



INSIGHT

THE NANSEN PASSPORT AND THE EU TEMPORARY PROTECTION DIRECTIVE: REFLECTIONS ON SOLIDARITY, MOBILITY RIGHTS AND THE FUTURE OF ASYLUM IN EUROPE

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ABSTRACT: The Temporary Protection Directive (TPD) is one of the most controversial pieces of EU legislation. Adopted back in 2001 and never implemented, it has been at the margins of EU migration and asylum policies until, on 3 March 2022, the Home Affairs Ministers of the EU27 reached an “historic agreement” on its activation. This *Insight* seeks to contextualise the activation of the TPD for those who flee from Ukraine under the broader horizon of collective responsibility for international protection. Departing from the rationale and constraints embedded in the historical development of refugee status – and underpinning the Common European Asylum System (CEAS) – this *Insight* explores the potential impact of the current situation at the Eastern borders of Europe on the balance between “what is reasonable and possible” within the framework of the EU asylum and immigration policies.

KEYWORDS: Temporary Protection Directive – principle of solidarity – right to move – New Pact on Immigration and Asylum – Nansen passport – war in Ukraine.

I. INTRODUCTION

The Temporary Protection Directive (TPD)¹ is one of the most controversial pieces of EU legislation. Adopted back in 2001 and never implemented, it has been at the margins of EU migration and asylum policies until, on 3 March 2022, the Home Affairs Ministers of the EU27 reached an “historic agreement” on its activation – to use the words of the French Interior Minister Darmanin and EU Commissioner Johansson.

The TPD establishes a supranational mechanism for a collective response in cases of sudden and massive influxes of displaced persons, to be activated by the Council, which

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¹ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.



decides by a qualified majority on a proposal from the Commission (art. 5). It does not envisage the attribution of a harmonised protection status, but a one-year residence permit issued by EU Member States, which can be extended where reasons for its establishment persist (art. 4). It allows the holder to reside in the territory of the issuing Member State (art. 2(g)) and to enjoy an array of rights, including the right to work (art. 12).² The permit for temporary protection cannot be equated to (and cannot prejudice) the recognition of international protection in the forms of refugee status and subsidiary protection, as enshrined in the Common European Asylum System (CEAS), even if concurrent enjoyment of temporary protection and an application for international protection status can be excluded by the Member States (art. 19(1)).

This *Insight* seeks to contextualise the activation of the TPD for persons who flee from Ukraine under the broader horizon of collective responsibility for international protection. Departing from the rationale and constraints embedded in the historical development of refugee status – and underpinning the CEAS – this *Insight* explores the potential impact of the current situation at the Eastern borders of Europe on the balance between “what is reasonable and possible” within the framework of the EU asylum and immigration policies.

II. OCCURRENCES AND RECURRENCES OF HISTORY: THE REFUGEE PROTECTION BETWEEN WHAT IS REASONABLE AND POSSIBLE

Odessa, March 1919. Russian refugees are evacuated to Western Europe in the midst of the civil war between the White Army troops and the Bolsheviks.

Odessa, March 2022. Ukrainian refugees are evacuated to Poland by train in the midst of the Russian aggression towards Ukraine. Only women and children can leave the country, men are stopped at the borders to stay and fight.

The *Pax Europaea* is broken again. After the Balkan wars and Russia’s unlawful annexation of Crimea in 2014, war returns to Europe, with all its inventory of brutality and inhumanity. And, once again, people who were “citizens” of a European country at the moment of the outbreak of the hostilities suddenly become “refugees” in public discourse and in the eyes of the international community.

Leaving legal qualifications aside for a moment, this shift pinpoints the dilemma with which the receiving European countries are confronted today, as they were yesterday: on the one hand, showing solidarity to those who are forced to flee, treating them in a dignified way and positioning us, Europeans, on the right side of history while on the other, distributing in equitable terms the “unduly heavy burdens” that the granting of protection may place on certain countries.³

² For further analysis, see A Skordas, ‘Temporary Protection Directive 2001/55/EC’ in D Thym and K Hailbronner (eds), *EU Immigration and Asylum Law. Article-by-Article Commentary* (Hart Publishing 2022) 1177; M Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill 2018).

³ See recital 4 of the preamble of the Convention relating to the Status of Refugees [1951].

The development of refugee status as a protected condition under international law can be depicted as a creative solution to this dilemma, by linking the collective responsibility of the international community towards refugees to the very same premises of its responsibility for collective security and peace.⁴ Back in the early 20th century, the exodus of more than one million Russian citizens, forced by civil war and Bolshevik persecution to illegally enter the external borders of Western European States, suddenly became more than a transboundary threat, requiring international cooperation for containment.⁵

Those Russians without official papers had no prospects of regaining their citizenship once the war ceased.⁶ Their protection was determined by the same victimhood narrative determining the protection of civilians under humanitarian law, a narrative having its legal translation into the formal recognition of an international status to those who flee.⁷ At the same time, the definition of “refugee” contained in the 1933 Convention relating to the International Status of Refugees, and the rights attached to the status, were the result of a finely balanced mediation between “what was reasonable [and] what was possible”.⁸ A mediation that, later on, served as a blueprint for the 1951 Refugee Convention.⁹

III. AN INNER GLOW TO THE DARK SIDE OF THE MOON: BEYOND UNEQUAL SOLIDARITY

Today, as yesterday, the response to mass displacement is trapped within the ethical and legal boundaries of the relationship between what would be considered reasonable and what is in fact possible under the given circumstances. At first glance, the current situation at the Eastern borders of Europe does not seem to constitute an exception to this rule. The first activation of the TPD with the Council Implementing Decision (EU) 2022/382¹⁰ blatantly upheld a structural feature underpinning the development of EU

⁴ A Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009) 21.

⁵ Memorandum sur la question des réfugiés russes présenté au Conseil de la Société des Nations par la Conférence des Organisations Russes réunie à Paris en août 1921 [1921] 4-5. On the condition of Russian refugees between 1920 and 1922, see C Gousseff, *L'exil russe: La fabrique du réfugié apatride* (CNRS Éditions 2008) 52.

⁶ On the deprivation of citizenship for those who left Russia in the aftermath of the 1917 revolution see JM Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Kluwer Law International 1995) 92.

⁷ W Adams, ‘Extent and Nature of the World Refugee Problem’ (1939) *The Annals of the American Academy of Political and Social Science* 26.

⁸ League of Nations Official Journal [1927] 8(10), 1138, reporting the concerns about the expansion of the refugee definition by Mr M. Lennuyeux- Cornène, France.

⁹ G Jaeger, ‘On the History of the International Protection of Refugees’ (2001) *International Review of the Red Cross* 730. On the dilemmas underpinning the definition of “refugee” in the 1951 Convention see P Weis, *The Refugee Convention, 1951. The Travaux Préparatoires Analysed with a Commentary* (Cambridge University Press 1995).

¹⁰ 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 (Decision 2022/382).

immigration and asylum policies: the “bifurcation of human mobility” along the North/South axis.¹¹ Indeed, the Council’s “historic agreement” on its activation has been dearly paid for when considering the dilution of key obligations foreseen in the Commission’s proposal¹² and its practical consequences.

First, reference to “the spirit of Directive 2001/55/EC” – as a teleological ground for the extension of the personal scope of temporary protection to all third country nationals residing in Ukraine at the time of the events leading to the mass influx, and who are unable to return to their country or region of origin in safe and durable conditions – has been wiped from Decision 2022/382.¹³

Second, this move was a prelude to a further differentiation among three categories of displaced persons who had to leave Ukraine as of 24 February 2022: (i) Ukrainian citizens, non-Ukrainian nationals with a recognized refugee status and members of their families, who are automatically covered by the EU temporary protection (art. 2(1) and (4)); (ii) non-Ukrainian nationals or stateless persons with a permanent residence permit issued under Ukrainian law, whose humanitarian admission is made conditional upon documentary requirements and the verification that they cannot be safely returned home, and which may be granted “adequate protection” under national law (art. 2(2)); (iii) non-Ukrainian nationals or stateless persons who were short-term residents and whose destiny is left entirely in the hands of the Member States, which may decide to apply the TPD upon evidence of legal residence in Ukraine and a risk of *refoulement* in case of removal (art. 2(3)).

Third, although compatible with the letter of the TPD,¹⁴ this differentiation is particularly worrisome for non-European asylum seekers, students and seasonal workers, who may not be able to return home safely and whose only safety net may be an asylum application filed within the very defective asylum systems of the over-burdened Visegrad States.¹⁵

Fourth, even for those who might be able to return home safely the priority must be humanitarian evacuation. The Decision 2022/382 makes it clear that these persons

¹¹ T Spijkerboer, ‘Bifurcation of Mobility, Bifurcation of Law. Externalization of Migration Policy Before the EU Court of Justice’ (2018) *Journal of Refugee Studies* 216.

¹² Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection, COM(2022) 91 final (the proposal).

¹³ Compare recital 11 of both the proposal and Decision 2022/382 cit.

¹⁴ See, in particular, the definitions of “displaced persons” and “max influx” in art. 2 TPD, on which N Arenas, ‘The Concept of “Mass Influx of Displaced Persons” in the European Directive Establishing the Temporary Protection System’ (2005) *European Journal of Migration and Law* 7.

¹⁵ On this issue, see S Peers, ‘Temporary Protection for Ukrainians in the EU? Q and A’ (27 February 2022) *EU Law Analysis* www.eulawanalysis.blogspot.com; M Ineli-Ciger, ‘5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022’ (7 March 2022) *EU Immigration and Asylum Law and Policy* www.eumigrationlawblog.eu; S Carrera and others, ‘The EU grants temporary protection for people fleeing war in Ukraine. Time to rethink unequal solidarity in EU asylum policy’ (CEPS Policy Insights 9-2022) 31.

should be given unconditional access to the territory of the Member States “to ensure safe passage with a view to returning to their country or region of origin” (recital 13). However, as expected, push-back practices based on ethnic profiling have already materialised at the Eastern borders and are well documented, not only against non-European refugees,¹⁶ but also against families with a Roma background.¹⁷

In order to reduce the room for State practices which may deviate from the “spirit” of the TPD, the Commission has adopted guidelines addressing the main criticisms of the temporary protection framework.¹⁸ In particular, through these guidelines, the Commission aims to offer Member States effective operational tools and coordination mechanisms which should reduce the attractiveness and feasibility of unequal solidarity. Further specifying the implementation strategy set forth in its Communication on European solidarity,¹⁹ the Commission envisages a three-legged approach to humanitarian admission via temporary protection.

First, the development of a Solidarity Platform, which operationalises the duties of administrative cooperation set forth in art. 27 TPD through a harmonised infrastructure for the sharing of information on numbers and reception capacity. The Platform integrates the functioning of the EU Migration Preparedness and Crisis Blueprint²⁰ envisaged under the New Pact on Migration and Asylum,²¹ and completes the architecture of the Council’s Integrated Political Crisis Response, allowing Member States to ask and swiftly receive technical, operational and financial support. The Commission, assisted by EU agencies, will be in charge of coordinating this solidarity mechanism and liaising with all relevant stakeholders, including through providing assistance to Member States to streamline the registration process at check points.

Second, the Commission proposes an innovative approach to responsibility-sharing, lessening the burden on Member States “through catalysing a whole of society response”,²² based on the empowerment and full mobilisation of civil society, human-rights NGOs, grassroots organisations and diasporas. In the first weeks of the conflict, these actors have proved to be motivated by an overwhelming determination to relieve mass suffering and to have the ability to mobilise increasing resources, energies and ideas to

¹⁶ See, e.g., African Union, Statement of 28 February 2022 on the reported ill treatment of Africans trying to leave Ukraine.

¹⁷ Briefing of the European Commissioner for Home Affairs Johansson before the LIBE Committee on 16 March, Q&A, multimedia.europarl.europa.eu.

¹⁸ Communication C(2022) 1806 final from the Commission of 21 March 2022 on Operational guidelines for the implementation of temporary protection.

¹⁹ Communication COM(2022) 107 final from the Commission of 8 March 2022 on European solidarity with refugees and those fleeing war in Ukraine.

²⁰ Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration.

²¹ Communication COM(2020) 609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum (New Pact).

²² Communication COM(2022) 107 final cit., 8 ff.

partnering public authorities in providing reception and integration means to refugees. The Commission's implementing strategy goes in the direction of unleashing this potential, through a coordinated, EU-led laboratory on "community sponsorship" – a goal which has been already set out in the New Pact.²³

Third, a diversified portfolio of funding opportunities, made immediately available to national and regional authorities and allowing for flexible access to funding for all people fleeing Ukraine, including for those categories of third country nationals who are not covered by Decision 2022/382.²⁴ This portfolio encompasses: (i) the funds of the Union Civil Protection Mechanism, which have been used for the COVID-19 pandemic and envisage the application of rules foreseen for urgent public procurement to satisfy emergency reception needs; (ii) the European regional and social funds of the 2014-2020 cohesion programme, which will be retargeted to address the challenges of reception and integration of people fleeing Ukraine, under the initiative "Cohesion's Action for Refugees in Europe" (CARE); (iii) the 2022 Recovery Assistance for Cohesion and the Territories of Europe ('REACT-EU') funds, which will finance activities falling within the aims of the post-pandemic recovery; (iv) the new generation of Home Affairs funds for 2021-27, which will also be eligible for financial support to civil society engaged in humanitarian assistance; (v) the residual funding opportunity from the Asylum, Migration and Integration Fund, as enshrined in art. 24 TPD.²⁵

This portfolio embeds the EU operational response in a "dual-solidarity" paradigm, intersecting the inter-state solidarity rationale – which should underpin the cooperation within the CEAS – with the Union's commitment to "live up to our values and receive *everyone* fleeing Russian aggression with respect and humanity".²⁶ Should the Commission's experiment succeed, the issue of unequal solidarity under the TPD would be partially fixed – at least at the implementation level. Exclusion from temporary protection of certain categories of persons fleeing from Ukraine would be a costly choice for Member States, which will have strong incentives to exercise the discretion left by Decision 2022/382 in compliance with the spirit of the TPD, which does not allow any distinction based on ethnic or personal characteristics.

Critically, the Visegrad States, which strongly supported the amendment to the original proposal to introduce double standards, should be alerted that this time, more than ever,

²³ Communication COM(2020) 609 final cit., para. 6.6. See also the Joint Statement by the European Commission and Economic and Social Partners on the renewal of the European Partnership for Integration, offering opportunities for refugees to integrate in the European labour market, European Commission Press Release IP/20/1561 of 7 September 2020.

²⁴ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1303/2013 and Regulation (EU) No 223/2014 as regards Cohesion's Action for Refugees in Europe (CARE), COM(2022) 109 final. On the outcome of the European Parliament's first reading, see the European Parliament Legislative Resolution of 24 March 2022 on refugees in Europe: CARE I, P9_TA(2022) 83.

²⁵ See recital 22 of Decision 2022/382 cit.

²⁶ Communication COM(2022) 107 final cit., 1 (emphasis added).

the alternative to the opening of borders and welcoming all those who are fleeing from the war would amount to a total abdication of European values of freedom and peace, with potentially disastrous and irreversible consequences for the credibility of the EU project in the eyes of the international community. A risk that – at least in principle – may re-expand the ethical and legal sphere of what is deemed reasonable from a human rights perspective, to the detriment of what was considered possible under the containment-based approach to migration and asylum developed in Europe over the last decades.

IV. FROM INTER-STATE SOLIDARITY TO “DUAL VOLUNTARISM”

What is at stake in the present humanitarian crisis is much more than the effective coordination of border surveillance and reception machines in the frontline Member States. This reality is sparking creative legal solutions to mitigate the risks of implementing failure linked to contradictory elements in the normative design of temporary protection.²⁷ The most creative one – both in its intrinsic content and in the methods through which it was adopted – is certainly the recognition of the right of holders of a temporary protection permit to move freely within the EU. This right has been recognised in a Statement – referred to in recital 15 of Decision 2022/382 – through which the Member States clarify how they will apply art. 11 TPD.

According to art. 11, a “take back” mechanism – similar to that applying to Dublin cooperation²⁸ – is also foreseen for temporary protection, allowing the return of a person enjoying temporary protection to the Member State that granted it. This mechanism sacrifices the freedom of movement of the beneficiaries of temporary protection to ensure inter-state cooperation, on the basis of the reception capacity, as declared “in figures or in general terms” by individual Member States upon the activation of the burden-sharing mechanism in art. 5 (art. 25 TPD). However, it has to be squared with the principle of “dual voluntarism”, according to which the physical relocation of beneficiaries depends on two determinants: on the one hand, the capacity of the Member State to receive a certain number of people, as stated at the time a mass influx is declared and subsequently updated during the temporary protection period (art. 25 (1) TPD); on the other, the consent of individuals, who are not yet in a Member State, to be received into its territory (art. 25 (2) TPD), and of those already enjoying temporary protection in a Member State, to be transferred from one Member State to another (art. 26 TPD).

The combined effect of these two determinants may hinder the practical implementation of the burden-sharing mechanism set forth in art. 5 TPD, first and foremost because

²⁷ On which, see S Peers, ‘Temporary Protection for Ukrainians in the EU?’ cit.; D Thym, ‘Temporary Protection for Ukrainians: The Unexpected Renaissance of “Free Choice”’ (7 March 2022) EU Immigration and Asylum Law and Policy www.eumigrationlawblog.eu.

²⁸ On the functioning of this mechanism and on its possible reform, see G Morgese, ‘Dublin System, “Scrooge-Like” Solidarity and the EU Law: Are There Viable Options to the Never-Ending Reform of the Dublin III Regulation?’ (2019) *Diritto immigrazione e cittadinanza* 86, and the literature cited therewith.

of the lack of quantitative indicators or qualitative criteria to pre-determine the reception capacity of each Member State.²⁹ In addition, the duty to take into account the will of the beneficiaries of temporary protection, in relation to both their entry in a Member State and the transferal to another Member State, may turn into an obstacle to the smooth implementation of the TPD. Such a requirement, built to the design of the solidarity mechanism, may add a further element of complexity to administrative cooperation among national contact points appointed pursuant to art. 27 TPD, especially in light of the variety of national legislation on the conferral of a residence permit for temporary protection and the sharp differentials in reception conditions among the Member States.³⁰

Art. 11 TPD, though, adds that “Member States may, on the basis of a bilateral agreement, decide that this Article should not apply”, with the practical implication of enabling Member States to relinquish “take-back” rationale and the very same logic underpinning the physical relocation of protection seekers. The Statement resorts to the discretionary power conferred by the provision to ultimately reverse the relation between the rule and the exception. Acting collectively in their capacity as representatives of Member States, the members of the Council decided the disapplication of art. 11 TPD on a reciprocal basis, “unless on a bilateral basis Member States agree otherwise”.

The legitimacy of this *modus procedendi* is obviously not undisputed, even if the EU Court of justice has conceded a certain leeway to Member States with regards to highly sensitive decisions in the field of immigration and asylum.³¹ However, what is relevant here – and should be weighted in the assessment of whether the Statement complies with the *effet utile* of the TPD – is the aim of this stance, adopted “[w]ith a view to supporting Member States who are the main entry points of the mass influx of displaced persons fleeing war from Ukraine [...] and to promoting a balance of efforts between all Member States”.³² In other words, the stretching of the discretion conferred by art. 11 TPD seems – in the present case – justified by a double endeavour: on the one hand, an attempt to unleash the spirit of solidarity recalled in art. 25 TPD, as an expression of the overarching solidarity principle enshrined in art. 80 TFEU, having its emergency declination in art. 78(3) TFEU; on the other, the need to shield the solidarity machinery from the inherent risks of misimplementation and disengagement, connected to the lack of quantitative

²⁹ M Savino and FL Gatta, ‘On the Brink of a New Refugee Crisis. Temporary protection as a paradigm shift?’ (10 March 2022) *Verfassungsblog* www.verfassungsblog.de.

³⁰ These risks were lucidly outlined by H Beirens and other, ‘Study on the Temporary Protection Directive. Final Report’ (European Union 2016), which is particularly topical because it drew directly on a case study on the hypothetical escalation of the Ukraine crisis (Annex 4).

³¹ C-208/17 P *NF and Others v European Council* ECLI:EU:C:2018:705 paras 62-72.

³² Proposal COM(2022) 91 final cit., Statement of the Member States (ADD 6826/22).

indicators to pre-determine the reception capacity of the Member States or qualitative criteria to streamline consent of the beneficiaries to pre-identified “meaningful links”.³³

This might proceed in the very same direction sketched out by the Commission in its guidance on derogations from the fulfilment of entry conditions for third country nationals pursuant to art. 6(5)(c) of the Schengen Border Code, where it invited Member States “to ensure that the onward travel – and the future return – of these third country nationals remains possible”.³⁴ The Commission even envisaged the possibility for Member States to exempt carriers from paying fines for “carrying passengers who are not adequately documented due to the ongoing conflict in Ukraine”, expressly acknowledging the wish of many Ukrainian nationals “to travel further to other EU destinations”.³⁵

From this viewpoint, the Council Decision 2022/382 is a game-changer. It signals a feasible alternative to the traditional inter-state paradigm of solidarity and responsibility-sharing, based upon: *i*) the physical redistribution of protected persons, *ii*) the restriction of their movement rights, and *iii*) the use of coercion to obtain compliance. A “dual-solidarity” paradigm, with its primary focus on sharing the norms and rationalising the distribution of funds, may become more appealing at this juncture. It could eventually challenge the idea of “sharing people”³⁶ without their consent³⁷ and refute the assumption that programmes based on the consent of the concerned persons and States “can only have symbolic significance”,³⁸ by pinpointing their missing link: the lack of a coordinated and comprehensive strategy based on incremental incentives and whole of society responses.

Key features of this strategy shall be: *i*) the individual choice of the responsible Member State; *ii*) an interest-led mechanism of spontaneous relocation, leveraging on diaspo-

³³ On the relevance of the “meaningful links” in the Dublin reform, see M Di Filippo, ‘Dublin “Reloaded” or Time for Ambitious Pragmatism?’ (12 October 2016) EU Immigration and Asylum Law and Policy www.eumigrationlawblog.eu.

³⁴ Communication C(2022) 1404 final from the Commission of 4 March 2022 providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders, 5.

³⁵ *Ibid.*

³⁶ F Maiani, ‘The Reform of the Dublin System and the Dystopia of “Sharing People”’ (2017) *Maastricht Journal of European and Comparative Law* 622.

³⁷ On the (un)reasonableness of limiting the refugee’s choice of the host country, see already the Statement by the representative of the Inter-Parliamentary Union, Mr Rollin, at the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Tenth Meeting on 21 November 1951: “That a political refugee who had a horror of his country of origin, and had no intention whatsoever of returning to it, should find himself given the personal status provided by the legislation of his host country seemed reasonable. But would it be reasonable, it might well be asked, to impose on refugees [...] a personal status which might vary considerably according to their country of residence, and to adopt that measure [...] without the person affected having an opportunity of expressing his own desires on the matter?”.

³⁸ F Maiani, ‘The Reform of the Dublin III Regulation. Study for the LIBE Committee’ (European Parliament 2016) 17 ff., with reference to the EUREMA Project.

ras, labour incentives, private sponsorship and meaningful links; *iii*) an overarching system of financial compensation, information exchange and technical assistance, funded through the Union's budget and coordinated by the Commission's services.

It's true that both the TPD and its implementing act leave these procedural issues undetermined, raising doubts on the connection between temporary protection and Dublin procedures.³⁹ The preamble of Decision 2022/382 might also be considered problematic in what it expressly states in relation to the lack of any obligation for the second State to issue a residence permit once temporary protection has been granted by another Member State (recital 16).⁴⁰ This latter stance may suggest that the issuance of a residence permit under the scope of the TPD is constitutive of the protection status, automatically excluding mutual recognition of national decisions on status attribution and connected rights, including free mobility rights.⁴¹ However, such a conclusion would be at odds with Member States' Statement on art. 11 TPD, as well as with key features of the Directive itself, including the principle of dual voluntarism, the aim of relieving pressure on the asylum systems of the most affected States, and the very same rationale of a procedure linking *ipso iure* the enjoyment of a protection status derived from EU law to a Council decision establishing the existence of a "mass influx".⁴²

Therefore, it seems difficult to exclude *in toto* any extraterritorial effect of a residence permit issued within the remit of the TPD. Rather, mutual recognition of national decisions may be limited to free movement rights, so as to link the enjoyment of the social and economic rights derived from status recognition to the jurisdiction that first issued the residence permit, while granting free movement rights to people covered by Decision 2022/382 both before and after the recognition of the status. As the Commission explained in its Communication on European solidarity, this would imply – for Ukrainians and their families – that free movement rights extend after the expiration of visa-free status, and for all other eligible third country nationals the recognition of a temporary protection status that "will apply across the EU".⁴³

³⁹ On the solution proposed by the Commission to solve potential inconsistencies between the TPD and the Dublin regime, see Communication C(2022) 1806 final cit., para. 7. The Commission recommends Member States to avail themselves of the discretionary clauses set forth in Regulation (EU) No 604/2013 to take responsibility for asylum applications lodged on their territory by persons who are entitled to temporary protection. It invites to do so "with a view to alleviating pressure" on the most affected Member States and reducing the risk of asylum shopping. With this stance, the Commission *de facto* recognises the irremediable fallacy of the Dublin system.

⁴⁰ For further analysis of these two aspects, refer to S Peers, 'Temporary Protection for Ukrainians in the EU?' cit.

⁴¹ On different interpretative options, see D Thym, 'Temporary Protection for Ukrainians' cit.

⁴² The Commission expressly confirmed the declaratory nature of the status of temporary protection in its Communication C(2022) 1806 final cit., para. 4.

⁴³ Communication COM(2022) 107 final cit., 6.

This reading also seems to be the most effective in terms of equitable burden and responsibility. All in all, “[t]o distribute people is firstly about sharing norms”, and therefore “the rights of the asylum seekers must be guaranteed in reality, not just in law”.⁴⁴

V. ON THE NANSEN PASSPORT AND TEMPORARY PROTECTION: RE-LINKING PROTECTION WITH MOBILITY RIGHTS

A parallel can be traced between the unexpected activation of the TPD and the recognition of refugee status to Russian refugees back in the 1920s. Now and then the problem faced by European States is/was that mass displacement impacts the balancing between what is reasonable and what is possible, to the point that “the only practical substitute for a nonexistent homeland [risks being] an internment camp”.⁴⁵ At the same time, the exceptional proximity to the war and a communal sense of imminent threats have made room for creative solutions to forced displacement, by relinking protection with mobility rights. This was what happened with the Nansen passport – a document granted to Russian nationals fleeing the Bolshevik revolution, and afterwards to other refugees on a national basis.⁴⁶ The passport bestowed free travel rights in the countries of the League of Nations on the holders, offering an internationally-recognised identity to those who had lost everything. At the same time, it fostered inter-state cooperation on asylum and relieved the pressure on the most affected States through positive incentives, in terms of employment and integration opportunities.⁴⁷

The EU Member States’ Statement on the non-application of art. 11 TPD seems to travel in the same direction of re-linking protection with mobility rights in the management of mass displacement. However, the attainment of this goal will depend on how effective administrative cooperation among national authorities and coordination by the Commission turns out to be. Operational gaps in the registration process at the borders, as well as the unpreparedness of national reception and integration systems, have already been acknowledged by the Commission. Accordingly, it has adopted a communication to deal with the support that its services will provide to the Member States with a view to ensuring full enjoyment of the rights to which people fleeing the war in Ukraine are entitled as beneficiaries of temporary protection, as well as to providing special protection to vulnerable persons, particularly children.⁴⁸

⁴⁴ G Noll, ‘Why the EU gets in the way of refugee solidarity?’ (22 September 2015) openDemocracy www.opendemocracy.net.

⁴⁵ H Arendt, *The Origins of Totalitarianism. Part II* (The World Publishing Company 1958) 284.

⁴⁶ P Gatrell, ‘The Nansen passport: the innovative response to the refugee crisis that followed the Russian Revolution’ (6 November 2017) [The Conversation theconversation.com](http://TheConversationtheconversation.com).

⁴⁷ See for further analysis, A Kraler, B Etzold and N Ferreira, ‘Understanding the dynamics of protracted displacement’ (2021) *Forced Migration Review* 49.

⁴⁸ Communication COM(2022) 131 final from the Commission of 23 March 2022, Welcoming those fleeing war in Ukraine: Readyng Europe to meet the needs.

Streamlining the registration process may, though, be much more complicated, lacking an EU-wide platform accessible to potential beneficiaries through “a single entry point”⁴⁹ to make a request for a temporary protection permit. Such a device would allow for spontaneous redistribution among the Member States and, at the same time, feed the Solidarity Platform with real-time information of the numbers in the different countries.⁵⁰ It would be “as if” the holders of a temporary protection permit had received an EU electronic passport upon registration to the portal, a passport letting them move across the Union to reach their elective Member State.

At this watershed moment, undertaking the necessary administrative and coordination steps to ensure full application of the TPD is, therefore, the real challenge ahead. But meeting this challenge is also the only way to fully endorse the solidarity principle as a dual-purpose tool. In inter-state relations, this would imply a genuine acknowledgement that, within the TPD, “the spirit of solidarity between Member States [...] constitutes a specific expression [...] of the principle of solidarity, which is itself one of the fundamental principles of EU law” and “underpins the entire legal system of the European Union”.⁵¹ Thus, contributing “to the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx”⁵² entails “an obligation of solidarity between themselves and with regard to the common interest of the European Union”.⁵³

From a broader constitutional standpoint, it would attest that the delivery of the founding values of the Union – both internally and externally – prioritises an additional understanding of solidarity within EU asylum and migration policies. Solidarity, in fact, becomes an expression of that spirit of hospitality and solicitude towards those who are forced to leave their homeland which has historically shaped the collective responsibility of the international community towards refugees.⁵⁴

⁴⁹ Communication C(2022) 1806 final cit., para. 9.

⁵⁰ Portugal has already announced the opening of an online platform to collect temporary protection requests coming from Ukrainian refugees and this experiment could serve as a pilot for an EU-wide platform. See F Calçada and R Salvado, ‘Portugal to open platform for temporary protection of Ukrainian refugees’ (14 March 2022) Euractiv www.euractiv.com.

⁵¹ See, *mutatis mutandis*, case C-848/19 *Germany v Poland* ECLI:EU:C:2021:598 paras 38-41.

⁵² See recital 20 TPD.

⁵³ *Germany v Poland* cit. para. 49.

⁵⁴ P Ricoeur, *Soi-même comme un autre* (Seuil 1990); F Crépeau, *Droit d'asile. De l'hospitalité aux contrôles migratoires* (Bruylant 1995). According to A Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell 1980) 54, also the principle of *non-refoulement* “is an expression of the collective responsibility of the community of States, stated already by Grotius and Vattel, that persons seeking asylum shall be able to find an abode somewhere”. From this responsibility a highly topical consequence derives: “[i]f a particular State finds that the burden imposed upon it by the influx of asylum-seekers is too heavy to bear alone, the remedy should not be to turn the asylum-seekers away, but to enlist the cooperation of other States”.

This conclusion does not underestimate the structural obstacles deriving from the current orientation and goals of migration policies in EU Member States, nor the contingent risks of political misconduct, restrictive interpretation and deviations from the target goals and agreed terms of the EU response to the humanitarian crisis at the Eastern borders. However, it attempts to show that inconsistency and deviation could be fatal, in a moment in which European values – and the Union's normative power – face their severest ever attack.

VI. THE FUTURE OF ASYLUM IN EUROPE: BETWEEN *REALPOLITIK* AND DIFFERENTIAL ELEMENTS OF CONSTITUTIONAL CAPTURE

The deplorableness of the Russian invasion of Ukraine, and the sense of common threat it has engendered in Europe, seem to add weight to what is reasonable from a human rights perspective, in the balancing exercise with what until very recently was deemed possible in terms of administrative sustainability.

The collective responsibility to provide humanitarian shelter to refugees and displaced persons from Russian aggression is shown through the statements and resolutions of international and EU institutions.⁵⁵

The same Visegrad States that not so long ago contested the application of the principles of solidarity and responsibility-sharing pursuant to the Relocation Decisions,⁵⁶ while putting forward practices of systematic pushbacks,⁵⁷ amending their asylum systems to restrict asylum⁵⁸ and criminalizing humanitarian assistance,⁵⁹ are now turning into the standard-bearers of European solidarity for over three million people forced to flee in the first twenty days of the Russian offensive.

In the same vein, the European Commission, which, until recently, demonstrated a marked tendency to pragmatism, *de facto* pivoting to the positions of the Council on the need to enhance border control and containment, swiftly adopted operational guidelines for the relaxation of external border management to facilitate border crossings at the EU-

⁵⁵ See, in particular, General Assembly, Resolution adopted on 2 March 2022, Aggression against Ukraine, UN Doc A/RES/ES-11/1; European Parliament Resolution of 1 March 2022 on the Russian aggression against Ukraine, P9_TA(2022) 52; Statement of the heads of state or government of the European Union, meeting in Versailles on 10 March 2022, in EU Council Press Release 232/22 of 11 March 2022.

⁵⁶ Case C-715/17 *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* ECLI:EU:C:2020:257.

⁵⁷ ECtHR *M.K. and Others v Poland* App n. 40503/17, 42902/17 and 43643/17 [23 July 2020].

⁵⁸ Case C-924/19 PPU *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* ECLI:EU:C:2020:367.

⁵⁹ Case C-821/19 *Commission v Hungary (Incrimination de l'aide aux demandeurs d'asile)* ECLI:EU:C:2021:930.

Ukraine borders.⁶⁰ The Commission's proposal to trigger, for the very first time, the burden-sharing mechanism set forth in art. 5 TPD, was then adopted by the Council in four days, unanimously and with the annexed Statement on the non-application of art. 11.⁶¹

This acceleration deserves special attention, in light of the TPD's history. This act has been dormant for a long time, notwithstanding the material conditions for triggering its activation materialised on several occasions.⁶² The reason for its non-implementation – as identified by the Commission itself in the explanatory memorandum of the proposal for a Migration and Asylum Crisis Regulation⁶³ – seemed definitive and truly political. The Council would have never agreed on the activation of the TPD because it “no longer responds to Member States' current reality and needs”.⁶⁴

In lieu of this obsolete act, this proposal envisaged another form of group protection to deal with crises or situations of *force majeure*: the “immediate protection”. While simplifying the trigger mechanism and introducing more objective indicators of what can be defined as a “mass influx”,⁶⁵ the proposal is part of a package – the New Pact – which concedes a lot to the containment paradigm.⁶⁶

The EU response to Ukrainian refugees, however, demonstrates once for all that the containment paradigm is deceptive and obsolete itself and that refugee crises may be induced or to some extent exacerbated by wrong political reactions. Once the war is over (hopefully sooner rather than later), a thorough reflection on what should come next would be unescapable. And any such reflection could not leave aside the impact of the mass displacement of Ukrainians on EU migration and asylum policies.

A preliminary issue that needs to be addressed in order to understand what kind of impact the EU collective response to the humanitarian emergency in Ukraine may have in the long run is the broad consensus that unexpectedly led to the Council compromise agreement of 3 March. Is this just another demonstration that the effectiveness of EU

⁶⁰ Communication C(2022) 1404 final cit. On the different approach adopted in previous cases of mass influx at the external borders, see C Favilli, ‘La gestion difficile des flux migratoires pour un État situé à la frontière maritime extérieure de l'Union européenne’ (2013) *Annuaire français de droit international* 257.

⁶¹ See *supra*, section IV.

⁶² H Beirens and other, ‘Study on the Temporary Protection Directive’ cit. (Annex 2); M Ineli-Ciger, ‘Time to Activate the Temporary Protection Directive’ (2016) *European Journal of Migration and Law* 1.

⁶³ 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.

⁶⁴ *Ibid.* 10.

⁶⁵ For further analysis, M Ineli-Ciger, ‘What a difference two decades make? The shift from temporary to immediate protection in the new European Pact on Asylum and Migration’ (11 November 2020) *EU Immigration and Asylum Law and Policy* www.eumigrationlawblog.eu.

⁶⁶ See D Thym, ‘European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the “New” Pact on Migration and Asylum’ (28 September 2020) *EU Immigration and Asylum Law and Policy* www.eumigrationlawblog.eu; F Maiani, ‘A “Fresh Start” or One More Clunker? Dublin and Solidarity in the New Pact’ (20 October 2020) *EU Immigration and Asylum Law and Policy* www.eumigrationlawblog.eu; P De Bruycker, ‘The New Pact on Migration and Asylum: What it is not and what it could have been’ (15 December 2020) *EU Immigration and Asylum Law and Policy* www.eumigrationlawblog.eu.

migration and asylum policies depends on the Member States' political will? Or will the potential shock wave of the Ukrainian crisis become an irreversible game changer? In the first case, the possibility of reiteration would be limited, and the activation of this EU-wide solidarity mechanism would remain an isolated case prompted by the exceptional circumstances of the present case. In the second case, this "senseless war"⁶⁷ would offer a unique window of opportunity for rerouting EU migration and asylum policies to the original Tampere track.⁶⁸

Some factual and political dynamics militate in favour of the first case. In fact, it is undeniable that beyond the position of the Visegrad Member States there are ethnic and religious drives, rooted in the geographical proximity and historical bonding among the host communities and those who flee.⁶⁹ Seemingly, it cannot be contended that the situation is exceptional, since Russian aggression is producing a "butterfly effect" for the overall security and stability of the European continent, also due to uncontrolled diasporas of millions of Ukrainians benefitting from visa-free travel under EU law. Rather, this mass influx may be part of the Russian strategy to destabilise Western Europe.⁷⁰ And, therefore, readiness and solidarity in the humanitarian assistance to Ukrainian refugees may be seen as a key strategic asset for the EU in the present confrontation.⁷¹

However, these contingent political and strategic factors do not seem to offer a self-explanatory and conclusive justification of the broad support for a solution *uti universi* to the Ukrainian displacement problem. On the contrary, the decisive differential element prompting the swift agreement reached by the Council – and its rapid implementation by 21 Member States in 12 days⁷² – appears to be of a legal nature and constitutional capture.

Indeed, Russian aggression towards Ukraine is clearly more than a threat to the territorial integrity of bordering Member States. It represents the most dangerous and willful assault on EU values since the inception of the European Communities and a powerful threat to the very same idea of European integration as a magic formula for a perpetual peace.⁷³ This is probably what additionally made it possible to overcome the opposition

⁶⁷ As labelled by the UN High Commissioner for refugees in his Statement of 3 March 2022 "1 million refugees have fled Ukraine in a week", UNHCR RF1204629.

⁶⁸ European Council of 15-16 October 1999, Tampere Presidency Conclusions, para 3, indicating among the milestones towards a common policy on migration and asylum the need to "offer guarantees to those who seek protection in or access to the European Union".

⁶⁹ J Berlinger, 'Does the Ukraine exodus reveal a "shocking distinction" on refugees in some parts of the EU?' (1 March 2022) Euronews www.euronews.com.

⁷⁰ On the instrumentalisation of Ukrainian migrants by Russia, even before the recent invasion, see A Fakhry, A Parkes and R Rácz, 'Migration instrumentalization: A taxonomy for an efficient response' (Hybrid CoE Working Paper 14-2022) 23-25.

⁷¹ C Rampell, 'Opinion: We might be on the verge of the greatest displacement of Europeans since World War II' (24 February 2022) The Washington Post www.washingtonpost.com.

⁷² Briefing of the European Commissioner for Home Affairs Johansson cit.

⁷³ S Žižek, 'What Does Defending Europe Mean?' (2 March 2022) Project Syndicate www.project-syndicate.org.

of Poland and Hungary to the inclusion of non-Ukrainian nationals with a refugee status in the personal scope of the measure. But the same rationale may be behind what has been rightly qualified as a “Copernican revolution”:⁷⁴ the recognition of free mobility rights to the beneficiary of the temporary protection.

The defence of the EU values – including “the indivisible, universal values of human dignity, freedom, equality and solidarity”, enshrined in the preamble of the EU Charter of fundamental rights – is, for the Union, much more than a political endeavor. As recently recognised by the EU Court of Justice, “Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States”.⁷⁵ In our time, the defence of the EU values turns into a strategy of peaceful resistance to autocracies; a strategy which imposes, more than ever, the exercise of coherence and commitment to the normative backbone of European integration.

The Union’s coordinated response to the war in Ukraine is dispelling myths and dogmas underpinning the migration containment and externalisation paradigms: from “invasion rhetoric”, to the irremissibility of the Dublin principle of “unique jurisdiction”, to the obsession for secondary movements. At the same time, it shows that the Member States are trying to outdistance themselves from the macroscopic deviations from EU values giving rise – until very recently – to mutual distrust and the backsliding of the rule of law at the Union’s external borders.⁷⁶ At this juncture, creative solutions to re-balance “what is reasonable and possible” within the realm of immigration and asylum should, more than ever, consider that what is reasonable, for the EU, is a matter of law, and – as such – it should prevail over volatile political decisions.

⁷⁴ S Peers, ‘Temporary Protection for Ukrainians in the EU?’ cit.

⁷⁵ Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 para. 232.

⁷⁶ On which see L Tsourdi, ‘Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?’ (2021) *European Constitutional Law Review* 471; V Moreno-Lax, ‘Mutual (Dis-)Trust in EU Migration and Asylum Law: The Exceptionalisation of Fundamental Rights’ in M González Pascual and S Iglesias Sánchez (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press 2021) 77.