the voluntary repatriation process of TP beneficiaries.

### 3. Changing Focus of the Temporary Protection and the Way Out

In principle, TP was born as a return-oriented protection tool.<sup>19</sup> However, Türkiye's TP experience has proven that states may be overly optimistic about the prospects for rapid and safe return. Historical examples also prove this. For instance, during the crisis in the Former Yugoslavia vast majority of Bosnians who had originally received TP eventually gained permanent or quasi-permanent status<sup>20</sup> in the EU Member States<sup>21</sup>. This experience has shown that when the TP process gets overly long, the solution of the situation gets equally difficult.

Considering the current security situation in Syria, repatriation of the TP beneficiaries does not seem possible in the near future.<sup>22</sup> According to the UNHCR<sup>23</sup>, the flight of civilians from Syria is still considered a refugee movement with the vast majority of Syrian asylum-seekers continuing to be

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19 Durieux, 'Temporary Protection: Hovering at the Edges of Refugee Law' 232; UNHCR, 'Note on International Protection' (A/AC.96/830, 7 September 1994) 24 <<https://www.refworld.org/docid/3f0a935f2.html>> accessed 1 December 2022.

20 Joanne Van Selm-Thorburn, *Refugee Protection in Europe: Lessons of the Yugoslav Crisis* (Brill Nijhoff 1998) 224-225.

21 The stay of a significant portion of Bosnians brought hesitation among the EU member states about burden sharing during the Kosovo crisis. During NATO intervention in 1999, around 900.000 Kosovars crossed into the borders of the neighbouring countries including FYROM, Albania and Montenegro. However, vast majority of the evacuated refugees returned back to Kosovo in the following couple of months. See Durieux, 'Temporary Protection: Hovering at the Edges of Refugee Law' 240-241.

22 A recent ECtHR judgement against Türkiye (*Akkad v. Turkey*) has confirmed this fact by stating that the forced return to Syria of a Syrian TP beneficiary under the guise of voluntary return was in breach of Turkish law and of the Convention. See *Akkad v. Turkey*, App no 1557/19 (ECHR, 21 June 2022).

23 UNHCR, 'International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update VI', (HCR/PC/SYR/2021/06, March 2021) 8-9 <<https://www.refworld.org/docid/606427d97.html>> accessed 1 December 2022.

in need of international refugee protection. The security situation in Ukraine does not look promising either. Similarly, the situation in Ukraine is defined as “volatile”, which is expected to continue for a while.<sup>24</sup> Thus, states are advised to suspend the forcible returns to this country until the security situation improves significantly.

Looking prospectively, if the conflict situation in Ukraine does not end in the medium term, the EU should decide about the next steps after the termination of TP.<sup>25</sup> Thus, the initiation or at least the planning for the initiation of individual or group/prima facie RSD procedures is quite essential. The 1951 Convention is silent on RSD leaving the procedural aspect of the refugee protection to the discretion of the State Parties. Thus, temporary suspension or delays in the processing of asylum applications in proportion to the capacity of the state *per se* would not breach the 1951 Convention.<sup>26</sup>

## 4. Türkiye’s Experience as a Lesson Learned

When we look at Türkiye’s experience on TP, Turkish national asylum practice has not even proceeded to the planning stage of transition to RSD procedures. On the contrary, such planning is getting more and more delayed. There are many reasons behind this delay. From a legal point of view, the wording of Article 14/1 of the TR TPR<sup>27</sup>, which states that “*TP beneficiaries shall depart from Turkey following the termination decision of the TP*”, equates termination of TP with the end of TP beneficiaries’ need for protection. In the minds of the authorities this may very well mean that termination of TP equals almost immediate return. However, this would be quite a short-sighted view as the decision to terminate the TP regime (which is a political decision in lack of objective criteria for such termination) does not mean the end of the need for protection of the TP beneficiaries (which is a legal fact). Even if such termination

24 UNHCR, ‘UNHCR Position on Returns to Ukraine’ (March 2022) 3 <<https://www.refworld.org/pdfid/621de9894.pdf>> accessed 1 December 2022.

25 Ineli-Ciger, *Temporary Protection in Law and Practise* 232-251.

26 UNHCR, ‘Roundtable on Temporary Protection 19-20 July 2012, International Institute of Humanitarian Law, San Remo, Italy: Summary Conclusions on Temporary Protection’7; Neva Övünç Öztürk, ‘Geçici Korumanın Uluslararası Koruma Rejimine Uyumlu Üzerine Bir İnceleme’ (2017) 66 Ankara Üniversitesi Hukuk Fakültesi Dergisi 201, 201, 228.

27 Republic of Türkiye Ministry of Interior Presidency of Migration Management, ‘Temporary Protection’ <<https://www.goc.gov.tr/gecici-koruma5638>> accessed 1 December 2022.



occurs, it should be assessed whether a Syrian could then be deported back to Syria under LFIP, Articles 4 and 55, which needs to be examined individually.

In essence, such an equation is based on a previous misperception. Türkiye acted with the initial assumption that the number of persons which it would have to process under regular asylum procedures would be limited thinking that Assad Regime would not last long<sup>28</sup> and Syrians would voluntarily return back to their homes. Thus, the steps rather focused on covering the humanitarian needs of TP beneficiaries and their access to services. Today the reality is far from a regime change in Syria.

According to the official figures, a total of 19.502 Syrians were resettled to third countries<sup>29</sup> between 2014-2022,<sup>30</sup> 200.950 Syrians<sup>31</sup> were granted Turkish citizenship on exceptional grounds<sup>32</sup> and 502.000 individuals voluntarily returned back to certain areas of within Syria. Currently 3.6 million Syrians<sup>33</sup> benefit from TP, many of whom have been in Türkiye over the five-year threshold of the protracted refugee situation.

Traditionally, once TP is declared, the arduous task of determining the status of TP beneficiaries is being postponed to the future. Although not being obliged to process individual asylum applications seems to be an advantage in the short-run (as it helps efficient allocation of resources and allow some form of protection to the displaced persons), depending on how the situation is handled for the duration of the TP, it may turn into a disadvantage the more postponed the process is, the more postponed the transition will become.<sup>34</sup> It also negatively affects the devising of durable solutions.

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28 This view was also supported by some at the international arena as well. See Aljazeera, 'Fall of Syria's Assad 'only a matter of time' *Aljazeera* (27 July 2012) <<https://www.aljazeera.com/news/2012/7/27/fall-of-syrias-assad-only-a-matter-of-time>> accessed 1 December 2022.

29 Republic of Türkiye, Ministry of Interior Presidency of Migration Management, 'Temporary Protection' <<https://www.goc.gov.tr/gecici-koruma5638>> accessed 1 December 2022.

30 As of 18.08.2022.

31 T24, 'İçişleri Bakanı Soylu, Türkiye Cumhuriyeti vatandaşı olan Suriyeli sayısını açıkladı' *T24* (10 March 2022) <<https://t24.com.tr/haber/icisleri-bakani-soylu-turkiye-cumhuriyeti-vatandasi-olan-suriyeli-sayisini-acikladi,1033131>> accessed 1 December 2022.

32 As of 10.05.2022.

33 Republic of Türkiye, Ministry of Interior Presidency of Migration Management.

34 On a relevant note, another element that supports the expectation of Syrians to repatriate is TPR, Article 25. This provision clearly excludes TP beneficiaries from obtaining long-term residence permit or application of citizenship as the time spent under the TP ID may not be interpreted to count for the fulfilment of 5 years uninterrupted legal residence as a precondition for such statuses.

On the other hand, the logic behind such postponement should not be forgotten. TP as a regime aims not only to prevent the overburdening of national asylum systems by allocating human, financial, institutional and time resources in a short period of time but also offers an opportunity to the authorities to plan on what steps to take when the decision to terminate the TP regime would be given by the policy makers. As analysed in this publication by Joanne van Selm, 2022 TP regime applied to Ukrainians is significantly different from the one applied to former-Yugoslavs during 1990s.<sup>35</sup> The latter was less standardised, weakly harmonised and focused on return, while the current one supports the displaced persons as a priority rather than focusing on their longer-term solutions.

Even though the predominantly refugee character of the flow from Ukraine is difficult to deny, among TP beneficiaries there may be Convention refugees as well as those who face grave but non-persecutory harm and even those who do not deserve international protection.<sup>36</sup> Currently it is not possible to make a proper assessment about the refugee status of Ukrainians under TP. As mentioned in this publication by Hugo Storey, differing views exist as to whether they would qualify for refugee status or subsidiary protection.<sup>37</sup>

It is difficult to estimate how the conflict will evolve. Russian forces currently control the eastern and south-eastern parts of the Ukrainian territory<sup>38</sup> and reportedly have seen big losses since the invasion began.<sup>39</sup>

If the conflict continues and does not allow return in the medium run, it is possible to initiate RSD process, which could be conducted individually or on group/prima facie basis. Individual RSD for 3.8 million Ukrainians would require allocation of massive resources even if a short interview to be conducted per case. This means that Member States' RSD capacities would be overwhelmed, and meanwhile available sources couldn't be channelled to assistance.

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35 Joanne van Selm, 'Temporary Protection for Ukrainians: learning the lessons of the 1990s?' in this collection.

36 Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' 294-295.

37 Hugo Storey, 'Are those fleeing Ukraine refugees?' in this collection.

38 OCHA, 'Ukraine Situation Report' (2022) < <https://reports.unocha.org/en/country/ukraine> > accessed 1 December 2022.

39 The Visual Journalism Team, 'Ukraine in maps: Tracking the war with Russia' *BBC NEWS (Europe*, 21 September 2022) < <https://www.bbc.com/news/world-europe-60506682> > accessed 1 December 2022.

Instead, it is possible to initiate *prima facie* RSD (PFRSD)<sup>40</sup>, which could be defined as “an expedited form of individual RSD”.<sup>41</sup> PFRSD would be applicable to those who come from specific parts of Ukraine within a specified time period. During this process personalized information (particularly the profiles of the individuals and their reasons for flight) obtained during registration could be utilized. PFRSD has certain benefits like cost-effectiveness but reliance on “thorough, clear and accessible” country of origin information is essential.<sup>42</sup> With today’s technology and availability of diverse sources of information such reliance wouldn’t be a challenge for the case adjudicators. However, this process has a certain disadvantage due to its inability of not being able to detect cases with exclusion profiles. Therefore, for those cases triggering exclusion full individual examination should be utilized.<sup>43</sup>

Given the conflict-driven nature of the displacement from Ukraine, granting of subsidiary protection on *prima facie* basis would be quite likely as well. However, for such a decision, it should first be determined that individuals within the group do not qualify for refugee status based on 1951 Convention grounds. In this regard the discussions concerning the nexus between the fear of persecution and the Convention ground(s) in the RSD process should be revisited as to whether “nationality” and “political opinion” grounds could be applicable to those fleeing from the persecution of Russia<sup>44</sup>.

The conflict may cease, and the Russian invasion may continue in some parts of Ukraine. In such a case, an internal flight alternative (IFA) in some part of the Ukrainian territory not controlled by the Russian forces might be an option within the RSD determination process. Accordingly, the EU may decide on the return of some Ukrainians as long as such returns would not violate the principle of non-refoulement and the EU Member States’ human rights obligations. The added value of individual RSD comes into play at this

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40 UNHCR, ‘Guidelines on international Protection No. 11: Prima Facie Recognition of Refugee Status’ (HCR/GIP/15/11, 24 June 2015) < <https://www.unhcr.org/558a62299.html> > accessed 1 December 2022.

41 Matthew Albert, ‘Governance and “Prima Facie” Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx’ (2010) 29 *Refugee Survey Quarterly* 61, 83.

42 *ibid* 64-68.

43 UNHCR, ‘Guidelines on international Protection No. 11: Prima Facie Recognition of Refugee Status’ (HCR/GIP/15/11, 24 June 2015) 5 < <https://www.unhcr.org/558a62299.html> > accessed 1 December 2022.

44 Storey H, ‘Are those fleeing Ukraine refugees?’ in this collection.

stage to determine those who would not have well-founded fear of persecution to return certain parts of Ukraine based on a relevance and reasonableness test as defined by UNHCR Guidelines on IFA<sup>45</sup>. Obviously, such determination is based on many factors, mainly the cease of the conflict in Ukraine as well as an individual risk analysis.

The Putin Regime may also withdraw from Ukraine in the future and for a significant portion of Ukrainians voluntary, safe and dignified return would be an option – at least in certain parts of Ukraine. In such a scenario, “TP beneficiaries’ being able to return” does not mean that “they would return voluntarily”. The possibility of return in line with international law could be established by a careful determination of protection needs through individual RSD. If some of the Ukrainians will be able to safely return back to safe parts of Ukraine, it could be argued that there wouldn’t be a need for the EU to wait for individuals’ personal decisions.

All in all, the EU authorities will need to assess the size and speed of the influx vis a vis the RSD capacities of the Member States as well as the protection needs of the individuals and conflict related developments to decide on which option to choose. Currently, transition to RSD procedures after TP does not appear to be discussed at the EU level, however, this does not change the fact that such transition will have to take place if the conflict continues. What is crucial for any state hosting a massive number of TP beneficiaries is to decide when and how to initiate such a shift including transition to regular procedures or application of other options.<sup>46</sup> Any of these options require timely, strategic and detailed planning and development of a roadmap and procedure. The example of Türkiye lacks such planning. This unfortunately shifts the protection to an uncertain sphere where mainly humanitarian assistance and access to rights are provided by the national authorities and durable solutions are largely ignored.

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45 UNHCR, ‘Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (HCR/GIP/03/04, 23 July 2003) <<https://www.refworld.org/pdfid/3f2791a44.pdf>> accessed 1 December 2022.

46 Another alternative would be the regularization of the status of TP beneficiaries through changes concerning residence and paving the way for long term residence for Ukrainians without initiating access to asylum procedures (Amendment of the Long Term Residence Directive, Article 3.2.b & Article 4 as recommended). For additional information please see Sergio Carrera and others, ‘the EU Grants Temporary Protection for people Fleeing War in Ukraine: Time to rethink unequal solidarity in EU asylum policy’ in this collection.

As similarly argued by the editors of this volume<sup>47</sup> Türkiye's experience should rather be taken as a lesson learned. The EU authorities should act wisely and be prepared for the reality that they would face in the near future.

## 5. Conclusion

The EU TPD establishes a regime of exception applicable in mass influx situations where return to the country of origin is not possible while efficient operation of the asylum system – due to the mass influx – is not feasible. This does not undermine the application of the 1951 Convention as it guarantees access to asylum any time. TP serves as an interim solution until an appropriate long-term response could be developed. However, once a clear maximum duration is set for the termination of TP, preparation and planning for the way out should also start well before such a deadline. Because termination of the TP does not, in and by itself, mean the end of the protection needs and is not sufficient to conclude that safe and dignified return is possible. Therefore, based on the lesson learned from Türkiye, in their plan, the EU authorities should also consider whether Ukrainians would be granted *prima facie* international protection status, should go through individual RSD or provided with long-term residence permits in the Member States. Time will show which of these option/s will be implemented by the EU authorities.

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<sup>47</sup> Sergio Carrera and others, 'the EU Grants Temporary Protection for people Fleeing War in Ukraine: Time to rethink unequal solidarity in EU asylum policy' in this collection.

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com/3ae68cfc0/progress-report-informal-consultations-provision-international-protection.html> accessed 1 December 2022

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## Case

*Akkad v. Turkey*, App no 1557/19 (ECHR, 21 June 2022)



# **Section V**

The EU Response  
to Ukrainian  
Displacement  
in Light of the  
Principles of Non-  
discrimination,  
Solidarity and  
Justice

# Chapter 20

## Temporary Protection for Ukrainians: Learning the Lessons of the 1990s?

Dr Joanne van Selm\*

### 1. Introduction

On 4 March 2022, a quite exceptional, revolutionary and original way for Europe to approach arrivals from a major displacement crisis in a neighbouring state was activated. The Council's decision<sup>1</sup> to implement the EU's 2001 Temporary Protection Directive<sup>2</sup> gave life to a form of temporary protection which until then had only existed on paper, although the concept of 'temporary protection' (or 'temporary refuge' and similar terms) has been

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\* Independent Policy Researcher.

- 1 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.
- 2 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.

part of refugee policy for decades.<sup>3</sup>

The initial impact, combined with existing visa free travel,<sup>4</sup> has been to allow Ukraine's displaced persons, primarily women, children and the elderly, to be welcomed and supported,<sup>5</sup> in stark contrast to European experiences with the majority of refugee arrivals<sup>6</sup> over recent years and decades. It has also, as intended, provided a moment of pause for authorities. Although they need to deal with the practical aspects of sheltering millions of refugee arrivals within a matter of days, they have not had to try to start processing individual asylum applications. From a policy and practical perspective, this has surely been to the immediate advantage of both refugees and the EU states.

Many<sup>7</sup> have pointed to the Directive's contextual background<sup>8</sup> in the 1990s Balkans conflict and displacement crises, sometimes<sup>9</sup> erroneously suggesting the same form of protection was used then. This chapter will compare current the temporary protection methodology to its 1990s predecessors.

The temporary protection of the 1990s in fact took a vastly different approach than that encapsulated in the Directive. The policy and practical lessons learned from handling displacements resulting from those European conflicts and the intention to do it better if there were to be a next time underpin the broad Directive. In particular, the insight that temporary protection should not be an alternative to refugee status (as it had been cast during the 1990s) but an administrative prelude<sup>10</sup> to the application of the Convention

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3 Deborah Perluss and Joan F. Hartman, 'Temporary Refugee: Emergence of a Customary Norm' [1986] 26 Va. J. Int'l L. 551.

4 ETIAS, 'ETIAS for Ukrainians the European Travel Authorisation for Ukrainian Citizens' <<https://www.etiasvisa.com/etias-requirements/ukrainians>> accessed 1 December 2022.

5 UNHCR, 'Poland welcomes more than two million refugees from Ukraine' (18 March 2022) <<https://www.unhcr.org/news/press/2022/3/6234811a4/poland-welcomes-million-refugees-ukraine.html>> accessed 1 December 2022.

6 Jacob Poushter, 'European opinions of the refugee crisis in 5 charts' (Pew Research Center, 16 September 2016) <<https://www.pewresearch.org/fact-tank/2016/09/16/european-opinions-of-the-refugee-crisis-in-5-charts/>> accessed 1 December 2022.

7 Jessie Butchley, 'European Union: What is The European Union Temporary Protection Directive?' (7 March 2022) <<https://resources.envoyglobal.com/blog/what-is-the-european-union-temporary-protection-directive>> accessed 1 December 2022.

8 Monika Pronczuk and Dan Bilefsky, 'The E.U. is expected to grant blanket protection to Ukrainian refugees' *The New York Times* (2 March 2022).

9 *ibid.*

10 Joanne van Selm, 'Temporarily Protecting Displaced Persons or Offering the Possibility to Start a New Life in the European Union' [2001] *European Journal of Migration and Law* 23.

caught the interest of policy makers, and is a major intention of Directive. The form and content of temporary protection being offered to Ukrainians now is conceptually, practically and motivationally quite different from anything offered to former-Yugoslavs, as will be elaborated below. In particular, temporary protection during the Balkan crises could be characterized as reactive, and a reluctant alternative intended to be less generous than asylum. The activation of the directive in 2022 is a proactive measure, welcoming and offering immediate protection and relative stability to displaced Ukrainians. Whereas the temporary protection of the 1990s was focused on return, the focus in 2022 is on supporting the displaced – whether they need to remain long-term, can return or will move on is a matter of later concern.

The major lesson of the 1990s which underlies the 2001 Directive is that Temporary Protection in Europe should be about granting protection to those who seek it, and a strong, organized policy approach that recognizes that asylum systems are not geared up to assess sudden massive numbers of claims. In the Directive, and the practice in 2022, temporary protection no longer means an undercutting of protection standards for people who might well qualify as refugees or with subsidiary protection. Temporary protection, as devised in the Directive, gives breathing space, for governments and for displaced persons, with essential rights guaranteed, while both can assess and ready themselves for how the situation might unfold.

Below, I will address the motivational points of comparison between then and now. After setting out some contextual notes, I will characterize the manifestations of temporary protection through the three phases of the former-Yugoslav displacements, and the Directive as drafted in 2000/2001, to its activation for Ukrainians in 2022. This takes us through the limitations approach to Croats in 1992; the grudging acceptance of, and provisional approach to, Bosnians in 1992-1995; and the emergency stop-gap of 1999, with the mixed arrivals of Kosovars through the Humanitarian Evacuation Programme and those who arrived by their own means. The Directive is pragmatic, if until now hypothetical, an intended win-win for both the refugees and the European states, with beneficiaries granted immediate rights and protections while asylum administration systems are not overwhelmed by sudden significant increases in applications. Due to the brevity of this chapter, the overview will be cursory, with limited illustration of key points. The focus is on policy and approaches, not the legal basis or content of the protection involved.

The major take away is that temporary protection in the EU has changed since the 1990s. The changes are not linked to the altered nature of EU asylum

policy, with its underpinning of harmonization and common approaches through agreed directives. Rather they are the result of the understanding that grew out of the 1990s crises of the need for a singular policy tool for a unique type of situation. One could now posit that had the EU updated the Temporary Protection Directive, as had been planned following a 2016 review,<sup>11</sup> doing so without the immediate hindsight of a major influx from a neighbouring or nearby state might have resulted in a tool that was inadequate to the actual situation now faced from Ukraine.

Temporary protection, in the shape of the directive, is exceptional. That in itself is a major contrast with the way in which the concept was handled in the 1990s. This experience implementing the directive should lead to modifications that maintain the EU's readiness to react to any major situation in which European states are necessarily first responders, and continue to enhance the nature of temporary protection as a policy tool for specific situations, and not as an alternative to Convention or subsidiary refugee protection in the way it was previously applied in the 1990s, but as a complementary measure, alongside the obligations of other Directives.

## 2. Motives

One major difference, motivationally, is that those fleeing former-Yugoslavia were trying to escape the 'ethnic cleansing' of their lands, the fundamental underpinning of the conflicts. European leaders at the time felt this 'cleansing' would appear to be supported through the open encouragement of protection elsewhere<sup>12</sup> in Europe or beyond, or through the granting of asylum, which in spite of the 1951 Convention's cessation clause was typically viewed as a permanent solution.

Those who arrived in EU states were often, as a group, granted a national form of temporary protection. Ukrainians are fleeing an all-out war of aggression, in which civilians appear (early in the conflict, with limited clarity on Russia's aims, or limits) to be not just indiscriminate victims but targets, and which seems to be intended by the aggressor to bring its victims and their country back into some form of greater Russia, a future against which Ukrainians are fighting. The activation of the 2001 Directive grants blanket protection

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11 European Commission, Study on the Temporary Protection Directive (2006) <[https://home-affairs.ec.europa.eu/system/files/2020-09/final\\_report\\_evaluation\\_tpd\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2020-09/final_report_evaluation_tpd_en.pdf)> accessed 11 April 2022.

12 Medina Dzubur, 'Temporary Protection Status: A Yugoslavian Precedent' [2020] 27 *Indiana Journal of Global Legal Studies* 391.

to all Ukrainians (and some non-citizens who were legal residents of Ukraine).

The situation<sup>13</sup> starting in late 2021 in which Belarussian authorities encouraged displaced Iraqis and others to cross the Polish border has surely also motivated quick, unified and supportive action. That was potentially a precursor to ‘weaponizing’ refugees from Ukraine as a threat to Europe, a possibility which had to be met head on with an open welcome to arrivals who are themselves under threat. No such direct challenge occurred in the 1990s. The Temporary Protection Directive meant the EU had a plan ready for precisely this type of situation. This has, in a turn that will surprise many critics, not only allowed the EU to present a united, humanitarian face to this challenge, but also put it out ahead on refugee protection for Ukrainians while the UK,<sup>14</sup> US<sup>15</sup> and others fumble with accommodating these sudden arrivals, or pressure for resettlement, in less flexible systems.

### 3. Context

Throughout the 1990s the European Union was not only dealing with refugee arrivals from former Yugoslavia, but also developing its own very early steps towards harmonization and a Common European Asylum System, and managing the changes and migration-related concerns, indeed fears,<sup>16</sup> of the collapse of Communist power structures in Eastern Europe and the former Soviet Union. There was an internal jockeying for position on asylum and migration policy, as it was in its infancy as an EU area of harmonization. The EU was creating its structures in a changed environment, in which it was becoming a regional power. In 2022, the EU has made a concerted effort to demonstrate its unity, and indeed to project power, on all aspects of the approach not only to the humanitarian crisis in Ukraine, but to Russia’s aggression. In spite of many other displacement crises around the world, the EU is, and has to be, laser

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13 Associated Press, ‘Migrants stranded, freezing cold at Belarus-Poland border’ *Nbc News* (29 December 2021) <<https://www.nbcnews.com/news/world/migrants-stranded-freezing-cold-belarus-poland-border-rcna10285>> accessed 1 December 2022.

14 Peter Walker, ‘Tory rebels join Labour in opposing law change that could see refugees jailed’ *The Guardian* (21 March 2022).

15 Mark Hetfield, ‘Hetfield in Washington Post: Bring Ukrainian Refugees to U.S. the Right Way’ (HIAS, 21 March 2022) <<https://www.hias.org/blog/hetfield-wp-bring-ukrainian-refugees-us-right-way>> accessed 1 December 2022.

16 Dietrich Thränhardt, ‘European migration from east to west: Present patterns and future directions’ [2010] *Journal of Ethnic and Migration Studies* 227.

focused on Ukraine as an existential matter for Europe's future. The need for the EU to be united in 2022 goes well beyond issues of forms of protection for displaced persons, or any suggestions there are implied hierarchies of refugees. Russia's aggression towards Ukraine risks destabilizing Europe and current regional security structures in their entirety. The EU must support displaced Ukrainians, it has no alternative.

A second, related, point, which the two situations on which I am reflecting have in common, but which is (ethically) contested, is geography. The Temporary Protection Directive is a 'first responder' measure. Although none of the affected former Yugoslav republics directly bordered on a contemporary EU Member State in the 1990s, EU states were immediate neighbours to Yugoslavia. Ukraine is bordered by four current EU Member States. The EU, is by necessity, the location of first response – or one could say, as the EU might describe other continents: the EU is the region of origin. There have been other situations, most prominent among them Europe's 'Migration Crisis' of 2015-16, in which there were calls<sup>17</sup> for the implementation of the Temporary Protection Directive.

The question of 'why activate the TP Directive now, but not in 2015' has been posed by many<sup>18</sup> and responses often include a sense that racism or discrimination is at play. That could be the case, or at least part of the answer, whether directly for some member states, or with fears of a backlash from increasingly present right-wing political parties and their followers. However, I would suggest that a major reason for which the directive was not applied in 2015 was that the situation was not an immediate displacement crisis requiring the urgent protection response of direct neighbours. There is a political logic to differing reactions to the immediate displacement of people from a neighbouring state and to the secondary migration of people who, in many cases, were displaced over the course of five years but received limited protection or solution opportunities in other, geographically closer countries (even if a country of first asylum, Turkey, borders the EU). While there are legal and moral obligations to all refugees, there is, of course, a cold hard element of

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17 Olga Mitrovic, 'Used during the Balkan crises, the EU's Temporary Protection Directive may now be a solution to Europe's refugee emergency' (LSE, 22 December 2015) <<https://blogs.lse.ac.uk/europpblog/2015/12/22/the-eus-temporary-protection-directive-as-a-solution-to-europes-refugee-crisis/#Author>> accessed 1 December 2022.

18 Meltem Ineli-Ciger, '5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022' (EU Immigration and Asylum Law and Policy, 7 March 2022) <<https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>> accessed 1 December 2022.

‘who else could possibly protect them?’ or ‘where else could they possibly go?’ As such, activation could be a result of urgent political decision making in the face of an immediate, proximate crisis in which the EU itself, and most of its Member States as NATO members, has a direct and existential stake. Geography necessarily<sup>19</sup> underpins many decisions in war as in life.

## 4. Temporary Protection 1992: Limits on early former Yugoslav arrivals

In the early 1990s, when former Yugoslav ‘refugees’<sup>20</sup> started to arrive in European Community (at the time) member states, they faced states focused on erecting barriers to asylum seeker arrivals. European governments had started to realise that in the absence of broad immigration admission channels, the one legitimate way for a person to arrive and remain was to request asylum. In spite of, or even because of, the conflict between Serbia and Croatia, and emerging conflict in Bosnia, those people arriving in various member states were not viewed as refugees<sup>21</sup> in the Convention sense. The focus was on carefully defining, Convention refugee status as a scarce resource, and these people, it was argued, did not fit the individualised refugee definition based on persecution, not war. During the Cold War the people western European nations focused on as refugees were those fleeing Communist countries. Their arrival was limited by the restrictions on exit in the states which they might try to leave. Now they had become the most likely irregular migrants whose arrival, en masse, was feared by governments across western Europe.

In that context, temporary protection was developed as a form of limitation. It offered, by design, a lesser status than asylum: fewer rights, limited duration of stay. It was intended almost as a deterrence, a statement that these people were not refugees, and not expected to stay, and would at best be tolerated. The statuses granted, in terms of rights, residence and reception, differed significantly from one European country to another. Temporary protection in this context essentially signalled ‘you’re here, we can’t send you back, but you’re not welcome’.

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19 Haili Blassingame, ‘Tim Marshall explains the geography of war’ (1A, 14 March 2022) <<https://the1a.org/segments/tim-marshall-explains-the-geography-of-war/>> accessed 1 December 2022.

20 Mirjana Morokvasic, ‘Yugoslav Refugees, Displaced Persons and The Civil War’ [1992] 11 Refugee 3.

21 Albrecht Schnabel, ‘Undermining the Refugee Convention: Germany’s Civil War Clause and Temporary Asylum’ [1994] 14 Refugee 30.



## 5. Temporary Protection mid-1990s: a provisional, grudging acceptance of Bosnians

Temporary protection evolved somewhat during the 1990s. For some European governments it became the standard. Whereas Convention status was like the ‘gold medal’, preserved for a few, limited and very carefully defined cases, temporary protection was a kind of participation certificate. It manifested as an almost grudging acceptance: towards Bosnians in particular, it was a statement of “well, if you make the journey here, we might have to let you stay because we cannot send you back, but you should really have stayed there or closer to home” (mostly in ‘safe areas’ which proved anything but, or in immediately neighbouring and not yet EU states).

There were continued limitations on rights, reception and residence duration in most European countries, which still took divergent approaches, and still focused on limitations and restrictions.<sup>22</sup> Temporary protection sometimes became a form of provisional protection, a kind of stepping stone to make sure that there really was a longer lasting protection need, as was the case, for example, in the Netherlands.<sup>23</sup>

## 6. Temporary Protection 1999: an emergency stop gap for Kosovars

The situation surrounding displacement of Kosovars in 1999 was fundamentally different than it had been for Bosnians in the earlier 1990s, even if the main driving actor (Slobodan Milosevic) and cause (Serb nationalism) were common factors. The Serb forces had started to forcibly displace Kosovar Albanians in Spring 1999, and to kill many. NATO forces intervened to stop this atrocity viewed as undermining the security of the NATO region, even if there were no direct attack on any NATO member state. Hundreds of thousands of Kosovars continued to flee the Serb army’s continued attacks, crossing the borders into Albania and (now Northern) Macedonia. The Skopje govern-

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22 Joanne Thorburn, ‘Transcending Boundaries: Temporary Protection and Burden-sharing in Europe’ [1995] 7 *International Journal of Refugee Law* 459.

23 Joanne van Selm, ‘Asylum in the Netherlands: A Hazy Shade of Purple’ [2000] 13 *Journal of Refugee Studies* 74.

ment requested assistance as its own ability to shelter the number of arrivals faltered, and it feared a shift in the ethnic balance<sup>24</sup> within North Macedonia, which had narrowly avoided its own conflict during the 1990s.

The resulting assistance took the form of a Humanitarian Evacuation Programme, with over 50,000 Kosovars flown out of North Macedonia in a few weeks in April/May 1999. These evacuees were, as a group, granted national forms of temporary protection in EU states (some were resettled as refugees to the US and Canada). This could be characterized as an emergency stop gap, which covered not only evacuees but also those who arrived on their own. The lessons of HEP were primarily about solidarity (with a neighbouring state, as well as across the EU) and managing the arrivals of people in need of protection, which contributed to thinking on re-establishing resettlement programmes in the EU.

The absence of significant returns by Bosnians was part of the reason for which there was a lack of generosity in Member States' approaches to Kosovars who arrived spontaneously, although many had further developed temporary protection policies in the intervening years. The fact was that temporary protection was still meant as a deterrent and restriction. It also meant a focus on return.

There was popular support to do something for Kosovar refugees – NATO countries, overlapping with many EU Member States, had intervened in the conflict. Hostility towards asylum seekers was suddenly, and temporarily reversed, for this case only. Seeing images of people geographically nearby,<sup>25</sup> to whom they could relate, EU populations generally, and briefly, opened their hearts. Governments remained reluctant,<sup>26</sup> however, seemingly aware that the impact of the imagery might not last long, and that a kind of social selfishness would prevail over the longer-term.

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24 Stuart J. Kaufman, 'Preventive peacekeeping, ethnic violence, and Macedonia' [1996] 19 *Studies in Conflict & Terrorism* 229.

25 Matthew J Gibney, 'Kosovo and beyond: popular and unpopular refugees' (Forced Migration, 1999) <<https://www.fmreview.org/kosovo/gibney>> accessed 1 December 2022.

26 Joanne van Selm (ed), *Kosovo's Refugees in the European Union* (Bloomsbury Academic 2000) 239.

## 7. Links to and movements towards European Union Asylum Policy

A common feature of all of the Balkan cases is that there was limited EU harmonization or unity. The 1992 Maastricht Treaty on European Union,<sup>27</sup> which initiated ‘harmonization’, was really more a ‘getting to know you’ phase and coincided with the earlier Balkan examples of the use of temporary protection. In 1999 (Kosovo), the 1997 Amsterdam Treaty<sup>28</sup> was just entering into force and the Finnish Presidency meeting in Tampere setting out the first work programme for the Common European Asylum System was in reality the first move towards more concrete harmonization.

The realization that a European approach to temporary protection was needed came at the conjunction in time of the Tampere work programme<sup>29</sup> to develop the CEAS and the major case of Kosovo, focusing attention of leaders on how working together on managing protection would be to the advantage of most, if not all. The tension was always on the methods of sharing responsibility, be it in terms of relocation or of financial support.

## 8. The 2001 Temporary Protection Directive

The Temporary Protection Directive was the first piece of EU legislation on asylum to be agreed. None of the other elements of the CEAS (e.g. on qualification, reception), which have since been reviewed at least once, were in place. There was the Dublin Convention, but not yet a regulation determining the state responsible for assessing an asylum claim.

In a sense, therefore, by the time of its first implementation in 2022, the directive was somewhat anachronistic. It had been due for revision, and indeed the Commission had proposed in the 2020 New Pact on Migration and Asylum<sup>30</sup> to repeal the directive and proposed a new regulation to address

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27 Treaty on European Union [2008] OJ C 191.

28 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340.

29 European Union: Council of the European Union, ‘Presidency Conclusions, Tampere European Council 15-16 October 1999’ (16 October 1999) <[https://www.europarl.europa.eu/summits/tam\\_en.htm](https://www.europarl.europa.eu/summits/tam_en.htm)> accessed 1 December 2022.

30 Commission, ‘Communication From the Commission, on a New Pact on Migration and Asylum’ COM(2020) 609 final.

crisis situations.<sup>31</sup> That initiative was in many ways reactive to events of 2015. However, it is possible that it proves optimal for the EU, the Member States and Ukrainians that the Directive had remained untouched. A primary hypothesis would be that if revised, the provisions of the Directive would have been set more in line with other EU directives in 2022, focused still on an unknown crisis that might require such a measure, and with 2015's 'Migrant Crisis' the most recent major example – one which the EU did not choose to address with the existing temporary protection directive, itself a reflection on the last time there was a displacement crisis from a neighbouring country.

Temporary protection as set out in the directive was no longer about restricting access to asylum. Rather, it was about upholding the integrity of asylum systems in the case of mass influx, while accepting admissions as inevitable due to the nature and location of a major 'refugee' producing situation. Indeed, in order to make temporary protection under the directive at least as attractive for individuals as applying for asylum, which of course they have the right to do, the entitlements and rights granted to beneficiaries are closer to those of people with refugee or subsidiary protection status than to those of asylum seekers. Beneficiaries of temporary protection under the directive, if and when activated, can work, study, reside in any EU country.

## 9. Temporary Protection 2022: The Welcoming Approach to Ukrainians

Following activation of the Temporary Protection Directive for Ukrainians on 4 March 2022, EU Member States have been able to tell people arriving that they are welcome, that they have access to several rights,<sup>32</sup> including legal residence, healthcare, accommodation, education and employment opportunities, and that they will have this protection for at least one year. In practice, in the initial couple of weeks, the decision to activate the directive has meant the focus can be on the refugees, while behind the scenes the European Commis-

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31 Committee on Civil Liberties, Justice and Home Affairs, 'Draft Report, on the proposal for a regulation of the European Parliament and of the Council addressing situations of crisis in the field of migration and asylum' (COM(2020)0613 – C9-0308/2020 – 2020/0277(COD)).

32 Commission, 'Information for people fleeing the war in Ukraine' <[https://eu-solidarity-ukraine.ec.europa.eu/information-people-fleeing-war-ukraine\\_en](https://eu-solidarity-ukraine.ec.europa.eu/information-people-fleeing-war-ukraine_en)> accessed 1 December 2022.

sion and Member States prepare operational guidelines<sup>33</sup> and ready systems for registration and the necessary administrative and legal actions associated with residence and protection.

Apart from the actual content of protection in the directive or driven by governments, people in all EU Member States have been offering rooms and housing to arriving Ukrainians. The situation is not without problems: the sheer number of, and chaos of, arrivals has left openings for smugglers and traffickers<sup>34</sup> to prey on people, for example. This is particularly the case as those arriving are primarily women, children and seniors, as able men aged 18-60 are required by the Ukrainian authorities to remain and defend the country. The Directive applies to certain non-citizens also present in Ukraine at the time of the Russian invasion and in need of protection, reacting to some initial instances of apparent discrimination.<sup>35</sup>

The decision to apply the directive grants residence and other rights for an initial year (to 4 March 2023) extendable by two consecutive periods of six months and another year, to make three years in total. National variations on the minimum measures enacted by the decision can take place. Some of these, linked to existing national legislation, might make the actual form that temporary protection takes in some states closer to the temporary protection of the past. But the directive itself, as an EU wide action and all that entails, makes this reactive protection package more proactive and collective than it has ever previously been. The Commission<sup>36</sup> has called for solidarity and transparency, and is pulling together the means to make implementation feasible and well-organized. Time will tell how successful this action is.

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33 Commission, 'Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection' (2022/C 126 I/01).

34 UNICEF, 'Children fleeing war in Ukraine at heightened risk of trafficking and exploitation' (19 March 2022) <<https://www.unicef.org/press-releases/children-fleeing-war-ukraine-heightened-risk-trafficking-and-exploitation>> accessed 1 December 2022.

35 Lorenzo Tondo and Emmanuel Akinwotu, 'People of colour fleeing Ukraine attacked by Polish nationalists' *The Guardian* (2 March 2022) <<https://www.theguardian.com/global-development/2022/mar/02/people-of-colour-fleeing-ukraine-attacked-by-polish-nationalists>> accessed 1 December 2022.

36 Ylva Johansson, '#TimeToDeliverMigrationEU No.25 - After historic decision on Temporary Protection – the way forward' (*European Commission*, 21 March 2022) <[https://ec.europa.eu/commission/commissioners/2019-2024/johansson/blog/timetodelivermigrationeu-no25-after-historic-decision-temporary-protection-way-forward\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/johansson/blog/timetodelivermigrationeu-no25-after-historic-decision-temporary-protection-way-forward_en)> accessed 1 December 2022.

## 10. Conclusion

On 4 March 2022, a quite exceptional, revolutionary and original way for Europe to approach arrivals from a major displacement crisis in a neighbouring state was activated. Thanks to the Temporary Protection Directive, agreed as a first step in a Common European Asylum System, one that remained hypothetical for over two decades, the EU was ready to act with unity. That alone is a stark contrast with any temporary protection policy? implemented in Europe in the 1990s.

Temporary protection, in the shape of the directive, is an exceptional measure, another major contrast with the way in which the concept of temporary protection was handled in the 1990s. The experience implementing the directive now should lead to modifications that maintain the EU's readiness to react to any major situation in which European states are necessarily first responders, and continue to enhance the nature of temporary protection as a policy tool for specific situations leading to more entrenched status and protection, rather than as an alternative to Convention or subsidiary refugee protection.

Implementation of the directive will surely not be without problems. Nor will it, as a policy tool, resolve all the difficulties that could arise in offering protection to those displaced by the invasion of Ukraine. We can hypothesise that when the time comes, the EU might reflect on its response to this displacement crisis, relating it to both the 1990s crises and reactions in 2015, and surmise that one 'crisis' instrument will not fit all possible emergencies or crisis models. Whatever the resulting and revised emergency instrument(s), urgent reaction plans, including temporary protection, are clearly a necessary tool among refugee policy instruments that enable states to maintain stability and solidarity in their response, while ensuring access to protection and status for all who need them.

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# Chapter 21

## Preferential, Differential or Discriminatory? EU Protection Arrangements for Persons Displaced from Ukraine

Dr Julia Kienast\*, Dr Nikolas Feith Tan\*\* and  
Prof Jens Vedsted-Hansen\*\*\*

### 1. Introduction

The recent mass displacement, caused by the Russian invasion of Ukraine on 24 February 2022,<sup>1</sup> triggered a response that surprised many observers of EU migration and asylum policy. Instead of following the long-lasting trend

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\* Postdoc Researcher at Aarhus University.

\*\* Senior Research Fellow, Danish Institute for Human Rights.

\*\*\* Professor, Aarhus University.

1 Silvia Aloisi and Frank Jack Daniel, 'Timeline: The events leading up to Russia's invasion of Ukraine' *Reuters* (1 March 2022) <<https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine-2022-02-28/>> accessed 1 December 2022.

of containment and deterrence at the external borders, the EU and its Member States kept borders open to persons fleeing the armed conflict in Ukraine. In particular, EU Member States agreed at long last to activate the Temporary Protection Directive (TPD)<sup>2</sup> to grant fast and easy access to protection in the EU for Ukrainians. However, the open border policy did not apply equally<sup>3</sup> to all persons arriving at the external borders as differentiations due to nationality, residence status as well as gender and race have been reported.<sup>4</sup> Moreover, beneficiaries under the TPD experience differential treatment in comparison to asylum seekers, refugees and subsidiary protection holders under the EU asylum *acquis*.

In light of these emerging policies and practices, this chapter provides a legal analysis investigating the EU's preferential, differential or even discriminatory treatment afforded those displaced from Ukraine and asylum seekers and refugees from other parts of the world. This chapter examines these questions with regard to access to the EU territory, secondary movements, the scope of beneficiaries, asylum procedures and standards of treatment. As it will appear from the following, due to the evolving EU protection responses to the Ukraine crisis, the examination is preliminary, and the conclusions should generally be considered tentative.

## 2. The principle of non-discrimination

Most national, regional and international human rights regimes include the principle of non-discrimination, and, for this reason, the principle is even considered to constitute *jus cogens*.<sup>5</sup> The prohibition of discrimination demands that people in comparable or 'relevantly similar' situations must be treated equally unless there are objective and reasonable justifications for the differential treatment.

2 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212.

3 Sergio Carrera and others, 'The EU grants temporary protection for people fleeing war in Ukraine: Time to rethink unequal solidarity in EU asylum policy' in this collection.

4 United Nations, 'UNHCR chief condemns 'discrimination, violence and racism' against some fleeing Ukraine' (21 March 2022) <<https://news.un.org/en/story/2022/03/1114282>> accessed 1 December 2022.

5 Marie-Bénédicte Dembour, 'The Voice of the Inter-American Court: Equality as *Jus Cogens* (Advisory Opinions 16/99 and 18/03)', *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford 2015) pp. 282-312.

Such protections can be found in a range of international and regional treaties, including Article 14 ECHR, Article 21 EUCFR, Article 2(2) ICERD, Article 3 ICRSR, Article 26 ICCPR and Article 2(2) ICESCR. These provisions usually provide a list of protected grounds which may *not* be used to justify differential treatment, such as sex, race and national origin. Under Article 14 ECHR, for example, the test for discrimination comprises two limbs: whether there has been a difference in treatment of persons in analogous or relevantly similar situations; and whether such differential treatment is objectively justified in pursuing a legitimate aim in a manner that is reasonably proportionate to that aim.

At the same time, preferential treatment of certain categories of non-citizens is a widely accepted norm in the context of migration control. Although it is generally not required to treat non-citizens equally to citizens, there are significant limitations as regards the permissibility of differential treatment of non-citizens staying in the country, and discrimination amongst foreigners<sup>6</sup> based on ethnicity, race or national origin is prohibited. Article 14 ECHR further includes an open category of “any other status”, which the ECtHR has recognized to include immigration status (here<sup>7</sup> and here.<sup>8</sup>). These cases concerned the discrimination of lawfully staying persons in conjunction with their rights under Article 8 ECHR.

The EU Council Decision<sup>9</sup> introducing temporary protection for Ukrainians illustrates this tension between apparently opposing legal principles. It provides for clearly preferential treatment for Ukrainian citizens and their family members vis-a-vis protection seekers from previous conflicts, such as Syrians in 2015 or Afghans in 2021.<sup>10</sup> Hence, this raises questions of preferential treatment of Ukrainians and discrimination against other categories of forced migrants who could as well have been offered protection on a

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6 Sergio Carrera and others, ‘The EU grants temporary protection for people fleeing war in Ukraine: Time to rethink unequal solidarity in EU asylum policy’ in this collection.

7 *Hode and Abdi v UK* App no 22341/09 (ECHR, 6 February 2013).

8 *Bab v UK* App no 56328/07 (ECHR, 27 December 2011).

9 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

10 Meltem Ineli-Ciger, ‘5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022’ (EU Immigration and Asylum Law and Policy, 7 March 2022) <<https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>> accessed 1 December 2022.

group basis. In addition, non-Ukrainian third-country nationals and stateless persons, who were legally residing in Ukraine until the invasion, are not equally covered by the Council Decision. Russian deserters, draft evaders, dissidents and others fleeing the oppressive Russian regime, who may also be considered victims of the current armed conflict, are likely to face severe obstacles in accessing protection in the EU. What is more, this apparently discriminatory approach is amplified through some politicians emphasising that Ukrainians must be helped because they are European Christians.<sup>11</sup>

### 3. Access to EU territory

With regards to access to the EU territory, Ukrainians had an easier starting point than forced migrants from other countries already before the activation of the TPD. Since 2017,<sup>12</sup> Ukrainian nationals have been exempt<sup>13</sup> from visa requirements when crossing the external borders of the EU, provided they hold a biometric passport. This visa-free regime not only permits Ukrainians to enter the EU, but also enables them to stay and travel in the Schengen area for up to 90 days in any 180-day period. Such a visa exemption is a recognised instrument of selective immigration control and cannot in and of itself be considered incompatible with the principle of non-discrimination. This kind of selectivity may generally constitute lack of comparability with nationals of other states, hence meaning that the prohibition of discrimination is not applicable in the first place.

This seems to be supported by the fact that the visa exemption for Ukrainians resulted from the visa liberalisation dialogue<sup>14</sup> that had been conducted

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11 Joshua Berlinger, 'Does the Ukraine exodus reveal a 'shocking distinction' on refugees in some parts of the EU?' *Euronews* (1 March 2022) <<https://www.euronews.com/2022/03/01/does-the-ukraine-exodus-reveal-a-shocking-distinction-on-refugees-in-some-parts-of-the-eu>> accessed 1 December 2022.

12 European Commission, 'European Commission welcomes the Council adoption of visa liberalisation for the citizens of Ukraine' (Brussels, 11 May 2017) <[https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_17\\_1270](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_1270)> accessed 1 December 2022.

13 Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) [2018] OJ L 303/39.

14 European Commission, 'Visa liberalisation with Moldova, Ukraine and Georgia' (20 December 2017) <[https://home-affairs.ec.europa.eu/policies/international-affairs/collaboration-countries/visa-liberalisation-moldova-ukraine-and-georgia\\_en](https://home-affairs.ec.europa.eu/policies/international-affairs/collaboration-countries/visa-liberalisation-moldova-ukraine-and-georgia_en)> accessed 1 December 2022.

between the EU and the ‘Eastern Partnership’ countries Moldova, Georgia and Ukraine within the framework of European Neighbourhood Policy.<sup>15</sup> Based on certain benchmarks related to document security, border management, migration and asylum, public order and security and fundamental rights, this policy process led to the visa exemption for nationals of the three countries in 2014 and 2017, respectively. As regards Ukraine specifically, this was preceded by agreements concluded with the EU in 2007<sup>16</sup> and 2012<sup>17</sup> on the facilitation of the issuance of visas. Thus, while constituting selective immigration policy, the visa-free regime was introduced by the EU as an element of a policy process towards neighbouring states, based on wider considerations of international relations. As such, preferential treatment of Ukrainian nationals in terms of visa-free access to and travel within Member States can be considered legitimate.

Nonetheless, visa-free and visa-required third-country nationals can be considered being in ‘relevantly similar situations’ in specific contexts and thus protected by the prohibition of discrimination. In principle, Article 14 ECHR applies insofar as there are accessory ECHR rights at stake. That was undoubtedly the case for people seeking admission to EU territory in order to escape the dangers flowing from Russian military attacks, as the circumstances would be likely to fall within the scope of Articles 3 and 8 ECHR and could further raise questions under Article 4 ECHR Protocol 4. It therefore does not automatically follow from the above that the various forms of differential treatment that occurred at the external EU borders after the Russian invasion of Ukraine were falling outside the scope of Article 14 ECHR (and other non-discrimination norms) altogether, simply due to lack of comparability as a result of the visa exemption.

By way of example, reported instances of blatant discrimination in the *de facto* exercise of control at Ukraine’s border with Poland and possibly other

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15 European Commission, European Neighbourhood Policy and Enlargement Negotiations, ‘European Neighbourhood Policy What is it?’ <[https://neighbourhood-enlargement.ec.europa.eu/european-neighbourhood-policy\\_en](https://neighbourhood-enlargement.ec.europa.eu/european-neighbourhood-policy_en)> accessed 1 December 2022.

16 Agreement between the European Community and Ukraine on the facilitation of the issuance of visas - Protocol - Declaration - Joint Declarations [2007] OJ L 332.

17 Agreement between the European Union and Ukraine amending the Agreement between the European Community and Ukraine on the facilitation of the issuance of visas [2013] OJ L 168/11.

external EU borders (as described here<sup>18</sup> and here<sup>19</sup>) appear to have been undoubtedly in violation of prohibitions of discrimination in both international law and EU law. Furthermore, as regards Russians deserting the army or escaping oppression, there would arguably be an obligation on EU Member States to grant visas in order to compensate the negative distinction caused by the visa requirement imposed on them in contrast to Ukrainian victims of the conflict. In addition, obstacles<sup>20</sup> for Ukrainians without biometric passports to crossing external (or internal) EU borders seem to have been unjustified differences in treatment amounting to discrimination in certain cases. For instance, elderly people, children, or disabled persons are unable to meet the formal requirement to benefit from visa-free travel and that requirement was not sufficiently modified in practice by implementing the Commission's border management guidelines.<sup>21</sup> Arguments for a potential violation of Article 3 in conjunction with Article 14 ECHR might also dismantle the argument of incomparability between Ukrainians and others displaced by generalised violence and leaving in a mass exodus, for whom the TPD was not activated, such as Syrians and Afghans.

## 4. Secondary movements

As a consequence of the visa exemption examined above, Ukrainian nationals can also move freely across internal borders in the Schengen area, as opposed to ordinary protection seekers who would be legally prevented from 'secondary movement' by the interaction between the Schengen Borders Code<sup>22</sup> and

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18 Meltem Ineli-Ciger, '5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022'.

19 Carrera and others, 'The EU grants temporary protection for people fleeing war in Ukraine: Time to rethink unequal solidarity in EU asylum policy' in this collection..

20 Steen A. Jørgensen, 'En særlig gruppe ukrainske flygtninge må droppe at komme ind i Danmark' *Jyllands-Posten* (14 March 2022) <<https://jyllands-posten.dk/inland/ECE13824429/en-saerlig-gruppe-ukrainske-flygtninge-maa-droppe-at-komme-ind-i-danmark/>> accessed 1 December 2022.

21 Commission Communication Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders (2022/C 104 I/01, 2 March 2022) [2022] OJ C 104 I.

22 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77.



the Dublin Regulation.<sup>23</sup> While the Dublin Regulation will, according to Article 18 TPD, apply to beneficiaries of temporary protection who avail themselves of the right to lodge an application for asylum down the track (cf. Articles 17 and 19 TPD, see below), those who remain exclusively within the TPD scheme will be free to choose the Member State in which they enjoy such protection. This is the intended result of Member States' undertaking not to apply Article 11 TPD, normally providing for the obligation to take back persons with temporary protection in case of their unauthorised movement to another Member State, as reflected in the statement referred to in recital 15 of the Council Decision.<sup>24</sup>

The permissibility of this preferential, and indeed exceptional, treatment of displaced Ukrainians falling within the TPD may largely depend on the rationale behind the commitment to what has been described as a free choice of the country of destination.<sup>25</sup> Whether or not this right to choose the country of protection will remain acceptable to Member States in general, there is little doubt that it was introduced with a view to sharing responsibilities for protection of the displaced with the frontline Member States bordering Ukraine in a situation of mass influx. Thus, somewhat ironically, this measure of 'dual solidarity'<sup>26</sup> was adopted not only as a sign of solidarity and respect for the displaced persons' agency and personal integrity, but also in order to alleviate the protection burdens of frontline Member States, among which some have previously adamantly resisted regulatory attempts towards intra-EU solidarity.

This rationale would seem to provide sufficient justification for the preferential treatment compared to asylum seekers inasmuch as it is based on con-

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23 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180.

24 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

25 Daniel Thym, 'Temporary Protection for Ukrainians: the Unexpected Renaissance of 'Free Choice'' (EU Immigration and Asylum Law and Policy, 7 March 2022) <<https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/>> accessed 1 December 2022.

26 Daniela Vitiello, 'The Nansen Passport and the EU Temporary Protection Directive: Reflections on Solidarity, Mobility Rights and the Future of Asylum in Europe' (2022) 7(1) European Papers <<https://www.europeanpapers.eu/en/europeanforum/nansen-passport-eu-temporary-protection-directive-solidarity-mobility-rights-future-asylum>> accessed 1 December 2022.

siderations with clear relevance to protection, and the distinction can hardly be considered disproportionate to the weight of the aim pursued. In addition, the Commission<sup>27</sup> has indicated that once a residence permit has been issued by one Member State under the TPD, it must expire and be withdrawn in accordance with ‘the spirit of’ Articles 15(6) and 26(4) TPD if the beneficiary subsequently moves to another Member State and receives another temporary protection residence permit there. Thus, the right of ‘free choice’ is not unlimited.

In assessing the proportionality of this differential treatment, it should also be kept in mind that the agency of people exercising ‘free choice’ may in practice enable them to move away from Member States with insufficient protection standards, whether such standards are at variance with those laid down in the TPD or in violation of fundamental rights, albeit formally in line with the TPD. From a fundamental rights perspective it might seem hard to argue that differential treatment serving this purpose should be considered inappropriate, even if it reflects a distinction between various categories of protection beneficiaries.

## 5. Scope of beneficiaries

Pursuant to Article 2(1) of the Council Decision<sup>28</sup> activating the TPD, protection is offered to three groups of persons fleeing Ukraine: Ukrainian nationals residing in the country before the date of the Russian invasion; stateless persons, and nationals of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before the same date; and family members of these two groups. Before the war, 82,550<sup>29</sup> stateless persons resided in Ukraine though it is not clear how many of them are eligible for protection under the TPD.

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27 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection (2022/C 126 I/01) [2022] OJ C 126 I.

28 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

29 Chris Nash, ‘Amidst the unspeakable awfulness of the conflict in Ukraine we should not forget the particular protection needs of stateless people’ (European Network on Statelessness, 11 March 2022) <<https://www.statelessness.eu/updates/editorial/amidst-unspeakable-awfulness-conflict-ukraine-we-should-not-forget-particular>> accessed 1 December 2022.

The Council Decision leaves it open to individual EU Member States whether to apply the TPD or ‘adequate protection under their national law’ for a further group of persons, namely stateless persons without refugee status and other third country nationals with permanent residence in Ukraine who are unable to return in safe and durable conditions to their country of origin. A Commission Communication<sup>30</sup> of 21 March 2022 providing operational guidelines for the implementation of the TPD provides that such national protection ‘does not have to entail benefits identical to those attached to temporary protection’ but must extend to certain minimum rights to ensure a dignified standard of living, notably residency rights, access to means of subsistence and accommodation, emergency care and adequate care for minors.

Finally, Article 2(3) of the Council Decision gives Member States the option of applying the TPD to stateless persons and third country nationals with temporary residence in Ukraine who cannot safely return to their country of origin. The extent to which this discretion will be exercised in favour of a broader scope of beneficiaries remains to be seen, though as noted above, there are already reports<sup>31</sup> of ethnic and racial discrimination<sup>32</sup> at the point of access to EU territory, targeted against both persons of non-European background and of Roma background.

## 6. Interaction between the TPD and national asylum systems

A further key question (if not now, then almost certainly in future) is the interaction between the operation of the TPD and national asylum systems. Article 17 TPD provides that ‘persons enjoying temporary protection must be able to lodge an application for asylum at any time’. Article 19 TPD leaves it to Member State discretion as to whether rights under the TPD are to be enjoyed concurrently while an application for international protection is pending and

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30 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection (2022/C 126 I/01) [2022] OJ C 126 I.

31 Daniela Vitiello, ‘The Nansen Passport and the EU Temporary Protection Directive: Reflections on Solidarity, Mobility Rights and the Future of Asylum in Europe’.

32 Carrera and others, ‘The EU grants temporary protection for people fleeing war in Ukraine: Time to rethink unequal solidarity in EU asylum policy’ in this collection.

the Communication<sup>33</sup> of 21 March 2022 notes that Member States can decide that ‘temporary protection may not be enjoyed concurrently with the status of applicant for international protection while their applications are under consideration’.

Time will tell how state practice will evolve in this regard. Given the current political support for generous standards of treatment afforded those fleeing the Ukraine conflict, we anticipate that many Member States will allow for persons under the TPD to maintain their rights during an asylum procedure unless the opposite would be considered necessary to prevent the ordinary asylum procedure from getting overburdened.

Finally, there is the question of whether a person can concurrently hold a residence permit under the TPD and a national asylum system. While the TPD is silent on this question, it does not rule it out and, indeed, the Danish special law expressly provides for the possibility of holding both residence permits concurrently.<sup>34</sup>

However the operation of the TPD plays out, we note that persons under the TPD would seem to be in a protection ‘middle-ground’, generally receiving higher standards of treatment than asylum seekers and lower standards of treatment than beneficiaries of international protection. This makes future access to national asylum systems potentially crucial to ensure the full realisation of rights under the Qualification Directive,<sup>35</sup> as discussed below.

## 7. Standards of treatment

The TPD contains a set of rights for beneficiaries under its scope, such as a residence permit, information on temporary protection, access to the asylum procedure, (limited) access to employment, suitable accommodation or housing,

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33 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection (2022/C 126 I/01) [2022] OJ C 126 I.

34 Bill no. L 145 of 14 March 2022 on temporary residence permits to persons who are displaced from Ukraine, explanatory memorandum pp. 39 and 80. It is to be noted that, due to its opt-out from the Common European Asylum System, Denmark is not bound by the TPD, but the special law (no. 324 of 16 March 2022) in large parts mirrors the TPD.

35 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337.

social welfare, medical care, education for persons under 18 years, family reunification in certain circumstances, banking services, free choice of settling<sup>36</sup> in an EU Member State before the issuance of a residence permit and free movement for 90 days after a residence permit in the host EU country is issued.

These rights are generous compared to the standard of treatment for asylum seekers under EU law. Under the Reception Conditions Directive,<sup>37</sup> asylum seekers also have a right to information, documentation, access to housing, food, clothing, health care, education for minors and (after maximum nine months) access to employment. As discussed above, however, they cannot choose their country of protection and they may not move freely within the EU.

Persons with formally recognised refugee or subsidiary protection status enjoy the right to information, family unity, a renewable residence permit, travel documents, access to employment and to education for minors *en par* with nationals, education for adults *en par* with legal residents, recognition of qualifications, (core benefits of) social welfare and healthcare according to the Qualification Directive.<sup>38</sup>

Hence, the level or quality of the rights provided under the TPD regime seems to lie between those for asylum seekers and those for recognised beneficiaries of international protection granted refugee or subsidiary protection status. However, the TPD is less prescriptive than the two other Directives in this regard, and we lack prior instances of application that would help to make the substance of rights more concrete. It remains to be seen how Member States interpret and apply these TPD obligations in practice, and whether differences in the standards of treatment across Member States may ultimately create push-factors leading to secondary movements beyond what is considered reasonable from an EU perspective and acceptable for receiving Member States.

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36 Daniel Thym, “Temporary Protection for Ukrainians: the Unexpected Renaissance of ‘Free Choice’” in this collection.

37 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180.

38 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337.

## 8. Concluding remarks

The rationale of the various differences in treatment described above may be found, on the one hand, in the fact that Member States already recognised a need for protection for Ukrainians by adopting the Council Decision bringing them within the scope of the TPD, while for asylum seekers this is yet to be determined in an individual examination procedure. On the other hand, the protection need under the TPD is granted in explicitly temporary terms and on a large-scale group basis. Hence, an overarching idea of TPD protection is that EU protection resources must be distributed more broadly and, simultaneously, Member States are given options to support the short-term integration of the beneficiaries of temporary protection in terms of limited access to employment and education.

Similarly, the ‘free choice’ approach under Council Decision activating the TPD sensibly avoids lengthy procedures on the transfer of applicants to other Member States or individualised determination of protection status in face of large-scale arrivals of persons with a perceived temporary need for protection. One could argue that persons granted protection under the TPD receive preferential treatment in comparison with asylum seekers due to their collectively recognised need for such protection, while the disadvantages of their standards of treatment as compared to persons with refugee or subsidiary protection status might be mitigated by receiving immediate protection.

Importantly and unsurprisingly, time is a key factor when considering and assessing temporary protection. There are indeed limits to the extent and duration of the legitimate differences of treatment of persons granted protection under the TPD, regardless whether such differences are positive or negative, depending on the comparable category of persons.

We emphasise that the TPD does not create any separate legal ‘status’ for the beneficiaries of temporary protection, in line with refugee status or subsidiary protection status for persons granted protection under the Qualification Directive. To the contrary, it is clear from both recital 10 and Articles 2(a), 3 and 17 TPD that those granted temporary protection *may* qualify for refugee or subsidiary protection status, only their status has yet to be determined. Therefore, any differences between the TPD standards and those laid down in Chapter VII of the Qualification Directive should be limited in time and scope in order to reflect the presumptive, but temporarily undetermined, status of those granted protection under the TPD and thereby respect the legal obligations flowing from the ICRSR (UN Refugee Convention) and the Qualification Directive.



The question of discrimination in the context of the special protection arrangements for persons displaced by the armed conflict in Ukraine is central and crucial, with no simple or unequivocal answers. The preliminary answers seem to differ significantly depending on whether the differential treatment concerns access to the EU territory and to protection under the TPD, or the question of discrimination arises as a result of the different standards of treatment under the TPD in comparison with the Reception Conditions Directive or the Qualification Directive. In the latter cases, the time factor may ultimately become decisive. In any case, the EU and Member States must be prepared to justify the distinctions being introduced if they want to uphold special treatment of certain categories of persons in need of international protection.

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# Chapter 22

## Receiving Ukrainian Refugees in the EU: A Case of Solidarity?

Dr Eleni Karageorgiou\* and Prof Gregor Noll\*\*

### 1. Introduction

The European Union is consistently describing<sup>1</sup> cooperation to receive and protect refugees from the armed conflict in Ukraine in terms of solidarity. So are many commentators, including those who qualify it as ‘unequal solidarity’:<sup>2</sup> that is, a solidarity that evolves double standards<sup>3</sup> in the protection of Ukrainian

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\* Gothenburg University / Lund University.

\*\* Gothenburg University.

1 European Commission, ‘Ukraine: EU steps up solidarity with those fleeing war’ (Strasbourg, 8 March 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1610](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1610)> accessed 1 December 2022.

2 Sergio Carrera and others, ‘The EU grants temporary protection for people fleeing war in Ukraine: Time to rethink unequal solidarity in EU asylum policy’ in this collection.

3 Slavoj Žižek, ‘What Does Defending Europe Mean?’ Project Syndicate (2 March 2022) <<https://www.project-syndicate.org/commentary/europe-unequal-treatment-of-refugees-exposed-by-ukraine-by-slavoj-zizek-2022-03>> accessed 1 December 2022.

refugees and those from other countries<sup>4</sup>, criticized heavily, among others, by the UN Special rapporteur on contemporary forms of racism<sup>5</sup> and the African Union.<sup>6</sup> This type of solidarity does not apply equally to all participating countries, but rather entails differentiated legal responsibility<sup>7</sup> (see e.g. the notion of flexible solidarity<sup>8</sup> that allows Member States to choose *a la carte* their contributions).

By sticking to a solidarity *leitmotif*, critics of double standards in EU migration and asylum policy arguably risk undermining the strength of their own critiques. As we will show, the conceptual history of solidarity is intellectually incapacitating for any argument in support of a ‘human-centric’ form of resource sharing on egalitarian terms. In particular, we argue that it is historically wrong-headed to analyze the reception and protection of Ukrainians through the lens of solidarity alone. Rather, we suggest, the temporary protection of Ukrainians is better understood as the outflow of an overarching alliance logic, embracing the totality of EU policies in this area, with the Syrian outflows as much as that of the Ukrainians. Warning scholars away from the use of solidarity terminology appears counterintuitive at first sight. However, it becomes less so once we explore the ties between French solidarism and the solidarity concept as related to states and international organizations in the current debate.

Before arguing for our claim, we should say a few more words on its core

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- 4 See Bram Frouws, ‘When war hit Ukraine. Reflections on what it might mean for refugee, asylum and migration policies in Europe’ (Mixed Migration Center, 9 March 2022) <<https://mixedmigration.org/articles/when-war-hit-ukraine-reflections-on-what-it-might-mean-for-refugee-asylum-and-migration-policies-in-europe/>> accessed 1 December 2022. See also Lamis Abdelaaty (7 March 2022) <<https://twitter.com/LAbdelaaty/status/1500885577738203140>> accessed 1 December 2022.
  - 5 United Nations, ‘Ukraine: UN expert condemns racist threats, xenophobia at border’ (3 March 2022) <<https://www.ohchr.org/en/press-releases/2022/03/ukraine-un-expert-condemns-racist-threats-xenophobia-border>> accessed 1 December 2022.
  - 6 African Union, ‘Statement of the African Union on the reported ill treatment of Africans trying to leave Ukraine’ (28 February 2022) <<https://au.int/en/pressreleases/20220228/statement-ill-treatment-africans-trying-leave-ukraine>> accessed 1 December 2022.
  - 7 Sergio Carrera and Roberto Cortinovis, ‘The Malta declaration on SAR and relocation: A predictable EU solidarity mechanism?’ (CEPS Policy Insights No 2019-14 / October 2019) <[https://www.ceps.eu/wp-content/uploads/2019/10/PI2019\\_14\\_SCRC\\_Malta-Declaration-1.pdf](https://www.ceps.eu/wp-content/uploads/2019/10/PI2019_14_SCRC_Malta-Declaration-1.pdf)> accessed 1 December 2022.
  - 8 Evelien Brouwer, Giuseppe Campesi, Sergio Carrera, Roberto Cortinovis, Eleni Karageorgiou, Jens Vedsted-Hansen, Lina Vosyliūtė, ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’ (European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies PE 697.130 - July 2021) <[https://www.europarl.europa.eu/thinktank/en/document/IPOL\\_STU\(2021\)697130](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)697130)> accessed 1 December 2022.

concepts of solidarity and alliance. In an article published in *Jus Cogens*,<sup>9</sup> we test whether Article 80 TFEU resonates with the conceptual history of solidarity, as it expresses itself in the two dominant historical traditions: Roman law *obligatio in solidum* and the French solidarism. We explore discourses of burden-sharing and solidarity in EU law from the 1990s up to Article 80 TFEU as introduced by the Lisbon Treaty in 2009 with a view to identifying emergent path dependencies. We find that Article 80 TFEU, with its exclusive focus on relations between Member States, does not resonate with the Roman legal concept of *obligatio in solidum* at all. While the Roman law concept features a clear repartition of obligations and agency, its relational focus on creditor-surety relations is beyond analogy to Article 80 TFEU. A comparative reading with other cooperation and solidarity clauses in EU primary law confirms that Article 80 TFEU is better understood as an alliance clause. The alliance it engenders focuses on the immobilization of irregular movements. Immobilization practices stretch back to the very beginning of EU cooperation in this field and so does the discourse on ‘combating illegal migration’. Perhaps the best example of strong path dependency in immobilization is the Dublin system, now entering its third decade with its core dysfunctions intact.

So where is the link to French solidarism in Article 80 TFEU? The threat that French solidarist thinkers sought to avert was the self-organization of revolutionary French workers, while the threat EU solidarity seeks to avert is the self-organization of migrants. As illustrated by the differential treatment of non-Ukrainian protection seekers at the Polish border<sup>10</sup>, immobilization aims at a particular group of migrants, namely those coming from the global South and epitomizing global inequalities of opportunity. Both forms of self-organization—that of nineteenth-century French workers eyeing socialism and that of contemporary migrants eyeing Europe—are read as systemic challenges to the political order of the day. Ukrainians are not, hence their differential treatment.

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9 Eleni Karageorgiou and Gregor Noll, ‘What is Wrong with Solidarity in EU Asylum and Migration Law?’ [2022] (4) *Jus Cogens* 131–154 <<https://link.springer.com/article/10.1007/s42439-022-00059-4>> accessed 1 December 2022.

10 Lorenzo Tondo, ‘Embraced or pushed back: on the Polish border, sadly, not all refugees are welcome’ *The Guardian* (4 Mar 2022) <<https://www.theguardian.com/global-development/commentisfree/2022/mar/04/embraced-or-pushed-back-on-the-polish-border-sadly-not-all-refugees-are-welcome>> accessed 1 December 2022.

<i>Who is part of the alliance...</i>	<i>... against which threat...</i>	<i>...using which means?</i>
19th Century French Solidarists	Self-organization of workers and revolution	Immobilization of workers by repression and appease- ment
1990 to present: EU Member States	Self-organization of migrants as a political challenge	Immobilization of migrants by collectivized border control

In the following section, we draw out how an alliance might find it opportune to focus on the *mobilization* of humans for the purposes of self-defence in one set of situations, while the same alliance might then focus on the *immobilization* of humans for the purpose of self-defence in another situation. As we will see, the ‘self’ of self-defence refers to a group of collaborating states in both instances. We seek to demonstrate that the reception of Ukrainians rests on mobilization, while the non-reception of other refugee nationalities rests on the immobilization effectuated by border control. The last section offers conclusions.

## 2. ‘Burden-sharing’ and ‘Solidarity’

During the 1990s, ‘burden-sharing’ was at the core of the discussions relating to the creation of a common European asylum system, involving both EU Member States and non-members. The term ‘burden-sharing’ was an import from the realm of the military; the ‘burden’ was that of collective self-defence, to be shared by means of member contributions to alliance forces within NATO.<sup>11</sup> The debate on European asylum burden-sharing not only pivoted on a term from the playbook of the military, it also took place in a militarized context. By way of example, the movements of asylum seekers fleeing the Bosnian war were discussed alongside NATO involvement and UNPROFOR’s<sup>12</sup> mandate to use force. It was, in fact, the failure of the 1990s normative infrastructure to respond to large refugee movements from Bosnia, and later Kosovo, that trig-

11 See e.g. Simon Lunn, *Burden Sharing in NATO* (Routledge 1983).

12 United Nations Department of Public Information, ‘UNPROFOR’ <<https://peacekeeping.un.org/mission/past/unprofor.htm>> accessed 1 December 2022.

gered a heated debate on European burden-sharing.

Yet these discussions failed to produce more than vague commitments, however pressing the case of refugee movements from the former Yugoslavia was deemed. Rather, states converged on the idea to contain flight from the conflict to the region in distress. As stated by van Selm<sup>13</sup>, the focus has been on return. Burden sharing was a ‘dismal failure during the Yugoslav crisis’<sup>14</sup>, allowing the most exposed states, such as Germany, to seek justification for their ‘toleration’ practices with regard to refugees from former Yugoslavia, implying a tangible reduction in rights.

To wit, the war in Bosnia led to massive refugee outflows, yet military intervention came late in the history of the conflict and remained relatively guarded. By contrast, the 1998-9 Kosovo crisis set off a decisive military intervention by NATO against the Federal Republic of Yugoslavia (FRY), ultimately leading to the withdrawal of FRY troops from the province of Kosovo. To encourage neighbouring North Macedonia to keep its borders open to refugees from Kosovo, a group of 29 states, of which many were EU Members, agreed on the Humanitarian Evacuation Programme (HEP).<sup>15</sup> The point of the HEP, and the add-on Humanitarian Transfer Programme to Albania (HTP), was to airlift arriving Kosovars from North Macedonian territory onwards to cooperating states, where protection solutions would be found. For NATO and its partners, mobilizing Kosovar civilians with the HEP was crucial for achieving the political goals of its military intervention. Sharing the burden of refugee protection was an expression of alliance logic and solved strategic problems, mainly in the NATO campaign, and an analogous conclusion applies to the *in-casu* alliance between NATO and its partner states. While these problems may well have been of a humanitarian nature, this does not override their strategic importance to the battlespace situation that intervening powers saw themselves confronted with.

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13 Joanne van Selm, ‘Temporary Protection for Ukrainians: learning the lessons of the 1990s?’ in this collection.

14 See Susan Martin and Andrew I. Schoenholtz, ‘Asylum in Practice: Successes, Failures, and the Challenges Ahead’ [2000] 14(3) *Georgetown Immigration Law Journal* 589. See also Gregor Noll, ‘Prisoners’ Dilemma in Fortress Europe: On the Prospects for Equitable Burden-Sharing in the European Union’ [1997] 40 *German Y.B. Int’l L.* 405.

15 Relevant numbers are to be found at UNHCR, *Kosovo Emergency (1999)* <<https://www.unhcr.org/3e2d4d5f7.pdf>> accessed 1 December 2022. For a brief exposé see Gregor Noll, *Negotiating Asylum, The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) 263-351.



The story of the HEP and HTP reverberates strongly with the mobilization of Ukrainian civilians across borders opened for them. Today, support to Ukraine is a matter of providing matériel and intelligence as much as security for part of its citizenry. Each component contributes to the achievement of the political goals of states, EU Member States included, allying to assist Ukraine. As was the case with the HEP, there is a strategic dimension to helping friendly civilians to flee, and the burden of this strategy is shifted out across the alliance in question. Strikingly, the mobilization of Kosovars as much as of Ukrainians was not planned over a long horizon, but rather shadowed an armed conflict as the main driver of events.

By the end of the 1990s, an instrument that would do more than respond to a particular set of events such as the Bosnia and Kosovo crises was considered crucial. Essentially, the emergence of a separate discourse on solidarity was about offsetting the burden-concentrating effects of the 1990 Dublin Convention. This was reflected in the major institutional achievement towards the communitarization of asylum and migration policy, namely the adoption of the Amsterdam Treaty<sup>16</sup> which introduced solidarity as a guiding norm of the EU asylum policy, by prescribing ‘a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons’.<sup>17</sup> In the same vein, the Tampere conclusions<sup>18</sup> emphasized solidarity between the Member States, though primarily in relation to temporary protection. At that point, replacing the Dublin Convention with a mechanism for distributing asylum applicants between the Member States in proportion to each Member State’s capacity to receive them was not considered as a ‘pragmatic’ solution,<sup>19</sup> particularly since debates on burden-sharing by a pre-planned redistribution of protection seekers had not produced any concrete results. In the discussions preceding the adoption of the Temporary Protec-

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16 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts 1997.

17 *ibid* Article 73(k) 2(b).

18 European Parliament, ‘Tampere European Council 15 and 16 October 1999 Presidency Conclusions’ (1999) <[https://www.europarl.europa.eu/summits/tam\\_en.htm](https://www.europarl.europa.eu/summits/tam_en.htm)> accessed 1 December 2022.

19 Commission of The European Communities Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States SEC (2000) 522 <<https://www.statewatch.org/media/documents/semDOC/assets/files/commission/SEC-2000-522.pdf>> accessed 1 December 2022.

tion Directive <sup>20</sup> (hereafter TPD), it was emphasized that concrete solidarity measures as a response to a mass influx should materialize mainly through financial assistance and, as a subsidiary means, through the distribution between the Member States of people granted temporary protection.

To conclude, as the 1990s did not produce meaningful agreement on refugee burden-sharing, Member States invested into an immobilization logic, with the Schengen II and Dublin Conventions as its cornerstones. Immobilization aggravated and created its own reception imbalances, though, and a solidarity logic emerged to address those. The HEP represents an exception to the pervasive rule of immobilization: with many Member States engaged in or supporting NATO's military intervention in the FRY, Kosovar refugees turned from a liability into an asset, and the Western alliance supporting action against the FRY made their mobilization into a political goal upon its own. In the HEP, we see how an overarching alliance logic let states toggle between stopping refugees in their tracks to actively inviting them in, foreboding the mobilization of Ukrainians today.

### 3. The EU Response to the Ukrainian Exodus

During the two decades following the actual adoption of the TPD in 2001, the EU never took the requisite decision to activate its distributional mechanism, relegating it to the normative deadstock of the *acquis*. It was generally believed that certain of its features undermined its potential utility, namely the procedural requirements under which it could be invoked, the lack of sufficiently firm and mandatory solidarity commitments, and the scope and content of protection. In 2015, an EU relocation scheme<sup>21</sup> to transfer primarily Syrian refugees from Greece and Italy to other Member States was implemented as a mandatory solidarity mechanism binding under EU law. The Court of Justice of the EU has suggested<sup>22</sup> that the situation at the time, characterized by mass

20 Proposal for a joint action concerning solidarity in the admission and residence of beneficiaries of the temporary protection of displaced persons / COM/98/0372 final - CNS 98/0222 [1998] OJ C 268 <[https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:51998P-C0372\(02\)&from=IT](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:51998P-C0372(02)&from=IT)> accessed 1 December 2022.

21 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L 248/80.

22 Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* [2017] ECLI:EU:C:2017:631 paras 256-257. See also AG's opinion to the case paras 257-260).

daily crossings into the EU, demanded a rapid and far-reaching response, and thus the mandatory quota mechanism of the Relocation decisions was deemed more appropriate than the solidarity mechanism of the TPD based on voluntary commitments.

Yet the way in which the EU institutions have responded to the Ukrainian exodus, through the unanimous activation of the TPD,<sup>23</sup> appears to challenge this exegesis as to why the directive has not been used. Telling in this regard is the reasoning of the Commission motivating the suitability of the temporary protection regime. The Commission suggested<sup>24</sup> that applying the TPD would benefit displaced persons themselves, enabling their immediate protection in the form of harmonized standards across the EU; it would benefit Member States confronted with the mass influx, by applying simplified procedures and thus avoid the overwhelming of asylum and reception systems; and, finally, it would benefit the Union as a whole due to a fairer distribution of reception responsibilities. According to the Commission, the expectation that Ukrainian nationals would spread across the EU, joining family and friends already located in different EU countries and the possibility of solidarity transfers would guarantee this fairer result.

It is striking how the long-held assumption underpinning the Dublin system as well as the 2015 quota mechanism was completely sidelined in the case of the Ukrainians. Under the Dublin Regulation and the 2015 relocation scheme, refugee agency is assumed to be bad, as it results in an unequal distribution of responsibility. This assumption has been reproduced by the CJEU which, in relation to the 2015 emergency relocation mechanism, held<sup>25</sup> that

‘If relocation were to be strictly conditional upon the existence of cultural or linguistic ties between each applicant for international protection and the Member State of relocation, the distribution of those applicants between all the Member States in accordance with the principle of solidarity laid down by Article 80 TFEU and, con-

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23 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

24 Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection (Brussels, 2 March 2022) COM(2022) 91 final.

25 Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* [2017] para 304.

sequently, the adoption of a binding relocation mechanism would be impossible.’

As stated by Carrera et al,<sup>26</sup> the triggering of the TPD shows that the prevailing EU asylum policy principle where asylum seekers and refugees are excluded from the right to freely move inside the Schengen Area should be reconsidered in the name of equal treatment. With the Ukrainian refugees being handled under the temporary protection framework and being entitled to enter the EU without a visa, refugee agency exceptionally turns into a force for good.

Temporary protection in the EU for those fleeing the war aside, central to the EU’s response has been ‘the solidarity between Member States’.<sup>27</sup> The EU has been supporting Member States to meet refugee demands on their territory primarily through financial assistance<sup>28</sup> (see e.g. the legislative proposal on the EU’s Cohesion’s Action for Refugees in Europe),<sup>29</sup> operational support for border management (e.g. Frontex staff by EU agencies deployed at focal border points such as Romania and Moldova-Ukraine)<sup>30</sup> and through the so-called ‘Solidarity platform’<sup>31</sup> (Rec. 20 Council Decision 2022/382), a mechanism set up by the European Commission and led by DG HOME to coordinate cooperation between Member States, Schengen Associated States, EU Agencies as well as IOM, UNHCR and other partners. In particular, the Platform collects the needs identified in the Member States and organizes the operational response which takes the form of a ‘solidarity transfer’ of protection seekers from a Member State under most pressure to another with a suitable reception capacity. Such relocation is contingent on a requirement of double voluntariness.

26 Sergio Carrera and others, ‘The EU grants temporary protection for people fleeing war in Ukraine: Time to rethink unequal solidarity in EU asylum policy’ in this collection p 28.

27 European Commission, ‘Ukraine: EU steps up solidarity with those fleeing war’ (Strasbourg, 8 March 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1610](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1610)> accessed 1 December 2022.

28 European Commission, ‘EU Solidarity with Ukraine’ <[https://eu-solidarity-ukraine.ec.europa.eu/index\\_en](https://eu-solidarity-ukraine.ec.europa.eu/index_en)> accessed 1 December 2022.

29 The European Union, ‘Ukraine: Council approves swift release of cohesion resources to help refugees’ (16 March 2022) <<https://reliefweb.int/report/ukraine/ukraine-council-approves-swift-release-cohesion-resources-help-refugees>> accessed 1 December 2022.

30 European Commission, ‘Ukraine: EU steps up solidarity with those fleeing war’ (Strasbourg, 8 March 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1610](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1610)> accessed 1 December 2022.

31 European Commission, ‘Ensuring temporary protection rights of people fleeing the war in Ukraine’ (25 March 2022) <[https://home-affairs.ec.europa.eu/news/ensuring-temporary-protection-rights-people-fleeing-war-ukraine-2022-03-25\\_en](https://home-affairs.ec.europa.eu/news/ensuring-temporary-protection-rights-people-fleeing-war-ukraine-2022-03-25_en)> accessed 1 December 2022.

According to the Commission Communication,<sup>32</sup> in the Platform's first week of operation, six Member States and Norway pledged to receive people who had fled Ukraine from Moldova.<sup>33</sup> The Platform's work draws on guidance provided by Member States within the Integrated Political Crisis Response mechanism (IPCR)<sup>34</sup> and benefits from the operationalisation of the Crisis Management Blueprint Network, a framework recommended<sup>35</sup> by the Commission in the context of the 2020 EU Pact on Migration and Asylum<sup>36</sup> to monitor Member States' capacities and organize joint response to situations of crisis. Solidarity through the Platform extends beyond the EU, helping to establish pathways<sup>37</sup> towards non-EU countries that already host Ukrainian diaspora, such as Canada and the United Kingdom.

The formalization of temporary protection followed by voluntary solidarity commitments in the Ukrainian case has been praised<sup>38</sup> and portrayed as a step forward<sup>39</sup>, associated with flexibility and justified by invocations of emergency.

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32 European Commission, 'Communication From The Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee Of The Regions Welcoming those fleeing war in Ukraine: Ready Europe to meet the needs' (Brussels, 23 March 2022) COM (2022) 131 final <[https://ec.europa.eu/info/sites/default/files/communication\\_welcoming\\_those\\_fleeing\\_war\\_in\\_ukraine.pdf](https://ec.europa.eu/info/sites/default/files/communication_welcoming_those_fleeing_war_in_ukraine.pdf)> accessed 1 December 2022.

33 UNHCR, 'IOM, UNHCR welcome the first flights of refugees out of Moldova to EU Member States' (22 March 2022) <<https://www.unhcr.org/news/press/2022/3/6239dd294/iom-unhcr-welcome-first-flights-refugees-moldova-eu-member-states.html>> accessed 1 December 2022.

34 Council of the European Union, 'How the Council coordinates the EU response to crises' (12 September 2022) <<https://www.consilium.europa.eu/en/policies/ipcr-response-to-crises/>> accessed 1 December 2022.

35 Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration (Migration Preparedness and Crisis Blueprint) [2020] OJ L 317/26.

36 Communication From The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions on a New Pact on Migration and Asylum (Brussels, 23 September 2020) COM(2020) 609 final.

37 European Commission, 'Ukraine: EU support to help Member States meet the needs of refugees' (Brussels, 23 March 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1946](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1946)> accessed 1 December 2022.

38 Pascale Moreau, 'News Comment: UNHCR welcomes EU decision to offer Temporary Protection to Refugees fleeing Ukraine' (UNHCR, 4 March 2022) <<https://www.unhcr.org/news/press/2022/3/6221f1c84/news-comment-unhcr-welcomes-eu-decision-offer-temporary-protection-refugees.html>> accessed 1 December 2022.

39 European Commission, 'Ukraine: Commission proposes temporary protection for people fleeing war in Ukraine and guidelines for border checks' (Brussels, 2 March 2022 <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1469](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1469)> accessed 1 December 2022.

This, however, deserves some scrutiny. There is little doubt that the military invasion of Ukraine by the Russian Federation triggered a displacement crisis of great magnitude. At the same time, it has shown that a large-scale movement into several wealthy European states need not create a reception emergency, as long as there is political agreement that a maximum of openness serves the political and strategic interests of those states. It does not hurt either that a loose system of first reception is in place and that responsibilities are shared, or self-distributing, among states.

<i>Who is part of the alliance...</i>	<i>... against which threat...</i>	<i>...using which means?</i>
1999 NATO Members and select other states	Geopolitical destabilization by the FR of Yugoslavia	Mobilization of refugees through airlifts
2022 EU Member States	Geopolitical destabilization by the Russian Federation	Mobilization of Ukrainian civilians by visa freedom and temporary protection

To sum up, the EU's response since the Russian invasion of Ukraine can be characterized as the epitome of a 'welcoming' policy for Ukrainians fleeing war and of a robust coordinated action in terms of border management and cooperation for matching needs to capacity with the whole EU apparatus in full motion. The language of solidarity is repeatedly referred to in varying formulations, 'compassion and solidarity', 'unity in solidarity'; 'solidarity in action', 'finance solidarity', 'real solidarity'. However, the solidarity language stands in the way of seeing the alliance logic at work here. Unlike the lexicon definition of solidarity<sup>40</sup>, the alliance logic does not presuppose unity or agreement of action. On the contrary, it is based on the 'appearance' of unity. This is the case in the EU, where sovereign divisions and the disagreement on how solidarity should be given effect, exposed by the 2015/2016 'refugee crisis', lead to a deadlock during the negotiations for reforming the Dublin III Regulation, and were lately reflected in the 2020 EU Pact proposals. This disagreement continues to haunt the asylum debate, attesting to the current East–West and North–South divides. Such circumstantial unity stemming from convergence of

<sup>40</sup> 'solidarity, n' (Cambridge Dictionary) <<https://dictionary.cambridge.org/dictionary/english/solidarity>> accessed 1 December 2022.

interest in protecting borders and containing migrants is, we argue, the driving force behind the EU's response to the Ukrainian exodus, trumping any kind of equal legal responsibility and rule of law considerations discussed<sup>41</sup> as the main components of solidarity in the EU legal system.

## 4. Conclusion: The Alliance Logic at Work

Here is where our argument that Article 80 TFEU should be read as an alliance clause devised to defend borders and manage migration becomes relevant. Elements of the deterrence<sup>42</sup> paradigm practiced by the EU and its Member States both in their casual migration governance over the last years and as a response to earlier large-scale migrant movements, including in 2015,<sup>43</sup> in 2020<sup>44</sup> and in 2021,<sup>45</sup> are clearly discernible in the current policies addressing the Ukrainian situation as discussed in the literature<sup>46</sup>. The prevailing practice of solidarity being used to counter a threat of irregular immigration through immobilization of particular groups of migrants can swiftly morph into migrant mobilization, if a larger geopolitical threat so requires.

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41 Sergio Carrera and Roberto Cortinovis, 'Search and rescue, disembarkation and relocation arrangements in the Mediterranean Sailing Away from Responsibility?' (CEPS, No. 2019-10, June 2019) <[https://www.ceps.eu/wp-content/uploads/2019/06/LSE2019-10\\_ReSoma\\_Sailing-Away-from-Responsibility.pdf](https://www.ceps.eu/wp-content/uploads/2019/06/LSE2019-10_ReSoma_Sailing-Away-from-Responsibility.pdf)> accessed 1 December 2022.

42 Thomas Gammeltoft-Hansen and James C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' [2015] 53(2) Colum. J. Transnat'l L. 235.

43 Cathryn Costello, 'Overcoming Refugee Containment and Crisis' [2020] 21(1) German Law Journal 17.

44 Ayşe Dicle Ergin, 'What Happened at the Greece-Turkey Border in early 2020?' (Verfassungsblog, 30 September 2020) <<https://verfassungsblog.de/what-happened-at-the-greece-turkey-border-in-early-2020/>> accessed 1 December 2022.

45 United Nations, 'End 'appalling' Belarus-Poland border crisis, UN rights office urges' (21 December 2021) <<https://news.un.org/en/story/2021/12/1108502>> accessed 1 December 2022.

46 Meltem Ineli-Ciger, '5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022' (EU Immigration and Asylum Law and Policy, 7 March 2022) <<https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>> accessed 1 December 2022. See also Hassan Hankir and Hams Rabah, 'Arab refugees see double standards in Europe's embrace of Ukrainians' *Swiss Info* (2 March 2022) <<https://www.swissinfo.ch/eng/arab-refugees-see-double-standards-in-europe-s-embrace-of-ukrainians/47395932>> accessed 1 December 2022.



Equally, the ‘open arms’<sup>47</sup> response corroborates the claim that Article 80 TFEU juridifies a communitarian–instrumentalist concept of alliance, reflecting a form of conducting regional and global politics. As argued by van Selm,<sup>48</sup> the EU had no alternative but protect Ukrainians, as a way to ‘project power’ against Russia’s aggression and demonstrate unity in the face of an ‘existential crisis’ for it and its Member States, primarily as NATO members.

We have to realize that the language of solidarity as used at the EU level is not about benign caring for others, as reflected for instance in the actions of individuals<sup>49</sup> and grassroots movements<sup>50</sup> mobilising against state containment policies and laws. Whether we like it or not, French solidarism has successfully infused the use of solidarity terminology by states and international organizations with a political immobilization agenda that is still operative today. When the EU reception of Ukrainian refugees is labelled as ‘unequal solidarity’, this occludes that French solidarism was all about the preservation of social inequality through the promise of nationalism. This lives on in the common project of protecting the borders of states making up the EU, preserving inequality through the promise of humanitarianism. So *any* solidarity by states and international organizations is unequal, not only that expressing itself in the preferred treatment of Ukrainian refugees. On a historically informed reading, the concept of solidarity in EU asylum policy has to be linked not to refugee reception, but rather to cooperative ventures of averting transformational threats to the status quo.

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47 European Commission, ‘Statement by President von der Leyen on further measures to respond to the Russian invasion of Ukraine’ (Brussels, 27 February 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/statement\\_22\\_1441](https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1441)> accessed 1 December 2022.

48 Joanne van Selm, ‘Temporary Protection for Ukrainians: learning the lessons of the 1990s?’.

49 AFP, ‘French court scraps farmer’s conviction for helping migrants cross border’ *The Guardian* (Lyon, 13 May 2020) <<https://www.theguardian.com/world/2020/may/13/french-court-scrap-olive-farmers-conviction-for-helping-migrants-cross-border>> accessed 1 December 2022.

50 Linda Maria Madeleine Kainz, ‘Grassroots movements and the refugees: Refugees Welcome and PEGIDA’ (27 February 2016) <<https://wpmu.mah.se/nmict161group1/2016/02/27/grassroots-movements-and-the-refugees-refugees-welcome-and-pegida/>> accessed 1 December 2022.



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# Chapter 23

## Temporary Protection and European Racism

Prof Dr Achilles Skordas\*

### 1. Introduction: The R-word as polemical concept

‘Racism’ is a sociological and psychological, legal *and* polemical concept. Concerns about potentially racist and discriminatory practices against certain groups in the course of the implementation of the EU temporary protection system were raised by non-governmental organizations, international agencies and academics. Here is a relevant statement by the European Network against Racism (ENAR): ‘The decision to invoke the Temporary Protection Directive is historical and yet disappointing in that it still applies a racist double standard which prevents non-Ukrainians from having the same legal protection.’<sup>1</sup> This is an issue of broader significance deserving a thorough discussion and I will

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\* Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

1 ENAR, ‘Racist double-standards persist at EU/Ukraine borders and beyond’ (Brussels, 30 March 2022) <[https://www.enar-eu.org/wp-content/uploads/ENAR\\_RacistDoubleStandardsEUUkraine\\_final.pdf](https://www.enar-eu.org/wp-content/uploads/ENAR_RacistDoubleStandardsEUUkraine_final.pdf)> accessed 1 December 2022.

try to set the record straight. The Temporary Protection Directive (TPD),<sup>2</sup> adopted in 2001 in the aftermath of the wars in the former Yugoslavia, had remained inactive for over twenty years. Under the impression of its obsolescence, the Commission proposed in 2020 its replacement with a Regulation ‘addressing situations of crisis and *force majeure* in the field of migration and asylum’.<sup>3</sup> However, the temporary protection came suddenly back from the cold, when the Council adopted the Implementing Decision of 4 March 2022 (CID)<sup>4</sup> to manage the mass influx of displaced persons from Ukraine. Before entering the discussion on the TPD and the CID, we should first clarify the meaning(s) of racism in law and politics.

In terms of law, racism can be a crime *per se*, or can depict an individual’s state of mind that may lead to the commitment of ‘racially motivated crimes’. States implement strategies against racism in their domestic legislation, including banning or restricting the activities of neo-Nazi parties and other racist groups, such as supremacists. In international law, state policies and practices during armed conflict, are ‘racially discriminatory’, if they violate the rules or principles of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) of 1966<sup>5</sup> and three cases are currently pending

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2 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212. See also Achilles Skordas, ‘Temporary Protection Directive 2001/55/EC’ in Thym/Hailbronner (eds), *EU Immigration and Asylum Law – Article-by-Article Commentary* (3rd edn, Nomos 2022) pp. 1177-1228; the Commentary was published before the war in Ukraine and could not consider the relevant developments.

3 Proposal for a Regulation of the European Parliament and the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM (2020) 613 final, 23 September 2020.; Meltem Ineli-Ciger, ‘What a difference two decades make? The shift from temporary to immediate protection in the new European Pact on Asylum and Migration’ (EU Immigration and Asylum Law and Policy, 11 November 2020) <<https://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/>> accessed 1 December 2022.

4 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

5 UNTS, vol. 660, p. 195.



before the International Court of Justice (ICJ).<sup>6</sup> The Convention contains an authoritative definition of racial discrimination on a universal level, considering that it has been ratified by 182 countries as of November 2022. States may expand the meaning of discrimination in their domestic law or through human rights treaties, but this does not affect the scope of the CERD.

In the political discourse, ‘racism’ can be used as a polemical concept, if it facilitates the semantic domination (*Deutungshoheit*) of a political group or an intellectual movement over their opponents. The accusation of racism, even if it is not true, compels those criticized to defend themselves and, at least for a moment, retreat from the advancement of their own objectives. The use of polemical exchanges with accusations of ‘racism’ are typical for politically charged environments and leads to further polarization through the ‘(im)moralization’ of political communication. There is also a negative impact on the social system of law in the form of instrumentalization or ‘corruption’ of established legal concepts.

Instrumentalization creates a ‘cloud of suspicion’ over legitimate policies and legislation. ‘Polemical discourse’ is an argumentative pattern that intends to create stereotypes and biases against the opposite numbers. Polemical discourses construct strawmen and attack them with a variety of techniques, including by the non-differentiated use of the R-word, or by selective application of facts, context and relevant normative regimes, by implicit and generalized attribution of responsibility, or by confounding the distinction between norms and facts.

The signals emitted by UN institutions with respect to temporary protection of Ukrainians followed occasionally a line of critique parallel to that of civil society actors. Following the adoption of the CID on 4 March 2022, the UN High Commissioner for Refugees, Filippo Grandi, made a statement less than three weeks later, on the International Day for the Elimination of Racial Discrimination (21 March), where he framed the issue of racism and discrimination in connection with the reception of displaced persons in the EU. After mentioning his commitment ‘to ensure that UNHCR, the UN

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6 Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 558; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Request for the Indication of Provisional Measures, Order of 7 December 2021; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Request for the Indication of Provisional Measures, Order of 7 December 2021.

Refugee Agency, becomes an anti-racist organization’, he continued as follows:

And while I am humbled by the outpouring of support we witnessed by host countries and communities, we also bore witness to the ugly reality that some Black and Brown people fleeing Ukraine – and other wars and conflicts around the world – have not received the same treatment as Ukrainian refugees. They reported disturbing incidents of discrimination, violence, and racism. These acts of discrimination are unacceptable, and we are using our many channels and resources to make sure that all people are protected equally.<sup>7</sup>

Firstly, the High Commissioner confounds the boundaries between an NGO or a protest movement and an agency exercising international public authority, bound by the definition of racial discrimination in the CERD, as authoritatively interpreted by the ICJ (see *infra* 2). Secondly, there is no doubt that as far as racist incidents happen, they should be condemned<sup>8</sup> and punished, and administrative failures of border agencies should be rectified as soon as possible. The question is, whether these are isolated incidents or systemic failures. The context, wording and weight of the statement, including that the UNHCR use their ‘many channels and resources’ to safeguard equality, indicate their belief in the existence of systemic issues. A statement by the UN Working Group (WG) of Experts on People of African Descent<sup>9</sup> referring to reports of discrimination against people of African descent at the EU-Ukrainian border was issued on 3 March, before the implementation of the TPD/CID system and does also not clarify whether the specific problems affect only persons of African descent, or generally non-citizens coming from Ukraine. Patterns of racial discrimination appear as a differential treatment of persons with the protected characteristics. The statement of the WG would be more helpful, if it would identify institutional patterns of arbitrary distinctions against people of African descent *separate* from the treatment of third-country

7 Filippo Grandi, ‘High Commissioner’s message on the International Day for the Elimination of Racial Discrimination’ (21 March 2022) <<https://www.unhcr.org/news/press/2022/3/62370dc44/high-commissioners-message-international-day-elimination-racial-discrimination.html>> accessed 1 December 2022.

8 UNGA Res. ES-11/2 of 28 March 2022, on the humanitarian consequences of the aggression against Ukraine.

9 UNHCR, ‘Ukraine: UN experts concerned by reports of discrimination against people of African descent at border’ (3 March 2022) <<https://reliefweb.int/report/ukraine/ukraine-un-experts-concerned-reports-discrimination-against-people-african-descent>> accessed 1 December 2022.

nationals fleeing Ukraine. The ill-treatment of third-country nationals may violate Art. 3 ECHR, but does not constitute racial discrimination, unless there are clear patterns of discrimination on the basis of the protected characteristics of the CERD.

Grandi also complains that Black and Brown people fleeing ‘other wars and conflicts around the world...have not received the same treatment as Ukrainian refugees’. It is not clear whether he criticizes the EU for the non-activation of the TPD in other instances of mass inflows since the 2010s, or whether it is a general observation done, nevertheless, in the context of a critique of the reception of displaced persons from Ukraine. Similar concerns and critique of EU policies have been expressed in the academic writing, as well.<sup>10</sup>

The broader issue is whether it would have been more appropriate for the UN institutions to positively compare the openness of the EU response in embracing the victims of the war with the response in other regions of the world. The refusal of the UN Human Rights Council to consider the situation of human rights in Xinjiang during its 51st regular session (September-October 2022) is a clear evidence of double standards and lack of coherence in the UN human rights system.<sup>11</sup>

One may wonder whether isolated incidents allegedly happening at the EU-Ukrainian border or some short-term administrative difficulties are so grave violations of international law to deserve standing at the center of the UNHCR message on the International Day for the Elimination of Racial Discrimination and mobilize a second UN institution (the WG). The statements of the UN officials create a ‘cloud of suspicion’ over EU practices, by making allegations that are general enough not to be found evidently untruthful and sufficiently subtle to insinuate the existence of ‘active racism’ in EU policies.

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10 See Sergio Carrera and others, ‘The EU grants temporary protection for people fleeing war in Ukraine: Time to rethink unequal solidarity in EU asylum policy’ in this collection; Meltem Ineli-Ciger, ‘5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022’ (EU Immigration and Asylum Law and Policy, 7 March 2022) <<https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>> accessed 1 December 2022.

11 The respective draft decision A/HRC/51/L.6 on a ‘debate on the situation of human rights in the Xinjiang Uyghur Autonomous Region, China’ was rejected by 17 votes in favour, 19 against, and 11 abstentions. See <<https://www.ohchr.org/>> accessed 1 December 2022.

## 2. The ICJ Qatar v. UAE case (2021)

For a policy to be racist under international law, it should be incompatible with the CERD. According to Art. 1, para.1 CERD, ‘the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin’. Not only there is no mentioning either of citizenship or of religion in this provision but in addition, Art. 1(2) and (3) explicitly state that the Convention is not applicable on distinctions or exclusions based on citizenship. Despite this clear wording, Recommendation XXX of the Committee on the Elimination of Racial Discrimination (CERD Committee)<sup>12</sup> extended the scope of the Convention on distinctions based on citizenship.

In its recent judgment in the case Qatar v. United Arab Emirates (2021)<sup>13</sup> the ICJ put an end to this practice, by ruling that measures or exclusions based on ‘current citizenship’ do not constitute direct or indirect racial discrimination. After the judgment, the prohibition of racial discrimination has ceased to have relevance for migration policies<sup>14</sup> *based on the above criterion*. The judgment was carried by both *ad hoc* judges and by a clear majority (11-6), including the four sitting judges from the permanent members of the UN Security Council (there is no judge from the UK in the Court’s current composition), and four judges deciding from a Southern perspective (two judges from the regular composition of the ICJ and the two *ad hoc* judges). In the rare case of collision between ICJ judgments and CERD Committee recommendations, the former prevail because of their binding nature and the authority of the Court over the interpretation of international law.

Migration critique and restrictionist policies cannot be characterized as ‘racist’ or ‘discriminatory’ under the CERD, as long as they are framed on the basis of ‘current citizenship’. By introducing the fundamental distinction ‘Ukrainian citizens/non-Ukrainian third country nationals’, the EU system of temporary protection does not violate the CERD. However, this is not the

12 CERD Committee, General Recommendation XXX on Discrimination Against Non Citizens’ (5 August 2004), 65th Session (2005) <<https://www.refworld.org/docid/45139e084.html>> accessed 1 December 2022.

13 ‘Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 71 <<https://icj-cij.org/en/case/172/judgments>> accessed 1 December 2022.

14 Cathryn Costello and Michelle Foster, ‘Race Discrimination Effaced at the International Court of Justice’, (2021) *AJIL Unbound*, 115, 339-344; for a presentation of the judgment, see Geir Ulfstein, ‘Qatar v. United Arab Emirates’ [2022] *AJIL* 116, 397-403.

end of the matter. In addition, I argue that not only there is no racial discrimination, but that there is no other detectable discrimination in the TPD/CID system. In the above judgment, the ICJ ruled that its interpretation affects only the CERD and not non-discrimination clauses in other instruments (para. 104 of the judgment). Therefore, every such clause should be decided on its own merits. I cannot make a detailed argument for each one of them, but will limit my approach to the question, whether the distinctions made by the TDP/CID system with regard to the admission and stay of displaced persons are reasonable and meaningful and thus, in principle non-discriminatory.

There are three separate issues to discuss. First, whether the non-activation of temporary protection in other comparable situations constitutes evidence of discrimination. The answer depends on whether there is a fundamental structural difference between mass influx of displaced persons under the TPD and irregular migration movements that would justify a differentiated treatment (*infra* 3). Second, whether the geopolitical interest of the EU is a legitimate factor that should be considered by the activation of temporary protection (*infra* 4). Third, whether the Council Implementing Decision 2022, by introducing different kinds of treatment among groups of persons fleeing Ukraine, discriminates against some of them. No discrimination exists, if the distinctions are justified and appropriate to the circumstances (*infra* 5).

### 3. Mass influx v. irregular mass migration

(i) The concept of ‘mass influx of displaced persons’ in the TPD is a legal term and a condition for temporary protection. In the case of mass influx of displaced persons, armed conflict or endemic violence must be the proximate causes of the movements. ‘Mass influx’ should be contrasted to irregular mass migration, where the movement is caused by a synergy of multiple factors. In such case, the significance of armed conflict as a proximate cause has already retreated in the background. The proximity and clarity of the cause is important, because it demonstrates the necessity of temporary protection, whilst its absence indicates the appropriateness of migration management through different tools.

Thus, it is doubtful whether the great majority of persons who arrived in the Union in 2015 were ‘displaced’ in the sense of the TPD. The ‘displacement’ indicates movement from the country or area of armed conflict to the country of destination, which does not need to be uninterrupted, but has to be involuntary or compulsory in the narrow sense of ‘having no alternative but’. Ac-

cording to Art. 2c of the TPD, the term displaced persons means ‘third-country nationals who *have had to leave* their country or region of origin’, ‘*haben verlassen müssen*’, ‘*ont dû quitter*’. ‘Have to’, ‘müssen’, or ‘dû’ should be interpreted according to their ‘ordinary meaning’ (see Art. 31 Vienna Convention on the Law of Treaties).<sup>15</sup> Evacuation efforts of displaced persons do not refute, but may even strengthen the case for the character of the exodus as compulsory, as the situation of the Yazidis has shown.<sup>16</sup> On the contrary, the persons that moved to the Union in 2015 did not ‘have to leave their region of origin’, because they were already protected in Jordan, Lebanon and Turkey.

The movements of persons from a third country to another third country for personal or economic reasons does not constitute ‘displacement’. Persons having fled armed conflict or systematic or generalized rights violations in their country of origin and enjoy temporary or humanitarian status in a third country, are not ‘displaced persons’ in the sense of the TPD, if they choose to move to the Union *en masse*, unless these conditions were repeated in the third country where they initially fled. Then, they are ‘displaced persons’ from their ‘region’ (Art. 2c TPD).

The irregular mass movements of 2015 were partly motivated by wrong signals sent by the Greek and the German governments<sup>17</sup> that were understood as encouraging the exodus of persons from third countries, where they stayed in relative safety outside of the areas and countries of armed conflict. The voluntary nature of the movement is also clear in the case of the failed attempts of forcible entry of migrants from Turkey to Greece in 2020, who were encouraged and actively supported by the Turkish authorities to reach the borders and enter the territorial space of the EU, even though they were settled in Turkey for a number of years (here<sup>18</sup> and here<sup>19</sup>). The case of Ukraine is very

15 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

16 Martin Chulov and others, ‘US troops land on Iraq’s Mt Sinjar to plan for Yazidi evacuation,’ *The Guardian* (13 August 2014) <<https://www.theguardian.com/world/2014/aug/13/us-ground-troops-direct-role-evacuate-yazidis-iraq>> accessed 1 December 2022.

17 Achilles Skordas, ‘A Very German Cultural War: Migrants and the Law’ [2019] 79 *ZaöRV* 923-934.

18 Achilles Skordas, ‘The Twenty-Day Greek-Turkish Border Crisis and Beyond: Geopolitics of Migration and Asylum Law (Part I) (5 May 2020) <<https://eumigrationlawblog.eu/the-twenty-day-greek-turkish-border-crisis-and-beyond-geopolitics-of-migration-and-asylum-law-part-i/>> accessed 1 December 2022.

19 Achilles Skordas, ‘The Twenty-Day Greek-Turkish Border Crisis and Beyond: Geopolitics of Migration and Asylum Law (Part II) (8 May 2020) <<https://eumigrationlawblog.eu/the-twenty-day-greek-turkish-border-crisis-and-beyond-geopolitics-of-migration-and-asylum-law-part-ii/>> accessed 1 December 2022.

different, because the extent, breadth, and spontaneity of movement demonstrate, beyond any doubt, that the armed conflict was the proximate cause of the displacement.

(iii) The TPD is unsuitable as a tool for the management of irregular migration movements. It is difficult to see, how the Council could exercise its authority to determine ‘the specific groups of persons to whom the temporary protection applies’ (Art. 5, para. 3a) in cases of irregular migration. The difficulty has two dimensions: first, how to determine the protected groups and second how to determine the membership of individuals to them. These are questions that can be answered only in a structured administrative or judicial procedure on refugee or subsidiary protection of individual applicants. The advantage of the TPD is to provide immediate and non-bureaucratic protection to displaced groups and populations. In irregular mass movements, the *raison-d’être* for the activation of the Directive disappears.

The argument that the ‘apparently discriminatory approach is amplified through some politicians emphasizing that Ukrainians must be helped because they are European Christians’,<sup>20</sup> compared to the treatment of irregular migrants from the Middle East and Central Asia, is typical for this kind of argumentation. Statements of ‘some politicians’ is becoming evidence of discrimination-in-law and Christians, even more European ones, are finger-pointed as the immanently privileged group. Instead, the UN General Assembly has been regularly using the term ‘Christianophobia’ (f.ex., UNGA Res. /65/211 of 2011, UNGA Res. 76/254 of 2022), a term that I have personally never encountered in European refugee law discourses, and the relatively recent report and debates in the UK House of Commons have demonstrated the suffering and worldwide persecution of Christians.<sup>21</sup>

(iv) The temporary protection should not be activated in the case of smuggling of migrants in the Union, because these activities create irregular migration movements artificially. To put it differently: had the criminal business networks not existed, the system of irregular migration would have not existed either, because people on the move over big distances need a services infrastruc-

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20 Julia Kienast, Nikolas Feith Tan and Jens Vedsted-Hansen, ‘Preferential, differential or discriminatory? EU protection arrangements for persons displaced from Ukraine’ in this collection.

21 UK Parliament, House of Commons Library CDP 019 (2020), ‘Persecution of Christians’ (6 February 2020) <<https://researchbriefings.files.parliament.uk/documents/CDP-2020-0019/CDP-2020-0019.pdf>> accessed 1 December 2022.; UK Parliament, House of Commons, Persecution of Christians Overseas, Hansard columns 1018-1048 (18 July 2019); Persecution of Christians, Hansard columns 508-550 (6 February 2020).



ture. The demand for a movement does not translate automatically into a right to a movement. Moreover, the demand as such is not protected by refugee law and the travel through various third countries towards Europe is also not protected by EU law or human rights law.

The system of temporary protection does not fulfill the function of facilitating activities that violate the Palermo Protocols<sup>22</sup> and UN Security Council resolution 2240/2015, or are inconsistent with the Global Compact on Migration<sup>23</sup>. According to the Europol,<sup>24</sup> 90% of irregular migrants crossing into the EU use the so-called ‘facilitation services’.<sup>25</sup> In the case of Ukraine, the affected population does not use such services, because they literally flee the war and cross the border to the Union, just as the Bosnians and Kosovars had done in the 1990s. The differences between mass influx and irregular migration could not be clearer.

## 4. Geopolitics and temporary protection

Geopolitical considerations play an important role in the decision to activate or not to activate the system of temporary protection. This conclusion can be inferred from the wide political discretion conferred to the Council, in combination with the Union’s foreign policy objectives ‘to safeguard its values, fundamental interests, security, independence and integrity’ (Art. 21, para. 2b in combination with Art. 2 TEU). The humanitarian dimension of the Union’s action is inherent in the overall system of temporary protection and it is not necessary to expand on it. The geopolitical interests require that no temporary protection should be granted, if the Union’s fundamental interests and its

22 United Nations Convention against Transnational Organized Crime, 15 November 2000, 2225 U.N.T.S. 209; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2237 U.N.T.S. 319; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2241 U.N.T.S. 507.

23 UNGA Res. 73/195, objective 9.

24 EUROPOL, ‘Facilitation of Illegal Immigration’, <[www.europol.europa.eu/crime-areas-and-statistics/crime-areas/facilitation-of-illegal-immigration](http://www.europol.europa.eu/crime-areas-and-statistics/crime-areas/facilitation-of-illegal-immigration)> accessed 1 December 2022.

25 Katrien Luyten, ‘Understanding EU action against migrant smuggling’, (EPRS | European Parliamentary Research Service, 19 January 2021) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2021\)659450](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)659450)> accessed 1 December 2022.



security could be negatively affected by the activation of the Directive. Here I should like to mention that the 2022 EU Strategic Compass for Security and Defense<sup>26</sup> considers irregular migration as a security concern, for well-known reasons.

On the contrary, the Union's interests require the temporary protection of Ukrainians. The geopolitical reasoning is clearly expressed in the preamble of the Council Implementing Decision 2022/382 and is linked to the Russian aggression and to the direct threat to the European and global security and stability (paras. 1-4). Other than the international legal obligations to suppress the smuggling and trafficking of migrants, including in particular across the Mediterranean, the UN Member States and in particular the neighboring countries to Ukraine were called upon by the UN General Assembly to provide any necessary assistance to displaced persons from Ukraine (UNGA Res. ES-11/2).

## 5. Protection of displaced persons from Ukraine

Let me come to the last issue, namely whether the distinctions made by the Council Implementing Decision 2022/382 with regard to persons enjoying temporary protection are arbitrary and thus discriminatory, or whether they merely treat different situations differently. The CID provides for the obligatory protection of the following categories of persons and the members of their families: Ukrainian citizens, stateless persons and third country nationals (but obviously not EU citizens) who enjoyed international protection or equivalent protection under Ukrainian law before 24.02.2022, and stateless persons and third country nationals who can prove that they resided in Ukraine 'on the basis of a valid permanent residence permit issued in accordance with Ukrainian law and who are unable to return in safe and durable conditions to their country of region or origin' ('shall clauses', Art. 2, paras. 1 and 2 CID).

Member States *may* grant temporary protection to other categories of stateless persons and third country nationals including students and foreign workers on short-term basis, who are unable to return to their country or region of origin. Even though formally only permanent legal residents of Ukraine are protected, the Decision provides that other persons 'should in any event be

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<sup>26</sup> European Union, 'A Strategic Compass for Security and Defence' (March 2022) <[https://www.eeas.europa.eu/sites/default/files/documents/strategic\\_compass\\_en3\\_web.pdf](https://www.eeas.europa.eu/sites/default/files/documents/strategic_compass_en3_web.pdf)> accessed 1 December 2022.

admitted into the Union on humanitarian grounds, without requiring ... possession of a valid visa or sufficient means of subsistence or valid travel documents ('may clause', Art. 2, para. 3 CID, preamble, para. 13).

This system here is mixed and includes a 'may-clause' on the granting of temporary protection by Member States and a 'shall clause' on granting humanitarian protection 'to ensure safe passage with a view to returning to their country or region of origin'. This is a set of rules that ensures compliance with international law. In other words, *nobody will be denied entry in the Union or will be returned to Ukraine*. But, if such persons ask for international protection in the Union, they will first have to answer why they had not applied for a protected status in Ukraine, while they resided there.

It is obvious that the return of workers on short-term basis and students in the countries of origin is a reasonable rule. The same is applicable for permanent residents of Ukraine who can 'return in safe and durable conditions to their country or region of origin' (Art. 2 para. 2). After all, one of the most basic principles of international law provides that every person enjoys the protection of their country of citizenship, as the ICJ had decided in the *Nottebohm* case already in 1955.<sup>27</sup> Moreover, as already explained, the system of the TPD is not an instrument of immigration, but an instrument of protection.

If third country nationals of African descent are not permitted to enter the Union, even though third country nationals in general are permitted to do so, there is a clear case of racial discrimination, constituting a violation of both the CERD and the TPD/CID system. However, in such cases the system itself is not discriminatory, unless it acquiesces to a pattern of violations, which is a matter of fact.

Whether elements of discrimination may emerge at the point of intersection between the TPD/CID, Qualification Directive and Receptions Directive<sup>28</sup> is an interesting, albeit theoretical issue. Anyway, corrective action in individual cases through interpretation and equitable considerations for the rectification of injustices is always possible. The question of an individual refugee status for Ukrainians in EU Member States has a limited practical significance, for as long as the current democratic government remains in power. In the improbable case that Russia succeeds in installing a puppet regime in Kyiv, then granting refugee or subsidiary status to displaced Ukrainians will become necessary.

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27 *Nottebohm (Liechtenstein v. Guatemala)* [1955] ICJ Rep 4.

28 Julia Kienast, Nikolas Feith Tan and Jens Vedsted-Hansen, 'Preferential, differential or discriminatory? EU protection arrangements for persons displaced from Ukraine' in this collection.

## 6. Concluding remarks

The term ‘racism’ describes a phenomenon of social pathology with global dimensions. Racism and discrimination are perceived in different ways and managed with different tools in every social system. If the economic system focuses on poverty and social exclusion of discriminated groups, in the legal system it is about formal criteria or informal practices of discrimination and about the operational patterns of institutions. Racist and discriminatory motives of actors are not easily transformed into legal-institutional racism, which is defined by legally sanctioned discriminatory provisions and practices.

Concerns of discrimination or institutional racism in the implementation of the EU system of temporary protection are overblown. The EU should instead be praised for its policies and its willingness to welcome and protect the victims of the war. We should also not lose sight of the broader picture. The Union and its Member States are facing the long-term challenge of dystopic Russian *Großraum* ambitions<sup>29</sup> and there is no place for complacency. A repetition of the events of 2015 would test the social and political cohesion of the European space and the effectiveness of its response. Displaced persons must be protected, but irregular mass migration movements should be prevented – and this has nothing to do with racism and all to do with geopolitics.

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29 Achilles Skordas, ‘Russia’s Eurasian Großraum and its Consequences’ (Verfassungsblog, 31 March 2022) <<https://verfassungsblog.de/russias-eurasian-groraum-and-its-consequences/>> accessed 1 December 2022.

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# Chapter 24

## Temporary Protection and EU Solidarity: Reflecting on European Racism

Prof Dora Kostakopoulou\*

### 1. Introduction

President Vladimir Putin's unprovoked aggression towards Ukraine on 24 February 2022 did not give the world a chance to contemplate an 'after' to the Covid-19 pandemic. The leap from Covid-19's inescapable vulnerabilities, the significant global death toll, the financial strain and the damage to people's lives and livelihoods to Mr Putin's invasion, destruction, indiscriminate bombings, the targeting and killing of civilians was swift and unpredictable, at least if one considers the scale, and the level of the displayed brutality, of the attack.

The Russian airstrikes and bombs did not distinguish among the targeted civilians in Mariupol, Kharkiv and elsewhere on the basis of race, colour, ethnicity, religion or nationality. All residents in the targeted areas were equally affected – most of them experienced severe trauma and millions sought refuge in the neighbouring countries and in the West.

Within a short space of time Putin's war made millions of people 'exiles': it uprooted them, displaced them and scattered them without distinction. As

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\* KU Leuven.



Ukrainian men were not permitted to leave the country, women and children started arriving in Poland, Hungary, Moldova and Romania exhausted and scared because their lives and freedoms were threatened. They crossed the Ukrainian borders because there was nowhere else to go. The European Union and Moldova were the only *hopelands* for the traumatised sanctuary seekers.

The fact that non-white residents were facing obstacles in the rush to leave Ukraine and at its borders and were experiencing differential treatment is both shameful and unacceptable in a European Union which has explicitly declared that its values (Article 2 TEU) and principles matter and are legally binding and, thus, enforceable. Non-white asylum seekers and refugees should not have been exposed to dehumanising racism on top of the Hobbesian nightmare created by Mr Putin's war. 'Europe has no soul', they must have thought the moment they encountered either a cold bureaucratic indifference or contempt to their distress and suffering.

This experience was dis-orienting at a time when the West was seeking to re-orient the world's attention to the importance of the world-wide strengthening of the rule of law, freedom, democracy and respect for human rights and human dignity. Since Mr Putin had displayed contempt for the Ukrainian people, their rights and international law, the only appropriate political response by his critics was a heightened respect for the above triad. And, since Mr Putin had acted believing that he was entitled to be a law to himself in dealing with neighbouring nations, then European leaders needed to emphasise the importance of state sovereignty under law and of living under a liberal democratic rule of law which affirms the principles of equality and non-discrimination.

To an extent this happened, but only to an extent. Hence, the critique outlined in the thoughtful kick off contribution by Carrera, Ineli-Ciger, Vosiute and Brumat<sup>1</sup>. They documented the discrimination, racism and xenophobia experienced by non-European third country nationals fleeing Ukraine whilst highlighting the EU's positive steps in activating the Temporary Protection Directive<sup>2</sup>(TPD thereafter). By comparing and contrasting similar experiences of mass displacement in Latin America and the chosen policy responses,

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1 Carrera and others, 'The EU Grants Temporary Protection for People Fleeing War in Ukraine: Time to rethink unequal solidarity in EU asylum policy' in this collection.

2 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2002] OJ L 212.

they made a well-articulated case for the rethinking, and reframing, of the EU solidarity principle on the grounds of providing real and effective protection to asylum seekers and refugees and non-discrimination on the basis of race, colour, ethnic origin, religion, national minority membership.<sup>3</sup>

But their arguments did not convince Professor Skordas who argued that ‘the accusations of discrimination, racism or ‘institutional racism’ against the system of temporary protection of displaced persons from Ukraine are not grounded on facts and norms’<sup>4</sup>. In this contribution, I wish to take issue with Professor Skordas’ submissions<sup>5</sup> (his first draft and the revised final contribution) from a twofold standpoint, namely a legal one and the perspective of political morality.

Before responding to Professor Skordas, however, I wish to make three brief observations at the outset. First, the activation of the TPD was a very positive as well as significant step. Unlike previous such crises, including the huge displacement of persons by the internal conflict in the former Yugoslavia which prompted the Council of Ministers to agree a Conclusion in 1992 and a subsequent Resolution in 1993 on the admission of persons for temporary protection. These were not published in the Official Journal, and were later followed by a Council Resolution, a Decision (OJ 1995 C 262/1<sup>6</sup> and OJ 1996 C 63/10<sup>7</sup>) and a Joint Action proposal by the Commission on burden-sharing<sup>8</sup> during temporary protection which following the objections of the United Kingdom was redrafted by the Commission and later on became the Temporary Protection Directive, swift action took place on 4 March 2022 and a welcoming and rights-based approach prevailed. It is also noteworthy that the historic discourse on burden-sharing did not surface in spring 2022 – the new refugees have been seen as assets in European politics and economies facing labour shortages. This is a fundamental change in asylum law and policy narratives – even though it might be short-lived.

Secondly, it is not very profitable to place considerable weight to the

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3 Carrera and others, ‘The EU Grants Temporary Protection for People Fleeing War in Ukraine: Time to rethink unequal solidarity in EU asylum policy’ in this collection.

4 Achilles Skordas, ‘Temporary Protection and European Racism’ in this collection.

5 *ibid.*

6 Commission Notice on the Notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [1995] OJ C262.

7 Council Decision of 4 March 1996 on an alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis [1996] OJ L63.

8 Commission, ‘Proposal to the Council for a Joint Action based on Article K.3(2)(b) of the Treaty on European Union concerning temporary protection of displaced persons’ COM (97) 93 final.

question of why the TPD was activated now and not in the past when the plight of Syrian refugees and others was heard loudly in Europe. Undoubtedly, Europe had a duty to protect them, and one could not easily abdicate those responsibilities by depicting an exodus of people in the past as an ‘irregular mass migration movement’<sup>9</sup>. Carrera et al<sup>10</sup> discussed where the responsibility lied for the non-activation of the TPD in 2015-2016. Achilles may hold a different opinion, but no one would argue that the TPD serves as a tool for the management of irregular migration by either design or default.

This brings me to the third preliminary observation. The Council’s Decision 2022/382<sup>11</sup> which determined the personal scope of the TPD is precisely that – the Council’s Decision. It would be unfair to lay blame on the European Commission, or the EU, for the failures and omissions of its Member States. Not only did the Commission’s proposal<sup>12</sup> include as beneficiaries of temporary protection Ukrainian nationals displaced outside Ukraine as of 24 February 2022, third country national refugees or asylum seekers in Ukraine at the time of the vents, stateless persons and third country nationals who are ‘unable to return in safe and durable conditions to their country or region of origin’ and long-term residents in Ukraine, as well as their family members

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9 Skordas, ‘Temporary Protection and European Racism’ in this collection.

10 Carrera and others, ‘The EU Grants Temporary Protection for People Fleeing War in Ukraine: Time to rethink unequal solidarity in EU asylum policy’ in this collection.

11 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71.

12 Commission, ‘Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection’ COM(2022) 91 final.

(Art. 1.1.),<sup>13</sup> but its Operational Guidelines<sup>14</sup> also recommended the extension of temporary protection to displaced Ukrainians and third country nationals not long before 24 February 2022, third country nationals and stateless persons permanently residing in Ukraine before 24 February 2022, and resident third country nationals ‘who were studying or working in Ukraine on a short-term basis’ should be admitted on ‘humanitarian grounds’, without Member States requiring travel documents and ensuring ‘safe passage’ to their country or region of origin.

The Commission’s Operational Guidelines are consistent with its previous emphasis on the right to human dignity as the core of EU legislation and policy measures in the field of humanitarian protection. I recall the Emergency Support Regulation of 15 March 2016<sup>15</sup>, the Commission Staff Working document on Humanitarian Protection (SWD (2016) 183 final, 23.4.2016) and the Commission Communication on Forced Displacement and Development of April 2016<sup>16</sup> which pronounced human dignity and non-discrimination core elements of its approach to forced displacement.

In accordance with the above-mentioned background, it is questionable whether geopolitical considerations play, or should play, an important role in the activation of the regime of temporary protection, as van Selm<sup>17</sup> and Professor

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13 The final text of the Council Decision leaves it to the MS to decide whether they would grant temporary protection or ‘adequate protection under their national law’ in respect of all categories of third country nationals, including long term residents, in particular to those ‘who can prove that they were legally residing in Ukraine before 24 February 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law, and who are unable to return in safe and durable conditions to their country or region of origin.’ It also leaves to the discretion of the MS to apply the TPD to other persons – including third country nationals other than Ukrainians – ‘who were residing legally in Ukraine and who are unable to return in safe and durable conditions to their country or region of origin’.

14 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ C126 1/1.

15 Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union [2016] OJ L70/1.

16 Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Lives in Dignity: from Aid-dependence to Self-reliance Forced Displacement and Development’ COM/2016/0234 final.

17 Joanne van Selm, ‘Temporary Protection for Ukrainians: learning the lessons of the 1990s?’ in this collection.

Skordas has argued<sup>18</sup>. In answering this question, only EU law can provide authoritative guidance. According to Article 78(1) TFEU, ‘the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28th of July 1951 and the Protocol of 31st of January 1967 relating to the status of refugees, and other relevant Treaties’.

In order to meet the above objectives, according to Article 78(2) TFEU, the European Parliament and the Council in accordance with the ordinary legislative procedure shall adopt measures comprising:

- a. a uniform status of asylum for nationals of third countries, valid throughout the Union;
- b. a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- c. a common system of temporary protection for displaced persons in the event of a massive inflow.

It is important to mention, here, the emergency provision of Article 78(3) TFEU which states that ‘in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission and after consulting the European Parliament, may adopt provisional measures for the benefit of the Member State(s) concerned’.

Clearly the textual wording of Article 78 TFEU is premised only on *the need* of displaced third country nationals to acquire international protection or temporary protection and on *compliance with the Geneva Convention, the New York Protocol and other relevant international norms*. There is no reference to the Union’s geopolitical interest or foreign policy objectives. In this respect, if one made Article 78 TFEU conditional on requirements pertaining to TEU’s Title V on external action and CFSP, that would be unlawful. Additionally, since temporary protection falls within the common policy on asylum, which is one element of the Area of Freedom, Security and Justice, the requirement of respect for fundamental rights reaffirmed in Article 67 TFEU applies.

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18 Skordas, ‘Temporary Protection and European Racism’ in this collection.

The follow up question is therefore whether the Council's *de jure* restrictions on the personal scope of the beneficiaries of temporary protection are fundamental rights compliant. The fundamental rights which are protected by primary EU law, and thus the EU Charter of Fundamental rights are, Articles 1 (on human dignity), Article 2 (right to life), Article 3 (right to the integrity of the person (including mental integrity), Article 4 (on the prohibition of torture and inhuman or degrading treatment or punishment), Article 7 (the right to respect for private and family life), Article 18 (right to asylum), Article 19 (protection from refoulement), Article 21 (non-discrimination), Article 23 (equality between men and women) and Article 24 (the rights of the child).

These rights are explicitly mentioned in the Commission's proposed Regulation<sup>19</sup> addressing situations of crisis and force majeure in the field of asylum and migration. Under section 3.3, the proposed regulation confirms the 'full respect of fundamental rights as enshrined in the Charter' as well as 'obligations stemming from international law'. In addition to Article 21 EUCFR, therefore, Article 14 ECHR, which refers to non-discrimination on race, colour, national origin and association with a national minority, and Article 1 ICERD, which refers to the prohibited grounds of race, colour, national or ethnic origin which have the purpose of nullifying or impairing the recognition or enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms, apply.

In this respect, in the event of a mass exodus of third country nationals fleeing war-based violence, any differentiated treatment of them which includes arbitrariness, discrimination or racism would violate the legal provisions mentioned above. It is not an issue of exclusions or restrictions between citizens and non-citizens, but an issue of singling out a racial, ethnic or national group of third country nationals for privileged treatment when all groups are equally displaced and fleeing the same area of armed conflict.

From the standpoint of equality and justice as even handedness, the new institutional fixity contained in the Council's Decision was not one of necessity but one of choice and restriction with respect to the potential beneficiaries of international protection. If that choice had been subjected to principled constraints, then all persons who could not return to the country of origin in safe and durable conditions should have had not only rights to spaces of safety (admission rights) but also the same set of rights prescribed by the temporary protection regime. In this respect, the Council's Decision does not 'look sound

<sup>19</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum' COM/2020/613 final.

and coherent' because it is based on 'only reasonable differentiations based on individuals' migration status in Ukraine, as Professor Skordas argued in his initial contribution.

So, we are where we are. The Council's decision had to be taken quickly to address the situation on the ground and took into account the unyielding pressures of domestic politics and narratives of nationalism and white supremacy. In the end, the contradictions are fundamental because solidarity towards those fleeing the invaded Ukraine can only be ethically grounded – not ethnically or racially grounded. After all, vindicating rights and compliance with the law are constitutive of the political culture of a polity. Constitutionalism must begin 'at home' before it is preached to autocratic Others. And as the ethical, legal and the political are interlaced in the field of humanitarian protection, it is the equal human vulnerability and the affirmation in praxis of the values of respect for human dignity and non-discrimination as well as respect for the rule of law (international, EU law-based and national constitutional) that underpin decisions of individual and political morality.

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persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2002] OJ L 212

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# Chapter 25

## EUrope's Selective Dehumanisation: The Revival of Geographical Determinism as Rationalisation to Justify the Preferential Protection of Ukrainian Refugees in the EU

Dr Rodrigo Bueno Lacy\* and Prof Henk van Houtum\*\*

*“It’s really emotional for me because I see European people with blue eyes and blond hair being killed.”*

David Sakvarelidze, Ukraine’s Former Deputy Chief Prosecutor

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\* Karelian Institute, University of Eastern Finland.

\*\* Nijmegen Centre for Border Research, Radboud University & University of Eastern Finland.

# 1. Introduction: The smokescreen of proximity

The Russian invasion of Ukraine, on February 24th of 2022, has so far prompted the flight of almost 8 million Ukrainians—of which nearly 5 million have requested the EU's Temporary Protection<sup>1</sup>. Given the EU's provision of unprecedented supplementary protection mechanisms<sup>2</sup> to them, it would be an understatement to point out that the dignified manner in which Ukrainian refugees have been welcomed—and rightfully so—stands in stark contrast with the illegalisation<sup>3</sup>, push-backs<sup>4</sup>, deportation<sup>5</sup>, blatant murder<sup>6</sup> and fatal passiveness<sup>7</sup> (i.e., letting die at sea<sup>8</sup>, across the Sahara desert<sup>9</sup> or as consequence of either turning a blind eye to inhuman paramilitary forces or out-

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- 1 UNHCR, 'Ukraine Refugee Situation' <<https://data.unhcr.org/en/situations/ukraine>> accessed 27 June 2022.
  - 2 Olivia Long, 'EU invokes Temporary Protection Directive to help those fleeing Ukraine' (*European Commission*, 3 March 2022) <[https://ec.europa.eu/migrant-integration/news/eu-invokes-temporary-protection-directive-help-those-fleeing-ukraine\\_en](https://ec.europa.eu/migrant-integration/news/eu-invokes-temporary-protection-directive-help-those-fleeing-ukraine_en)> accessed 1 December 2022.
  - 3 Henk Van Houtum and Roos Pijpers, 'The European Union as a Gated Community: The Two-faced Border and Immigration Regime of the EU' (2007) 39(2) *Antipode* 291.
  - 4 The Left, 'The Black Book of Pushbacks - Volumes I & II' (*The Left*, 18 December 2020) <<https://left.eu/issues/publications/black-book-of-pushbacks-volumes-i-ii/#:~:text=Compiled%20by%20Border%20Violence%20Monitoring,rights%20violations%20at%20external%20borders.>> accessed 1 December 2022.
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  - 9 UN, 'Migrant deaths in Libyan desert 'wake-up call' for stronger protections' (1 July 2022) <<https://news.un.org/en/story/2022/07/1121832>> accessed 1 December 2022.

sourcing<sup>10</sup> migratory controls to Libya's slave markets<sup>11</sup> and other authoritarian gatekeepers<sup>12</sup>). This is the chamber of horrors that the European border regime<sup>13</sup> has reserved for refugees other than Ukrainian.<sup>14</sup>

Notably, the widespread accommodation of Ukrainian refugees in private homes<sup>15</sup> across the EU as well as the comparatively seamless integration<sup>16</sup> that such heart-warming policies afford them (although the intentions may not always be as high-minded as they seem<sup>17</sup>) expose a jaw-dropping incongruousness with the often inhumane<sup>18</sup>, extremely violent<sup>19</sup>, exploitative<sup>20</sup> and

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- 10 Luiza Bialasiewicz, 'Off-shoring and out-sourcing the borders of Europe: Libya and EU border work in the Mediterranean' (2012) 17(4) *Geopolitics* 843.
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conveniently delocalised<sup>21</sup> camps and prisons<sup>22</sup> where *other* refugees are kept hidden from public scrutiny and often left to languish<sup>23</sup>. By comparison, the arrival of over a million refugees in 2015<sup>24</sup>—most of them Syrians who, tellingly, were also fleeing the Russian army's shelling-based terrorisation<sup>25</sup> of their civilian settlements, was met with a securitisation panic<sup>26</sup> rooted in a long-standing European Islamophobia<sup>27</sup>.

Granted, for a brief period towards the end of 2015, Syrians seeking refuge in EUrope were met with sympathy and even solidarity<sup>28</sup>—especially after images of Alan Kurdi<sup>29</sup>, a Syrian toddler whose corpse washed upon a beach near Bodrum, Turkey, made headlines around the world. Yet, such goodwill rapidly eroded over the course of 2016, as a downright anti-refugee discourse<sup>30</sup> took over the European public debate on migration.

Even though the so-called 'refugee crisis' of 2015 was, at the time, drummed

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- 21 Paolo Cuttitta, 'Delocalization, Humanitarianism, and Human Rights: The Mediterranean Border Between Exclusion and Inclusion' (2017) 50 *Antipode* 783.
- 22 Kati Nieminen, 'The Detainee, the Prisoner, and the Refugee: The Dynamics of Violent Subject Production' (2019) 15(2) *Law, Culture and the Humanities* 516.
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up as the “biggest challenge” the Union had ever faced<sup>31</sup>, the plight of Syrians did not warrant the invocation of the EU’s Temporary Protection Directive<sup>32</sup>: an emergency policy tool specifically designed to welcome extraordinary increases of asylum seekers and quickly integrate them by granting them the right to participate directly in society and join the labour market. Bafflingly, even though the EU has had this tool at its disposal since 2001, it dusted it only after Ukrainians started fleeing to the EU, i.e. to the sole advantage of refugees whose distinct vulnerability seems to stem from their “blond hair and blue eyes”—and the geographical imaginations of essential Europeanness<sup>33</sup> such traits evoke.

Painfully and shamefully, the EU has extended the benefits of its Temporary Protection Directive exclusively to Ukrainians even as African labour migrants and refugees<sup>34</sup> residing in Ukraine have been excluded from the policy’s scope. Instead, Africans are being forced, through beatings and arrests, to remain in a country at war in which they are foreigners anyway.<sup>35</sup> Are they not trying to flee the very country that the EU itself recognised to have become so perilous that its Member States opened their doors to as many of its citizens as those in need of refugee protection? Is their humanity not near enough to ours?

Extraordinarily, the activation of the Temporary Protection Directive provides Ukrainian refugees with immediate access to employment across the EU<sup>36</sup>. This is exceptional. Opening the EU’s labour market to about 4.8 million

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31 Daniel Trilling, ‘How the media contributed to the migrant crisis’ *The Guardian* (1 August 2019) <<https://www.theguardian.com/news/2019/aug/01/media-framed-migrant-crisis-disaster-reporting>> accessed 1 December 2022.

32 European Commission, ‘Temporary protection’ <[https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en)> accessed 1 December 2022.

33 Patricia Seed, ‘Are These Not Also Men?: The Indians’ Humanity and Capacity for Spanish Civilisation’ (1993) 25 *Journal of Latin American Studies* 629.

34 The Conversation, ‘Ukraine refugee crisis exposes racism and contradictions in the definition of human’ (*The Conversation*, 21 March 2022) <<https://theconversation.com/ukraine-refugee-crisis-exposes-racism-and-contradictions-in-the-definition-of-human-179150>> accessed 1 December 2022.

35 Jessie Williams, ‘Scared for our lives’: grave concerns over safety of refugees detained by Ukraine’ *The Guardian* (Europe, 12 April 2022) <<https://www.theguardian.com/global-development/2022/apr/12/ukraine-refugees-detained-russia-war>> accessed 1 December 2022.

36 Martin Hoffman, ‘Getting Ukrainian refugees into work: The importance of early competence checks’ (*ICMPD*, 28 March 2022) <<https://www.icmpd.org/blog/2022/getting-ukrainian-refugees-into-work-the-importance-of-early-competence-checks>> accessed 1 December 2022.

Ukrainians<sup>37</sup> stands in diametrical antagonism with the waiting despair<sup>38</sup> that the EU's usual asylum procedure imposes on all other asylum seekers. Equally telling is the absence of the xenophobic panic of apocalyptic overtones<sup>39</sup> that typically takes over European media and political discourse following the first media reports about the arrival of 'non-European' asylum seekers (e.g., non-Christian<sup>40</sup>).

In short, we are witnessing real-time racial discrimination on a continental scale<sup>41</sup>: a simultaneous display of heroic solidarity<sup>42</sup> and repugnant racism<sup>43</sup>. Just as Ukrainian refugees are being integrated without much hassle<sup>44</sup> into EU Member States, European governments keep drumming up tropes that denounce refugees as a 'burden'. Such demonisation is not accidental but strategic: it is employed to justify a state's otherwise unjustifiable structural harassment of unwanted refugees<sup>45</sup> as well as the systematic violation of their rights<sup>46</sup>.

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37 UNHCR, 'Ukraine refugee situation,' (UNCHR, 6 February 2023) <<https://data.unhcr.org/en/situations/ukraine>>

38 Henk Van Houtum, 'Waiting Before the Law: Kafka on the Border' (2010) 19 *Social & Legal Studies* 285.

39 Natalia Zawadzka-Paluckta, 'Ukrainian refugees in Polish press' (2022) 0 *Discourse & Communication* 1.

40 Lenka Kisoová, 'The Production of (Un)deserving and (Un)acceptable: Shifting Representations of Migrants within Political Discourse in Slovakia' (2017) 32 *East European Politics and Societies: and Cultures* 743.

41 James Traub, 'The Moral Realism of Europe's Refugee Hypocrisy', *Foreign Policy* (21 March 2022) <<https://foreignpolicy.com/2022/03/21/ukraine-refugees-europe-hypocrisy-syria/>> accessed 1 December 2022.

42 Merijn van Nuland, 'Friese 'taxidienst' stopt: 447 vluchtelingen opgehaald uit Oekraïne', *Trouw* (7 November 2022) <<https://www.trouw.nl/binnenland/friese-taxidienst-stopt-447-vluchtelingen-opgehaald-uit-oekraïne~bd1c5b22/>> accessed 1 December 2022.

43 John Henley, 'People treated like weapons': more deaths feared at Poland-Belarus border', *The Guardian* (31 October 2021) <<https://www.theguardian.com/world/2021/oct/31/poland-belarus-border-migrants-deaths>> accessed 1 December 2022.

44 Andrew Higgins, 'In Poland, a Warm Welcome for Ukrainian Refugees Wobbles' *The New York Times* (15 November 2022) <<https://www.nytimes.com/2022/11/15/world/europe/poland-ukrainian-war-refugees.html>> accessed 1 December 2022.

45 Daniel Boffey, 'Baby dies in 'inhuman' Dutch centre for asylum seekers', *The Guardian* (25 August 2022) <<https://www.theguardian.com/world/2022/aug/25/baby-dies-in-inhuman-dutch-centre-for-asylum-seekers>> accessed 1 December 2022.

46 Statewatch, 'EU: Legal actions pile up against Frontex for involvement in rights violations' *Statewatch* (Europe, 23 February 2021) <<https://www.statewatch.org/news/2021/february/eu-legal-actions-pile-up-against-frontex-for-involvement-in-rights-violations/>> accessed 1 December 2022.

Furthermore, the vitriol that the EU reserves for the overwhelming majority of its unwanted asylum seekers is spilling over to corrode the fundamental liberties of European citizens, who are finding themselves persecuted<sup>47</sup> for saving asylum seekers' lives.

However, rather than condemning the selective dehumanisation and cruel fate to which the EU damns refugees of a 'less desirable'<sup>48</sup> descent—who have as much a right to international protection as Ukrainians—a barrage of commentators<sup>49</sup> and ministers of state<sup>50</sup> have tried to explain away the discrepancy in treatment with the deceptively commonsensical 'logic' of *geographical proximity*.

Examples of this fallacious logic abound<sup>51</sup>.

Take Philippe Corbé<sup>52</sup>, head of the political service of BFMTV, who argued that Ukrainians are “not Syrians but refugees who look like us [...] We're talking about Europeans who are leaving in their cars that look like our cars and who are just trying to save their lives.” Reproducing a similarly tormented lucidity, Charlie D'Agata<sup>53</sup>, a CBS News correspondent, stated that Ukraine “isn't a place, with all due respect, like Iraq or Afghanistan, that has seen conflict raging for decades. This is a relatively civilised, relatively Euro-

47 Liz Fekete, 'Migrants, borders and the criminalisation of solidarity in the EU' (2018) 59 *Race & Class* 65-83

48 Emily Venturi and Anna Lasmi Vallianatou, 'Ukraine exposes Europe's double standards for refugees' (*Chatnam House*, 30 March 2022) <<https://www.chathamhouse.org/2022/03/ukraine-exposes-europes-double-standards-refugees>> accessed 1 December 2022.

49 Euro-Med Monitor, 'Europe's official, media handling of Ukrainian crisis exposes deep-rooted, racist policy against non-Europeans [EN/AR]' Reliefweb (3 March 2022) <<https://reliefweb.int/report/ukraine/europes-official-media-handling-ukrainian-crisis-exposes-deep-rooted-racist-policy>> accessed 1 December 2022.

50 Valentijn Bartels and Niels Rigter, 'Van der Burg: Opvang in regio is beste oplossing' *De Telegraaf* (14 June 2022) <<https://www.telegraaf.nl/nieuws/93903795/van-der-burg-opvang-in-regio-is-beste-oplossing>> accessed 1 December 2022.

51 Janine Dahinden, 'A Call for Solidarity with All Refugees, Beyond Double Standards!' (*NCCR*, 24 March 2022) <<https://nccr-onthemove.ch/blog/a-call-for-solidarity-with-all-refugees-beyond-double-standards/>> accessed 1 December 2022.

52 Hams Salmi (*Twitter*, 24 February 2022) <https://twitter.com/el74180865/status/1496878026558165008>; accessed 1 December 2022.

53 Imraan Siddiqi, 'Civilized' (*Twitter*, 26 February 2022) <<https://twitter.com/imraansiddiqi/status/1497607326487826435>> accessed 1 December 2022.



pean—I have to choose those words carefully, too—city, where you wouldn't expect that or hope that it's going to happen.” Santiago Abascal, the leader of Spain's far-right party VOX<sup>54</sup>, even alluded to the great replacement theory<sup>55</sup> (a core element of contemporary fascist ideology<sup>56</sup>) to justify the patent discrimination between Ukrainians and other refugees: “Anyone can understand the difference between these flows and the invasions of young, military-age males of Muslim origin that have been launched against Europe's borders.” Likewise, the *Neue Zürcher Zeitung*<sup>57</sup> bluntly claimed that “They are real refugees this time [...] We see the suffering of these people. No one can deny the danger they are in. It's different with many migrants who came to Europe in the past as supposed refugees.” Also, Daniel Hanna, in the *Telegraph*<sup>58</sup>, attempted to tuck away such brazen discrimination behind a benevolent façade by framing it as an objective differentiation grounded on geographical and cultural proximity: “They seem so like us. That is what makes it so shocking. Ukraine is a European country. Its people watch Netflix and have Instagram accounts, vote in free elections and read uncensored newspapers. War is no longer something visited upon impoverished and remote populations.”

On the ASILE platform, some authors have chimed in with a similarly parochial argument (we do not employ this adjective gratuitously but rather etymologically, from the classical Greek *pároikos*: *para-* ‘near’ + *oikos* ‘house’ = geographically short-sighted) to justify this policy. As Joanne van Selm<sup>59</sup> explains:

54 Alberto Ortiz, ‘Abascal diferencia a los refugiados ucranianos de las “invasiones de jóvenes” de origen musulmán que “atacan” las fronteras de Europa’ (*OelDiario*, 2 March 2022) <[https://www.eldiario.es/politica/abascal-aprovecha-guerra-cargar-inmigracion-refugiados-ucranianos-invasiones-jovenes-musulmanes\\_1\\_8794717.html](https://www.eldiario.es/politica/abascal-aprovecha-guerra-cargar-inmigracion-refugiados-ucranianos-invasiones-jovenes-musulmanes_1_8794717.html)> accessed 1 December 2022.

55 Steve Rose, ‘A deadly ideology: how the ‘great replacement theory’ went mainstream’ *The Guardian* (Europe, 8 June 2022) <<https://www.theguardian.com/world/2022/jun/08/a-deadly-ideology-how-the-great-replacement-theory-went-mainstream>> accessed 1 December 2022.

56 Eirikur Bergmann, ‘The Eurabia conspiracy theory’ in Andreas Önnarfors and André Krouwel (eds), *Europe: Continent of Conspiracies: Conspiracy Theories in and about Europe* (Routledge 2021).

57 Marc Felix Serrao, ‘Willkommenskultur – aber richtig!’ *Neue Zürcher Zeitung* (Berlin, 1 March 2022) <<https://www.nzz.ch/meinung/fluechtlinge-aus-der-ukraine-zeit-fuer-eine-neue-willkommenskultur-ld.1672134?reduced=true>> accessed 1 December 2022.

58 Daniel Hannan, ‘Vladimir Putin's monstrous invasion is an attack on civilisation itself’ *The Telegraph* (26 February 2022) <<https://www.telegraph.co.uk/news/2022/02/26/vladimir-putins-monstrous-invasion-attack-civilisation/>> accessed 1 December 2022.

59 Joanne van Selm, ‘Temporary Protection for Ukrainians: learning the lessons of the 1990s?’ in this collection.

A [...] related point [...] is geography [...] Ukraine is bordered by four current EU Member States. The EU is by necessity, the location of first response—or one could say, as the EU might describe other continents: the EU is the region of origin [...] The question of ‘why activate the TP Directive now, but not in 2015’ has been posed by many<sup>60</sup> and responses often include a sense that racism or discrimination is at play. That could be the case, or at least part of the answer, whether directly for some member states, or with fears of a backlash from increasingly present right-wing political parties and their followers. However, I would suggest that a major reason for which the directive was not applied in 2015 was that the situation was not an immediate displacement crisis requiring the urgent protection response of direct neighbours. There is a political logic to differing reactions to the immediate displacement of people from a neighbouring state and to the secondary migration of people who, in many cases, were displaced over the course of five years but received limited protection or solution opportunities in other, geographically closer countries (even if a country of first asylum, Turkey, borders the EU). While there are legal and moral obligations to all refugees, there is, of course, a cold hard element of ‘who else could possibly protect them?’ or ‘where else could they possibly go?’ As such, activation could be a result of urgent political decision making in the face of an immediate, proximate crisis in which the EU itself, and most of its Member States as NATO members, has a direct and existential stake. Geography necessarily underpins many decisions in war as in life (sic).

In our chapter, we contend that such seemingly neutral and objective ‘geographical’ justifications, which are intended to legitimise an essentialising moral distinction between otherwise equally deserving refugee populations, boil down to a fallacy of geographical proximity that is flawed on at least three counts: 1) It implies a misunderstanding of the universal geographical scope of the legal obligations to which the signatories of the 1951 Refugee Convention and its 1967 Protocol—such as the EU—are bound. 2) It neglects the EU’s b/

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60 Meltem Ineli-Ciger, ‘5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022’ (*EU Immigration and Asylum Law and Policy*, 7 March 2022) <<https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>> accessed 1 December 2022.

ordering regime<sup>61</sup> and its visa-based principle, which ascribes arbitrary moral value to human beings on the basis of descent and manifests itself spatially as a global apartheid<sup>62</sup>. 3) It is based on a chauvinistic, essentialist and scientifically aberrant<sup>63</sup> understanding of geography—both as a discipline<sup>64</sup> and as an object of study<sup>65</sup>—that risks replicating and sustaining the xenophobia and war-mongering nationalism<sup>66</sup> responsible for producing<sup>67</sup> refugees in the first place.

In what follows, we elaborate on these three flaws and conclude with a plea to end this apartheid—and dispel the belief that the geographical sciences can be honestly employed to justify such an immoral<sup>68</sup> and scientifically abominable discrimination.

## 2. The three flaws of the proximity trap

Long before Ukrainians became EUrope's largest refugee population, political forces across the ideological spectrum—spanning mostly liberal to far-right political parties<sup>69</sup>—had been using asylum seekers and other easily identifiable minorities lacking political representation as scapegoats for their unpop-

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61 Henk van Houtum and Rodrigo Bueno Lacy, 'The Autoimmunity of the EU's Deadly B/ordering Regime; Overcoming its Paradoxical Paper, Iron and Camp Borders' (2020) 25 *Geopolitics* 706.

62 Henk van Houtum, 'Human Blacklisting: The Global Apartheid of the EU's External Border Regime' (2010) 28 *Environment and Planning D: Society and Space* 957.

63 Prof. Simon Springer, 'Anarchist Geography' (2 October 2019) < <https://www.youtube.com/watch?v=873cHiR4J8I> > accessed 1 December 2022.

64 Laura Dassow Walls, *The Passage to Cosmos: Alexander von Humboldt and the Shaping of America* (The University of Chicago Press 2009).

65 John K. Wright, 'Terrae Incognitae: The Place of the Imagination in Geography' (1947) 37 *Annals of the Association of American Geographers* 1.

66 Samuel P. Huntington, 'The Clash of Civilizations?' (*Foreign Affairs*, Summer 1993) < <https://www.foreignaffairs.com/articles/united-states/1993-06-01/clash-civilizations> > accessed 1 December 2022.

67 Gholam Khiabany, 'Refugee crisis, imperialism and pitiless wars on the poor' (2016) 38 *Media, Culture & Society* 755.

68 Paul Feyerabend, 'How to Defend Society Against Science' (1975) 011 *Radical Philosophy* 3.

69 Henk van Houtum and Rodrigo Bueno Lacy, 'The political extreme as the new normal: the cases of Brexit, the French state of emergency and Dutch Islamophobia' (2017) 195 *Fennia - International Journal of Geography* 85.

ular austerity policies<sup>70</sup>. Such mean-spiritedness cuts to the core of an electoral strategy<sup>71</sup> that has been deployed by EUropean parties of all stripes<sup>72</sup> to deflect responsibility for the acute loss of prosperity<sup>73</sup> otherwise caused by the predatory capitalism<sup>74</sup> they all have advocated<sup>75</sup> since “1993, immediately after the consolidation of the Single Market and the signing of the Treaty of Maastricht<sup>76</sup>”. Ever since, a series of ever-more unscrupulous state-driven wholesales of—*inter alia*—EUropean pensions<sup>77</sup>, social housing<sup>78</sup> and public healthcare<sup>79</sup> (i.e., ‘privatisations’) have been misshaping what were not long ago the world’s most enviable public services into the greedy business of unaccountable transnational corporations. This plundering of the EUropean commons has strewn the widespread impoverishment of vast socio-economic sectors which are no longer able to enjoy formerly affordable public services of decent quality. Ominously, such privatisations have wreaked havoc amidst a much-diminished workforce. Not only is the EUropean working class (i.e., anyone depending on a wage to cover their basic needs) no longer backed by powerful unions but it has been left devastated by decade-and-a-half of despotic austerity measures

70 Alexandra Koronaiou et al, ‘Golden Dawn, austerity and young people: the rise of fascist extremism among young people in contemporary Greek society’ 2 *The Sociological Review* 234-258

71 Interview with Thomas Piketty, Economist (*Euronews*, 26 September 2019) <<https://www.euronews.com/2019/09/26/economic-disillusionment-feeds-nationalism-says-economist-thomas-piketty>> accessed 1 December 2022.

72 Cas Mudde, ‘Why copying the populist right isn’t going to save the left’ *The Guardian* (14 May 2019) <<https://www.theguardian.com/news/2019/may/14/why-copying-the-populist-right-isnt-going-to-save-the-left>> accessed 1 December 2022.

73 The Lancet Public Health, ‘The cost of living: an avoidable public health crisis’ (2022) 7 *The Lancet Public Health*.

74 Noam Chomsky and Abby Martin, ‘The Empire’s Election Extravaganza’ (25 October 2015) <<https://www.youtube.com/watch?v=YUc8ukdVtMs>> accessed 1 December 2022.

75 Neil Gilbert, ‘Transformation of the Welfare State: The Silent Surrender of Public Responsibility’ (Oxford University Press 2002)

76 Judith Clifton, Francisco Comín and Daniel Díaz Fuentes, ‘Privatizing public enterprises in the European Union 1960–2002: ideological, pragmatic, inevitable?’ (2006) 13 *Journal of European Public Policy* 736-756

77 Bernard Ebbinghaus, ‘The Privatization and Marketization of Pensions in Europe: A Double Transformation Facing the Crisis’ (2015) 1 *European Policy Analysis* 56-73.

78 Jan Douwe van der Ploeg, Jennifer C. Franco and Saturnino M Borrás Jr, ‘Land concentration and land grabbing in Europe: a preliminary analysis’ (2015) 36 *Canadian Journal of Development Studies* 147-162.

79 Vicente Navarro, ‘The Consequences of Neoliberalism in the Current Pandemic’ (2020) 50 *International Journal of Health Services* 271-275.

jointly imposed by the EU and the IMF<sup>80</sup>.

Exacerbating such vulnerability is the state's steady encroachment on allegedly fundamental rights of association, protest, and any others which might be grossly trampled upon whenever governments summon the faceless riot police<sup>81</sup> along with its skin-tearing dogs, skull-cracking batons, hand-tearing water cannons, eye-bursting rubber bullets, undercover police provocateurs, kidnapping vans and the legal authority to maul the discontented population back into obedience. As these excesses show, fundamental rights across the EU have been gutted by the introduction of ever-more common states of exception<sup>82</sup> (e.g., the French state's systematic intimidation of Muslim communities<sup>83</sup> after each Islamist terrorist attack; the Covid-19 pandemic's lockdowns and curfews<sup>84</sup>). These 'existential threats'—so we are told<sup>85</sup>—represent a menace of such magnitude that any dissent regarding either the danger they represent or the policies the state chooses to address them should be met by nothing more indulging than the immediate deployment of militarised riot police<sup>86</sup>.

The need to employ ever-more brute force against both its citizens and refugees reflects the growing authoritarianism of European policymaking and politics<sup>87</sup>. Tellingly, European workers were forced to foot the bailouts that the EU employed to rescue the bankers who caused the economic crisis of 2008

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80 Philip R. Laine, 'The European Sovereign Debt Crisis' (2012) 26 *Journal of Economic Perspective* 49-68.

81 William I. Robinson, 'The Global Police State' (Pluto Press 2020).

82 Giorgio Agamben, 'Stato di eccezione e stato di emergenza' *Quodlibet* (20 July 2020) <<https://www.quodlibet.it/giorgio-agamben-stato-di-eccezione-e-stato-di-emergenza>> accessed 1 December 2022.

83 Jennifer Fredette, 'The French State of Emergency' (2017) 116 *Current History* 101-106.

84 Nick Megoran, 'Borders on steroids: Open borders in a Covid-19 world?' 91 *Political Geography* 102443.

85 Gemma Ahearne, 'Long read: The War on Dissent during the State of Exception', University of Liverpool's School of Law and Social Justice (4 August 2021) <<https://www.liverpool.ac.uk/law-and-social-justice/blog/war-on-dissent-during-state-of-exception/>> accessed 1 December 2022.

86 Chiem Balduk, 'VN-gezant blijft bij kritiek op Nederlandse politie, is 'oprecht bang voor geweldsescalatie'', NOS (10 January 2022) <<https://nos.nl/artikel/2412538-vn-gezant-blijft-bij-kritiek-op-nederlandse-politie-is-oprecht-bang-voor-geweldsescalatie>> accessed 1 December 2022.

87 Christian Kreuder-Sonnen, 'An authoritarian turn in Europe and European Studies?' (2018) 25 *Journal of European Public Policy* 452-464.

only to be rewarded by evictions and homelessness<sup>88</sup>. It is of the essence to understand this process for, ultimately, EUrope's political elites (both national and EUropean) have come to depend on their ability to keep business as usual<sup>89</sup> in order to preserve their power and privilege intact. Such ability has relied on the optical illusion that is brought about by a rhetoric that promotes radical economic justice yet is followed by policies that preserve its political economy intact: blaming easily identifiable and vulnerable targets such as refugees—and minority diasporas—while propping up the interests of socio-economic elites sowing inequality. After all, the billionaire press<sup>90</sup> can create and sustain this sort of spectacle (i.e., a technologically manufactured reality), thus becoming a king-maker that can precipitate the rise and fall of ministers while making itself indispensable to fund the signature policies of the political figures such press champions. Overall, this 'wall of disinformation'<sup>91</sup> has estranged asylum seekers from EUropean society by making them look as 'parasites'<sup>92</sup> while further perverting the geopolitics of our moral imagination<sup>93</sup> by making colossal economic predators profiting from social decay look like our friends and family.

Thus, the geographical notion that asylum seekers other than Ukrainian are too far from the EU is a hegemonic geopolitical imagination manufactured by structural disinformation that is disseminated by the symbiotic interests among political elites and corporations<sup>94</sup>—not electorates. The most compelling proof of such political interdependence lies in a concrete fact: it has become common among prominent EUropean heads of government to retire from public life by cashing fat checks at the boards of directors of the

88 Camilo Bernal, Alejandro Forero and Iñaki Rivera, 'State-Corporate Crime and Social Harm in the Spanish Crisis' (2014) 3 *State Crime Journal* 220–36.

89 Arthur Goldhammer (trs), *Capital and Ideology* (Harvard University Press 2020).

90 Georges Monbiot, 'Billionaires bought Brexit – they are controlling our venal political system' *The Guardian* (13 July 2016) <<https://www.theguardian.com/commentisfree/2016/jul/13/billionaires-bought-brexit-controlling-britains-political-system>> accessed 1 December 2022.

91 Greg Philo, Emma Briant, and Pauline Donald, 'The role of the press in the war on asylum' (2013) 55 *Race & Class* 28–41.

92 Anita van Rootselaar, 'De oplossing voor de asielcrisis? 'Begin met legalisatie van migratie'' *Het Parool* (7 September 2022) <<https://www.parool.nl/nederland/de-oplossing-voor-de-asielcrisis-begin-met-legalisatie-van-migratie-bbc01532/>> accessed 1 December 2022.

93 George Monbiot, 'How Consumerism Destroys Our Minds' *Double Down News* (25 March 2021) <<https://www.doubledown.news/watch/2021/25/march/how-consumerism-destroys-our-minds-george-monbiot>> accessed 1 December 2022.

94 Clara E. Mattei, *The Capital Order How Economists Invented Austerity and Paved the Way to Fascism* (Chicago University Press 2022)

corporations they favoured during their time in office<sup>95</sup>. Instead of transforming the political economy causing so much misery<sup>96</sup>, Europe's governments have been mass-producing scapegoats<sup>97</sup> on which electorates can vent their anger for the undeniable decay in living standards<sup>98</sup> brought about by poverty-expanding and inequality-sowing policies. This false consciousness<sup>99</sup> has taken shape in a political economy that privatises corporate profits while subsidising its losses<sup>100</sup>; and which cosies up to strongmen<sup>101</sup> such as Vladimir Putin and his oligarchs<sup>102</sup> instead of phasing out the environmentally destructive energy sources<sup>103</sup> on which their politics of aggression depend<sup>104</sup>.

Although the geopolitical magnitude of this 'swipe to the far right' is hard to overstate<sup>105</sup>, a widespread awareness among the European public about the dev-

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95 Melissa Eddy, 'Some, but not all, former European leaders quit Russian boards' *The New York Times* (24 February 2022) <<https://www.nytimes.com/2022/02/24/business/russia-ukraine-corporate-boards.html>> accessed 1 December 2022.

96 Georges Monbiot, 'Capitalism is killing the planet—it's time to stop buying into our own destruction' *The Guardian* (30 October 2021) <<https://www.theguardian.com/environment/2021/oct/30/capitalism-is-killing-the-planet-its-time-to-stop-buying-into-our-own-destruction>> accessed 1 December 2022.

97 Cas Mudde, 'Why copying the populist right isn't going to save the left' *The Guardian* (14 May 2019) <<https://www.theguardian.com/news/2019/may/14/why-copying-the-populist-right-isnt-going-to-save-the-left>> accessed 1 December 2022.

98 Agence France-Presse, 'War, hunger, Covid-19 cast gloomy shadow over Europe' *edn Hub* (6 June 2022) <<https://ednh.news/war-hunger-covid-19-cast-gloomy-shadow-over-europe/>> accessed 1 December 2022.

99 Georg Lukács, *History and False Consciousness* (The MIT Press 1972).

100 David Reiss, 'Fannie Mae and Freddie Mac: Privatizing Profit and Socializing Loss' (2010) 156 Brooklyn Law School, Legal Studies Paper 1.

101 Katrin Bennhold, 'The Former Chancellor Who Became Putin's Man in Germany' *The New York Times* (23 April 2022) <<https://www.nytimes.com/2022/04/23/world/europe/schroder-germany-russia-gas-ukraine-war-energy.html>> accessed 1 December 2022.

102 Redactie, 'Livecast - Rijke Russen in belastingparadijs Nederland' (*Follow the Money*, 16 Mei 2022) <<https://www.ftm.nl/artikelen/livecast-rijke-russen-belastingparadijs-nederland>> accessed 1 December 2022.

103 Andreas Malm, *Fossil Capital: The Rise of Steam Power and the Roots of Global Warming* (Verso 2016).

104 Matthew Karnitsching, 'Putin's useful German idiots' *Politico* (Berlin, 28 March 2022) <<https://www.politico.eu/article/putin-merkel-germany-scholz-foreign-policy-ukraine-war-invasion-nord-stream-2/>> accessed 1 December 2022.

105 Cas Mudde, 'The far right may not have cleaned up, but its influence now dominates Europe' *The Guardian* (Europe, 28 May 2019) <<https://www.theguardian.com/commentisfree/2019/may/28/far-right-european-elections-eu-politics>> accessed 1 December 2022.



astation<sup>106</sup> such a course is inflicting on their societies remains diffuse given the constant diversion<sup>107</sup> into migrant blaming<sup>108</sup> on which the European political debate is bent. For this reason, we believe that the appallingly asymmetrical reception of Ukrainian and Syrian refugees provides a unique case study to analyse the political motivations shaping the EU border regime.

Bearing this context in mind, we claim that arguments seeking recourse on geographical proximity as a justification to welcome some refugees over others, is not only politically naïve but also geographically and morally wrong. This is what we would mint 'a proximity trap' on three grounds:

## 2.1 The EU's stark differential treatment of asylum seekers on the basis of their nationality is a slippery slope into autoimmune lawlessness

Musing on whether refugees' origins or destinations provide a legal justification to treat them differently involves a process of legal mystification. The Refugee convention and its protocol<sup>109</sup>, which all EU Member States have ratified, do not stipulate any requirements on geographical provenance (like 'our region') or descent as valid grounds for discrimination—quite the opposite. And for good reason. Lumping asylum requests by nationality would be immoral. It would reproduce the very kind of discrimination that the convention aimed to preclude. The scope of refugee-protection treaties is therefore explicitly and intentionally universal<sup>110</sup>.

As Moustafa Bayoumi<sup>111</sup> powerfully put it regarding the EU's reception of

106 Oxfam International, 'Increasing inequality plunging millions more Europeans into poverty' (*OXFAM International*, 8 September 2015) <<https://www.oxfam.org/en/press-releases/increasing-inequality-plunging-millions-more-europeans-poverty>> accessed 1 December 2022.

107 Carole Cadwalladr, 'The great British Brexit robbery: how our democracy was hijacked' *The Guardian* (7 May 2017) <<https://www.theguardian.com/technology/2017/may/07/the-great-british-brexite-robbery-hijacked-democracy>> accessed 1 December 2022.

108 Humaira Mahmud, 'Brexit: The scapegoating of the EU for the failures of British Neoliberalism?' (2021) NEXTEUK Working Paper Series, 1/2020 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3854841#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3854841#)> accessed 1 December 2022.

109 Convention and Protocol Relating to the Status of Refugees.

110 Gilad Ben-Nun, 'From Ad Hoc to Universal: The International Refugee Regime from Fragmentation to Unity 1922–1954' (2015) 34 OUP 23.

111 Moustafa Bayoumi, 'They are 'civilised' and 'look like us': the racist coverage of Ukraine' *The Guardian* (Europe, 2 March 2022) <<https://www.theguardian.com/commentisfree/2022/mar/02/civilised-european-look-like-us-racist-coverage-ukraine>> accessed 1 December 2022.



### Ukrainian refugees:

Yes, that makes sense, you might say. Neighbour helping neighbour. But what these journalists and politicians all seem to want to miss is that the very concept of providing refuge is not and should not be based on factors such as physical proximity or skin color, and for a very good reason. If our sympathy is activated only for welcoming people who look like us or pray like us, then we are doomed to replicate the very sort of narrow, ignorant nationalism that war promotes in the first place.

Equally fundamental is the historically imbued legal doctrine that such effort would undermine the ethos of Europe's inheritance as declared in the Lisbon Treaty<sup>112</sup>, which praises "the universal values of the inviolable and inalienable rights of the human person". Similarly, such a distinction would constitute an infringement on Art. 14 of the European Convention on Human Rights<sup>113</sup>, according to which refugee-protection rights "shall be secured without discrimination on any ground"; as well as its preamble, which unreservedly declares that "all persons are equal before the law and are entitled to the equal protection of the law".

In fact, Turkey's adherence to the obsolete geographical limitation of the 1951 Refugee Convention allowing such discrimination has represented an obstacle<sup>114</sup> in the country's accession negotiations with the EU. To be sure, given the proliferation of legalistic intellectualisations to subvert the unambiguous meaning of these obligations, we should wonder how much such lofty words<sup>115</sup> may still be worth—and how much they have been hollowed out—not least because the rights they confer reverberate on the human rights of all Europeans too.<sup>116</sup>

Consequently, attempts to justify a hierarchy among refugees based on their alleged geographical proximity, however defined, stands in full antagonism

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112 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306.

113 European Convention on Human Rights 1950.

114 Umut Aydin and Kemal Kirişçi, 'With or Without the EU: Europeanisation of Asylum and Competition Policies in Turkey' (2013) 18 *South European Society and Politics* 375.

115 Mark Mazower, 'The Strange Triumph of Human Rights, 1933-1950' (2004) 47 *The Historical Journal* 379.

116 Bueno Lacy and Van Houtum, 'Death as policy: The EU's criminalisation of solidarity with undocumented migrants'.

with public international law and is hence unlawful. Furthermore, breaching the very principles EUrope has agreed upon means that the EU is sabotaging its own rule of law, which is supposed to constitute an integral element of both its membership requirements<sup>117</sup> and border policies<sup>118</sup>. Elsewhere, we have diagnosed this border disorder<sup>119</sup> as a self-destructive autoimmunity<sup>120</sup>. Yet, it is conspicuous as well as revealing that the EU's systematic and blunt violation of its own fundamental principles—with all the far-reaching consequences thereof<sup>121</sup>—remains a marginal part of this debate. Instead, EUrope is scraping the cesspool of its moral debasement by openly debating what sort of intellectual contortions and scientific distortions—geographical, in this case—may provide a more credible cover to justify its differentiated treatment of Ukrainian and Syrian asylum seekers.

## 2.2 The second flaw inherent to the proximity argument is that it normalises apartheid as the basis of the EU's b/ordering regime

Pretending that self-evident geographical proximity trumps otherwise patent discrimination is a scientist<sup>122</sup> attempt to conceal prejudice under the patina of scientific objectivity, namely by ignoring that the EU's b/order infrastructure is fundamentally driven by an ideal geopolitical order that presupposes apartheid<sup>123</sup> by design and racism as principle.

This racism-fueled apartheid is built into the political economy of the EU

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117 European Commission, 'Accession criteria' <[https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/accession-criteria\\_en](https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/accession-criteria_en)> accessed 1 December 2022.

118 Henk van Houtum and Rodrigo Bueno Lacy, 'The migration map trap. On the invasion arrows in the cartography of migration' (2020) 15 *Mobilities* 196.

119 Rodrigo Bueno Lacy and Henk van Houtum, 'Europe's Border Disorder' (*E-International Relations*, 5 December 2013) <<https://www.e-ir.info/2013/12/05/europes-border-disorder/>> accessed 1 December 2022.

120 Van Houtum and Bueno Lacy, 'The Autoimmunity of the EU's Deadly B/ordering Regime; Overcoming its Paradoxical Paper, Iron and Camp Borders' (2020) 45 *Geopolitics* 706-733.

121 Natasha Lennard, 'Italian Mayor Who Housed Mideast and African Migrants Faces 13 Years in Prison' (*The Intercept*, 21 March 2022) <<https://theintercept.com/2022/03/21/ukraine-refugees-europe-italy-domenico-lucano/>> accessed 1 December 2022.

122 Paul Feyerabend, 'How to Defend Society against Science' (1975) in Hollinger Klemke (ed) *Introductory Readings in the Philosophy of Science - 3rd Edition* (Prometheus Books 1998) 54-65.

123 Van Houtum, 'Human Blacklisting: The Global Apartheid of the EU's External Border Regime'.

to such an extent that the common visa b/ordering of the EU from which it stems dates back to the Schengen Agreement of 1985<sup>124</sup>, which envisioned the gradual abolition of internal borders in exchange for the establishment of strict border controls along the EU's external borders—a feat that implied merging EU Member States' border guards under a joint command.

Once equipped with the Schengen Information System (SIS) and Visa Information System (VIS) that resulted from these agreements—implemented in 2006 and 2011, respectively—the EU established common external border surveillance<sup>125</sup> systems aimed at filtering out global border crossers lacking the travelling papers required by the Schengen Agreement. The culmination of this 'paper' b/ordering regime was the common Schengen list<sup>126</sup> of visa-required countries introduced in 2001. This highly significant—yet still remarkably under-researched 'black and white list'; later re-branded as the 'negative and positive list'—demarcates a sharp division between countries whose citizens must undergo strict examination to be granted a visa for the EU (largely Muslim, African, and overall less affluent countries) and those more or less exempted from it (i.e., largely OECD members as well as a few countries in South America and Asia). Axiomatically, this list is based on the principle of nativist discrimination<sup>127</sup>: a standpoint forbidden by law in all member states of the EU yet a defining cogwheel in the EU's b/ordering machinery that has, in effect, almost entirely closed off all legal migration channels to the EU for the large majority of the world<sup>128</sup>.

The result of this legalised and bureaucratised apartheid has been as counterproductive as it has been dramatic. The Catch-22<sup>129</sup> embedded in the EU's refugee legislation is captured by Escher-like tragedies whose the unhappy

124 Simone Paoli, 'The Schengen Agreements and The Emergency of a New Migration Rejime in Europe: An Interpretation' (2015) <<http://aei.pitt.edu/79458/1/Paoli.pdf>> accessed 1 December 2022.

125 Sarah Léonard and Christian Kaunert, 'The securitisation of migration in the European Union: Frontex and its evolving security practices' (2020) 48:6 *Journal of Ethnic and Migration Studies* 1417.

126 Henk van Houtum and Annelies Van Uden, 'The birth of the paper prison. The global inequality trap of visa borders' (2021) *EPC: Politics and Space* 20.

127 *ibid.*

128 Mark Akkerman, 'Expanding the fortress: The policies, the profiteers and the people shaped by EU's border externalisation programme' (2018) <<https://www.tni.org/en/publication/expanding-the-fortress>> accessed 1 December 2022.

129 Mike Nichols (director), 'Catch-22 - Official Trailer' (IMDb, 19 October 2022) <[https://www.imdb.com/video/vi2850865177/?playlistId=tt0065528&ref\\_=tt\\_pr\\_ov\\_vi](https://www.imdb.com/video/vi2850865177/?playlistId=tt0065528&ref_=tt_pr_ov_vi)> accessed 1 December 2022.

protagonists are doomed to be *damned if they do and damned if they don't*. Imagine: Even if someone were fleeing from life-threatening situations in their country, they would not be able to request a visa for the EU because the country they are escaping from has been blacklisted by Brussels and thus their entrance into EU territory has been pre-emptively deemed suspicious—if not summarily stamped as ‘illegal’<sup>130</sup>. By refusing legal entry to legitimate asylum-seekers, the EU’s paper fortress paradoxically punishes people for being born in the wrong place<sup>131</sup>, which may imply trying to get away from an oppressive regime, violence, economic despair or natural disaster. This constitutes not only a violation of international refugee law (see our first argument) but also a factual rejection of both the humanist ethos and legal custom on which the internationally-recognised right to ask for another country’s protection has been built.

The result of the EU’s wilful non-compliance with such international responsibilities is that access to its regular asylum system can only be gained irregularly—i.e., through smugglers and other illicit ways<sup>132</sup>. The safe alternative of air travel is also unavailable to those blacklisted by the EU’s visa policy: since 2001, air carriers can be fined for boarding migrants lacking the required visa (Directive 2001/51/EC). Meanwhile, humanitarian assistance has been criminalised<sup>133</sup> along the Mediterranean as well as within the EU’s internal borders. By strong-arming asylum seekers to undertake a reckless journey, the EU has boosted a large-scale smuggling industry<sup>134</sup> that profits from the legal void that the EU itself has made sure to enforce. Ergo, this paper border<sup>135</sup> should be credited with turning the routes to seek asylum in the EU—a supposedly safe destination—into a grim and perilous survival of the fittest<sup>136</sup>. Since this is pre-

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130 Frances Kendall, ‘Catch-22? : The Assessment of Credibility in UK Asylum Applications.’ (MA, Malmö University 2020).

131 Van Houtum and Van Uden, ‘The birth of the paper prison. The global inequality trap of visa borders’. (2021), EPC: Politics and Space. 20

132 Cuttitta, ‘Delocalization, Humanitarianism, and Human Rights: The Mediterranean Border Between Exclusion and Inclusion’.

133 Bueno Lacy and Van Houtum, ‘Death as policy: The EU’s criminalisation of solidarity with undocumented migrants’..

134 Ben Hayes, ‘The EU Security-industrial Complex’ (*Transnationalinstitute*, 3 September 2010) <<https://www.tni.org/en/article/the-eu-security-industrial-complex>> accessed 1 December 2022.

135 Van Houtum and Bueno Lacy, ‘The Autoimmunity of the EU’s Deadly B/ordering Regime; Overcoming its Paradoxical Paper, Iron and Camp Borders’..

136 Katie Kuschminder and Anna Triandafyllidou, ‘Smuggling, Trafficking, and Extortion: New Conceptual and Policy Challenges on the Libyan Route to Europe’ (2019) 52 *Antipode* 206.

cisely the kind of distress that refugee law is intended to prevent, the so-called 'EU migration crisis' of 2015 would be better described as a 'refugee-protection crisis'<sup>137</sup>.

The wilfully blind view that arguments on geographical proximity invite us to adopt risks normalising the unlawfulness of the EU's refugee discrimination and legitimising its appallingly differentiated treatment. In fact, such stratification of the world's populations according to national provenance serves a European political economy<sup>138</sup> that, housing the elites of such hierarchy<sup>139</sup>, thrives by letting them take advantage of those below them, both within and beyond the EU's borders. Notable cases include not only exploited undocumented agricultural workers from Morocco<sup>140</sup> but also eastern European women who are coerced into prostitution<sup>141</sup> as well as Polish workers<sup>142</sup> who are systematically maltreated in, for instance, the Netherlands.

Such integrated system of power, in which social imaginations and constructions of race<sup>143</sup> serve an economic machinery of geopolitically managed exploitation is what we link to practices of racism<sup>144</sup>. Accordingly, we conceptualise racism as a form of false consciousness (i.e., a discourse we promote against our own interests while benefitting those who oppress us) that has been historically fostered by the powerful in order to prevent the formation of

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137 Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, 'Understanding the crisis of refugee law: Legal scholarship and the EU asylum system' (2020) 33(4) *Leiden Journal of International Law* 871.

138 Hein de Haas, 'The Myth of Invasion: the inconvenient realities of African migration to Europe' (2009) 29 *Third World Quarterly* 1305.

139 Roberto Saviano, 'Nederland is het rottende hart van Europa' *NRC* (30 June 2021) <<https://www.nrc.nl/nieuws/2021/07/30/nederland-is-het-rotte-hart-van-europa-a4053069>> accessed 1 December 2022.

140 Marie-Laure Augère-Granier, 'Migrant seasonal workers in the European agricultural sector' (PE 689.347) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689347/EPRS\\_BRI\(2021\)689347\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689347/EPRS_BRI(2021)689347_EN.pdf)> accessed 1 December 2022.

141 Donna M. Hughes, 'The 'Natasha' Trade: The Transnational Shadow Market of Trafficking in Women.' (2000) 53 *Journal of International Affairs* 625.

142 Annelot Vink and others, 'Labour Exploitation of Polish Migrant Workers in the Netherlands: Fair Work and Equality Law Clinic' (2021) *Amsterdam Law Clinics* <<https://student.uva.nl/binaries/content/assets/studentensites/fdr/rechten-bachelors-en-masters/amsterdam-law-practice/final-report---labour-exploitation-of-polish-migrant-workers-in-the-netherlands---fwel-clinic.pdf>> accessed 1 December 2022.

143 Charles W. Mills, *The Racial Contract* (Cornell 2022).

144 Aníbal Quijano, 'Coloniality of Power and Eurocentrism in Latin America' (2000) 15 *International Sociology* 215.

solidary networks among the working classes whose grievances threaten their interests. In this regard, we consider crucial to decri the limitation of those who reduce racism to ‘black’ and ‘white’<sup>145</sup> phenotypes or identities (concepts which are diffuse<sup>146</sup> as well as biologically and culturally senseless<sup>147</sup> anyway). Instead, we recognise racism as a crucial structure of capitalism and thus of classism: the hegemonic discourse that cultivates and justifies the differential treatment of people according to their socio-economic class<sup>148</sup>. Constraining racism to, say, legal codifications that narrow it to open invective or injury (e.g., neo-Nazis’ wanton hate crimes) or dismissing<sup>149</sup> it as a ‘polemic’ term—as has earlier<sup>150</sup> been suggested in this ASILE platform—would reveal a naivety about the structural power<sup>151</sup> dynamics of implicit discriminative othering.

By erecting such an insurmountable paper border, the EU has advocated a politics of death<sup>152</sup>—a necropolitics<sup>153</sup>—aimed at killing targeted groups of refugees or at simply letting them die. This is precisely what sets the journey of Ukrainian refugees a world apart from, say, the Odyssey of Syrian refugees. Since 2017, Ukrainians have been on Schengen’s ‘white list’, which means that most of those amongst them who have sought asylum did not have to travel illegally to the EU relying on blind fortune and the help of smugglers; that they

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145 Charlie Riggs, ‘Who Killed Essentialism? On the forbidden but unavoidable concept.’ (*the Hedgehog Review*, 16 July 2021) < <https://hedgehogreview.com/web-features/thr/posts/who-killed-essentialism>> accessed 1 December 2022.

146 Malcolm X, ‘The House Negro and the Field Negro’ <<https://www.youtube.com/watch?v=7kf-7fujM4ag>> accessed 1 December 2022.

147 Alok Jha, ‘Superior: The Return of Race Science by Angela Saini – review’ *The Guardian* (27 May 2019) < <https://www.theguardian.com/books/2019/may/27/superior-the-return-of-race-science-by-angela-saini-book-review>> accessed 1 December 2022.

148 David Harvey, ‘David Harvey’s Anti-Capitalist Chronicles: Race and Class’ *Roar Magazine* (7 July 2020) <<https://roarmag.org/2020/07/07/david-harveys-anti-capitalist-chronicles-race-and-class/>> accessed 1 December 2022.

149 Touré F. Reed, ‘Why Liberals Separate Race from Class’ (*Jacobin*, 22 August 2015) < <https://jacobin.com/2015/08/bernie-sanders-black-lives-matter-civil-rights-movement>> accessed 1 December 2022.

150 Achilles Skordas, ‘Temporary Protection and European Racism’ in this collection.

151 Mahzarin R. Banaji, Susan T. Fiske and Douglas S. Massey, ‘Systemic racism: individuals and interactions, institutions and society’ (2021) 6:82 Cogn. Research.

152 Daria Davitti, ‘Biopolitical Borders and the State of Exception in the European Migration ‘Crisis’ (2019) 29 *European Journal of International Law* 1173.

153 Achille Mbembe, *Necropolitics* (Duke University Press 2019).

are not victims of stomach-wrenching pushbacks including rape and abuse<sup>154</sup> by EU border guards; that they do not need to fear deportations<sup>155</sup> reminiscent of totalitarian police dictatorships<sup>156</sup>; and that they do not need to fear dehumanising asylum camps<sup>157</sup>. Such dissimilar images, narratives and experiences exert a decisive impact on European perceptions of their geographical proximity to different refugee populations: the material consequences of such privilege or misery as well as their mediatisation render monumentally different images<sup>158</sup> of Ukrainians and Syrians traveling to the EU, thus informing staggeringly different national stereotypes<sup>159</sup> and public perceptions<sup>160</sup> about the deservedness of the plight of each.

The footage, photographic stock and overall journalistic reports on Ukrainian refugees that circulate across EU media are unlike analogous representations of Syrian asylum seekers, whose journeys call forth the same instances of illegality pervading the experience of refugees from countries on Schengen's negative list. Unwanted asylum seekers are forced to play the part of, say, destitute wretches inhabiting makeshift tents amidst squalid detention

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154 EURACTIV with AFP, 'UN warns pushbacks of migrants in Europe becoming 'normalised'' *Euroactiv* (Europe, 21 February 2022) <<https://www.euractiv.com/section/global-europe/news/un-warns-pushbacks-of-migrants-in-europe-becoming-normalised/>> accessed 1 December 2022.

155 Matthew J. Gibney, 'Is Deportation a Form of Forced Migration?' (2013) 32 *Refugee Survey Quarterly* 116.

156 Zeit Online, 'Europarat kritisiert Polizeigewalt bei Abschiebungen aus Deutschland' *Zeit Online* (9 May 2019). <[https://www.zeit.de/politik/deutschland/2019-05/menschenrechte-europarat-abschiebungen-gewalt-afghanistan-anti-folter-komitee?utm\\_referrer=https%3A%2F%2Fwww.asileproject.eu%2Fthe-proximity-trap-how-geography-is-misused-in-the-differential-treatment-of-ukrainian-refugees-to-hide-for-the-underlying-global-apartheid-in-the-european-border-regime%2F](https://www.zeit.de/politik/deutschland/2019-05/menschenrechte-europarat-abschiebungen-gewalt-afghanistan-anti-folter-komitee?utm_referrer=https%3A%2F%2Fwww.asileproject.eu%2Fthe-proximity-trap-how-geography-is-misused-in-the-differential-treatment-of-ukrainian-refugees-to-hide-for-the-underlying-global-apartheid-in-the-european-border-regime%2F)> accessed 1 December 2022.

157 Harriet Grant, 'Moria is a hell': new arrivals describe life in a Greek refugee camp' *The Guardian* (17 January 2020). <<https://www.theguardian.com/global-development/2020/jan/17/moria-is-a-hell-new-arrivals-describe-life-in-a-greek-refugee-camp>> accessed 1 December 2022.

158 Asylum Access, 'How US and European Media Language Used to Describe the Ukrainian Crisis Reflect Deeply Rooted Racism Against Non-European Refugees' (*Asylum Access*, 13 May 2022) <<https://asylumaccess.org/media-language-and-racism-against-non-european-refugees/>> accessed 1 December 2022.

159 Derek Gregory, 'Imaginative Geographies' 19 *Progress in Human Geography* 447-485.

160 Nadine Talaat, 'Good refugee, bad refugee: Why media representation matters' (*The New Arab*, 10 March 2022) <<https://english.alaraby.co.uk/analysis/good-refugee-bad-refugee-why-media-representation-matters>> accessed 1 December 2022.



prisons<sup>161</sup>; ‘invading hordes’ seeking deadly skirmishes with Europe’s beleaguered police guards<sup>162</sup>; etc.) Contrary to the widespread view that these images only confirm the ‘commonsensical’<sup>163</sup> prejudice of such refugees as being ‘culturally incompatible’ with European values, it is of the essence to understand that this ‘commonsensical’ portrayal is in truth an artificial misrepresentation curated by power.

Refugee behaviour is scripted by the rules that the EU border regime enforces on their mobility. Unlike Ukrainian refugees, who can travel freely across Europe while acquiring the necessary documents to claim fundamental, social, economic or even cultural rights, most Asian, African and Latin American refugees are purposefully typecast, whether they want it or not, as poverty-stricken fiscal burdens—or even time-bombs—by a European border regime that compels them to depend on charity<sup>164</sup>. Through purposeful policy, asylum seekers blacklisted by Schengen become the caricature that the far-right<sup>165</sup> and the EU<sup>166</sup> make of them as a civilisational hazard. How could people who rely on the state’s charity ever get a job? How could people who dare confront the police in such violent ways not constitute a threat? These media-created hyperrealities are the basis of the fears fuelling concerns for ‘the great replacement’<sup>167</sup>. Through such scripted representations, the EU’s differentiated mechanisms to filtrate nationalities becomes mired in a self-fulfilling prophecy characterised by hyperreality<sup>168</sup>: policy based on prejudice (e.g., racism) shapes

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161 Matina Stevis-Gridneff and Mauricio Lima, ‘After Fire Razes Squalid Greek Camp, Homeless Migrants Fear What’s Next’ *The New York Times* (13 September 2020) <<https://www.nytimes.com/2020/09/13/world/europe/camp-fire-greece-migrants.html>> accessed 1 December 2022.

162 Sam Jones, ‘Spain asked to explain deaths at Moroccan border crossing’ *The Guardian* (8 November 2022) <<https://www.theguardian.com/world/2022/nov/08/spain-asked-to-explain-deaths-at-moroccan-border-crossing>> accessed 1 December 2022.

163 Liza Schuster, ‘Common sense or racism? The treatment of asylum-seekers in Europe’ (2003) 37 *Patterns of Prejudice* 233-256.

164 Amnesty International, ‘Het probleem’ <<https://www.amnesty.nl/wat-we-doen/themas/vluchtelingen-en-asielzoekers/het-probleem>> accessed 1 December 2022.

165 Sakib Nazmus and Syed Muhammad Ishraque Osman, ‘Syrian refugee influx and the rise of far-right rhetoric: a quasi-experimental investigation’ (2020) 21 *European Politics & Society* 371-383.

166 Edwyn Plenel, ‘Cette Europe qui nous fait honte’ *Mediapart* (12 September 2019) <<https://www.mediapart.fr/journal/international/120919/cette-europe-qui-nous-fait-honte>> accessed 1 December 2022.

167 Mattias Ekmann, ‘The great replacement: Strategic mainstreaming of far-right conspiracy claims’ (2022) 28 *Convergence: The International Journal of Research into New Media Technologies* 1127-1143.

168 Adam Curtis, ‘Hypernormalisation’ *BBC* (16 October 2016) <<https://www.bbc.co.uk/programmes/p04b183c>> accessed 1 December 2022.



reality (a shared worldview of refugees within the EU or its Member States), and finally, this *hyperreality* (an impostor reality) informs policy back. Prejudice becomes 'real' as undesirable refugees are manufactured by a European b/order regime (in which media represents a key cogwheel) that pushes them to acquire racialised traits that are largely imposed on them throughout the extreme mental and bodily duress they must overcome.

Consequently, racialised prejudice is spatially manifested and institutionally maintained—not 'fought against' or dismantled. This is a key insight to keep in mind in order to understand the workings of the EUropean b/order regime, for such prejudice is not an error of bias but the EU's very worldview instead. The asymmetry in the reception of Syrian and Ukrainian refugees constitutes a real-scale geopolitical testimony of a conscious regime of global apartheid<sup>169</sup> created by EUropean b/ordering and othering regime<sup>170</sup>. Its selective dehumanisation of refugees is a vivid illustration of what has been termed 'borderism'<sup>171</sup>: the wanton politics of spatial segregation that essentialise—and politicise—the value of human beings on the basis of the bordered (id)entity<sup>172</sup> they are born into, reside in, travel from or are associated with.

The visa policy underlying an ordering of EUropean space and society that determines the inclusion of some (e.g., the 'blond and blue-eyed' Ukrainians) and the exclusion of others (e.g., the 'threatening Muslims and Africans'<sup>173</sup>) should thus be regarded as neither a natural nor a self-evident policy. Instead, it constitutes a purposeful strategy anchored in longstanding European prejudice<sup>174</sup> whose irrefutable spatial consequence is apartheid—not only between the EU and its neighbourhood<sup>175</sup> but also between EU metropolises and their migrant

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169 Van Houtum, 'Human Blacklisting: The Global Apartheid of the EU's External Border Regime'.

170 Henk Van Houtum and Ton Van Naerssen, 'Bordering, Ordering and Othering' (2002) 93 *Tijdschrift voor Economische en Sociale Geografie* 125.

171 Henk van Houtum, 'Beyond 'Borderism': Overcoming Discriminative B/Ordering and Othering' (2021) 112 *Tijdschrift voor Economische en Sociale Geografie* 34.

172 Chiara Bottici and Benoît Challand, 'Rethinking Political Myth: The Clash of Civilizations as a Self-Fulfilling Prophecy' (2006) 9 *European Journal of Social Theory* 315.

173 Madeline-Sophie Abbas, 'Conflating the Muslim refugee and the terror suspect: responses to the Syrian refugee "crisis" in Brexit Britain' (2019) 42 *Ethnic and Racial Studies* 2450.

174 Edward W. Said, *Orientalism* (Vintage Books 1979).

175 Henk van Houtum and Freerk Boedeltje, 'Questioning the EU's Neighbourhood Geo-Politics: Introduction to a Special Section' (2011) 16 *Geopolitics* 121.

ghettos<sup>176</sup>, which reproduce the racialised lines of division<sup>177</sup> structured by the EU visa border policy and constitute an unequivocal continuity between Europe's colonial past and its colonial present<sup>178</sup>.

### 2.3 The argument on geographical proximity is based on an unscientific, essentialist and politically corrosive geographical determinism

The third flaw of the proximity argument is its geopolitical ingenuousness. Although the assumption of Ukraine as 'being in the neighbourhood'<sup>179</sup> seems geographically commonsensical, morally neutral, politically practical and cartographically unassailable, this is a mirage conjured up by the widespread but false equivalence between cartographic contiguity and geographical proximity. Our main contention on this point is that the geographical assumptions on which such analysis rests betray a misunderstanding of geography that paradoxically replicates the violence-mongering rhetoric that keeps producing refugees through financial predation<sup>180</sup>, war and the violent impoverishment of the European neighbourhood they have engendered.

Geography is more than puerile assumptions on cartographical proximity<sup>181</sup>. Incidentally, geopolitical arguments derived mainly from maps—perhaps the most deviously anti-geographical artefacts<sup>182</sup> of the geographical disciplines—or from the carto-geopolitical worldviews they conjure up are reckless at best. At worst, however, these simplistic geographical imaginations have the power to destroy the only cultural trait that can conceivably allow us

176 Olivier Roy, 'France's Oedipal Islamist Complex' *FP* (7 January 2016) < <https://foreignpolicy.com/2016/01/07/frances-oedipal-islamist-complex-charlie-hebdo-islamic-state-isis/> accessed 1 December 2022.

177 Charles Pinderhughes, 'Toward a New Theory of Internal Colonialism' (2011) 25 *Socialism and Democracy* 235.

178 Derek Gregory, *The Colonial Present: Afghanistan. Palestine. Iraq* (Blackwell Publishing 2004).

179 Bialasiewicz, 'Off-shoring and out-sourcing the borders of Europe: Libya and EU border work in the Mediterranean'.

180 Javier Garcia-Bernardo and others, 'Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network' (2017) 7 *Sci Rep*.

181 Rodrigo Bueno Lacy and Henk Van Houtum, 'Lies, Damned Lies & Maps: The EU's Cartopolitical Invention of Europe' (2015) 23 *Journal of Contemporary European Studies* 477.

182 George Herderson and Marvin Waterstone (eds), *Geographic Thought: A praxis perspective* (Routledge 2009).

to survive as a species: cooperation.

We are not talking about itemised forms of cooperation: we are talking about solidarity. Solidarity to dismantle the ideological regimes of false consciousness that prevent us from living better by helping one another. This requires rejecting charity in favour of more horizontal structures of political organisation that allow us to understand that what we do to others echoes on what happens to us. Such awareness should wake us up to the fact that we cannot endlessly bolster a border security industrial complex<sup>183</sup> without simultaneously entrenching an ever-more policed, surveilled and ultimately unfree society. Put vividly: we cannot wage wars yet expect no refugees<sup>184</sup>.

Such are not the conclusions we draw inspired by a naïve idealism but by timeless scientific fact instead<sup>185</sup>. Evidence points to our need to cultivate an ability to recognise commonalities across identities, especially against the insidious images, narratives and practices that incline us to support unjust policies and political systems based on identitary borders that are ultimately detrimental for everyone<sup>186</sup>. An ambitious project of this sort would involve an attempt to see through misogyny, racism, nationalism and faith in order to recognise ourselves in others while trying to make others look past their prejudices so they can see us—instead of mistaking us for the misleading representations that others make about who we are supposed to be. Unfortunately, we find ourselves trapped in a geopolitical play in which we are puppeteered against our will to take an antagonistic stand against each other. The least we can do against this ominous world theatre beyond our control is tear its mask of benevolence<sup>187</sup> and exhibit it in all its ugliness.

Geopolitical analysts reproducing parochial arguments based on geographi-

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183 Mark Akerman, 'FINANCING BORDER WARS: The border industry, its financiers and human rights' *Transnational Institute* (April 2021) <[https://www.tni.org/files/publication-downloads/financingborderwars-report-tni\\_2.pdf](https://www.tni.org/files/publication-downloads/financingborderwars-report-tni_2.pdf)> accessed 1 December 2022.

184 Rodrigo Bueno Lacy and Henk van Houtum, 'Recycling violence: How maps about terrorism fail to round up the argument', *Compass to Cartopolitics* (17 June 2016) <<https://compasscartopolitics.wordpress.com/2016/06/17/recycling-violence-how-maps-about-terrorism-fail-to-round-up-the-argument/>> accessed 1 December 2022.

185 Frans de Waal et al, *Primates and Philosophers: How Morality Evolved* (Princeton University Press 2006).

186 Bill McGuire, 'Whether you're a climate 'doomer' or 'appeaser', it's best to prepare for the worst' *The Guardian* (22 August 2022) <<https://www.theguardian.com/commentisfree/2022/aug/22/climate-emergency-doomer-appeaser-precautionary-principle>> accessed 1 December 2022.

187 R. Daniel Kelemen, 'The European Union's authoritarian equilibrium' 27 *Journal of European Public Theory* 481-499

cal proximity usually peddle common fallacies recurrent among commentators and practitioners of statecraft<sup>188</sup>. Among their recurrently fostered fallacies, a perniciously prominent one is the ‘territorial trap’<sup>189</sup>, a fundamental epistemological flaw in the analysis of world politics characterised by the convergence of three misleading assumptions: that the state represents the will of a homogeneous nation; that a state’s domestic and foreign policies are unrelated; and that each nation-state constitutes its own closed system. Keeping this fallacy in mind is crucial when assessing the proximity of a country to another. For example, a rigorous analysis of Syria’s position reveals that countries are often closer than the map—and the political actors adducing it as incontrovertible ‘evidence’—may make them appear.

Is Ukraine not closer—or more related—to the EU than Syria? We don’t think so. It is argued that Ukraine is the EU’s neighbour because it shares a contiguous border with Poland, an EU Member State, while, say, Syria, cannot be considered to be in the EU’s neighbourhood because it clearly does not meet this criterion. However, such a distinction relies on the assumption that Syria does not share a contiguous border with Cyprus, and thus with the EU, which in turn depends on an apocryphal geographical assumption of the sea as a ‘natural border’<sup>190</sup>—an ill-reputed commonplace widely disproven across the geographical disciplines. Such a presupposition would neglect the proximity between Cypriot and Syrian exclusive economic areas—as well as the energy disputes<sup>191</sup> taking place in them—but also the fact that 12.000 Syrians<sup>192</sup> have sought refuge in Cyprus since 2011. What’s more, an exercise as simple as measuring the distance between these two countries of origin and the nearest European urban settlements, which constitute refugees’ preferred

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188 S Dalby, ‘Critical Geopolitics: Discourse, Difference, and Dissent’ (1991) 9 *Environment and Planning D: Society and Space* 261.

189 John Agnew, ‘The Territorial Trap: The Geographical Assumptions of International Relations Theory’ (1994) 1 *Review of International Political Economy* 53.

190 Juliet J. Fall, ‘Artificial states? On the enduring geographical myth of natural borders’ (2010) 29 *Political Geography* 140.

191 Ioannis N. Grigoriadis, ‘Energy Discoveries in the Eastern Mediterranean: Conflict or Cooperation?’ (2014) XXI *Middle East Policy* 124.

192 UNHCR, ‘Syria Refugee Crisis – Globally, in Europe and in Cyprus’ (18 March 2021) <<https://www.unhcr.org/cy/2021/03/18/syria-refugee-crisis-globally-in-europe-and-in-cyprus-meet-some-syrian-refugees-in-cyprus/>> accessed 1 December 2022.

destination<sup>193</sup>, reveals the spuriousness of any seemingly intuitive notions of geographical proximity: the distance between Damascus, Syria, and Nicosia, Cyprus, is about 323.68 Km, while the distance between Kiev, Ukraine, and Warsaw, Poland—the nearest EU capital—is about 668.45 Km.

Considerations like these, however, are still insufficient, for they do not take into account the larger geopolitical dimensions of the EU nor the caveats pertaining to a holistic appraisal of geographical proximity: in its full geographical sense not only of territory but also of people and culture—and thus of the inescapable mobility and hybridity that human geography inexorably entails. After all, Syria is not only an Associated State of the EU but it also shares a border with Turkey, one of the most integrated Associated States of the EU<sup>194</sup> and a strategic partner in the European security architecture due to both its military stature as NATO's second largest army<sup>195</sup> and to its role in the EU's containment-hotspot policy<sup>196</sup>—without mentioning its geopolitical position within a region from which the EU's largest asylum-seeking populations<sup>197</sup> come from.

Which brings us back to our point: concerning the borders of the European geostrategic neighbourhood, Syria is of as much strategic importance to the EU as Ukraine. Moreover, the Russian aggression of Ukraine, in its recklessness and criminal methods<sup>198</sup>, is proof of the EU's parochial understanding of its own neighbourhood, which underlies its failure to foresee—in spite of many warnings<sup>199</sup>—that the unimpeded devastation of the Syrian civilian population

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193 Feriha Nazda Güngördü and Zerrin Ezgi Kahraman, 'Investigating Syrian Refugees' Choice of Location in Urban Areas as a Subjective Process: A Cross-case Comparison in the Neighbourhoods of Önder (Ankara) and Yunusemre (İzmir)' (2021) 10 *International Journal of Islamic Architecture* 387.

194 Agreement Establishing an Association between the EEC and Turkey 1963.

195 *ibid.*

196 Katharyne Mitchell and Matthew Sparke, 'Hotspot geopolitics versus geosocial solidarity: Contending constructions of safe space for migrants in Europe' (2018) 38 *Environment and Planning D: Society and Space* 1046.

197 D. Clark, 'Number of asylum applications in the European Union 2021, by country of origin' (*statista*, 25 March 2022) <<https://www.statista.com/statistics/455305/eu-asylum-applications-in-by-country-of-origin/>> accessed 1 December 2022.

198 Boris Sokolov, 'Bad repetition. The Red Army's World War II Rampage' (*The Insider*, 13 April 2022) <<https://theins.ru/en/politics/250248>> accessed 1 December 2022.

199 Nicolas Tenzer, 'Syria's war of extermination signals the end of the international community' (*The Conversation* 12 October 2016) <<https://theconversation.com/syrias-war-of-extermination-signals-the-end-of-the-international-community-66708>> accessed 1 December 2022.

not only could tempt Putin's Russia to calculate that it could invade its periphery, not least Ukraine<sup>200</sup>, without much pushback, but also to believe that it could resort to the same atrocities as those perpetrated in Syria to demoralise Ukraine's civilian population and weaken its resistance.

Finally, it should be noted that both the US<sup>201</sup> and Russia's<sup>202</sup> geopolitical justifications for their involvement in the devastation of Ukraine find their intellectual foundation in their own expansionist versions<sup>203</sup> of an argument captured by what is perhaps the most infamous geopolitical text ever published, Halford Mackinder's "The Geographical Pivot of History"<sup>204</sup> (1904). This text and the stream of geopolitically deterministic arguments it keeps animating<sup>205</sup> (arguably the essence of European imperialism<sup>206</sup>) constitute the foundations of a school of thought known as Classical Geopolitics<sup>207</sup>: a pseudo-scientific discipline that emerged towards the end of the 19th century, eventually provided the justification for Nazi expansionism<sup>208</sup> and later influenced the development of the realist school of International Relations in the US<sup>209</sup>.

Through a combination of imperial desire and a predator-centred distor-

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200 Eugene Rumer and Andrew S Weiss, 'Ukraine: Putin's Unfinished Business' (Carnegie Ednowment for International Peace 12 November 2021).

201 John Mearsheimer, 'Why is Ukraine the West's Fault?' (25 September 2015) <<https://www.youtube.com/watch?v=JrMiSQAGOS4>> accessed 1 December 2022.

202 Charles Clover, 'The Unlikely Origins of Russia's Manifest Destiny' *FP* (27 July 2016) <<https://foreignpolicy.com/2016/07/27/geopolitics-russia-mackinder-eurasia-heartland-dugin-ukraine- Eurasianism-manifest-destiny-putin/>> accessed 1 December 2022.

203 Bruce E. Johansen, 'Donald Trump, Andrew Jackson, Lebensraum, and Manifest Destiny' (2017) 41 *American Indian Culture and Research Journal* 115.

204 H. J. Mackinder, 'The geographical pivot of history (1904)' (2004) 170 *The Geographical Journal* 298.

205 Gerry Kearns, 'Naturalising Empire: Echoes of Mackinder for the Next American Century?' (2006) 11 *Geopolitics* 74.

206 Sven Lindqvist, *"Exterminate All the Brutes" One Man's Odyssey into the Heart of Darkness and the Origins of European Genocide* (The New Press 2007).

207 Ladis K.D. Kristof, 'The origins and evolution of geopolitics' (1960) 4 *Journal of Conflict Resolution* 15.

208 Holger H. Herwig, 'The Demon of Geopolitics: How Karl Haushofer "Educated" Hitler and Hess' (*EuropeNow*, 6 September 2017) <<https://www.europenowjournal.org/2017/09/05/the-demon-of-geopolitics-how-karl-haushofer-educated-hitler-and-hess-by-holger-h-herwig/>> accessed 1 December 2022.

209 Curran Flynn, 'Political geography and Morgenthau's early American works' (2016) 29 *Cambridge Review of International Affairs* 1582.

tion of evolutionary theory for the study of world politics, classical geopolitical writers made scientific racism and crude geographical determinism pass for the dispassionate study of global politics. An inherent aspect to this strain of political geography is the cartohypnotic trance<sup>210</sup> in which its practitioners indulge to make believe<sup>211</sup> that the politics of the world can be understood simply by glancing at maps: at the whole worldly drama from a God-like vantage point above the rest of us—without questioning where the fundamental infrastructure of those maps<sup>212</sup> came from. Yet, as critical geopolitical scholars have urgently insisted: merely to label—less colour, border or illustrate—a place already amounts to an implicit<sup>213</sup> foreign policy recommendation. To designate Syrians as far-away, as incontiguous, is to implicitly legitimise our denial to help them.

The historical proximity of Syria to Europe is also informative about the extravagance of considering Syria farther than Ukraine. Whether Ukraine belongs to Europe or Russia is a statement that can be solved by neither history<sup>214</sup> nor by a simplistic cartographic appraisal disguised as a sober assessment of geographical proximity—or imagined civilisational affiliation. As a political organisation, Europe has never existed beyond the political will<sup>215</sup> to create it. Europe is an idea<sup>216</sup>—not a family, a people, a cartographical necessity<sup>217</sup> or, as the failure of the Common Asylum System reveals<sup>218</sup>, not even a congruent legal entity. Moreover, as its successive enlargement and overlapping juris-

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210 S. W. Boggs, “Cartohypnosis.” (1947) 64 *The Scientific Monthly* 469.

211 Edoardo Boria, ‘Geopolitical Maps: A Sketch History of a Neglected Trend in Cartography’ (2008) 13 *Geopolitics* 278.

212 Mark Monmonier, *How to Lie with Maps* (The University of Chicago Press 2018).

213 Klaus-John Dodds and James Derrick Sidaway, ‘Locating Critical Geopolitics’ (1994) 12 *Environment and Planning D: Society and Space* 515.

214 Beverley C. Southgate, *History Meets Fiction* (Routledge 2009).

215 Gerard Delanty, ‘The frontier and identities of exclusion in European history’ (2012) 22 *History of European Ideas* 93.

216 Michael Wintle, ‘Renaissance maps and the construction of the idea of Europe’ (1999) 25 *Journal of Historical Geography* 137.

217 Bueno Lacy and Van Houtum, ‘Lies, Damned Lies & Maps: The EU’s Cartopolitical Invention of Europe’.

218 Maarten den Heijer, Jorrit Rijpma and Thomas Spijkerboer, ‘Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System’ (2016) 53 *Common Market Law Review* 607.



dictions show, its juridico-political<sup>219</sup> borders and geographical neighbours are not enshrined in stone. Instead, grand geographical imaginations such as ‘the West’, ‘the East’, ‘the global South/global North’, or notions of a ‘Russian state-civilisation<sup>220</sup>’ are socially fabricated compartmentalisations of the world that only have meaning insofar as political organisations cultivate large-scale institutionalised efforts to foster a belief in them as well as policies to keep their realities (better conceived as hyperrealities) alive.

Whether Ukraine will be part of the EU is therefore not a geographical or historical necessity or logic but a political decision<sup>221</sup>. Crucially, it is a decision that, still for now, is dependent on another actor whose proximity to European geopolitics is also usually misjudged: US military power. In this regard, it is telling to remember that the third most common nationality of asylum seekers in the EU comes from Iraq, a country wrecked by two decades of a US occupation endorsed by several EU Member States and thus, unsurprisingly, the breeding ground of refugees and Islamic terrorism targeting Europe.

Although these geopolitical phenomena occupy the utmost priority in the European debate on security<sup>222</sup>, their roots in both EU foreign policy—and in its meek alignment with US global military imperialism<sup>223</sup>—often go unmentioned<sup>224</sup>. It is thus worth keeping in mind that, even though it lies across the Atlantic Ocean, the US remains the most important military force in Europe, for it possesses the largest NATO army and hence it remains an indispensable guarantor of European security. The US is such an important geopolitical player in European security that its escalation<sup>225</sup> of the war with Russia through the provision of military support to Ukraine may cause Europe

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219 Katharina Holzinger and Frank Schimmelfennig, ‘Differentiated Integration in the European Union: Many Concepts, Sparse Theory, Few Data’ (2012) 19 *Journal of European Public Policy* 292.

220 Fabian Linde, ‘State Civilisation: The Statist Core of Vladimir Putin’s Civilisational Discourse and Its Implications for Russian Foreign Policy’ (2016) 12 *Politics in Central Europe* 21.

221 Michel Kerres and Clara van de Wiel, ‘Oekraïne krijgt zicht op EU, maar het kan nog jaren, decennia duren’ *NRC* (23 June 2022) <<https://www.nrc.nl/nieuws/2022/06/23/oekraïne-krijgt-zicht-op-eu-maar-het-kan-nog-jaren-decennia-duren-2-a4134536>> accessed 1 December 2022.

222 Liz Fekete, ‘Anti-Muslim Racism and the European Security State’ (2004) 46 *Race & Class* 3.

223 Michael Parenti, ‘The Darker Myths of Empire: Heart of Darkness Series’ (16 November 2005) <<https://www.youtube.com/watch?v=OOF56wYT11w>> accessed 1 December 2022.

224 Mark Danner, *Spiral: Trapped in the Forever* (Simon & Schuster 2016).

225 Vladimir Pozner, ‘How the United States Created Vladimir Putin’ (2 October 2018) <<https://www.youtube.com/watch?v=8X7Ng75e5gQ>> accessed 1 December 2022.



to sleepwalk<sup>226</sup> into a nuclear war<sup>227</sup>—even though such US military strategy may pursue no more honourable strategic interests than those of the arms-congress-media industrial complex<sup>228</sup>, which profits from the monumental devastation inflicted by US invasions<sup>229</sup>, proxy wars, overall arms purchases<sup>230</sup> and, crucially, the sort of armed conflict<sup>231</sup> that pushes large populations to seek asylum in the EU and elsewhere.

### 3. Conclusion

We have contended that arguments of geographical proximity understood as mere territorial contiguity amount to scientific ignorance at best and geopolitical mystification at worst. The attempt to rationalise obvious discrimination as geographical common-sense dismisses the obvious cause of a phenomenon in favour of a convenient intellectualisation that stays within the boundaries of a politically acceptable discourse in which racism and practices of apartheid are considered taboo<sup>232</sup>. We thus make a plea to employ scientific language and name things by their name, which requires not only moral integrity but scientific rigour. This effort is what is required to challenge the foundations of what we are supposed to believe are the official reasons behind a deadly EU bordering regime (e.g., the manifestly absurd EU narratives depicting it as a heroic crackdown on human smuggling or, worse, an effort to prevent a ‘great

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226 Ian Pindar, ‘The Sleepwalkers by Christopher Clark – review’ (*The Guardian*, 19 July 2013) < <https://www.theguardian.com/books/2013/jul/19/sleepwalkers-christopher-clark-review>> accessed 1 December 2022.

227 John J. Mearsheimer, ‘The causes and consequences of the Ukraine war: A lecture’ (6 June 2022) < <https://www.youtube.com/watch?v=qciVozNtCDM>> accessed 1 December 2022.

228 Brian Cloughley, ‘The Military-Industrial Complex Needs Perpetual Confrontation’ (*Counter Punch*, 19 November 2021) < <https://www.counterpunch.org/2021/11/19/the-military-industrial-complex-needs-perpetual-confrontation/>> accessed 1 December 2022.

229 John Schwarz, ‘\$10,000 Invested in Defense Stocks When Afghanistan War Began Now Worth Almost \$100,000’ *The Intercept* (16 August 2021) < <https://theintercept.com/2021/08/16/afghanistan-war-defense-stocks/>> 27 June 2022.

230 Sara Sirota, ‘Military-Industrial Complex is Itching to Send “Hunter-Killer” Drones to Ukraine’ *The Intercept* (18 May 2022) < <https://theintercept.com/2022/05/18/ukraine-reaper-drones-weapons-transfer/>> accessed 1 December 2022.

231 William D. Hartung, *Prophets of War: Lockheed Martin and the Making of the Military-Industrial Complex* (Bold Type Books 2012).

232 Arshad Isakjee and others, ‘Liberal Violence and the Racial Borders of the European Union’ (2020) 52 *Antipode* 1751.

replacement'). Overwhelming and indisputable evidence should not be cowed to accept a portrayal other than the one it can substantiate: a European border regime founded on an apartheid that benefits those who are privileged enough to travel freely and comfortably (e.g., oligarchs) yet simultaneously criminalises, illegalises, and dooms some of the most destitute wretches of the world's wicked theatre to the crude odds of birth's ruthless lottery; victims whom it construes and manhandles as though they were marginal 'human waste'<sup>233</sup>.

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233 Zygmunt Bauman, *Wasted Lives: Modernity and Its Outcasts* (Polity 2004).

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# Chapter 26

## The Declaration on a Voluntary Solidarity Mechanism and EU Asylum Policy One Step Forward, Three Steps Back on Equal Solidarity

Dr Sergio Carrera\* and Dr Roberto Cortinovis\*\*

“We must live up to the new challenges that history always puts before us. Just like Europeans did when millions of Ukrainians came knocking on their door. This is Europe at its best. A Union of determination and solidarity. But this determination and drive for solidarity is still missing in our migration debate. Our actions towards Ukrainian refugees must not be an exception. They can be our blueprint for going forward. We need [...] a permanent and legally binding mechanism that ensures solidarity. And at the same time, we need effective control of our external borders, in line with the respect of fundamental rights. I want a Europe that manages migration with dignity and respect. I want a Europe where all Member States take responsibility for challenges we all share.

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\* Senior Research Fellow, CEPS.

\*\* Research Fellow CEPS.

And I want a Europe that shows solidarity to all Member States.”

Ursula von der Leyen, State of the Union Address<sup>1</sup>, 14 September 2022

## 1. Introduction

The former EU French Presidency’s strategy to unlock stalled negotiations on the EU Pact on Migration and Asylum<sup>2</sup>, proposed by the European Commission in September 2020, relied on a ‘gradual approach’. This implied an attempt to abandon the long-held ‘package approach’<sup>3</sup> that linked the reform of the EU Dublin Regulation and a permanent relocation system to the rest of the legislative reforms comprising the Pact.

The gradual approach strategy favoured breaking down the negotiation processes into a set of distinct stages and pieces of legislation. As part of the first stage<sup>4</sup> agreed on June 2022, EU Member States representatives adopted a Declaration<sup>5</sup> on a voluntary solidarity mechanism. This has been presented as addressing issues of ‘solidarity and responsibility sharing’ among EU Member States over who is responsible for assessing applications of asylum seekers rescued at sea.

The Declaration was endorsed by the ministers in charge of migration matters of 21 States (18 Member States and 3 Schengen-associated States).

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1 European Commission, ‘State of Union’ (14 September 2022) <[https://state-of-the-union.ec.europa.eu/index\\_en](https://state-of-the-union.ec.europa.eu/index_en)> accessed 1 December 2022.

2 Sergio Carrera and Andrew Geddes (eds.), ‘The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees International Experiences on Containment and Mobility and their Impacts on Trust and Rights’ (European University Institute, 2021).

3 Evelien Brouwer and others, ‘The European Commission’s legislative proposals in the New Pact on Migration and Asylum’, (Study Commissioned by the LIBE Committee of the European Parliament, 2021) <<https://www.ceps.eu/ceps-publications/the-european-commissions-legislative-proposals-in-the-new-pact-on-migration-and-asylum/>> accessed 1 December 2022.

4 French Presidency of the Council of the European Union, ‘Asylum and Migration: The Council adopts the first stage of the phased Pact’ (22 June 2022) <<https://presidence-francaise.consilium.europa.eu/en/news/asylum-and-migration-the-council-adopts-the-first-stage-of-the-phased-pact/>> accessed 1 December 2022..

5 French Presidency of the Council of the European Union, ‘First step in the gradual implementation of the European Pact on Migration and Asylum: modus operandi of a voluntary solidarity mechanism’ (22 June 2022) <<https://presidence-francaise.consilium.europa.eu/en/news/first-step-in-the-gradual-implementation-of-the-european-pact-on-migration-and-asylum-modus-operandi-of-a-voluntary-solidarity-mechanism-1/>> accessed 1 December 2022..



Under this plan, 10,000 asylum seekers<sup>6</sup> rescued at sea in Southern European countries are supposed to be relocated to other participating countries within a year.

The reforms to the EU Pact are being influenced by the large-scale arrival of persons fleeing the war in Ukraine since February 2022. In March the same year, the EU and its Member States decided to activate<sup>7</sup> for the first time the 2001 Temporary Protection Directive (TPD)<sup>8</sup>. This instrument has granted people fleeing the war in Ukraine temporary protection status on a group basis, along with a wide set of common EU rights. In an unprecedented move, temporary protection (TP) beneficiaries have been recognised the right to freely move<sup>9</sup> or self-relocate and enjoy the protection associated with that status across Member States.

The specific features of the TP regime activated to respond to the Ukraine situation have possible implications for the ongoing reform of EU migration and asylum policies in the context of the Pact and raise questions more widely about the EU principle of solidarity enshrined in Article 80 of the Treaty on the Functioning of the EU (TFEU). What does the new Declaration on a voluntary solidarity mechanism tell us about the EU concept of solidarity? Is the Declaration another example of unequal solidarity<sup>10</sup> in EU asylum policy?

This analysis closes the online Forum discussion on The EU Temporary Protection Responses to the Ukraine War and the Future of the EU Asylum

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6 Agence Europe, 'Declaration of solidarity and relocations of people rescued at sea, EU27 discussions to continue on 11 July in Prague' (5 July 2022) <<https://agenceurope.eu/en/bulletin/article/12986/26>> accessed 1 December 2022..

7 European Council, 'Infographic - EU temporary protection for displaced persons' <<https://www.consilium.europa.eu/en/infographics/temporary-protection-displaced-persons/>> accessed 1 December 2022.

8 Council of the EU, 'Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof' (L 212/12, 7.8.2001).

9 European Commission, 'Ukraine refugees: Operational guidelines to support Member States in applying the Temporary Protection Directive' (press release, 18 March 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_1727](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1727)> accessed 1 December 2022.

10 Sergio Carrera and Roberto Cortinovis, 'Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing Away from Responsibility?' (CEPS Paper No 2019-10) <<https://www.ceps.eu/ceps-publications/search-and-rescue-disembarkation-and-relocation-arrangements-in-the-mediterranean/>> accessed 1 December 2022.

System<sup>11</sup>, organised within the context of the Horizon 2020 ASILE Project. Section 2 examines the scope and key features of the 2022 Declaration. The assessment is carried out against the background of the EU Pact on Migration and Asylum and the EU response to the Ukraine situation. It argues that the Declaration constitutes another example of unequal solidarity in EU asylum policy. Section 3 puts forward an understanding of EU solidarity that moves away from a state-centric *alliance* logic<sup>12</sup> driven by the priority of containing asylum seekers' mobility, and towards a rule of law and human rights-centred logic, which subordinates solidarity to justice.

Section 4 argues that TPD activation in response to the war in Ukraine has shown the feasibility of an alternative approach to the dysfunctional EU Dublin system and its compensatory arrangements. This alternative approach rests on the recognition of refugees' and asylum seekers' agency as key for ensuring the legitimacy and sustainability of the entire EU asylum system. This would give priority to upholding and delivering international human rights and the right to asylum enshrined in the EU Charter of Fundamental Rights. The concluding section outlines five action points for future EU asylum policy.

## 2. The 2022 Declaration Explained: Scope and Key Features

The 2022 Declaration has been explicitly framed as a non-legislative and temporary arrangement, focusing exclusively on human movements across the Mediterranean and the Atlantic seas; however, it is stated that its implementation may provide 'useful lessons' for the design of the 'permanent solidarity mechanism' envisaged in the Asylum and migration management regulation (RAMM)<sup>13</sup> proposed by the Commission to reform the EU Dublin system as part of the 2020 Pact.

Despite their initial reluctance about the design of the Declaration and the volume of pledges initially mobilised, the 'Med 5' countries of Cyprus, Greece,

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11 Sergio Carrera and others, 'EU Temporary Protection Responses to the Ukraine War and the Future of the EU Asylum System' in this collection.

12 Eleni Karageorgiou and Gregor Noll, 'Receiving Ukrainian Refugees in the EU: A Case of Solidarity?' in this collection.

13 European Parliament Legislative Observatory, 'Regulation on Asylum And Migration Management' <<https://www.europarl.europa.eu/legislative-train/theme-promoting-our-european-way-of-life/file-asylum-and-migration-management-regulation>> accessed 1 December 2022.

Spain, Italy and Malta, were persuaded to give the green light to the Council ‘general approach’ on the screening and Eurodac legislative files. The Declaration didn’t count on unanimous support. Nine EU Member States decided not to sign it, and six of them<sup>14</sup> – Austria, Denmark, Poland, Hungary, Latvia and Slovakia – rejected it flat-out.

The Declaration bears close similarities to the ‘Malta Declaration’ adopted in September 2019<sup>15</sup>. The latter consisted of a non-legally binding arrangement that expressed the willingness of a group of Member States’ interior ministers (initially Italy, Malta, France, and Germany) to take ‘voluntary commitments [...] for a Predictable Temporary Solidarity Mechanism’ in the form of a relocation scheme for asylum seekers rescued at sea. The initiative’s rationale was to provide a more predictable and stable alternative to the ship-by-ship<sup>16</sup> approach that had been implemented since the summer of 2018 as a reaction to the controversial closed-ports policy<sup>17</sup> adopted (or threatened) by EU Mediterranean states’ governments, such as those of Italy and Malta.

The similarities between the two documents are many. Both are framed as ‘declarations<sup>18</sup>’. This means that they are neither EU legal acts nor international agreements according to the EU treaties. They lack democratic legitimacy by preventing the European Parliament from exercising accountability in its role as co-legislator, and the checks and balances inherent in the use of formal EU legal acts, including judicial control by the Luxembourg Court. Rather, the declarations can be understood as political arrangements that are not fully binding for the parties and cannot be effectively enforced by the Commission in case of non-compliance.

The 2019 Malta Declaration’s purported aim was to lay down Standard

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14 ECRE, ‘End Game of French Presidency – Passing on a Partial Reform’ (ECRE Editorial, 24 June 2022) < <https://ecre.org/ecre-editorial-end-game-of-french-presidency-passing-on-a-partial-reform/>> accessed 1 December 2022.

15 Joint Declaration of Intent on a Controlled Emergency Procedure – Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism (2019) <<https://www.statewatch.org/media/documents/news/2019/sep/eu-temporary-voluntary-relocation-mechanism-declaration.pdf>> accessed 1 December 2022.

16 Carrera and Cortinovis, ‘Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing Away from Responsibility?’.

17 Eugenio Cusumano and Kristof Gombeer, ‘In deep waters: The legal, humanitarian and political implications of closing Italian ports to migrant rescuers’ (2020) 25 *Mediterranean Politics* 245.

18 Sergio Carrera and Roberto Cortinovis, ‘The Malta declaration on SAR and relocation: A predictable EU solidarity mechanism?’ (CEPS Policy Insights No 2019-14) < <https://www.ceps.eu/ceps-publications/the-malta-declaration-on-sar-and-relocation/>> accessed 1 December 2022.

Operating Procedures<sup>19</sup> for the swift relocation – taking no longer than four weeks – of asylum seekers rescued at sea. Implementation of the relocation process has been described by the Commission in terms of a workflow<sup>20</sup>, laying down a list of actions to be undertaken by Member States’ authorities, the Commission and EU agencies (Frontex and the EU Asylum Agency (EUAA)). These include initial identification and screening, interviewing and ‘matching’ of candidates for relocation with receiving Member States.

The language of the 2022 Declaration is possibly even more vague than that of the Malta Declaration as it frames the proposed initiative in terms of a ‘modus operandi’. Both the notions of workflow and modus operandi are equally alien to EU law and extraneous to any existing EU legal act on migration and asylum.

The two instruments are centred on intergovernmental voluntarism and differentiation. This means that participating EU Member States’ ministries remain by and large free to determine not only if they wish to participate in the first place, but also to pick and choose the nature and amount of their contribution – including in forms other than relocation – and ultimately to deliver on their expressed pledges.

The 2022 Declaration states that relocations should primarily apply to ‘persons in need of international protection’, with priority accorded to the ‘most vulnerable’ ones. In line with relocation practices carried out in the framework of the Malta Declaration, it gives Member States the opportunity to preselect a profile of potential beneficiaries based on their own political preferences, for example specific nationalities or only ‘vulnerable’ applicants.

The unclear scope, coupled with the documented lack of standardised and reliable procedures for assessing vulnerability in many contexts (as, for example, in the case of Greek hotspot procedures<sup>21</sup>) runs the risk of legitimising prohibited discrimination and excluding applicants facing precarity but who don’t formally match stereotypical or narrow understandings of vulnerability.<sup>22</sup>

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19 ‘Standard Operating Procedures for Ad Hoc Relocation Exercises’ (2019) < <https://inlimine.asgi.it/wp-content/uploads/2020/11/Standard-Operating-Procedures-for-ad-hoc-relocation-exercises.pdf> > accessed 1 December 2022.

20 *ibid.*

21 Karin Aberg, ‘Detecting Vulnerability in Greek Hotspots’ (EU Immigration and Asylum Law and Policy, 29 June 2022) < <https://eumigrationlawblog.eu/detecting-vulnerability-in-greek-hotspots/> > accessed 1 December 2022.

22 Lewis Turner, ‘The Politics of Labeling Refugee Men as “Vulnerable”’ (2021) 28 *Social Politics: International Studies in Gender, State & Society* 1.

Another common feature of the two declarations is the focus on disembarkation following search and rescue (SAR) at sea. However, while the Malta Declaration focused exclusively on relocation of disembarked asylum seekers from Italy and Malta, the new arrangement extends its coverage to the Atlantic Sea and Spain, while potentially also applying to non-SAR cases, including the situation in Cyprus and the Greek Islands.

The relocation framework sketched out above is complemented by the following two elements selectively extrapolated from the system of flexible solidarity<sup>23</sup> laid down by the 2020 RAMM proposal.

First, similarly to the distribution key regulating relocation contributions in the RAMM, each participating Member State will be asked to present a 'relocation pledge' linked to a target number based on its population and GDP. By way of derogation, however, the Declaration envisages that a Member State facing a situation of 'disproportionate pressure' due to 'secondary flows' of asylum seekers within its territory, would be allowed to temporarily suspend its relocation commitment.

Second, in line with the logic of asymmetric solidarity<sup>24</sup> of the RAMM, participating Member States may voluntarily choose contributions other than relocation. These may take the form of financial contributions or operational support to Member States of first entry in areas such as reception, border surveillance, detention, and return. The 2022 Declaration does not include any reference to the controversial concept of return sponsorship<sup>25</sup>, which was intended to be a key feature of the RAMM 'solidarity system'. Mirroring a similar RAMM provision, however, Member States may choose to contribute by financing projects in third countries expected to contain/prevent people from leaving or travelling towards the EU external borders.

What would happen in cases where EU Member States decide to voluntarily participate by offering financial contributions instead that relocation? The Declaration avoids reproducing the intricacies of the complex (albeit legally

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23 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund] [2020]' COM(2020) 610 final.

24 Brouwer and others, 'The European Commission's legislative proposals in the New Pact on Migration and Asylum'.

25 Lina Vosyliūtė, 'When principles are compromised: EU return sponsorship in light of the UN Global Compacts' (ASILE Forum Discussion, 17 February 2021) < <https://www.asileproject.eu/eu-return-sponsorship-in-light-of-the-un-global-compacts/> > accessed 1 December 2022.

binding) ‘mass correction mechanism’<sup>26</sup> laid down in the RAMM proposal. Instead, it provides, in a convoluted manner, that ‘a minimum indicative contribution for each participating Member State will be foreseen so that this target is not reduced exceedingly in case a low number of Member States take part in relocation’.

No additional specification is provided on the functioning of the proposed relocation process. This leaves the door open on a number of fundamental questions: notably, who, and on the basis of which objective criteria and independent procedure, will determine that a Member State is facing a situation of disproportionate pressure? Additionally, what will happen if Member States do not provide enough relocation pledges or if they fail to fulfil their expressed relocation commitments?

The proposed *modus operandi* is thus, by design, fraught with a lack of foreseeability and predictability. This legal uncertainty by design, combined with the absence of any obligation for the involved Member States, implies that the Declaration shouldn’t be qualified as a “mechanism”. It is rather an arrangement or a statement of intent<sup>27</sup> between participating ministries of interior, DG Home Affairs (HOME) of the Commission and the EUAA, which is not amenable to implementing the EU Pact on Migration and Asylum.

The arrangement is expected to run for an initial period of one year, after which a stocktaking exercise will be carried out by the Commission to monitor its implementation and consider a possible prolongation. The latter, however, will depend on a number of factors unrelated to its performance in ensuring effective relocation; these include progress made at the EU level towards the adoption and implementation of the screening and Eurodac regulation proposals, as well as the identified impact of the mechanism on the migration dynamics to the EU and intra-EU movements of asylum seekers.

Just a few days after the adoption of the Declaration, the Commission organised a meeting to establish a ‘solidarity platform’<sup>28</sup> with the aim of starting

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26 European Commission, ‘New Pact on Migration and Asylum: Questions and Answers’ (23 September 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_1707](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1707)> accessed 1 December 2022.

27 Catherine Woollard, ‘Better, Bad, Worse, Worst Approaches? The Asylum Reforms after “Ukraine”’ (ECRE Editorial 3 June 2022) <<https://ecre.org/ecre-editorial-better-bad-worse-worst-approaches-the-asylum-reforms-after-ukraine/>> accessed 1 December 2022.

28 European Commission, ‘Migration and Asylum: Commission welcomes today’s progress in the Council on the New Pact on Migration and Asylum’ (press release, 22 June 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_3970](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3970)> accessed 1 December 2022.

its implementation. According to public information<sup>29</sup> provided by the EU Home Affairs Commissioner, Ylva Johansson, as of July 2022, 13 EU Member States had expressed their ‘readiness’ to relocate people rescued at sea, bringing the total number of relocation pledges over one year to more than 8,000. The bigger pledges were made by France (3,000) and Germany (3,500), with other countries, including Luxembourg, Ireland, Portugal, and Belgium, making smaller relocation pledges. On 25 August 2022<sup>30</sup>, a group of 38 asylum seekers left Italy for France, the first to be relocated under the temporary solidarity mechanism.

The overall numbers of potential relocated persons are indeed low in scale and ambition, taking into account the wide geographical scope of the arrangement. The above numbers, however, still represent an increase compared to the volume of relocations in the framework of the Malta Declaration; according to the latest publicly available data provided by the Commission<sup>31</sup> in September 2021, 2,100 applicants had been successfully transferred in that context since 2019 (1,145 from Italy and 959 from Malta). Still, from the perspective of scale, a quantitative comparison between the total number of people expected to be covered by the Declaration and those having fled Ukraine, which as of 27 September 2022 has been estimated to be around 7.4 million<sup>32</sup> since the start of the war, is staggering.

The exact practicalities concerning the functioning and monitoring of the arrangement have been deliberately left for a later stage. As in the context of the Malta Declaration, the Commission has accepted taking up the role of coordinator of the implementation of the exercise, in close relation with the EUAA and with the operational support of the International Organisation for Migration (IOM).<sup>33</sup>

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29 Agence Europe, ‘Thirteen EU Member States have committed, as of July, to relocate migrants rescued at sea’ (11 July 2022) <<https://agenceurope.eu/en/bulletin/article/12990/5>> accessed 1 December 2022.

30 Info Migrants, ‘First asylum seekers relocated from Italy to France via new EU mechanism’ (29 August 2022) <<http://www.infomigrants.net/en/post/42929/first-asylum-seekers-relocated-from-italy-to-france-via-new-eu-mechanism>> accessed 1 December 2022.

31 European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Report on Migration and Asylum’ COM(2021) 590 final.

32 UNHCR, ‘Ukraine Refugee Situation’ <<https://data.unhcr.org/en/situations/ukraine>> accessed 1 December 2022.

33 IOM, ‘Relocation’ <<https://eea.iom.int/relocation>> accessed 1 December 2022.



The Commission's choice to take full ownership of an intergovernmental declaration in another instance where 'unity' has not prevailed is controversial.<sup>34</sup> Furthermore, given the informal and extra-EU treaty nature of the arrangement, the legitimacy costs for the Commission to assume this role remain large. This is particularly so in light of von der Leyen's State of the Union call for a permanent and legally binding mechanism and, more generally, the Commission's own enforcement role as guarantor of the Treaties.

### 3. What and Whose Solidarity?

In our previous analyses of EU responses concerning SAR and disembarkation of migrants rescued at sea, we qualified ad hoc disembarkation and relocation arrangements carried out in different modalities since the second half of 2018 as examples of unequal solidarity<sup>35</sup>. We expressed our doubts as to whether these intergovernmental arrangements furthered EU Treaties' objectives and reinforced the European integration process in the area of asylum. We concluded that informal or even formalised manifestations of variable geometry in the asylum domain put at risk the Treaties' objective stipulated in Article 78 TFEU to establish a common policy and uniform area of asylum in the EU.

Instead, we called for an understanding of the EU solidarity principle through the lens of 'equal solidarity', whereby clear legally binding responsibility is upheld and equally shared<sup>36</sup> among all participating governments in line with treaty decision-making procedures and the EU Charter of Fundamental Rights.

Karageorgiou and Noll<sup>37</sup> have argued that the language of solidarity should be abandoned altogether when it comes to analysing the EU response to the Ukrainian situation. In their view, the 'open arms' response to refugees from Ukraine - as labelled by President von der Leyen in her 2022 State of the Union quoted above - should be instead understood as the expression of a *communitarian-instrumentalist* concept of alliance. Favouring the mobility of Ukrain-

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34 European Commission, 'Migration and Asylum: Commission welcomes today's progress in the Council on the New Pact on Migration and Asylum'.

35 Carrera and Cortinovis, 'Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing Away from Responsibility?'

36 Carrera and Cortinovis, 'The Malta declaration on SAR and relocation: A predictable EU solidarity mechanism?'

37 Karageorgiou and Noll, 'Receiving Ukrainian Refugees in the EU: A Case of Solidarity?' in this collection.



ians into EU Member States would thus be – alongside providing equipment and intelligence to Ukrainian authorities – one of the components of the EU strategy of ‘projecting its power’ towards Russia.

In their view, the EU response to the Ukrainian situation should be considered as an exception to the prevailing practice of solidarity in the asylum field between EU Member States, which has instead been usually deployed to the purpose of “immobilising” particular groups of third country nationals through collective border control practices. In this sense, Karageorgiou and Noll conclude that ‘any form of solidarity by states and international organizations is, by definition, unequal’.

In spite of the persuasiveness of this conclusion, we argue that it is still crucial to focus on an alternative understanding to the one conveying the EU solidarity principle as an *interstate alliance clause*. This is particularly so at times of understanding the EU policy developments that have emerged since 2015, and specifically the increasing use of non-treaty based and variable geometry arrangements covering relocation and SAR, with the last instance being the 2022 Declaration on the voluntary solidarity mechanism examined in this contribution.

In our view, solidarity understood in terms of cooperation between EU Member States is not always unequal. The fact that some forms of solidarity may be more unequal than others has been illustrated by the controversies brought before the Court of Justice of the EU (CJEU) in Luxembourg regarding the 2015 emergency relocation Decisions<sup>38</sup> and the conclusions reached by the Court.

In that case, the emergency relocation mechanism was adopted by the Council in line with the Treaty decision-making parameters and therefore by means of qualified majority voting (QMV), rather than through a consensus-building logic. It was strongly opposed by a group of Member States, in particular Slovakia, Hungary, the Czech Republic, and Romania. These governments voted against the second relocation decision in the Council – which didn’t prevent its formal adoption – and later refused to fulfil their legal com-

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38 Sergio Carrera and Elspeth Guild, ‘Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU’ (CEPS Policy Brief, 2015) <<https://www.ceps.eu/ceps-publications/can-new-refugee-relocation-system-work-perils-dublin-logic-and-flawed-reception/>> accessed 1 December 2022.

mitments under the legal act.<sup>39</sup>

The CJEU made clear<sup>40</sup> that the relocation Decisions were lawful. It then found the Slovak and Hungarian governments in violation of their obligations under EU law. The Court called for equal solidarity among EU Member States by stating that when one or more Member States are faced with an ‘emergency situation characterised by a sudden inflow of nationals of third countries, the responses must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy’ (emphasis added).

In a parallel ruling about the same 2015 emergency relocation mechanism<sup>41</sup>, the Court held that allowing EU Member States’ authorities to make relocation of asylum seekers conditional on the selection of certain applicants with ‘cultural or linguistic ties’ with a specific EU Member State would make it unfeasible for any such mechanism to work in practice. The Court underlined that any considerations related to ethnic origin of asylum applicants – which often hides behind nationality selection criteria – would be discriminatory and run contrary to Article 21 of the EU Charter of Fundamental Rights.

Through its case law, therefore, the CJEU has recognised that specific manifestations of unequal solidarity run contrary to the essence of the EU solidarity and fair sharing of responsibilities principle enshrined in Article 80 TFEU. The Court has also placed equality and non-discrimination at the heart of the equation regarding the right to asylum under the EU Charter of Fundamental Rights.

Paradoxically, the response of the European Commission to the unsatisfactory implementation of the 2015 emergency relocation decisions and, later on, the failing 2016 reform of the EU Dublin Regulation<sup>42</sup> – envisaging a per-

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39 Elspeth Guild et others, ‘In-depth analysis on Implementation of the 2015 Council Decisions on relocation’, Study requested by the LIBE Committee of the European Parliament (2017) <<https://www.ceps.eu/ceps-projects/in-depth-analysis-on-implementation-of-the-2015-council-decisions-on-relocation/>> accessed 1 December 2022.

40 Court of Justice of the European Union, ‘The Court dismisses the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seeker, Press release 91/17 (2017) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf>> accessed 1 December 2022.

41 Court of Justice of the European Union, Case C-643/15 - *Slovakia v Council* (6 September 2017).

42 European Commission, ‘Communication from the Commission to the European Parliament and the Council towards a reform of the Common European Asylum System and Enhancing Legal Avenues to Europe’ COM(2016) 197 final.

manent corrective responsibility-sharing mechanism – has been that of fostering and facilitating inequality and differentiation in EU asylum policies. It has pursued an artificial need for consensus building or de facto unanimity voting<sup>43</sup> among all EU Member States' governments in EU asylum policy reforms, including those in Budapest and Warsaw. This has been translated into the Commission's support and indirect involvement in the adoption of intergovernmental declarations and non-legally binding arrangements implementing 'flexible solidarity' among the participating governments.

The notion of solidarity in the EU constitutional framework has been the subject of rich academic debate. Habermas has<sup>44</sup> highlighted how solidarity can be understood as a political act calling for a 'cooperative effort from a shared political perspective' amongst EU Member States. In his view, the solidarity concept describes<sup>45</sup>:

[...] the mutually trusting relationship between two actors who have become part of a *joint political project* of their own free will. Solidarity is *not charity*, and it certainly isn't a form of *conditioning for the advantage of one of the actors*. Those who engage in solidarity are willing to accept short-term disadvantage in the service of their *long-term self-interest* and in the knowledge that the other will behave the same way in a similar situation (emphasis added).

The assumption of 'mutually trusting relationship' underlying Habermas' conceptualisation of solidarity, however, should not be taken for granted in the current EU, context. "Mistrust" is in fact one of the most crucial challenges facing the Union across many policy areas, including those dealing with asylum. Some EU Member States' governments are instrumentally engaging in nationalistic and extreme-right agendas, which include rule of law backsliding and systematic anti-migration and anti-refugee policies running contrary to EU founding principles. Mutual trust here no longer holds and therefore, as we argue below, a notion of solidarity understood in these terms needs to be integrated with a rule of law and human-rights centred concept that focuses on upholding justice.

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43 Sergio Carrera, 'An Appraisal of the European Commission of Crisis' CEPS (2019).

44 Jürgen Habermas, 'Democracy, Solidarity and the European Crisis', Lecture delivered at Leuven University (26 April 2013) <<https://www.pro-europa.eu/europe/jurgen-habermas-democracy-solidarity-and-the-european-crisis/?print=print>> accessed 1 December 2022.

45 Jürgen Habermas, 'Are We Still Good Europeans?', *Social Europe* (13 July 2018) <<https://socialeurope.eu/are-we-still-good-europeans>> accessed 1 December 2022.

To an understanding of solidarity based on interstate cooperation, Habermas adds the concept of civic solidarity<sup>46</sup>, which he understands as solidarity among citizens who are willing to support each other in a joint political will-formation in the EU. This version of solidarity presents interesting potential but remains too constrained to formal citizenship and ‘joint political will’ considerations. To this one we add another notion focused on individuals’ agency, which we call *humanitarian solidarity*<sup>47</sup>, understood as enacted by individuals and civil society actors towards anyone in need – including in response to migration management policies criminalising third country nationals’ unauthorised mobility, as well as those who assist them.<sup>48</sup>

As the EU principle of solidarity is formally enshrined in the Treaties and is here to stay, it is necessary to rethink the ethical and legal foundations of Article 80 TFEU. This would provide the basis for moving beyond the prevailing interstate alliance logic, towards an understanding of solidarity that is read and interpreted in conformity with the EU Treaties and the EU Charter of Fundamental Rights, and which is therefore subject to the rule of law and justice principles in the EU legal system.

Article 80 TFEU must be read in light of the EU Charter which, according to its Preamble, places the individual at the heart of the Union’s activities. The same Preamble states that the Union is founded on the indivisible values of human dignity, freedom, equality and solidarity, as well as the principles of democracy and the rule of law.

Those same principles are enshrined in Article 2 of the Treaty on the European Union (TEU), which identifies ‘human dignity, freedom, democracy, equality, the rule of law and respect for human rights’, and ‘a society where solidarity prevails’, as key founding principles of the EU. Article 2 TEU seems in this way to posit legal principles such as human rights, rule of law and democracy as preconditions for solidarity to prevail. Accordingly, when Article 3.3 TEU mentions that the Union shall promote solidarity among EU Member States, it is obvious that this must be done in full compliance with Article 2 TEU.

Except for Title V, which deals with ‘Citizens Rights’, all the other Titles

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46 Jürgen Habermas, ‘The Crisis of the European Union in the Light of a Constitutionalization of International Law’ (2012) 23 *The European Journal of International Law* 335.

47 Sergio Carrera and others, ‘Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society’ (Bloomsbury Publishing, 2019).

48 Marta Gionco and Jyothi Kanics, ‘Resilience and Resistance: the Criminalisation of Solidarity across Europe’ (GREENS/EFA, 2022).

and provisions of the EU Charter provide crucial rights to any person – irrespective of migration status. These EU fundamental rights are of direct relevance when interpreting and implementing the EU principle of solidarity and fair sharing of responsibility. These include human dignity, the right to asylum, the obligation to treat asylum seekers without any prohibited discrimination ground and the protection of the freedom of association and independence of civil society and human rights’ defenders.<sup>49</sup>

To the previous should be added that several chapters of this ASILE collection have convincingly argued against the legitimacy of any argument suggesting that TP activation should be linked with the Union’s geopolitical interest of ‘projecting its power’ towards Russia. Kostakopoulou<sup>50</sup> has showed how Article 78 TFEU – which calls the Union to develop ‘a common policy on asylum, subsidiary protection and temporary protection’ – does not mention the Union’s geopolitical interests or foreign policy objectives.

Moreover, Bueno Lacy and van Houtum<sup>51</sup> have unpacked the ‘geographical proximity trap’ that lies behind arguments<sup>52</sup> that aim to rationalise unequal treatment between Ukrainian and other refugees. They have convincingly showed how geography considerations are misused to hide unjustified discrimination towards asylum seekers coming from African as well as some Middle-East, South American and Asian countries – including the main refugee and producing states<sup>53</sup> around the world. This inequality is structurally embedded in current EU borders, visas and asylum policies.

In light of the above, an EU Charter proof-based version of the EU principle of solidarity could prove central to develop and include interpretations that contest or even run contrary to what Karageorgiou and Noll<sup>54</sup> aptly define as

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49 UN General Assembly, ‘Declaration on human rights defenders’ (1998) <<https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/declaration-human-rights-defenders>> accessed 1 December 2022.

50 Dora Kostakopoulou, ‘Temporary Protection and EU Solidarity: Reflecting on European Racism’ in this collection.

51 Rodrigo Bueno Lacy and Henk van Houtum, ‘The proximity trap: how geography is misused in the differential treatment of Ukrainian refugees to hide for the underlying global apartheid in the European border regime’ in this collection.

52 Joanne van Selm, ‘Temporary Protection for Ukrainians: learning the lessons of the 1990s?’ in this collection.

53 UNHCR, ‘Refugee Data Finder’ <<https://www.unhcr.org/refugee-statistics/download/?url=e-7C00Y>> accessed 1 December 2022.

54 Karageorgiou and Noll, ‘Receiving Ukrainian Refugees in the EU: A Case of Solidarity?’ in this collection.

an interstate alliance logic. Such rule of law and human rights-centred notion of solidarity provides an alternative vision that puts justice and individuals at the heart, not only that of people on the move but also of citizens, human rights' defenders and civil society actors who mobilise against restrictive laws and who provide assistance to anyone, irrespective of their migration administrative status.

## 4. Unmet Expectations for a Shift in EU Asylum Responsibility-Sharing

The EU responses to the Ukraine cross-border displacements provide an alternative way to understand solidarity towards individuals and among EU Member States in the framework of the Common European Asylum System (CEAS). It is particularly striking how the major pillars underpinning the EU Dublin system, previously defended as the untouchable cornerstone of the CEAS when responding to the 2015/2016 so-called 'European Refugee Crisis', were swiftly and easily put aside from one day to the next in the aftermath of large-scale movements of Ukrainians.

The TPD has led to the establishment of a free movement regime for Ukrainian refugees that sharply contrasts with the containment response and ongoing human rights violations towards non-European asylum seekers at the Polish and Hungarian external borders<sup>55</sup>, as well as other unlawful and inhumane pushbacks at the EU external borders in countries like Greece<sup>56</sup>, Spain and Croatia.<sup>57</sup> In this respect, the UN High Commissioner for Refugees<sup>58</sup> has acknowledged the inherently discriminatory nature of 'restrictive legislation, barbed wire, naval blockades, and pushbacks' applying to non-Ukrainian refugees and

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55 Amaya Valcárcel, 'Out of Sight – Refugees and Migrants at the Belarus-Poland Border' (Jesuit Refugee Service, 2022) < <https://jrs.net/en/news/out-of-sight-refugees-and-migrants-at-the-belarus-poland-border/>> accessed 1 December 2022.

56 Alice Tidey, 'Violent and illegal' migrant pushbacks must end now, EU warns Greece' *Euronews* (8 July 2022) < <https://www.euronews.com/my-europe/2022/07/04/violent-and-illegal-migrant-pushbacks-must-end-now-eu-warns-greece>> accessed 1 December 2022.

57 Georgi Gotev, 'Journalistic investigation exposes violent pushbacks at EU borders' *Euractiv* (7 October 2021) < <https://www.euractiv.com/section/justice-home-affairs/news/journalistic-investigation-exposes-violent-pushbacks-at-eu-borders/>> accessed 1 December 2022.

58 ANSA, 'UNHCR chief calls naval blockades and pushbacks 'racism'' *Info Migrants* (6 September 2022) < <http://www.infomigrants.net/en/post/43113/unhcr-chief-calls-naval-blockades-and-pushbacks-racism>> accessed 1 December 2022.

asylum seekers, which he defined as a manifestation of racism.

Irrespective of the underlying logic driving its activation, TP as laid down in Council Decision 2022/382 sketches the contours of a policy framework that has for long been called for by scholars and refugee advocates. The TP regime set in place at the EU level shows that a model of allocation of responsibility<sup>59</sup> that incorporates individuals' agency, leveraging existing networks with diasporas and other links with Member States, is a suitable option to achieve rapid inclusion and avoid the dysfunction and implementation gaps that have characterised the EU Dublin system.

The Commission itself has recognised<sup>60</sup> that granting agency to TP applicants can be expected to have a positive impact by not overwhelming Member States' asylum systems and reduce pressures on national reception systems. The 'double standards' emerging when comparing the EU responses dealing with Ukrainians fleeing war and people leaving other conflicts in African and Middle East countries has been recently underlined.

For example, the Greek Minister of Migration Affairs<sup>61</sup> reiterated his government's calls for the EU to recognise the free movement of refugees – yet not of asylum seekers – inside the Union's territory. This is also reflected in the text of the 2022 Declaration, which acknowledges the importance of 'ensuring that beneficiaries of international protection have access to legal mobility between Member States and that the relevant provisions in the Pact should be examined in that respect'.

Rather than opening a new chapter in the field of EU asylum policy, however, the gradual approach to the Pact reform devised by the EU French Presidency has remained rooted in a security and policing framing of asylum policies. Its limited ambition reflects persistent challenges on the part of Member States' ministries of interior to overcome divergencies on the reform of the Dublin system and to agree on a predictable and fair mechanism of re-

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59 Sergio Carrera and others, 'the EU Grants Temporary Protection for people Fleeing War in Ukraine: Time to rethink unequal solidarity in EU asylum policy' (CEPS Policy Insights 2022-09) < <https://www.ceps.eu/ceps-publications/eu-grants-temporary-protection-for-people-fleeing-war-in-ukraine/> > accessed 1 December 2022.

60 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ C 126 1/1.

61 Natasha Mellersh, 'Greece urges EU to allow freedom of movement for refugees' *Info Migrants* (27 September 2022) < <http://www.infomigrants.net/en/post/43623/greece-urges-eu-to-allow-freedom-of-movement-for-refugees> > accessed 1 December 2022.



sponsibility-sharing to underpin the CEAS, including in cases of large-scale cross-border displacements.

Ironically, the French Presidency ‘mini-deal’ on the Eurodac and screening Regulations and the 2022 Declaration represents a clear win for governments in countries like Hungary and Poland, which have opposed any relocation-based form of EU responsibility sharing for asylum seekers. As underlined in Vavoula’s<sup>62</sup> chapter in the collection, the Polish and Hungarian governments have been successful in negotiating an ‘opt out’ of the application of the newly reformed Eurodac database to the TP regime activated to address displacement from Ukraine. In addition, as explained above, these two governments have stated their outright disagreement with the model advanced by the 2022 Declaration and have refused to participate in any relocation scheme.

The picture that emerges in light of these developments is one where flexibility and a consensus-building approach are pursued by the Commission and the Presidency of the Council. This approach, however, is providing for the illegitimate use of de facto unanimity voting inside the EU Council. It is legitimising a closed-doors, intergovernmental, and largely undemocratic policy-making process which contrasts with the guarantees laid down in the EU Treaties. It is also allowing some EU governments to wrongly think that they can disregard their obligations under EU asylum law and, in some instances, even systematically engage in the violation of EU founding principles by implementing of racist asylum and border policies.

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62 Niovi Vavoula, ‘The Registration of Beneficiaries of Temporary Protection: Eurodac to the Rescue?’ in this collection.



## 5. Conclusions

The EU responses to refugees fleeing Ukraine have underlined once again the urgent need to abandon the prevailing state-centric understanding of solidarity embedded in EU asylum policies and address the unequal, unfair and discriminatory elements that underline its use and fundamentals. Crucially, it has showed all the limits associated with an EU principle of solidarity understood merely as an ‘alliance clause’ aiming to immobilise asylum seekers and shifting responsibility towards non-EU countries.

The EU response to the Ukrainian situation has demonstrated that the containment paradigm entrenched in the 2020 EU Pact on Migration and Asylum, and its focus on restrictions and criminalisation of ‘secondary movements’, is not compatible with the justice and rule of law principles on which the EU legal framework and the EU Charter of Fundamental Rights are grounded. The activation of the TPD, with all its limitations, hints at an alternative and realistic way<sup>63</sup> to deal with asylum phenomena. It embeds a model of addressing large-scale asylum movements different from containment at all costs.

As illustrated by the outcome of the 2022 Declaration on a ‘Voluntary Solidarity Mechanism’, however, this potential for the emergence of a different approach has not yet materialised. The Declaration constitutes yet another example of unequal solidarity at a time when – as emphasised in President von der Leyen’s 2022 State of the Union speech – a common, permanent and legally binding EU action, firmly rooted in Article 2 TEU founding principles and fundamental rights, is most needed.

This analysis has called for a fundamental reconsideration of the EU principle of solidarity through a conceptualisation that is rule of law-centred, and which is subordinated to justice and safeguards humanitarian solidarity. To proceed in that direction, the EU needs to prioritise the following five action points:

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63 Sergio Carrera and others, ‘the EU Grants Temporary Protection for people Fleeing War in Ukraine: Time to rethink unequal solidarity in EU asylum policy’.

1. abandoning the consensus-building practice in EU decision-making on the asylum reform by ensuring the application of QMV (as set out in the EU Treaties) and fully guaranteeing democratic accountability by the European Parliament in its role as co-legislator, and effectively enforcing current EU legal standards on asylum procedures and reception conditions.
2. assigning equal legal responsibilities to all EU Member States for the relocation of asylum seekers, coupled with the abolition of the EU Dublin regime's first irregular entry criterion.
3. delivering the right to asylum to every person irrespective of their nationality and/or origins, and tackling institutionalised manifestations of discrimination and racism against third country nationals, asylum seekers and refugees in relevant EU governments through a rule of law approach, i.e. based on Article 7 TEU, as these constitute serious threats to EU Treaties' founding principles.
4. upholding asylum seekers and refugees' access to effective remedies against negative asylum and expulsions' decisions, and recognising their agency by acknowledging their legitimate and humanitarian reasons for moving to a Member State different from the one of first unauthorised arrival, and guaranteeing the mutual recognition of positive asylum decisions among all EU Member States and the free movement of international protection beneficiaries.
5. prohibiting the policing and criminalisation of civil society actors and human rights' defenders, and ensuring their independence, in the provision of humanitarian assistance and rescue at sea, to anyone in need.

It is time for an honest and self-critical debate about the underlying causes for the failures experienced by the EU Dublin system over the past three decades of European integration. These mainly relate to the insistence of the Member States' responsible authorities on *contained mobility*<sup>64</sup> policy paradigm focused on policing, deterrence and the criminalisation of asylum seekers and refugees' entry and mobility. This paradigm has not only undermined the overall democratic legitimation of EU's policies in these areas. It has also proved to be inhuman, unfeasible and contrary to the constitutive principles of the Union's legal system.

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64 Sergio Carrera and Roberto Cortinovis, 'The EU's Role in Implementing the UN Global Compact on Refugees: Contained Mobility vs. International Protection' (CEPS Paper, 2018-04) < [https://www.ceps.eu/wp-content/uploads/2019/04/LSE-04\\_ReSOMA\\_ImplementingGCR.pdf](https://www.ceps.eu/wp-content/uploads/2019/04/LSE-04_ReSOMA_ImplementingGCR.pdf) > accessed 1 December 2022.

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