

PERSONS FLEEING FROM THE WAR IN UKRAINE AND THE FUTURE OF EMERGENCY PROTECTION, STATUS AND RIGHTS

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ABSTRACT

As the conflict in Ukraine continues to worsen and individuals flee from the country, many face the next challenge of acquiring some form of recognition and protection in the states protecting them. The European Union (EU) is experimenting with a new approach that may serve as a model for others that sacrifices some of the protections of the Refugee Convention for speed and efficiency. While it borrows the same concepts, framework, and core rights from the Refugee Convention, it remains unclear whether that status and its rights will be interpreted and implemented in line with the traditional application of the Convention. It also remains unclear whether the new system serves to simply avoid refugee recognition at all. As this experiment unfolds, other states are watching to see if adopting similar approaches would work for them. As an alternative, and in parallel, Europe may also begin considering Ukraine for EU membership, thus granting Ukrainians EU citizenship. Again, here such fast-tracked status would constitute an experiment, deviating from the typically slow EU accession process. Thus, the conflict in Ukraine, and the resulting influx of people fleeing the conflict, is triggering a highly experimental, emergency approach to providing protection, status, and rights that may serve as a model for other states in future situations of mass influx.

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INTRODUCTION

As the conflict in Ukraine continues to worsen and individuals flee from the country, many face the next challenge of acquiring some form of asylum protection and rights in the states protecting them. Europe is experimenting with a new approach that may serve as a model for others, which sacrifices some of the protections of the 1951 Refugee Convention for speed and efficiency.¹ While this new form of protection borrows the same concepts, framework, and core rights from the 1951 Refugee Convention, it remains unclear whether those rights will be interpreted and implemented in line with the traditional application of the Convention. As this experiment unfolds, other states are watching to see if adopting similar approaches would work for them.² In addition, as a parallel approach to status and rights, the EU is also contemplating a fast-tracked application by Ukraine to gain European Union (EU) membership,³ which would grant EU citizenship to Ukrainians and could have future implications for other candidate states. Therefore, the mass influx of asylum-seekers fleeing the armed conflict in Ukraine has the potential to significantly reshape the entire regional approach to asylum, status, rights, and EU citizenship and may serve as a model for other states in future situations of mass influx.

The 1951 Refugee Convention provides the model framework for protection and various rights, but because it only covers individuals

¹ See *infra* Part III.

² See *id.*

³ See generally Dimitry V. Kochenov & Ronald Janse, *Admitting Ukraine to the EU: Article 49 TEU is the 'Special Procedure'*, EU LAW LIVE (Mar. 30, 2022), <https://eulawlive.com/op-ed-admitting-ukraine-to-the-eu-article-49-teu-is-the-special-procedure-by-dimitry-kochenov-and-ronald-janse/>. [https://perma.cc/L33J-ZGGP].

fleeing persecution, it largely does not apply to the Ukraine situation.⁴ Instead, the most important legal regime is EU law, which absorbs, builds on, and expands the 1951 Refugee Convention model by covering armed conflict, though it also limits other rights, such as employment and education rights, that are protected under the 1951 Refugee Convention.⁵

In addition, the sheer number of individuals fleeing into European Union Member States surpasses anything the continent has seen,⁶ so the EU has, for the first time, implemented its “Temporary Protection” regime.⁷ This system also uses the same framework as the 1951 Refugee Convention but deviates even further than general EU law, effectively postponing any determination of refugee status or eligibility for subsidiary protection. Thus, this new measure for those fleeing Ukraine constitutes an experimental approach to protecting asylum-seekers. The effective operation of this Temporary Protection mechanism, which has served as a model for some other states’ temporary protection systems, may provide guidance for developing and refining such systems in the future. The application of this system, as an alternative to refugee status determination, may have yet further implications for the implementation of the 1951 Refugee Convention itself, possibly undermining the Convention and/or general EU law on asylum seekers, or creating opportunities for EU member states to offer a reduced portfolio of benefits.

⁴ Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention] (limiting the application of the Refugee Convention to situations of persecution).

⁵ Council Directive 2004/83/EC of 29 Apr. 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, O.J. (L304/12) [hereinafter EU Qualification Directive].

⁶ *How the war in Ukraine compares to other refugee crises: Four million people have fled the country in just five weeks*, THE ECONOMIST (Mar. 30, 2022), <https://www.economist.com/graphic-detail/2022/03/30/how-the-war-in-ukraine-compares-to-other-refugee-crises>, [https://perma.cc/SY3E-JJH4].

⁷ See Council Implementing Decision (EU) 2022/382 of 4 Mar. 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, O.J. EU (L 71) 1; Council Directive 2001/55/EC of 20 July 2001, Proposal for a Council Implementing Decision Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine within the Meaning of Article 5 (EU), COM (2022) 91 final.

I. STATUS AND RIGHTS UNDER THE 1951 REFUGEE CONVENTION

The foundational framework for providing status and rights to individuals fleeing from one state for another is the Refugee Convention of 1951 and its 1967 Protocol (collectively “Refugee Convention”).⁸ Under this Convention, refugees benefit from a number of absolute and relative rights and protections that increase in relation to the permanence of the individual’s presence and residence in the state.⁹ Some issues, such as the critical protection from being expelled from the state (“*non-refoulement*”),¹⁰ accrue to anyone qualifying as a refugee regardless of residence. However, other rights are dependent on the individual’s degree of permanence and legal status in the state. In addition, at higher levels of permanence, the rights that refugees enjoy may be either absolute or relative, measured in comparison to the rights enjoyed by nationals or other aliens generally.¹¹ Specifically for EU member states, Hathaway has included EU citizens in the other aliens category, so, in his view, refugees should receive the privileged treatment of EU citizens.¹² On this basis, refugees who are in the territory of the state must be issued identity documents,¹³ and the refugees must have their personal status respected.¹⁴ Refugees also receive the same treatment as nationals for rationing,¹⁵ practicing religion,¹⁶ and receiving public elementary education.¹⁷ Public education beyond elementary level is only granted to the same degree as any other alien would receive.¹⁸ Provided that their

⁸ See 1951 Refugee Convention, *supra* note 4.

⁹ See *id.* arts. 3–34.

¹⁰ See *id.* art. 33(1).

¹¹ See *id.* arts. 3–34.

¹² See JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 954 (2d ed. 2021) (internal citations omitted) (citing Alice Edwards, *Article 17*, in A. ZIMMERMANN ED., *THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* 966 (2011)) (“It follows, therefore, that all state parties that are members of the European Union . . . must grant refugees lawfully staying in their territory the same access to employment as is provided to citizens of other European Union countries. This requirement does not impact the position of refugees awaiting status verification (who are in most cases merely lawfully present, not yet lawfully staying).”).

¹³ See 1951 Refugee Convention, *supra* note 4, art. 27.

¹⁴ *Id.*

¹⁵ See *id.* art. 12.

¹⁶ See *id.* art. 20.

¹⁷ See *id.* art. 4.

¹⁸ See *id.* art. 22(1) (“The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.”).

presence in the state's territory is lawful, the state must also permit refugees to engage in self-employment,¹⁹ and the state must allow them to move freely within the state.²⁰ Once refugees are sufficiently settled in the state for it to be their residence, they have rights to travel documents.²¹ While they also have rights to public assistance,²² labor law protections,²³ and social security,²⁴ those rights are limited to what a state's nationals would receive. And while they also have rights to wage-earning employment,²⁵ the practice of "liberal professions,"²⁶ and housing,²⁷ they only receive those rights to the same degree that aliens generally enjoy. The distinctions between absolute and relative benefits, in turn, raise questions of interpretation and implementation. After consulting the Refugee Convention preparatory works, Hathaway concluded that refugees must be treated in the same manner as any other similarly situated alien.²⁸ Yet, even with this interpretation, some relative protections might be illusory. For example, Weis has observed that the protection of religious rights to the same level of nationals makes little sense if the state of refuge has an official state religion and no rights for nationals to practice other faiths.²⁹

However, for an individual to receive these benefits, they must qualify under the Refugee Convention, and many individuals fleeing the war in Ukraine might not so qualify. The Refugee Convention only covers individuals who are at risk of persecution and cannot return to their state for that reason.³⁰ It does not cover people fleeing armed

¹⁹ *See id.* art. 22(2) ("The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education . . .").

²⁰ *See id.* art. 18.

²¹ *See id.* art. 26.

²² *See id.* art. 28.

²³ *See id.* art. 23.

²⁴ *See id.* art. 24(a).

²⁵ *See id.* art. 24(b).

²⁶ *See id.* art. 17(1) ("The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.").

²⁷ *See id.* art. 19.

²⁸ *See id.* art. 21.

²⁹ *See* HATHAWAY, *supra* note 12, at 662 ("The duty to treat refugees on terms of equality with nationals applies, however, only to the extent that refugees and nationals can be said to be 'in similar situations.'").

³⁰ *See* PAUL WEIS, *THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS* 43 (1995).

conflict.³¹ It might very well be that some or many of the people fleeing the armed conflict in Ukraine do have a well-founded fear of persecution on the basis of one or more of the protected grounds. Armed conflict often masks a general degradation of human rights protections.³² Unfortunately, the Refugee Convention calls for an individualized determination that is next to impossible to apply during situations of massive social upheaval.³³ It will take months, if not years, to fully process four million applications with the individualized attention and care that the Refugee Convention demands. However, at first glance, many people fleeing Ukraine left due to the armed conflict and likely do not qualify. Because of the omission of armed conflict as persecution, the most applicable legal regime is EU law, where most Ukrainians are fleeing, with similar status and benefits as the Refugee Convention.

II. STATUS AND RIGHTS UNDER EU LAW

The European Union has harmonized refugee law within its region, in particular with the adoption of several legislative measures.³⁴ EU law takes the form of a number of interconnected instruments, mostly “directives,” which are legally binding instruments under EU law.³⁵ Only Ireland and Denmark have an opt-out of the common asylum system.³⁶ This EU legislation includes, *inter alia*, the “Reception Directive,”³⁷

³¹ See 1951 Refugee Convention, *supra* note 4, art. 1(A) (“the term ‘refugee’ shall apply to any person who: . . . (2) . . . 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.”).

³² *See id.*

³³ See, e.g., Hugo Storey, *Armed Conflict in Asylum Law: The “War-Flaw,”* 31 REFUGEE SURV. Q. 1, 1–32 (2012).

³⁴ UNHCR, *Protecting Refugees: questions and answers*, UN HIGH COMM’R REFUGEES (Feb. 1, 2002), <https://www.unhcr.org/publications/brochures/3b779dfe2/protecting-refugees-questions-answers.html>. (“However, during a mass exodus such as occurred from Kosovo or Africa’s Great Lakes, it may not be possible to carry out individual screening.”). [<https://perma.cc/6TLY-EYR8>].

³⁵ See EU Qualification Directive, *supra* note 5.

³⁶ See, e.g., Council Decision 2000/596/EC, 2000 O.J. (L 252) 12; see also Council Decision 2004/904/EC, 2004 O.J. (L 381) 52.

³⁷ See Protocol (No. 21) on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, O.J. EU C 202, 295 (June 7, 2016); Protocol (No. 22) on the Position of Denmark, O.J. (C 326) 1 (Oct. 26, 2012).

“Qualification Directive,”³⁸ and “Asylum Procedures Directive,”³⁹ among others.⁴⁰ Some of these instruments have been revised and re-issued as “recast” directives.⁴¹

EU law incorporates the same terms as the 1951 Refugee Convention defining refugees based on persecution,⁴² but it adds a supplementary category of “subsidiary protection” for asylum-seekers who do not qualify as refugees, but otherwise deserve international protection.⁴³ This category extends protection to individuals fleeing “serious harm,” including the death penalty,⁴⁴ torture or other inhuman or degrading treatment,⁴⁵ and international or non-international armed conflict.⁴⁶ Formally, persons in this category are not “refugees” qualifying under the Refugee Convention and, thus, do not accrue the rights provided in the Convention, though EU law extends most of the same rights.⁴⁷ As such, there may be an incentive for EU Member States to classify individuals under subsidiary protection when the individual might have also qualified as a refugee due to persecution. In so doing, EU Member States could argue that they have granted the individual a valid legal status as an alternative to refugee status and are not responsible for granting as many rights from that alternative status, and thus do not incur the related costs and possible political pressures. Most of the people fleeing the war in Ukraine are most likely to be covered by

³⁸ See Council Directive 2012/33/EU, 2013 O.J. (L 180), 96 [hereinafter Reception Directive].

³⁹ See EU Qualification Directive, *supra* note 5.

⁴⁰ See Council Directive 2013/32/EU, 2013 O.J. (L 180) 60 [hereinafter Asylum Procedures Directive].

⁴¹ See, e.g., Commission Regulation 604/2013, 2013 O.J. (L 180) 31 [hereinafter Dublin III Regulation].

⁴² See EU Qualification Directive, *supra* note 5, art. 2(c).

⁴³ See *id.* art. 2(e) (“[p]erson eligible for subsidiary protection’ means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.”).

⁴⁴ See *id.* art. 15 (“Serious harm consists of: (a) the death penalty or execution . . .”).

⁴⁵ See *id.* (“Serious harm consists of: . . . (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin . . .”).

⁴⁶ See *id.* (“Serious harm consists of: . . . (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”).

⁴⁷ See Jane McAdam, *The Qualification Directive: An Overview*, in *THE QUALIFICATION DIRECTIVE: CENTRAL THEMES, PROBLEM ISSUES, AND IMPLEMENTATION IN SELECTED MEMBER STATES* 7, 10 (Karin Zwaan ed., 2007).

this category rather than the Refugee Convention because they are seeking to escape the armed conflict, but the mere existence of armed conflict alone does not exclude the possibility that they might nonetheless be fleeing persecution. A final remark on EU protection is that EU citizens are excluded from protection by other EU member states,⁴⁸ regardless of the risk to them. Clearly, this provision is not in alignment with the Refugee Convention which is not so limited.⁴⁹ So, if any individuals fleeing Ukraine are EU citizens, they cannot qualify for asylum in any EU member state. While it is true that their status as EU citizens would ensure freedom of movement and residence within any EU member state, along with a long list of other rights, the Refugee Convention could be more generous in limited situations.⁵⁰ In any event, there is no basis under the Refugee Convention for simply removing certain individuals from coverage based on their nationality. To be fully in compliance with the Refugee Convention, EU law should offer EU citizens whichever treatment is preferable, EU citizenship or refugee status.

As for status and rights, the Qualification Directive requires states to grant a range of benefits to those who receive international protection in the EU under its terms, yet it does not fully provide for the same rights that an individual would receive under the Refugee Convention.⁵¹ In general, EU law only partly discriminates between the rights of refugees and the rights of those receiving subsidiary protection.⁵² Some have argued that subsidiary status is therefore also subsidiary to refugee status in that the latter must be granted whenever possible rather than the former.⁵³ McAdam has argued that there are strong policy incentives for states to grant subsidiary protection rather

⁴⁸ See Consolidated Version of the Treaty on the Functioning of the European Union art. 78(1), Oct. 26, 2012, 2012 O.J. (C 326) 76 [hereinafter Treaty on the Functioning of the European Union].

⁴⁹ See McAdam, *supra* note 47, at 10.

⁵⁰ See, e.g., 1951 Refugee Convention, *supra* note 4, art. 34 (the obligation to facilitate naturalization in the state of refuge, which is a benefit that is not granted to EU citizens).

⁵¹ See McAdam, *supra* note 47, at 8.

⁵² See EU Qualification Directive, *supra* note 5, art. 25.

⁵³ See Evangelia Tsurdi, *Regional Refugee Regimes: Europe*, in THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW 358 (Cathryn Costello, Michelle Foster & Jane McAdam, eds., 2022) (“This status is ‘subsidiary’ to refugee status, which must be given precedence.”); see also EU Qualification Directive, *supra* note 5, arts. 7–8; Asylum Procedures Directive, *supra* note 40, art. 10(2).

than recognize refugee status.⁵⁴ She has documented the decisions in some EU member states to reduce the benefits of their domestic subsidiary protection regimes to the minimum permitted under EU law,⁵⁵ and they try to avoid identifying individuals as refugees if they can arguably grant subsidiary protection instead.⁵⁶ EU law, unlike the Refugee Convention, does not establish a system of increasing rights in proportion to increasing permanence of stay, but it does distinguish between rights that are absolute and those that are measured against rights enjoyed by nationals or third-country aliens.⁵⁷ These rights are not necessarily in alignment with those provided in the Refugee Convention,⁵⁸ which is a clear incentive to classify individuals under subsidiary protection rather than as a “refugee.”

The rights accruing to protected persons are therefore not organized under EU law in the same way as they are under the Refugee Convention. Under EU law, rights are categorized by whether they are absolute or relative to those enjoyed by nationals or third-country aliens and are not dependent on differing degrees of residence in the state. Critically, all of the rights that are covered under EU law are conditioned on the EU Member State recognizing the person’s protected status.⁵⁹ This approach runs contrary to that of the Refugee Convention, which grants its rights from the moment the individual qualifies under the Convention and not from the moment of status determination. Thus, the EU system is far more restrictive.

In addition, the substance of the rights under EU law differs from the Refugee Convention. Starting with the absolute rights, the Directive

⁵⁴ See Jane McAdam, *Complementary Protection*, in *THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW* 670, 670 (Cathryn Costello, Michelle Foster & Jane McAdam, eds., 2022) (“A related—and very real—problem is that if complementary protection results in beneficiaries receiving a lesser status, there may be policy pressures to grant that, rather than refugee status.”).

⁵⁵ See *id.* at 671.

⁵⁶ See *id.* (“Following the arrival of 890,000 Syrian asylum seekers in Germany in 2015, a policy change reducing the entitlements of beneficiaries of subsidiary protection (including no family reunion) saw a surge in grants of that status, and a sharp decline in grants of refugee status. As a result, thousands of people appealed their subsidiary protection determination to try to ‘upgrade’ to refugee status—with over 75 per cent succeeding in 2016.”).

⁵⁷ See JANE MCADAM, *COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW* 56 (2007).

⁵⁸ *Id.* at 41; Tsourdi, *supra* note 53, at 358.

⁵⁹ See Hathaway, *supra* note 12, at 928; see also EU Qualification Directive, *supra* note 34, arts. 22, 24–25, 26(1), 31, 34–35; Reception Directive, *supra* note 38, art. 15(1); M. den Heijer et al., *Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System*, 53(3) COMMON MKT L. REV. 607 (2016).

provides for *non-refoulement*.⁶⁰ This requirement essentially repeats the same provision in the 1951 Refugee Convention,⁶¹ prohibiting EU member states from returning a refugee to his or her state. The only exception is when “there are reasonable grounds for considering him or her as a danger to . . . security” or when a refugee is “convicted by a final judgment of a particularly serious crime.”⁶² The Qualification Directive also grants additional rights, such as absolute rights to information,⁶³ family unity,⁶⁴ residence permits,⁶⁵ and travel documents.⁶⁶ Authorization for self-employment or wage-earning employment is conditioned only on “rules generally applicable to the profession and to the public service,”⁶⁷ which, at least for refugees, is a mixed provision. It is more liberal than the Refugee Convention because it does not demand that they are staying in the state and receive the same treatment as aliens generally, yet it also imposes additional qualification rules that are not in the Refugee Convention.⁶⁸ The rules on immediate authorization for self-employment are more generous than the Refugee Convention requires, which only demands that states grant refugees those rights when they are lawfully staying in the state.⁶⁹ EU law does not specifically address some of the other rights in the Refugee Convention such as right to practice religion.⁷⁰

⁶⁰ See EU Qualification Directive, *supra* note 5, art. 21.

⁶¹ See *id.* art. 21.

⁶² See *id.* art. 21(2).

⁶³ See *id.* art. 22.

⁶⁴ See *id.* art. 23.

⁶⁵ See EU Qualification Directive, *supra* note 5, art. 24 (the Refugee Convention requires states to issue “identity documents” and residence permits should qualify provided they contain identity information and can be used as such); see also 1951 Refugee Convention, *supra* note 4, art. 27.

⁶⁶ See EU Qualification Directive, *supra* note 5, art. 25 (although the Directive does not appear to contemplate it, some states restrict travel documents from being valid for travel to the individual’s state of origin); see also 1951 Refugee Convention, *supra* note 4, art. 28 (the Refugee Convention only requires travel documents for refugees when they are staying within a state. Note that this is an improvement from the prior version of the Directive that only demanded a travel document if the individual had a compelling reason for travel); see also Steve Peers, *Legislative Update 2011, EU Immigration and Asylum Law: The Recast Qualification Directive*, 14 EUR. J. MIGRATION & L. 199, 216–17 (2012).

⁶⁷ See EU Qualification Directive, *supra* note 5, art. 26(1) (“Member States shall authorize beneficiaries of international protection to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, immediately after protection has been granted.”); see also Peers, *supra* note 66, at 217 (the recast Directive provides the same access to employment for both refugees and persons under subsidiary protection, whereas the former version of the Directive permitted states to limit employment benefits for those under subsidiary protection).

⁶⁸ See 1951 Refugee Convention, *supra* note 4, arts. 17, 19.

⁶⁹ See *id.* art. 18.

⁷⁰ See *id.* art. 4.

Beyond those absolute rights, EU law requires member states to grant a second collection of relative rights, measured only to the standard that they are similarly offered to a state's own nationals.⁷¹ These rights include vocational training;⁷² employment-related education (which may be limited to "adults");⁷³ education for minors,⁷⁴ which may be limited to the state education system,⁷⁵ though states should not exclude individuals from secondary education simply due to reaching the age of majority;⁷⁶ social assistance,⁷⁷ which could be limited to "core benefits" for those under subsidiary protection;⁷⁸ and healthcare.⁷⁹ Some of these rights are not identical to the Refugee Convention. For example, the Refugee Convention protects elementary education in the same manner as nationals for refugees in a state's territory,⁸⁰ and though it does not define that education level,⁸¹ EU law instead protects education for minors,⁸² rather than based on the level of education.⁸³ Significantly, some of these rights are only phrased as obligations of the member states to provide access to procedures, not necessarily guarantee outcomes.⁸⁴ For example, for employment-related education, states are only encouraged to "facilitate full access" to individuals under protection.⁸⁵ However, some rights are more equivocal, for example, the recognition of qualifications is titled as an obligation of "access" to qualification assessment

⁷¹ See EU Qualification Directive, *supra* note 5, at 19, ch. VII.

⁷² *Id.* art. 26(2).

⁷³ *Id.*

⁷⁴ *Id.* art. 27(1).

⁷⁵ Reception Directive, *supra* note 38, art. 14(1).

⁷⁶ *Id.*

⁷⁷ EU Qualification Directive, *supra* note 5, art. 29(1), *questioned in* Peers, *supra* note 66.

⁷⁸ EU Qualification Directive, *supra* note 5, art. 29(2). Some states, somewhat not in keeping with the Directive, impose obligations for attending integration courses or other hurdles in order to receive social assistance, whereas the Refugee Convention only requires the same social assistance available to nationals for refugees who are staying in the state. See 1951 Refugee Convention, *supra* note 4, art. 23.

⁷⁹ EU Qualification Directive, *supra* note 5, art. 30.

⁸⁰ 1951 Refugee Convention, *supra* note 4, art. 22.

⁸¹ Samuel K. N. Blay & B. Martin Tsamenyi, *Reservations and Declarations under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 2 INT'L J. REFUGEE L. 527, 547 (1990).

⁸² EU Qualification Directive, *supra* note 5, art. 27.

⁸³ See 1951 Refugee Convention, *supra* note 4, art. 22(1); Blay & Tsamenyi, *supra* note 81, at 547.

⁸⁴ See EU Qualification Directive, *supra* note 5, arts. 27(1), 30; see also Reception Directive, *supra* note 38, art. 14(1).

⁸⁵ See EU Qualification Directive, *supra* note 5, art. 26(3).

procedures.⁸⁶ The text requires states to “endeavour to facilitate full access” to such procedures when the individuals do not have evidence of their qualifications, yet the same article also states that, when individuals do have evidence of their qualifications, that the state “ensure equal treatment” with nationals.⁸⁷ Granting access only raises questions about some of the limitations several EU states have imposed on recognizing qualifications. Hathaway has criticized some states’ requirements for original certificates or local language fluency, or limitations on qualification recognition to a list of limited professions, as not in compliance with the Refugee Convention.⁸⁸ And again, as was the case for other rights mentioned above, the rights demanding national treatment are also only extended upon acknowledgement of protected status.⁸⁹ The only exception is for the education of minors who have access to the education system within three months of the time they, or their parents, apply for protection, but during this application phase, they only have the right to access education under conditions “similar” to nationals rather than the same as nationals,⁹⁰ which could involve education alternatives in line with domestic practice.⁹¹

Lastly, some rights are also relative, but measured by the benefit available to third-country nationals who are legal residents in the state. These rights include adult education,⁹² accommodation,⁹³ and freedom of movement within the state.⁹⁴ Adult education and accommodation, however, are only rights of access on the same terms as any other alien, not rights to necessarily receive accommodation or education.⁹⁵ Again, for education rights, while the Refugee Convention only requires treatment at the same standard as enjoyed by aliens generally for refugees in the state’s territory, it does not distinguish between child and adult education, but rather between elementary education and education beyond elementary level.⁹⁶ Thus, EU law is potentially more generous than the Refugee Convention in situations where a minor child would

⁸⁶ See *id.* art. 28.

⁸⁷ See *id.*

⁸⁸ See HATHAWAY, *supra* note 12, at 993–1011.

⁸⁹ See EU Qualification Directive, *supra* note 5, arts. 26–29.

⁹⁰ See Reception Directive, *supra* note 38, art. 14.

⁹¹ *Id.*

⁹² EU Qualification Directive, *supra* note 5, art. 27(2).

⁹³ *Id.* art. 32.

⁹⁴ *Id.* art. 33.

⁹⁵ *Id.* arts. 31, 33.

⁹⁶ See 1951 Refugee Convention, *supra* note 4, art. 22.

have rights to education beyond the elementary level. The freedom of movement is also largely in compliance with the Refugee Convention,⁹⁷ although the EU extends the same rights also to those under subsidiary protection. Because some rights are limited to only rights of access, Hathaway has noted that measures in some EU states limiting housing rights to either a state's own nationals or not at all, and measures that do not prioritize individuals under protection, may be permissible.⁹⁸

III. STATUS AND RIGHTS UNDER THE EU TEMPORARY PROTECTION DIRECTIVE

The EU international protection regime, much like the Refugee Convention, is not well-suited to handling mass influxes of persons seeking protection.⁹⁹ Both EU law and the Refugee Convention call for individualized status determinations, which is infeasible when there are thousands, or, in extreme cases, millions, of potential applicants.¹⁰⁰ Following the conflict in the former Yugoslavia, the EU determined that its common asylum policies were insufficient for situations of mass influx of asylum-seekers and created an experimental “Temporary Protection” system.¹⁰¹ The concept of such a system had been debated for a decade prior, proposing various means to balance large groups of persons on the one hand and careful individualized determination on the other.¹⁰² Thus, the use of the word “temporary” in Temporary Protection is a bit of misnomer, because all international protection is, at least in

⁹⁷ *Id.* art. 26.

⁹⁸ See HATHAWAY, *supra* note 12, at 1034–35.

⁹⁹ See Jean-François Durieux, *Temporary Protection and Temporary Refuge*, in THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW 678, 679 (Cathryn Costello, Michelle Foster, & Jane McAdam eds., 2022).

¹⁰⁰ See U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, ¶¶ 38–41, U.N. Doc. HCR/IP/4/ENG/Rev.4 (Feb. 2019); U.N. High Comm’r for Refugees, *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, ¶ 17, U.N. Doc. EC/GC/01/4 (Feb. 19, 2001); Durieux, *supra* note 99, at 680.

¹⁰¹ See Council Directive 2001/55, 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, 2001 O.J. (L 212) 12 (EC) [hereinafter Temporary Protection Directive]; Karoline Kerber, *The Temporary Protection Directive*, 4 EUR. J. MIGRATION L. 193 (2002).

¹⁰² See U.N. High Comm’r for Refugees, *A Comprehensive Response to the Humanitarian Crisis in the Former Yugoslavia*, ¶ 3, U.N. Doc. HCR/IMFY/1992/2 (July 24, 1992).

principle, temporary.¹⁰³ Temporary Protection is really a mechanism for effectively dealing with emergency situations of mass migration that would otherwise overwhelm receiving states' ability to process applications for asylum.

However, almost immediately after the creation of the Temporary Protection Directive, it was seen as an insufficient solution.¹⁰⁴ There were proposals to abolish it in favor of a better crafted provision.¹⁰⁵ Some scholars even went so far as to conclude that states had lost their enthusiasm for temporary protection as a concept,¹⁰⁶ despite efforts by the Office of the United Nations High Commissioner for Refugees (UNHCR) to keep the idea alive.¹⁰⁷ The Temporary Protection Directive had never been invoked in the twenty years since being adopted, even throughout the Syrian asylum-seeker crisis,¹⁰⁸ until the conflict in

¹⁰³ See U.N. High Comm'r for Refugees, *Note on International Protection*, at 24, U.N. Doc. A/AC.96/830 (Sept. 7, 1994).

¹⁰⁴ See Tsourdi, *supra* note 53, at 358 ("There are various reasons for the Directive's non-implementation, including the procedure for the institution of a temporary protection scheme; the indeterminacy of the concept of 'mass influx'; and the political fear that its instatement would create a so-called pull factor, 'inviting' to the EU refugees and displaced persons qualifying for its protection."); DURIEUX, *supra* note 99, at 690 ("While the prescribed procedure is far from odd within the EU context, in view of its complexity it does not seem well suited to emergency situations that require quick action. In view of these two shortcomings, the risk of the Directive remaining a dead letter is real.").

¹⁰⁵ See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, COM (2020) 609 final (Sept. 23, 2020) (recommending the repeat of the Temporary Protection Directive); see *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 (Sept. 23, 2020) (proposing a replacement for the Temporary protection Directive).

¹⁰⁶ See Durieux, *supra* note 99, at 692; see generally Meltem Ineli-Ciger, *Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and Its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean*, in *SEEKING ASYLUM IN THE EUROPEAN UNION: SELECTED PROTECTION ISSUES RAISED BY THE SECOND PHASE OF THE COMMON EUROPEAN ASYLUM SYSTEM* (Céline Bauloz, Meltem Ineli-Ciger, Sarah Singer & Vladislava Stoyanova, eds., 2015).

¹⁰⁷ See U.N. High Comm'r for Refugees, Roundtable on Temporary Protection, 19-20 July 2012: Summary Conclusions on Temporary Protection, <https://www.refworld.org/docid/506d908a2.html> [<https://perma.cc/H6EY-HU4Z>]; see also U.N. High Comm'r for Refugees, Global Roundtable on Temporary Protection 15-16 July 2013: Concept Note, <https://www.unhcr.org/5284cf2b9.pdf> [<https://perma.cc/5QMY-A4SU>]; see also U.N. High Comm'r for Refugees, *Guidelines on Temporary Protection or Stay Arrangements* (Feb. 2014).

¹⁰⁸ Nonetheless, some states created their own temporary protection regimes to address the situation, perhaps inspired by the EU Directive, including one created by Turkey to manage the Syrians fleeing their state. See *Law on Foreigners and International Protection*, 2013 (Law No 6458)

Ukraine. In 2022, the Council invoked the Temporary Protection Directive for the first time.¹⁰⁹ The questions for the Temporary Protection Directive now are whether this action has given new life to the Directive and how the EU and member states will interpret and implement it.

Whether a situation constitutes *mass influx* and calls for temporary protection is effectively a political decision. The UNHCR Executive Committee has made some efforts to define *mass influx* generally outside the specific content of EU law both in terms of numbers and impact on the state of reception,¹¹⁰ but the concept remains somewhat vague in international law.¹¹¹ Mass influx is defined in the Temporary Protection Directive as “a large number of displaced persons, who come from a specific country or geographical area.”¹¹² However, while based on the definition and gravity of the situation,¹¹³ the existence of mass influx is determined by majority vote in the Council,¹¹⁴ it and

(Turk.), Official Gazette (Resmi Gazete (RG)) No. 28615 (Apr. 11, 2013); Temporary Protection Regulation, 2014 (Turk.) Official Gazette (Resmi Gazete (RG)) No. 29153.

¹⁰⁹ See 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, O.J. (L 71) 1; *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 (Mar. 3, 2022).

¹¹⁰ See U.N. High Comm’r for Refugees, *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations*, ¶ (a), No. 100 (LV) (Oct. 8, 2004); U.N. High Comm’r of Refugees, *supra* note 103, at 22 (“Temporary protection has served as a means, in situations of mass outflow, for providing refuge to groups or categories of persons recognized to be in need of international protection, without recourse, at least initially, to individual refugee status determinations. [A] more limited range of rights and benefits are offered in the initial stage than would customarily be accorded to refugees granted asylum under the 1951 Convention and the 1967 Protocol.”).

¹¹¹ See Alice Edwards, *Temporary Protection, Derogation and the 1951 Refugee Convention*, 13 MELB. J. INT’L L. 595, 599 (2012) (“Temporary protection has no accepted meaning under international law . . . It is a concept commonly used to describe a short-term emergency response to a ‘mass influx’ of asylum seekers.”).

¹¹² Temporary Protection Directive, *supra* note 101, art. 2(d); Nuria Arenas, *The Concept of ‘Mass Influx of Displaced Persons’ in the European Directive Establishing the Temporary Protection System*, 7 EUR. J. MIGRATION & L. 435, 439 (2005).

¹¹³ See Temporary Protection Directive, *supra* note 101, art. 5(4) (“The Council Decision shall be based on: (a) an examination of the situation and the scale of the movements of displaced persons; . . . (c) information received from the Member States, the Commission, UNHCR and other relevant international organisations.”).

¹¹⁴ See *id.* art. 5(1) (“The existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council.”).

must be weighed against its “advisability.”¹¹⁵ Ultimately, the decision is political.

In addition, the decision invoking Temporary Protection can be limited. As mentioned above, in the Ukraine situation, the Council adopted a Decision triggering the application of the Temporary Protection Directive on March 4, 2022,¹¹⁶ but that Decision does not cover all persons fleeing the war equally. In the Decision, the Council designated for international protection Ukrainian nationals and non-Ukrainian nationals who had refugee status.¹¹⁷ It also designated other non-Ukrainian nationals or stateless persons with permanent residence in Ukraine, but they may only be admitted for temporary protection if they have certain documents and if they cannot return to their state of nationality.¹¹⁸ These individuals only need to receive “adequate protection” under domestic law.¹¹⁹ Other non-Ukrainian nationals with short-term or non-residential status in Ukraine are not covered but the individual EU member states may grant temporary protection under domestic law.¹²⁰ However, the Decision does require EU member states to admit these non-Ukrainians on an emergency basis because of the humanitarian crisis,¹²¹ although in practice some EU member states do not appear to be honoring this expectation.¹²² This differentiation between Ukrainian and non-Ukrainians, and between those with and without long-term residence, is, at least in principle, permitted,¹²³ though it means that a number of the people fleeing the war in Ukraine will not benefit from Temporary Protection or may need to lodge asylum

¹¹⁵ See *id.* art. 5(4) (“The Council Decision shall be based on: . . . (b) an assessment of the advisability of establishing temporary protection, taking into account the potential for emergency aid and action on the ground or the inadequacy of such measures.”).

¹¹⁶ See Decision 2022/382, *supra* note 7.

¹¹⁷ See *id.* art. 2(1).

¹¹⁸ See *id.* art. 2(2).

¹¹⁹ *Id.*

¹²⁰ See *id.* art. 2(3).

¹²¹ Decision 2022/382 makes it clear that these persons 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.” See *id.* at 2–3.

¹²² See, e.g., African Union, *Statement of the African Union on the Reported Ill Treatment of Africans Trying to Leave Ukraine* (Feb. 28, 2022); Eur. Parliament, *Committee on Civil Liberties, Justice and Home Affairs*, at 14:49:11–15:53:26 (Mar. 16, 2022), https://multimedia.europarl.europa.eu/en/webstreaming/libe-committee-meeting_20220316-1345-COMMITTEE-LIBE (briefing of the European Commissioner for Home Affairs Johansson before the LIBE Committee, including a Q&A) [<https://perma.cc/L8GL-2632>].

¹²³ See Arenas, *supra* note 112, at 444.

applications in the states where they arrive.¹²⁴ This fragmented approach runs contrary to the underlying purpose of Temporary Protection—to manage mass influx without the burden of performing individualized assessments.¹²⁵ Notably, the Council did not transport into its temporary protection decision the rule in EU law that EU citizens cannot qualify for protection.¹²⁶

Protection under the Directive is initially for one year and may be extended,¹²⁷ though any extension beyond two years requires a new Decision by the Council.¹²⁸ Protection can end sooner than initially determined, should the Council so decide.¹²⁹ The end of temporary protection reclassifies the status of the relevant person to an ordinary third-country national, potentially subject to deportation.¹³⁰ In essence, if the protected person wishes to continue protection beyond the term established by the Council, then that person must apply for asylum or recognition of refugee status in due time.¹³¹

The Directive essentially permits states to avoid definitive refugee classifications by derogating, albeit temporarily, from their obligations under the 1951 Refugee Convention and EU law.¹³² In this way, temporary protection can create incentives for states to classify individuals as temporarily protected, without needing to make a full commitment to refugee status, rather than opting for the less protected

¹²⁴ See Steve Peers, *Temporary Protection for Ukrainians in the EU? Q and A*, EU LAW ANALYSIS (Feb. 27, 2022), <http://eulawanalysis.blogspot.com/2022/02/temporary-protection-for-ukrainians-in.html> [https://perma.cc/V59X-GFN6]; see Meltem Ineli-Ciger, *5 Reasons Why: Understanding the Reasons Behind the Activation of the Temporary Protection Directive in 2022*, EU MIGRATION LAW BLOG (Mar. 7, 2022), <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/> [https://perma.cc/EAB9-3S35].

¹²⁵ See Temporary Protection Directive, *supra* note 101, pmb1.

¹²⁶ See Treaty on the Functioning of the European Union, *supra* note 48, art. 78(1); see also *id.* at 305, protocol no. 24.

¹²⁷ See Temporary Protection Directive, *supra* note 101, art. 4.

¹²⁸ See *id.*

¹²⁹ See *id.* art. 6(1) (“Temporary protection shall come to an end: (a) when the maximum duration has been reached; or (b) at any time, by Council Decision adopted by a qualified majority on a proposal for the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council.”).

¹³⁰ See *id.* arts. 20, 22, 23.

¹³¹ See *id.* art. 3(1) (“Temporary protection shall not prejudice recognition of refugee status under the Geneva Convention.”).

¹³² See *id.* art. 6(1); see also U.N. High Comm’r for Refugees, *Conclusions on Protection of Asylum-Seekers in Situations of Large-Scale Influx*, No. 22 (XXXII) (1981); see also U.N. High Comm’r for Refugees, *Conclusion Adopted by the Executive Committee on International Protection of Refugees*, No. 74 (XLV) (1994).

subsidiary protection. The Temporary Protection Directive clearly positions temporary protection as a procedure when the normal asylum system is at risk of being unable to cope; it is not itself a form of legal status,¹³³ though the precise significance of this distinction is unclear. Certainly, Ukrainians who have fled to EU member states and receive benefits there have some form of status, even if only as a tolerated presence.¹³⁴ Temporary Protection also comes to an end when the person receives asylum or recognition of refugee status. The Temporary Protection Directive currently requires, at minimum, that the states make applications for asylum available,¹³⁵ and that the states process those applications before Temporary Protection ends.¹³⁶ The fact that asylum applications must be available under the Temporary Protection Directive,¹³⁷ however, also runs contrary to the underlying purpose of the Directive: to resolve mass influx that would overwhelm the asylum system. If asylum applications must be available, then the state would be overwhelmed on the basis of the Temporary Protection Directive itself. Thus, at the heart of the Directive is a fundamental tension between whether it truly constitutes a derogation from the Refugee Convention and EU law or not.¹³⁸ Durieux argues that Temporary Protection is designed to bridge the emergency admission and the regular application of the Qualification Directive and Refugee Convention,¹³⁹ because it contains some of the same rights and benefits, though in somewhat of a more conservative manner than those that successful asylum seekers receive.¹⁴⁰ But McAdam has argued that if the Temporary Protection

¹³³ See Temporary Protection Directive, *supra* note 101, art. 2(a) (“[T]emporary protection’ means a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection[.]”).

¹³⁴ See *id.* art. 8(1) (requiring EU Member States to adopt measures under domestic law providing residence permits to persons under Temporary Protection); see also *id.* art. 19(1) (appearing to view Temporary Protection as a form of status when providing that “The Member States may provide that temporary protection may not be enjoyed concurrently with the status of asylum seeker while applications are under consideration.”).

¹³⁵ See *id.* art. 17(1).

¹³⁶ See *id.* art. 17(2).

¹³⁷ See *id.*

¹³⁸ See Durieux, *supra* note 99, at 690.

¹³⁹ See *id.*

¹⁴⁰ See Jean-François Durieux & Agnès Hurwitz, *How Many Is Too Many? African and European Legal Responses to Mass Influxes of Refugees*, 47 GERMAN Y.B. INT’L L. 105, 149 (2004).

system had been triggered by the Council during the crisis of Syrian asylum-seekers, then Germany would not have elected to implement a widespread classification of Syrians for subsidiary protection instead of refugee status.¹⁴¹ Since Temporary Protection would have protected Syrians fleeing the armed conflict, albeit without demanding the same level of status and rights under subsidiary protection, then subsidiary protection would not have been necessary.¹⁴² And Germany could have protected the Syrians without making such a large commitment to them.¹⁴³ Despite efforts to emphasize that Temporary Protection is a procedure,¹⁴⁴ it is at least a form of *de facto* status. The question for those fleeing Ukraine is whether this temporary suspension of Refugee Convention and EU law will shift those individuals into less permanent situations or whether it will ease their transition and application for asylum.

Furthermore, asylum-seekers admitted under temporary protection may very well qualify as refugees under the Refugee Convention. Regardless of any temporary postponement of refugee status determination, the individuals could already be qualified as refugees under international law from the moment they left Ukraine. Thus, by merely granting temporary protection rights and not the full benefits of the Refugee Convention, the states hosting them would technically be in breach of their international obligations.

Recipients of temporary protection receive a number of benefits, though not to the same degree as people protected under other EU directives and the Refugee Convention. What remains to be seen is whether terms under the Temporary Protection Directive are interpreted and implemented in a similar manner to comparable terms under those other legal instruments, for example, the relativity of benefits compared to nationals or third country nationals or the need for benefits to accrue to those similarly situated. Significantly, persons under temporary protection do not receive, as they would under other EU directives, unconditional family reunification, travel documents, or free movement to the same degree as third country nationals.¹⁴⁵ However, they do receive

¹⁴¹ See McAdam, *supra* note 54, at 671 n.97.

¹⁴² See *id.*

¹⁴³ See *id.* at 671.

¹⁴⁴ See Durieux, *supra* note 99, at 690 (“Emphasis on the procedural character of temporary protection is essential, as it discards the notion that temporary protection might constitute an alternative or additional status.”).

¹⁴⁵ See generally INELI-CIGER, *supra* note 106.

residence permits and limited family reunification.¹⁴⁶ They also have a right to information on their status “in a language likely to be understood by them,”¹⁴⁷ similar to the Qualification Directive’s rights to information.¹⁴⁸ EU Member states must offer repatriation,¹⁴⁹ and, as mentioned above, they must provide access to their asylum application system.¹⁵⁰

For education rights under temporary protection, it offers slightly different benefits than other EU directives and the Refugee Convention. Under temporary protection, EU member states need only provide access to persons under eighteen years old under the same conditions as nationals,¹⁵¹ a stronger benefit than the Qualification Directive’s obligation to provide education that is only “similar” to nationals.¹⁵² Both systems only protect access to education,¹⁵³ and while the Qualification Directive, unlike the Temporary Protection Directive, adds terms protecting children from “aging-out,”¹⁵⁴ it also permits states to delay as much as three months before enrolling children and offers the option to enroll children in education alternatives.¹⁵⁵ But note again that the Refugee Convention does not use this minor/adult system, instead using an elementary and non-elementary system,¹⁵⁶ so the Temporary Protection regime may perpetuate some of the same non-compliance with the Refugee Convention as the Qualification Directive. For adults under the Temporary Protection system, EU member states “may” permit “access to the general education system,” but are not obliged to do so.¹⁵⁷ These rules are more restrictive than EU law generally on refugees and subsidiary protection, which is far more generous, granting vocational training and requiring states to facilitate employment-related education

¹⁴⁶ Temporary Protection Directive, *supra* note 101, arts. 8(1), 15.

¹⁴⁷ *Id.* art. 9.

¹⁴⁸ See EU Qualification Directive, *supra* note 5, art. 22.

¹⁴⁹ Temporary Protection Directive, *supra* note 101, art. 21.

¹⁵⁰ *Id.* art. 17(1).

¹⁵¹ *Id.* art. 14(1).

¹⁵² See *id.* art. 14(1).

¹⁵³ See Reception Directive, *supra* note 38, art. 14.

¹⁵⁴ See EU Qualification Directive, *supra* note 5, arts. 27(1), 30(1); see also Reception Directive, *supra* note 38, art. 14(1).

¹⁵⁵ See Reception Directive, *supra* note 38, art. 14(2).

¹⁵⁶ See *id.* art. 14(3).

¹⁵⁷ See 1951 Refugee Convention, *supra* note 4, arts. 22(1)–(2); see also Blay & Tsamenyi, *supra* note 81, at 547.

for adults to the same extent as the state's own nationals.¹⁵⁸ Access to other education for adults is protected by the Qualification Directive at the level available to third-country nationals,¹⁵⁹ again more generous than the Temporary Protection Directive.

Also related to employment, temporary protection differs from the Refugee Convention and EU law on refugees and subsidiary protection. Under temporary protection, EU member states must authorize self-employment or wage-earning employment, or vocational education, but may give priority to EU citizens, citizens of the European Economic Area, and legally residing third country nationals.¹⁶⁰ This is clearly in violation of the Refugee Convention and constitutes a deviation even from EU law on this point. They may also impose the typical rules on access to professions, which is similar to the terms in EU law generally,¹⁶¹ though EU law requires states to facilitate access to qualification assessment.¹⁶² As such, the language proficiency and original certificate requirements of entry into certain professions, noted by Hathaway, would certainly be permitted under the temporary protection system.¹⁶³ Otherwise, the generally applicable rules on remuneration and social security for employment apply to those under temporary protection,¹⁶⁴ just as they implicitly do for those qualifying under the Qualification Directive.¹⁶⁵

For other social benefits under temporary protection, there are further distinctions from refugee status or subsidiary protection, such as social welfare,¹⁶⁶ emergency and necessary healthcare,¹⁶⁷ and access to accommodation.¹⁶⁸ EU states are explicitly permitted to take the person's ability to contribute to those costs from his or her earnings into consideration.¹⁶⁹ Interestingly the Temporary Protection Directive does

¹⁵⁸ Temporary Protection Directive, *supra* note 101, art. 14(2).

¹⁵⁹ See EU Qualification Directive, *supra* note 5, art. 26(2).

¹⁶⁰ See *id.* art. 27(2).

¹⁶¹ See Temporary Protection Directive, *supra* note 101, art. 12.

¹⁶² See EU Qualification Directive, *supra* note 5, art. 26(1); Note that the recast Directive provides the same access to employment for both refugees and persons under subsidiary protection, whereas the former version of the Directive permitted states to limit employment benefits for those under subsidiary protection. See Peers, *supra* note 66, at 217.

¹⁶³ See EU Qualification Directive, *supra* note 5, art. 26(1).

¹⁶⁴ See HATHAWAY, *supra* note 12, at 994.

¹⁶⁵ See EU Qualification Directive, *supra* note 5, art. 26(5).

¹⁶⁶ See Temporary Protection Directive, *supra* note 101, art. 13(2).

¹⁶⁷ See *id.* art. 13.

¹⁶⁸ See *id.* art. 13(1).

¹⁶⁹ See *id.* art. 13(2)–(3).

not appear to restrict social assistance just to core benefits for those under subsidiary protection, as the Qualification Directive does,¹⁷⁰ most likely because the precise qualifying status of those under Temporary Protection might be unclear. Of course, states are not permitted to wait until official confirmation of each individual's status as a refugee or beneficiary of subsidiary protection before granting these benefits, because the Council has already determined that all of the persons in the situation qualify for temporary protection without any individualized examination.¹⁷¹

In addition to the differences between the typical EU legal regime and temporary protection, EU member states are undertaking mixed implementation of their obligations. EU member states are free to grant more liberal protection than minimally required under the Directive.¹⁷² Some EU member states have adopted domestic measures that are more generous than the Directive. Italy, for example, exempts some Ukrainian physicians from the standard, more burdensome, professional qualification equivalency procedure.¹⁷³ Denmark, although an EU member state, has an opt-out from EU asylum measures.¹⁷⁴ Nonetheless, on March 18, 2022, it adopted domestic legislation that largely internalizes the same measures as the EU Temporary Protection Directive for those fleeing Ukraine.¹⁷⁵ While Poland permits Ukrainian nationals to remain in Poland for eighteen months with an option to extend up to three years,¹⁷⁶ they will lose this right should they leave

¹⁷⁰ See EU Qualification Directive, *supra* note 5, art. 28(2). Note that the Commission proposed eliminating this discrimination, though the Council did not act on this recommendation. See PEERS, *supra* note 66, at 217–218. The Refugee Convention only requires the same social assistance available to nationals for refugees who are staying in a state. See 1951 Refugee Convention, *supra* note 4, art. 24(1)(b).

¹⁷¹ See Temporary Protection Directive, *supra* note 101, pmb1.

¹⁷² *Id.* arts. 3(5), 7(1).

¹⁷³ See Decreto-Legge 21 marzo 2022, n.21, G.U. Mar. 21, 2022, n.67, art. 34(1) (It.) [<https://perma.cc/XG4D-QJWD>].

¹⁷⁴ See *The Danish Opt-Outs from EU Cooperation*, FOLKETINGET (Nov. 25, 2022), <https://www.thedanishparliament.dk/en/eu-information-centre/the-danish-opt-outs-from-eu-cooperation> [<https://perma.cc/BF65-4J8W>].

¹⁷⁵ See Michala Clante Bendixen, *New Danish Law for Those Fleeing Ukraine Mirrors EU Temporary Protection Directive*, EUROPEAN COMMISSION (Mar. 16, 2022), https://ec.europa.eu/migrant-integration/news/new-danish-law-those-fleeing-ukraine-mirrors-eu-temporary-protection-directive_en [<https://perma.cc/V6GR-6856>].

¹⁷⁶ See *O pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa* [Act on Assisting Citizens of Ukraine in Connection with the Armed Conflict in the Territory of That Country] (2022, Dz. U. r. poz. 583, 682, 683, 684), arts. 2(1), 38(3) [<https://perma.cc/B5UY-87LB>].

Poland for more than one month.¹⁷⁷ While Ukrainians are eligible to apply for temporary resident permits,¹⁷⁸ they must apply for and receive a Polish individual identification number (PESEL) within sixty days of being admitted to the state.¹⁷⁹ Having so registered in Poland, Ukrainians receive a range of benefits, including accommodation, medical care, family allowance, sanitary and personal hygiene products, and even some meals.¹⁸⁰ Once their residence in Poland is deemed lawful and they have received their PESEL, they may work under the same terms as Polish nationals.¹⁸¹ Hungary, however, has adopted domestic implementing legislation that does not fully respect the terms of the Temporary Protection Directive.¹⁸² While this decree extends protection to Ukrainian nationals, it limits coverage of non-Ukrainian residents of Ukraine to those who would otherwise qualify under the standard Hungarian asylum regime, which effectively bars applicants unless they first apply for a visa at a Hungarian embassy abroad.¹⁸³

At this point, several critical issues remain open. First, the EU might not make serious efforts to rein in the divergent implementation of temporary protection in states such as Hungary. The EU has already

¹⁷⁷ See *id.* art. 11(2).

¹⁷⁸ See *id.* art. 38(1).

¹⁷⁹ See *id.* art. 4(1)–(2).

¹⁸⁰ See *id.* arts. 12(1)(1)–(5), 12(3), 17, 18, 25(3)(3b), 28(2)–(3), 29(1)–(3), 31(1)–(2), 31(6), 32(1), 32(3), 37(1)–(2), 41(1)(2)–(3), 45(1)–(2).

¹⁸¹ See *id.* arts. 22(1), 23(1)–(2).

¹⁸² 86/2022 (III. 7.) Korm. r. az ideiglenes védelemre jogosultként elismert személyekkel kapcsolatos veszélyhelyzeti szabályokról (Governmental Decree No. 86/2022 (III.7.) on the emergency rules relating to persons recognized as entitled to temporary protection) (Hung.); see also Karolína Babická, *Temporary Protection: Poland and Hungary Once Again Creating Their Own Rules in Breach of EU Law*, OPINIOJURIS (Apr. 11, 2022), <http://opiniojuris.org/2022/04/11/temporary-protection-poland-and-hungary-once-again-creating-their-own-rules-in-breach-of-eu-law/>.

¹⁸³ 233/2020. (V. 26.) Korm. r. az élet- és vagyonbiztonságot veszélyeztető tömeges megbetegedést okozó humánjárvány megelőzése, illetve következményeinek elhárítása, a magyar állampolgárok egészségének és életének megóvása érdekében elrendelt veszélyhelyzet során a menekültügyi eljárás szabályairól (Governmental Decree No. 233/2020 (V.26.) on the rules of the asylum procedure during the state of danger declared for the prevention of the human epidemic endangering life and property and causing massive disease outbreaks, and for the protection of the health and lives of Hungarian citizens) (Hung.); 292/2020. (VI. 17.) Korm. r. az élet- és vagyonbiztonságot veszélyeztető tömeges megbetegedést okozó humánjárvány megelőzése, illetve következményeinek elhárítása, a magyar állampolgárok egészségének és életének megóvása érdekében elrendelt veszélyhelyzet során a menekültügyi eljárás szabályairól (Governmental Decree No. 292/2020 (VI. 17.) on the rules of the asylum procedure during the state of danger declared for the prevention of the human epidemic endangering life and property and causing massive disease outbreaks, and for the protection of the health and lives of Hungarian citizens) (Hung.).

shown that it is reluctant to insist that Hungary comply with other terms of EU law.¹⁸⁴ Second, where the Temporary Protection Directive is being followed, the EU may not interpret the benefits in the same manner (national treatment or third-country national treatment) as traditionally done under EU law or the Refugee Convention. Third, even if the EU does interpret the terms of temporary protection in alignment with traditional understandings, the entire temporary protection regime is in effect a derogation from the Refugee Convention, which does not permit derogations.¹⁸⁵ If accepted as such, the EU and its member states might be tempted to use this alternative to avoid their obligations under the Refugee Convention. And lastly, as an experiment in managing mass influx, the EU may wish to amend, revise, or abolish the temporary protection system entirely in favor of other proposed solutions, depending on its experience with the Temporary Protection Directive.

IV. EUROPEAN UNION MEMBERSHIP

The last option for migration status and benefits, at first a wildcard and now increasingly possible, is for Ukraine to join the European Union as a new Member State. Such an option could present another approach to solving the Ukraine crisis. Ukraine has already submitted its application,¹⁸⁶ and the EU has begun the process,¹⁸⁷ with encouraging support.¹⁸⁸ The European Parliament has already voted with

¹⁸⁴ See *EU Criticized For Slow Response To Hungary's Crackdown On Press Freedom*, NAT'L PUBL. RADIO (Mar. 4, 2021), <https://www.npr.org/2021/03/04/973561022/eu-criticized-for-slow-response-to-hungarys-crackdown-on-press-freedom>; but see C-769/22—European Commission v Hungary (Action brought on 19 December 2022), 2023 O.J. (C 54/16).

¹⁸⁵ See generally 1951 Refugee Convention, *supra* note 4 (lacking any terms permitting derogations).

¹⁸⁶ Andrii Sybiha (@andrii_sybiha) (Deputy Head of Ukrainian President's Office), TWITTER (Feb. 28, 2022, 5:10 PM), https://twitter.com/andrii_sybiha/status/1498329873751986176 ("The President of Ukraine, Volodymyr Zelensky has just signed a historical document-Ukraine's application for European Union membership. In addition a joint statement was signed with Ruslan Stephanchuk, the Head of the Parliament, and Denys Shmygal, Prime Minister.Glory to Ukraine!").

¹⁸⁷ *EU Chief Offers Kyiv Fast Track to Bloc Membership*, DEUTSCHE WELLE (Apr. 8, 2022), <https://www.dw.com/en/ukraine-eu-chief-offers-kyiv-fast-track-to-membership/a-61409635> [permalink: <https://p.dw.com/p/49fRz>].

¹⁸⁸ See Meabh Mc Mahon, *Ukraine is One of Us and We Want Them in EU, Ursula Von Der Leyen Tells Euronews*, EURONEWS (May 19, 2022), <https://www.euronews.com/2022/02/27/ukraine-is-one-of-us-and-we-want-them-in-eu-ursula-von-der-leyen-tells-euronews>; Katherine Fung, *Here Are the Members of Parliament Who Voted to Deny Ukraine's EU Admission*, NEWSWEEK (Mar. 1, 2022), <https://www.newsweek.com/here-are-members-parliament-who-voted-deny-ukraines-eu-admission-1683808>.

637 votes in favor, 13 against, and 26 abstentions, though there is no Council decision yet.¹⁸⁹ The Commission has decided to recommend EU candidate status for Ukraine, and the EU member states will decide on the recommendation shortly.¹⁹⁰ Even Putin has stated that he is not opposed to Ukraine joining the EU.¹⁹¹ Early reports suggested a fast-track vote on membership is possible, though the Dutch Cabinet has discouraged such speculation.¹⁹² While most accession negotiations take years and involve extensive harmonization and assurances, there is no requirement for those preliminaries in the Treaties on European Union and accession could be as quick as the other EU states and EU organs permit.¹⁹³

If Ukraine were to join the European Union, then Ukrainian nationals would automatically become EU citizens from the moment of accession. Unless the EU and Ukraine agreed to terms delaying or restricting the rights that the new EU citizens would enjoy within other EU Member States, Ukrainians would enjoy the same employment and education rights as EU Member States nationals. Thus, temporary protection and status under the Qualification Directive would be rendered moot because they would already have permanent, more

¹⁸⁹ See Jon Stone, *European Parliament Says Ukraine Should be Made Official Candidate for EU Membership*, INDEP. (Feb. 28, 2022), <https://www.independent.co.uk/news/world/europe/ukraine-join-eu-parliament-war-b2025174.html>.

¹⁹⁰ See Alice Tidey, *Brussels Backs Ukraine and Moldova as Candidates for EU Membership*, EURONEWS (June 17, 2022), <https://www.euronews.com/my-europe/2022/06/17/brussels-set-to-endorse-ukraine-as-a-candidate-for-eu-membership> (“European Commission chief Ursula von der Leyen said in the case of Ukraine that ‘we all know that Ukrainians are ready to die for the European perspective, we want them to live with us, the EU’ . . . ‘To conclude on Ukraine, we have one clear message and that is, yes Ukraine deserves European perspective, yes Ukraine should be welcome as a candidate country,’ she told reporters.”).

¹⁹¹ See Radina Gigova, *Putin Says “We Have Nothing Against” Ukraine Joining the EU*, CNN (June 18, 2022, 12:40 PM), https://edition.cnn.com/europe/live-news/russia-ukraine-war-news-06-17-22/h_c3cc8deffcc6129f944ff87936ce65e4 (“Russian President Vladimir Putin said Friday that Russia has ‘nothing against’ Ukraine joining the European Union. ‘The EU is not a military-political bloc, unlike NATO, therefore we have always said and I have always said that our position here is consistent, understandable, and we have nothing against it,’ Putin said during a panel discussion following his speech at the St. Petersburg International Economic Forum.”).

¹⁹² See *No Fast-Track Procedure for Ukraine to Join EU, Dutch Government Warns*, DUTCHNEWS (Apr. 13, 2022), https://www.dutchnews.nl/news/2022/04/no-fast-track-procedure-for-ukraine-to-join-eu-dutch-government-warns/?utm_source=newsletter.

¹⁹³ See generally Kochenov & Janse, *supra* note 3.

protective rights.¹⁹⁴ This status would give Ukrainians indefinite rights to live and work in any Member State of the EU.

However, as noted above, Hathaway believes that EU citizenship is actually moot in situations concerning refugees. He notes that the Refugee Convention, at a minimum, demands that states grant rights at least at the level of similarly situated aliens generally. EU citizens, when similarly situated, are still aliens in other EU Member States. Therefore, refugees should receive the same treatment as EU citizens.¹⁹⁵ As such, the Refugee Convention already requires EU member states to treat those fleeing Ukraine as equivalent to EU citizens anyway, at least for those rights listed in the Convention. Insofar as EU law and temporary protection provide for similar rights, employing the same terminology and standards from the Refugee Convention, then even those under temporary protection should be treated as EU citizens for certain rights. Actual accession of Ukraine to the EU is not necessary for Ukrainians to benefit from the listed rights at the same level as EU citizens. The benefit, of course, would be that accession would grant a wider degree of rights and do so permanently.¹⁹⁶

The possible accession of Ukraine to the EU would have risks, including security risks, directly under EU law. While admitting a state to the EU as a means to express solidarity and support for a state at war would be unusual, it would not be completely unprecedented. Several current EU states had and continue to have some form of on-going conflict when they joined, and the foundational Franco-Germanic alliance has always drawn inspiration from an effort to prevent future war in Europe.¹⁹⁷ However, one important concrete consideration for membership is Article 42 of the Treaty on European Union which is similar to the mutual defense terms in the NATO treaty. Article 42 requires EU Member states to come to the military defense of any

¹⁹⁴ *But see* EU Qualification Directive, *supra* note 5 (arguing that in some situations rights under the Refugee Convention might be superior to rights from EU citizenship status and that, on that basis, EU citizens should still retain the ability to qualify as refugees in other EU Member States).

¹⁹⁵ *See* HATHAWAY, *supra* note 12, at 954.

¹⁹⁶ *See, e.g.*, Consolidated Version of the Treaty on the Functioning of the European Union art. 20(2)(b), Oct. 26, 2012, 2012 O.J. (C 326) 56, art. 20(2)(c) (“Citizens of the Union shall enjoy . . . the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State”).

¹⁹⁷ *See, e.g.*, Schuman Declaration (May 9, 1950) https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en.

another EU Member State that is attacked.¹⁹⁸ Thus, immediately following any Ukrainian accession to the EU, the EU would, essentially, enter into a state of war with Russia. And given that France and Russia are both nuclear powers, Ukrainian accession to the EU would effectively create an armed conflict between nuclear powers. It is possible that the application of Article 42 might be limited by agreement during accession talks, for example, to only a part of the territory of Ukraine or none at all, but such a limitation might set an unwelcome precedent for future EU accessions. Such considerations will likely weigh heavily on the decision to grant membership while this particular international armed conflict is still underway. A desire to extend EU citizenship, among other objectives, might not outweigh this risk.

In any event, to the degree to which EU accession is motivated by a desire to grant Ukrainians more durable status within the EU, and the moral urgency of supporting a European state in a defensive war, the expedited accession may have implications for other candidate states. Moldova has already requested expedited membership,¹⁹⁹ and other existing candidate states, locked into lengthy accession negotiations, may begin to invoke a new wave of EU openness and enthusiasm. The map of the EU may look very different in a few years' time, and with it may come an expansion in the population of EU citizens.

V. CONCLUSION

The conflict in Ukraine is triggering rapid and unprecedented changes across the EU and the world, including the field of asylum law. Although the Refugee Convention applies, it remains unclear how many people fleeing Ukraine would qualify as refugees in the narrow sense of being individuals at risk of persecution. However, EU law has both absorbed the Refugee Convention requirements for protecting refugees and added a supplementary category of subsidiary protection that is more clearly applicable to the Ukraine situation. Thus, while the Refugee

¹⁹⁸ See Consolidated Version of the Treaty on European Union art. 42(7), Oct. 26, 2012, 2012 O.J. (C 326) 39 ("If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter . . . cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organization, which, for those States which are members of it, remains the foundation of their collective defense and the forum for its implementation.").

¹⁹⁹ See *Moldova Officially Applies for EU Membership*, AL JAZEERA MEDIA NETWORK (Mar. 3, 2022), <https://www.aljazeera.com/news/2022/3/3/moldova-officially-applies-for-eu-membership>.

Convention remains relevant for any individuals covered by it, more likely, individuals fleeing the armed conflict in Ukraine would only be covered by EU subsidiary protection. EU law, in turn, adopts a range of benefits for protected persons that are similar to benefits under the Refugee Convention, though with important differences. It also adopts the Refugee Convention practice of granting some rights absolutely, and others relatively. However, because the Refugee Convention and EU law are not suited to mass influx, the EU has a third possible protection that is relevant: temporary protection. The international community has long struggled with mass influx of asylum-seekers, offering only vague concepts and hesitant to make bold decisions. The EU created but never used this system, and it seemed destined to wither on the vine just like other initiatives before it. But somehow Ukraine was different.

Following the bold, first use of temporary protection, the EU is now in the midst of a major, months-long experiment in migration law and management. Temporary protection does not grant a status as such, but instead a mechanism for coping with an overwhelming numbers of asylum seekers. One critical development arising from the conflict in Ukraine is the operationalization of this new experimental process. As the situation in Ukraine quickly evolves, the question regarding the individuals fleeing the conflict is whether they will truly receive temporary protection, whether the rights under temporary protection will be interpreted and implemented in line with the Refugee Convention and/or EU law, and whether asylum-seekers will be directed into temporary protection and away from subsidiary protection or refugee status. This experiment will also inspire renewed debate over the political nature of temporary protection, favoring certain nationalities fleeing certain conflicts and disfavoring others. It may also serve as guidance (or caution) for other states in creating their own temporary protection regimes. Even more important for migrant status within the EU, the conflicts in Ukraine might trigger a reform to the EU accession process and a means to expedite the grant of EU citizenship. As the continent moves into the summer of 2023, the EU may already have a significantly different approach to protecting people in situations of mass asylum influx. Other states are watching closely.