Comment

The Disparate State of Refugee Protection in the European Union

I. Introduction

On 15 July 2022, the research group Forensic Architecture published documentation, collected over several months, about so-called drift-backs in the Aegean Sea. Drift-backs describe instances in which Greek border guards intercepted migrants, causing them to drift back towards Turkish waters, in boats without fuel or on unsteerable floating islands. The documentation lists numerous such instances, some committed by official forces and others by individuals without clear identification, but all tolerated or supported by state officials. While the details of drift-back practices vary, the described acts potentially violate rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR), as they actively endanger human lives (Article 2) and can amount to inhuman or degrading treatment (Article 3) given what persons suffer while left at sea and upon their return to Turkey. Acts that take place in Greek territorial waters also violate the explicit right to claim asylum under European Union (EU) law. Drift-backs had been reported before,[1] but the evidence now shows the systematic nature of the practices and the severity of rights violations.

Just a week before this documentation was published, on 7 July 2022, the European Court of Human Rights (ECtHR) handed down its decision in the case *Safi and others v. Greece*.[2] The Court found that insufficient national

1 Niamh Keady-Tabbal and Itamar Mann, *Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations*, Just Security, <https://www.justsecurity.org/70309/tents-at-sea-how-greek-officials-use-rescue-equipment-for-illegal-deportations/>, 22 May 2020.

2 ECtHR, *Safi and Others v. Greece*, judgement of 7 July 2022, no. 5418/15.

DOI 10.17104/0044-2348-2022-3-529 ZaöRV 82 (2022), 529-539

legal investigations into the sinking of a migrant boat constituted a violation of Article 2 ECHR and that the treatment of the surviving migrants had violated Article 3 ECHR.

And just one week before that, on 1 July 2022, the Border Violence Monitoring Network had published an extensive report on illegal pushbacks over the Evros river and Greek authorities' systematic disregard for ECtHR interim measures.[3]

By now, there have been innumerable reports of severe rights violations in the context of migration. Yet official reactions to the violations, whether documented by non-governmental organisations or established in court rulings, have remained flimsy. Decisions from the ECtHR are frequently ignored, as in the abovementioned cases in Greece, or in Poland after the rulings on pushbacks in *D.A. and others* (2021) as well as *M.K. and others* (2020).[4] The European Commission, in its role as guardian of the Treaties, has taken little action in form of infringement procedures against Member States that violate EU asylum laws.[5] Also, public reactions to the violation of migrants' rights have been lacklustre.

The European Union has a substantive rule-of-law problem regarding migration.[6] In too many cases, laws are deliberately violated and court decisions ignored. While persons who commit illegal violence often face impunity, humanitarian activities are cause for criminal charges in several Member States. Recent reform proposals at the level of the European Union have all pointed in one direction: to restrict the rights guarantees for migrants and extend States' discretion in handling border controls and access to an asylum procedure.[7] Apparently, the EU is reacting to States' increasing unwillingness to respect existing laws by changing the laws in question.

---

3 Border Violence Monitoring Network, Islets, Interim Measures and Illegal Pushbacks: The Erosion of the Rule of Law in Greece, <https://www.borderviolence.eu/20548-2/>, 1 July 2022. On interim measures, see also the Greek Refugee Council, <https://www.gcr.gr/en/news/press-releases-announcements/item/1962-the-european-court-for-human-rights-ecthr-grants-interim-measures-for-5th-group-of-syrian-refugees-stranded-on-an-islet-in-the-evros-river>.

4 ECtHR, *D.A. and others v. Poland*, judgement of 8 July 2021, no. 51246/17; ECtHR, *M.K. and others v. Poland,* judgement of 23 July 2020, nos 40503/17, 42902/17 and 43643/17.

5 The procedure against Hungary that was upheld by the Court of Justice in November 2021 constituted one exception: CJEU (Grand Chamber), *Commission v. Hungary*, judgement of 16 November 2021, case no. C-821/19, ECLI:EU:C:2021:930.

6 See also (in German): Dana Schmalz, *Die andere Rechtsstaatlichkeitskrise: Menschenrechtsverletzungen an der polnisch-belarussischen Grenze*, Verfassungsblog, <https://verfassungsblog.de/die-andere-rechtsstaatlichkeitskrise/>, 28 October 2021.

7 Cf. in that regard (in German): Catharina Ziebritzki, 'Warum die "Instrumentalisierung" Asylsuchender kein Argument für die Aussetzung ihrer Grundrechte ist', KJ 55 (2022), 2, 152.

 DOI 10.17104/0044-2348-2022-3-529

Overall, the state of refugee protection in the European Union is rather bleak. At the same time, there is the contrasting example of the reception of Ukrainian refugees over the past months. The legal framework as well as the political reaction differ substantially. Already at the outset, the legal situation was distinct because Ukrainian citizens enjoy visa-free travel in the Schengen area for up to 90 days and could therefore enter the European Union without difficulties. Furthermore, EU Member States promptly, and for the first time ever, activated the Temporary Protection Directive (TPD).[8] The Directive provides that refugees from Ukraine receive a right to stay for up to three years, without having to go through an asylum procedure and prove individual risk or persecution.

Beyond the application of the Directive, Ukrainian refugees have been received, thus far, with widely shared support and pragmatic efforts to accommodate arising needs. This seems to follow an entirely different logic than that of other refugee protection in the European Union. Is that a reason for optimism? For now, it means that two largely separate systems of refugee reception are emerging. Yet some of the experiences from the reception of Ukrainian refugees will be hard to ignore in the development of the Common European Asylum System more broadly. The following discussion maps the recent developments in general European refugee law and asks what the insights and potential influence from the first experiences with the application of the Temporary Protection Directive for Ukrainian refugees might be.

II. Developments in General European Refugee Law

European refugee law, as applicable in EU Member States, is shaped by the rules of the Common European Asylum System (CEAS) as well as by the case law of the ECtHR. This means a complex and layered system of interpretation, in which the interpretation of individual rights before the ECtHR, as well as before the Court of Justice of the European Union (CJEU) and national courts, plays an important role. EU law sets standards for asylum procedures and reception conditions, and it coordinates State responsibility in the Dublin Regulation. New legislative proposals at the EU level have included far-reaching reforms of the Dublin Regulation and other aspects of the CEAS as well as a proposal for emergency measures following

8 Council implementing decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

the border crisis with Belarus. The following looks at two threads of recent developments: firstly, the stagnated reforms and emergency measures in the CEAS (1.) and secondly, the line of case law with which the European Court of Human Rights has successively narrowed down the prohibition of collective expulsions (2.).

1. Stagnated Reforms and Emergency Measures in the CEAS

In autumn of 2020, the debates about a reform of the CEAS gained new momentum. The Commission presented a Migration and Asylum Package that included previous and new proposals. One key concern was the reform of the Dublin Regulation, in force since 2013, which distributes responsibility for asylum procedures and, correspondingly, for reception among the Member States. Over the years, the application of the Regulation has become more and more complex and dysfunctional: The general rule that the State of first entry is responsible has meant a significant burden on States at the external borders, especially Greece. Many asylum seekers were no longer registered, or even when registered in Greece, they could not be returned there from other Member States because of the rights violation they would face.[9] Overall, the system entails regular prolonged bureaucratic procedures between States concerning the responsibility for an asylum procedure before the actual asylum procedure would even begin. Not only does this burden all administrations involved and lead to dissatisfaction on many ends, but it also harms those whom the system is meant to protect: asylum seekers who have to wait ever longer for a procedure and a clear prognosis if and where they can stay.

The main purpose of reform, therefore, is to restructure solidarity within the CEAS. Article 80 of the Treaty on the Functioning of the European Union (TFEU) states that asylum policies and their implementation 'shall be governed by the principle of solidarity and fair sharing of responsibility'. However, the proposal in autumn of 2020 did not change the basic rule that, absent other ties, the State of first entry is responsible for a person's asylum application, nor did it include a mandatory redistribution of asylum seekers among Member States according to quotas. It did provide for financial incentives and a so-called mechanism for mandatory solidarity that a Member State under pressure can trigger. Besides those reform proposals concerning

9 ECtHR, (Grand Chamber), *M.S.S. and others v. Belgium and Greece*, judgement of 21 January 2011, no. 30696/09; CJEU (Grand Chamber), *N.S. v. SSHD*, judgement of 21 December 2011, Joined Cases C-411/10 and C-493/10, ECLI:EU:C:2011:865.

 DOI 10.17104/0044-2348-2022-3-529

the distribution of responsibility, the proposals provide for new border procedures, including a pre-screening and a fast border procedure for those coming from States with a low recognition rate.

The proposals are currently under negotiation in Member States, and it seems unlikely that the reforms will be adopted. Meanwhile, in December 2021, the crisis at the borders that Poland, Latvia, and Lithuania share with Belarus led to a proposal for emergency measures under Article 78 (3) TFEU. The proposal suggested extended timeframes for border procedures, including detention, and seemed to follow the approach of making procedures more flexible for States, in the hope that they would abide by the most basic rule of not pushing back persons at the border.[10]

The crisis at the borders with Belarus, while not resolved, has been de-escalated, but above all, public attention has turned elsewhere. The state of emergency that Poland had declared in the border zone and that, for months, had excluded media reporters from entering, was lifted in late June 2022. A fence along most of the border with Belarus has now been completed. Overall, there remains a stark contrast at the two borders in direct proximity: the Polish-Ukrainian border, which has been a main entry point for Ukrainian refugees into Europe, with free access, welcoming policies, and civil-society support, and the Polish-Belarussian border, which has a militarised border structure that includes a fence, where entry is nearly impossible, and push-backs have been frequent.

2. The ECtHR Narrowing Down the Prohibition of Collective Expulsions

The legal assessment of pushbacks has been another main thread in the development of European refugee law over the past 2,5 years. This development has been marked by the ECtHR's line of case law in which it interpreted Article 4 of the 4th Additional Protocol, the prohibition of collective expulsion. While the central provision of non-refoulement und the ECHR is Article 3, Article 4 of the 4th Additional Protocol has come to play an increasingly important role. Article 3 prohibits States from return persons to

10 For a criticism of the measures and of the 'push-back legislation' in the States: European Council on Refugees and Exiles (ECRE), EU Eastern Borders: Commission Emergency Proposal Comes Under Fire, MEPs Visit Rights-Free Border Zone, Supreme Court Rules on Polish Media Ban, <https://ecre.org/eu-eastern-borders-commission-emergency-proposal-comes-under-fire-meps-visit-rights-free-border-zone-supreme-court-rules-on-polish-media-ban/>, 21 January 2022.

another State if they face the risk of inhuman or degrading treatment there. In practice, this means that for most of those seeking asylum, at least a first assessment of their circumstances is necessary before such risk can be excluded. Article 4 of the 4th Additional Protocol, which applies regardless of whether a person has a claim to international protection, prohibits collective expulsions of persons, meaning expulsions without notice of individual circumstances. In many situations, both provisions have a similar effect: they prohibit states from returning persons without assessment of their circumstances. However, since a legal evaluation of events usually takes place afterwards, in some cases it is established that while the person has no claim to international protection, the prohibition of collective expulsion has nevertheless been violated. In that sense, the personal scope goes beyond Article 3.

The obligations States have towards persons arriving in search of protection are subject to clashing perceptions and legal controversies. One widespread perception is that only a minority of migrants has a claim to international protection and that other 'irregular immigration' must be avoided. However, since it takes time to assess individual circumstances and to evaluate whether a person has a claim to protection, an obligation of first reception extends to all persons arriving. The recent question in the ECtHR case law was if that includes all types of arrivals or is limited to arrivals at official entry points.

In the seminal case of *N.D. and N. T. v. Spain*, the Court's Grand Chamber introduced an exception to the prohibition of collective expulsions that came as a surprise to many.[11] The case concerned two migrants who had participated in a group attempt to cross the highly secured border structure between Morocco and the Spanish exclave Melilla. Already on Spanish territory, they were handcuffed and returned to Morocco without any identification or opportunity to apply for asylum. The Grand Chamber held that this did not constitute a collective expulsion. It based its argument on previous case law where an expulsion was deemed not collective because the lack of individual assessment could be attributed to the person's behaviour, namely the refusal to show identification. In the case of *N.D. and N. T.*, the Grand Chamber extended this exception on the basis of persons' own conduct to 'situations in which the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety' when, at the same time, 'genuine and effective access to means of legal entry, in particular border procedures' were

11 ECtHR (Grand Chamber), *N.D. and N. T. v. Spain*, judgement of 13 February 2020, nos 8675/15 and 8697/15.

 DOI 10.17104/0044-2348-2022-3-529

available and the later applicants did not make use of them without 'cogent reasons'.[12]

This 'exception of unlawfulness' is highly problematic in the context of migration, since irregularity is the rule for those seeking asylum, not by choice but by lack of alternative. The interpretation of Article 4 of the 4th Additional Protocol was also unsound and a limitation of a Convention right that went against its clear wording.[13] Yet the Court provided a list of cumulative criteria for the exception to apply.

A first case in which the Court had to apply the criteria of *N.D. and N. T.* was the case *Shahzad v. Hungary* in 2021.[14] A Pakistani man, together with a small group, had entered Hungary from Serbia, cutting a hole in the border fence. The group was later apprehended and forcibly returned. The question under dispute was whether the expulsion was of a collective nature and constituted a violation of Article 4 of the 4th Additional Protocol to the ECHR. The Court found that the prohibition of collective expulsion had been violated. It applied the criteria of *N.D. and N. T.*, stressing that there was no indication that the applicants had used force, resisted officers, or otherwise created a 'disruptive situation'.[15] Moreover, the Court noted that there was no legal means of entry, as the applicant had tried entering Hungary by way of one of the transit zones but had been refused access. In that sense, the Court's decision in the case of *Shahzad* underlined that the *N.D. and N. T.* precedent must be interpreted narrowly and does not constitute a blanket permission of pushbacks.

Four months later, the Court ruled on another case in which a collective expulsion was under dispute. In *M.H. and others v. Croatia*, an Afghan mother and her six children, who had entered Croatia from Serbia, were apprehended by a police officer who ignored their requests for asylum, drove them to the border and told them to return to Serbia.[16] The Court ruled that this pushback violated Article 4 of the 4th Additional Protocol, since it was not possible to establish whether there was a legal entry point for claiming asylum.[17]

The latest decision in that line of development has been the case of *A.A. and others v. North Macedonia*. The applicants were Afghan, Iraqi, and

12 *N.D. and N. T.* (n. 11), para. 213.

13 For a critique, see Max Pichl and Dana Schmalz, *'Unlawful' may not mean rightless: The shocking ECtHR Grand Chamber judgment in case N. D. and N. T.*, Verfassungsblog, <https://verfassungsblog.de/unlawful-may-not-mean-rightless/, 14 February 2020.

14 ECtHR, *Shahzad v. Hungary*, judgement of 8 July 2021, no. 12625/17.

15 *Shahzad v. Hungary* (n. 14), para. 61.

16 ECtHR, *M.H. and others v. Croatia*, judgement of 18 November 2021, nos 15670/18 and 43115/18.

17 *M.H. and others v. Croatia* (n. 16), paras 293-304.

Syrian nationals, who had been in the refugee camp of Idomeni and, in March 2016, had walked into North Macedonia as part of a group of several hundred persons. They were stopped and forcibly returned to Greece. In determining whether these returns violated the prohibition of collective expulsions, the Court applied the criteria of *N.D. and N. T.* but focused only on the existence of legal entry points. It found that while the applicants had entered North Macedonia as part of a large group, there had been no use of force. The Court deemed it sufficient, however, that the persons had crossed the border irregularly, and it held that a procedure for legal entry existed. Unlike the list of criteria in *N.D. and N. T.*, above all the requirement of use of force and the intention to create a disruptive situation, it was now deemed sufficient that the persons crossed in a group and did so irregularly, despite an existing legal entry point.

While the requirements under Article 3 ECHR remain in place, the interpretation of Article 4 of the 4th Additional Protocol has added to the insecurity concerning how migrants' rights are safeguarded. The interpretation has reduced the prohibition of collective expulsion to an obligation for States to provide some access point for asylum claims. Whether such access effectively exists is often contested; for migrants themselves, it is difficult to document and prove lacking access. It is not coincidental that the elaborate documentation gathered by organisations such as Forensic Architecture or the Border Violence Monitoring Network now plays an important role in countering States' representation of facts. That turn to documentation is a component in legal struggles to uphold some pillars of refugee protection, and it also seeks to address the public processes of decision-making around migration.

III. The Reception of Ukrainian Refugees

The reception of Ukrainian refugees in the European Union contrasts with the described situation of increasingly difficult access to protection and systematic rights violations. At the outset, the most significant difference is that some EU Member States share direct borders with Ukraine and that Ukrainians can travel in the EU without a visa. Thus, Ukrainians do not encounter the severe challenges of access to protection.

However, beyond that initial difference, the activation of the Temporary Protection Directive has also meant a significant difference in the further process of reception. The Directive was adopted in 2001 but had never been activated. It was activated by a Council decision on 4 March 2022 for persons

fleeing Ukraine.[18] The Directive provides that the Council decision describes the group of beneficiaries of protection, while Member States can extend the protection to further groups.[19] The Council decision from 4 March lays down that at least Ukrainian nationals residing in Ukraine before 24 February 2022, beneficiaries of international protection in Ukraine, and their respective family members receive protection under the Directive. The protection under the TPD does not foreclose the right to apply for asylum.[20] The 'beneficiaries of international protection in Ukraine' include those who hold another residence permit in Ukraine, for instance for work or study, but cannot safely return to their states of origin.[21] Human-rights obligations might preclude the return or deportation of other third-country nationals.

The Directive provides that beneficiaries of protection receive the right to work,[22] financial support and accommodation,[23] and access to education for minors.[24] While there was little scholarship that dealt with the Directive before,[25] there are now several contributions that discuss the first experiences in implementing the Directive.[26] These scholarly reactions have emphasised the fact that the distribution – mostly self-distribution – of Ukrainians within the EU has seemed to work well so far. The Directive, in recital 20, speaks of a 'solidarity mechanism intended to contribute to the attainment of a balance of effort between Member States'. While a solidarity platform has been created, it does not include a system of mandatory distribution or a quota for the reception of persons. This amounts to what Daniel Thym has termed the

18 See (n. 8).

19 Article 7 TPD.

20 Article 17 TPD.

21 Cf. also for the implementation in Germany Federal Ministry of the Interior, Umsetzung des Durchführungsbeschlusses des Rates zur Feststellung des Bestehens eines Massenzustroms im Sinne des Artikels 5 der Richtlinie 2001/55/EG und zur Einführung eines vorübergehenden Schutzes, M3-21000/33#6, 14 March 2022.

22 Article 12 TPD.

23 Article 13 TPD.

24 Article 14 TPD.

25 But see, for an encompassing overview, Achilles Skordas, 'Temporary Protection Directive 2001/55/EC' in: Daniel Thym and Kay Hailbronner (eds.), *EU Immigration and Asylum Law – Commentary*, (3rd edn, Munich: C. H. Beck 2022), 1177-1228.

26 E.g. Daniel Thym, *Temporary Protection for Ukrainians: The Unexpected Renaissance of 'Free Choice'*, Verfassungsblog, <https://verfassungsblog.de/temporary-protection-for-ukrainians/>, 5 March 2022; Janine Prantl and Ian Matthew Kysel, *Generous, but Equal Treatment? Anti-Discrimination Duties of States Hosting Refugees Fleeing Ukraine*, Odysseus Law Blog, <https://eumigrationlawblog.eu/generous-but-equal-treatment-anti-discrimination-duties-of-states-hosting-refugees-fleeing-ukraine/>, 4 May 2022; in the German context: Bertold Huber, 'Die Aufnahme von Kriegsflüchtlingen aus der Ukraine', Zeitschrift für das gesamte Sicherheitsrecht – Sonderausgabe 2022, 51-55; Klaus Ritgen, 'Aufnahme und Aufenthaltsrecht von Flüchtlingen aus der Ukraine: Die kommunale Perspektive', ZAR 42 (2022), 238-244.

'unexpected renaissance of Free Choice'.[27] The situation of refugees who are able to freely choose their place of reception and residence differs dramatically from the years of gridlocked negotiations about reforming the Dublin system.

The systematic rights violations and the narrowing protection at the external borders of the EU described above cannot be considered separately from these oppositions to responsibility-sharing inside the EU. The continuous disputes about the Dublin system have contributed both to the inaction of other Member States and EU bodies in the face of rights violations and to political pressure to tighten protective laws. In that sense, the experience in the context of the TPD can inform general European refugee law as an example of a less agitated approach. It remains to be seen how the reception and integration of refugees will develop within the next year or two.[28]

To explain why Ukrainian refugees have been received so differently from other refugees, many point out that the Ukraine is close to Europe. However, the distance between Aleppo and Athens is less than half of the distance between Odessa and Madrid. Greece and Turkey also share direct borders, with a considerable number of asylum seekers arriving from Turkey. The debate about what distinguishes the reception of Ukrainians should also prompt the European public to re-evaluate its sense of responsibility towards people fleeing from other places.

Moreover, it is noteworthy that the unusually high number of arrivals in a very short time has not caused major disruptions. The response has been pragmatic, with a focus on creating arrival centres and coordinating state measures with the help of volunteer initiatives. Here too, the reception of Ukrainians sheds new light on the otherwise knotty conditions for asylum procedures, volunteer work, and state coordination. The Temporary Protection Directive is based on the event of a 'mass influx'.[29] This notion of mass arrivals often serves as a cue for the opposite reaction: 'Masses' may connote 'too many' people – an overwhelming number of persons no longer perceived as individuals. The experience of the past months has made it clear that it is not the numbers of persons arriving that is most decisive but the

27 Thym (n. 26).

28 Cf. also the German Minister for the Interior, Nancy Faeser, in a recent editorial in the major migration law journal, asking if the TPD can be 'a blueprint' and responding that 'we will only know a few years from now': *Nancy Faeser*, 'Die Richtlinie 2001/55/EG: Von "der vergessenen Richtlinie" zur Blaupause für eine neue Gemeinsame Asylpolitik?', ZAR 42 (2022), 221-223.

29 For an overview of the international legal framework, cf. Leonard Amaru Feil, 'Der "Massenzustrom" von Flüchtlingen aus völkerrechtlicher Perspektive', ZAR 38 (2018), 155-160.

 DOI 10.17104/0044-2348-2022-3-529

attitude in the receiving States. It remains to be seen whether and how this experience will influence further negotiations for reforms of the CEAS. Even if it does not immediately impact legislation, it will have caused the public to reflect on their experience with a less agitated response to forced migration.

Dana Schmalz

DOI 10.17104/0044-2348-2022-3-529