

Temporary protection of displaced persons: the case of refugees from Ukraine

*Ana Čurčija**

ABSTRACT

Whilst armed conflict of the Russian Federation against Ukraine threatens global stability and security, it has also caused a humanitarian crisis and a mass influx of displaced persons from Ukraine to Europe. The European Union's responded to this migration crisis by activating the Temporary Protection Directive, an instrument adopted within the framework of the Common European Asylum System, that regulates the status of temporary protection. Temporary protection exists separately from the regime of international protection, as it is a pragmatic mechanism, that is activated only in emergency crisis situations. The role of temporary protection is twofold, as it namely ensures immediate reception and protection of a large number of asylum seekers with the aim of respecting the principle of non-refoulement, all while preventing the overload and breakdown of the asylum systems of the receiving countries, as it is also a shortened procedure for granting protection to refugees. In this article, we will present the mechanism of temporary protection and its application in practice, on the example of the mass arrival of refugees from Ukraine.

Keywords: international protection, temporary protection, mass influx, displaced persons, solidarity mechanism

* Ana Čurčija, New University, Faculty of Government and European Studies, Žanova ulica 3, 4000 Kranj, Slovenia, e-mail: Ana.curcija@student.nova-uni.si.

Začasna zaščita razseljenih oseb: primer beguncev iz Ukrajine

POVZETEK

Napad Ruske federacije na Ukrajino je ogrozil svetovno stabilnost in varnost, povzročil humanitarno krizo ter množični prihod razseljenih oseb iz Ukrajine v Evropo. Evropska unija se je na to migracijsko krizo odzvala z aktivacijo Direktive o začasni zaščiti, instrumenta, ki je sprejet znotraj skupnega evropskega azilnega sistema in ureja status začasne zaščite. Posebnost začasne zaščite je v tem, da ta obstaja ločeno od režima mednarodne zaščite, saj je to pragmatičen mehanizem, ki se aktivira le v izrednih kriznih razmerah. Vloga začasne zaščite je dvojna, in sicer zagotoviti takojšen sprejem in zaščito velikemu številu prosilcev za azil s ciljem spoštovanja načela nevračanja, hkrati je to tudi skrajšan postopek za podelitev zaščite zaradi preprečevanja preobremenjenosti in zloma azilnih sistemov držav sprejemnic. V tem prispevku bomo predstavili mehanizem začasne zaščite in njeno uporabo v praksi, na primeru množičnega prihoda beguncev iz Ukrajine.

Ključne besede: mednarodna zaščita, začasna zaščita, množičen prihod, razseljene osebe, solidarnostni mehanizem

1. Introduction

On 24 February 2022, Russia invades Ukraine, which is the first armed attack on an independent and sovereign European country since the Second World War. Since then, we have watched the Russian Federation deny and violate the international legal order and threaten world peace. International law exists for the solidarity of the countries of the world, as an instrument to ensure peace and to protect human rights and fundamental freedoms, democracy and the doctrine of the rule of law. Therefore, solidarity, (especially) between European countries and with Ukraine, is (also) crucial to mitigate the war and to rehabilitate its consequences.

In this situation, the institutions of the European Union (hereinafter EU) and its Member States have a multifaceted role to play in safeguarding the values on which the EU is founded. In this paper, we focus on the EU's response in order to protect

those who, in addition to those who remain in Ukraine, suffer the consequences of this war. Since the beginning of the war until the end of December 2023, almost six million people have fled Ukraine for Europe (Operational data portal, 2023, e-source), which is the biggest refugee crisis since the Second World War (Koo, 2022, e-source). This massive and sudden influx of refugees from Ukraine posed a risk to the functioning of asylum systems in EU Member States (Scissa, 2022, e-source), whilst the refugees had to be guaranteed a prompt and dignified reception in an EU Member State and certain rights under international law. This is why the Council of the EU (hereinafter the Council) activated 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 (hereinafter referred to as Directive 2001/55/EC or the Temporary Protection Directive), which regulates temporary protection status. Directive 2001/55/EC defines temporary protection as an exceptional procedure which provides immediate and temporary protection in the event of mass arrivals of persons from third world countries who are unable to return to their country because of armed conflict or systematic and human rights violations (Temporary Protection Directive, Article 2, para. 1).

Given that the Directive has been activated for the first time in 21 years after its adoption and represents one of the EU's responses to the first armed conflict by a sovereign state in Europe since the Second World War, it seems important to analyse its application in practice. We are therefore interested in the use of temporary protection for displaced persons in the case of refugees from Ukraine.

After an introductory chapter, we introduce the concept of temporary protection and, in addition to the definition, highlight its legal regulation, i.e. Directive 2001/55/EC. We first summarise the historical factors that have contributed to the legal regulation of this status in the EU. We then present the provisions of this Directive. We review its strengths and weaknesses and, on the basis of an analysis of selected theoretical works, we try to disclose why it has never been activated until 2022, after twenty-one years and numerous migration crises in the EU Member States. In the

third part, we examine the Russian invasion of Ukraine. We present the response of the EU institutions to the massive influx of people from Ukraine and the Implementing Decision 2022/382, which activated the Temporary Protection Directive. We examine the response of doctrine and international organisations to this decision. Then we illustrate the application of the Directive in practice, focusing on the response of the EU Member States. In the concluding chapter, we summarise the facts and relevant findings and critically evaluate the situation.

2. Temporary protection mechanism

2.1. Temporary protection

Temporary protection is a mechanism to cope with mass arrivals of people fleeing armed conflict, violence, climate change or disasters from their countries of origin (Coles in, Lambert, 2021, p. 249). It provides refugees with minimum standards of protection and refoulement (Guidelines on Temporary Protection or Stay Arrangements, 2014, point 4). This is a pragmatic way of providing international protection in emergency situations (Note on international protection, 1994, para. 45).

The concept is based on the assumption that if voluntary return to the country of origin is not possible, a way will be found to resettle the refugees permanently in the receiving countries (Greig, in Lambert, 2021, p. 249). The majority doctrinal view is that temporary protection has become part of customary international law (for a more detailed argument, see: Greig, in Lambert, 2021, p. 252).

Lambert explains and justifies, with reference to the profession, that temporary protection imposes an obligation on states to respect the principle of *non-refoulement* and requires states and international organisations to cooperate and find durable solutions (Greig, in Lambert, 2021, p. 250). The link between the obligation to receive and protect large numbers of persons and the obligation to find durable solutions for their continued stay in the receiving countries in the event of an inability to return to their country of origin is a positive aspect of temporary protection. The doctrine points out a number of shortcomings of this protection, including the fact that while beneficiaries of tempo-

rary protection are initially granted reception and basic rights, after a certain period of time they should be guaranteed full rights set out in the Convention relating to the Status of Refugees (hereinafter also the Geneva Convention) and its Protocol relating to the Status of Refugees (hereinafter also the New York Protocol). Integration of beneficiaries of temporary protection in receiving countries is often the durable solution, as they face contemporary challenges such as natural disasters, armed conflicts and cooperation between countries to find durable solutions is often lacking Greig, in Lambert, 2021, p. 250).

Premature return of asylum seekers to their country of origin, which is no longer safe for them, would violate the principle of non-refoulement. As a result, beneficiaries of international protection reside legally in the receiving countries and are guaranteed rights under both the provisions of the Geneva Convention and human rights standards. This leads to an almost inevitable integration of these persons in the receiving countries, as the stabilisation process in the refugees' countries of origin takes longer or occurs slowly or not at all (Durieux, 2021, pp. 678-679). This, Durieux explains, is the problem with the Geneva Convention's arrangements for the mass arrival of displaced persons. It does not define the extent of the principle of non-refoulement when the mass arrival of displaced persons threatens the internal security of the receiving State and it does not define the strain on its resources, nor does it define the legal situation of persons in the event of their mass arrival and, lastly, it does not define the extent of the international community's solidarity in receiving these persons and providing durable solutions for their continued stay in the receiving States (Durieux, 2021, p. 679).

At EU level, the European Commission (hereinafter the Commission) has clarified in its proposal for a Temporary Protection Directive that temporary protection is not a third form of protection alongside refugee and subsidiary protection status, but a tool serving the Common European Asylum System, (Proposal for a Council Directive on minimum standards for giving temporary protection in the event of 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, p. 3, 1.5 point) and that the temporary protection mechanism should not prejudice the approval of refugee status

(Ibid, p. 27, recital 10). Temporary protection therefore does not fall within the scope of international protection under Directive 2011/95/EU.

2.2. Temporary Protection Directive

2.2.1. *Historical background*

The concept of temporary protection has its origins in Australasia, and its understanding and regulation in international law is mainly based on European practice and European law (Durieux, 2021, p. 686). Temporary protection came into focus in the 1990s (Durieux, 2021, p. 686) when the war in the countries of the former Yugoslavia, which caused a humanitarian and migration crisis, made it necessary to provide protection to 1.8 million refugees and displaced persons who had fled Bosnia and Herzegovina for Europe (A Comprehensive Response to the Humanitarian Crisis in the former Yugoslavia, 1992, pt. 1). At the time, the United Nations High Commissioner for Refugees (hereinafter UNHCR) proposed temporary protection, considering that it would not be practical to deal with such a large number of displaced persons from third countries on an individual basis. It also envisaged that temporary protection should ensure reception, respect for basic human rights and the return of displaced persons to their countries of origin when the situation in those countries becomes suitable for return (A Comprehensive Response to the Humanitarian Crisis in the former Yugoslavia, 1992, pt. 5).

The creation of the institution of temporary protection had to be in line with the standards of protection of the rights of refugees guaranteed by the Geneva Convention and the European Convention on Human Rights, as the European countries receiving refugees from the former Yugoslavia are all signatories to both conventions (Kälin, in Durieux, 2021, p. 687). The UNHCR took on the position that the migration crisis of the mass influx of displaced persons from the former Yugoslavia could be solved with its help and with the help of European countries (Ogata stresses need for solutions to refugee plight, 1996, e-source. The UN High Commissioner stated that conditions must be created to allow refugees to return to Bosnia). This position, as Durieux explains, meant that countries could provide a

lower level of protection in the form of temporary protection, because their help would ensure the return of those persons to their home countries. Temporary protection in the international community comes into play in crisis situations where, as already explained, it is assessed that the displaced persons will be able to return to their country of origin after a reasonable period of time (Durieux, 2021, p. 688).

During the migration crisis of refugees from the former Yugoslavia, EU Member States had their own national legal frameworks for regulating temporary protection (Beirens et al., 2016, p. 4). As mass arrivals continued until the late 1990s, especially in 1999 due to the Kosovo crisis, different national regimes led to secondary movements, with uneven burdens on certain Member States with large numbers of asylum seekers (Akram, Rempel, in: Beirens et al., 2016, p. 5). The need for harmonisation of temporary protection status in EU Member States has become apparent (Muriel Guin, in: Beirens et al., 2016, p. 5). The Commission has played a key role, having been given the power to harmonise the migration and asylum policies of EU Member States following the adoption of the Maastricht Treaty (Durieux, 2021, pp. 688-689). When the Tampere Conclusions also set the objective of reaching agreement on temporary protection on the basis of solidarity between EU Member States in the event of a mass influx of displaced persons (Presidency Conclusions, Tampere European Council, 1999, point 16), the Commission proposed the adoption of a Directive on Temporary Protection in October 2000, which was subsequently adopted in July 2001 (Durieux, 2021, p. 689). The Directive binds all Member States except Denmark (Directive 2001/55/EC, 2001, recital 26).

2.2.2. Selected provisions

The Temporary Protection Directive is the first instrument adopted within the Common European Asylum System to harmonise EU Member States' asylum systems (Beirens et al., 2016, p. 8). The two main purposes of this Directive are to establish minimum standards for temporary protection in the event of a mass influx of displaced persons from third countries and to support the balancing of reception efforts and the consequences of reception between Member States (Directive 2001/55/EC,

2001, Article 1). In its proposal for a Temporary Protection Directive, the Commission outlined its objectives: to ensure the immediate protection and rights of beneficiaries of temporary protection; to prevent the collapse of national asylum systems in the event of a mass influx of displaced persons; to clarify the relationship between temporary protection and the protection provided for in the Geneva Convention; and to ensure that there is a balance of efforts and a practical implementation of the principle of solidarity between Member States in the reception of beneficiaries of temporary protection (Proposal for a Council Directive on minimum standards for giving temporary protection in the event of mass influx of displaced persons, 2000, pp. 6-7, point 5.1).

According to Article 2.a of the Temporary Protection Directive, temporary protection is an exceptional procedure to be triggered in the event of a mass or imminent arrival of displaced persons and to provide immediate and temporary protection to these persons, in particular where there is also a risk that, as a result of the mass arrival, the asylum system will not be able to process the arrival without adverse effects on its effective functioning.

The Directive defines displaced persons as third-country nationals or stateless persons who, as a result of armed conflict, endemic violence, or because they are at high risk or because they have already been the victims of systematic or generalised human rights violations, have been forced to leave their country of origin or have been evacuated, and are unable to return to a safe and durable situation because of the situation in their country of origin (Directive 2001/55/EC, 2001, Article 2(c)).

Mass arrival is defined as the spontaneous arrival or arrival by evacuation programme of a large number of displaced persons from a particular country or a particular geographical area (Directive 2001/55/EC, 2001, Article 2(d)). Mass arrival is the main criterion for activation of temporary protection, which must include the following elements: (1) the arrival of an extremely large number of persons; (2) the displaced persons come from a particular third country or geographical area; (3) the displaced persons cannot return to their country of origin; (4) such arrival threatens to cause adverse effects on the asylum systems of the Member States (Beirens et al., 2016, p. 38).

The Directive also stipulates that when applying temporary

protection, Member States respect human rights and fundamental freedoms and the principle of non-refoulement, and have the specific right to provide more favourable conditions for beneficiaries of temporary protection than those laid down in the Temporary Protection Directive (Directive 2001/55/EC, 2001, Article 3, points 2 and 5). Temporary protection shall be granted, implemented and terminated after regular consultation with UNHCR and other relevant international organisations (Directive 2001/55/EC, 2001, Article 3, para. 3).

The existence of a mass influx of displaced persons is established by a Council implementing decision adopted by qualified majority. The Council Decision activates or establishes temporary protection in all EU Member States for the displaced persons to whom it applies. The Council adopts the decision on the basis of a proposal from the Commission. In addition, Member States have the right to request the Commission to propose that the Council adopt the decision. The European Parliament is informed of the adoption of the decision (Directive 2001/55/EC, 2001, Article 5).

Temporary protection lasts for one year, with the possibility of automatic renewal for up to one more year. Where the grounds for protection are of a longer duration, the Council, acting on a proposal from the Commission, shall decide to extend the temporary protection for a further year. Member States shall have the right to address a request to the Commission to submit to the Council an extension of the temporary protection. The European Parliament shall be informed of the Council's decision (Directive 2001/55/EC, 2001, Article 4).

Temporary protection ends when the maximum duration is reached or when the Council adopts a decision on a proposal from the Commission, which also examines any request by Member States to end temporary protection after finding that the situation in the displaced persons' country of origin has become safe and durable for their return to that country. The European Parliament is to be informed of the decision (Directive 2001/55/EC, 2001, Article 6).

EU Member States have funding from the European Refugee Fund to implement the measures set out in the Temporary Protection Directive (Directive 2001/55/EC, 2001, Article 24). They take in persons eligible for temporary protection on the basis of mutual solidarity, with an indication of their reception capacity,

which is then specified in the Council implementing decision activating temporary protection (Directive 2001/55/EC, 2001, Article 25, para. 1).

The Temporary Protection Directive also contains a so-called solidarity mechanism. Member States ensure that persons who have not yet arrived on their territory but who meet the conditions for temporary protection have expressed their willingness to be admitted to their territory. Where the number of displaced persons exceeds the reception capacity of a Member State, the Member State concerned is provided with appropriate support (Directive 2001/55/EC, 2001, Article 25, para. 2 and 3). The Solidarity Mechanism also provides for cooperation between Member States on the relocation of beneficiaries of temporary protection, taking into account their consent to relocation. When a Member State is overwhelmed, it can send a request for the transfer of beneficiaries of temporary protection to all Member States, informing the Commission and the UNHCR, which will then inform the Member States of their reception capacities to transfer beneficiaries of temporary protection to their territory. Once the transfer has taken place, the residence permit and the obligations arising from the temporary protection status shall cease in the Member State of departure, which shall be obliged to provide the new receiving State with information on the temporary protection status. The obligations arising from the temporary protection status are then transferred to the new receiving State (Directive 2001/55/EC, 2001, Article 26).

2.2.3. Advantages and disadvantages of the Temporary Protection Directive

The Temporary Protection Directive has its advantages and disadvantages. It has the advantage of a shortened procedure which provides immediate protection against refoulement, while avoiding overburdening Member States' asylum systems. Another positive aspect of the Temporary Protection Directive is that it allows beneficiaries of temporary protection to apply for asylum at any time during the period of protection (Directive 2001/55/EC, 2001, Article 17, para. 1).

Furthermore, the Temporary Protection Directive provides for a comprehensive set of rights for beneficiaries of tempo-

rary protection, which, while less than that granted to persons with refugee status, is greater than that granted to applicants for international protection (Durieux, Hurtwitz, in Durieux, 2021, p. 690). This advantage also proves to be a certain disadvantage since providing such range of rights can be financially burdensome for certain Member States, which may make temporary protection an unattractive solution (Beirens et al., 2016, p. 25).

Mass arrival is defined broadly in the Temporary Protection Directive, allowing temporary protection to be activated in different cases of mass arrivals and in different situations of pressure on Member States. This means that the grounds for activating temporary protection depend on an assessment of each individual mass arrival case (Beirens et al., 2016, p. 15). However, the generality of this definition makes it difficult to apply in practice, as there are no criteria to determine in advance when there is a large-scale arrival of displaced persons. This leads to dilemmas and different understandings on when it is appropriate to activate temporary protection.

The side effects referred to in Article 2a of the Temporary Protection Directive and the criteria for determining side effects should be clarified, given that there are differences between Member States' capacities to cope with a mass influx of displaced persons. The generality of the provisions of the Directive results in the activation of temporary protection being at the discretion of EU Member States, making the activation process itself lengthy and politicised and the likelihood of activation actually taking place very low (Beirens et al., 2016, pp. 17-19).

The question arises whether it is not a weakness of this Directive that the Commission is the sole initiator of the procedure and that the Member States do not have the power to propose directly to the Council the activation of temporary protection (Beirens et al., 2016, p. 17). The European Parliament does not have a prominent role in the decision-making process. For this reason, and because of the generality of the definitions of the key concepts, the procedure of activation of temporary protection itself may become the subject of political debates in the Council, rather than the subject of a judgement on whether the conditions for activation of temporary protection are met (Beirens et al., 2016, pp. 20-22).

The Temporary Protection Directive is the first and still the only legally binding instrument that allows for the sharing of the efforts to admit large numbers of persons between Member States. However, it is precisely voluntary solidarity that has proved to be the biggest weakness of the Temporary Protection Directive. Indeed, the objective of the Directive to ensure a balance of efforts between Member States has been found to be undermined by the absence of clearly defined rules on fair burden sharing and relocation and by the absence of common criteria for calculating the reception capacity of each Member State (Beirens et al., 2016, p. 23). Another thing that complicates fair burden-sharing is the provision in Article 25(2) of the Directive that beneficiaries of temporary protection may declare their wish before they arrive in the EU that they wish to be admitted to the territory of a particular Member State (Directive 2001/55/EC, 2001, Article 25, para. 2). Although this provision is not in itself a negative aspect of the Directive, it may be problematic in practice, as it may lead to a disproportionate number of persons expressing their willingness to reside in the territory of only those Member States which provide higher standards of benefits. This is due to the fact that in practice common standards of temporary protection are not ensured in all EU Member States (Beirens et al., 2016, p. 24).

These weaknesses are the main reasons why the Temporary Protection Directive was not activated before 2022. When migration flows put pressure on Member States' asylum systems in 2011-2014 due to the arrival of large numbers of people from Tunisia, Libya and Syria in Europe, the Italian and Maltese governments proposed to activate this mechanism. The response of the Council (Justice and Home Affairs) at the time was that the criteria for activation were not met. The Directive was not activated even in 2015, when around one million displaced persons from Syria entered the EU illegally (Cığır, 2022, e-source), which at the time was considered as a larger influx of asylum seekers at one time than in the whole period 2001-2014 combined (Beirens et al., 2016, p. 33). As such an influx put severe pressure on the asylum systems of Greece and Italy, Council Decision (EU) 2015/1601 was adopted in 2015, ordering the relocation of a number of refugees from Italy and Greece to other EU Member States. Hungary and Slovakia opposed the decision and brought proceedings

before the CJEU in the joined cases of *Slovakia v. Council and Hungary v. Council*. Recitals 225-227 show that Slovakia pleaded that activating temporary protection would be a better way to deal with the migration crisis in Italy and Greece (CJEU *Slovakia v. Council and Hungary v. Council*, C643/15 and C-647/15, 26.7.2017).

The CJEU agreed with the Council when it took the view that the temporary protection mechanism would not provide an effective response to the crisis situation in Italy and Greece in the specific case at hand, since the Temporary Protection Directive provides that persons are entitled to temporary protection in the Member State in which they are located, which would not relieve Italy and Greece of the large number of migrants who have already arrived on their territory. On Slovakia's argument regarding the decision to grant international protection status by implementing Decision 2015/1601 instead of temporary protection status, which confers a lesser range of rights on its beneficiaries, the CJEU stated that this was a political decision, the appropriateness of which it could not judge (CJEU *Slovakia v Council and Hungary v Council*, C643/15 and C-647/15, 26.7.2017, points 256 and 257 of the Explanatory Memorandum).

Based on the EU's responses to migration crises in the past, there has been a general consensus among experts that the Temporary Protection Directive has not been applied, mainly due to political disagreement between Member States. Some experts consider that the use of temporary protection depends mainly on political will, as its activation initially requires a proposal from the Commission and then the approval of a qualified majority in the Council (Schultz et al., 2022, e-source). Garlick notes that the behaviour of some Member States during the 2015 migration crisis shows that they were concerned that activating the Directive would encourage more refugees to come from Syria (Garlick, 2016, pp. 116-119). Garlick's opinion is confirmed by a study carried out on temporary protection. This study states that some Member States are reluctant to apply temporary protection because activating this mechanism would be proof that their asylum systems are not functioning. On the other hand, some Member States consider that the activation of temporary protection is unjust, since it would work to the advantage of those Member States that are unable to process the increased number of asylum

applications because they have long ignored the need to reform their asylum systems. Moreover, the study shows that some Member States find temporary protection an unattractive option because, by introducing it, they would not be able to have sufficient control over which persons they allow to enter their territory (Beirens et al., 2016, p. 35).

3. Temporary protection in the case of refugees from Ukraine

3.1. Russian Federation attack on Ukraine

The invasion of Ukraine by the Russian Federation began on 24 February 2022. Although Russian President Vladimir Putin initially defiantly declared that it is not an armed conflict but a »special military operation« (Clark, et. al., 2022, p. 1), the Russian army's attacks aimed at occupying cities across Ukraine (The Russian Invasion of Ukraine, 2022) show the motive for Russia's military aggression - the drive to occupy and change the regime in Ukraine, a former member of the USSR (Clark, et. al., 2022, p. 1). The President of Ukraine, Volodymyr Zelensky, immediately declared martial law and called for a general mobilisation of the militarily capable population of Ukraine, while the armed conflict itself has caused millions of people to flee Ukraine, especially when the Russian army started targeting civilians with rockets and artillery in its 'special military operation'. One of the first attacks on civilians took place in Mariupol, twenty days into the war, when the Russian army bombed a theatre where hundreds of people, mostly women, children and the elderly, were sheltered (The Russian Invasion of Ukraine, 2022).

Such unprovoked attack has been widely condemned by the international community. The United Nations High Commissioner for Refugees, Filippo Grandi, condemned Russia's actions and called for cooperation on the first day of the armed conflict to provide humanitarian assistance to those fleeing the war and seeking protection in neighbouring countries. In his statement, he also called on neighbouring countries to keep their borders open to refugees from Ukraine and expressed support for all those who will be able to cope with the arrival of the forcibly displaced Ukrainian population (Statement on the situation in Ukraine at

tributed to UN High Commissioner for Refugees Filippo Grandi, UNHCR, 2022, e-source).

3.2. The European Union's response

On 24 February 2022, the European Council held an extraordinary meeting in Brussels and in its conclusions expressed support for Ukraine and strongly condemned the military aggression by the Russian Federation, which it described as a flagrant violation of international law and the United Nations Charter, and a threat to European and global stability (European Council Conclusions on unprovoked and unjustified military aggression by Russia against Ukraine, 2022, point 1). The conclusions also announced the adoption of additional restrictive measures against Russia and Belarus (European Council Conclusions on unprovoked and unjustified military aggression by Russia against Ukraine, 2022, point 5).

3.2.1. Preparation of Implementing Decision 2022/382

In this light, on 2 March 2022, the Commission made a proposal for the adoption of an implementing Decision on the determination of the existence of a mass influx of displaced persons from Ukraine with the effect of imposing temporary protection for the first time since 2001, when the Temporary Protection Directive was adopted. In its proposal, the Commission predicted that the EU would face a mass influx of displaced persons from Ukraine, given that more than 650,000 displaced persons arrived in the EU via Poland, Slovakia, Hungary and Romania between 24 February and 2 March, and that this number is set to increase. In the light of the situation, it concluded that activation of temporary protection is an appropriate way to provide immediate protection to persons from Ukraine and to enable them to have access to the same rights in all EU Member States. On the other hand, Commission pointed out that temporary protection is also a way to avoid straining the asylum systems of Member States, which would undoubtedly be under extreme pressure due to such a large-scale mass influx (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, pp. 1-2).

In addition, Ukrainian citizens can enter and stay legally in the EU for 90 days without a visa. Those Ukrainian nationals who resided in the EU before the outbreak of the war will be able to apply for international protection after the expiry of their period of legal residence in an EU Member State. In this case, the Commission estimates, temporary protection will further relieve the burden on Member States' asylum systems to process asylum applications (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, p. 2). The Commission notes that the right of citizens of Ukraine to move freely within the EU without a visa allows persons to choose the Member State in which to enjoy their temporary protection rights and to join their family or friends in the extensive diasporas that exist across the EU, which will facilitate the balancing of efforts in managing mass arrivals between Member States. In such cases, the Commission does not rule out the possibility for these persons to take advantage of the possibility of legal migration. Temporary protection, as explained by the Commission, will allow Member States to effectively manage and control the flow of displaced persons from Ukraine, with additional support for those Member States that are overburdened. To this end, Member States will communicate to each other and to the Commission, through the Solidarity Platform, their reception capacities and the number of persons enjoying temporary protection on their territories, as provided for in Article 27 of the Temporary Protection Directive, with the Commission playing a coordinating role (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, p. 3).

3.2.2. Adoption of Implementing Decision 2022/382

The Council acted swiftly on the Commission's proposal and unanimously adopted 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 imposing temporary protection (Implementing Decision 2022/382), which entered into force on the day of its publication, i.e. on 4 March 2022 (Council Implementing Decision 2022/382, 2022). This swift EU response to the humanitarian and migration crisis was praised by the United Nations High Commissioner, Filippo Grandi, immediately after the activation of the Temporary Protection, and was considered an appropriate way to provide protection and stability to refugees from Ukraine (Grandi, 2022, e-source).

As mentioned earlier, Ukrainian nationals have the right to move freely within the EU for 90 days during a 180-day period. This does not affect their ability to be issued with a residence permit at any time during that period. Implementing Decision 2022/382 also clarifies that beneficiaries of temporary protection can only enjoy the rights of temporary protection status in the territory of the Member State which issued the residence permit (Council Implementing Decision 2022/382, 2022, seventeenth recital).

Beneficiaries of temporary protection are persons who left Ukraine on or after 24 February 2022 because of the military invasion by the Russian armed forces. According to Council Implementing Decision 2022/382, these are: (1) Ukrainian nationals who resided in Ukraine before 24 February 2022 and their close family members; (2) stateless persons or nationals of third countries other than Ukraine who enjoyed international protection or equivalent national protection in Ukraine and their close family members (Council Implementing Decision 2022/382, 2022, Article 2).

It is further provided that either this Decision or protection under national law may be applied to third-country nationals and stateless persons who have proved that they were lawfully residing in Ukraine on the basis of a permanent residence permit before 24 February, if they are unable to return to a safe and durable situation in their countries of origin (Council Implementing Decision 2022/382, 2022, Article 2, para. 2). If they cannot produce the relevant documents, Member States must propose another appropriate procedure (Council Implementing Decision 2022/382, 2022, recital 12).

The Commission subsequently clarified that temporary protection does not, in principle, apply to the following categories

of persons: (1) Ukrainian nationals and stateless persons or nationals of third countries other than Ukraine who have enjoyed international or equivalent protection in Ukraine, and that have, before 24 February 2022, been displaced from Ukraine or left Ukraine before that date for reasons such as work, study, vacation, family or medical visits or for other reasons; (2) stateless persons or third-country nationals, other than nationals of Ukraine, who can prove that they have, before 24 February 2022, had a valid permanent residence permit in Ukraine, but who may be able to return to their country or region of origin in a safe and durable manner; and (3) stateless persons or third-country nationals other than Ukraine who were temporarily lawfully residing in Ukraine prior to 24 February 2022 for the purpose of work or study, both in the event that they are able to return to their country or region of origin, and in the event that they are not able to return to a safe and durable situation in their country or region of origin (Commission Communication on operational guidelines for the implementation of 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 imposing temporary protection 2022/C 126 I/01, 2022).

Implementing Decision 2022/382 provides that Member States may extend the protection provided for in that Decision to the above categories of persons (Implementing Decision 2022/382, 2022, Article 2, paragraph 3). The Decision therefore leaves Member States free to decide whether to grant temporary protection, while advising them to at least admit such persons to their territory on humanitarian grounds, without requiring them to present a valid visa or evidence of sufficient means of subsistence or valid travel documents, in order to ensure their safe passage with a view to their return to their countries of origin (Implementing Decision 2022/382, 2022, thirteenth recital).

3.2.3. Reactions of the professional public to the adoption of Implementing Decision 2022/382

We would also like to add the reaction of some experts who were surprised by the activation of temporary protection for refugees from Ukraine in the EU, as they considered the Tempo-

rary Protection Directive to be a dead letter. McAdam estimated that temporary protection will save millions of people who have fled Ukraine, while also pointing out that this form of protection should not be an excuse to grant fewer rights than those guaranteed by the Geneva Convention and the New York Protocol (McAdam, 2022, e-source). Goodwin-Gill believes that the activation of the Temporary Protection Directive is undoubtedly a positive response by the EU, revealing that the scale of mass arrivals is not an obstacle to the provision of protection when Member States cooperate with each other. He suggests that the reason for the use of temporary protection is the inevitability of the situation, the immediate need for protection and the fact that the war is so close to Europe. Although there are uncertainties about finding durable solutions, he believes that temporary protection is the most appropriate way to comply with the principle of non-refoulement at this time, given the situation (Goodwin-Gill, 2022, e-source). Uncertainty about what will happen to persons with temporary protection if they are unable to return to Ukraine and what the EU's approach will be in this case was also highlighted by other experts. Enríquez considers that temporary protection is an appropriate response to the current situation, but notes that if the situation in Ukraine does not stabilise after the end of temporary protection, the integration of refugees from Ukraine who will apply for asylum will be even more challenging for Member States, whose administrative and financial resources will be strained, and for the refugees from Ukraine themselves, as it is difficult to find job and accommodation stability in some Member States (Enríquez, 2022, e-source). In this context, Koo also warns that temporary protection is not a permanent solution and that EU values and solidarity will be tested if the situation in Ukraine becomes a long-term situation. Koo further points out that there are differences in the treatment of temporary protection between third-country nationals and citizens of Ukraine (Koo, 2022, e-source), as it is clear from Implementing Decision 2022/382 that not everyone is eligible for temporary protection unless Member States themselves decide to extend temporary protection (Council Implementing Decision 2022/382, 2022, Article 2, para. 3).

Experts are trying to find out what is the reason for the EU's solidarity with refugees from Ukraine, as in the past the EU has been strongly criticised precisely for the lack of cooperation be-

tween EU Member States in dealing with migration crises. Ciğer assessed that the activation of temporary protection depends on the political will of the Commission and the Council. This now exists in the case of refugees from Ukraine, because of the rapid and large-scale displacement of people from a European country as a result of unjustified Russian aggression (Ciğer, 2022, e-source). Karageorgiou and Noll argue that the lack of solidarity in past migration crises shows that the EU is united only when it is politically appropriate to do so, which is why solidarity in the EU as such does not refer to refugee protection (Karageorgiou, Noll, 2022, e-source). The dilemmas regarding the reasons for solidarity in the mass influx of refugees from Ukraine are best explained by van Selm's assessment. She notes that the reason for activating temporary protection is that the EU had to respond not only to a humanitarian crisis, but also to Russian aggression, which risks destabilising Europe and the entire regional security architecture. The fact that the EU activated the Temporary Protection Directive in the wake of the war in Ukraine shows that the solidarity of the EU Member States is demonstrated when they have to be united for reasons that go beyond the issue of forms of protection for displaced persons. The second reason van Selm points out is that Ukraine borders four EU Member States and the rapid and imminent arrival of large numbers of refugees at their borders has left the EU with virtually no alternative but to activate temporary protection (Van Selm, 2022, e-source).

3.3. Temporary protection in practice

According to the Commission, it should not be a barrier to entry to the EU if displaced people do not carry travel documents, as all Member States are obliged to admit them on humanitarian grounds (Information for people fleeing the war in Ukraine, European Commission, 2022, e-source). All Member States in principle allow the entry of nationals of Ukraine who do not have travel documents (European Union/Ukraine: EU member states start implementing Temporary protection directive, Fragomen, 2022, e-source) on the basis of other identity documents such as an identity card, an expired driving licence or passport or a birth certificate, if they have applied for temporary protection. In addition, Member States bordering Ukraine allow all displaced per-

sons from Ukraine to enter on humanitarian grounds, regardless of whether they are in possession of travel documents (Information for people fleeing the war in Ukraine, European Commission, 2022, e-source). Poland, which faces the highest migration pressure, in practice allows entry to any person coming from Ukraine, even if they do not have any documents (Information for new Arrivals From Ukraine - Arrival to Poland, UNHCR Help Poland, 2022, e-source). In Hungary all displaced persons from Ukraine are allowed entry, even without a passport or visa (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p. 20). Slovakia as well allows entry without a passport or visa (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p. 36). Romania allows entry to all persons who have come from Ukraine, but if they have no documents to enter its territory, they must apply for asylum (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p. 33).

In practice, temporary protection is intended to ensure simplified entry into EU countries by allowing border guards to partially waive border checks (Ukrajina: Komisija predlaga začasno zaščito za ljudi, ki bežijo pred vojno v Ukrajini in smernice za mejne kontrole, Evropska komisija, 2022, e-source). Once admitted, the competent authorities of the Member States should inform the person that he/she is eligible for temporary protection and give him/her guidance on how to obtain this status (Informacije za osebe, ki bežijo pred vojno v Ukrajini, Evropska komisija, 2022, e-source).

The European Council on Refugees and Exiles (hereinafter ECRE) fact sheet, which provides an overview of the application of temporary protection in the Member States for the period up to June 2022, shows that in practice, persons have to lodge an application with the designated competent authority of each Member State in which they wish to benefit from temporary protection. If a person is eligible for temporary protection, after a certain period of time he/she obtains a residence permit and, on that basis, the rights deriving from the temporary protection status (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022), which is undoubtedly a faster process compared to the international protection application procedure, which takes, according to Halpin, approximately

nine to fifteen months (Halpin, 2022, p. 12).

When extending temporary protection to categories of persons other than those listed in Article 2(1) of Implementing Decision 2022/382, Member States are competent to regulate their own rules in this area. This discretionary power leads to significant differences in the Member States' arrangements in this area (Information for new Arrivals From Ukraine - Arrival to Poland, UNHCR Help Poland, 2022, e-source). For example, almost all Member States, except Austria, Estonia, Greece and Hungary, grant the right to temporary protection to stateless persons or third-country nationals who were permanently resident in Ukraine before 24 February and are unable to return to a safe and durable situation in their countries of origin (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, pp. 7, 14, 16 and 20). The Netherlands grants temporary protection only to third-country nationals, not to stateless persons (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p. 29). France and Finland offer temporary protection to immediate family members of stateless persons or third-country nationals who were permanently resident in Ukraine before 24 February and who are unable to return to a safe and durable situation in their countries of origin (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, pp. 15 and 17). In Slovenia, Luxembourg and Portugal, all stateless persons or third-country nationals who are unable to return to a safe and durable situation in their countries of origin, even if they have been temporarily residing in Ukraine, are entitled to temporary protection (The EU Temporary Protection Directive in practice, 2022, p. 2). Finland has the same arrangement as the states mentioned in the previous sentence (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p.17). In Bulgaria, all stateless persons or third-country nationals who have expressed a wish to be granted temporary protection before 31 March 2022 are entitled to temporary protection. Germany also grants temporary protection to third-country nationals who are unable to return to their countries of origin and who have been legally residing on the territory of Ukraine for durable reasons (e.g. to study or work), even if they do not have a permanent residence permit (Information

Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p. 4).

Austria and Germany also grant temporary protection status to those citizens of Ukraine who, before 24 February, resided in the territory of those Member States on the basis of a residence permit which is about to expire or which they cannot renew for any reason if they cannot return to Ukraine (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, pp. 7 and 18). Spain shall also grant temporary protection status to those citizens of Ukraine who were legally residing on its territory before 24 February (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p. 40). The Czech Republic grants temporary protection to citizens of Ukraine who were temporarily residing on its territory without a visa or on the basis of a temporary visa before 24 February (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, p. 12). Finland, the Netherlands and Ireland grant temporary protection to citizens of Ukraine if they were already residing on their territories before 24 February, albeit under different conditions. France grants temporary protection to Ukrainians who were temporarily residing in Europe before 24 February and who cannot safely return to Ukraine. Ukrainian nationals who fled just before 24 February are entitled to temporary protection in Finland, Croatia, Luxembourg and Germany. Belgium grants them temporary protection if they left Ukraine after 24 November 2021, Sweden after 30 October 2021 and the Netherlands if they fled Ukraine after 27 November 2021 (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022, pp. 5-6).

Based on the ECRE Information sheet, it is worth pointing out that in regards to the rights granted to displaced persons who are beneficiaries of temporary protection, all EU countries offer access to housing, social protection, education for children and young people, the labour market and health care, to varying degrees. All Member States have introduced the possibility of free public transport, reception centres, border counselling, information centres, psychological support and mental distress call centres. Furthermore, all Member States provide assistance in finding private accommodation, including a social allowance.

Persons with temporary protection are entitled to pocket money in all Member States. The amount and duration of the cash assistance depends on the individual Member State and the personal circumstances of the person with temporary protection. Member States provide assistance in finding employment and, in principle, all Member States have stated that they are committed to supporting the employment of persons with temporary protection and to providing them with vocational training. Most Member States provide free courses in their official languages (Information Sheet - Measures in response to the arrival of displaced people fleeing the war in Ukraine, 2022).

The EU supports Member States' solidarity with Ukraine in several ways. It provides financial assistance to Member States for measures to be taken in the context of the implementation of temporary protection rights, and it also provides financial assistance to Ukraine and Moldova. The Commission provides operational guidance for the efficient, rapid and safe crossing of borders by displaced persons, while EU agencies ensure the presence of their technical assistance staff at Member States' borders. In addition, through its Solidarity Platform, the EU ensures the exchange of information on Member States' reception capacities and coordinates their cooperation (Ukraine: EU steps up solidarity with those fleeing war, European Commission, 2022, e-source). At the beginning of the migration crisis, six Member States committed to accept refugees from Ukraine via Moldova in March 2022 through coordination and participation in this platform. The first transfer was made on 19 March 2022 from Moldova to Austria (Ukraine situation flash update #5, 2022, pp. 4-5). The relocation of Ukrainian refugees from Moldova to the territory of the Member States has continued uninterrupted. Finally, in September 2022, Austria, France, Germany, Ireland, Italy, Latvia, the Netherlands, Norway, Portugal, Spain and Switzerland transferred Ukrainian refugees to their territory from Moldova (Ukraine situation flash update #28, 2022, p. 5).

Seeing as there is still no end in sight to the war in Ukraine, the Council adopted a Council Implementing Decision (EU) 2024/1836 of 25 June 2024 extending temporary protection as introduced by Implementing Decision 2022/382. In the Implementing decision 2024/1836 the Council states that the current situation in Ukraine does not allow the return of displaced per-

sons to Ukraine in safe and durable conditions. Moreover, the Council noted that the number of Ukrainian refugees in the EU is not likely to decrease anytime soon. With this in mind, the temporary protection for Ukrainian refugees has been extended until 4 March 2026. (Council Implementing decision (EU) 2024/1836 of 25 June 2024 extending temporary protection as introduced by Implementing Decision 2022/382).

4. Conclusion

The main focus of this article is the temporary protection mechanism and its application in practice. The international community was positively surprised when the EU activated the Temporary Protection Directive for the first time in 21 years after its adoption, when Russia's aggression against Ukraine triggered the largest mass influx of asylum seekers in recent history. It is particularly commendable that the response of the EU institutions and Member States was extremely swift. The Temporary Protection Directive allows Member States to dispense with complex administrative procedures for entry, which is allowed to all refugees from Ukraine on humanitarian grounds, and for the granting of residence permits, which then give rise to rights for beneficiaries of temporary protection that are the same in all Member States. For citizens of Ukraine and persons who have benefited from international protection in Ukraine, as well as third-country nationals or stateless persons who have resided permanently in Ukraine, the only condition for obtaining temporary protection is that they prove, on the basis of any identification document, that they have fled from Ukraine after 24 February 2022.

Although Member States' approaches are harmonised as regards entry and the rights they grant, we believe that temporary protection should be regulated by a Regulation. The case of protection of refugees from Ukraine has shown that regulation by a Directive cannot create common standards in all EU Member States. Standards in Member States differ drastically with regard to the granting of temporary protection to other categories of third-country nationals and stateless persons, as well as to persons who fled Ukraine before 24 February. It could be argued that these differences are not too much of a problem in the given situation, given that the categories of persons eligible for temporary

protection under Implementing Decision 2022/382 are entitled to temporary protection in all or most Member States. Moreover, these persons may benefit from the possibility of legal migration or international protection if they left Ukraine before 24 February. If third-country nationals or stateless persons who were not permanently resident in Ukraine or who left Ukraine before 24 February are not eligible for temporary protection in a particular Member State, they are allowed to enter Member States to apply for international protection, but only if they are unable to return to their countries of origin. The flexibility and options available, although not the same standards of benefits in all Member States, nevertheless allow for more protection options and for the distribution of displaced persons on the territory of EU Member States, which in particular relieves the burden on Member States bordering Ukraine. Setting aside concerns about what would be an ideal approach, it can be concluded that such an approach provides immediate protection to all displaced persons from the risk of war in Ukraine.

According to experts, based on past EU responses to migration crises, the activation of temporary protection for refugees from Ukraine has shown that the reason for the non-application of the Temporary Protection Directive is due to the political unwillingness of Member States. We do not condone or argue that temporary protection has not been needed in the past or that there are not possible double standards in some Member States with regard to refugees. Temporary protection or voluntary solidarity in the form of relocation were certainly necessary when one million refugees from Syria arrived in Europe in 2015, with Greece facing thousands of refugees per day. Some EU Member States, such as Hungary, which has closed its borders to Syrian refugees (Reid, 2022, e-source), have flagrantly violated the principles of international humanitarian law. The lack of solidarity in this situation with the burdened Member States and with the refugees really shows that the EU needs a compulsory solidarity mechanism. The EU's inadequate response to the migration crises has confirmed the need to reform the legal regime of the European Common Asylum System.

The activation of temporary protection requires political will and solidarity among Member States. This situation needs to be understood more broadly in the case of the massive influx of

refugees from Ukraine. First of all, it should be stressed that such a large-scale influx left no room for any doubt that it was a massive influx of displaced persons, which would certainly lead to the collapse of the Member States' asylum systems and endanger their internal security, while at the same time, as a consequence, would make it impossible to provide adequate protection to the displaced persons. This influx has been rapid, sudden, abrupt and directly on the borders of Poland, Hungary, Romania and Slovakia. These Member States had no choice but to accept the refugees. Moreover, there is another reason for introducing temporary protection - the hope that, with the help of the EU and other international organisations, the need to protect refugees will be temporary. The launch of the temporary protection mechanism is one of the EU's responses to the unjustified armed conflict in Ukraine, and providing adequate protection to refugees from Ukraine is one of the ways for liberal democracy to maintain stability in Europe and the world, to show solidarity and support for Ukraine, and to prevent Russia from possibly taking advantage of the EU's moment of weakness. Such a rush directly to the borders of EU Member States did not leave too much room and time to deliberate on whether or not it was appropriate to activate the Temporary Protection Directive, but was the only instrument that could be used to contain such an influx, while at the same time protecting the refugees from Ukraine and creating a united front in the face of the threat to European and world peace.

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