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## THE TEMPORARY PROTECTION DIRECTIVE IS DEAD, LONG LIVE THE TEMPORARY PROTECTION DIRECTIVE! INDISPENSABILITY OF THE TEMPORARY PROTECTION SCHEME IN THE EU LEGAL LANDSCAPE

**Abstract:** *On 24 February 2022 an unprovoked Russia attacked Ukraine, causing a mass movement of displaced persons fleeing Ukraine and in need of international protection. On 4 March 2022, the European Council established the existence of a mass influx of displaced persons, and with that for the first time in the history activated Directive 2001/55/EC, providing quick and effective assistance to people fleeing the war. This action has become an exception in the treatment of forcibly displaced persons arriving at the European Union (EU) borders. The main objective of this study is to explore the complementary position that temporary protection occupies within the Common European Asylum System (CEAS), where it serves not only as a tool to provide protection to persons forcefully displaced en masse, but also to ease the pressure on national asylum systems. What makes the presented research even more interesting is the fact that although temporary protection in the EU had been regulated (at least in theory) for over twenty years, it is still highly politicized and dependent on the will of European leaders. This article combines theoretical considerations (analysis of international law and European law) with a case study of actions taken (and not taken) by the EU during the 2022 migratory pressures.*

**Keywords:** refugee, crisis, temporary protection, non-refoulement, Common European Asylum System

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## INTRODUCTION

Temporary protection is a well-established notion in international refugee law,<sup>1</sup> dating back to at least 1953.<sup>2</sup> Already in the mid-1980s, D. Perluss and J. Hartman made a strong argument that temporary protection had developed into a customary international law.<sup>3</sup> However, progress towards its codification at the international level has been slow.<sup>4</sup>

Although there is no universally accepted definition of temporary protection, nor agreement on its minimum content,<sup>5</sup> it can be generally described as a “short-term emergency response to a significant influx of asylum seekers”.<sup>6</sup> It concerns a mass scale displacement that often makes determination of individual refugee status impossible in practice. In the same way as the United Nations High Commissioner for Refugees (UNHCR) ties temporary protection to a humanitarian strategy to mass displacement,<sup>7</sup> so too the European Council on Refugees and Exiles (ECRE) proposes that – apart from the large-scale outflow – the definition should relate to the burden placed on a receiving State or States.<sup>8</sup> Therefore, the aim of temporary protection is twofold: apart from providing immediate group-based protection (the humanitarian component), it is used by receiving states to prevent national asylum systems from being blocked (the operational component). In addition, the UNHCR adds to it a layer of international solidarity, stating that temporary protection is also a burden-sharing mechanism for states receiving large numbers of asylum seekers.<sup>9</sup>

The concept of temporary protection granted by receiving states has various forms, including temporary admission, temporary refuge, and temporary asylum.<sup>10</sup>

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<sup>1</sup> United Nations High Commissioner for Refugees (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.

<sup>2</sup> It was mentioned for the first time in the UNHCR Report, referring to Chinese refugees as “temporarily admitted” to the Benelux States and Hong Kong (UNHCR, *Report of the United Nations High Commissioner for Refugees*, 1 January 1954, A/2394).

<sup>3</sup> D. Perluss, J.F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 *Virginia Journal of International Law* 551 (1986).

<sup>4</sup> J. Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94(2) *The American Journal of International Law* 279 (2000), p. 279.

<sup>5</sup> UNHCR, *supra* note 2.

<sup>6</sup> UNHCR, *Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)*, June 2005, PPLA/2005/02.

<sup>7</sup> Fitzpatrick, *supra* note 4, p. 296.

<sup>8</sup> European Council on Refugees and Exiles (ECRE), *Position of the European Council on Refugees and Exiles on temporary protection in the context of the need for a supplementary refugee definition*, 1 March 1997, available at: <https://tinyurl.com/2yyh473r> (accessed 30 April 2023).

<sup>9</sup> Executive Committee of the High Commissioner’s Programme, *Protection of Asylum-Seekers in Situations of Large-Scale Influx No. 22 (XXXII) - 1981*, 21 October 1981.

<sup>10</sup> Most notably in Asia and the Middle East (UNHCR, *supra* note 2).

It also serves multiple purposes: from granting protection to a category of persons not covered by the 1951 Convention Relating to the Status of Refugees,<sup>11</sup> through to serving as an emergency tool in situations of mass influx where national determination systems are inoperative; and keeping borders open to being used as a “safety valve”.<sup>12</sup> Among the European Union (EU) legislative instruments, the tool for providing temporary protection is established by Directive 2001/55/EC,<sup>13</sup> which addresses situations of mass influx of displaced persons from non-EU countries and who are unable to return to their country of origin.

The migration and asylum policy in the EU is regulated by a mixture of Member States laws, EU law, the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, and other international instruments. Since the main objective of this study is to explore the complementary position that temporary protection occupies within the Common European Asylum System, the focus of the presented research will be on the EU framework (with the exception of the first part, which is dedicated to the protection of refugees and asylum seekers in international law). References to Member States national systems will be made only when necessary in order to better understand the legal situation of the forcefully displaced.

Triggering the mechanism encapsulated in Directive 2001/55/EC allows not only for theoretical reflection, but also for political commentary in the historical context and empirical endeavors to establish comparative frames of reference (mainly by comparing large scale displacements and migratory pressure on the EU external borders caused by them). This is reflected in this article’s structure. The first part explores the complementary position that temporary protection occupies within the international refugee protection regime; thus laying the grounds for understanding of the rationale behind the adoption and implementation of the scheme in regional and national asylum systems. The second part is dedicated to the development of the temporary protection scheme at the EU level in the context of the birth of the Common European Asylum System (CEAS). The third part covers the mechanism for activating Directive 2001/55/EC vis-à-vis the unprovoked Russia’s aggression on Ukraine. References are also made to previous migratory pressures on the EU borders, when the Directive remained inactive.

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<sup>11</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention).

<sup>12</sup> As was the case in the Kosovo crisis, when the mechanism helped to secure the admission of refugees into Macedonia while evacuating some outside the region on a temporary basis.

<sup>13</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001, p. 12-23.

## 1. INTERNATIONAL REFUGEE PROTECTION AND TEMPORARY PROTECTION

The UNHCR defines temporary protection as a “means, in situations of mass outflow, for providing refuge to groups or categories of people recognized to be in need of international protection, but without recourse, at least initially, to individual refugee status determination”.<sup>14</sup> It is therefore considered as a flexible, solution-oriented, and time-limited<sup>15</sup> instrument, complementary to the international refugee protection regime,<sup>16</sup> which is based on two instruments: 1951 Refugee Convention, and the Protocol Relating to the Status of Refugees from 1967.<sup>17</sup> The international system of refugee protection is supplemented by regional arrangements,<sup>18</sup> which allow participating states to provide responsive protection in a more efficient manner.<sup>19</sup>

One of the most critical issues regarding temporary protection is its “unclear relationship” with the above-mentioned 1951 Refugee Convention and the 1967 Protocol. This sometimes leads to confusion, mainly in terms of status and standards of treatment<sup>20</sup> toward “Convention refugees” and beneficiaries of temporary protection. Since temporary protection “is conceived as an emergency protection measure of short duration”, it offers a more limited range of rights and benefits

<sup>14</sup> UNHCR, *Note on International Protection*, UN Doc. A/AC.96/830 (1994).

<sup>15</sup> It is widely agreed that the upper limit for temporary protection should not exceed three years (UNHCR, *supra* note 2). ECRE stated that temporary protection should last for a period between six months and two years, sufficient time to manage the consequences of a sudden mass influx (ECRE, *supra* note 8). However, it is also being widely accepted that the 1951 Convention refugee status does not guarantee a right to long-lasting admission to an asylum country, but only protection for the duration of the risk (J. Hathaway, *The Rights of Refugees Under International Law*, Cambridge University Press, New York: 2005, p. 395).

<sup>16</sup> UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, February 2014.

<sup>17</sup> Protocol relating to the Status of Refugees (opened for signature 31 January 1967, entered into force 4 October 1967), 606 UNTS 267 (1967 Protocol).

<sup>18</sup> Notably the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa adopted in 1969; the Cartagena Declaration on Refugees adopted in 1984; and the constellation of asylum laws, including the most far-reaching ones developed within the European Union.

<sup>19</sup> See K. Jastram, *Regional refugee protection in comparative perspective. Lessons learned from the Asia-Pacific, the Americas, Africa, and Europe*, The Andrew & Renata Kaldor Centre for International Refugee Law, Policy Brief, available at: <https://tinyurl.com/2r43bdsr>; N. Feith Tan, J. Kienast, *The Right of Asylum in Comparative Regional Perspectives Access, Procedures and Protection*, ASILE, Global Asylum Governance and the European Union’s Role, available at: <https://www.asileproject.eu/wp-content/uploads/2022/05/ASILE-D3.2-final-clean-19042022.pdf> (both accessed 30 April 2023); S. Kneebone, *Comparative regional protection frameworks for refugees: Norms and norm entrepreneurs*, 20(2) *The International Journal of Human Rights* 153 (2016), pp. 153-172; cf. also T. Tubakovic, *The failure of regional refugee protection and responsibility sharing: Policy neglect in the EU and ASEAN*, 28(2) *Asian and Pacific Migration Journal* 183 (2019), p. 183.

<sup>20</sup> United Nations High Commissioner for Refugees, *Global Consultations on International Protection*, 19 February 2001, EC/GC/01/4, available at: <https://www.refworld.org/docid/3bfa83504.html> (accessed 30 April 2023).

than would “customarily be accorded to refugees granted asylum under the 1951 Convention and the 1967 Protocol”.<sup>21</sup>

Undoubtedly, *non-refoulement*<sup>22</sup> – enshrined in Art. 33 of the 1951 Convention, and non-penalisation, encapsulated in Art. 31 – constitute the most basic rights of refugees<sup>23</sup> and extend to beneficiaries of temporary protection.<sup>24</sup>

Under international human rights law, the principle of *non-refoulement* guarantees that no one should be returned to a country where they would face torture, cruel, inhuman, or degrading treatment or punishment and other irreparable harm. This principle applies to all migrants, irrespective of their migration status.<sup>25</sup> Meanwhile, Art. 31 of the 1951 Refugee Convention refers to refugees that entered the country of refuge without authorization; however it does not fully cover aspects of the treatment of asylum seekers in cases of mass influxes.<sup>26</sup> Persons involved in a large-scale displacement are often fleeing armed conflict or general violence, and therefore are unable to prove a risk of individual persecution. Thus, contrary to the 1951 Refugee Convention definition of a refugee,<sup>27</sup> the scope and delimitations of temporary protection are based on “categories, groups or scenarios”.<sup>28</sup>

Temporary protection<sup>29</sup> can be treated as alternative form of protection when a state is not able to grant asylum to a person who has a well-founded fear of per-

<sup>21</sup> United Nation High Representative for Refugees, *supra* note 16.

<sup>22</sup> A principle that applies to all migrants, under which no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other harm. See generally E. Lauterpacht, D. Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in: D. Bethlehem (ed.), *Refugee Protection in: International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge: 2003; G. Goodwin-Gill, J. McAdam, *The Refugee in International Law*, Oxford University Press, Oxford: 2007, pp. 201-267; W. Kälin, *Article 33, Paragraph 1*, in: A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, Oxford University Press, Oxford: 2011, pp. 1327-1396; United Nation High Representative for Refugees, EXCOM, *Non-refoulement, Conclusion No. 6 (XXVIII)*, 1977.

<sup>23</sup> M. Crock, K. Bones, *Australian Exceptionalism: Temporary Protection and the Rights of Refugees*, 16 *Melbourne Journal of International Law* 1 (2015), p. 3.

<sup>24</sup> In case of the *non-refoulement* principle: see Lauterpacht, Bethlehem, *supra* note 22, p. 120. Regarding the non-penalisation of illegal entry, see note 26.

<sup>25</sup> Office of the United Nations High Commissioner for Human Rights, *The principle of non-refoulement under international human rights law*, available at: <https://tinyurl.com/y46n3ete> (accessed 30 April 2022).

<sup>26</sup> Art. 31 of the 1951 Refugee Convention provides: “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

<sup>27</sup> Pursuant to Art. 1(A)(2) of the 1951 Refugee Convention, a refugee is a person who: has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”; is outside the country of his or her nationality; and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country.

<sup>28</sup> UNHCR, *supra* note 16.

<sup>29</sup> But also a temporary refugee.

secution, and when that state is unable to admit asylum-seekers on a durable basis, yet – as previously stated – must provide a solution which does not amount to *refoulement*.<sup>30</sup> The “alternative” dimension of temporary protection is also seen as a critical element by the ECRE, which states that temporary protection is “a reasonable administrative policy only in an emergency situation”.<sup>31</sup> Additionally, the scheme proved its relevance in regions where only a few states are parties to the 1951 Refugee Convention and/or 1967 Protocol<sup>32</sup> or other regional protection mechanism; or where those mechanisms are difficult to implement because of the character of the movements.<sup>33</sup> In these situations, a common approach to temporary protection is of significant importance.<sup>34</sup> This form of protection might be also inadequate as a response mechanism in situations rooted in long-standing conflicts, where return to the country of origin is not likely in the short term.

However, there are also critical voices claiming that temporary protection offers a “diluted substitute protection” for 1951 Convention refugee status, and thus it can undermine the international protection regime.<sup>35</sup> For some others, the notion itself is antithetical to the protection granted by the 1951 Convention.<sup>36</sup> Therefore, it is extremely important that policymakers and leaders do not use temporary protection as a substitute for other protection mechanisms that would respond adequately to the situation at hand<sup>37</sup> or be more suitable.<sup>38</sup> Temporary protection should also not be used as an alternative form of protection for individuals whose application for Convention status was rejected, but cannot be returned due to the prohibition of torture contained in Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>39</sup>

Finally, since there is no general agreement whether temporary protection should be limited to mass influx situations,<sup>40</sup> the question arises of if and how to apply the concept beyond situations of large-scale displacements. Based on the UNHCR’s

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<sup>30</sup> E. Feller, V. Türk, F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, Cambridge: 2003, para. 76. According to Lauterpacht and Bethlehem, no other analysis is consistent with the terms of Art. 33(1) of the 1951 Convention (Lauterpacht, Bethlehem, *supra* note 22, p. 113).

<sup>31</sup> ECRE, *supra* note 9.

<sup>32</sup> Most notably Asia and the Middle East (UNHCR, *supra* note 2).

<sup>33</sup> UNHCR, *supra* note 16.

<sup>34</sup> UNHCR, *supra* note 2.

<sup>35</sup> Fitzpatrick, *supra* note 4, pp. 279, 281.

<sup>36</sup> H. Esmaili, B. Wells, *The “Temporary” Refugees: Australia’s Legal Response to the Arrival of Iraqi and Afghan Boat-People*, 23(3) *University of New South Wales Law Journal* 224 (2000), p. 225.

<sup>37</sup> Like, for example, a *prima facie* mechanism that can be used as a procedural shortcut to the grant of refugee status to entire groups of persons. However, states are usually reluctant to make use of this possibility.

<sup>38</sup> UNHCR, *supra* note 16.

<sup>39</sup> ECRE, *supra* note 9.

<sup>40</sup> Fitzpatrick, *supra* note 4, p. 289.

criticism toward “growing tendency for states to extend the application of temporary protection regimes to asylum-seekers arriving outside the context of mass displacement,”<sup>41</sup> it can be assumed that in the UNHCR’s view temporary protection should be applied only in a case of large-scale displacement; otherwise it can lead to malpractice toward asylum seekers.

## 2. TEMPORARY PROTECTION IN THE EUROPEAN UNION

Before establishing a common scheme, many EU Member States used national forms of temporary protection,<sup>42</sup> notably to protect persons fleeing from war.<sup>43</sup> They were mainly driven by pragmatic considerations, not by principles.<sup>44</sup> As noted by the UNHCR, governments in western Europe have implemented temporary protection schemes mainly due to political circumstances rather than an inability to provide protection under the 1951 Refugee Convention.<sup>45</sup> This lack of a common scheme was a serious regulatory challenge, particularly in the context of the war in former Yugoslavia.<sup>46</sup> The Ministers responsible for immigration expressed their concerns relating to the situation of displaced persons during meetings in London (1992) and Copenhagen (1993). The Maastricht Treaty, which officially came into force on 1 November 1993 – although not a ground-breaking act in the area of asylum<sup>47</sup> – nonetheless brought about some changes. Pursuant to Art. K.1(1) and (3) refugee policy was regarded as a matter of common interest.

Although the Council stated in November 1993 that the transfer of competence on the right of asylum to the Community institutions would be “premature”, a number of texts reviewing the admission and reception of displaced persons from Yugoslavia were adopted.<sup>48</sup> In its resolution from 1995,<sup>49</sup> Council acknowledged

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<sup>41</sup> Executive Committee of the High Commissioner’s Programme, *Note on International Protection*, A/AC.96/914, 7 July 1999.

<sup>42</sup> For more on disparities between national legislations of the EU Member States, see K. Kerber, *Temporary Protection in the European Union: A Chronology*, 14 *Georgetown Immigration Law Journal* 35 (1999), pp. 36-38.

<sup>43</sup> Among others, temporary protection was granted by Member States to persons fleeing war in Bosnia and Kosovo, but also fleeing conflicts in Iraq and Syria.

<sup>44</sup> Kälén, *supra* note 22, p. 202.

<sup>45</sup> UNHCR, *supra* note 6.

<sup>46</sup> According to the report adopted by the European Council in 1991, in the area of migration and asylum priority was given to the harmonization of rules for the admission of students from third countries.

<sup>47</sup> See R. Bank, *The Emergent EU Policy on Asylum and Refugees The New Framework Set by the Treaty of Amsterdam: Landmark or Standstill?*, 68 *Nordic Journal of International Law* 1 (1999), p. 2.

<sup>48</sup> 1710th Council meeting (Justice and Home Affairs), Brussels, 29 and 30 November 1993.

<sup>49</sup> Council, Council Resolution of 25 September 1995 on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis, 95 /C 262 /01.

the need for harmonization of the protection granted by states,<sup>50</sup> stating that it is “desirable” that the conditions for admission and residence in those states should be “arranged in a concerted fashion” and “in a spirit of solidarity between Member States”. The work however barely moved forward with the Council Decision from 1996<sup>51</sup> on alert and emergency procedures for burden-sharing.<sup>52</sup> Neither the mechanism on burden-sharing with regards to the admission and residence of displaced persons on a temporary basis (based on Art. K.1 of the Union Treaty) from 1995, nor the alert and emergency procedure for burden-sharing regarding admission and residence of displaced persons on a temporary basis (based on Art. K.3(2)(a)) from 1996 were implemented. Voices calling for work on a common asylum system became more widespread.<sup>53</sup> Work on a new framework was unavoidable.

The Treaty of Amsterdam, signed on 2 October 1997, brought significant changes to the institutional framework, notably in the areas of migration and asylum policy.<sup>54</sup> Pursuant to Art. 63(2)(a) the Council, within five years after the entry into force of the Treaty, had to adopt measures on displaced persons in the area of “minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection”. Furthermore, Art. 63(2)(b) empowered the Council to adopt measures that promote burden-sharing with respect to receiving refugees and displaced persons between Member States. Accordingly, the Council and Commission Action Plan of 3 December 1998<sup>55</sup> and scoreboard to review progress on the creation of an area of “Freedom, Security and Justice,”<sup>56</sup> set minimum standards for giving temporary protection to displaced persons from third countries, which were to be adopted “as quickly as possible”.<sup>57</sup> Insofar as regards the mass displacement caused by

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<sup>50</sup> In its resolution, the Council stated that temporary refuge should be given “to people whose lives or health are under threat as a result of armed conflict or civil war in future, if there is no other way of averting danger”.

<sup>51</sup> 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 L 63/10.

<sup>52</sup> According to the decision, the Coordinating Committee (referred to in Article K.4 of the Treaty on European Union) may be convened. Additionally, arrangements on monitoring, including the admission of displaced persons, were to be decided by each Member State.

<sup>53</sup> ECRE, *supra* note 8.

<sup>54</sup> See Bank, *supra* note 47; C. Levy, *European asylum and refugee policy after the Treaty of Amsterdam: the birth of a new regime?*, in: A. Bloch, C. Levy (eds.), *Refugees, Citizenship and Social Policy in Europe*, Palgrave Macmillan, London: 1999, pp. 12-50.

<sup>55</sup> Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133080> (accessed 30 April 2023).

<sup>56</sup> Commission communication of 24 March 2000: Scoreboard to review progress on the creation of an area of “Freedom, Security and Justice” in the European Union (COM(2000) 167 final - not published in the Official Journal), available at: <https://tinyurl.com/2b45tt9r> (accessed 30 April 2023).

<sup>57</sup> The plan specifies categories of measures to taken in the short term (two years) and long term (five years). According to K. Kerber, the provision on the adoption of measures “as quickly as possible” should be

the Kosovo war, Member States acted independently<sup>58</sup> which led to unwanted secondary movements.<sup>59</sup> The Council called on the Commission and the Member States “to learn the lessons of their response to the Kosovo crisis in order to establish measures in accordance with the Treaty”.<sup>60</sup> At its special meeting in Tampere in October 1999, the European Council agreed to work towards establishing the Common European Asylum System (CEAS), acknowledging the need to address the issue of temporary protection on the basis of solidarity between Member States.<sup>61</sup> Finally, in 2000, based on Art. 63(2)(a) and (2) (b) the European Commission – with the strong support of the states affected during the Kosovo crisis<sup>62</sup> – adopted a proposal<sup>63</sup> on temporary protection.<sup>64</sup> On 20 July 2001, the Council of the European Communities adopted the Directive on Temporary Protection.

As is pointed out below, the Common European Asylum System consists of various regulations and directives. In the case of Directive 2001/55/EC, the European Commission explained its choice of a directive as a legal form evoking the principle of proportionality. According to the Commission, the Directive allows for laying down minimum standards, while leaving Member States with the choice of form and methods of transposition.<sup>65</sup> This decision was praised by the UNHCR, which underlined that Member States can adopt more favorable standards and that it does not affect schemes adopted prior to the establishment of the European regime.<sup>66</sup>

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interpreted as encompassing measures that are to be treated with the highest priority, and not like a separate category between two and five years (Kerber, *supra* note 42, p. 47).

<sup>58</sup> Protection granted by Member States differed in terms of the granted status, procedures, duration, rights, and benefits.

<sup>59</sup> Secondary movements occur when refugees or asylum-seekers move from the country in which they first arrived to seek protection or permanent resettlement elsewhere.

<sup>60</sup> 2184th Council meeting – Justice and home affairs, Brussels, 27/28 May 1999.

<sup>61</sup> European Council, *Presidency Conclusions*, Tampere 15-16 October 1999.

<sup>62</sup> European Commission, *Study on the Temporary Protection Directive. Final report*, January 2016, available at: [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 30 April 2023).

<sup>63</sup> The proposal was welcomed by the UNHCR. It stated that the proposal provides “a sound basis for establishing a European approach to temporary protection” (UNHCR, *UNHCR Summary Observations on the Commission Proposal for a Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx*, COM (2000) 303, 24 May 2000), 15 September 2000, available at: <https://www.refworld.org/docid/437c64b04.html> (accessed 30 April 2023).

<sup>64</sup> European Commission, *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. The proposal was a part of a series of initiatives presented by the European Commission under the Treaty of Amsterdam, including – among others – a draft concerning the Eurodac system; a proposal for a Council Decision establishing a European Refugee Fund; and a proposal for a Council Directive on family reunification.

<sup>65</sup> *Ibidem*.

<sup>66</sup> United Nations High Commissioner for Refugees, *supra* note 63.

At this point it is also worth noting that unlike other regional refugee protection systems, the EU has not developed a definition of “refugee” (which ideally would go beyond the definition from Art. 1 of 1951 Convention). Therefore, the European asylum policy is based “on a full and inclusive application” of the 1951 Refugee Convention. The Stockholm Programme even stated that the “Union should seek accession to the Geneva Convention and its 1967 Protocol”.<sup>67</sup> However, this is legally unfeasible since the 1951 Refugee Convention covers refugees’ rights which lie within the competence of the Member States, thus it would clearly violate the principle of conferral. Moreover, the 1951 Convention is open only to state parties.<sup>68</sup>

The enactment of the Directive was a part of the first phase of creation of the Common European Asylum System (CEAS). The process itself was not linear. The first phase of the CEAS creation took place between 2000 and 2005 and was relatively successful. In that period, six sources of secondary law in the area of migration and asylum were created. Apart from Directive 2001/55/EC, they included: the Eurodac Regulation;<sup>69</sup> the Dublin II Regulation;<sup>70</sup> the Reception Conditions Directive;<sup>71</sup> the Qualification Directive;<sup>72</sup> and the Asylum Procedures Directive.<sup>73</sup> The regime introduced by Directive 2001/55/EC supplemented the concept of international protection based on refugee status and subsidiary protection – embedded in the Qualification Directive – enabling coverage of “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”.<sup>74</sup> Inasmuch as it was touted as being a “system of rules moving

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<sup>67</sup> European Council, *The Stockholm Programme - an open and secure Europe serving and protecting citizens*, 2010/C 115/01, C 115/1.

<sup>68</sup> Any attempt to introduce an amendment to 1951 Refugee Convention may open a debate which in the end would lead to debate on its substance.

<sup>69</sup> 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 316/1.

<sup>70</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

<sup>71</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.

<sup>72</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] L 304/12.

<sup>73</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] L 326/13.

<sup>74</sup> CJEU, Case C-285/12 *Diakite* [2014], Opinion of Advocate General Mengozzi, 18 July 2013, ECLI:EU:C:2014:39, para. 60.

towards completion,<sup>75</sup> it was implicitly acknowledged that the next phase of the CEAS development must come quickly.<sup>76</sup>

During the second phase, five out of six key legal instruments were recast. The only one not amended was Directive 2001/55/EC, possibly due to the fact it was perceived as an emergency measure which had not yet been tested. Reform of the CEAS eventually became finalized on the eve of migratory pressure that the national asylum and reception systems faced in 2015. When this “perfect storm”<sup>77</sup> hit the EU, apart from the Temporary Protection Directive, it was Art. 78(3) of the Treaty on the Functioning of the European Union (TFUE)<sup>78</sup> that provided for the adoption of provisional measures in emergency migratory situations in the field of asylum.<sup>79</sup> When read together with Art. 80 TFEU, it offers a legal basis for measures implementing the principle of solidarity.

Promotion of solidarity between the Member States in the event of mass influx is explicit throughout the Directive 2001/55/EC. Although it is unclear what is the required number of member states whose national systems are overburdened, it seems reasonable to trigger temporary protection even if only one Member State is affected.<sup>80</sup> Already in the preamble of the Directive, it is stated that the solidarity mechanism should consist of two components: financial and the actual reception of persons in the Member States based on declared availability (the rule of double voluntarism). The financial component is encapsulated in Art. 24, which allows for access to refugee funding during activation of the Directive. The latter is based on the availability declared by Member States, which must indicate their capacity<sup>81</sup> to receive persons eligible for temporary protection.<sup>82</sup> This information should be included in the Council decision giving the right to temporary protection.

<sup>75</sup> *Ibidem.*

<sup>76</sup> European Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 13 December 2004 [2005] OJ C 53/1, p. 3.

<sup>77</sup> T. Spijkerboer, *The Refugee Crisis and European Integration Minimalist Reflections on Europe, Refugees and Law*, European Papers 2016, available at: <https://tinyurl.com/3kdxbbmd> (accessed 30 April 2023).

<sup>78</sup> Art. 78(3) establishes that “[i]n 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, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament”.

<sup>79</sup> For more on the emergency measures in the EU asylum policy, see S.F. Nicolosi, *Addressing a Crisis through Law: EU Emergency Legislation and its Limits in the Field of Asylum*, 17(4) *Utrecht Law Review* 19 (2021), pp. 19-30.

<sup>80</sup> D. Gluns, J. Wessels, *Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current “Refugee Crisis”*, 36(2) *Refugee Survey Quarterly* 57 (2017), p. 63.

<sup>81</sup> The Member States can indicate their capacity either in figures or in general terms.

<sup>82</sup> The declared availability was hailed by the Economic and Social Committee, according to which the mechanism allows for sharing responsibility between member states while respecting the “practical requirements” of Member States and considering the wishes of displaced persons (Economic and Social Committee, *Opinion of the Economic and Social Committee on the ‘Proposal for a Council Directive on minimum standards for giving*

Directive 2001/55/EC has two purposes – first, to “establish minimum standards for giving temporary protection in the event of a mass influx<sup>83</sup> of displaced persons from third countries who are unable to return to their country of origin; and secondly, as already mentioned, to “promote a balance of efforts between Member States in receiving and bearing the consequences of receiving such persons” (Art. 1).<sup>84</sup> Temporary protection (immediate in its character) is a unique measure, used in the event of a mass influx or an imminent mass influx.<sup>85</sup> According to the European Commission, it should not be treated as a third form of protection, i.e. alongside 1951 Refugee Convention status and EU-regulated subsidiary status.<sup>86</sup> Furthermore, the European Commission described it in pragmatist terms as “a tool enabling the system to operate smoothly and not collapse under a mass influx”, in accordance with the services of the Common European Asylum System and the full operation of the Geneva Convention.<sup>87</sup>

As abovementioned, temporary protection is an exceptional measure,<sup>88</sup> which does not constitute a derogation from the application of the 1951 Refugee Convention.<sup>89</sup> Pursuant to Art. 78 TFEU, the EU must provide a policy for temporary protection<sup>90</sup> “ensuring compliance with the principle of *non-refoulement*”. This policy must be in accordance with the 1951 Geneva Convention and its Protocol

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*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*, 28 March 2001, OJEU 2001, p. 25).

<sup>83</sup> While mass influx is hard to define, nonetheless according to the UNHCR, mass influx situations may have some of the following features: (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption capacity in the hosting state; (iv) overload of the asylum system, which is unable to deal with individual asylum procedures. Executive Committee of the High Commissioner’s Programme, *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations*, 8 October 2004, No. 100 (LV), para. a.

<sup>84</sup> The Proposal also included the specific aim of avoiding a total blockage in national asylum systems, which would have negative effects not only on the Member States, but also on the persons concerned and others seeking protection outside the context of a mass influx.

<sup>85</sup> The Proposal did not list the case of an “imminent mass influx”.

<sup>86</sup> In the European Union, subsidiary protection is regulated by Art. 2(f) of 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 337/9 and Case C-465/07 *Elgafaji v. Staatssecretaris van Justitie* [2009], ECR I-00921, paras. 43-44. According to the ECRE, subsidiary protection is a response to the causes of person’s flight, whereas temporary protection is a reaction to a mass influx (ECRE, *Position on Complementary Protection*, September 2000, available at: <https://tinyurl.com/3ndm5wrv>, accessed 30 April 2023).

<sup>87</sup> European Commission, *supra* note 64.

<sup>88</sup> With that, Directive 2001/55/EC reaffirms the primacy of the 1951 Refugee Convention and its 1967 Protocol.

<sup>89</sup> Directive 2001/55/EC also does not set standards relating to the interpretation of the 1951 Refugee Convention.

<sup>90</sup> The same rule applies to the asylum policy and subsidiary protection granted by the EU Member States.

and other relevant treaties”.<sup>91</sup> Moreover, the adoption of a “uniform status”, as mentioned in Art. 78(2), also extends to a “common system” of temporary protection.

According to Art. 3(1) of Directive 2001/55/EC, temporary protection does not prejudice the recognition of refugee status under the Convention. Moreover, in light of the Directive the beneficiary of temporary protection shall be guaranteed the possibility to lodge an application for asylum at any time. However, a Member State can prohibit persons from simultaneously holding the status of beneficiary of temporary protection and asylum seeker while the applications are under consideration.

With regard to implementation, the temporary protection cannot be resorted to individually by a Member State. A collective decision must be taken by the Council of Ministers. However, one of the most contentious issues regarding the temporary protection in the EU is its triggering mechanism, primarily due to the indetermination of a ‘mass influx’. According to the act, a mass influx implies the combination of two phenomena. First, the influx must originate from the same country or geographical area, whether it was spontaneous or aided (for example through an evacuation program). Thus, it excludes cyclical and mixed flows from different countries. Secondly, the number of arriving persons must be substantial.<sup>92</sup> Due to the lack of a pre-determined quantitative criteria for declaring a mass influx<sup>93</sup> (or even more so an “imminent mass influx”), the existence of it is established by a Council decision adopted by a qualified majority,<sup>94</sup> based on the Commission’s proposal.<sup>95</sup> The European Parliament must be informed of the Council decision, which has the effect of introducing temporary protection in all Member States. The establishment, implementation, and termination of temporary protection should be consulted with the UNHCR and other relevant international organizations.

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<sup>91</sup> The list includes the Convention for the Protection of Human Rights and Fundamental Freedoms; the United Nations Convention on the Rights of the Child; the United Nations Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights.

<sup>92</sup> In its explanatory memorandum, the European Commission also pointed out that the gradual arrival of displaced persons, asylum-seekers and refugees from a single country or region does not constitute a triggering factor. However, once the gradual movement intensifies to the point of becoming massive and overburdening “the normal asylum system”, which is no longer able to absorb the flow, the introduction of temporary protection is justified (European Commission, *supra* note 64).

<sup>93</sup> Even the UNHCR states that what constitutes a “mass large-scale influx” should be defined in the context of the receiving state’s resources, not in absolute terms (UNHCR, *supra* note 63).

<sup>94</sup> An unanimity requirement could not only lead to protracted negotiations, but also to a situation in which the veto of a single member state would prevent from the activation of the Directive.

<sup>95</sup> The European Commission has a monopoly in this regard.

Contrary to the “indeterminate legal concept”<sup>96</sup> of a mass influx, the limited duration of the offered protection seems undisputable.<sup>97</sup> During the drafting of the Directive, the Economic and Social Committee even stated that one of its aims is to prepare beneficiaries “for the return to their country of origin,”<sup>98</sup> underlining the temporary nature of the protection. Crucially, the duration of the regime and rights afforded to persons under the scheme should be known from the outset.<sup>99</sup> Pursuant to Art. 4 of the Directive, the duration of temporary protection is one year. It may be extended by six-month periods for a further year. A decision taken by the Council (by qualified majority) on a proposal from the Commission can lead to an extension of up to one year. The temporary protection may be terminated in two ways: at the end of the maximum period, or by the Council’s decision at any time during this period. The Council’s decision must be based on establishment of the fact that the situation in the country of origin allows for a safe and durable return.<sup>100</sup>

In terms of granted rights, Member States must issue residence permits for beneficiaries of temporary protection. For persons that would normally require a visa, due to the urgency of the situation formalities must be kept to a minimum and visas should be either free of charge, or their cost be reduced to a minimum. The Member States must provide information on the rules governing such protection. Persons enjoying temporary protection should have access to employment on equal terms with refugees.<sup>101</sup> They should also have access to suitable accommodation (or the means to obtain housing) and necessary assistance (including social welfare, means of subsistence, and medical care). Persons under 18 years should receive access to the education system. The right to family unification has been limited due to the “temporary nature of the situation”.<sup>102</sup> However, the Directive does not determine the Member State’s obligations as to the conditions of reception and residence. Moreover, in the case of temporary protection the Reception Conditions Directive does not apply.

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<sup>96</sup> N. Arenas-Hidalgo, *The eternal question: What does “mass influx” really mean? Reflections after the first activation of the Temporary Protection Directive 2001/55*, Global Asylum Governance and the European Union’s Role, available at: <https://tinyurl.com/3bmn4772> (accessed 30 April 2023).

<sup>97</sup> According to the Proposal (Annex, recital 14), setting a maximum duration for this type of protection is a complementary measure due to the lack of possibility of setting quantitative criteria in advance as to what constitutes a mass influx.

<sup>98</sup> Economic and Social Committee, *supra* note 82, p. 22. The Proposal for the Directive mentioned access to employment, and access to the general education system and to vocational training in the hosting state as useful during reintegration on their return to country of origin.

<sup>99</sup> ECRE, *supra* note 8.

<sup>100</sup> Although the ‘return to the country of origin in safe and durable conditions’ is not defined in Directive 2001/55/EC, nor in the Council’s Decision, it can be assumed that it implies the cessation of the causes leading to the mass displacement.

<sup>101</sup> It also applies to remuneration, employment-related social security, and other terms of employment.

<sup>102</sup> European Commission, *supra* note 63.

### 3. TEMPORARY PROTECTION DIRECTIVE – MAIDEN ACTIVATION

On 24 February 2022, an unprovoked Russia attacked Ukraine. The war caused a mass movement of displaced persons fleeing Ukraine and in need of international protection. On 4 March 2022, the European Council of the European Union adopted a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine.<sup>103</sup> The decision was introduced unanimously<sup>104</sup> and with a record speed (it entered into force on the same day<sup>105</sup>). The right to temporary protection was immediate.<sup>106</sup> Member States enacted temporary protection at the national levels through legislative acts, executive acts, decisions of the administrative authorities and, in some cases, without additional formalities. They were also left with flexibility in the application of practical measures, starting with facilitating access to the EU territory and registration.

Temporary protection was granted until 4 March 2023. Pursuant to Art. 4 of the Directive, on 14 October 2022, the European Commission at the Justice and Home Affairs Council announced that it would extend the temporary protection in unchanged form for one year. If the reasons for temporary protection persist, the European Commission may propose to the Council another extension for up to another year. As mentioned in the previous part, the temporary protection will end when the maximum duration will be reached or any time that the Council establishes that the situation in Ukraine allows for a safe and durable return.<sup>107</sup>

Temporary protection was granted to three categories of persons displaced from Ukraine on or after 24 February 2022, who left Ukraine as a result of the Russian invasion: (i) Ukrainian citizens residing in Ukraine before 24 February 2022; (ii) stateless persons and nationals of third countries other than Ukraine, who enjoyed

<sup>103</sup> 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] ST/6846/2022/INIT OJ L 71.

<sup>104</sup> This was welcomed by the UNHCR, which called the move “unprecedented” (UNHCR, *UNHCR welcomes EU decision to offer Temporary Protection to Refugees fleeing Ukraine*, Press release, 4 March 2022, available at: <https://www.unhcr.org/news/press/2022/3/6221f1c84/news-comment-unhcr-welcomes-eu-decision-offer-temporary-protection-refugees.html> (accessed 30 April 2023).

<sup>105</sup> Directive 2001/55/EC applies to all EU Member States except Denmark, which has introduced a national form of temporary protection which reflects the Directive’s provisions. Iceland, Norway and Switzerland also introduced national protection measures similar to the Directive.

<sup>106</sup> 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] 2022/C 126 I/01, C/2022/1806 (Operational guidelines).

<sup>107</sup> A decision would be made based on the proposal by the European Commission, which keeps the situation in Ukraine under “constant monitoring and review”.

refugee status (or equivalent national protection<sup>108</sup>) before the day of attack; and (iii) family members of the above-mentioned categories. Regarding stateless persons and nationals of third countries other than Ukraine, who could prove that they were legally residing<sup>109</sup> in Ukraine before 24 February and were unable to return to their country of origin, Member States were given the option to either grant them temporary protection or “adequate”<sup>110</sup> protection under national law.

Since there is no application process under national systems when applying for a temporary and adequate form of protection, when presenting themselves to the authorities persons concerned must only demonstrate their nationality; international protection or equivalent protection status; and residence in Ukraine or a family link, as appropriate. In the Nansen spirit, the European Commission allowed for proving Ukrainian nationality with documents with expired validity.<sup>111</sup>

Since Ukrainian citizens holding biometric passports are exempted from the requirement to possess a visa,<sup>112</sup> they can move freely within the EU after being admitted into the territory for a 90-day period within a 180-day period, which allows them to choose the Member State in which they wish to be granted temporary protection and join their family members.<sup>113</sup> This act was called an “unexpected renaissance of ‘free choice’”.<sup>114</sup> Additionally, a significant number of “pendular” movements have been recorded. As of 1 November 2022, UNHCR had registered more than 7 million crossings at the Ukrainian borders.<sup>115</sup>

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<sup>108</sup> While announcing Operational guidelines, the Commission was still gathering information from Ukrainian authorities about forms of protections under Ukrainian law and documents issued for beneficiaries of those forms.

<sup>109</sup> Pursuant to Art. 2(2), legal residency is established on the “basis of a valid permanent residence permit issued in accordance with Ukrainian law”. This was repeated in the Operational guidelines.

<sup>110</sup> The notion of “adequate” protection was explained in the Operational guidelines. The European Commission stated that this type of protection does not need to entail the same benefits as those attached to temporary protection. Nevertheless, according to the Commission, a member state must respect Charter of Fundamental Rights of the EU and “the spirit of Directive 2001/55/EC”.

<sup>111</sup> Operational guidelines, *supra* note 106.

<sup>112</sup> Annex II to 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] PE/50/2018/REV/1 OJ L 303.

<sup>113</sup> Beneficiaries of temporary protection can also visit Ukraine. Because of that, a high number of pendular movement has been recorded. However, the clear legal provision regulating pendular movement is missing. Different Member States adopted different approaches to those movements, increasing risk for premature suspension of the status. The ECRE has already called for maintaining the temporary protection status as long as directive remains active (ECRE, *Movement to and from Ukraine under the Temporary Protection Directive*, Policy Note 43-2023, available at: <https://tinyurl.com/bddas9ap>, accessed 30 April 2023).

<sup>114</sup> D. Thym, *Temporary Protection for Ukrainians. The Unexpected Renaissance of ‘Free Choice’*, Verfassungs Blog, 5 March 2022, available at: <https://verfassungsblog.de/temporary-protection-for-ukrainians/> (accessed 30 April 2023).

<sup>115</sup> UNHCR, *Ukraine Refugee Situation*, available at: <https://data2.unhcr.org/en/situations/ukraine> (accessed 30 April 2023).

What is particularly interesting in the context of the free movement of beneficiaries is the fact that in order to support Member States who were the main entry points and “to promote a balance of efforts”, states agreed not to apply Art. 11 of Directive 2001/55/EC, which obliges Member State granting temporary protection to take back beneficiaries of that protection, if they stay or seek to enter another Member State without authorization.<sup>116</sup>

This move raises a question concerning the core part of Regulation (EU) 604/2013 – aka the Dublin III Regulation<sup>117</sup> – according to which a Member State responsible for processing asylum applications should be determined on objective criteria,<sup>118</sup> and where none of them can be applied it is a Member State of a first entry. This is especially relevant since beneficiaries of temporary protection (or an adequate form of protection under national law) can lodge an application for international protection in any Member State. In this case Dublin III applies. However, considering that the beneficiary of temporary protection can enjoy their rights in any Member State, the Member State where the application was lodged is encouraged to “take responsibility for examining the application pursuant to the discretionary clause set out in Article 17(1)” of the Dublin III.<sup>119</sup>

Once the Directive 2001/55/EC entered into force, Member states took different approaches toward Dublin transfers. For example, the German Regional Administrative Court of Aachen cancelled a Dublin transfer to Poland in reaction to Poland’s request to suspend transfers due to the significant number of arrivals of Ukrainians.<sup>120</sup> In contrast, the Dutch Council of State rejected an appeal regarding a transfer to Romania by an applicant claiming mistreatment by Romanian authorities. The Council of State ruled that the principle of mutual trust still applies to Romania.<sup>121</sup>

The entry into force of the Directive also influenced asylum procedures in other ways. Some member states initially suspended the processing of applications for international protection by Ukrainians. Pursuant to Art. 31(4) of the recast Asylum

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<sup>116</sup> General Secretariat of the Council, *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 – Statement of the Member States*, Brussels, 4 March 2022.

<sup>117</sup> 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.

<sup>118</sup> The objective criteria (in the hierarchical order) are: presence of family members in a Member State, issuance of a visa or a residence permit, irregular entry into the EU, or visa waived entry.

<sup>119</sup> Operational guidelines, *supra* note 106, p. 15.

<sup>120</sup> Verwaltungsgerichte, 6 L 156/22.A, 18 March 2022.

<sup>121</sup> Council of State, ECLI:NL:RVS:2021:1645, 29 July 2021.

Procedure Directive,<sup>122</sup> a procedure can be suspended due to the uncertain situation in the country of origin.<sup>123</sup> Following the outbreak of the war, some Member States also overturned their negative asylum decisions, granting international protection *sur place*, defined under Art. 5 of the recast Qualification Directive.<sup>124</sup> Ukraine was also removed from national lists of safe countries of origin.<sup>125</sup>

By its decision, the Council acknowledged the appropriateness of the temporary protection, underlining, among others, that the balancing of efforts between Member States reduces the pressure on national reception systems. Despite the fact that the Directive does not regulate the establishment of network capacities, pursuant to Art. 3(2) of the Council decision the Commission set up a “Solidarity Platform” collecting information and assessing the needs of Member States in order to coordinate the response to these needs. The Platform is based on the “matching of offers for solidarity with the needs identified and coordinate the transfer of persons” between Member States and third countries.<sup>126</sup> Moreover, it allows for cooperation between the United Nations Refugee Agency and International Organization for Migration.<sup>127</sup>

In the context of the current decisions taken by European leaders, one question remains: Why has the Directive not been used during previous migratory pressures, especially during the 2015/2016 crisis? The answers proffered vary. According to the European Parliament, it was not used due to the vagueness of its terms and tensions between the Member States in the Council over burden-sharing.<sup>128</sup> H. Beirens and others concluded that the underlying reason was Member States’ preference to invest its efforts into finding concrete measures, rather than getting involved in long-lasting negotiations with uncertain outcomes.<sup>129</sup> I.M. Ciger named six reasons

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<sup>122</sup> 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.

<sup>123</sup> This is the case of Belgium, Finland, Germany, Latvia, Luxembourg, the Netherlands and Sweden.

<sup>124</sup> 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 337/9.

<sup>125</sup> The notion of a safe country of origin was enshrined in Article 36 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 (recast) [2013] OJ L 180.

<sup>126</sup> Operational guidelines, *supra* note 106.

<sup>127</sup> IOM UN Migration, *IOM and UNHCR Welcome Flight with Refugees from Ukraine via Republic of Moldova to Germany*, IOM, 25 March 2022, available at: <https://www.iom.int/news/iom-and-unhcr-welcome-flight-refugees-ukraine-republic-moldova-germany> (accessed 30 April 2023).

<sup>128</sup> European Parliament, *Migration and Asylum: a challenge for Europe (Fact Sheets on the European Union)*, June 2018, available at: <https://tinyurl.com/5d5dyjyb> (accessed 30 April 2023).

<sup>129</sup> European Commission, *Study on the Temporary Protection Directive. Final report*, January 2016, available at: [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 30 April 2023).

behind the non-implementation of the Directive,<sup>130</sup> and even claimed that if the state responsible for an ensuing mass influx was a state other than Russia, the EU would not have activated Directive 2001/55/EC.<sup>131</sup> However, it must be pointed out that refugees from Syria were also fleeing from Russian bombings. On the other hand, while explaining the activation of the Directive in 2022, J. van Selm made a “direct neighboring” argument,<sup>132</sup> which according to R.B. Lacy and H. van Houtum is a spatial manifestation of a global apartheid.<sup>133</sup>

Interestingly, during the 2015/16 migration crisis, countries opposing the introduction of provisional measures introduced on the basis of Art. 78(3) claimed that the purpose of Directive 2001/55/EC is in essence “to respond to the same situations of massive inflows of migrants as the contested decision by laying down a procedure for relocating persons”.<sup>134</sup> The Slovak Republic, with the support of Poland, maintained that launching Directive 2001/55/EC “would have been less restrictive for Member States” and “impinged less on the ‘sovereign’ right of each Member State to decide freely upon the admission of nationals of third countries to its territory” due to its rootedness in declared availability.<sup>135</sup> However, considering the then-highly charged political climate in Slovakia and Hungary (applicants) and Poland (intervener), it is highly doubtful that those Member States would have agreed to the introduction of temporary protection.

Despite the Directive being “geographically and historically neutral”,<sup>136</sup> and with confirmations by Commissioner Margaritis Schinas that “skin colour is not a criterion for EU policy,”<sup>137</sup> displaced people other than those fleeing from attacked

<sup>130</sup> M.Ī. Ciġer, *Temporary Protection in Law and Practice*, Brill/Nijhoff, Leiden: 2015.

<sup>131</sup> M.Ī. Ciġer, *5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022*, EU Immigration and Asylum Law and Policy Blog, 7 March 2022, available at: <https://tinyurl.com/2c884zy3> (accessed 30 April 2023).

<sup>132</sup> J. van Selm, *Temporary Protection for Ukrainians: learning the lessons of the 1990s?*, Global Asylum Governance and the European Union’s Role, available at: <https://www.asileproject.eu/temporary-protection-for-ukrainians-learning-the-lessons-of-the-1990s/> (accessed 30 April 2023).

<sup>133</sup> R.B. Lacy, H. 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*, Global Asylum Governance and the European Union’s Role, available at: <https://tinyurl.com/bddudn52> (accessed 30 April 2023).

<sup>134</sup> Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v. Poland, Hungary and the Czech Republic* [2020] ECLI:EU:C:2020:257. See also L. Gruszczynski, R. Friedery, *The Populist Challenge of Common EU Policies: The Case of (Im)migration (2015-2018)*, XLII Polish Yearbook of International Law (2022) on the crisis itself.

<sup>135</sup> Another reason for using Directive 2001/55/EC instead of the relocation mechanism was the fact that it confers fewer rights than the status of international protection, and thus imposes less of a burden on the Member State(s).

<sup>136</sup> Economic and Social Committee, *supra* note 82, p. 25. The ESC stated that the Directive is not a “Balkan Directive”, thereby unequivocally pointing that out that it should be also used irrespective of the region of origin. The Committee went further, suggesting it might also be used to protect persons displaced by natural disasters.

<sup>137</sup> European Parliament, *Press conference by Margaritis Schinas, EC Vice-President for promoting our European Way of Life, Ylva Johansson, Commissioner for Home Affairs and Janez Lenarčič, Commissioner for*

Ukraine have lower chances of ever becoming beneficiaries of temporary protection.<sup>138</sup> Ylva Johansson, the EU Commissioner for Home Affairs, confirmed that it is unlikely that the Directive would be launched for those who arrive to Europe via the Mediterranean route.<sup>139</sup> The selective activation of Directive 2001/55/EC not only amplified accusations that the EU was creating a “two-tier system” and of institutionalized racism towards non-Ukrainian asylum seekers,<sup>140</sup> but also confirmed that the choice between granting the status of temporary protection and international protection is “essentially a political choice”.<sup>141</sup>

## CONCLUSIONS

Since 2001, when the Directive 2001/55/EC was introduced, the legal landscape in the areas of migration and asylum has changed significantly. The first generation of the Common European Asylum System (established in 2011) had been adopted and recast, and the European Asylum Support Office transformed into the European Union Agency for Asylum (2022), similarly to how the European Agency for the Management of Operational Cooperation at the External Borders established in 2004 was turned into the fully-fledged European Border and Coast Guard Agency in 2016. And yet during this time the Directive itself remained unchanged and unused, sliding into obsolescence. Its activation after Russia’s full-scale war on Ukraine has proven that the Temporary Protection Directive is a vital part of the Common European Asylum System<sup>142</sup> and should not be used to create an alternative system of protection for forcibly displaced persons, but rather to enforce the protection of persons fleeing wars, violence and persecution.

The fact that so far temporary protection has been activated only in 2022 – and even called then “the most appropriate instrument” by the European Commission<sup>143</sup> – highlights that although temporary protection has been regulated within the EU

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*Crisis Management*, Multimedia Center 2022, available at: <https://tinyurl.com/2p8xmbdc> (access 30 April 2023).

<sup>138</sup> This was confirmed by the EU Commissioner for Home Affairs who stated that it is unlikely to activate the Directive again for those who arrive via the Mediterranean Sea route (E. Vasques, *No Temporary Protection Directive for Mediterranean crisis, Commissioner says*, Euractive, 21 November 2022, available at: <https://tinyurl.com/ye23yzuv> (accessed 30 April 2023)).

<sup>139</sup> *Ibidem*.

<sup>140</sup> CEPS, *The EU grants temporary protection for people fleeing war in Ukraine*, CEPS Policy Insights, no. 2022-09, p. i.

<sup>141</sup> Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v. Poland, Hungary and the Czech Republic*.

<sup>142</sup> C-411-10 and C-493-10, *Joined cases of N.S. v. United Kingdom and M.E. v. Ireland* [2011] 2011 I-13905, para. 12.

<sup>143</sup> 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] ST/6846/2022/INIT OJ L 71.

for over twenty years, it still has not fully moved into the realm of law, remaining dependent on the political will of European leaders. This reflects the fact that within the EU, the refugee crisis is first and foremost a political crisis. Considering the above-mentioned comment made by the EU Commissioner for Home Affairs, it is highly probable that Directive 2001/55/EC will remain a single-use measure.<sup>144</sup>

In 2020, the European Commission presented a New Pact on Migration and Asylum.<sup>145</sup> Among nine new instruments, a Proposal for a Migration and Asylum Crisis Regulation<sup>146</sup> sought to repeal Directive 2001/55/EC and change temporary protection to immediate protection. To increase the chances of implementation, changes regarding the activation mechanism and its scope and duration were introduced. To make matters even more complicated, the European Commission introduced a proposal for a regulation addressing situations of instrumentalisation in the field of migration and asylum.<sup>147</sup> The relationship between those two proposals is still hazy.<sup>148</sup> So far, very limited progress has been made on the Pact on Migration and Asylum, despite the “gradual approach” introduced by the French Presidency. This situation is becoming more convoluted since Directive 2001/55/EC is currently being used in order to provide protection for around 5 million persons who have left Ukraine and registered for temporary protection in Europe.<sup>149</sup>

To sum up, as presented above the temporary protection scheme under the EU law is not the remedy for pressing European asylum issues. It does not mitigate push factors in sending states, nor does it provide “full” protection like refugee status. However, it helps to fill the gap left by the international refugee protection system; prohibits states from *refoulement*; encapsulates a solidarity mechanism; and helps to ease the pressure on national asylum systems. The application of the Directive 2001/55/EC as a response to the Russian conflict-induced displacement has proven that the European Union can deal with a large-scale movements with the tools it already possesses, and that in situations of serious pressure is able to use “ready-to-go” solutions created during previous crises.

<sup>144</sup> S.K. Mazur, *Too Little, Too Slow – an Analysis of 2022’s Developments in the EU’s Migration and Asylum Policy*, 28(3) *Studia Europejskie – Studies in European Affairs* (2023, forthcoming).

<sup>145</sup> European Commission, *New Pact on Migration and Asylum*, available at: <https://tinyurl.com/3zzxbucz> (accessed 30 April 2023).

<sup>146</sup> 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.

<sup>147</sup> Proposal for a regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM/2021/890 final.

<sup>148</sup> See ECRE, *Quo vadis EU asylum reform? Stuck between gradual approach, (mini)-package deals and “instrumentalisation” (Analysis)*, available at: <https://ecre.org/wp-content/uploads/2022/09/Policy-Parer-Quo-Vadis-EU-asylum-reform-September-2022.pdf> (accessed 30 April 2023).

<sup>149</sup> According to the UNHCR, around 5,140,000 refugees from Ukraine registered for temporary protection or similar national protection schemes in Europe (UNHCR, *supra* note 114).

As much as constant discussion on the system of temporary protection is needed – especially in the face of increasing risks of migratory pressures caused by climate change<sup>150</sup> – any and all plans to repeal Directive 2001/55/EC should be paused and deemed unnecessary.

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<sup>150</sup> UNHCR, *Summary of Deliberations on Climate Change and Displacement*, available at: <https://www.unhcr.org/4da2b5e19.pdf> (accessed 30 April 2023).