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The impact of war in Ukraine on EU migration

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When the Russian Federation invaded Ukraine on 24 February 2022, one of the most immediate and dramatic reactions of the European Union (EU) was to open a special protection scheme for Ukrainians and non-Ukrainians who were resident in the country on the date of the invasion to enter the EU and remain with extensive rights (All EU states are part of the scheme with the exception of Denmark which because of particularities in its constitutional position in the EU opened a parallel national scheme rather than join the EU scheme). The legal basis of the scheme is a directive adopted in 2001, on Temporary Protection which had been slated for repeal but which had not yet occurred at the date of the invasion and is now on hold. Since then, according to UNHCR, 8,046,560 Ukrainians (or persons who were resident in Ukraine at the relevant date) have been recorded across Europe. In this article we examine the status and rights of TP beneficiaries in the EU and the challenges ahead for them and the EU as the war continues.

KEYWORDS

temporary protection, Ukrainian, refugee, EU migration, integration

1. Introduction: the invasion of Ukraine and the opening of an EU temporary protection scheme for those fleeing

When the Russian Federation invaded Ukraine on 24 February 2022, one of the most immediate and dramatic reactions of the European Union (EU) was to open a special protection scheme for Ukrainians and non-Ukrainians who were resident in the country on the date of the invasion to enter the EU and remain with extensive rights (All EU states are part of the scheme with the exception of Denmark which because of particularities in its constitutional position in the EU opened a parallel national scheme rather than join the EU scheme). The legal basis of the scheme is a directive adopted in 2001, on Temporary Protection¹ which had been slated for repeal but which had not yet occurred at the date of the invasion and is now on hold. Since then, according to UNHCR,² 8,046,560 Ukrainians (or persons who were resident in Ukraine at the relevant date) have been recorded across Europe. Of those, 4,823,326 are recorded under the TP Scheme or parallel schemes (as regards Denmark, non-EU states: Iceland, Norway and Switzerland).³ The largest numbers have been registered in Poland (~1.5 million) and the Czech Republic (1/2 million). The majority of these persons are women and children. The Ukrainian President, Zelensky, in a tweet in March 2022, thanked the EU⁴ for opening the scheme to save his people.

1 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof *OJ L 212, 7.8.2001, p. 12–23*.

2 <https://data.unhcr.org/en/situations/ukraine>

3 The population of Ukraine is approximately 43.8 million and the EU 450 million people.

4 <https://twitter.com/ZelenskyyUa/status/1500222175944577028?ctx=HHwWIMC4IduH7tEpAAAA>

Critical to EU arrivals of refugees from Ukraine has been the fact that the EU lifted the mandatory visa requirement in June 2017, thus their entry in 2022 was not dependent on possession of a valid visa (though this was a requirement for non-Ukrainians who were resident in that country but were EU mandatory visa nationals fleeing the war). The TP scheme, which we will discuss below, provides those who come within its scope with immediate rights which are only evidenced by a state document (in most cases a residence permit but in some a provisional residence permission sticker) for 1 year, which, at the time of writing has been extended for a further year to March 2024. It can be renewed for one more year. There is no provision for renewal of the scheme beyond a maximum of 3 years.

The question we pose here, bearing in mind the direction of the war in Ukraine, is whether the war will continue for more than 3 years and whether or not it does, what should be the correct response of the EU when the TP scheme ends as regards those displaced from Ukraine who still cannot go home. We will address this question from the perspective of EU and international human rights law.

In order to understand the challenge which this war over time presents for the EU, we will examine the question in four parts. First, in the introduction we will spell out the main features of the TP scheme as contained in the directive and the measures taken around it. We will also set out its place in international law. Secondly, in the next section we will examine the Scheme comparing the rights of TP beneficiaries with the Refugee Convention and other measures part of the Common European Asylum System (CEAS). Thirdly we will assess the level of integration of beneficiaries of the Ukraine TP scheme in selected Member States, focusing particularly on labor market and educational integration. In the fourth section we address the question of options at the end of the maximum 3 year period of TP in light of the possibility that Ukraine may still not be a safe country to which to return. In the final section we will set out our conclusions from this investigation.

1.1. The directive

The TP directive has its roots in the civil war which took place in the former Yugoslavia from 1992 to 1995 and the war in Kosovo in 1998–1999. At that time, the EU had no competence for action in respect of asylum, migration or border control, thus the outflow of several million persons fleeing the conflict and their reception in EU states depended exclusively on national law implementing international commitments.⁵ This resulted in very substantial differences in approaches and outcomes. The bombing of Serbia in 1999, in the context of the Kosovo crisis, once again led to a substantial displacement of person from the region, again without a common coordinated response to their reception by EU Member States. Thus, one of the first measures adopted when the EU was granted competence in the field was this directive which bears the hallmarks of an EU response to war in the region. It is the first

5 This competence was only accorded to the Eu institutions in 1999 with the Amsterdam Treaty.

measure adopted under the Common European Asylum System (CEAS) and as such the language used is often inconsistent with later directives under the CEAS. The other measures of the CEAS were subject to a full review and revision in 2011–2013. But the TP Directive was left untouched.

The directive is designed to meet two objectives: first it is a means to accommodate mass influxes of displaced persons (from outside the EU) unable to return to their country; secondly it promotes a balance of efforts among Member States by establishing a minimum standard of treatment for such persons (Article 1). The assumption of the directive is that TP beneficiaries will be prima facie refugees and their access to protection should be based on a collective measure whereby everyone who comes within the scope of a TP scheme automatically obtains the rights set out in it. This assumption is founded on international law in that the treatment of TP beneficiaries must be consistent with Member States obligations under instruments of international law to which they are parties and prohibit discrimination (Preamble 16). The main instruments of international law relevant to TP beneficiaries are the Refugee Convention,⁶ the Convention against Torture, Inhuman and Degrading Treatment,⁷ the Convention against Enforced Disappearances,⁸ and the two International Covenants, one on Civil and Political Rights (ICCPR)⁹ the other on Economic, Social and Cultural Rights (ICESCR).¹⁰ The definition of a refugee is contained in the refugee convention while the obligations on non-refoulement are found in the Refugee Convention, the Convention against Torture and the Convention against Enforced Disappearances. The civil and economic rights of all persons are set out in the ICCPR and ICESCR with the refugee convention rights being *lex specialis* in respect of refugees. The reference in the directive to non-discrimination is directed at ensuring that TP beneficiaries, who are prima facie refugees (though have not been through a refugee determination procedure), are entitled to almost the same rights as refugees who have been through a determination procedure. TP beneficiaries are specifically defined as including refugees under the Refugee Convention but also persons who have fled armed conflict or endemic violence and those at serious risk of generalized violation of their human rights (engaging the Convention against Torture and the Convention against Enforced

6 UN General Assembly (1951). *Convention Relating to the Status of Refugees*. Treaty Series, Vol. 189. United Nations, 137. Available at: <https://www.refworld.org/docid/3be01b964.html> (accessed February 28, 2023).

7 UN General Assembly (1984). *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Treaty Series, Vol. 1465. United Nations, 85. Available online at: <https://www.refworld.org/docid/3ae6b3a94.html> (accessed February 28, 2023).

8 UN General Assembly (2006). *International Convention for the Protection of All Persons from Enforced Disappearance*. Available online at: <https://www.refworld.org/docid/47fdfaeb0.html> (accessed February 28, 2023).

9 UN General Assembly (1966). *International Covenant on Civil and Political Rights*. Treaty Series, Vol. 999. United Nations, 171. Available online at: <https://www.refworld.org/docid/3ae6b3aa0.html> (accessed February 28, 2023).

10 UN General Assembly (1966). *International Covenant on Economic, Social and Cultural Rights*. Treaty Series, vol. 993. United Nations, 3. Available online at: <https://www.refworld.org/docid/3ae6b36c0.html> (accessed February 28, 2023).

Disappearances). This is also the language which would later be used to describe refugees and other beneficiaries of international protection in the Qualification Directive adopted 3 years later. In European regional law, the relevant standards are found in the European Convention on Human Rights (ECHR) article 3, and the EU Charter of Fundamental Rights (the Charter) articles 3, 4, 18, and 19.

The opening of a TP scheme is based on the need to protect national asylum determination procedures from being overwhelmed by the arrival of mass numbers of refugees [Article 2(a)] and does not prejudice refugee status under the Refugee Convention, though it allows Member States to delay determination until the end of the scheme (articles 3, 21, 22, and 23—see below). The opening of a scheme is subject to specific rules engaging all the actors of the EU legislator but giving a special place to the Council (which represents the Member States' Executives directly). The limitation of the duration of a TP scheme is specified in articles 6 and 7 which does not permit extension beyond 3 years.

Chapter III sets out the obligations of Member States toward TP beneficiaries. By designing the directive in this manner defining state obligations to beneficiaries, the legislator gives the beneficiaries rights the acknowledgment of which by the national administrations is only declaratory of their existence and evidence of the state's duty to provide them to those beneficiaries. A quick summary of those rights are as follows: (1) a residence permit or equivalent document/evidence for the duration of the scheme [article 8(1)]; (2) irrespective of the validity of the residence permit/document, the rights set out [article 8(1)(2)]; (3) provision of a document in a language they are likely to understand of the provisions relating to temporary protection article 9); (3) registration of personal data (set out in an annex) (article 10); (4) the right to take employment or self-employment, educational opportunities for adults (with the possibility of a national priority mechanism), vocational training and practical workplace experience, the application of national law on remuneration, access to social security and other conditions of employment (article 12); (5) access to suitable accommodation or if necessary the means to obtain housing, necessary assistance in terms of social welfare and means of subsistence and medical care which must include at least emergency care and essential treatment of illness, including for those with special needs (article 13); (6) those under 18 have a right to education under the same conditions as nationals. For family reunification purposes the directive defines family members as including spouses, unmarried partners, minor unmarried children¹¹ and other close relatives who lived together as part of the family unit at the time of the invasion and who are wholly or mainly dependent on the sponsor [article 15(1)].¹² The family relationship must have existed in

Ukraine and the separation of the family the result of the invasion. Reunited family members are entitled to residence permits under temporary protection [article 15(6)].¹³ Special provisions apply to unaccompanied minors (article 16).

Thereafter the directive sets out the relationship of TP with international protection in articles 17–19). Basically, TP beneficiaries must be entitled to make an asylum application at any time but if the application is not processed by the end of the TP scheme then it must be so determined thereafter. Member State may, however, provide that TP cannot be enjoyed by someone who is seeking asylum and whose application is under consideration. In this case, the reception conditions directive,¹⁴ would apply with lower rights than those available to TP beneficiaries. If, on conclusion of a consideration of an application for asylum, the decision is negative, someone entitled to TP must be permitted to continue to enjoy TP rights (including that of residence) until the end of the scheme notwithstanding the rejection of his or her asylum claim. According to Article 3(3) of the Reception Conditions Directive, that directive does not apply to TP beneficiaries so long as the TP Scheme is still in place.

1.2. The scheme

The Council adopted an implementing decision on 4 March 2022 in accordance with the directive, opening a TP Scheme for

to above or living under his roof in the country whence he comes (article 10). The regulation was replaced by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) *OJ L 158, 30.4.2004, p. 77–123* where article 3(2)(a) replacing article 10, defines these other family members as "any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen..." There is extensive case law from the CJEU on the meaning of dependence as regards other family members under the directive.

13 The provisions on family reunification include a number of limitations and provisions for families who are resident in different Member States. These are not relevant for TP beneficiaries under the Ukraine Scheme as the Member States declared that they would not be applying article 11, which provides for the allocation of TP beneficiaries to specific Member States, thus permitting TP beneficiaries under the scheme free movement within the EU.

14 Now, this is Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) *OJ L 180, 29.6.2013, p. 96–116*; it replaced Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers *OJ L 31, 6.2.2003, p. 18–25*. But at the time of the adoption of the TP directive neither were yet in place.

11 The age limit for unaccompanied minors is 18, thus it would be coherent if the age limit for family reunification with minors is also 18 years of age.

12 This wording follows closely that contain in Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community *OJ L 257, 19.10.1968, p. 2–12* which was in force at the time to Directive was adopted: a duty on states to facilitate the admission of any member of the family not coming within the provisions of paragraph 1 (spouses and minor children) if dependent on the worker referred

Ukraine.¹⁵ After confirming the support of the EU for Ukraine and its disapproval of the Russian invasion which it states seeks to undermine European and global security and stability (preamble 3), the Decision notes that the conflict has implications for the EU, including a high likelihood of migratory pressure. It has regard to the exemption of Ukrainians from mandatory visa requirements,¹⁶ and in light of the experience after the Russian annexation of Crimea, the numbers could be expected to be between 2.5 and 6.5 million persons (UNHCR estimated 4 million at the time). As a result of these forecasts, the Council found that the EU was facing a mass influx of displaced persons unable to return because of Russian military aggression (preambles 6 and 7). The decision welcomes the favorable opinion of UNHCR to the opening of the scheme. The scope of the TP Scheme includes: (1) Ukrainian nationals residing in Ukraine before 24 February 2022; (2) stateless persons and third country nationals with international protection in Ukraine before 24 February 2022; (3) family members of (1) and (2) [article 1(a)-(c)]; (4) third country nationals with a valid permanent residence permit in Ukraine who are unable to return safely and in durable conditions to their country or region of origin (article 2). Thereafter Member States may apply the scheme to other persons including third country nationals who were residing legally in Ukraine at the relevant date who are unable to return in safe and durable conditions to their country of origin [article 2(3)].

In a declaration by the Member States issued with the Council Decision, the Member States undertook that they would not apply article 11 of the directive which allocates TP beneficiaries to residence in specific states as determined by criteria set out therein.¹⁷ The purpose of this non-application of the residence rules was to alleviate the pressure on the Member States experiencing mass arrivals by allowing TP beneficiaries to move to other Member States at will. We will examine the implications of this further in the next section.

1.3. The border

As mentioned above, the EU lifted mandatory visa requirements for Ukrainians in June 2017, a response to Russia's annexation of Crimea. This meant that Ukrainian nationals were able to enter the EU with their (biometric) passports for short stays of 90 days out of every 180, provided they fulfilled the conditions of evidence of resources for their stay and a legitimate interest (and do not constitute a danger to public policy, health or security). This 90 day rule is found in the Schengen Borders Code,¹⁸ which applies to 27 states, (excluding the EU states: Bulgaria, Cyprus, Ireland and

Romania) but including the non-EU states: Iceland, Liechtenstein, Norway and Switzerland. Once within the Schengen area, anyone who has been admitted as a visitor under the Schengen rules is entitled to travel to any other Schengen state as part of the 90 days permitted. The abolition of intra-Schengen state border controls has simplified dramatically intra-Schengen movement including by third country nationals like Ukrainians. Thereafter, those Ukrainians who sought to stay longer and to exercise economic activities had to seek residence permits mainly in accordance with national law. According to Eurostat, Ukrainians were issued first residence permits in the EU at the rate of about 750,000 in 2019, 600,000 in 2020 and almost 900,000 in 2021.¹⁹ According to Eurostat, 1.57 million Ukrainians were living in the EU at the end of 2021.²⁰ The most important state issuing these residence permits was Poland where according to academic studies they have had a very positive impact on the labor market (Strzelecki et al., 2022).

Thus, when the invasion took place, many Ukrainians were already resident in the EU, working and with housing. This means that many of those who fled after the invasion have someone they know or a family member living already in the EU. While over 650,000 of these residents were living in Poland, Italy had over 230,000 residents and Portugal and Spain accounted for over 100,000 (see text footnote 13). Many Ukrainians fleeing the invasion may have had links to states other than Poland, and the UNHCR statistics indicate that indeed many went to other countries in Europe.²¹

As mentioned above, the decision of the Member States not to apply a residence requirement on TP beneficiaries meant that once they entered the EU they could choose where they wanted to go and could go there lawfully within their first 90 days within the Schengen area. As the rights under the directive are declaratory not constitutive, these people were (in law) entitled to those rights in every Member State through which they passed. However, according to the Commission's guidelines TP beneficiaries need to notify the national authorities of their exercise of TP status on the national territory within that 90 day period. Many Member States simplified the task by making available specialized personnel with the requisite language skills to assist TP beneficiaries at railways stations and other entry points. Where a TP beneficiary notified his or her presence in one Member State but then decided to move to another the only requirement was to de-register in the first Member State and re-register in the second or subsequent state. In this way, Ukrainians were given the right to what the EU calls secondary movement, to move from one Member State to another at will and take up residence there. They are the only group of third country nationals (outside of family members of mobile EU citizens) with such a right. Bearing in mind the importance of

15 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 ST/6846/2022/INIT OJ L 71, 4.3.2022, p. 1–6.

16 Annex II, Regulation 2018/1806.

17 See recital 15 of the Council Implementing Decision of 4 March 2022.

18 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement

of persons across borders (Schengen Borders Code) (codification) OJ L 77, 23.3.2016, p. 1–52.

19 https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Residence_permits_-_statistics_on_first_permits_issued_during_the_year&oldid=584076#First_residence_permits_by_citizenship

20 https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Ukrainian_citizens_in_the_EU#Ukrainian_citizens_authorised_to_stay_in_the_EU

21 <https://data.unhcr.org/en/situations/ukraine>

secondary movement in the EU legislators debates on the New Pact for Migration and Asylum, evidence from the authorization of secondary movement in the TP Ukraine Scheme is of great importance before any new efforts to prevent secondary movement among asylum seekers are adopted.

In order to assist Member State authorities to apply correctly the TP scheme, the Commission issues guidelines on external border management to facilitate crossing at EU-Ukraine borders 2 days before the Council decision opening the scheme but in anticipation of it.²² Later in March 2022, it issued operational guidelines for the implementation of the Scheme, seeking to answer all the questions which were arising in practice for Member State authorities.²³ Wherever the directive was unclear or left options open to the Member States, the Commission strongly recommended a generous exercise of discretion in favor of those claiming TP protection, for instance calling on Member States to include in the scheme Ukrainians who may have fled before 24 February 2022.²⁴

Other than bottlenecks at EU-Ukraine crossing points, initial arrivals of Ukrainians while fairly chaotic has generally been facilitated (De Coninck, 2022). But the treatment of stateless persons and third country nationals who had been living in Ukraine was much criticized for the lack of facilitation provided to these persons also potentially within the scope of the scheme (Costello and Foster, 2022).

Now that the first year of the TP scheme has ended and the Scheme has been extended, it is important to examine what the future may bring for TP beneficiaries in the EU and what lessons the EU has learned from its first experience of using the TP directive.

2. Implementation of the TP scheme

The opening of the TP scheme had immediate effect and so Member States started applying it in accordance with their national laws transposing the directive, the final date for which was 31 December 2022.²⁵ Not surprisingly, different Member States took different approaches to their duties. We have set out in the introduction a short summary of the rights accorded under the TP directive. In this section we will examine the legal foundations for those rights through a comparison of:

- The international standards contained in the Refugee Convention;

22 C(2022) 1404 final, 2.3.2022.

23 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01 C/2022/1806 OJ C 126I, 21.3.2022, p. 1–16.

24 Available online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022XC0321%2803%29&qid=1647940863274> (accessed March 4, 2023).

25 See here for information on national implementing measures: <https://eur-lex.europa.eu/legal-content/en/NIM/?uri=celex:32001L0055>.

- The EU qualification directive²⁶ which, inter alia, transposes into EU law the rights contained in the refugee convention together with variations for people who are deemed not to be refugees but still entitled to non-refoulement under other international (and EU) obligations, as set out above (the second group is called beneficiaries of subsidiary protection); and
- The reception conditions directive²⁷ which applies to people who claim to be refugees but whose application has yet to be determined by the authorities.

The two main options available to Member States in implementing the TP rights were (a) to rely exclusive on the refugee convention on the ground that temporary protection beneficiaries are prima facie refugees and so should be assimilated into this group as regards rights which means reliance on international law commitments; this argument is supported by the UNHCR interpretation of the refugee convention that an individual is a refugee from the time he or she fulfills the conditions of the Article 1 of the convention irrespective of whether national authorities have completed an examination of the individual circumstances;²⁸ (b) to rely exclusively on the qualification directive on the basis that beneficiaries of temporary protection come within one of the two groups of beneficiaries of international protection set out in that directive and would be entitled to these rights but for the incapacity of state authorities to determine their applications on account of the mass influx. This choice means reliance on EU law which transposes international law on refugees' rights. There has been some discussion as to whether there is a third option open to Member States that is to provide rights to temporary protection beneficiaries as if they were asylum seekers under the reception conditions directive²⁹ as the state authorities had not (or not yet) made an individual assessment of their claims to be beneficiaries of international protection. In our opinion this is not a lawful option as the rights of asylum seekers are far below those accorded to TP beneficiaries under the directive. The Commission guidelines do not deal with this question of the correct level of rights though the European Council on Refugees and Exiles, a European NGO,

26 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) OJ L 337, 20.12.2011, p. 9–26.

27 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) OJ L 337, 20.12.2011, p. 9–26.

28 <https://www.unhcr.org/publications/legal/5ddfc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>

29 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L 180, 29.6.2013, p. 96–116.

calls for the level of rights to be that of the qualification directive (effectively the best set of rights of all the options).³⁰

One of the key legal issues is the application of the principle of non-discrimination contained in preamble 16 of the TP directive. It states that regarding the treatment of temporary protection beneficiaries, states are bound by obligations under instruments of international law (i.e., the international conventions) which prohibit discrimination. What is missing here is any indication of what discrimination in comparison with whom is within the scope. These are possible options: recognized refugees (the ECRE position), asylum seekers, third country nationals lawfully within the territory or citizens of the state. In other words, regardless of a persons immigration status, so long as he or she fulfills the conditions of the Scheme, he or she can enjoy temporary protection and the accompanying rights. The refugee convention, which is the most relevant international standard for the purposes of preamble 16, sets different standards for different rights, notwithstanding its general non-discrimination provision in article 3 which requires states to apply the provisions of the convention to refugees without discrimination as to race, religion or country of origin. This means that the fall-back position, where no specific non-discrimination comparator is provided, is the prohibition of discrimination among refugees where the ground is race, religion or country of origin (Zimmermann et al., 2011). A very compelling argument is made by Clark and Crépeau (1999) that the intersection of the refugee convention with international human rights law means that the non-discrimination rights in the later are also applicable, a position to which we adhere but which for our purposes here we will not repeat.

We will examine here the relevant standards regarding seven rights from the perspective of the three possibilities open to Member States—the refugee convention, the EU qualification directive, or the EU reception conditions standards. The subject matters are: free movement, housing, welfare, healthcare, education, access to employment and family reunification. Starting with free movement, the refugee convention requires states to accord all refugees lawfully on their territory the right to choose their place of residence and to move freely within its territory (with specific exceptions) (article 26). There is no specific non-discrimination provision here so the general rule applies. The qualification directive requires Member States to provide free movement to beneficiaries of international protection within their territory under the same conditions and restrictions as are applicable to other third country nationals legally resident there (article 33). The reception conditions directive, however, provides for detention of asylum seekers although it states that applicants may be detained only under very clearly defined exceptional circumstances laid down in the directive and subject to the principle of necessity and proportionality with regard to both the manner and the purpose of such detention (preamble 15 and article 8).³¹ There is no non-discrimination comparator. The TP directive

does not cover free movement and the Commission's guidelines on free movement only cover movement into the EU and across EU internal borders. Article 11 of the directive, had it been applied, would have limited free movement for beneficiaries to a single Member State as determined by EU rules. While there are rules in all three regimes regarding exclusion from protection on security grounds, until now, the Ukraine TP Scheme has not had to deal with these issues (Simeon, 2020).

As regards housing, the refugee convention states that refugees lawfully within the territory shall be accorded treatment as favorable as possible and in any event not less favorable than that accorded to aliens generally in the same circumstances (article 21). The qualification directive requires states to ensure that all beneficiaries of international protection have access to accommodation under equivalent conditions as other third country nationals legally resident in the state (article 32). These two provisions are close in that in both cases the comparator is legally resident non-nationals (aliens for the refugee convention and third country nationals for the qualification directive). The reception conditions directive, in addition to providing for detention, allows housing to be made available in premises at the border or in transit zones, accommodation centers (which guarantee an adequate standard of living) or private houses, flats, hotels or other premises adapted for housing applicants [article 18(1)]. There is no non-discrimination right and thus no comparator here. Further, if asylum seekers misbehave the directive allows states to reduce their reception conditions including access to housing (article 20, though this has been limited by the caselaw of the Court of Justice). The standard of housing is obviously inferior to that applicable to aliens or third country nationals legally resident other than those who

(b) In order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;

(c) In order to decide, in the context of a procedure, on the applicant's right to enter the territory;

(d) When he or she is detained subject to a return procedure under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (9), in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

(e) When protection of national security or public order so requires;

(f) In accordance with Article 28 of 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 (10).

The grounds for detention shall be laid down in national law.

4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law."

30 <https://ecre.org/ecre-recommendations-the-eus-response-to-displacement-from-ukraine/>

31 Article 8 (3) Reception Conditions Directive: "An applicant may be detained only:

(a) In order to determine or verify his or her identity or nationality;

are indigent. The TP directive simply provides that states shall ensure that beneficiaries have access to suitable accommodation or if necessary the means to obtain it [article 13(1)] leaving the possibility of arguments regarding standards under which regime (see also [Jesse, 2022](#)).

Welfare is covered in all the measures. Starting with the refugee convention, article 23 on public relief requires states to accord refugees the same treatment with respect to public relief and assistance as is accorded to their own nationals. This is the first time the non-discrimination comparator has been own nationals which is the highest level of equal treatment. The qualification directive follows the refugee convention requiring the provision of social assistance as provided to nationals of the state [article 29(1)]. However, for beneficiaries of subsidiary protection, social assistance can be limited to core benefits which are defined as (at least) minimum income support, assistance in the case of illness or pregnancy and parental assistance but these core benefits must be provided on the basis of non-discrimination with own nationals [article 29(2)]. The reception conditions directive makes no reference to social assistance or welfare but states that states shall ensure material reception conditions are provided which fulfill an adequate standard of living for the applicants and guarantees their subsistence, protecting their physical and mental health (article 17). There is no non-discrimination requirement. The TP directive requires states to make available to beneficiaries necessary assistance in terms of social welfare and means of subsistence [article 13(2)]. There is no non-discrimination provision (see also [Ociepa-Kicińska and Gorzałczyńska-Koczkodaj, 2022](#)).

Healthcare is not covered in the refugee convention (though [Costello and Foster, 2022](#) argue that this can be inferred from other international human rights conventions). The qualification directive requires states to provide access to healthcare to all beneficiaries of international protection under the same eligibility conditions as own nationals (article 30). The reception conditions directive requires the provision of healthcare which covers emergency care and essential treatment of illness and of serious mental disorders (article 19). Beneficiaries of temporary protection are entitled to medical care which at least includes emergency care and essential treatment of illness [article 13(2)], a standard which echoes the reception conditions directive rather than its qualification counterpart. There is no non-discrimination requirement. Nonetheless, access to health care has been a substantial issue for Ukrainian TP beneficiaries ([Spiegel, 2022](#)).

Education is covered by all the measures compared here. The refugee convention requires equal treatment with own nationals in access to elementary education for refugees [article 22(1)]. As regards other education states must provide treatment as favorable as possible and in any event not less favorable than that accorded to aliens in respect to education other than elementary including access to studies, recognition of certificates, diplomas and degrees and remission of fees/scholarships [article 22(2)]. The qualification directive requires equal treatment with own nationals regarding access to all education for minors and equal treatment with third country nationals for access of adults to the general education system, training and re-training [article 27(2)]. It also requires state to provide access for adult beneficiaries of international protection to vocational training, upgrading of skills

etc. [article 26(2)]. As regards recognition of qualifications, states must ensure equal treatment with own nationals for beneficiaries of international protection (both refugees and beneficiaries of subsidiary protection) in the context of recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications and to endeavor to facilitate those who cannot provide documentary evidence of qualifications to appropriate schemes of assessment, validation and accreditation (article 28). Under the reception conditions directive minor children, both of applicants and applicants themselves, are entitled to access to education under the same conditions as own nationals, with the addition that preparatory classes, including language classes must be provided to minors to facilitate their access to and participation in the education system. This education may be provided in accommodation centers [article 14(1)]. Access to secondary education must be continued even after a minor reaches majority. However, there is a let out where access to the education system is not possible due to the specific situation of the minor in which case the minor must have access to other educational arrangements [article 14(3)]. The TP directive requires for minors under 18 access to the educational system under the same conditions as own nationals though this may be confined to the state education system (article 14) as well as educational opportunities for adults, vocational training and practical workplace experience without a non-discrimination provision (article 12). Here again, the TP directive is closer to the refugee convention than to the reception conditions alternative.

Next, as regards access to employment, the refugee convention requires access for refugees to wage-earning employment under the most favorable treatment accorded to resident aliens in the same circumstances (article 17). However, restrictive measures imposed on aliens to protect that national labor market cannot be applied to a refugee who has completed 3 years residence in the state, has a spouse national of the state of residence or one or more children nationals of the state of residence [article 17(2)]. Additionally, states must give sympathetic consideration to assimilate the rights of refugees regarding wage-earning employment to those of nationals [article 17(3)]. As regards labor rights, the convention requires states to accord refugees the same treatment as nationals in respect of remuneration, family allowances, hours of work, overtime, paid holidays, restrictions on work, minimum age, apprenticeships and training, women and young people's work and collective bargaining. Self-employment in the areas of agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies is to be accorded to refugees on the basis of non-discrimination with aliens in similar circumstances (article 18). Regarding self-employment, the convention only requires states to accord refugees who hold nationally recognized diplomas treatment as favorable as possible and, in any event, no less favorable than that accorded to aliens to practice a liberal profession (article 19). The qualification directive requires states to authorize beneficiaries of international protection to engage in employment and self-employment subject to generally applicable rules and to apply the general rules of remuneration, access to social security systems to them (article 26). Under the reception conditions regime, applicants have access to the labor market with a maximum permitted delay of 9

months after the application has been made, so long as there has been no first instance decision [article 15(1)]. While that access to the labor market must be effective it can be subject to national rules, including priority for EU and EEA nationals and legally residing third country nationals and there is no non-discrimination requirement [article 15(2)]. States may allow access to vocational training but if it is related to an employment contract, the rules of article 15 apply (article 16). Under the temporary protection directive, states are required to authorize employment or self-employment subject to a priority of EU and EEA nationals and legally resident third country nationals (article 12).

Finally, as regards family reunification, the refugee convention is silent on this matter though the Final Act adopting the convention calls on states to provide for family reunification of refugees where the head of the family fulfills the conditions or where the refugees in an unaccompanied minor. The qualification directive provides that family unity should be maintained (article 23) and some rights for family members but the main provisions on admission and residence of family members of refugees are found in directive 2003/86 on family reunification (articles 9–15). The category includes spouses and minor children with a specific optional provision for the admission of other family members dependent on the refugee. Unaccompanied minors are entitled to family reunification with first degree family members in the ascending line or of his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced. The family relationship had to be in existence before the flight and various requirements regarding deadlines for submission of applications can be applied. The reception conditions directive defines family members as spouses and unmarried partners, minor unmarried children and for unaccompanied minors, the father, mother or another adult responsible for the applicant [article 2(c)]. The directive applied a somewhat complicated take charge provision to determine where families should be reunited. The temporary protection directive provides for reunification of spouses and unmarried partners, minor unmarried children and other close relatives who lived together as part of the family unit at the time of the events leading to the mass influx, and who were wholly or mainly dependent on the sponsor at the time [article 15(b)]. The family relationship must already have existed in the country of origin and the family members were separated due to circumstances surrounding the mass influx,

From this review of seven area of particular importance to TP beneficiaries, it is evident that the directive is less clear than might be wished regarding the regime of equal treatment and with whom (own nationals or resident aliens/third country nationals). It is farthest from the reception conditions directive, where there is no equal treatment either with own nationals or resident aliens/third country nationals. But both the refugee convention and the qualification directive are much more specific about the rights and how the non-discrimination requirement applies. An inclusive implementation of the TP directive, as proposed by the Commission in its guidelines would require states to take an inclusive approach and apply the highest standards of the refugee convention and qualification directive.

The argument that the TP directive is a measure to protect national administrations from being overburdened by a mass influx of refugees favors an interpretation of rights in accordance with the refugee convention and qualification directive (recital 10 of the directive explicitly refers to the refugee convention), rather than the lower rights of the reception conditions directive. Similarly, it must be born in mind that the reception conditions directive was adopted years later the temporary protection one and with the clear intention to have a far lower level of rights at or (just above the minimum of the ECHR) cannot be a point of reference for interpretation of temporary protection directive rights other than in a negative sense, that is to say that the temporary protection rights intentionally are better.

3. Integration into the labor force and education for TP beneficiaries

According to a January 2023 report from the OECD³² notwithstanding some variations in statistics on Ukrainian TP beneficiaries, at least 70% of the adults are women and 56% of them have completed tertiary degrees—a Masters or higher (compared to 43% of Ukrainian men). Some studies indicate even higher rates of tertiary education among these women, up to and over 70% (see text footnote 33). This high level of educational achievement is consistent across the EU with some variations in some Member States. This is also a higher rate of tertiary education among TP beneficiaries than among the Ukrainian population as a whole. The two biggest professional groups of TP beneficiaries in the EU are health and education. Children account for 41% of the TP population, less than one per adult. Person over 65 form between 4 and 6% of the TP beneficiary population in the EU.

According to the report, most of these TP beneficiaries have started to settle in their host societies and are actively engaged with labor market integration. This proportion has increased since the prospects of an early end to the war have dimmed. On the basis of the statistics, the EU labor force may be increased by 0.5% as a result of the influx. As regards language skills, often an important factor in labor market integration, for those TP beneficiaries who arrived by June 2022, 44% speak English well or very well. Only a small share of them, however, speak other European languages. For example, only 4% speak good or very good German and 63% self-declare that before arrival in Germany they had no knowledge of the language. The lack of language skills is affecting women more than men (71% as opposed to 63%) mainly because of the sectors where they are finding work where women are more likely to find jobs in the service sector. Language skills are greater in countries with official Slavic languages as the transition from Ukrainian to a Slavic language is simpler.

Before departure from Ukraine, 77% of the beneficiaries were in employment, the majority in full time jobs and a fifth had been self-employed or entrepreneurs. The majority of TP beneficiaries declared that they had worked in intellectual or scientific jobs before their flight.

³² <https://www.oecd-ilibrary.org/docserver/c7e694aa-en.pdf?expires=1676016648&id=id&accname=guest&checksum=E6BBA2FE1F8FDDEA7F8440D588B82754>

According to the OECD study, the integration of Ukrainian TP beneficiaries into the EU labor force has been faster than for other groups. This has been much aided by immediate access to the labor market for them (as opposed to delays and waiting periods for other refugees). At the time of the collection of the evidence for the report, the OECD calculated that over 40% of adult TP beneficiaries were already in work, where both short term and informal employment is included. The percentage, according to the study is rising rapidly as language skills are acquired and TP beneficiaries adjust to the labor market opportunities and requirements in their host state. The highest level of labor market integration reported is in the Netherlands where the study suggests that 40,000 adult TP beneficiaries out of 55,000 are already in work.

For the moment, according to the study, there is still an unfavorable balance between early labor market entry and sustainable employment commensurate with the TP beneficiaries skills. Many are working in low skilled occupations in accommodation, hospitality and food services—jobs which are easily accessible but do not match the skills of the beneficiaries, the problem of skills mismatch. Many Member States have put at the disposal of TP beneficiaries specific services to assist them to find employment and the private sector has responded with a variety of on line sites (not always reliable) offering to match offers and demand. Other Member States had targeted TP beneficiaries with information and assistance to set up self-employed and entrepreneurial activities often with an accent on links with Ukraine and knowledge of markets there (e.g., Lithuania).

Many Member States are also addressing issue of recognition of diplomas, a subject which is particularly important for TP beneficiaries whose qualifications and skills are in healthcare and education, both highly-regulated professional areas. Germany has been particularly active in this regards providing rapid initial assessment of vocational qualifications, work experience and language skills through the Chamber of Commerce and Industry and the Chamber of Trade. Portugal has applied a case-by-case assessment with the power to waive the need to hand in diplomas, certificates or other academic documentation. Spain and Hungary have waived administrative fees for recognition procedures for these beneficiaries. Among the factors which the report highlights as an aid to TP beneficiaries has been the existence of a large Ukrainian diaspora in many EU countries whose members are already integrated into the local labor markets and can assist the newcomers with practical experience of how to enter.

The OECD report highlights a number of issues relevant to labor market integration of TP beneficiaries. For those who have young children (<50%), accessible child-care has been noted as a problem. Secondly the skills mismatch and underemployment is clearly a feature of the rapid labor market integration of Ukrainian TP beneficiaries. If the example of EU enlargement in 2004 in particular is relevant, this was definitely a feature of movement of skilled workers from the EU8 to the EU 15 but gradually diminished as the effect of EU legislation on mutual recognition of diplomas³³ enabled EU8 workers to establish their credentials and

their language skills improved. Thirdly, language skills generally are a key factor to improving labor market integration, but in order to encourage TP beneficiaries to invest in these skills, security of residence is key. Fourthly, for those who have accreditation issues or skills gaps, bridging courses and up-skilling measures are valuable mechanisms to overcome these. In this regard, the OECD stresses that early assessment accompanied by remedial action reduces the risks of de-skilling and waste of important educational assets.

As regards children within the scope of the Scheme, access to education is critical. EU law requires that newly arrived students register in the host country's schools within 3 months of moving according to an OECD report on education for children under the Scheme issued in August 2022.³⁴ It notes that as the situations of refugees are by their nature unstable, accommodation needs to be made for these children which takes into account the fact that their futures may be in Ukraine or in the host state. Thus, flexible pathways need to be developed. This may result in students both following the national curriculum of the host state and, in practice, also schooling on line in the Ukrainian school system.

In December 2022, UNESCO issued a report on mapping host countries' education responses to the influx of Ukrainian students.³⁵ As minors make up ~41% of TP beneficiaries, their access to education in particular from September 2022 when the new school year began was a matter of much concern. The UNESCO report indicates that there has been a very substantial effort by Member States, with detailed information by Member State. The integration of Ukrainian children but also teachers and educational personnel has been one of the challenges addressed over the summer. One of the first issues was language skills. Here many Member states have extensive experience of providing language training in education settings for third country nationals who have arrived without these skills. The need to roll out these capacities across all states has been challenging. According to the report, Slovakia lists sources to learn basic Ukrainian to their teachers while also providing examples of communication cards and games to use in class. Czechia lists translation applications to use, sources to learn the language and provides for the first days in class an "NPI First Rescue Box" methodology for communication. Czech teachers can use interpreting services through NPI for more complex communication struggles.

Coping in schools with minors who have suffered trauma has also been a substantial issue. The report provides examples of practices from Member States to deal with this such as the provision of links and initiatives to support teachers in dealing with children who have suffered trauma (e.g., Austria, Denmark, Germany, Greece). Croatia, Czechia, and Slovakia have handbooks on how to attend to pupils' mental health, prevent conflict in classes, and talk about sensitive topics. To manage the extra staffed need to deal with language barrier issues, for example, Poland set up additional learning centers and facilitated

33 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (Text with EEA relevance) *OJ L 255, 30.9.2005, p. 22–142*.

34 Available online at: <https://www.oecd.org/ukraine-hub/policy-responses/supporting-refugee-students-from-ukraine-in-host-countries-b02bcaa7/> (accessed February 28, 2023).

35 <https://www.unesco.org/es/node/66235>

the employment of Ukrainian citizens as teacher assistants. To overcome financial obstacles, both the Commission and a number of Member States have been making available extra funding to states in difficulty.

UNICEF, on the other hand, reports a less positive picture. According to a report from 24 January 2023, it estimates 2 out of 3 Ukrainian refugee children not currently enrolled in the host country's education system. The factors behind this are various, but UNICEF considers that stretched education capacities and the fact that, at the start of the crisis and throughout the summer, many refugee families opted for online learning, instead of attending local schools, as they hoped to be able to return home quickly are primary.³⁶ UNICEF is currently calling for prioritization of the integration of Ukrainian refugee children into national education systems across education levels, especially early childhood education and primary education—with qualified teachers, learning materials and available spaces to support their face-to-face learning, development, and wellbeing.

What is clear from this picture of labor market and educational integration of TP beneficiaries into the EU is that Member States are applying the TP directive fairly well and beneficiaries have access to immediate employment and children to schooling (with some provisos). The terminology of integration is used by all the EU and international institutions to discuss this aspect of the situation of TP beneficiaries. Integration has long term impacts. As people become more integrated in a host state, their dreams and choices for the future are modified. While for many people the return home will remain a primary factor, but for others retaining the benefit of skills, education and experience valuable in the host state may also be a factor to take into account for the future.

A number of things become clear from the available information about TP beneficiaries, employment and education. The first is that assuming the information about qualifications is correct, many TP beneficiaries may also qualify for work permits under EU or national law on highly skilled migrants. Secondly, assuming that TP beneficiaries are able to obtain recognition of their qualifications or supplement them with national diplomas, they are unlikely to remain for long in low skilled employment. However, investment in upgrading skills and qualifications may require certainty about the value of the investment by the individual, which requires confidence in security of residence. As regards education, it seems that many TP families face difficult decisions about the education of their children. Return to Ukraine means that remaining within the Ukrainian education system is important. But the longer families live in host states, the more important it becomes for these children to integrate into the host Member State school system, leaving aside the legal requirement to do so. The long term future of these children rests in the decisions which they and their families are taking now.

36 <https://www.unicef.org/press-releases/11-months-war-ukraine-have-disrupted-education-more-five-million-children>

4. How does the temporary protections end and what happens next?

Basically, temporary protection ends *collectively* for all protected persons from Ukraine at the same time, either automatically when the maximum duration of 3 years has been reached on 4 March 2025 or at any time earlier by a Decision of the Council on a proposal of the Commission [Article 6(1)(a) and (b)]. The Council could make such a decision when the war in Ukraine would end before 4 March 2025.

Before the general TP Scheme has come to an end, temporary protection may end in *individual* cases on four different grounds. Firstly, because the protected person has exercised his or her right to voluntary returns to Ukraine before the end of the Scheme other than for a short visit. In those cases, the host Member State should give favorable consideration to a request for return to that Member State [article 21(2)], especially, when the person is still within the personal scope of the Scheme. According to data from the Dutch Statistical Agency almost 20% of the more than 100,000 persons from Ukraine registered since March 2022 had left the Netherlands by November 2022. They either returned to Ukraine or moved to elsewhere inside or outside the EU. Where they returned to Ukraine the provision applies, where they have moved elsewhere in the EU this will be in exercise of their right to secondary movement and they remain within the scope of the Scheme. Where they have moved to a third country outside the EU they move outside the scope of the Scheme.

Member States may exclude a person from temporary protection for having committed one of the very serious crimes listed in article 28. Thirdly, an exclusion decision could be based on the ground that the person is not (or no longer) covered by the article 2(2) or 2(3) of the Council Implementing Decision due to being able to return in safe and durable conditions to his or her country or region of origin (this is relevant for non-Ukrainian TP beneficiaries). Finally, a Member State may exclude a person on the basis that false information was provided at the registration, since Union law does not protect rights obtained by fraudulent behavior. In all such cases the person excluded from protection is entitled to a reasoned written decision (article 41 EU Charter) an effective judicial remedy under article 29 of the directive and article 47 EU Charter. In the rest of this section we will not deal with these individual grounds, but focus on what happens to the overwhelming majority of persons for which the protection will end collectively.

4.1. Voluntary or forced return?

Chapter V of the directive, according to its title, deals with return and measures after temporary protection had ended. The chapter provides for rules on voluntary return (article 21), on forced return (article 22) and on prolonged residence and reception condition in exceptional cases related to health conditions of formerly protected persons or in order to allow their children to complete the current school period (article 23). All three alternatives are based on the

assumption that the formerly protected persons will leave the host Member State. However, other rules in the directive foresee that at least part of the former TP beneficiaries could remain in the host Member State after the end of the temporary protection.

4.2. Other possibilities to remain in the host Member State

The legislator, apparently, was aware that the aforementioned rules of the directive cover only part of the alternatives available to ex-protected persons and to Member States at the end of a TP Scheme. Hence, Chapter V of the directive starts with the general rule in article 20 that when the temporary protection ends “the general law on protection and on aliens in the Member States shall apply, without prejudice to articles 21, 22, and 23.” Most probably the European Commission while drafting the proposal and Member States during the negotiations in the Council with the term “general law” had in mind international law and the national law of Member States. This is supported by the fact that the directive at several places makes reference to the Refugee Convention, to non-refoulement and to human rights and fundamental freedoms.³⁷

At the time of adoption of the directive in July 2001 the Council had not yet adopted any instrument on migration or asylum of third-country nationals yet. Today, a series of EU migration and asylum instruments are in force and are part of the “general law” in force in Member States. As a consequence, the relevance of EU law increased and the room for national law has decreased. This is most evident in the area of asylum, but it applies to the EU migration directives as well.

4.3. Asylum seeker status and international protection

According to article 17(1) of the directive, persons enjoying temporary protection must be able to lodge an application for asylum at any time. Once such application is filed, the Dublin III Regulation³⁸ determines which Member State is responsible for dealing with the application with the additional rule of Article 18 TPD making the Member State which accepted the transfer of the TP beneficiary to its territory responsible. The processing of the asylum application today is governed by the Asylum Procedures Directive. In case a Member State has used the possibility of Article 19(1) TPD to provide that temporary protection rights “may not be enjoyed concurrently with the status of asylum

seeker while the applications are under consideration”, the status of the applicant during the asylum procedure will be governed by the Reception Conditions Directive. Above we explained that the rights of an asylum seekers to accommodation, employment, social security, education and family reunification under the latter directive are considerably lower/limited in comparison with those on the basis of the TPD. In 2001 the Union legislator could not have been aware that these differences would appear, since the first Reception Conditions Directive was adopted only in 2003.³⁹

If no final decision on that asylum application was made at the time the temporary protection regime ends, the processing of that application should be resumed and completed [article 17(2)]. This implies that during the remaining duration of the procedure and the rules of the Asylum Procedure Directive and the Reception Conditions Directive are also applicable and the ex-TP beneficiaries would be treated as asylum seekers. In case the asylum application was completed during the TP Scheme and refugee status or subsidiary protection was granted, the Qualification Directive will continue to apply to that third-country national automatically at the end of the TP Scheme [article 19(2)]. The directive is part and parcel of the Common European Asylum System, including where the formerly protected person applies for asylum after the end of the TP Scheme.

4.4. A new role for the legal migration directives?

When the TP Scheme comes to an end, many protected persons will probably decide to return to Ukraine, to contribute to the rebuilding of the country after the war and to try to resume their live there to the extent possible. Others may prefer to stay in the host Member State or another Member State for a myriad of different reasons generally governing the behavior of migrants: a good job, better prospects for the children, completion of a study, a new family relationship, the home or the city or both being destroyed, nowhere to go in the country of origin.

The experience of the labor migration to the original six EEC-Member States in the 1960s and 1970s from neighboring countries like Spain, Portugal, Greece and from more distant countries as Turkey and Morocco is that the majority of those immigrants after a few years in Western Europe returned to their country of origin. The rate of return further increased, after the neighboring countries of origin became EU Member States and free movement rules granted to possibility to come back to the host Member State if the return to the country of origin was unsuccessful. This also applied to many who fled civil war in the former Yugoslavia in the 1990s. The possibility to make (long) exploratory visits without losing the protection status in the host country also stimulated return. The relevant provision in article 21(1) reflects that experience: “The Member State shall ensure that the decision of those persons to return is taken in full knowledge of the facts. The Member States

37 Article 2 (b) and (e), Article 3(1) and (2), Article 6(2) and recital 10.

38 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) *OJ L 180, 29.6.2013, p. 31–59*.

39 Directive 2003/9.

may provide for exploratory visits.⁴⁰ The possibility of Ukraine citizens to enter and travel visa-free to and in the Schengen area will support the return movement. The long-term prospect of accession of Ukraine to the EU may contribute as well.

4.5. Current exclusion of TP beneficiaries from the legal migration directives

Currently, seven migration directives are in force, two of them are recast of early directives adopted after 2003. All seven migration directives explicitly or implicitly exclude TP beneficiaries from their personal scope. Article 3(2)(b) Family Reunification Directive provides that this directive shall not apply where the sponsor is: “authorised to reside in a Member State on the basis of temporary protection or applying for authorisation to reside on that basis and awaiting a decision on his status”. Similar wording in article 3(2)(b) of the Long-term Residents Directive and article 3(2)(f) of the Single Permit Directive exclude all third-country nationals with TP status from the coverage of those two directives. The more recent recast Students and Researchers Directive 2016/901 and the recast Blue Card Directive 2021/1883 both in article 3(2)(a) exclude from their personal scope third-country nationals those “who are beneficiaries of temporary protection in accordance with Council Directive 2001/55/EC (23) in a Member State”. Third-country nationals with TP status are implicitly excluded from the scope of the two directives adopted in 2014: the Seasonal Workers Directive 2014/36 does not apply to third-country nationals who at the time of application reside in the territory of a Member State⁴¹ and the ICT-Directive 2014/66 only applies to third-country nationals who reside outside the territory of the Member States at the time of application and apply to be admitted as an intra-corporate transfer as managers, specialists or trainee employees.⁴²

4.6. Recast of the LTR and the SPD

Two months after the second Russian invasion in Ukraine of 24 February 2022 the Commission presented proposals for the recast of the Single Permit Directive and the LTR-Directive.⁴³ The position TP beneficiaries is mentioned in the latter recast at one point only. In both proposals their current exclusion is left unchanged. In the proposal for the *recast of*

the Single Permit Directive the Commission proposes to delete the clause excluding beneficiaries of protection based on national law or practice in article 3(2)(h) SPD. Some Member States expressed disagreement with this proposal. In February 2023, the Swedish Presidency summarizes its position on this issue as follows:

“Member States who wish to broaden the scope of the Single Permit Directive and make it more inclusive are therefore welcome to clarify their position at the IMEX meeting. If there is broad support for such a change, the Presidency could present a proposal aimed at including beneficiaries of protection in accordance with national law, international obligations or the practice of a Member State in the scope, but still excluding applicants for such protection.”⁴⁴

Again there is no mention of the millions of TP beneficiaries from Ukraine actually employed in the EU. The Presidency’s suggestion would leave their explicit exclusion in article 3(2)(f) recast SPD intact. In the November 2022 draft report of the European Parliament’s rapporteur, Javier Moreno Sánchez, it is proposed to delete this exclusionary clause.⁴⁵ The European Parliament’s rapporteur on the *recast of the Long-term Residents Directive*, Damian Boeselager, in his draft report, proposed to delete the exclusion of TP beneficiaries from the personal scope of the LTR-Directive proposed by the Commission.⁴⁶ None of the Member States raised the issue of this exclusion in their first reaction to the proposal.⁴⁷ This European Parliament amendment, if accepted, will benefit Ukraine citizens who were lawfully resident for two or more years in a Member State. It would enable them to acquire the LTR status even before the end of the current TP regime. The Commission did propose in article 4(5) of its recast that residence on the basis of the TP status should count for the 5 years of lawful residence required for acquisition of the LTR status. In the current directive residence on the basis of TP status is explicitly not taken into account for calculation of the required 5 years.⁴⁸ In its first reaction to the proposal only Austria signaled opposition to the proposal to take periods of residence as a person with TP into account for the 5 years.⁴⁹

5. The end of the TP scheme: what future for the beneficiaries?

After 12 months of hostilities in Ukraine it is apparent that there is unlikely to be a rapid resolution of the war. It is also unclear exactly what the end of the war is going to look like. In the meantime, in a joint assessment of the World Bank, the

40 The Commission in COM(2000)303 in its proposal for Article 21 explains: “The voluntary return of persons benefiting or having benefited from temporary protection is the most preferable solution and is regarded as a priority. Accordingly, the Member States must facilitate such returns. Candidates for voluntary return must be fully informed of the conditions in which they will return. The Member States may use exploratory visits as a way of helping candidates. Exploratory visits enable some candidates to visit their country of origin for a short time to see for themselves the security situation and the circumstances of reintegration, before voluntary return is fully completed.”

41 Article 2(1) of Directive 2014/36.

42 See Article 2(1) of Directive 2014/66.

43 COM(2022)655 and COM(2022)650.

44 Council document 6688/23 of 23 February 2023, p. 4.

45 Draft Report of 21 November 2022, PE738.493v02-00, p. 31; the amendment is also supported in the Opinion of the EP’s Employment committee of 25 January 2023, AD\1270882EN, p. 20.

46 Draft Report of 21 November 2022, PE738.503v02-00, p. 32.

47 Council document 13381/22 of 26 October 2022.

48 Article 4(2) of Directive 2003/109.

49 Council document 13381/22 of 26 October 2022, p. 15.

Ukraine Government and the European Commission issued on 9 September 2022, the cost of reconstruction of Ukraine was set at Euros 349 billion.⁵⁰ One year on from the invasion, the World Bank estimated that Ukraine's GDP had contract by 35% in 2022 and that the population share with income below the national poverty line would reach nearly 60% in 2022, up from 18% in 2021.⁵¹ Further, the World Bank assessed that more than 35% of Ukrainians fled their homes since the start of the invasion and with 8 million people now living in poverty, while generally poverty increased 5-fold in 1 year, reversing 15 years of development gains.⁵² The human and economic costs of this war are catastrophic for the country.

Such devastation of the country will have consequences for those who have fled and are currently receiving temporary protection in the EU, particularly considering that there may be more damage to come. Already, it has been accepted that many of those TP beneficiaries already in the EU will not be able to go back to their country in the short term and for this reason the Scheme has been extended. Whether the circumstances for beneficiaries to return to Ukraine will be more favorable within the next 24 months, the maximum duration of the Scheme, is uncertain but unlikely at least for many of them. While many Ukrainians are determined to go home and some have already done so⁵³ it is likely that many will not be able to do so at least in the short term.⁵⁴ Assuming that this is the case, we need to consider what the alternative migration statuses may be for those who currently are protected by the TP Scheme. In the Commission's assessment of the first year of the TP Scheme issued on 8 March 2023, it specifically recognized the need for a road map into the future for TP beneficiaries.⁵⁵ The Commission reiterated the EU's commitment to TP beneficiaries stating that "Union will stand in support of those fleeing the Russian aggression against Ukraine for as long as needed." Determining how long is needed will be a matter of great importance, also acknowledging the fact that at least some TP beneficiaries may need to stay longer or indeed indefinitely on account of their personal circumstances in the EU is critical. There are at least five possible options which need to be considered.

50 Available online at: <https://www.worldbank.org/en/news/press-release/2022/09/09/ukraine-recovery-and-reconstruction-needs-estimated-349-billion> (accessed February 28, 2023).

51 Available online at: <https://www.worldbank.org/en/country/ukraine/overview#3> (accessed February 28, 2023).

52 Available online at: <https://www.worldbank.org/en/country/ukraine/overview> (accessed February 28, 2023).

53 Available online at: <https://www.euronews.com/my-europe/2022/09/15/you-feel-trapped-why-some-ukrainian-refugees-are-now-heading-home> (accessed February 28, 2023).

54 Available online at: <https://www.bruegel.org/policy-brief/will-ukraines-refugees-go-home> (accessed February 28, 2023).

55 Available online at: <https://home-affairs.ec.europa.eu/system/files/2023-03/Temporary%20protection%20for%20those%20fleeing%20Russia%20-%2080%99s%20of%20war%20of%20aggression%20against%20Ukraine%20one%20year%20on.pdf> (accessed March 9, 2023).

5.1. Options to avoid status insecurity and administrative chaos at the end of the TP Scheme

In theory, there are four different options for a common solution on the basis EU law: (1) prolong the TP Scheme, (2) extend free movement to Ukrainian nationals through a sui generis agreement in pursuit of Ukraine's eventual accession to the EU (3) use rules from the 2017 EU-Ukraine Association Agreement to enhance security of residence of Ukrainians exercising economic activities in EU states, or (4) amend current secondary EU law to include former TP beneficiaries. In their scope All four options aim at preventing the fifth option: massive asylum procedures and forced return of Ukrainians at the end of the TP Scheme.

All of the options have advantages and disadvantages which we will examine below. The determining factor will be the exercise of political will—how far does the EU wish to go? The first option, extending the Scheme, is unattractive because of the temporariness which is inherent therein against which the Directive itself is designed. The second option, free movement of persons equivalent to that of EU nationals, would require the greatest exercise of political will—a unanimous decision of the Member States and would probably affect all Ukrainians not simply those former TP beneficiaries. Because of the interpretation of the right of free movement in EU law, some TP beneficiaries, such as those who are completely dependent on public assistance and/or without family members who qualify could still be excluded. Further, some would consider this option to be overinclusive. The third option of an enhanced use of the Association Agreement could benefit some former TP beneficiaries but not necessarily all so it could be used in conjunction with at least one of the other options (other than 2). The fourth option would require the amendment of several directives which could be undertaken by one legislative act and would provide possibilities of security of residence to quite a lot of former TP beneficiaries though once again, there would likely be some, those who have never exercised an economic activity, been part of a family where one member qualifies or had sickness insurance (as examples) who would be excluded. We set out the issues relevant to each option below.

5.2. Prolongation of the TP scheme after 3 years

First, perhaps a simple solution for the EU from the perspective of staying within the CEAS, would be to amend the TP directive and permit extension of the status beyond the maximum 3 year period. The advantage to this approach would be the maintenance of the status quo for those already enjoying protection in the EU but the disadvantages would be substantial not least in the perpetuation of the uncertainty of residence status for those beneficiaries. Already, beneficiaries are reconstructing their lives in Europe, finding work, studying and building their futures. For these people, security of residence is a necessary component if they are to invest in their new host states fully. This does not preclude in any way that they may well-return to Ukraine once the conditions for such a safe return have been secured. But in the meantime, their contribution

to the EU should be acknowledged and their residence status made more secure.

This solution continues the precarious legal status of the persons concerned and impedes making decisions and choices for their near and longer future. It postpones solving the issues until the end of the extension. The option does not provide security of residence since the Council may decide to end the TP at any time.

5.3. Extend free movement to citizens of Ukraine

At the opposite end of the scale would be for the EU to include Ukrainians in their system of free movement of EU citizens. On 23 June 2022, the Council declared Ukraine to be a candidate state for membership of the EU.⁵⁶ There is a long road ahead for the country before it will fulfill the conditions for membership, as the Council has set out. But it is not unimaginable that a pre-accession agreement between Ukraine and the EU could include free movement of persons, including the right for Ukrainians to enter, reside in, exercise economic activities and study in the EU in the same way as EU citizens. Four non-EU states already enjoy such free movement of persons with the EU under such agreements: Iceland, Liechtenstein, Norway and Switzerland in circumstances where these states have no intention of seeking membership of the EU. The pre-accession agreements with the Central and Eastern European states from 1990 up to their accession in 2004 included provisions permitting limited access to economic activities in the EU which were widely used (Guild and Bocker, 2002). The advantages of this approach would be that Ukrainians resident in the EU would be free to go back to Ukraine to see whether the conditions were right to re-commence their lives there but to return to the EU if they found the circumstances were not favorable. They would have a secure and durable residence status in the EU and would continue to enjoy mobility rights across the 27 Member States. It would also be a very strong political indication by the EU of its support for Ukraine and its determination to protect Ukrainians in the best possible conditions.

This option, however, may be overinclusive: it would cover all 40 plus million nationals of Ukraine in order to find a solution for 4–5 million who are TP beneficiaries in the EU. Moreover, extension of free movement to a country in war (already before 2022) could create serious security problems. The situation in Ukraine is different from the situation in Cyprus at its accession to EU in 2004 when the island was and still is divided with part of its territory occupied. Considering the long (7 years) waiting periods for free movement of workers in most recent accession agreements, Member States may hesitate to agree with pre-emptive free movement of workers this time or to grant full free movement of persons with adaptations required by the special case of Ukraine. If free movement rights would be granted only to those Ukrainian citizens who were TP beneficiaries in the EU, this would give them the opportunity to explore the possibilities of return to Ukraine and come back to the EU if they find employment in a Member State

56 Available online at: <https://www.consilium.europa.eu/en/policies/enlargement/ukraine/> (accessed February 28, 2023).

again or otherwise comply with the conditions of Directive 2004/38 on free movement of Union citizens.

5.4. Use the 2017 EU-Ukraine Association Agreement

A third option which has already been signaled by the Commission, is using the existing Association Agreement between the EU and Ukraine to its maximum to achieve greater integration of the country with the EU during the accession period.⁵⁷ A Partnership and Cooperation Agreement was first signed between the EU and Ukraine in 1994 and entered into force in 1998⁵⁸ remaining so until 31 August 2017 when a new Association Agreement replaced it on 1 September 2017.⁵⁹ Articles 24–40 of the original agreement provide for equal treatment of Ukrainian workers in the EU with nationals of the host state, liberalization of self-employment and the establishment of Ukrainian businesses in the EU, including the transfer of their key personnel, and liberalization of cross-border supply of services between the parties. The new Association Agreement repeats the provisions on treatment of workers from the previous agreement and adds a new provision (article 18) which calls upon Member States to improve existing facilities of access to employment for Ukrainian workers under bilateral agreements (and to enter into such agreements). An Association Council is charged with examining the possibility of granting other more favorable provisions regarding employment in additional areas.

The provisions on establishment in the 2017 Agreement set out as an objective the progressive reciprocal liberalization of establishment and trade in services (article 85) and include not only companies as the object of that liberalization but also natural persons [article 86(9)]. Both various categories of personnel of Ukrainian companies and independent professionals (as defined) benefit from a right of entry and stay in Member States subject to qualifications, limitations and time limits (articles 92–102). The 2017 Agreement also includes provisions on movement of persons (article 19) which provided an additional basis for the lifting of mandatory short stay visas for Ukrainian nationals that year. The Agreement also provides for a Deep and Comprehensive Free Trade Area in Title IV (Trade and Trade-related Matters) and support for Ukrainian efforts to complete the transition into a functioning market economy by means of, inter alia, the progressive approximation of its legislation to that of the EU. These provisions provide a basis for further liberalization of cross-border movement, employment and self-employment of Ukrainians in host Member States including Ukrainians already exercising economic activities there.

57 Available online at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_461 [accessed 28 February 2023]; <https://www.consilium.europa.eu/en/press/press-releases/2023/02/03/joint-statement-following-the-24th-eu-ukraine-summit/> (accessed February 28, 2023).

58 OJ 1998 L 49.

59 Available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_2014.161.01.0003.01.ENG&toc=OJ%3AL%3A2014%3A161%3ATOC (accessed February 29, 2023).

The 2017 Association Agreement provides a basis for further liberalization of cross-border movement, employment and self-employment of Ukrainians in host Member States including Ukrainians already exercising economic activities there. If the EU-Ukraine Association Council could adopt a decision similar to Decision 1/80 of the Association Council EEC-Turkey, this could solve part of the problems of Ukraine workers or self-employed. However, it is unclear whether competence of the Association Council in article 18 of the Agreement extends to adoption of binding rules on admission and rights of family members, students, researchers and other categories of Ukraine nationals. A decision of the Association Council requires unanimity among Member States and the consent of Ukraine. All decisions discussed in the next subsection can be adopted by qualified majority in the EU Council of Ministers.

5.5. Amend secondary EU law

A fourth option would be to amend EU secondary law in order to create a secure residence status for those former TP beneficiaries who do not return immediately at the end of the TP Scheme and to amend the EU instruments on third country nationals resident or moving to the EU for family, study or economic purposes to specifically include beneficiaries of temporary protection.

At least three possible amendments of existing EU migration and asylum law should be considered: (a) amending the Qualification Directive to allow for collective granting of international protection to categories of former TP beneficiaries, (b) allow for acquisition of the Long Term Resident (LTR) status by former TP beneficiaries at the end of the TP scheme, and (c) delete the current exclusion of TP beneficiaries in the legal migration directives.

(a) *Amend the Qualification Directive (QD)* to allow for collective granting of international protection to former TP beneficiaries: this could be done by introducing a system of prima facie recognition of refugee status or subsidiary protection (This might require a fundamental change in both the QD and other asylum directives which are based on a system of individual decisions). Moreover, the cessation grounds in the QD will be a source of insecurity about loss of the status in case of longer visits and stays in Ukraine.⁶⁰

(b) *Allow for acquisition of the Long Term Resident status by former TP beneficiaries at the end of the TP scheme*: the pending recast of the LTR Directive offers a welcome opportunity to allow for the (semi-) automatic acquisition of the LTR status at the end of TP scheme for all former TP beneficiaries with 3 years of residence in the EU of which the last 2 years in the Member State where the LTR status is acquired. This semi-automatic acquisition would considerably reduce the administrative burden. An alternative, with far less reduction of that burden, would be to reduce the 5 years residence required in article 4 LTR Directive to 3 years for former TP beneficiaries, leaving the three other conditions (income, health insurance and Integration) in Article 5 in force.

Among the advantages are that there would be no direct relationship between the residence status and the development of the war, no relation between residence rights and kind of economic or other activity of the former beneficiary and no loss of status on economic grounds (lack of funds). Moreover, the LTR Directive allows for long visits/stays in Ukraine (up to 1 year) without the risk of losing the status. According to the recent Court of Justice of the European Union judgment in *Z.K.* (case C-624/20), the simple presence of a few day somewhere in the EU once a year is sufficient to avoid loss of the LTR status on the ground of absence from the EU for more than a year [article 9(1)(c) LTR Directive].

(c) *Delete the current exclusion of TP beneficiaries in most or all legal migration directives*

The attention in the Parliament for deleting the clauses excluding TP beneficiaries from the Family Reunification Directive and the Long-Term Residents Directive during the discussions on the pending recasts of both directive should be followed by a review of the viability (pro's and contra's) of similar clauses in the other legal migration directives, possibly by additional amendments in the pending recast proposals. Inclusion of TP beneficiaries would allow to move from one migration category to another should this become necessary.

These three solutions are not mutually exclusive. A mix of two or all three of these solution should be seriously considered. If a reasonable solution could not be achieved by amending existing EU instruments, adoption of a special instrument for former TP beneficiaries from Ukraine could be a last alternative of last resort, considering the time required for negotiation and adoption of a whole new instrument, which would add to the complexity of the GEAS.

5.6. Massive asylum procedures, forced return and various national laws of Member States?

Finally, the worst option from the perspective of TP beneficiaries and/or national administrations is that foreseen in the TP Directive itself, that at the end of the Scheme, either TP beneficiaries will transfer into the asylum determination procedure of the Member State (articles 17–19) or they are subject to expulsion procedures if the state authorities consider that the conditions in Ukraine permit (articles 20–23). Where Ukraine is still in no position to receive back its citizens at the end of the TP Scheme, the EU should ensure that measures are in place to provide for their continued residence in the EU as a class, not requiring national administrations to determine asylum applications individually, one by one, the avoidance of which was the whole objective of the TP Scheme in the first place. In the event that Ukraine may be able to accommodate some of its citizens who are beneficiaries of TP in the EU, the choice should be up to individuals whether to return or not and the residence of those who are not in a position to return is protected by EU law.

What is particularly important is that the arrangements for Ukraine TP beneficiaries at the end of the TP Scheme is determined by EU law not the national law of each Member State. The avoidance of disorder and uncertainty must be a priority with a

⁶⁰ Articles 11(1)(a), 14(1) and 16 QD.

common and consistent set of rules regarding their treatment to be adopted at the EU level. The warm welcome which the Ukraine TP beneficiaries have received in the EU must not be ruined by a disorganized and fragmented response determined by national priorities rather than EU ones as regards the end of the Scheme.

6. Conclusions

Stepping beyond the immediate crisis of protection in the context of the Russian invasion of Ukraine and the subsequent war, the EU has a number of lessons to note as a result of the first use of the TP Directive. First, when there is sufficient political will, carefully built by the EU institutions and Member States, the EU is fully capable of receiving over 4 million people fleeing war in good conditions of reception in a period of <12 months. The outcomes in terms of market and social integration have been greatly enhanced by immediate access to the labor market for TP beneficiaries and access to education. Lack of language skills, while a barrier to be overcome, has by no means been the enormous problem to labor and educational integration which some policy makers had feared. The argument that the EU or some of its Member States are “saturated” by migrant arrivals (Moreno-Lax et al., 2019) has proven groundless in this case. It has turned out that the EU has sufficient resources to receive millions of refugees in a single year and to maintain open access to the EU territory for as many people fleeing this war as wish to come. There has been no credible call for a reintroduction of mandatory visas for Ukrainians nationals to “slow” the rate of arrivals or diminish the possibilities for TP beneficiaries to return to Ukraine for short stays and return to their EU place of safety (Gammeltoft-Hansen, 2011). One of the claimed cornerstones of the EU’s Common European Asylum System has been the absolute necessity to prevent secondary movement of asylum seekers from the first EU country or arrival to another other EU country (Legomsky, 2003; Marin, 2020). This policy of no secondary movement has been an enormous political and practical problem for the EU—an area without internal borders

among (most of) the Member States (De Somer, 2020; Guild, 2021). In the case of TP beneficiaries, this policy has been reversed. For the largest single group arriving in the EU since the design of the CEAS, secondary movement is held out as a benefit both for states and beneficiaries. The opportunity to move from the first Member State of arrival (usually Poland or Romania) to another Member State where the beneficiaries may have links is promoted as an advantage. The surprise for officials across the EU has been the slow uptake of this right to move in particular bearing in mind the difference of standard of living between some of the first arrival states like Romania and other EU states like Germany (Simionescu, 2019). The big test before the EU now is how to provide those TP beneficiaries in need of long term protection with the security of residence they deserve.

Author contributions

All authors listed have made a substantial, direct, and intellectual contribution to the work and approved it for publication.

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