

The Protection of Ukrainian Migrants in Portugal, from the International and European Regime to Portuguese Law¹

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Abstract

The war in Ukraine caused a major humanitarian crisis, leading thousands of civilians to leave the country and seek refuge in third countries. In this perspective, rather than being migrants, the people fleeing this war shall be considered as refugees in accordance with the 1951 Refugee Convention and its 1967 Protocol. Council Directive 2001/55, of July 2001 created a special procedure to deal with a “mass influx” of people in need of international protection. Due to the war in Ukraine, this Directive was triggered by EU Council Decision 2022/382 of 4 March 2022. In this sequence, in response to the need for assistance to and protection of refugees, Portugal presented a plan for their reception, having established a legal regime delimiting criteria for their protection, as well as the scope of temporary protection to be granted under the decree-law 24-B/2022. We propose to analyse the protection regime granted, considering the criteria defined by Public International Law and European Union Law, to assess the convenience, opportunity and sufficiency of the measures implemented before proposing solutions consistent with the humanitarian crisis-situation experienced in Europe, and the reception and integration of these migrants.

Keywords: *refugees; asylum; temporary protection; Ukraine; EU; Portugal.*

JEL Classification: K33, K38

1. Introduction

The history of international refugee protection has been told alongside the history of armed conflicts and state sovereignty. Forced migration (or not) is a challenge to the control of the territorial borders of states which is one of the most important dimensions of a state’s sovereignty. It is these borders that define which state will be responsible for processing a migrant’s application under international law, but also under European Union law and in particular the Dublin Regulation⁴.

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⁴ Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013

The previous refugee crisis in Europe, which occurred in the years 2015 and 2016 because of the worsening situation in Syria, laid bare a crisis of the global refugee protection regime that was, at that moment, reflected on a European scale. The existing rules and the political will of states did not prove sufficient to address the consequences of the mass flows of migrants to Europe in that period. The problems of the regime revealed themselves at various levels. Not only in terms of the violation of the human rights of the thousands of people awaiting a decision on their asylum application in Greece. But also, regarding the excessive burden placed on some states, such as Greece and Italy, which were responsible for processing most asylum applications, because of the rules imposed by the Dublin Regulation. A crisis of solidarity between European states was thus diagnosed in the face of the exponential increase in migratory flows to their territories.

The fragility of the situation meant that a different approach had to be adopted. With more than 7.4 million refugees from Ukraine across Europe⁵ provoked by the invasion⁶ of the Russian Federation into Ukrainian territory seven months ago, the European Union was required to respond promptly and effectively.

The Temporary Protection Directive⁷ was thus activated, with the existence of a massive influx of people being recognised for the first time and the need for an additional temporary protection regime⁸ to guarantee the reception and integration of the thousands of fleeing people who quickly reached the European Union's borders. This unprecedented solution put into operation a 20-year-old instrument that had never been used before. In this sequence, in response to the

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.

⁵ United Nations High Commissioner for Refugees (UNHCR), 'Refugees from Ukraine eager to work but need sustained support to ensure inclusion' (UNHCR, 23 September 2022) <https://www.unhcr.org/news/briefing/2022/9/632d6fba4/unhcr-survey-refugees-ukraine-eager-work-need-sustained-support-ensure.html> accessed 07 Oct 2022.

⁶ As Motte-Baumvol et al. observes "while the UN General Assembly Resolution of 1 March 2022 (A/RES/ES-11/1) uses the concept of 'aggression' to characterize the conflict between Ukraine and Russia, the EU Council Decision of 4 March 2022 uses the concept of 'invasion' (Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71/1). J. Motte-Baumvol, T. C. F. Mont'Alverne, and G. B. Guimarães. *Extending Social Protection for Migrants under de European Union's Temporary Protection Directive: Lessons from de War in Ukraine*. (2022) Oxford U Comparative L Forum 1 at ouc-lf.law.ox.ac.uk.

⁷ Council Directive 2001/55/EC of 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.

⁸ 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.

need for assistance to and protection of refugees, Portugal presented a plan for their reception, having established a legal regime delimiting criteria for their protection, as well as the scope of temporary protection to be granted under the decree-law 24-B/2022. Rather than subjugate its action to the mere application of the international and European regimes, to which it would be bound, Portugal sought to create conditions for the rapid reception and inclusion of these people, who, being able to benefit from access to the right of asylum and refuge under general law, benefited from a specific regime of faster and less bureaucratic admission.

Before turning to Portuguese law, it is important to set out the framework of the rights of these individuals and the duties of States under international law and European Union law.

2. The refugee definition

The 1951 Geneva Convention, as amended by the 1967 Additional Protocol of New York, is the main normative instrument for refugee protection. Before these instruments, the efforts of the League of Nations should be highlighted, with the appointment of the First High Commissioner for Refugees (1920-1930) or the creation of the Nansen passport, an identification document for stateless or undocumented refugees.⁹ But it is during the period of World War II, in which thousands of people sought refuge with states other than their own, that the current regime was triggered.¹⁰ It is within this framework that the newly created United Nations Organisation was compelled to create a procedure for the reception of refugees and stateless persons, adopting the 1951 Convention and creating the United Nations High Commissioner for Refugees, which replaced the Nansen International Committee for Refugees.

The 1951 Refugee Convention defines “refugee” as any person who: “has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization” or “as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

The protection of the Convention was originally limited to people who had been displaced by events within Europe before 1 January 1951. It was the

⁹ B. Meneses Queiroz, *A proteção internacional dos refugiados*, eds. J. A. Azeredo Lopes, Regimes Jurídicos Internacionais, Universidade Católica Editora, 2020, I, pp. 285-290.

¹⁰ *Ibidem*.

aftermath of the World War II, and it was necessary to create mechanisms to respond to the many millions of people displaced across this region. The 1967 Protocol removed those temporal and geographical restrictions. It is possible to be a part of the Convention and not to be a part of the Protocol, but not the opposite. This means that a state can be bound to apply the Convention's provisions but not the Protocol provisions¹¹, or even be a part of but have a reservation¹². But most of the states' who are part of both are bound to recognize the ones who fulfil the following criteria: (i) fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; (ii) being outside the country of his nationality or, if stateless, being outside the country of his former habitual residence; (iii) unable or unwilling to have the protection of their country of nationality or to return to the country of his former habitual residence.

Notwithstanding the need to fulfil these conditions, it should be noted that "refugee" status is of a declaratory nature.¹³ In other words, if the conditions of the Convention are met, the person falls into the category of refugee, *ipso iure*. A different situation is the recognition as a refugee by the national authorities of the country of destination. The refugee needs formal recognition of this status to effectively benefit from international protection, but - in fact - he or she is already a refugee before this formal recognition takes place, by virtue of the fulfilment of the requirements arising from the 1951 Convention.¹⁴

Despite its seeming simplicity, this status is not easy to ascertain. The first thing to mention here is the need for the refugee to be outside his or her country of origin or domicile. In other words, the person may flee or be forced to

¹¹ For instance, Madagascar and Saint Kitts and Nevis are a part of the Convention but have not adopted the Protocol.

¹² Turkey is a signatory of but made a declaration according to which the Protocol's scope of protection applies only to persons who have become refugees as a result of events occurring in Europe.

¹³ B. Meneses Queiroz, *op. cit.*, p. 287.

¹⁴ This has been the position adopted by most of the doctrine, and by the United Nations High Commission for Refugees which, for example, in its Note on the determination of refugee status in international instruments, of 24 August 1977, 5, states that it may be concluded from an analysis of the international instruments, which relate to refugee status, that this status can only be of a declarative nature. A person is a refugee within the scope of an international instrument if he or she meets the conditions set out therein for the concept of refugee, whether he or she has been formally recognized as a refugee. Recital 21 of the Qualification Directive (Directive 2011/95 of the European Parliament and of the Council of 13 December 2011) also follows the same line. See UN High Commissioner for Refugees (UNHCR), *Note on Determination of Refugee Status under International Instruments*, 24 August 1977, EC/SCP/5, available at: <https://www.refworld.org/docid/3ae68cc04.html> [accessed 1 October 2022]. See also 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.

flee without crossing international borders. In this case, we will not have a refugee but an internally displaced person.¹⁵ But if a person crosses the border of his or her country, he or she may become a refugee. So, a refugee is, first, someone who is outside his or her country of origin.

A difficult requirement to measure is the one defined as "persecution". What does it mean to be "persecuted"? What are acts of persecution? Doctrine and case law have developed several approaches to this definition,¹⁶ but there is now a consensus on the definition which connects the concept of "persecution" to a serious, severe and discriminatory violation of the human rights of those who seek assistance outside their country of origin, although it is up to the States to decide whether a particular behaviour or set of behaviours meets the criteria for persecution.¹⁷ Article 33 of the Convention completes this interpretation by considering as persecutory behaviours those that seriously threaten life, liberty or freedom by reason of race, religion, nationality, membership of a particular social group or political opinions. Regarding the European law, and without prejudice to the following analysis, it should be noted that these concepts have been clarified by secondary legislation and by the jurisprudence of the European Court of Justice.¹⁸

In addition to the persecution, there is the fear of persecution based on both subjective and objective elements. On the one hand, the asylum seeker must be in a situation where the prospect of return to the country of origin causes him extreme distress (subjective component) and, on the other hand, this subjective perception must match the available information on the *de facto* situation in the country of origin (objective component). Finally, and about the reasons for persecution, the Convention identifies five reasons: a) race, b) religion, c) nationality, d) membership of a particular social group and e) political opinions. Without prejudice to the updating that the 21st century human rights approach has brought to a 70-year-old Convention, one cannot fail to recognize the necessary cause-

¹⁵ 1998 UN Guiding Principles on Internal Displacement, point 2, states that internally displaced persons are persons, or groups of persons, who have been forced or obliged to flee or abandon their homes or their usual places of residence, particularly as a result of, or in order to avoid, the effects of armed conflict, situations of mass violence, violations of human rights or human or natural disasters, and who have not crossed an internationally recognized border of a State. Available at <https://www.unhcr.org/43ce1cff2.pdf> [accessed 1 October 2022].

¹⁶ J. C. Hathaway; M. Foster. *The Law of Refugee Status*, Cambridge University Press, Cambridge, 2014, pp. 186-190.

¹⁷ B. Meneses Queiroz, *ob.cit.*, p. 290.

¹⁸ The Qualification Directive developed and specified what was already within the scope of the concept of "persecution" in the 1951 Geneva Convention, giving as examples of acts of "persecution" (Articles 6 and 9), acts of physical or mental violence, including acts of sexual violence, legal, administrative, police and/or judicial measures when they are discriminatory or applied in a discriminatory manner. The CJEU, on the other hand, when analysing the importance of religious freedom as a fundamental right, considered that it does not have an absolute nature and therefore an act of persecution cannot be drawn from an interference in its exercise. ECJ, C-71/11, C-99/11, 2012.

effect between reasons and risk of persecution, which limit it to these five cases: a) race, b) religion, c) nationality, d) membership of a particular social group, and e) political opinions.¹⁹

A different situation is the possible recognition of a right of asylum when these requirements are met. First, it is important to distinguish between asylum seekers and refugees. Asylum seekers are nationals of a third State (or stateless persons) who have lodged an application for international protection and in relation to which no final decision has yet been taken. In other words, asylum seeker is the legal status that is granted to a person for the purpose of the procedure until a decision is made. This decision may be positive, in which case the asylum seeker will enjoy refugee status, or negative, in which case the migrant's stay in the territory becomes irregular. For international law, asylum is therefore a broader concept than refuge.²⁰

From the European perspective, international protection includes not only refugee status, but also subsidiary protection, which is an alternative status attributable to individuals who do not fall under the concept of refugee and therefore deserve guarantees of international protection. Take the example of an armed conflict such as the one currently taking place in Ukraine, which, by causing a massive displacement of people, will exempt the individual verification of the ownership of refugee status for the purposes of granting protection and the right to asylum. We would have *prima facie* refugees. But in cases where there is no persecution according to the criteria foreseen in the Geneva Convention, even if there is an armed conflict, at first sight it would not be possible to attribute the respective refugee status, unless we consider the concept of subsidiary protection.²¹

Finally, and back to Article 33 of the 1951 Convention, it is important to underline that Contracting States are prohibited from expelling a refugee "in any manner whatsoever" when his life or freedom is threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, and any forcible act of removal that may place someone at risk of persecution falling within the scope of the article. Still, it is clarified, this is not an absolute duty. Refugees can be expelled for reasons of public order or national security, under the terms of articles 33, paragraph 2 and 42 of the Convention. Still, this principle has been embodied in several international instruments that strengthen

¹⁹ B. Meneses Queiroz, *op. cit.* p. 294-300.

²⁰ *Ibidem*, p. 301 ss.

²¹ This notion is laid down in Directive 2004/83/EC, whose main objective is to protect persons who are at risk of serious harm to their fundamental rights. In the case of victims of armed conflicts, the Court of Justice has held that for the purposes of subsidiary protection it is not subject to the condition that the applicant proves that he is specifically targeted by reason of factors particular to his personal circumstances. Court of Justice of the EU, Case C - 465/07, 17 February 2009. See in this regards A. S. Pinto de Oliveira. "Introdução ao Direito de Asilo". *Direito de Asilo, Proteção Subsidiária e Apátrida*, Coleção de Formação Contínua do CEJ, 2021, p. 55

it.²²

Portugal, as all the EU members²³, is a signatory of both 1951 Convention and 1967 Protocol. Upon its accession to the 1967 Protocol, Portugal declared that (1) “the Protocol will be applied without any geographical limitation”, and (2) “in all cases in which the Protocol confers upon the refugees the most favoured person status granted to nationals of a foreign country, this clause will not be interpreted in such a way as to mean the status granted by Portugal to the nationals of Brazil or the nationals of other countries with whom Portugal may establish commonwealth type relations”. In any case, even if Portugal had established a geographical limitation, Ukraine is a European country, and as such, most of the Ukrainians would be entitled to [guaranteed] refugee status.

This protection may, however, be withdrawn in cases where (i) there are serious reasons for considering that the person has committed a crime against peace, a war crime, or a crime against humanity or (ii) the person is a danger to the security of the host State or (iii) a danger to his or her community.

3. The EU regime

The Directive 2011/95 of the European Parliament and of the Council of 13 December 2011 is the key instrument for granting refugee status. In addition to this directive, the “ordinary European asylum system”²⁴ is governed by two other directives and a regulation: Directive 2013/32/EU, which establishes common procedures for granting and withdrawing international protection status, and Directive 2013/33/EU, which establishes minimum standards for the reception of applicants for international protection. Regulation (EU) 604/2013, commonly known as the “Dublin Regulation”, is also in force.

However, it should be noted that this instrument was not activated in the case of reception of Ukrainians fleeing Ukraine because of the armed conflict launched by the Russian Federation. The European Union has chosen to trigger another Directive: Council Directive 2001/55/EC of 20 July 2001. The question is whether a Ukrainian national who arrives on the territory of the first safe State of the European Union after leaving his country of origin where he fears persecution, and who is legally a refugee, should not automatically be entitled to asylum?

The right to asylum is a fundamental right, granted on an individual basis,

²² The 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights or the European Convention on Human Rights.

²³ In relation to the other EU countries, objections were raised by Belgium, France, Germany, Italy, Luxembourg and the Netherlands and, with respect to territorial application, the Netherlands excluded the territory of Suriname.

²⁴ A. R. Gil, “Proteção Internacional Revisitada: As soluções da União Europeia para a proteção dos deslocados da Guerra da Ucrânia num contexto de “múltiplas crises de refugiados”, in *Relações Internacionais*, September 2022, 75, pp. 045-062. <https://doi.org/10.23906/ri2022.75a04>.

depending on the specific circumstances of the case.²⁵ The right to grant asylum is, in essence, a right of the State and so cannot be regarded as a subjective right of the applicant. To grant this right, in addition to the prerequisites already analysed in the above paragraph, it would be necessary that an application for asylum be submitted for any right to remain in the Member States to exist. In this respect Article 2(i) of the Qualification Directive and Article 9 of the Asylum Procedures Directive are very clear: 1. Applicants shall be allowed to remain in the Member State, for the purpose of the procedure only, until such time as the determining authority has taken a decision (...). This right to remain shall not entitle the asylum seeker to a residence permit. International protection from the European perspective includes refugee status and subsidiary protection and brings the concepts of asylum and refuge closer together, thus expanding the alternatives for protection. Even in this broadening, for the right to asylum to be granted, it would always be necessary to submit an asylum application. Article 18 of the Charter of Fundamental Rights of the European Union enshrines the guarantee of the right of asylum, within the framework of the 1951 Geneva Convention and the 1967 Protocol and the Treaty on European Union and the Treaty on the Functioning of the European Union. In this regard, the doctrine has considered that Member States have the obligation to grant asylum or international protection to migrants who fall within the concept of beneficiaries of these statutes and, therefore, "the secondary legislation already enshrines a right to asylum as a right to obtain asylum".²⁶ Therefore, if the requirements for the granting of asylum are met, whether or not the applicant is a refugee, he/she will have the right to this concession. The right to asylum is associated to the right to non-refoulement, and the Zambrano case is illustrative. It should be remembered that we were dealing with a Colombian migrant who had requested asylum in Belgium and that although this was not granted and the Belgian authorities had issued an order for his return, this was accompanied by a non-refoulement clause, preventing this return, because Zambrano and his family were at risk of torture, inhuman or degrading treatment.²⁷ The interesting thing about this case is that the interpretation of the Court of Justice went even further by considering that in cases where an individual deserves international protection because he/she runs the risk of having his/her human rights violated if returned to his/her country of origin, but is not granted refugee status or any other type of protection, once the asylum request is rejected and a non-return order is issued, whether by respect for the principle of non-refoulement or for another reason, he/she will be a non-returnable migrant.

²⁵ Pinto de Oliveira refers that the material substance of this right is not a particular sphere of life, but a personal history, a history that, by being marked by the persecution of which one is a victim, places a foreigner or a stateless person in a situation of lack of protection. A. S. Pinto de Oliveira. *The right to asylum in the Portuguese Constitution*, Coimbra, 2009, p. 341.

²⁶ A. R. Gil, "A Garantia de um Procedimento justo no Direito Europeu de Asilo", in *O contencioso do direito de asilo e proteção subsidiária*, Centro de Estudos Judiciários, 2016, p. 169.

²⁷ ECJ, C-34/09, Judgment of the Court (Grand Chamber) of 8 March 2011. Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm). *European Court Reports 2011 I-0117*.

Once the framework of European Union law has been established, we will move on to the legislation that has been triggered by the flow of refugees from the Ukrainian conflict. First, we should mention the Council Implementing Decision (EU) 2022/382. This is in line with Council Directive 2001/55/EC of 20 July 2001.

Council Directive 2001/55/EC of 20 July 2001 introduced a set of minimum standards for giving temporary protection in the event of a mass influx of displaced persons and measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.²⁸ This directive was adopted as a response to the refugee's crisis resulting from conflicts following the break-up of former Yugoslavia in the 1990s.²⁹

Although the Directive dates to the beginning of this century, it was only in March this year that the existence of a "mass influx of displaced persons into the Union" was recognized for the first time. The aim is to relieve the burden on national asylum systems and allow displaced persons to enjoy harmonised rights throughout the European Union, which include residence, access to the labour market and housing, social assistance, and children's access to education. It is an emergency mechanism that can be triggered in the event of a mass influx of displaced persons and aims to grant immediate and collective protection to displaced persons who are unable to return to their country of origin.³⁰

The Council Implementing Decision (EU) 2022/382 defines the categories of displaced persons entitled to temporary protection or appropriate protection under international law. Temporary protection will thus be granted to (i) Ukrainian nationals residing in Ukraine who are displaced on or after 24 February 2022 and (ii) third-country nationals who are displaced on or after the same date and enjoy refugee status or equivalent protection in Ukraine, as well as (iii) members of their families.³¹ This protection also extends to stateless persons and third-country nationals who were legally residing in Ukraine before 24 February 2022. It is enough for the person concerned to prove that they belong to one of these categories of people in order to benefit from this status. This is because the protection granted is collective, i.e. granted to members of a group, individual analysis is dispensed with. Under the terms of both the directive and the Council decision that activated it, states can only deny temporary protection to one of these people if it is concluded that they would pose a threat to public order and national security. This is the usual exception clause in all EU immigration and asylum policy instruments, so that the fulfilment of European and international asylum

²⁸ Official Journal of the European Communities, L 212, 07 August 2001, p. 12.

²⁹ For further developments see J. Motte-Baumvol, T. C. F. Mont'Alverne, and G. B. Guimarães. *op. cit.*

³⁰ See <https://www.consilium.europa.eu/pt/policies/eu-response-ukraine-invasion/eu-solidarity-ukraine/>, consulted on 1.10.2023.

³¹ See recital 11.

obligations does not jeopardise the cohesion and survival of the host state.³²

Following their admission to EU territory, Ukrainian nationals will be able to move freely for a period of 90 days, choosing the Member State in which they wish to enjoy the rights attached to time-limited protection and joining their family and friends, provided that once this period has expired and once a residence permit has been issued under Directive 2001/55/EC, they can only enjoy this permit in the territory of the state which issued it.³³ Member States have the ability to apply another regime for Ukrainian nationals provided it is more favourable. Otherwise, their legislation will have to be adapted to ensure the additional rights provided for in the Directive.³⁴ The Directive also provides for the possibility of this protection being withdrawn in cases provided for under international law. The temporary protection will last for a minimum of one year (until 4 March 2023) and a maximum of three years, depending on developments in Ukraine.³⁵

The Commission also issued a communication on receiving and addressing the needs of people fleeing the war in Ukraine, expressing its intention to offer safe refuge in Europe to Ukrainians, with access to accommodation and housing, health care and employment. There is particular concern for Ukrainian children, especially unaccompanied children, who are vulnerable to the risk of trafficking or abduction, and the need to give all children access to education.³⁶ Not being considered a binding instrument, this communication determines the lines of action that are being developed according to a 10-point plan: i) creating an EU platform for registration; ii) coordinating [an] approach[es] for transport and information hubs; iii) mapping reception capacity and accommodation; iv) developing national contingency plans; v) providing uniform guidance for the reception and support of children; vi) creating and implementing a common anti-trafficking plan; vii) reinforcing solidarity with Moldova; viii) reinforcing the framework for international cooperation on safe destinations; ix) addressing internal security implications of the war in Ukraine and; x) securing adequate resources and funding.³⁷ In this framework, legal acts like Regulation 2022/1280 have emerged,³⁸ which are binding on all Member States and their nationals, and directly applicable from the date of their publication in the Official Journal of the European Union.

³² A. R. Gil, (2022) *op. cit.*

³³ See recital 16.

³⁴ See recital 17.

³⁵ See recital 17.

³⁶ COM (2022) 0131. Welcoming those fleeing war in Ukraine: Readyng Europe to meet the needs.

³⁷ See https://home-affairs.ec.europa.eu/10-point-plan-stronger-european-coordination-welcoming-people-fleeing-war-ukraine_en, consulted on 1.10.2023.

³⁸ Regulation (EU) 2022/1280 of the European Parliament and of the Council of 18 July 2022 establishing specific and temporary measures, in view of the invasion of Ukraine by Russia, concerning driving documents issued by Ukraine in accordance with its legislation.

Despite the advantages of speed, urgency and legal certainty that the temporary protection regime confers on displaced people, it does not grant them refugee status or subsidiary protection. Unlike these two, beneficiaries of temporary protection only have a residence permit valid for one year, extendable for a further six months and possibly another six months. In exceptional cases, there may be a further exceptional extension of one year. During each of these periods, the situation in the country of origin is re-examined to see if the conditions that led to the granting of protection still apply. This situation has been maintained thanks to extensions, and is currently in force until 4 March 2025.³⁹ Temporary protection status is therefore more precarious than the status granted under Directive 2011/95.⁴⁰

4. The Portuguese law

The procedure for the concession of asylum and subsidiary protection and the attribution of refugee status in the Portuguese legal system is regulated by Law 27/2008 of 30 June, which transposes Directive 2004/83/EC of 29 April and Directive 2005/85/EC of 1 December.

To the Right to asylum corresponds a duty of the State to grant it, provided the respective legal prerequisites are met. Law 27/2008 enshrines some rights that poor asylum seekers enjoy, namely social support for food and housing (articles 51 and 56), medical assistance and medication (article 52), access to education for minors (article 53) and the right to work. By granting the right of asylum, the respective applicant acquires refugee status, and is therefore entitled to rights, freedoms and guarantees and social rights.

Portuguese asylum law⁴¹ brings the concept of refugee, as provided for in the Constitution of the Portuguese Republic, into line with that contained in the 1954 Convention. In short, to acquire refugee status according to the Portuguese asylum law, some requirements shall be fulfilled. First, one must be a national of a Foreign State; secondly, there should be a well-founded fear of persecution⁴², and it must be determined whether the fear shown is legitimate in the light of the circumstances existing in the country of nationality. In relation to the material scope of persecution and in the absence of a provision defining the concept, we must use Directive 2011/95/EU, of 13 December, in Article 9(1)(a), which defines persecution as an act of persecution within the meaning of Article

³⁹ See <https://www.consilium.europa.eu/en/press/press-releases/2023/09/28/ukrainian-refugees-eu-member-states-agree-to-extend-temporary-protection/>, consulted on 1.10.2023.

⁴⁰ A. R. Gil, (2022) *op. cit.*

⁴¹ Law 27/2008, of 30 June, as amended by Law 26/2014, of 5 May.

⁴² Thus, in the terms of the Judgement of the Supreme Administrative Court, of 9 February 2005, in the Case 01397/04: "Fear of persecution, given the legal requirement of its reasonableness, implies that it should not be reduced to a mere subjective condition (the appellant's state of mind), but should rather be based on a situation or factual reality of an objective nature, normally (in terms of the average person) generating such fear".

1(A) of the Geneva Convention, which must be sufficiently serious by its nature or repetitiveness as to constitute a severe violation of fundamental human rights, in particular those rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁴³

The Portuguese Constitution provides in its article 33, 8 that "the right of asylum is guaranteed to foreigners and stateless persons persecuted or seriously threatened by persecution as a consequence of their activities in favour of democracy, social and national liberation, peace among peoples, freedom and human rights.

The concept of asylum in the Portuguese fundamental law has a more restricted scope of application than in International Law. While in the international and European context the right to asylum is granted to those who are persecuted because of their race, religion, nationality, or political opinions, from the constitutional legal point of view the criterion is persecution based on certain activities. As the placement of the right as fundamental has advantages, concerning the corresponding protection, the interpretation of this right in the light of the open clause of fundamental rights could be the answer. This clause "operates a reception of extravagant rights contained, namely, in applicable norms of public international law, of European law and of ordinary laws, which may benefit (at least) from the substantive rule of rights, freedoms and guarantees if they are similar in nature to these".⁴⁴

In short, we cannot conceive that the list of circumstances on which asylum is based, provided for in article 33 (8) of the Portuguese Constitution, represents a closed range of situations.

Article 16 (2) of the Constitution provides that constitutional norms must be read in accordance with the provisions of the Universal Declaration of Human Rights. We cannot forget that this diploma was the source of the Portuguese Constitution, in this diploma "we even find some articles (...) that usefully clarify constitutional rules, avoid doubts, overcome differences in location or formulation, provide richer perspectives than, apparently, the perspectives of the text issued by the domestic law".⁴⁵

In this sense, it will be crucial to consider, when interpreting article 33 (8) of the Portuguese Constitution, article 14 of the Universal Declaration of Human Rights, which grants the right of asylum to any person subject to any kind of persecution and not only through the forms provided in that precept of the

⁴³ A. F. Neves. *Estatuto do Refugiado: Ameaça, receio e motivos de perseguição, Direito de Asilo, Proteção Subsidiária e Apátrida*, Coleção de Formação Continua do CEJ, 2021, p. 13-14.

⁴⁴ T. Fidalgo de Freitas, B. Menezes Queiroz; B. Esperança. *O conceito de refugiado nos ordenamentos jurídicos Internacional, Europeu e Português*, in *Contencioso do Direito de Asilo e proteção subsidiária*, coleção formação inicial CEJ, 2016, pp.129-135.

⁴⁵ J. Miranda. *Direito de asilo e refugiados na ordem jurídica Portuguesa*, Universidade Católica Editora, Lisboa, 2020, p. 19.

Fundamental Law.

In implementation of the Constitutional norms and the ordinary legislation already mentioned, the Portuguese State created a normative block that details the protection to be granted to Ukrainian refugees and the terms of that protection.

Faced with the urgency of the situation, the Portuguese State anticipated the European Union and created specific temporary mechanisms to respond to this influx of refugees through the Council of Ministers' [R]esolution 29-A/2022 of 1 March 2022, and decree-law 24-B/2022 of 11 March. The latter introduced exceptional measures to grant temporary protection to displaced persons from Ukraine and ensure the "effective, reliable and rapid reception and integration of the massive influx of displaced persons from Ukraine as a result of the recent armed conflicts in that country".

The diploma provides for i) a set of exemptions regarding certain registration acts and procedures that are requested by registry services, ii) the possibility to apply for student status in emergency situations for humanitarian reasons, iii) drivers who benefit from temporary protection will not be required to provide a certificate attesting to the authenticity of the driving license and may apply for automatic recognition of professional certification, iv) Entrance Door Scheme – Urgent Accommodation Support Programme, v) Simplified procedures for recognition, validation, and certification of competences.

This way, when a Ukrainian citizen arrives in Portugal, an immediate authorisation mechanism called "temporary protection title" for a residence permit is activated, with automatic attribution of Social Security identification numbers, tax identification, and access to the National Health System.

The Resolution of the Council of Ministers 29-A/2022 laid down the specific criteria for granting temporary protection to displaced persons from Ukraine. Due to the Exploitation Decision (EU) 2022/382, this resolution had to be extended. Thus, Decree-Law 28-D/2022 extended this temporary protection, under the same terms already recognized, i) to foreign citizens of other nationalities or stateless persons benefiting from international protection in Ukraine, coming from that country and unable to return there, as a result of the war and ii) to foreign citizens of other nationalities or stateless persons who are in the circumstances referred to above and who prove to be family members, or (iii) who can prove that they are permanent residents of Ukraine, or that they have a temporary residence permit, or that they are in possession of a long-stay visa for this type of permit and that they cannot safely and permanently return to their country of origin.

Additionally, [to extend the scope of the instrument] Decree-Law 28-B/2022, published on 25 March, establishes measures for the recognition of professional qualifications of beneficiaries of temporary protection in the context of the conflict. The legislation regarding this last instrument had to be completed by

additional diplomas. Ministerial Order 144/2022 of 13 May has clarified that certain professions are excluded from the scope of application of this recognition. This ordinance is a complement to article 8, paragraph a) of the Decree-Law 28-B/2022, which foresaw the need for additional legislation regarding certain activities, mainly in the areas associated with flights and aeronautics, electrical installations, gas, hospital technical activities, and the exclusion of drivers of collective transport of children or dangerous goods.

Professional qualifications in respect of the above definition require recognition by a competent authority and, if obtained outside of Portugal, such recognition shall comply with the legal framework approved by Law 9/2009 of 4 March, as amended, which transposes Directive 2005/36/EC into Portuguese law. The application for recognition of professional qualifications shall be addressed to the competent authority empowered to receive the evidence of training and other documents and information, as well as to receive applications and make decisions regarding those applications.

Regarding Ukrainian students, Dispatch 3597/2022, of 25 March, from the Ministry of Science, Technology and Higher Education ensured the exceptional allocation of social support to students who had been granted temporary protection and who entered higher education in Portugal. To date, and since 24 February, Portugal has granted temporary protections to more than 50,000 people fleeing the war in Ukraine, 27% of whom are minors.⁴⁶ In addition to the approved legislation, the online platform created by the SEF (Foreigners and Borders Service),⁴⁷ available in three languages, has contributed greatly to this, facilitating the legalization process, integration and access to benefits for affected individuals, but also greater control by the State of entries into national territory of people in fragile situations, particularly women and children, who could be an easy target for trafficking and prostitution networks.

5. Conclusions

Exceptional situations call for exceptional measures. The act of aggression perpetrated by the Russian Federation against the Republic of Ukraine in February 2022 caused an exodus of refugees not seen in Europe since World War II. As such, the European Union has created specific mechanisms to ensure the harmonization of protection policies on its territory, ensuring an additional protection beyond that arising from the concession of the right to asylum, or from the norms arising from international law.

These mechanisms do not prevent Member States from adopting more

⁴⁶ See Portuguese Bar Association, <https://portal.oa.pt/comunicacao/imprensa/2022/08/22/portugala-ja-atribuiu-mais-de-50-mil-protecoes-temporarias-a-refugiados-da-guerra-na-ucrania/>; e Portuguese newspaper <https://observador.pt/2022/08/22/sef-ja-atribuiu-mais-de-50-mil-protecoes-temporarias-a-pessoas-que-fugiram-da-guerra/>.

⁴⁷ See Foreign Borders Service of Portugal in <https://sefforukraine.sef.pt>.

favourable policies. Portugal has created mechanisms for the automatic attribution of residence permits, with automatic attribution of Social Security identification numbers, tax identification, and access to the National Health System, and has anticipated the recognition of the qualifications of Ukrainian citizens in order to integrate them swiftly into the labour market, thereby making a very active contribution to their integration into Portuguese society and to the possible normalization of the life of someone fleeing from armed conflict. Despite being the European State territorially furthest away from Ukraine, Portugal is one of the States that has received the most displaced Ukrainians, and it is worth mentioning the many Portuguese schools and universities where Ukrainian children and young adults have continued their studies.

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