

CAN TEMPORARY PROTECTION BE SEEN AS A LEGAL TOOL FAVORING MIGRATION?

*Thomas PEPIN**

The establishment of temporary protection, used for the first time, facilitated a better reception of populations from Ukraine. Despite the uncertainty surrounding this status, it allowed for a timely response to a pressing humanitarian emergency. This measure provided a legal framework for accommodating displaced persons, granting them temporary status that enables access to certain rights and essential services, such as housing, healthcare, and education. Although temporary, this initiative demonstrated governments' ability to take swift and effective action to address the needs of populations affected by humanitarian crises. Furthermore, it underscored the importance of international solidarity and regional cooperation in managing migration flows and emergency situations.

The invasion of part of Ukraine by Vladimir Putin's Russia on the morning of February 24, 2022, took the world by surprise. This action profoundly disrupted the balance that had prevailed on the old continent in recent years. The return of "high-intensity warfare" prompted European Union (EU) member states to react first against the aggressor, imposing a whole series of economic sanctions against Russia¹. They also expressed solidarity with the Ukrainian people fleeing combat zones. The conflict has driven many Ukrainian and foreign civilians to leave the country to seek refuge in neighboring European Union member states.

¹ Following an extraordinary meeting, the European Council announced a first series of economic sanctions in response to the Russian aggression. Refer to EC, Conclusions of the European Council on the unprovoked and unjustified military aggression of Russia against Ukraine, EUCO 18/22, February 24, 2022 (2022) [Conclusions of the European Council]. This initial set of measures will be followed by no fewer than nine subsequent waves of economic sanctions throughout the year 2022. For a more detailed overview of the scope of the sanctions imposed, please see the Council of the European Union, "EU Reaction to Russia's Invasion of Ukraine" (February 23, 2022), available online: [European Council <consilium.europa.eu/fr/policies/eu-response-ukraine-invasion/>](https://consilium.europa.eu/fr/policies/eu-response-ukraine-invasion/).

* Thomas PEPIN is a qualified lawyer specialized in international law. His areas of expertise include international humanitarian law and the law of migration and development issues.

Temporary Protection, a legal tool to address emergency situations

During the month of March 2022, there were nearly 2.3 million displaced persons in Poland and no less than 364,000 in Hungary². According to the United Nations High Commissioner for Refugees (UNHCR), there are nearly 7.9 million displaced persons from Ukraine across Europe³. While it's always challenging to provide an exact count during an event of such magnitude, it's undoubtedly the largest displacement of civilian populations in Europe since the end of World War II⁴. These entries into the territories of the EU member states are facilitated by the fact that Ukrainian nationals are exempt from visas to access the territory of the European Union. Indeed, since May 11, 2017, Ukrainian nationals have been granted visa exemption for crossing the external borders of the member states for stays not exceeding 90 days within a period of 180 days⁵. In response to this exceptional situation and unprecedented population displacement phenomenon, the Council of the European Union (Council), upon proposal from the European Commission (Commission), decided on March 4, 2022, to activate the temporary protection regime. This legal mechanism has existed since 2001. However, it had never been implemented during previous migration crises, notably in the context of the Syrian conflict. Some voices had advocated for its activation during the "migrant crisis" episode at that time⁶. However, due to a lack of political will in this regard, this proposal remained unimplemented. To understand the significance of activating the temporary protection mechanism in the context of the Ukrainian conflict, it is necessary to revisit the successive failures encountered during the war in former Yugoslavia. At that time, this conflict triggered the largest

² UN News, "The number of Ukrainian refugees has surpassed 4 million" (March 30, 2022), online: United Nations, <<https://news.un.org/fr/story/2022/03/1117282>>.

³ Operational Portal. Ukraine Refugee Situation, "Refugees from Ukraine recorded across Europe" (December 27, 2022), online: United Nations High Commissioner for Refugees <<https://data.unhcr.org/fr/situations/ukraine>>.

⁴ Louis Balmond, « Questions de sécurité humaine : migrants et réfugiés et victimes des conflits » (20 avril 2023) 19 Paix & sécurité européenne & Intl, en ligne (pdf) : HAL Open Science <hal.science/hal04029654/document>

⁵ See EC, Regulation (EU) 2017/850 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States and those whose nationals are exempt from that requirement (Ukraine), [2017] OJ, L 217/850.

⁶ Jeff Walsh, « Is temporary protection the answer to Europe's refugee crisis? » (2015) 10:2 The Researcher 31; Jinan Bastaki, « Temporary Protection Regimes and Refugees: What Works? Comparing the Kuwaiti, Bosnian, and Syrian Refugee Protection Regimes » (2018) 34:2 Refuge: Rev can réfugiés 73.

displacement of population on the continent since the end of World War II⁷. By the mid-1990s, population displacement in the regions neighboring former Yugoslavia had reached significant levels. The phenomenon intensified in the years following the onset of the conflict. At that time, there were more than a million displaced persons across Europe and the world. The lack of a common legal instrument prevented the harmonization of practices in welcoming Yugoslav displaced persons by different European states. This absence of European protection led to disparate situations:

Since there was no determined binding legal instruments or international legislation on conditions and limits of temporary protection then; European countries, who welcomed the asylum seekers from Former Yugoslavia due to civil war, provided different types of protection in their own circumstances based on their own interpretations⁸.

The genesis of Council Directive 2001/55/EC of 20 July 2001 (Directive) is thus analogous to the successive failures experienced by European states in their attempts to more equitably distribute refugees and displaced persons from the Yugoslav conflict. It is indisputable that these events are largely responsible for the drafting of the Directive on Temporary Protection⁹. The Ukrainian case stands out in several respects. The remarkable mobilization of civil society in Poland and Hungary, from the early days of the Russian invasion, to assist and welcome displaced persons from Ukraine, has undoubtedly strengthened the sense of solidarity towards this population fleeing conflict zones. The governments of the member states, driven by a sense of fraternity, whether genuine or strategic, and by political aspirations, have identified the temporary protection mechanism as the most suitable tool to address the imminent crisis.

Directive 2001/55/CE aims to "establish an exceptional mechanism providing immediate and temporary protection"¹⁰ in the event of a significant number of entries

⁷ Mirjana Morokvasic, « La guerre et les réfugiés dans l'ex-Yougoslavie » (1992) 8:2 RE migrations internationales 5.

⁸ Eren Esra Yilmaz, « Is Temporary Protection Eternal? The Future of Temporary Protection Status of Syrians in Turkey » (2019) 9:2 Border Crossing 127.

⁹ Janina W Dacyl, « La gestion de la crise des réfugiés de l'ex-Yougoslavie » (1997) 1025 Hommes & Migrations 5.

¹⁰ CE, Directive 2001/55/CE of the Council of 20 July 2001 on minimum standards for granting temporary protection in the event of a mass influx of displaced persons and on measures to ensure a balance between the efforts made by Member States to receive these persons and bear the consequences of such reception, [2001] OJ L I.212, recital 2 [Directive]

into the territory of the European Union from a third country¹¹. The temporary protection regime differs from asylum and humanitarian immigration as defined in Article 25 of the EU Visa Code in terms of their objectives, eligibility criteria, and duration of validity. Asylum is a regime of durable protection granted to individuals fleeing their country of origin due to persecution based on race, religion, nationality, membership in a particular social group, or political opinions. Humanitarian immigration, on the other hand, concerns the admission of vulnerable individuals or those with specific needs for humanitarian reasons. This is generally granted on an individual basis, depending on the particular circumstances of each case.

Public opinion plays a crucial role in the integration of migrant populations. When the host society expresses support and solidarity towards migrants, it fosters their acceptance and integration. Consequently, more generous and inclusive reception policies are more likely to be endorsed and even encouraged, as they contribute to better social cohesion and successful integration of newcomers.

The positive portrayal by the public opinion in the European Union Member States of the populations fleeing the conflict in Ukraine undoubtedly played a role in the Council's decision¹². Similarly, media coverage and information dissemination on social networks likely reinforced this sentiment by presenting "human portraits of refugees, focusing on the narrative of their lives and the resilience of those forced to leave their country."¹³ Additionally, the geographical proximity of Ukraine to the gates of the European Union, as well as the presence of Ukrainian communities before the onset of the invasion, may have bolstered the Council's decision. :

The proximity of Ukraine results in significant flows towards Europe, as (as of March 29, 2022) hundreds of thousands of Ukrainian refugees have been recorded in Poland (2,336,799), Romania (608,936), Moldova (387,151), Hungary (364,804), and Slovakia (281,172). These countries were also among those hosting the most Ukrainian migrants before the Russian invasion, highlighting the importance of network effects in migration choices. These effects are explained by the ability of migrants

¹¹ The exact notion used by the Directive is "mass influx of displaced persons from third countries." The term will be further examined in the subsequent part of this study, see *infra* note 26.

¹² Lenka Dražanová et Andrew Geddes, « Attitudes towards ukrainian refugees and governmental responses in 8 european countries: Forum on the EU temporary protection responses to the Ukraine war, Asile, global asylum governance and the European Union's role » (2022) Center For European Policy Studies.

¹³ Alexandra Castro, *La protection temporaire dans le monde : une réponse ordinaire à des situations d'exil exceptionnelles*, Paris, Notes de l'IFRI, 2023 à la p 9.

established for some time in the host country to facilitate the migration of individuals from the same country of origin¹⁴.

The decision-making process of the European Union regarding the activation of temporary protection measures can be interpreted as a demonstration of solidarity towards the Ukrainian population affected by the conflict, as well as an affirmation of its political role as a regional actor. However, it is important to emphasize that these decisions result from a delicate balance between political, humanitarian, and legal considerations, reflecting the inherent complexity in managing such situations.

Temporary Protection, a legal tool promoting the integration of hosted populations

Host countries must issue residence permits to allow displaced persons to reside temporarily on their territory. These residence permits serve as legal proof of their lawful presence in the host country and enable them to access certain rights and services, such as employment, education, and healthcare. By providing legal documentation, host countries contribute to protecting the rights of displaced persons and facilitate their temporary integration into society. These residence permits may come with specific conditions, such as movement restrictions or periodic renewal requirements, depending on each individual's situation and the host country's migration policies¹⁵.

Beneficiaries of temporary protection are granted access to the labor market and can engage in wage-earning activities within the host country, subject to the rules applicable to the chosen profession. They also have access to vocational training opportunities¹⁶. This employment opportunity undoubtedly constitutes one of the key factors facilitating their most significant socio-cultural integration. By enabling them to actively contribute to the economy and society of the host country, these displaced individuals can not only meet their own and their family's needs but also engage in social and cultural interactions that enhance their sense of belonging and integration into the local community. Beneficiaries of temporary protection also have the right to

¹⁴ Lucas Guichard, Joël Machado & Jean-François Maystadt, « Réfugiés ukrainiens : un besoin de coordination renforcé » (2022) 170 *Regards économiques* à la p 2.

¹⁵ Directive, *supra* note 10, art 8.

¹⁶ *Ibid*, art 12.

"appropriate accommodation" and receive "necessary support in terms of social assistance and subsistence, when they do not have sufficient resources, as well as medical care." These measures aim to ensure their well-being and dignity during their stay in the host state. By providing them with safe housing and livelihoods, as well as access to healthcare, authorities seek to address their basic needs and promote their socio-economic integration. This also helps to build their confidence in the reception system and facilitate their adaptation process to their new environment. Similarly, states must ensure that minor beneficiaries of temporary protection have access to the education system under the same conditions as nationals of the host Member State. This provision aims to ensure that refugee children can benefit from quality education, which is essential for their personal development and social integration. By having access to education, these children have the opportunity to rebuild their lives in their new country and make positive contributions to the host society. This also promotes their future autonomy by strengthening their skills and prospects¹⁷. This measure holds particular significance given the demographic composition of displaced populations from Ukraine. According to the United Nations Children's Fund (UNICEF), minor children constitute a significant portion of the flow of displaced persons from Ukraine. This underscores the crucial importance of ensuring access to education for these children, to provide them with future prospects and promote their integration into their new host country¹⁸.

Temporary protection provides migrants with legal and social stability that enhances their integration into societies of origin, transit, and destination. On a sociocultural level, it grants them access to essential services such as education, healthcare, and adequate housing, contributing to their well-being and that of their families. Moreover, by obtaining a work permit, migrants can actively participate in the economic life of their host country, thereby strengthening social and cultural ties within the community. From a civic and political standpoint, temporary protection offers them the opportunity to engage in associative activities, participate in community initiatives, and exercise their civil rights, fostering their social and political integration. Finally, on an economic level, migrants can contribute to economic growth as workers and entrepreneurs, creating jobs and stimulating economic development both in their home

¹⁷ *Ibid*, art 14.

¹⁸ "Two million children fleeing war in Ukraine have crossed borders in search of safety," (March 30, 2022), online: UNICEF <[unicef.org/fr/communiqu%C3%A9s-de-presse/deux-millionsdenfants-fuyant-la-guerre-en-ukraine-ont-fanchi-les-fronti%C3%A8res](https://www.unicef.org/fr/communiqu%C3%A9s-de-presse/deux-millionsdenfants-fuyant-la-guerre-en-ukraine-ont-fanchi-les-fronti%C3%A8res)>.

country and in their host country. In summary, temporary protection plays a crucial role in enabling migrants to fully integrate into the societies where they reside as active and contributing members of the community.

CONCLUSION:

Temporary protection can be seen as a legal tool facilitating migration in certain circumstances. It provides a legal framework for temporarily hosting displaced persons due to conflicts, natural disasters, or other humanitarian emergencies. By offering temporary status to migrants, temporary protection grants them access to essential rights and services, such as housing, healthcare, and education, which may encourage some individuals to seek refuge in countries that offer this type of protection.

However, it is important to note that temporary protection is designed as an exceptional measure in response to specific and temporary situations, and it is not intended to promote migration permanently. Rather, it aims to address urgent humanitarian needs and ensure the safety and well-being of displaced persons until they can return to their country of origin or find a durable solution to their situation. Thus, while temporary protection may facilitate the mobility of displaced persons in critical circumstances, it is primarily a humanitarian response instrument, limited in time and aimed at mitigating the immediate consequences of humanitarian crises. The example of Ukraine provides an initial successful use case of temporary protection, demonstrating its effectiveness in managing major humanitarian crises such as armed conflicts. However, there is no guarantee that this tool will be systematically employed in all similar situations in the future. Climate migrations, for example, could lead to waves of massive displacement requiring a response similar to that of temporary protection. This raises the question of the adaptability of this tool to emerging challenges and its ability to address a variety of displacement scenarios. Thus, temporary protection is an instrument in constant evolution, requiring ongoing reflection and adaptation to the changing needs of displaced populations worldwide.