UNIVERSIDADE CATÓLICA PORTUGUESA

Discrimination regarding access to international protection

A study of the activation of the Temporary Protection Directive in response to mass displacement from Ukraine

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To my parents, for all the love and support.

"Washing one's hands of the conflict between the powerful and the powerless means to side with the powerful, not to be neutral."

Paulo Freire, 1985

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Abstract

In response to the mass displacement caused by the Russian military invasion of Ukraine, the European Union activated for the first time the Temporary Protection Directive (TPD), signaling a shift towards ensuring safe access to protection for displaced persons. However, concerns have arisen regarding differential treatment in relation to other categories of asylum seekers, and also between persons eligible to temporary protection. This study examines whether such differential treatment amounts to unlawful discrimination, focusing on access to protection. The analysis is made through an examination of legislation, literature, and case-law. While acknowledging the importance of other grounds that shape discrimination in this context, the analysis is centered on nationality and race, two interrelated and prevalent grounds of refugee discrimination. By assessing the differential treatment granted to displaced persons from Ukraine, this study aims to identify unlawful discrimination and examine how non-discrimination rules can challenge State actions. The findings contribute to an understanding of refugee discrimination and underscore the importance of doctrinal tools in addressing differentiation within the global refugee regime.

Keywords: Discrimination, Protection, Refugees, Nationality, Race, Common European Asylum System

Resumo

Em resposta ao deslocamento em massa causado pela invasão militar russa da Ucrânia, a União Europeia ativou pela primeira vez a Diretiva de Proteção Temporária, sinalizando uma mudança em relação à garantia de um acesso seguro à proteção para pessoas deslocadas. No entanto, surgiram preocupações sobre o tratamento diferenciado em relação a outras categorias de requerentes de asilo, bem como entre pessoas elegíveis para proteção temporária. Este estudo examina se tal tratamento diferenciado configura discriminação proibida, com foco no acesso à proteção. A análise é feita através de um exame da legislação, literatura e jurisprudência. Apesar de reconhecer outros fatores que permeiam a discriminação neste contexto, a análise centra-se na nacionalidade e raça, dois fatores inter-relacionados e prevalentes de discriminação contra refugiados. Ao avaliar o tratamento diferenciado concedido a pessoas deslocadas da Ucrânia, este estudo visa identificar a discriminação e examinar como as normas de não-discriminação podem desafiar as ações dos Estados. Os resultados contribuem para uma compreensão da discriminação contra diferentes categorias de refugiados e destacam a importância da literatura na abordagem da diferenciação dentro do regime global de refugiados.

Palavras-chave: Discriminação, Proteção, Refugiados, Nacionalidade, Raça, Sistema Europeu Comum de Asilo

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List of Acronyms and Abbreviations

APD	Asylum Procedures Directive
Art.	Article
CERD	Committee on the Elimination of Racial Discrimination
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
QD	Qualification Directive
STC	Safe third country
TPD	Temporary Protection Directive
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

1. Introduction

In the context of mass displacement from Ukraine after the Russian military invasion, on February 24, 2022, with the activation by the European Union of the Temporary Protection Directive (TPD) a few days later and the welcoming reaction of Member States to the arrival of Ukrainians, differences in the way refugees are treated in Europe have evoked concern. This reaction of the EU represented a shift in the way of approaching access to protection: rather than focusing on deflection measures, which was the pattern of reaction to previous migratory flows, the Union seemed to have started focusing on guaranteeing a safe access to protection. Differential treatment, however, was noted not only between beneficiaries of temporary protection and asylum seekers in general, but also among persons eligible to temporary protection, some of whom faced obstacles or were even prevented from crossing the border.

Treating refugees differently based on nationality partly derives from the nature of refugeehood, as it implies evaluating conditions relating to the lack of state protection in a specific country. However, several other differentiations between refugees on grounds of their nationality and race are also prevalent in the refugee regime[1].

This work aims to analyze if the differential treatment granted to displaced persons from Ukraine, with the activation of the TPD, amounts to unlawful discrimination. In this context, the analysis is also going to include the examination of distinctions among persons eligible to temporary protection. To assess if the treatment is discriminatory, the analysis of legislation, literature and case-law is undertaken, to understand how non-discrimination rules are applied in the protection of refugees.

Despite acknowledging other dimensions of differential treatment, the analysis is going to focus on access to protection, with the comparison between the Common European Asylum System (CEAS) and the provisions of the TPD. Notwithstanding other important grounds that shape discrimination in the context of displacement in the war in Ukraine, such as religion and gender, this work is going to focus on the grounds of nationality and race, two interrelated and prevalent grounds of refugee discrimination. The discrimination suffered by refugees as a group (i.e., distinctions between citizens and refugees) is not going to be examined. The political reasons behind the activation of TPD and its lack of activation to previous migratory flows are also beyond the scope of analysis.

[1] Costello & Foster, 2022, p. 246.

The work is divided into three major parts. The first part comprises analysis of the legal framework, by examining non-discrimination provisions in refugee law and human rights law, and the way they interact in refugee protection. Case-law is examined in order to understand how the ECtHR approaches issues of differential treatment, especially against and between vulnerable groups. The second part approaches the CEAS, shedding light to the discriminatory dimensions that shape access to protection in Europe, such as the ones related to the implementation of interception measures, with the analysis of the case-law of the Court of Justice of the European Union (CJEU). The third part contains the analysis of the Temporary Protection Directive, with an examination of the scope of temporary protection and how access to protection is guaranteed in that instrument, in contrast with the regular asylum process. In the end, an assessment of differential treatment granted to Ukrainians is conducted, according to the parameters established by case-law and examined in the first chapters.

It is expected that this work contributes to the identification of unlawful discrimination between groups of refugees and to understand how non-discrimination rules can be used to challenge State action. As argued by Costello & Foster, doctrinal tools that identify unlawful discrimination are important, "precisely because of the ubiquity of differentiation in the global refugee regime"[2].

[2] *idem.*

2. The principle of non-discrimination and refugee protection: legal framework

Discrimination can affect displaced persons in various ways during the claim for international protection and after protection is granted. At the outset, displacement itself is motivated by persecution (or a well-founded fear of persecution) on the basis of a protected characteristic. After, during displacement, asylum-seekers often face discriminatory barriers when trying to access protection, which will be examined in greater depth in the next chapters. Also, refugees may be regarded as an "unwelcome disruption in the lives of local people among whom they have sought safety"[3], continuing to be affected by discrimination after international protection is granted. This can be harmful in many aspects, for instance hindering local integration in the host country or resettlement to a third country[4].

Besides the evident discrimination refugees suffer as a group, there are also differences in the way they are treated as individuals, or as subsets of this group. For this reason, when analyzing discrimination, it is important to consider intersectionality, a concept developed by Kimberlé Crenshaw[5], which stands for the intersection between different grounds of discrimination that shape the multiple dimensions of a person's experience. In the author's work, it is argued that, in order to address discrimination faced by black women, it is not adequate to look at the elements of race and gender separately, since this approach cannot fully capture the experiences faced by them. Instead, racism and sexism should be addressed as intersecting oppressions that affect their lives.

The same approach should be considered when examining discrimination faced by refugees. As sustained by Achiume, foreignness is an intersectional category, which entails "identity at the intersection of many different social structures: nationality, national origin, race, religion, class, ethnicity, gender, and others"[6]. This implies that even amongst refugees of the same nationality, some may be more subject to discrimination, due to other factors of identity. To exemplify, the author mentions that a Christian and a Muslim refugee, both from Syrian nationality, can be treated differently in Europe, which evidences that focusing only on the ground of nationality is not enough to address discrimination.

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[3] UNHCR, 2006, p. 75.
[4] *idem.*
[5] 1991, p. 1244-1245.
[6] 2021, p. 47-48.

This chapter will explore the interplay between refugee law and human rights law (international and European), including the crucial analysis of case-law, to shed light on how these complementary sources of law intersect to safeguard against discrimination and promote equality for all individuals seeking asylum.

The main instruments of international refugee protection are the 1951 United Nations Convention relating to the Status of Refugees and its Additional Protocol, adopted in 1967. They have been supplemented over the years by regional refugee regimes and by international human rights law[7], which granted refugees several rights, in addition to the ones established by the Convention.

Regarding the importance of human rights to the protection of refugees, Harvey observes that

> refugee law speaks to a world where international norms are realised through a carefully constructed status that many States are content to endorse and use. Human rights law is working towards a paradigm where guarantees apply to everyone, and people are then shielded from violations of accepted international norms. Whatever view is taken, it is now well established that international human rights law is key in the encouragement of complementary forms of protection, and in recognizing a more expansive range of reasons for flight[8].

According to the principle of non-discrimination, the provisions of the Convention should be applied without discrimination for reasons of race, religion or country of origin. As it is going to be further exposed, subsequent international human rights instruments added to the scope of this principle the prohibition of discrimination based on other grounds, such as sex and age.

2.1. International and European Human Rights Law

2.1.1. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) imposed on States a broad duty

[7] Convention and Protocol Relating to the Status of Refugees. Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR), p. 2.
[8] 2015, p. 46.

of non-discrimination, which forbids all kinds of status-based discrimination regarding any right enunciated by the Covenants[9].

The ICESCR determined, in Article 2, paragraph 2, that States Parties have to guarantee that the rights enunciated in the Covenant "will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The United Nations Committee on Economic, Social and Cultural Rights, the body that monitors implementation of ICESCR, has clarified that "the ground of nationality should not bar access to Covenant rights" and that the Covenant rights apply to everyone, including non-nationals, such as refugees, asylum-seekers and stateless persons[10].

The United Nations Human Rights Committee (HRC), the body that monitors implementation of the ICCPR, has also elucidated that, in general, the rights set forth in the Covenant apply to everyone, irrespective of nationality or statelessness[11]. The ICCPR established the prohibition of non-discrimination in Article 2 paragraph 1, determining that States Parties have to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinctions of any kind. The prohibited grounds of discrimination were identical to those listed in the ICESCR.

Nonetheless, the ICCPR went further and established a broader prohibition in Article 26:

> [...] the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This Article prohibits not only discrimination in relation to the rights set by the Covenant, but also "discrimination in law or in fact in any field regulated and protected by public authorities"[12]. Thus, it is clear that the rights of refugees also fall under the scope of this Article, making the Refugee Convention justiciable by the HRC. Although the Covenant does not recognize the right to enter or reside in the territory of a State Party — which is in principle a matter for the State to decide — in certain circumstances, such as when concerns of non-

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[9] Hathaway, 2021, p. 277.
[10] UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights).
[11] UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986.
[12] Lee, 2017, p. 493.

discrimination arise, persons may enjoy protection under the Covenant in relation to entry or residence[13].

An example that illustrates the breadth of Article 26 is related to the measure that some countries established to ban Muslim refugees from relocation programs. Even though there is no legal duty to resettle refugees from other countries — and therefore this measure is outside the scope of the obligation of non-discrimination in the Refugee Convention and other human rights treaties — the action is prohibited by this guarantee of equality before the law established by the ICCPR, which applies even to rights not established by the Covenant. So, whenever States implement refugee resettlement programs, they must "abide by the duty of non-discrimination in the design and administration of resettlement programs, meaning they may not lawfully discriminate against Muslim or other subsets of refugees".[14]

Although the term 'discrimination' has not been defined by the Covenants, the Human Rights Committee has clarified that the term should be understood as

> any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms[15].

However, it is recognized in international human rights law that not every distinction in treatment amounts to discrimination. In this sense, the HRC has stated that "The enjoyment of rights and freedoms on an equal footing [...] does not mean identical treatment in every instance"[16]. Permissible distinctions will be analyzed in more detail in the next subsection, illustrated by case-law.

States Parties to the ICCPR have the obligation to submit periodically to the Committee reports containing the indication of measures they have adopted to implement the rights indicated in the Covenant[17]. After considering a State's report, the Committee issues Concluding Observations, recommending further action that needs to be taken by the State. The rights of refugees are between the situations addressed by the HRC in these recommendations. For instance, in the Concluding Observations regarding the second periodic report of Lithuania, the

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[13] UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986.
[14] Hathaway, 2021, p. 282-283.
[15] CCPR General Comment No. 18: Non-discrimination, Adopted at the Thirty-seventh Session of the Human Rights Committee, on 10 November 1989, p. 2.
[16] *idem.*
[17] Article 40 of the ICCPR.

HRC manifested concern about the information that asylum-seekers from certain countries were being prevented from requesting asylum at the border. In response to that situation, the Committee recommended that Lithuania should adopt measures to "secure access for all asylum-seekers, irrespective of their country of origin, to the domestic asylum procedure, in particular when applications for asylum are made at the border"[18].

2.1.2. The European Convention on Human Rights

The principle of non-discrimination is a governing principle in several Council of Europe instruments[19]. The European Convention on Human Rights was adopted in 1950 by the Members of the Council of Europe and the implementation of the instrument is supervised by the European Court of Human Rights, which judges cases filed against Member States.

Article 14 of the ECHR establishes the prohibition of discrimination, determining that the rights and freedoms set in the Convention should be guaranteed without discrimination on any ground, "such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Thus, the scope of this article is limited to the rights outlined in the Convention and the Court considers that it has an ancillary character, and complements the substantive rights of the Convention[20]. For this reason, applicants commonly argue a violation of a substantive right in conjunction with a violation of the prohibition of discrimination, i.e., the alleged infringement with their rights not only failed to meet the standards required by the substantive right, but was also discriminatory in relation to individuals in a similar situation[21].

However, this ancillary nature does not mean that the application of this Article is dependent on the verification of a violation of the substantive right[22]. In some cases, the Court has analyzed the applicability of Art. 14, despite not having recognized a violation of the substantive right, and in other cases it has found a violation of a substantive Article in conjunction with Art. 14, and did not consider it necessary to examine the violation of the substantive Article alone, such as the case *Molla Salli v. Greece*, which is going to be further

[18] UN Human Rights Committee (HRC), Concluding observations: Lithuania, CCPR/CO/80/LTU, 4 May 2004.
[19] Handbook on European non-discrimination law, 2018, p. 19.
[20] ECtHR, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, p. 6.
[21] Handbook on European non-discrimination law, 2018, p. 29.
[22] ECtHR, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, p. 7.

mentioned.

In 2000, the Member States of the Council of Europe signed Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (one of the protocols that supplemented the ECHR), establishing a general prohibition of discrimination, that does not presuppose a connection with any other convention right[23]:

> Article 1 – General prohibition of discrimination
>
> 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

However, only 20 of the 46 Member States of the Council of Europe have ratified this Protocol[24] and consequently the ECtHR has not frequently referred to it in its jurisprudence[25].

Although there is no right to asylum stipulated in the ECHR, the protection of refugees is performed in many aspects by this Court[26], taking into account that applications for asylum can raise questions related to several human rights, not only related to the prohibition of discrimination, but also the right to life, the right to a fair trial, and especially the prohibition of *refoulement,* which has become recognized as customary international law and has been linked with several human rights, mainly the right to not be subject to torture and inhuman or degrading treatment[27].

The next subchapters will analyze how the ECtHR approaches discrimination and how the prohibition of discrimination is applied to the protection of refugees, with the examination of relevant case-law.

2.1.2.1. Criteria to be considered discrimination

According to the ECtHR case-law, the first step for an issue to arise under Article 14 is to verify the existence of a difference in the treatment of persons in analogous or relevantly

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[23] Petersen, 2018, p. 130.
[24] See https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=177
[25] Petersen, 2018, p. 130.
[26] Mole & Meredith, 2010, p. 11.
[27] Hamilton, 2020, p. 117-118.

similar situations[28]. It is not required that the comparator groups be identical, and the assessment of comparability must be 'specific and contextual', being based on objective elements and considering the comparable situations as a whole[29].

For instance, in the case of *Molla Sali v. Greece*, to verify if discriminatory treatment was perpetrated against the applicant, the ECtHR started the analysis by establishing whether "the applicant, a married woman who was a beneficiary of her Muslim husband's will, was in an analogous or relevantly similar situation to that of a married female beneficiary of a non-Muslim husband's will"[30].

After identifying that differential treatment is afforded to persons in analogous or relevantly similar situations, it has to be analyzed if that difference has an 'objective and reasonable justification'. This means that the measure has to be based on a legitimate aim and there has to be a relationship of proportionality between the means employed and the aim to be realized, i.e., the difference in treatment has to reach "a fair balance between the protection of the interests of the community and respect for the rights and freedoms of the individual"[31].

The Court usually grants States a certain margin of appreciation to assess the justification of differential treatment, considering that "the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds"[32]. However, this margin of appreciation can be reduced, especially when certain grounds of discrimination are at stake.

Differential treatment grounded exclusively or to a decisive extent on race or ethnicity is not capable of being objectively justified, as decided by the Court in *Timishev v. Russia*. This case approached refusal of entry in the Kabardino-Balkaria border to persons with Chechen ethnic origin. The Court observed the relation and overlap between the concepts of ethnicity and race, affirming that discrimination grounded on an individual's actual or perceived ethnicity is a form of racial discrimination, which is "a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction"[33]. For this reason, it was stated that

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[28] Case of Molla Sali v. Greece, European Court of Human Rights, 19 December 2018.
[29] ECtHR, 2022, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, p. 16-17.
[30] Case of Molla Sali v. Greece, ECtHR, 19 December 2018.
[31] ECtHR, 2022, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, p. 18-20.
[32] *ibidem*, p. 20.
[33] Case of Timishev v. Russia, ECtHR, 13 December 2005.

> [...] The Government did not offer any justification for the difference in treatment between persons of Chechen and non-Chechen ethnic origin in the enjoyment of their right to liberty of movement. In any event, the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures[34].

This case illustrates the relation between discrimination and refusal of entry, amounting to a violation of *non-refoulement.* Even if these measures are employed outside of the territory of the State, they may result in an exercise of jurisdiction, due to the extraterritorial application of the Convention in some circumstances, which was recognized by the ECtHR in cases such as *Hirsi Jamaa v. Italy*, involving the interception of vessels before arrival at the Italian coast.

2.1.2.2. Positive discrimination

It is consolidated in the ECtHR case-law that not every differentiation amounts to discrimination. In some cases, to correct discrimination in fact, affirmative measures that benefit a specific group are allowed, or even required. This is related to the idea of systemic discrimination, according to which certain disparities between individuals are rooted in societal structures, such as State practices or laws[35].

In the case of *Horváth and Kiss v. Hungary*, the Court has stated that

> Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article[36].

This case approached the placement of Roma children in a remedial school for children with special educational needs. The Court asserted that, due to the past history of discrimination and prejudice suffered by this ethnic group, the State has specific positive obligations to avoid perpetuation of discrimination, which in that specific case meant the obligation to prevent discrimination practices undercovered in tests that misdiagnosed Roma children.

Applied to the context of asylum, this principle means, for instance, that States may be required to implement positive obligations in favour of asylum seekers, even if this amounts to

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[34] *idem.*
[35] Krivenko, 2022, p. 195-196.
[36] Case of Horváth and Kiss v. Hungary, ECtHR, 29 January 2013.

differential treatment in comparison to voluntary migrants[37].

2.1.2.3. Indirect discrimination

Measures that seem to be neutral and do not have a discriminatory intent can also impact disproportionately certain groups of society, thereby implying indirect discrimination. Also, differences in treatment based on a certain prohibited ground can amount to indirect discrimination on another ground. This was recognized by the ECtHR, for instance, in the case *Biao v. Denmark*, in which a difference in treatment on the grounds of nationality also amounted to indirect discrimination on the basis of race or ethnic origin.

This case approached a refusal to grant family reunion, due to lack of the attachment requirement (it was required that the applicant had aggregate ties with Denmark which were stronger than aggregate ties with another country). The national law established that persons who had held Danish citizenship for at least twenty-eight years were exempted from this requirement.

The ECtHR asserted that this twenty-eight years rule was discriminatory not only on the grounds of nationality, but also indirectly on the grounds of ethnicity, as it had the indirect effect of favoring Danish nationals of Danish ethnic origin, and having a disproportionately prejudicial effect on persons who acquired Danish nationality later in life, the majority of which were of other ethnic origins[38].

The recent case *Memedova and others v. North Macedonia* approached the strengthening of border controls, aiming to restrict persons seeking to leave the country that could be potential asylum seekers, following an alert that the number of nationals seeking asylum in the EU had increased. In this case, the Court observed that, even though the alert did not contain specific guidelines to target Roma persons, "in the period after it had been disseminated, international bodies observed a trend of Roma persons being prevented from crossing the State border"[39].

The Court recognized indirect discrimination suffered by the applicants on grounds of their ethnic origin, on the following terms:

> [...] United Nations bodies such as the CERD and the HRC had expressed concerns about allegations of ethnic profiling at the borders, particularly of Roma persons, before the

[37] Mole & Meredith, 2010, p. 202.
[38] Case of Biao v. Denmark, ECtHR, 24 May 2016.
[39] Case of Memedova and others v. North Macedonia, ECtHR, 24 October 2023.

> applicants brought their cases, and had recommended that the respondent State ensure that its citizens' right to freedom of movement was fully respected and that all necessary steps were taken to prevent questioning and searches solely on the basis of ethnicity. Furthermore, Council of Europe bodies including ECRI and the Commissioner for Human Rights [...] noted the discriminatory impact of racial profiling by the border police, who seemed neither to have been aware of it nor to have shown any intention to end it.
>
> [...] despite the absence of any discriminatory wording in the internal instructions of 28 April 2011 or in the statutory provisions in force at the material time, the way in which those instructions were applied in practice by the border officers resulted in a disproportionate number of Roma being prevented from travelling abroad, as was also established by international bodies in their reports post-dating those instructions[40].

2.1.2.4. Vulnerability

The ECtHR has the tendency to recognize in its case-law the vulnerability of some groups of society, such as members of the Roma ethnic minority[41]. The vulnerability theory implies that, when it is identified that the applicant is a member of a vulnerable group, the threshold for determining that there was a violation of the Convention is significantly lowered[42].

The first case to consider the vulnerability of asylum-seekers was *M.S.S. v. Belgium* and Greece, in which the Court attached importance to "the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection"[43]. This recognition was essential to hold Greece responsible for a violation of Article 3 (right to not be subject to torture and inhuman or degrading treatment). The Court ruled that:

> [...] the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention[44].

This decision, besides not making reference to particular factors of discrimination that result in differences on the vulnerabilities faced by asylum-seekers, has recognized the group-

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[40] *idem.*
[41] Hamilton, 2020, p. 121.
[42] *ibidem*, p. 124.
[43] Case of M.S.S. v. Belgium and Greece, ECtHR, 21 January 2011.
[44] *idem.*

based vulnerability, mainly on account of their dependency on the host State to access rights[45].

In subsequent cases, the Court has clarified the possibility of dual vulnerability of asylum-seekers: the one originated from being a member of this vulnerable group, and another arising from personal circumstances. This implies that some persons, due to particular factors, may be more vulnerable than others, and should be distinguished inside the group as entitled to extra protection[46].

Examples of cases that demonstrate this understanding are: *Aden Ahmed v. Malta*, in which the Court considered the vulnerability of the applicant "not only because of the fact that she was an irregular immigrant and because of her specific past and her personal emotional circumstances [...], but also because of her fragile health"[47]; and *O.M. v. Hungary*, in which the Court recognized the vulnerability of an asylum seeker who was a member of a sexual minority in Iran. The recognition of the particular vulnerability of LGBT people led the Court to affirm that State authorities have the obligation to "exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place"[48].

This theory is considered by some as a potential contribution to achieve more substantive equality to refugees and has been increasingly employed in many aspects of refugee protection, such as access to protection[49]. Although it may seem to be applied in favor of refugees, the widespread use of the concept of vulnerability in refugee protection is criticized by some scholars. Krivenko warns that the effects of recurring to this concept are often negative to asylum seekers and refugees, as it is employed in a way that denies the principle of equality and brings uncertainty and arbitrariness[50]. In the author's work, it is observed that in the 10 years after the *M.S.S.* case, vulnerability was always employed with reference to additional factors of vulnerability, in comparison to 'an averagely vulnerable' refugee[51]. This means that refugees and asylum seekers have to demonstrate some kind of additional vulnerability for their claims to be assessed.

An example that illustrates the adverse employment of this concept is the case *Mahamed Jama v. Malta*, regarding detention conditions, in which the ECtHR did not recognize a violation of Article 3, affirming that

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[45] Hamilton, 2020, p. 125.
[46] *ibidem*, p. 129.
[47] Case Aden Ahmed v. Malta, ECtHR, 23 July 2013.
[48] Case O.M. v. Hungary, ECtHR, 5 July 2016.
[49] Krivenko, 2022, p. 193.
[50] *ibidem*, p. 200-201.
[51] *ibidem*, p. 203.

> [...] while it is true that the applicant, being an asylum-seeker, was particularly vulnerable because of everything she had been through during her migration and the traumatic experiences she was likely to have endured previously [...], a state of vulnerability which exists irrespective of other health concerns or age factors, the Court does not lose sight of the fact that the applicant in the present case was not more vulnerable than any other adult asylum seeker detained at the time[52].

Taking into account the uncertainty about the use of 'vulnerability' by the ECtHR, it is argued that this concept "transforms refugees and asylum seekers from active rights claimants into passive recipients of benevolent charity"[53].

2.2. International Refugee Law

The principle of non-discrimination is one of the main fundamental principles that underlie the Convention, alongside *non-refoulement* (prohibition of expelling or returning a refugee to a place where his life or freedom would be threatened) and non-penalization (prohibition of penalizing refugees for their illegal entry or stay)[54]. The fact that non-discrimination was placed as the very beginning of the Convention denotes that the drafters wanted to frame it as the "overarching spirit of the Convention" and the strongest principle of that instrument[55].

Article 3 codifies the duty of non-discrimination, establishing that "the Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin". Therefore, this provision rules all rights in the Convention. Although Art. 42 allows States to make reservations to articles of the Convention at the time of signature, ratification or accession, Art. 3 is one of the few exceptions to this possibility, meaning that every State party has to abide by it.

By the analysis of this Article, it is evident that its scope is significantly more restricted than the human rights provisions analyzed before, as it is limited to only three grounds (race, religion and country of origin). Besides that, it is only applicable to the rights established by the Convention and it does not prohibit discrimination against refugees as a group (i.e., discrimination between nationals and refugees), but exclusively prohibits discrimination between and among refugees.

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[52] Case Mahamed Jama v. Malta, ECtHR, 26 November 2015.
[53] Krivenko, 2022, p. 210.
[54] These principles are expressed, respectively, in Articles 3, 33 and 31.1 of the Refugee Convention.
[55] Lee, 2017, p. 488.

The possibility of expanding the scope of this Article was debated during the draft of the Convention, but the overwhelming majority of the drafters voted against it, demonstrating the refusal to grant refugees "the benefit of a comprehensive duty of non-discrimination"[56]. Despite its limited scope of application, in Hathaway's opinion, the intention to protect refugee rights from discrimination was clear. The Convention conceives "refugees as a generic class, all members of which are equally worthy of protection"[57], which means that any rights entitled because of refugee status should be extended to all refugees. Consequently, the differential allocation of rights between and among refugees is prohibited.

Regarding the entitlement of rights in the Convention, one of the criteria of attribution is related to the level of attachment of the refugee to the host State. A set of core rights is attributed to all refugees, but additional entitlements depend on the bond established between the individual and the State. This criteria was adopted as a result of the unplanned arrival of refugees at States' borders — which is the prevailing pattern of refugee flows nowadays. The drafters of the Convention reached the compromise of extending the protections of the Convention to the so-called 'unauthorized refugees', whether inside a State party's territory or seeking to enter it. However, they would only be entitled to basic rights, and additional rights would just be granted when their legal status was consolidated[58].

The obligation not to return refugees to a place where they may face a risk of persecution (*non-refoulement*) and the duty of non-discrimination are some of the provisions that are not subject to any level of attachment with the host State. The two mentioned rights represent "the minimum requirements for ensuring that any refugee is, by virtue of his or her refugeehood, positioned to engage the protections stipulated by the Convention"[59].

Following this perspective, non-discrimination is one of the rights that is granted even before the assessment of refugee status, i.e., it is guaranteed to all applicants for international protection. This is justified because the recognition of refugee status is not a constitutive act, but a declaratory act. As clarified by the UNHCR, "a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition", so "he does not become a refugee because of recognition, but is recognized because he is a refugee"[60].

Article 5 of the Convention asserts that nothing "shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention", which denotes

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[56] Hathaway, 2021, p. 286.
[57] *ibidem*, p. 266.
[58] *ibidem*, p. 177-178.
[59] *ibidem*, p. 183.
[60] UNHCR, 2019, p. 17.

the complementarity of human rights instruments to refugee protection. As highlighted by Lee[61], when the Refugee Convention was enacted, non-discrimination norms had not yet been marked by important events, such as the entry into force of human rights treaties, that were created in the following decades. Although the reading of Article 3 could imply a limited application of non-discrimination, this duty must be interpreted nowadays in a broader scope, in accordance with the advancing standards of human rights law.

In this sense, Hathaway[62] maintains that the interaction with Article 26 of the ICCPR remedies the limited scope of Article 3 of the Refugee Convention, requiring that all refugees have equal access to rights in the host country and prohibiting the asylum state to grant preferential treatment to any subsets of the refugee population. Chetail considers that "the most promising avenue for enhancing refugee protection through human rights law relies on the principle of non-discrimination" and argues that "Article 3 of the Geneva Convention has thus largely—if not totally—been neutralized by Article 26 of the Covenant"[63].

So, it is clear the necessity to rely on human rights instruments (particularly the ICCPR) to extend not only the grounds of prohibited discrimination, but also the catalog of rights that are embraced by this prohibition (not only those established in the Convention but related to all areas regulated by public authorities).

Besides human rights and refugee law, refugee protection is also governed by EU Law. Costello uses the term 'human rights pluralism' to frame these interrelated and sometimes overlapping systems[64]. The following chapter will examine the Common European Asylum System in light of these considerations.

[61] 2017, p. 490.
[62] 2021, p. 175.
[63] 2014, p. 48-49.
[64] 2016, p. 43.

3. Common European Asylum System

This chapter will begin with an overview of the Common European Asylum System, to understand how international protection is shaped in the EU. Next, the discriminatory dimensions of the system will be analyzed, particularly related to the access to protection.

3.1. Overview of the system

CEAS is composed of five legal instruments and one agency, the European Union Agency for Asylum, which supports Member States in the application of EU laws that govern international protection, by providing assistance in many forms[65]. Some of the legal instruments are 'regulations', which are directly binding on Member States. On the other hand, the majority of rules in the asylum field are 'directives', which require particular results to be accomplished by States, without specifying the methods for achieving them. Directives are transposed into national legislation and thus rely on national implementation to be effective[66].

The Dublin Regulation establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection presented in the EU. Regarding access to the procedure, Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones[67].

Although the common asylum policy "should be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States"[68] — as defined by the Asylum Procedures Directive (APD) — the rules of attribution of responsibility in the Dublin Regulation created an extremely unbalanced system, which is not characterized by solidarity in the so-called burden-sharing of refugees.

Chapter III of the Dublin Regulation lays down the criteria to determine the Member State responsible for analyzing the application for international protection, which should be assessed hierarchically in the order set out in the Chapter. One of the criteria applies when the applicant

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[65] *See* https://euaa.europa.eu/about-us/what-we-do

[66] Craig & Zwaan, 2019, p. 29.

[67] Article 3.1 of the Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

[68] Recital (2) of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

has irregularly crossed the border into a Member State having come from a third country. In this case, the Member State in which the irregular entry occurred should be responsible for examining the application[69].

When the responsibility cannot be designated based on any of the established criteria, the Member State responsible is the one in which the application was first lodged[70]. Considering that only an extremely low percentage of cases is transferred to other Member States — after proper assessment of the criteria — and the vast majority is processed by the States in which the application was lodged, the efficacy of the system is highly criticized[71].

Article 3.3 of the Dublin Regulation established the right of Member States to send applicants to a safe third country (STC), subject to the rules and safeguards set out in the Asylum Procedures Directive. This directive was adopted to develop the standards for procedures in Member States for granting and withdrawing international protection, with the aim of establishing a common asylum procedure in the Union and reducing movements between Member States, motivated by disparities between legal frameworks[72]. The concept of STC — which has consequences on the access to protection of asylum-seekers coming from or having passed through specific countries — will be approached in more detail in the subtopic 3.2.3.

Regarding the types of protection, not all the situations in which persons are in need of protection are included in the concept of refugee defined by the Refugee Convention, which required the creation by national and regional systems of complementary protection schemes. In this sense, EU Law created the concept of subsidiary protection. According to Article 2(f) of the Qualification Directive (QD), the definition of a person eligible for subsidiary protection is

> 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.

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[69] Article 13 of the Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

[70] Article 3.2 of the Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

[71] Goodwin-Gill & McAdam, 2021, p. 455.

[72] Recital (13) of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

This Directive determines that Member States are also bound by the prohibition of discrimination with respect to the treatment of beneficiaries of subsidiary protection[73].

3.2. Discrimination in the access to protection

Although no international instrument imposes on States the obligation to grant asylum, the Universal Declaration of Human Rights guarantees, in Art. 14(1), the right to seek asylum. This right is also guaranteed by EU Law, as well as the prohibition of *refoulement*.[74]

To claim international protection, asylum-seekers need to cross an international border, and even to trigger *non-refoulement* obligations, it is required to have contact with the host State[75]. Taking advantage of this, States employ a diverse range of 'non-arrival' policies to impede asylum-seekers from reaching their territories, by preventing them to leave their countries of origin or deflecting those who are in the journey to seek protection, and therefore undermine the possibility of claiming asylum[76]. These practices usually do not function to avoid State responsibility, since they may implicate the exercise of jurisdiction and consequently be under the scope of prohibition of *refoulement*.

Moreover, when implementing 'non-arrival' practices — such as visa requirements, carrier sanctions and interception measures — States may discriminate on prohibited grounds, as it is going to be analyzed in this subchapter.

3.2.1. Visa regimes

Although visa regimes are allowed as a way for States to control immigration, they may be unlawful if they are, for instance, discriminatory on the grounds of race[77]. Some authors argue that the EU Visa List Regulation[78] is racially discriminatory, as countries whose nationals

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[73] Recital (11) of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

[74] Articles 18 and 19 of the Charter of Fundamental Rights of the European Union, respectively.

[75] Costello, 2016, p. 231.

[76] Goodwin-Gill & McAdam, 2021, p. 418-420.

[77] *ibidem*, p. 421.

[78] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification).

are required a visa to enter the EU are composed by black majority populations[79].

Visa requirement impositions can also be employed as a way to obstruct access to protection, thereby violating refugee law and human rights law. Most persons who seek asylum in the EU are nationals of countries that require a visa to enter the territory of the Union[80], and a series of challenges prevent asylum seekers from obtaining visas, such as the risk of obtaining passports from State authorities which are the agents of persecution, and the impossibility of waiting for a visa, in the urgent need to leave the country. Moreover, usually States do not issue visas to allow people to seek asylum, and "even a standard tourist visa may not be granted if it is suspected that the individual will seek asylum on arrival in the destination State"[81].

As pointed out by Goodwin-Gill and McAdam[82], the imposition of visa requirements on nationals of refugee-producing countries is used by States as a way to block asylum flows, hindering the possibility of individuals to claim asylum and forcing asylum-seekers to rely on illegal migration options, such as trafficking and smuggling networks.

In the case *X and X*, regarding an application for a visa by a Syrian family in the Belgium Embassy in Lebanon, with the intention to claim asylum, the Court of Justice of the European Union reinforced that applications for international protection have to be made in the territory of Member States. It was clarified that States are not required, under the Visa Code, to allow third-country nationals to submit applications for international protection to consular representations situated in the territory of a third country[83].

In opposition to the understanding of the CJEU, it has been argued by scholars that there is an EU Law obligation to issue humanitarian visas (in accordance with provisions of the Visa Code), a practice that would facilitate access to the territory, by removing some of the barriers to access protection[84]. While this practice is not implemented, and lacking legal means to enter the EU to seek protection, the vast majority of asylum-seekers enter the territory by irregular methods[85], being subject to the containment measures described in the next subchapter.

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[79] Guild, 2001, p. 38.
[80] European Union Agency for Fundamental Rights & Council of Europe, 2013, p. 35.
[81] Goodwin-Gill & McAdam, 2021, p. 422-423.
[82] *idem*.
[83] Case X and X v. État belge, CJEU, 7 March 2017.
[84] Costello, 2016, p. 245.
[85] Goodwin-Gill & McAdam, 2021, p. 422-423.

3.2.2. Interception measures

As it was described by the UNHCR, interception is defined as

> encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination[86].

Since these measures aim to impede unauthorized arrivals and usually do not distinguish those seeking international protection from other migrants, they may violate the right to seek asylum[87]. This is particularly alarming considering the fact that among irregular arrivals at the EU there is a significant proportion of asylum seekers[88].

Interception policies are often related to violation of the obligation of non-discrimination. The 'Report on means to address the human rights impact of pushbacks of migrants on land and at sea' submitted by the United Nations Special Rapporteur on the human rights of migrants, called attention to the fact that

> Pushbacks often exacerbate situations of vulnerability, including those based on multiple and intersecting forms of discrimination, such as on the basis of gender, age, race, ethnicity, nationality, migration status, sexual orientation and gender identity, and other factors. States should protect migrants at all stages of the migratory process and guarantee access to justice to remedy any discriminatory treatment or human rights violations that they experience[89].

The Special Rapporteur also expressed concern about barriers imposed by Spain to persons seeking asylum, which included the allegations of discrimination suffered by migrants coming from sub-Saharan Africa, who were prevented from leaving their country of origin on the grounds of their appearance. Achiume also mentions this situation as an example of "a vivid manifestation of the bordering function performed by an individual's embodiment of race"[90]. The author mentions that, in north Morocco, even lawful permanent residents felt unsafe in

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[86] Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach, EC/50/SC/CRP.17, UNHCR Executive Committee, 9 June 2000.
[87] Goodwin-Gill & McAdam, 2021, p. 418-419.
[88] European Union Agency for Fundamental Rights, 2023, p. 8.
[89] Report on means to address the human rights impact of pushbacks of migrants on land and at sea : report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales, UN Human Rights Council, 2021.
[90] 2022, p. 484.

public, as the extraterritorial European immigration enforcement operation in place "relied on racial profiling as its means of identifying (and in many cases determining) migrants who were unlawfully present and presumed to be journeying to Europe"[91].

Regarding the challenges to assess deflection practices, the UN Special Rapporteur on the human rights of migrants observed that some of these measures are rooted in States' denial of their human rights obligations in relation to migrants, or from discriminatory legislation and policies[92]. Despite being evident that these measures violate EU Law (especially the Asylum Procedures Directive), when the CJEU had the opportunity to analyze practices that are "at the root of border violence", it has failed to do so[93]. The already mentioned case in which the Court analyzed the obligation to issue humanitarian visas is one of these examples.

3.2.3. Safe Third Country and Safe Country of Origin

Even after reaching the territory of the Union, the access to a full asylum procedure may not be guaranteed. As pointed by Costello, triggering the *non-refoulement* obligation "precludes States from returning asylum seekers to their countries of origin, but not necessarily elsewhere"[94].

States usually adopt Safe Third Country practices with the intention to shift responsibility to countries in which asylum-seekers could have claimed protection during their journey[95]. The Asylum Procedures Directive regulates these practices, establishing a presumption of safety to countries based on specific criteria, such as the absence of risk of serious harm, respect for *non-refoulement* and the absence of threats to life and liberty based on protected grounds[96]. APD determines that

> Member States should not be obliged to assess the substance of an application for international protection where the applicant, due to a sufficient connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country, and there are grounds for considering that the applicant will be admitted or

[91] *ibidem,* p. 485.
[92] Report on means to address the human rights impact of pushbacks of migrants on land and at sea : report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales, UN Human Rights Council, 2021.
[93] Tsourdi & Costello, 2023, p. 992-993.
[94] 2016, p. 252.
[95] *idem*.
[96] Article 38.1 of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

readmitted to that country[97].

Thus, when a third country is considered safe for the applicant, the application may be considered inadmissible. Moreover, the Directive establishes that the applications of persons whose countries of origin are designated as 'safe' should be accelerated and/or conducted at the border or in transit zones[98]. Although the general presumption of safety of a country is not absolute, it imposes a higher burden of proof on the applicant, who has to demonstrate that "there are valid reasons to consider the country not to be safe in his or her particular circumstances"[99], in order for the concept of safety to be disregarded in the specific case. Challenges related to the reversal of the safety presumption by asylum-seekers may include short time-limits, lack of legal assistance and accurate information about the country of origin, all of which allow to conclude it is "not an easy hurdle to overcome"[100].

It is clear that, by establishing a procedural disadvantage and increasing burden of proof for applicants, these practices may hinder access to protection of specific groups[101]. Bearing in mind that it allows States to grant less favorable procedural treatment to some groups of asylum-seekers than others, concerns have been raised in relation to the discriminatory character of this Directive[102].

Moreover, these concepts seem to be incompatible with the Refugee Convention spirit, which requires individual assessment of the risk of persecution faced by the person, for reasons of a protected ground. To define that a country is safe and free from persecution for all disregards the rights of minority groups, who are often more subject to harm, even in countries not marked by widespread conflict or violence[103].

The CJEU approached the matter in H.*I.D and B.A.* case. This case concerned a Nigerian national who claimed that the procedural disadvantage imposed by the concept of safe country of origin — which implied that less time and resources are invested in priority cases — constituted a violation of the prohibition of discrimination based on nationality. However, the Court ruled that the possibility to prioritize processing of an asylum application is under the

[97] Recital (44) of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).
[98] Article 33.2 (c) and Article 31.8 (b) of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).
[99] Recital (42) of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).
[100] European Council on Refugees and Exiles (ECRE), 2015, p. 10.
[101] European Council on Refugees and Exiles (ECRE), 2014, p. 48.
[102] European Council on Refugees and Exiles (ECRE), 2015, p. 2.
[103] *ibidem*, p. 4.

scope of discretion enjoyed by Member States regarding the organization of the processing of asylum applications.

Thus, the CJEU did not recognize this differential treatment as discrimination, and asserted that "the nationality of the applicant for asylum is an element which may be taken into consideration to justify the prioritised or accelerated processing of an asylum application"[104] provided that the accelerated procedure does not deprive the applicants from the guarantees established by the Asylum Procedures Directive. In Costello and Foster's opinion, the CJEU in this case did not give "due attention to human rights general principles or Article 3 of the Refugee Convention"[105].

Another concern related to the use of STC practices, as highlighted by Hathaway, is the fact that "procedural discrimination can give rise to a heightened risk of unjustified rejection and removal from the asylum state, thus indirectly engaging Art. 33's duty of non-refoulement"[106]. For instance, there are reports of mass forced returns of refugees to Syria, who had been previously sent to Turkey as part of the EU-Turkey deal[107]. In relation to these events, non-governmental organizations have pressured the EU to declare that Turkey must not be considered a safe third country, according to the criteria set in APD[108].

When the CJEU had the opportunity to assess the compatibility of the EU-Turkey Deal with the EU fundamental rights, it ruled that the document was authored by the 'Heads of State or Government of the Member States' and therefore could not be regarded as a measure adopted by the European Council, or by any institution of the EU. Under this argument, the Court concluded it did not have jurisdiction to rule on the lawfulness of the international agreement concluded by the Member States[109], refusing to recognize the relation between EU actions and the measures under scrutiny.

In respect of these systemic violations of the rights of asylum seekers, Tsourdi & Costello observe that they "connote a collective refugee protection backsliding in the EU which affects the rule of law"[110].

Having analyzed the legal framework of the regime and the 'layers of deflection'[111] that asylum seekers have to face to reach the jurisdiction of a Dublin Member State and to access

[104] Case C-175/11, Court of Justice of the European Union, 31 January 2013.
[105] 2022, p. 266.
[106] 2021, p. 281.
[107] Amnesty International, 2016.
[108] Human Rights Watch, 2022.
[109] Case NF v. European Council, CJEU, 28 February 2017.
[110] 2023, p. 992.
[111] Costello, 2016, p. 233.

protection, the next chapter will examine the more favorable treatment afforded to persons displaced from Ukraine, with the activation of the Temporary Protection Directive, in light of the principle of non-discrimination, that permeates the whole analysis in this work.

4. Case study: the activation of Temporary Protection Directive to persons displaced from the war in Ukraine

In March 2022, some days after Russia's military invasion of Ukraine, the European Union, by the Council Implementing Decision (EU) 2022/382, triggered the Temporary Protection Directive, as a response to the mass influx of people fleeing Ukraine. The decision stated that the concession of temporary protection was the most appropriate instrument, as it would allow the displaced persons to enjoy harmonized rights across the Union without the formalities and length of the regular asylum process. Also, it would benefit Member States, by creating a balance of efforts and reducing the risk of overloading national asylum systems.

TPD was adopted in 2001, following the conflicts in former Yugoslavia, but had never been activated before[112], despite the European Parliament's call to trigger it in response to the crisis in the Mediterranean[113]. Some years ago, there was even a proposal to repeal it[114]. Just a year before its activation, scholars still considered that the Directive was likely to become a dead letter[115].

The way Ukrainians were welcomed by the EU Member States was described as "a swift and encouraging show of solidarity"[116]. As observed by McAdam, this group would not "be forced through the cumbersome and complicated bureaucratic process that normally awaits those seeking asylum"[117]. This positive and welcoming reaction of EU Member States towards persons displaced from Ukraine contrasted sharply with their reaction to previous migratory flows, such as those of Syrians and Afghans, who also arrived at the Union fleeing conflicts in their countries of origin. This differential treatment raised concerns about unlawful discrimination. Moreover, significant differences in treatment among beneficiaries of temporary protection were also reported, as it will be exposed in subchapter 4.2.

This chapter will begin by analyzing the content and scope of temporary protection. Next, the consequences of it on the access to protection will be examined, in light of the concerns of unlawful discrimination. Lastly, an assessment of discrimination will be conducted, from two perspectives: between beneficiaries of temporary protection and asylum

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[112] See https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en

[113] European Parliament resolution of 29 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies (2015/2660(RSP)).

[114] Communication from the Commission on a New Pact on Migration and Asylum, 23 September 2020.

[115] Durieux, 2021, p. 690.

[116] See https://www.hrw.org/news/2022/03/01/eu-keep-borders-open-people-fleeing-ukraine.

[117] 2022.

seekers in general; and among beneficiaries of temporary protection.

4.1. Content and scope of temporary protection

Temporary protection is a political instrument, developed to provide emergency response to deal with situations of mass influx of asylum seekers. In the European context, this form of protection is associated with admission to the territory and temporary stay, based on a premise of eventual return[118].

According to Article 2(a) of the TPD, temporary protection is

> 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

For Durieux[119], it is important to emphasize this procedural character, since it clarifies that temporary protection is not an alternative nor additional status. It is a form of protection that "comes close to —but deliberately stops short of— *prima facie* recognition of the refugee character of all members of a group, which is practiced in other parts of the world"[120].

The term 'mass influx' does not have a legal definition, but it has been defined by TPD as "arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme"[121]. The UNHCR's Executive Committee has described it as a phenomenon that may have some or all of the following characteristics:

> (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers[122];

Besides facilitating access to protection, TPD defines a series of rights to beneficiaries,

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[118] Goodwin-Gill & McAdam, 2021, p. 292- 294.
[119] 2021, p. 690.
[120] *idem.*
[121] Article 2(a) of the 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.
[122] UNHCR Executive Committee of the High Commissioner's Programme, Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations No. 100 (LV), 2004.

such as residence permits, suitable accommodation and social welfare[123]. However, considering its limited duration, temporary protection is considered to be "a middle ground between the status of an asylum seeker and the rights accorded to refugees"[124]. As explained by Goodwin-Gill & McAdam[125], there are divergent logics to approach temporary protection. On one hand, the possibility to provide immediate protection to a mass influx of persons and minimum standards of treatment. On the other, it can be imposed by States as a restrictive status, to refrain from guaranteeing the Refugee Convention rights.

In respect of beneficiaries, the Council implementing decision determined that temporary protection should be applied for Ukrainian nationals and nationals of third countries who were benefiting in Ukraine from refugee status or equivalent protection before the date of the military invasion by Russian armed forces. The decision mentions that it 'would be appropriate' to grant protection to stateless persons and nationals of third countries who were legally residing in Ukraine and who are unable to return in safe and durable conditions to their country or region of origin[126]. According to the European Union Agency for Asylum, more than two-thirds of the EU Member States have implemented this provision and extended the concession of temporary protection to these groups[127].

4.2. Discrimination in the access to protection

As mentioned in the previous chapter, asylum seekers have to face risky journeys to access the territory of the EU, due to containment measures adopted by States to prevent them from reaching the territory. In contrast, Ukrainians benefit from visa-free access to the EU[128] and, according to the TPD, stateless persons and third country nationals who were lawfully residing in Ukraine should be admitted into the EU on humanitarian grounds without the requirement of a visa, to "ensure safe passage with a view to returning to their country or

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[123] Article 8 and Article 13 of the 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.
[124] Durieux & Hurwitz, 2004, *as cited in* Durieux., 2021, p. 690.
[125] 2021, p. 295.
[126] Recital (11) and Recital (12) of the 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.
[127] 2023, p. 13.
[128] Annex II of the REGULATION (EU) 2018/1806 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification).

region of origin"[129].

Thus, persons displaced from Ukraine do not have to be subject to all the layers of deflection that hinder access to protection, which places them in a significant advantage when compared to other asylum seekers, who, besides facing hazardous journeys, still have to deal "with the degrading asylum process and its carceral confinements"[130].

Moreover, the decision that implemented the temporary protection established that Ukrainians are able to choose the Member State where they want to reside, which allows them to "join their family and friends across the significant diaspora networks that currently exist across the Union"[131]. This possibility of choice is clearly not enjoyed by other asylum seekers, who have to comply with the rules of the much-criticized Dublin Regulation, not being able to choose the country in which they want to claim asylum.

The current model of solidarity in burden-sharing between Member States also draws attention, as it is not adopted towards other asylum seekers. Due to these striking advantages of the regime that emerged in response to those fleeing Ukraine — if compared to CEAS — it is considered to be a 'dual system'.[132]

An example that illustrates this outrageous difference in the access to protection regards the way Poland has opened its borders to receive Ukrainian refugees, while simultaneously continues to deploy containment measures at the border with Belarus, where it has built a 186 kilometers wall to deter people fleeing conflicts in the Middle East and Africa and seeking to enter EU territory[133]. Violent pushbacks, degrading treatment and arbitrary detention were also reported as measures adopted by the Polish authorities[134]. As described by Tondo,

> At the train station in Przemyśl in Poland, thousands of refugees fleeing the Russian invasion of Ukraine get off the carriages every day, seeking asylum in Europe. As they arrive, dozens of Polish border guards and soldiers distribute food, water, blankets and hot tea with a smile.
> I look on as the soldiers help Ukrainian women and children with their heavy luggage. I watch as they play with the children and caress their faces. As the scene unfolds, I can't help but think that this is the same border force which, for months, a short distance north,

[129] Recital (13) of the 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.
[130] Costello & Foster, 2022, p. 267-268.
[131] Article 16 of the 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.
[132] Costello & Foster, 2022, p. 267-268.
[133] Al Jazeera, 2022.
[134] Amnesty International, 2022.

> along the same eastern border, has been violently pushing back asylum seekers from Syria, Iraq and Afghanistan who attempt to cross the frontier from Belarus.
> It is the same border force which, instead of offering a caring touch and a comforting smile, brutally beat the refugees from Aleppo, who are also victims of Vladimir Putin's bombardments[135].

Besides concerns of discrimination between beneficiaries of temporary protection and asylum seekers in general, there were also several reports of discrimination among beneficiaries of temporary protection, related to nationality and race, such as African citizens resident in Ukraine being violently prevented from crossing the border. This led to a statement of the African Union, urging "all countries to respect international law and show the same empathy and support to all people fleeing war notwithstanding their racial identity"[136].

In that respect, the Committee on the Elimination of Racial Discrimination (CERD), "alarmed by reports of discriminatory treatment of people attempting to flee Ukraine into neighbouring countries, in particular people of African, Asian, Middle Eastern and Latin American descent"[137], issued a Statement calling upon all States parties to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) to allow access to their territories to "all persons fleeing the conflict without discrimination on grounds of race, colour, descent, or national or ethnic origin and regardless of their immigration status"[138].

As Costello & Foster have highlighted, the flight from Ukraine is an example of how "contemporary migration control practices include racial profiling and even violence, both correctly characterized as race discrimination"[139]. In this sense, Achiume affirms that

> race emerges as an illegality detection and production mechanism, as border infrastructure relied upon to presumptively exclude, subordinate, and immobilize through nonwhiteness, while presumptively including and facilitating the mobility through whiteness.[140]

In the next subchapter, the assessment of discriminatory treatment will be carried out, in light of the criteria established by case-law to verify if it amounts to unlawful discrimination.

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[135] 2022.
[136] Statement of the African Union on the reported ill treatment of Africans trying to leave Ukraine, 28 February 2022.
[137] CERD, Racial Discrimination against persons fleeing from the armed conflict in Ukraine, Statement 1 (2022).
[138] *idem.*
[139] 2022, p. 249.
[140] 2022, p. 485.

4.3. Assessment of discrimination

All the mentioned differences in the treatment afforded to displaced persons from Ukraine, with the activation of TPD, require the analysis of whether this preferential treatment amounts to unlawful discrimination. As it was exposed, not all differential treatment is considered discrimination. Especially in matters related to migration control, States enjoy a margin of discretion in formulating policies, as their legitimate aim is generally assumed[141]. However, as stressed by Costello & Foster, "discretion is often a mask for forms of selection that should be rejected".[142]

To make the assessment of discrimination in the scope of temporary protection regarding access to protection, it is necessary to analyze it from two perspectives: between beneficiaries of temporary protection and asylum seekers in general (i.e., other categories of displaced persons), and among persons eligible for temporary protection.

4.3.1. Discrimination between beneficiaries of temporary protection and other persons in need of protection

This first approach should be the analysis of whether the scope of the Directive itself is discriminatory, by granting preferential treatment to Ukrainians in comparison to other categories of forced migrants. Although the principle of non-discrimination is guaranteed in EU Law (Article 21 of the Charter of Fundamental Rights of the EU), EU Asylum Law is marked by differentiations between beneficiaries of international protection, as it was exposed.

To analyze the distinction between different categories of forced migrants, it is important to look at the Joined Cases *Alo and Osso*[143] , in which the CJEU analyzed the right to non-discrimination in relation to freedom of movement within a State, concerning differential treatment between refugees and beneficiaries of subsidiary protection who received social welfare benefits. Beneficiaries of subsidiary protection in Germany were subject to a condition on the place of residence that was not imposed on refugees and other third country nationals.

Regarding the assessment of discrimination, in relation to one of the aims invoked by the German State — achievement of an appropriate distribution of the burden of paying social

[141] Costello & Foster, 2022, p. 252.
[142] *ibidem*, p. 258.
[143] Cases C-443/14 and C-444/14, Kreis Warendorf v. Ibrahim Alo and Amira Osso v. Region Hannover, CJEU, 1 March 2016.

security benefits — the Court concluded that the restriction on the freedom of movement imposed on beneficiaries of beneficiary protection constituted a violation of the QD. Regarding the other aim alleged — to facilitate the integration of third-country nationals — the Court considered that the determination of comparability between the two situations should be conducted by the national court. To make this assessment, the CJEU indicated that the national court would have to

> determine whether the fact that a third country national in receipt of welfare benefits is a beneficiary of international protection — in this case subsidiary protection — means that he will face greater difficulties relating to integration than another third country national who is legally resident in Germany and in receipt of such benefits.

In this case, the Advocate General's Opinion had recognized that subsidiary protection is included in the concept of "other status" and therefore is a prohibited ground of discrimination, which resulted in the need to analyze the case under the scope of the prohibition of discrimination of Art. 21 of the Charter of Fundamental Rights of the EU and its interpretation in conformity with Art. 14 of the ECHR. However, the CJEU did not mention any non-discrimination provision in the judgment. In that respect, Storgaard observes that

> although it is far from certain that the CJEU intended to or even found it relevant to align the test developed under Articles 29 and 33 QD with that of Article 14 ECHR, the vocabulary chosen by the Court makes it reasonable to draw parallels and compare with that provision. And by departing from the approach of the ECtHR in a very similar case and leaving it for the referring national court to apply the test in practice in light of relatively abstract guiding criteria, the CJEU creates undue legal certainty about the applicable non-discrimination standard in cases involving difference of treatment of international protection beneficiaries[144].

In the same sense, Kienast & Vedsted-Hansen argue that there is still space for further development of the prohibition of discrimination under the scope of Art. 21 of the Charter of Fundamental Rights of the EU in the jurisprudence of the CJEU[145].

Due to this lack of clarity regarding differential treatment of beneficiaries of international protection in the jurisprudence of the CJEU and considering that the prohibition of discrimination in the ECHR is related to the prohibition of non-discrimination at the EU level, it is also important to conduct the assessment of discrimination in light of the jurisprudence of the ECtHR. The analysis of its wider jurisprudence regarding discrimination between persons

[144] 2016.
[145] 2024, p. 6.

in need of international protection can offer a valuable contribution to this assessment.

Moreover, although the EU is not part of the ECtHR and therefore applicants cannot bring cases directly against the EU regarding violations of human rights, under certain circumstances, it may be possible to complain indirectly about EU actions by bringing a case against one or more EU Member States before the ECtHR[146]. For that, applicants must prove a 'manifest deficiency' in EU protection[147]. Besides that, applicants could also take the cases to the ECtHR against Member States in relation to the cases involving discrimination in conjunction with the violation of other substantive rights of the Convention, such as the right not to be subject to degrading treatment, in the cases of pushbacks.

As previously stated, for an issue to arise under Art. 14 of the ECHR, differential treatment has to be afforded to persons in analogous or relevantly similar situations. Moreover, it has to be analyzed if there is an objective and reasonable justification for that difference in treatment, i.e., if the measure pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim to be achieved.

Regarding the comparability of situations, Heschl[148] argues that two elements are necessary to evaluate it: the preferential status of Ukrainians as exempt from visa to access the territory of the Union, and the proximity of the conflict to the EU. According to the understanding of ECtHR, it is not required that the comparator groups are identical, being enough that they are in relevantly similar situations[149]. So, the exemption of visa does not necessarily mean that the two situations are not comparable[150]. For Kienast and Vedsted-Hansen,"all those who seek protection in the context of a mass influx and have prima facie grounds for seeking protection must be considered as being in a relevantly similar situation"[151].

The proximity of the conflict implies that Ukrainians were obliged to seek refuge in the EU and did not pass through any third country before reaching the territory of the Union. Skordas[152] argues that it is doubtful whether the majority of persons who arrived at the EU in the 2015 migration crisis were displaced, in the meaning of the concept of TPD. He argues that these persons were already protected in third countries, such as Turkey and Lebanon, and therefore would not be considered displaced persons, as their movement en masse to the EU

[146] European Union Agency for Fundamental Rights & Council of Europe, 2020, p. 26.
[147] Costello, 2016, p. 247.
[148] 2023, p. 21.
[149] ECtHR, 2022, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, p. 17.
[150] Heschl, 2023, p. 22.
[151] 2024, p. 22.
[152] 2023, p. 426.

was voluntary. For this reason, the author considers that the situation in Ukraine is "very different, because the extent, breadth, and spontaneity of movement demonstrate, beyond any doubt, that the armed conflict was the proximate cause of the displacement"[153].

This argument that secondary movements are not considered to be in search of protection, but rather migration[154], can be refuted, since it ignores the particularities that can cause the third country to be considered unsafe for that individual, as a member of a minority group, for instance[155]. Also, as analyzed in chapter 3, some countries considered as 'safe' employ mass forced returns against refugees. So, it is argued that their movement to the EU cannot be considered voluntary and they would also be included in the concept of 'displaced', in the sense of the TPD's concept.

Concluding that the two situations are comparable, it is then necessary to analyze if there is an objective and reasonable justification for that difference in treatment. In this case, temporary protection was granted as a result of a sudden and mass displacement and had the objective to maintain the functioning of national asylum systems, which would be overwhelmed by individual asylum applications. Prantl & Kysel believe that "valid State objectives, especially given the unprecedented speed and scale of arrivals from Ukraine, likely justify the differential treatment reflected in the activation of the TPD"[156].

Regarding specifically the right to free movement in the EU and to choose the Member State in which they want to apply for protection, it is argued that the rationale of this measure was not only as a sign of solidarity to displaced persons, but was created also to alleviate the burdens of frontline Member States. For this reason, it would also likely be considered as sufficient justification for differential treatment[157].

However, the justification test includes a detailed proportionality assessment in a case-by-case basis[158]. So, scholars argue that the EU and Member States must "be prepared to justify the distinctions being introduced if they want to uphold special treatment of certain categories of persons in need of international protection."[159] Costello and Foster highlight that adjudicatory bodies which identify apparently discriminatory practices could "demand more of states in terms of justification, in particular when justification elides into racist exclusion"[160].

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[153] *ibidem*, p. 426-427.
[154] This is the same argument that States use to justify third-country practices.
[155] Goodwin-Gill & McAdam, 2021, p. 440.
[156] 2022.
[157] Kienast, Feith Tan & Vedsted-Hansen, 2022.
[158] Kienast & Vedsted-Hansen, 2024, p. 21.
[159] Kienast, Feith Tan & Vedsted-Hansen, 2022.
[160] 2022, p. 253.

4.3.2. Discrimination among persons eligible for temporary protection

Regarding persons fleeing the same conflict, the comparability of the situations is more evident. As pointed out by Kostakopoulou, "in the event of a mass exodus of third country nationals fleeing war-based violence, any differentiated treatment of them which includes arbitrariness, discrimination or racism"[161] would violate non-discrimination provisions, as it is an issue of "singling out a racial, ethnic or national group of third country nationals for privileged treatment when all groups are equally displaced and fleeing the same area of armed conflict"[162].

As mentioned, TPD did not impose on States the obligation to grant protection to all third country citizens displaced from Ukraine, although it considered it 'appropriate' to extend the protection to them. When implementing the Directive in their national systems, some countries only applied the protection to Ukrainian nationals, and reports of persons being prevented from crossing the border on allegedly racialized grounds were frequent, as exposed in subchapter 4.2.

If the difference in treatment is exclusively based on nationality, as stated by the ECtHR in the case of *Gaygusuz v. Austria*, 'very weighty reasons' would have to be put forward before the Court could consider it compatible with the Convention. For Prantl & Kysel[163], in the context of the war in Ukraine, it seems 'impossible' that 'very weighty reasons' would be identified to distinguish, based on nationality, who could cross the borders to seek refuge.

Moreover, differential treatment grounded exclusively or to a decisive extent on race or ethnicity is not capable of being objectively justified. Therefore, "any race-based restrictions on entry or humanitarian assistance by State parties are thus clearly discriminatory, irrespective of justification[164]".

Despite recognizing the importance of ECHR in guaranteeing non-discrimination on prohibited grounds, some challenges still remain in relation to the protection of asylum seekers, mainly related to the practical obstacles of challenging border practices in Courts[165]. The complexity of proving the indirect discriminatory effect of a measure on the grounds of race and ethnicity[166] is one of these difficulties, as well as barriers faced by asylum seekers to access

[161] 2023, p. 442.
[162] *idem.*
[163] 2022.
[164] Prantl & Kysel, 2022.
[165] Costello, 2016, p. 249.
[166] Heschl, 2023, p. 14.

justice. Bearing these challenges in mind, Costello points to the effects of these impediments in "obscuring the processes whereby lives are lost and access to protection precluded"[167].

[167] Costello, 2016, p. 249.

Conclusion

State practices approaching access to international protection usually grant divergent responses to different categories of refugees. This was exacerbated with the activation of the TPD to respond to the displacement of persons fleeing the war in Ukraine, which granted them an almost automatic right to enter and stay in the territory of the Union, as well as the possibility to choose the country in which they wanted to reside.

Since States retain a degree of discretion to impose measures related to immigration control, it is hard to challenge the application of temporary protection. Also, political reasons that go beyond the analysis of this work also permeated the activation of the Directive. Although scholars diverge in relation to the lawfulness of the scope of temporary protection — as defined in the TPD and in the decision that activated it — there is consensus that differentiations based exclusively on nationality would be extremely hard for States to justify.

Taking into account the strong condemnation of racial discrimination, differential treatment based exclusively or to a certain extent on race and ethnicity is not liable to be justified. So, regarding the reports of third country citizens who were violently prevented from crossing the border and access protection, these measures are very likely to be considered discriminatory if they are taken to the scrutiny of human rights Courts and bodies.

This work aims to contribute to the reinforcement of non-discrimination rules to the protection of refugees, by scrutinizing States policies regarding access to protection. As sustained by Prantl & Kysel, recurring to non-discrimination law could "foster better protection of refugees and other migrants in the current crisis and in the future, strengthening non-discrimination's rightful place as a key tool for advancing the rights of people crossing borders."[168]

Nonetheless, it is acknowledged that several obstacles hinder the possibility of asylum seekers to reach the Courts, which may limit the impact of these norms to challenge discriminatory practices. The implementation of safe possibilities to ensure safe access to EU territory for asylum seekers, for instance by granting humanitarian visas, is likely to have a greater impact on tackling discrimination.

As warned by Costello & Foster, there is also the risk that imposing a duty of equal treatment becomes "a pretext for levelling down, or even lead to withdrawal of certain benefits

[168] 2022.

altogether, or the creation of even more opaque processes".[169] In spite of that, it is recognized the importance of legal argumentation as a tool to challenge discrimination in refugee protection.

[169] 2022, p. 258.

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