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A Refugee is a Refugee is … a Refugee? Differential Treatment of Persons in Need of Protection and Non-discrimination Law

Lisa Heschl

Abstract: After the Russian attack on Ukraine millions of people were forced to leave in order to seek refuge in neighbouring countries, including European Union (EU) member states. While the EU asylum policy in the last decades has been mainly characterised by deterrence and containment, responses to the Ukrainian displacement differed and with the activation of the Temporary Protection Directive (TPD) immediate and unbureaucratic protection was granted to Ukrainian refugees[1]. While the preferential treatment of Ukrainians compared to other groups of forcibly displaced persons was widely embraced, questions about discrimination and the applicability of non-discrimination norms arose quickly. This article seeks to discuss the differential treatment of Ukrainians in light of the applicable non-discrimination frameworks provided by human rights law. It aims to contribute thereby to the necessary debate on how to reconcile non-discrimination rules with current political tendencies in the field of immigration and the protection of persons in need.

Keywords: temporary protection, Ukraine, forced displacement, differential treatment, non-discrimination, migration control, refugees

[1] This article aims to include arguments related to the widest possible personal scope of application. Therefore, the term refugee is used in the widest sense possible, including all forms of (presumptive) international protection beneficiaries, asylum seekers and those who fall within expanded regional and national refugee definitions, that encompass those fleeing generalized violence and insecurities.

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Introduction

When Russia attacked Ukraine in late February 2022 and millions of people were forced to flee the country, political and legal reactions by the EU and its member states (MS) were immediate.[2] Within a few days MS agreed to activate the Temporary Protection Directive (TPD),[3] providing immediate and effective protection to millions of displaced Ukrainians. The decision to activate the TPD to relieve those fleeing the Russian aggression from undergoing lengthy and burdensome asylum procedures, constitutes a remarkable turning point in the EU migration policy, otherwise predominantly characterized by deterrence and containment. Especially since 2015 the EU and its MS, unable to find agreement on the sharing of responsibilities for people seeking protection, have invested in keeping protection seekers ashore (Gammeltoft-Hansen and Vedsted-Hansen 2016), making European asylum systems hard to access. Even though widely embraced, the activation of the TPD and the preferential treatment of its beneficiaries compared to protection seekers from other countries has sparked immediate debates on the legality of such differential treatment and allegations of racially motivated decision-making processes and discrimination were raised (ENAR 2022). The latter became soon supported by reports of violence against students of African or Arab descent trying to flee Ukraine (CNN 2022) and statements by leading European politicians expressing their support for Ukrainians in clearly racialized terms (AP News 2022), prompting responses by commentators either quickly screaming racial discrimination (Churruca Muguruza 2022) or rejecting the latter (Skordas 2022). The Committee on the Elimination of Racial Discrimination (ICERD), acting under its Early Warning and Urgent Action Procedure, issued a statement calling on states to 'continue to allow access to their territories to all persons fleeing the conflict without discrimination on grounds of race, colour, descent, or national or ethnic origin and regardless of their immigration status' (ICERD 2022, 1); similarly, the African Union (AU) urged all states to respect international law and to 'show the same empathy and support to all people fleeing war notwithstanding their racial identity' (African Union 2022). While these instances of differential treatment relate to immediate access to territories, differential treatment

[2] This paper exclusively focuses on the events of 2022 and does not deal with the forced displacement taking place after the annexation of Crimea in 2014 and the following war in Eastern Ukraine.

[3] 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, OJL 212, 07/08/2011.

emerges from the different standards of treatment under the TPD compared to other standards deriving from the application of the general framework related to international protection in particular the Reception Conditions Directive[4] and the Qualification Directive[5] applicable to applicants for, and beneficiaries of, international protection. With the activation of the TPD a parallel legal system has been opened to forcibly displaced Ukrainians placing them at a considerable advantage when compared to people fleeing conflict and persecution in other parts of the world. While certain benefits Ukrainians are enjoying result from the visa liberalization, including the access to territory or free movement rights within the EU, certain beneficial treatments are a direct result of the activation of the TPD. This includes for example the avoidance of lengthy and burdensome asylum procedures or the immediate access to social support and the labor market. This has clearly created a chasm between Ukrainian displaced persons and other groups of people in need of protection and it has to be asked whether this differential treatment actually might be an instance of discrimination that could and should be addressed and mitigated by human rights non-discrimination norms. In immigration cases and particularly cases of forced displacement, the latter only played a subordinated role as their application proved to be quite complex and difficult due to a variety of different reasons. Yet, non-discrimination rules might provide a separate angle to address differential treatment of different groups of forcibly displaced persons and it is the aim of this article to contribute to the overdue and necessary discussion on how to reconcile non-discrimination rules with current political tendencies in the field of immigration and the protection of persons in need.

Part 1 will deal with the application of non-discrimination rules in the wider field of immigration. Non-discrimination norms have proved a very successful tool to challenge state actions discriminating against individuals or vulnerable groups of persons on different grounds often leading to significant legal changes and even social policy reforms. The relative success of non-discrimination challenges has, however, not materialized in the wider field of migration control even though there is plenty of concern. Regional (EU) and national migration policies are inherently discriminatory and

[4] 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), OJL 180/96.

[5] 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), OJL 337/9.

are shaped by political and economic interests of states. Immigration and citizenship laws divide migrants into different legal categories based on their motives and purposes of entry and stay, their qualifications or merely their nationality. Possessing the nationality of a favored state or having economically desirable qualifications literally enables access to territories, to legal status and to the enjoyment of rights. Grouping migrants into legal categories inevitably creates hierarchies and depending on a state's policy objectives, migrants become subjects to different legal regimes. Refugees, due to their particular vulnerability, enjoy a special status under international law and states have the obligation to provide protection to those in need under refugee and human rights law. Still, despite their special status, refugees and people in need of international protection are subject to general immigration policies and migration measures adopted by states and are, therefore, equally impacted by the general exclusionary powers of immigration laws. Especially when it comes to the access to territories and thereby to protection, refugees, like other group of migrants, are subject to policy decisions taken in the wider ambit of immigration policies. Accordingly, while refugee law forms an independent corpus of law, it is still strongly connected to wider immigration policy objectives which logically inform differential treatment of different groups of persons in need of protection. Yet, while states' interest in treating different groups of persons in need of protection might stem from wider policy objectives, they still have something in common, namely their need for protection. Even if the reasons for flight might differ, they all have a reason to search for protection, especially when fleeing persecution or conflict. The question is, thus, whether the underlying reasons for seeking protection might already establish comparable situations, which would allow non-discrimination rules as provided for by human rights law to apply. Part 1 of this contribution aims, therefore, to lay the scene for the application of non-discrimination norms in the field of immigration policies. While the differential treatment of displaced Ukrainians is a result of the activation of the TPD, the focus of the article is still placed on the jurisprudence of the ECtHR whose approach will be compared with the approaches by other huma rights bodies. While the EU has established its own anti-discrimination framework which has been interpreted by the CJEU, this contribution will focus on the ECHR and the jurisprudence of the ECtHR as framework of reference. It is not the TPD as such which is under scrutiny but the case of Ukrainians is used as entry door for assessing the role and leverage of non-discrimination rules in immigration policies. The main focus of the article is not on assessing the political choices that led to the activation of the TPD nor whether the activation itself amounts to unjustified discrimination as these assessments

are rather of a political than legal nature. The objective is to rather identify, in a soptlight type, instances where the differential treatment of Ukrainians on the one and third-country nationals fleeing armed conflict on the other hand might give raise to the application of human rights non-discrimination norms. Part 2 will, thus, try to apply the analysis of the different approaches by international and regional human rights bodies and courts to accommodate immigration control with the non-discrimination rules in human rights law of Part 1 as framework to assess different cases of differential treatment of Ukrainians compared to other third-country nationals either fleeing the same or another armed conflict. Comparing different groups of forcibly displaced persons is clearly a difficult endeavor as the assessment of a need of protection is based on individual cases and circumstances triggering people to leave may just take completely different forms. This contribution does therefore not make the claim to provide a detailed legal analysis of a singular case. It rather attempts to inquire the potential added value of applying non-discrimination norms stemming from the ECHR on situations of differential treatment of different groups of people who have in common that they were forced to leave because of armed conflict. The overall aim of the contribution is to see whether non-discrimination norms can actually provide some legal boundaries to the impact of wider policy choices in the field of immigration control providing eventually for an additional layer to address inequalities in the treatment of persons fleeing armed conflict and persecution.

Part 1: Non-Discrimination in the Context of Immigration Policies and Measures

1.1. Introductory Remarks: The Differentiating and Selective Nature of Immigration Laws and Policies

Compared to other persons in need of protection, European states have treated Ukrainians fleeing the Russian aggression differently. While the European migration and asylum policy in the last 20 years has been shaped by the reluctance of states to provide effective protection to those fleeing persecution and war by adopting policies and implementing measures focused on deterrence and containment making the access to EU territories and thereby to asylum procedures increasingly difficult (e.g. (Gammeltoft-Hansen and Vedsted-Hansen 2016), Ukrainian nationals have been immediately welcomed. Generally, we all have an intuitive understanding of equal treatment and non-discrimination shaped by the equality maxim of Aristoteles that ‘things that are alike should be treated alike; and things that

are unlike should be treated differently' (Cliffors 2013, 427). Breaking it down to refugees this means in a very simplified way, that as soon a person is in need of protection, there is the obligation, supported by international refugee and human rights law, to provide this person with effective protection. Yet, in comparison with people fleeing other conflict situations such as Syrians or Afghans, Ukrainians have been treated differently, even preferentially.[6] But that does not necessarily amount to prohibited discrimination but might well be justified under human rights law and might be just in line with the selective functions of contemporary immigration laws and policies.

The differential treatment of nationals and migrants on the one hand and different groups of migrants on the other is nothing new. The sovereign right to govern migration, historically associated with the defense of the realm (Ó Cinnéide 2021, 363) implies that states may not only distinguish between their own nationals and foreigners but also between nationals of favoured states and non-favoured states. Immigration policies, most exemplary visa policies, imposed on citizens of some but not all states according to certain criteria reflecting particular economic interests or the embedded legacy of historical or colonial ties, reflect the discretion of states in regulating migration according to their own policy objectives (Grundler 2021) and remain the 'most consequential tools for the demarcation of social inclusion and exclusion' (Ellermann 2020, 2465). Immigration measures, allowing the access to territory, the labor market or rights in general, operate on the basis of certain selection criteria distinguishing migrants in different legal categories. These selection criteria are often related to the motives and the purpose of the entry and stay of migrants and create legal hierarchies often disadvantaging individuals and groups on the basis of their ethnicity, nationality, gender, class, age etc. (Farcy 2020, 729-732).

The inherently selective nature of laws related to migration, is also evident in the context of forced displacement. Refugee law limits state discretion and challenges to a certain extent the prevalent and largely undisputed maxim that states have the sovereign right to decide who may enter and reside in their territories (UN General Assembly 1985, Art 2(1); US Supreme Court 1892; ECtHR 1985, para. 67). Once a person fulfils the criteria of the refugee definition and no exclusion grounds apply, state parties have an obligation to provide protection and thereby access to the territory, the access to certain rights; some of these rights call for equal treatment between refugees and

[6] At this point it should be noted that the responses by the EU and its Member States in February/March 2022 are strongly welcomed by the author. It is not the objective of this paper to criticize the measures taken in advantage of Ukrainians fleeing the Russian aggression but rather to shed light on the ambiguities in the application of international protection standards.

nationals. Additionally, according to Art 3 of the Geneva Refugee Convention 1951 (GRC) '[s]tates shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.' States must not treat refugees differently because of their national origin but must grant them the same rights due to their status as refugees. The decisive factor for refugeehood and other forms of international protection is, thus, the need for protection from persecution and human rights violations, i.e. the fear to become a victim of human rights violations. Yet, the refugee law regime itself is characterized by a range of differentiation between refugees on grounds of nationality, race and ethnicity (Costello and Foster 2022, 245). To begin with, the GRC with its original spatial and temporal limitations is by design and effect an expression of a racialized understanding of refugees and the preferences of states in the Global North, excluding a priori non-white refugees from the Global South (Tendayi Achiume E. 2021a, 56). While the 1967 Protocol formally universalized the refugee definition, it still remained a limited, Eurocentric perspective on the global refugee situation failing to acknowledge and reflect 'the full range of phenomena that give rise to involuntary migration, particularly in the less developed world' (Hathaway 1990, 164; see further Glynn 2012 and Oberoi 2001). The conceptual differentiation of refugees inherent to international refugee law perpetuates even racialized responses to forced displacement becoming politicized and driven by national policy objectives (Tendayi Achiume, 2021b). Resettlement programs can be used as illustration how ethnic/religious affinities, geopolitical relationships and historical ties shape highly divergent responses to forced displacement, where states often geographically remote from conflict exercise great discretion in choosing which kinds of refugees they admit employing 'racialized, religious, and even gendered preferences in their selections for admissions' (Tendayi Achiume 2021a, 51)

The tension between the sovereign right of states to control the entry and stay of non-nationals and the principle of non-discrimination and the equality in international human rights law seems thus to be integral part of immigration policies and laws. Yet, especially in the field of immigration, citizenship and refugee law, differential treatment of differential treatment among migrants is rarely found to be discriminatory but rather considered legitimate or even necessary in light of the state's sovereign rights and interests in regulating migration (Spijkerboer 2018, 468), as has been explained above. This view is also supported by the interpretations by human rights bodies and courts acknowledging that the prohibition of discrimination – at least to a certain extent - ceases in light of state migration control measures and that 'the principle of equality is significantly restricted in the field of immigration' (Farcy 2021, 726). It appears that the sensitivity of migration

in general functions as a *carte blanche* states enjoy while non-discrimination challenges to immigration measures are rarely decided by courts and other human rights bodies. Due to the lack of a solid corpus of jurisprudence on non-discrimination in the context of migration matters, the application of relevant human rights remains still underdeveloped and is still lacking substance, especially when it comes to differential treatment of persons in need of protection. The subsequent section discusses the general lines of argumentation and the tests applied by international human rights bodies and courts in applying non-discrimination rules in immigration related cases. By drawing particularly on the case law of the ECtHR, the relevant criteria for assessing whether the differential treatment of Ukrainians compared to other groups of migrants may amount to prohibited discrimination will be elaborated, focusing in particular on race and nationality.

1.2. The Prohibition of Discrimination in the Context of Immigration

The requirement to treat all human beings equally and in a non-discriminatory way has been at the core of international human rights law since its origins. The latter is built around the premise that 'all persons, by virtue of their essential humanity, should equally enjoy all human rights' (Weissbrodt 2008, 34), which is reflected in Art 1 (3) of the UN Charter, encouraging states to promote and respect for human rights for all without distinction as to race, sex, language, or religion. The importance attributed to equality and non-discrimination and their interdependence (Clifford 2013) has been further restated in various intergovernmental declarations recognizing them as 'fundamental rule[s] of international human rights law' (World Conference on Human Rights 1993, I-15) and as 'generally accepted and recognized principle of international law' (UNESCO 1978, Art 9).

Given the universal promise of human rights, unsurprisingly, all core human rights treaties include references to the principle of equality and the prohibition of discrimination requiring states to treat all human beings equally, irrespective of individual characteristics. Among core human rights treaties, only the Convention on the Elimination of All Forms of Racial Discrimination (CERD),[7] the Convention on the Elimination of All

[7] Art 1 (1) CERD 'In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

Forms of Discrimination against Women (CEDAW),[8] and the Convention on the Rights of Persons with Disabilities (CRPD)[9] include definitions of what discrimination means. However, treaty bodies in the interpretation of human rights norms have defined prohibited discrimination. For instance, the Human Rights Committee (HRC) in its General Comment 18, mirroring the definitions of discrimination in aforementioned treaties, stated that discrimination is understood to 'imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.' (HRC 1989, para. 7). In all definitions there is a common reference to 'in effect and purpose' meaning that direct and indirect discrimination are covered alike and suggesting that discrimination need not be intentional in order to be prohibited. Similar to the UN treaties and treaty bodies, the ECtHR in its jurisprudence to Art 14 ECHR understands discrimination as 'treating differently, without an objective and reasonable justification, persons in relevantly similar situations' (ECtHR 2002, para. 48 and 2007, para. 175).

As can already be deduced from the definition of the ECtHR, not every differential treatment necessarily amounts to prohibited discrimination. On the contrary, most human rights systems even accept measures of differential treatment in order to achieve greater equality. Positive actions measures are today widely recognized as valid means to achieve greater equality and human rights courts have recognized that states' failure to implement positive measures may be in breach of non-discrimination obligations (ECtHR 2009). In order to establish that differential treatment amounts to discrimination a proportionality test has to be performed. Once an 'objective and reasonable justification' for the differential treatment can be provided, it will be considered legitimate and not in violation of human rights. Deriving

[8] Art 1 CEDAW 'For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

[9] Art 2 CRPD '"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.'

from the definitions of discrimination as applied by UN treaty bodies and the ECtHR, certain elements have to be assessed in order to establish whether differential treatment is justifiable and does not amount to discrimination: i) the differential treatment in a comparable situation; iii) the objective and reasonable justification; iv) the proportionality.

1.2.1. Differential Treatment and Comparable Situations (Comparability Test)

A precondition for the objective and reasonable justification review of a measure is that the situation compared are actually similar (or different). Only if situations, i.e. the situation of the individual claiming discrimination and the situation of the persons benefitting from the differential treatment, are comparable, may discrimination emerge. The comparability test is a rather complex endeavor as has been pointed out by Anardóttir as it is an 'evaluative task requiring a moral appraisal' and not 'simply a matter of establishing the facts of the case' (Anardóttir 2014, 657). Assessing the comparability of a situation will be clearly case based and no general assumptions can be made on how to approach this assessment. Regarding differential treatment among migrants, should the fact that they are third-country nationals be sufficient to establish a comparable situation? Is it the need for protection enough to find a comparable situation for refugees from different countries of origin? According to the ECtHR an 'analogous situation' does not require that the comparator groups are identical but rather in a relevantly similar situation (ECtHR 2010c, para. 66). In its early case law, the ECtHR found the situation of EU citizens and third-country nationals as different and not comparable, given that the EU forms a particular legal order (ECtHR 1991, para. 49). However, it later recognized that with regard to family reunification, refugees are in a comparable situation to international students and migrant workers who also have only a limited right to reside in a state (ECtHR 2012b, paras. 54-55). The legal status is, even though indicative, not decisive to establish that a situation is necessarily different as will also be discussed in more detail in Part 2.

Once the comparability of a situation is found, the proportionality assessment in the wider sense will be conducted, in order to assess whether there is an objective and reasonable justification for the differential treatment.

1.2.2. Objective and Reasonable Justifications for the Differential Treatment of Migrants

Differential treatment will not amount to discrimination if objective and reasonable justifications for the measure can be provided. Whether differential treatment can be justified depends on its proportionality, i.e.

there has to be a 'reasonable relationship between the means employed and the aim sought to be realized' (ECtHR 1968, para.10 and 2002, para. 39). According to the ECtHR a twofold analysis is required in order to provide an objective and reasonable justification for differential treatment. First, the legitimate aim of a measure will be assessed, before the judicial review will turn secondly, to the question whether a fair balance has been struck between competing interests of the state and the individual.

1.2.3. The Assumed Legitimacy of Immigration Objectives

In the field of immigration, as has already been pointed out, it is well accepted under international (human rights) law that states have the sovereign right to decide who is allowed to enter a territory, who has the right to reside within a territory and who has to leave a country.[10] The review of the legitimate aim of a measure implementing a wider state policy is, thus, counterbalanced by the principle of sovereignty limiting the legal scrutiny of immigration measures considerably. Generally, states without great difficulties, may argue the legitimate aim of a differential treatment resulting from a measure implementing the wider policy interests of a state, as basically any differential treatment can be argued to pursue a legitimate aim. As long as there is no evident invidious discriminatory intent, the legitimate aim test of a measure will be satisfied as human rights bodies and courts will refrain from assessing whether the measure as such is conducive to the attainment of the aim proclaimed (Anardóttir 2002, 43 et seq.). In the field of immigration, especially preferences of certain groups of migrants based on socio-economic policy considerations have been considered legitimate. For example, the ECtHR in *Ponomaryovi v Bulgaria* has found a legitimate aim in 'curtailing the use of resourcehungry public services – such as welfare programmes, public benefits and health care – by shortterm and illegal immigrants, who, as a rule, do not contribute to their funding' (ECtHR 2011, para. 54). Similarly, in *Hode and Abdi v United Kingdom,* which concerned the differential treatment of refugees, migrant students and workers, the Court has found that 'offering incentives to certain groups of immigrants may amount to a legitimate aim for the purposes of Article 14 of the Convention' (ECtHR 2012b, para. 53). The problematic relationship between the Court and the legitimate aim test and its reluctance to engage in depth with the questions of a state's legitimate interest a differential treatment is based on, can be best seen in the case

[10] For example, the ECtHR since the case of Abdulaziz, Cabales and Balkandali v. the UK includes in the first paragraphs of its review the reference 'as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory'.

Biao v. Denmark. Even though the Court found that the contested measure was based on 'rather speculative arguments' (ECtHR 2016, para. 125) and biased stereotypes (ECtHR 2016, para. 126) rather than on 'objective factors' (ECtHR 2016, para. 127), it did not consider it necessary to take a separate stand on the question of its legitimate aim (ECtHR 2016, para. 121). Farcy argues that the lenient position of judges with regard to the legitimacy of public policy is understandable (Farcy 2020, 739-740), in particular in light of the principle of subsidiarity and the actual competences of the Court to review the conformity of a state measure with the Convention but not the intentions of a state how it governs a matter (ECtHR 1968, para. 10, 26). Yet, as other commentators, such as Arnardóttir, have pointed out 'the difficulties related to the construction of the legitimate aims test have rendered it completely redundant' (Arnardóttir 2002, 42-43) and that the 'establishment of a legitimate aim has become a rhetorical and artificial assertion that has nothing to do with the issues truly deciding the case' (Arnardóttir 2002, 45). The legitimate aim of migration policies is due to their political sensitivity and their connection to state sovereignty and security only superficially subject to legal scrutiny. Judicial review is, thus, limited to the balance of state interests and individual rights and the margin of appreciation states enjoy, as will be shown below.

That another approach to the legitimate aim analysis is possible has been shown by the Inter-American Court of Human Rights (IACtHR) in its Advisory Opinion on 'Juridical Condition and Rights of Undocumented Migrants' (IACtHR 2003). While acknowledging that states in the exercise of their power to establish migration policies are free to establish measures related to the entry, the residence or departure of migrant workers, such as granting or denying general work permits or permits for certain specific work, these have to be in accordance with human rights and states 'must establish mechanisms to ensure that this is done without any discrimination' (IACtHR 2003, para. 170). By stating that a state 'may not subordinate or condition the observance of the principle of equality before the law and non-discrimination to achieving the goals of its public policies, whatever these may be, including those of a migratory nature' and concluding that in 'each specific case [of migration control], the State must justify not only the reasonableness of the measure, but also examine rigorously whether it damages the principle of illegitimacy that affects all measures that restrict a right based on grounds that are prohibited by the principle of non-discrimination' (IACtHR 2003, 71) the IACtHR shifted the test whether a measure taken in order to implement a wider policy from the legitimate aim to a genuine aim test, rigorously applying non-discrimination rules.

1.2.4. Proportionality Stricto Sensu: Balancing State Interests with the Rights of Migrants

As the answer to the question whether a contested measure pursues a legitimate aim is answered in the affirmative, the reasonable proportionality between the measure chosen and the legitimate aim to be realized has to be assessed, i.e. whether the state has struck the balance between the infringement of a human right of an individual and the competing public interest. The question of the proportionality of a measure in relation to the legitimate aim controls the outcome of a case and can be considered a 'fair balance' test weighing the public against the individual interest. In the European context, the ECtHR has developed the margin of appreciation doctrine in order to assess whether differential treatment may be justified or will amount to discrimination. Depending on the circumstances of the case, the subject matter and the background (ECtHR 2010a, para.61) states are either granted a narrow or a wide margin of appreciation, i.e. basically a leeway, in justifying differential treatment, whose scope defines the intensity of the judicial review. The legal and factual circumstances condition, thus, the scope of the margin of appreciation of states in justifying differential treatment. Generally, in *Carson v. UK* the Court acknowledged that the scope of the margin of appreciation is usually wide when it comes to general measures of economic or social strategy (ECtHR 2010a, para. 61), which arguably includes immigration policies. This corresponds with the cautious legitimate aim analysis and reflects again the subsidiarity principle as described above.

As the proportionality test is about the balance between the state interest and the individual's rights, the nature of the individual right in issue (Legg 2012, 200 et seq.) and the grounds for the differential treatment have to be assessed. In the *Belgian Linguistic Case* the ECtHR has stated that the scope of application of Art 14 depends 'on the nature of [..] rights and freedoms' (ECtHR 1968, para. 9, 25) reflecting the accessory scope of Art 14 ECHR and its dependence on other substantive rights in the Convention. In order for Art 14 ECHR to be triggered, the facts of the case have to fall within the ambit of other provisions of the Convention. In immigration related cases, however, it might be more difficult to establish a relationship between Art 14 ECHR and other substantive rights and freedoms. Taking the example of the access to a territory: Despite knowing a right to leave a country, including his/her own country, human rights law does not know a corresponding right to enter a country.[11] Even though a right to enter may be derived from

[11] An exception could be the right to family reunification deduced from the right to family life. However, states are allowed to make family reunification dependent on certain criteria.

the right to a family life under family reunification schemes, this right is subject to conditions. Similarly, in the field of refugee law, there is no explicit right to enter a territory. Again, a temporary right to enter for example for the purpose of the conduct of a status determination procedure might be deduced from *non-refoulement* obligations if no protection can be found elsewhere (Wouters 2009, 569). Yet, the nature of a conditional implicit right is not comparable to the absolute nature of the right to life or the prohibition of torture. As the nature of the right determines the margin of appreciation of states, the vagueness of the rights mostly affected in immigration cases, allow states a rather wide margin in appreciation i.e. the judicial scrutiny of a measure will be less strict than in cases related to a core human rights.

The further scope of the margin of appreciation and the intensity of the judicial review will vary on the discrimination ground invoked. Human rights treaties have identified certain problematic grounds of discrimination related to personal characteristics typically deriving from the "lottery of birth" (Shachar 2009) such as ethnicity, gender, sexual orientation, disability, nationality or other core personal choices such as religion (Farcy 2020, 733) often reflecting pre-existing social hierarchies such as racial subordination, patriarchy or ableism (Costello and Foster 2022, 248). Only if a differential treatment is based on such a 'identifiable characteristic' (ECtHR 2010a, para. 61), the scope of application for non-discrimination norms is opened. Human rights treaties in their non-discrimination provisions include lists of grounds for differential treatment that are considered particularly problematic and as suspect criteria for distinction and differential treatment. For example, Art 26 ICCPR ensures equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Similarly, Art 14 ECHR contains a list of prohibited grounds of discrimination requesting states to secure the enjoyment of the rights and freedoms set forth in the Convention without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Important to note, the lists of prohibited grounds in human rights treaties are not exhaustive but open ended reflecting the evolving nature of non-discrimination law and jurisprudence (Farcy 2020, 733). Accordingly, the list of prohibited grounds has been developed rather at an *hoc basis* in the case law of human rights bodies and courts reflecting what is considered illegitimate at a certain time in a particular social and political context. For example, even though not explicitly listed in Art 14 ECHR, the ECtHR has frequently argued that 'sexual orientation' is undoubtfully covered by the latter (ECtHR 1999, para. 28; ECtHR 2003, para. 45; and ECtHR 2013c, para.77). The identification as a

problematic or suspect ground (Petersen 2021) does not automatically mean that all distinctions or differential treatments based on this criterion are automatically prohibited or a violation of the non-discrimination norm. Yet, the scope for the margin of appreciation will be considerable narrower, once a suspected ground is invoked and 'very weighty reasons' (ECtHR 1996, para. 42) must be put forward to justify the differential treatment.

Immigration laws and measures are highly selective and exclusive in their application. They legally provide for the differential treatment of migrants on the basis of different grounds. Following decolonialization, as Farcy has observed, differentiation and selection criteria in migration laws have amplified, moving away from origin based to merit-based criteria (Farcy 2020, 729). The (ethnic) origin of a person still plays a role and is often a decisive element in the differential treatment of different groups of migrants. Ethnicity/race, nationality and immigration status still matters for the treatment at the borders or for the enjoyment of rights as will be shown in the subsequent section.

1.2.5. Discrimination Based on Race and Ethnicity: Prohibited yet Common Practice in the Feld of Immigration

It is well recognized under international law that differential treatment because of race or ethnicity cannot be justified. In 1971, the ICJ in its well-known Advisory Opinion on Namibia observed that 'to establish […] and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin […] constitute[s] a denial of fundamental human rights' and 'is a flagrant violation of the purposes and principles of the [UN] Charter.'[12] And indeed, the prohibition of racial discrimination is today considered a customary and *jus cogens* norm by scholars (e.g. Brownlie 2008, 511; or Cassese 2005, 65) and states (UNGA 1979 or UNGA 2001). Accordingly, if an immigration policy or measure differentiates among migrants directly on grounds of race or ethnicity it will amount to prohibited discrimination. The European Commission on Human Rights (EComHR) in *East African Asians v UK* found the differential treatment of citizens of the UK of Asian origin in East Africa as discriminatory, as violation of Art 3 ECHR and as a 'special form of affront to human dignity' (EComHR 1973, para. 207). The progressive recognition of the universality of human rights and the rejection of policies inspired by racism and ethnic intolerance and the impetus to end rachial

[12] ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion), General List No 53 [1971], [16]–[54] para. 131.

discrimination, had a clear impact on immigration laws and policies with explicit direct discrimination on grounds of race and ethnicity increasingly vanishing. Yet, racial discrimination may also result from general and abstract rules arguably not aimed to create differential treatment but having indirect discriminatory effects in practice. At a very high level of generality, the EU visa regime and the 'black listing' of in particular African and Asian countries has been coined as 'global apartheid politics' (van Houtum 2010) perpetuating structural racial discrimination despite the facially neutral visa liberalization processes subject to objective benchmarks and criteria (den Heijer 2018). To establish the indirect discriminatory effect of a general measure on the grounds of race and ethnicity is a rather complex endeavor, which explains the relatively low number of cases decided by human rights bodies and courts in this regard. While the ECtHR has been dealing with indirect discrimination on racial grounds in the context of educational segregation of Roma children in the past (ECtHR 2007; ECtHR 2008; ECtHR 2010 b; ECtHR 2013a; and ECtHR 2013b), in the field of immigration and citizenship, it has dealt so far only one time with indirect discrimination on racial grounds. In *Biao v Denmark* the Court broadened the material scope of indirect racial discrimination to immigration laws and thereby to measures that so far have not been subject to judicial scrutiny (ECtHR 2016; see further Möschel 2017). On a more practical level, namely in the context of operational immigration control measures and practices, differential treatment on the basis of race or ethnicity is still widespread. At the border, race, i.e. physiological features (notably skin colour), 'emerges as an illegality detection and production mechanism, as border infrastructure relied upon to presumptively exclude, subordinate, and immobilize through nonwhiteness, while presumptively including and facilitating the mobility through whiteness' as has been argued by Tendayi Achiume (Tendayi Achiume 2022, 485). Ethnic profiling and race-based immigration checks have been subject to review by international human rights bodies and regional and national courts. While acknowledging that 'identity checks carried out for public security or crime prevention purposes in general, or to control illegal immigration, serve a legitimate purpose' (HRC 2009, para. 7.2) the HRC in *Lecraft v Spain* found that the 'the physical or ethnic characteristics of the persons subjected [to an identity check] should not by themselves be deemed indicative of their possible illegal presence in the country' (HRC 2009, para 7.2). While not only the dignity of a person would be negatively affected by ethnic profiling, such measures 'would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination' (HRC 2009, para. 7.2). The Committee found that the ethnic profiling in the *Lecraft*

case was not part of a larger policy but an individual act, still it took the view that there was a violation of Art 26 ICCPR in conjunction with the prohibition of discrimination in Art 2 ICCPR (HRC 2009, para. 8). In the European context the ECtHR dealt with ethnic profiling, a term firstly used in the context of police raids in a Roma village in Rumania (ECtHR 2019, para. 76) as part of larger official policies. In *Timishev v Russia* the ECtHR dealt with ethnic profiling at check points with accompanying restrictions of movements. Different from to the *Lecraft* case, the ethnic profiling in *Timishev* was result of a superordinated order to traffic police officers nor to admit "Chechens" and the Court found the order barring passage 'not only of any person who actually was of Chechen ethnicity, but also of those who were merely perceived as belonging to that ethnic group' (ECtHR 2005, para. 54) pass as violation of Art 14 ECHR in conjunction with the right to move freely within the territory of a State (Art 2 protocol 4 ECHR) (ECtHR 2005, para. 59). In more recent case law, especially *Basu v Germany*, the Court found positive obligations of a state 'to investigate the existence of a possible link between racist attitudes and a State agent's act' as being implicit in state responsibilities under Art 14 ECHR and as essential 'in order for the protection against racial discrimination not to become theoretical and illusory', and 'to ensure protection from stigmatisation of the persons concerned and to prevent the spread of xenophobic attitudes' (ECtHR 2022, para. 35). At the national level immigration control measures at the Prague airport by UK authorities became subject to review in the much-cited *Roma Rights* case. Controls performed at the Prague airport targeting particularly Roma travelers were found to be discriminatory and racially motivated by the UK House of Lords (UKHL). They formed part of a larger official policy aimed at deterring Roma from applying for asylum in the UK; a policy that was basically driven by stereotypes and certain assumptions about the behavior of Roma travelers and ultimately rejected by the Court for its discriminatory nature (UKHL 2004).[13]

Hence, if immigration measures result in a differential treatment because of race and ethnicity, the latter will constitute prohibited discrimination. Despite the leeway states enjoy in formulating wider immigration policies and implementing corresponding migration control measures in line with the principle of sovereignty, no justifications can be brought for instances of differential treatment on grounds of race and ethnicity. Yet, contemporary immigration policies differentiate not primarily or not overtly on the basis of race or ethnicity but rather make distinctions on the grounds of nationality.

[13] Ibid.

1.2.6. Discrimination Based on Nationality: Implicit Racial Discrimination or Necessity to Uphold Special Legal Orders?

Contrarily to the analysis above, there is the question whether distinctions made between migrants, including refugees and people forcibly displaced, based on grounds of nationality can amount to prohibited discrimination. As has been pointed out, most human rights treaties prohibit discrimination on a number of grounds. However, only the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPRM) makes an actual reference to 'nationality' as specific ground of discrimination while other human rights instruments refer to 'national origin'. One might assume, that given the illustrative character of the list of discrimination grounds in human rights treaties, 'nationality' as separate suspect ground might either be easy to accommodate as 'suspect other ground' or as covered by 'national origin'. Yet, academic commentary and jurisprudence have struggled with the question whether distinctions made in the immigration context on grounds of nationality amount to discriminatory treatment under human rights law. This struggle is not surprising considering its political dimension as immigration policies heavily rely on nationality as criterion for inclusion or exclusion and the facilitated access to territory and rights, including the access to the labor market or education. For the question whether nationality-based distinctions in immigration laws are discriminatory it is thus crucial to analyze how 'nationality' relates to adjacent concepts such 'national origin', 'race' or 'ethnical origin'. Establishing that nationality-based distinctions are related to racial or ethnic discrimination would make them prohibited under human rights law. While, according to Thornberry, 'national origin […] is most frequently coupled with "ethnic origin", suggesting that its primary register of meaning is ethnicity and not legal citizenship' (Thornberry 2016, 125), 'nationality' may be understood in a 'politico-legal sense' related to citizenship rather than to ethnic or national origin (Thornberry 2016, 145). The ICJ in its admissibility decision in *Qatar v. UAE* on the application of the ICERD on the question whether 'national origin' would encompass 'current nationality' held, that it did not, considering them mutually exclusive (ICJ 2021; see further Costello and Foster 2021). Decoupling 'nationality' from 'national origin' makes it difficult to establish that differential treatment on the grounds of nationality immediately amounts to prohibited discrimination. Yet, the ECtHR in *Gaygusuz* found that 'very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention' (ECtHR 1996, para. 42). Despite acknowledging that differential

treatment on grounds of nationality can only be justified on the basis of 'compelling or very weighty reasons' (ECtHR 2016, para. 114), the case law on nationality-based discrimination remained restricted to cases related to the differential treatment of legally resident aliens in the enjoyment of social security benefits and EU citizenship (Arnardóttir 2017, 156). Still, even in this limited field of application, the case law of the Court evolved towards a more pronounced understanding of discrimination based on nationality. While in *Moustaquim* the Court still granted a virtually unlimited leeway for the privileged treatment based on nationality (EU citizens) by simply accepting that the EU was a 'special legal order' without engaging deeper in the analysis of the alleged discrimination based on nationality (ECtHR 1991, para. 49), in its later case law it demanded equal treatment (ECtHR 2014) including between EU citizens and refugees (ECtHR 2010d).

The question of differential treatment on grounds of nationality arose as well in the context of the 2015/2016 closure of the Western Balkan route. In 2015, the Balkan route became the main route to Europe for refugees and migrants transiting from Turkey Western Balkan states to reach particularly northern and western EU Member states (Kuschminder et al. 2019). The spectrum of human rights violations along the Western Balkan route is wide and reports about the ill-treatment of refugees and migrants are countless (e.g. Amnesty International 2019 or ECRE 2021). For the analysis at hand, the practice of nationality-based profiling is, however, of particular interest. In late 2015, in a joint attempt to close the Western Balkan route, states along the route including Slovenia, North Macedonia, Serbia and Croatia introduced a policy of nationality-based profiling to restrict access to the Balkan route to only those nationalities deemed eligible for asylum in the EU. The concerted action banned all nationalities except Syrians, Afghans and Iraqis from entering the territories of participating countries leaving thousands of migrants with other nationalities stranded in border zones leading to violent eruptions and clashes with police forces (Kuschminder et al. 2019). In a joint statement UNHRC, the IOM and UNICEF criticized the profiling on the basis of nationality as 'untenable' for humanitarian, legal and safety reasons (UNHCR 2015). Yet, while the ECtHR has found violations of the rights of migrants on the Balkan route *inter alia* including violations of the prohibition of collective expulsions (ECtHR 2021), it has not been engaged with the question of differential treatment on the basis of nationality in the context of the closure of the Balkan route.

Nationality based differential treatment is inherent to immigration policies and laws and so far, non-discrimination provisions have not been an effective tool to address these cases. Again, the tension between the sovereign right of states to regulate migration and individual rights is reflected in the cautious

approaches chosen by international (human rights) courts in cases related to discrimination based on nationality. The activation of the TPD and the preferential treatment of Ukrainians compared to other protection seekers is arguably an illustration of aforementioned tensions. When assessing whether the differential treatment of Ukrainians may amount to discrimination it has to be determined in which situations the latter emerged.

Part II: Applying Non-discrimination Rules on the Differential Treatment of Ukrainians and Others in Need of International Protection

2.1. Introduction: Theoretical Mind Game or Actual Added Value?

As has been shown by the analysis in Part 1, the assessment whether the differential treatment of a group of people compared to another amounts to discrimination depends on a case-by-case assessment. As has been demonstrated, in the field of immigration states enjoy a wide margin regarding the formulation of their policy objectives which legitimacy has hardly ever been addressed by international human rights bodies or courts. The underlying political reasons for the decision to activate the TPD and the concomitant question why the TPD has not been activated in comparable situations is accordingly beyond the analysis of this contribution (see further Ciğer 2022 and European Commission 2016). Yet, other situations emerge where the non-discrimination framework as analysed above might be applicable for addressing cases of differential treatment, as will be shown below. It is clear, that one year into the conflict the situation at the borders between the Ukraine and EU member states and the situation of displaced Ukrainians in the EU Member states has changed considerably since the beginning of the Russian invasion in February 2022. According to UNHCR more than 8.1 million people have left Ukraine as a consequence of the war and more than 4.9 million Ukrainians have been registered for temporary protection in EU Member states (UNHCR 2023). However, the movements of displaced Ukrainians to and within the EU are not linear compared to one year ago. Art 11 TPD providing for a Dublin-like system for beneficiaries of temporary protection, has not been activated, which enables free intra-EU movement for beneficiaries of temporary protection (Council of the European Union 2022b). Furthermore, beneficiaries of temporary protection, different from other people enjoying international protection in the EU, are able to return to Ukraine for visits without losing their status. Accordingly,

a significant number of pendular movements – back-and-forth movements – has been recorded and demonstrate the fluid dynamics of the conflict induced displacement from Ukraine (ECRE 2023). Besides the changing patterns of movement, with the continuation of the conflict new questions arise regarding the legal position of beneficiaries of temporary protection. In October 2022, the EU has prolonged by 12 months the special status of Ukrainians till March 2024. While the volatile situation in Ukraine clearly suggests the prolongation of the application of the TPD, it still has to be recognized that the TPD is a regime implemented as emergency response to mass displacement. Hence, the protection provided under the TPD is considered to be temporary with a pre-determined duration. In Art 17, the TPD in principle recognizes the applicability of the 1951 GRC and the right of beneficiaries of temporary protection to seek asylum in the EU, yet, according to Art 19 (1) states may provide that 'temporary protection may not be enjoyed concurrently with the status of applicant for international protection while their applications are under consideration'. While Ukrainians enjoy wider rights than applicants for international protection, recognized refugees enjoy more rights and a more favourable status than beneficiaries of temporary protection. The longer the conflict lasts, the more questions, including questions of discrimination, will arise regarding the future treatment of Ukrainians enjoying temporary protection. This article will, however, focus on the differential treatment of Ukrainians compared to other forcibly displaced persons. Subsequently, the access to protection will be used as example on how applicable non-discrimination norms can be used to add to the necessary debate about the inherently discriminatory character of policies in the wider field of immigration and forced displacement. The findings are exemplary for further eventual questions of discrimination that still might arise in the context of the treatment of Ukrainians and other people in need of protection.

2.2. Access to Protection for Ukrainians and others Feeing General Violence and Armed Conflict

2.2.1. Comparable Situation or Different Situations Treated Differently?

The analysis whether access to protection for Ukrainians in need of protection compared to other persons in need of protection might amount to discrimination is rather complex. The elephant in the room is the question, whether the situation of Ukrainians forcibly displaced by the conflict is actually comparable to the situation of other persons forcibly displaced

by conflict or whether these are different situations. If the latter applies, a further analysis is redundant. In order to assess the comparability of the situations of Ukrainians with others forcibly displaced persons two main factors are decisive: First, the preferential status of Ukrainians under the visa waiver applied on them and second, the proximity of the conflict and the resulting displacement to the EU.

The legal foundation for the facilitated access of Ukrainians to EU territories and thereby to protection is the Schengen visa waiver exempting Ukrainian nationals from visas for entry into the EU and grating them the right to travel within the EU for 90 days within a 180-day period.[14] Accordingly, the only condition for displaced Ukrainian nationals to enter the EU is the need for a biometric passport, while MS shall, according to Art 8 (3) TPD provide persons to be admitted for the purpose of temporary protection with necessary visa or transit visa. Additionally, Ukrainians may decide in which Member State they wish to exercise their rights as beneficiaries of temporary protection. For persons fleeing other conflicts, legal access to the EU territories is incomparably more difficult to reach. When coming from a war and conflict torn country, to obtain a regular visa is hardly possible, especially since neither EU law nor the ECHR oblige states to grant visa to persons in view of seeking protection in an EU member state (CJEU 2017 and ECtHR 2020a). Despite being expression of potential longstanding racialised political choices (Houtum 2010), visa waivers, as has been pointed out, are a legitimate instrument for selective immigration control policies and cannot be considered per se illegitimate under non-discrimination laws. Nonetheless, for the application of the non-discrimination provisions of in particular Art 14 ECHR, the decisive question is whether the beneficial status of Ukrainians as visa-free nationals renders their situation in the context of forced displacement incomparable to the situation of visa-required third country nationals. In its case law, the ECtHR has clarified that 'the requirement to demonstrate an analogous position does not require that the comparator groups be identical' (ECtHR 2017, para. 64). As has been pointed out above, in *Hode and Abdi* the ECtHR has recognized that status *per se* does not preclude a situation to be analogous, but that it depends on the particular nature and context of the complaint and the rights at stake (ECtHR 2012b, para. 50). Accordingly, the visa exemption for Ukrainians does not *a priori* result in a lack of comparability falling outside the scope of Art 14 ECHR. It

[14] See Art 4 and ANNEX II Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

is recognized that non-refoulement obligations stemming from international human rights norms, while not creating an obligation to provide protection seekers with a residence permit, create some form of protected status. This status, even though being rather *de facto* than a legal status, allows persons seeking protection to remain in the care of the destination state or to be admitted to that state for the purpose of a legal examination of the claimed protection needs (Wouters 2009, 569). According to Art 1 ECHR states are obliged to ensure the protection to all humans once they are within their jurisdiction arguably established as soon as a person is under the personal control of a state when applying for international protection (Heschl 2018, 80 et seq) including to be not discriminated on the basis of race, ethnicity, nationality or any 'other status' which applies to visa-free and visa-required persons in need of protection alike.

Similarly, the comparability of the situation cannot be conclusively rejected by focusing on the geographic proximity of the reason for displacement. Skordas has argued that there is a fundamental structural difference between the mass influx of people from Ukraine and from other conflict situations in the world making them not comparable. While Ukrainians did not have any alternative but leaving for neighboring EU countries, the movement of people leaving other conflicts to the EU is not comparable to displacement as understood by the TPD as it lacks the urgency since relatively safety could be found in third countries *en route* (Skordas 2022). This argument lacks 'legal bite' because of several reasons: First, as has been pointed out, it can be dismantled by taking the rights at stake as starting point. Art 14 ECHR applies insofar as there are accessorial ECHR concerned. Even though the Convention does not know a right to enter a country in order to seek protection, Art 2 and Art 3, as well as Art 4 Protocol 4 ECHR find application and implicitly ensure the access to protection for people whose rights are under thread. The nature of the rights at stake are comparable for people fleeing whatever conflict and, thus, an analogous situation in line with the argumentation of the ECHR can be indeed established. Secondly, the argument loses its substance when applied to the differential treatment of Ukrainians fleeing the Russian invasion compared to third-country nationals other than Ukrainians fleeing the same conflict. With the Russian invasion not only Ukrainians have been forced to leave the country, but also persons having a nationality other than the Ukrainian one. According to the Council Implementation Decision, the TPD applies to Ukrainian nationals, stateless persons or beneficiaries of international protection in Ukraine and family members to aforementioned groups.[15] However, while these groups enjoyed

[15] See Art 2 (1) Implementation Decision of the TPD: This Decision applies to the following

immediate access and protection under the TPD, non-Ukrainian third-country nationals who were legally residing in Ukraine until the invasion, were not equally covered by the Council Decision (see further euobserver 2023). While many Member states extended the scope of the TPD to non-Ukrainian nationals legally residing or having been in possession of a permanent residence, protection is not equally provided yet (FRA 2022). Another question that might arise in this regard is whether people from Ukraine possessing Russian citizenship fleeing occupied territories will be treated as beneficiaries of temporary protection or not. And similarly, if the conflict in Ukraine is the deciding factor, how to deal with Russian deserters, draft evaders, dissidents and others fleeing the oppressive Russian regime, who arguably are as well victims of the current armed conflict but are likely to face severe obstacles in accessing protection in the EU, as will be further discussed below.

The comparability test as applied by the ECtHR involves a strong moral component and goes beyond the mere assessment of formal facts. So far, no clear line can be derived from the ECtHR's case law on how to establish whether two situations are to be treated equally or not. However, in light of the above said, a general refusal to accept the comparability of Ukrainians displaced by the armed conflict with other persons forcibly displaced by conflict on the basis of status or proximity cannot be argued.

2.2.2. Proportionality of the Differential Treatment of People Seeking Protection from Armed Conflict Compared to Ukrainians

Once having affirmed the comparability of the situation of Ukrainian displaced persons and others fleeing forced conflict and generalized violence, it has to be established whether the differential treatment regarding the access to territory and protection has been proportionate. As regards the legitimate aim of the state policy one can refer to the above analysis as states enjoy a wide margin in determining and defining their immigration objectives. The immediate activation of the TPD and the facilitated access to protection had the legitimate aim to prevent national asylum systems to collapse under the pressure of the mass influx. While being clearly selective, the legitimate

categories of persons displaced from Ukraine on or after 24 February 2022, as a result of the military invasion by Russian armed forces that began on that date: (a) Ukrainian nationals residing in Ukraine before 24 February 2022; (b)stateless persons, and nationals of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022; and, (c) family members of the persons referred to in points (a) and (b).

aim of the differential treatment under the current approaches can hardly be denied. When it comes to the balancing of rights and state interests, the grounds for the differential treatment have to be taken into account. As has become clear from the analysis above, racial and ethnic profiling at border crossing points and differential treatment on the grounds of race or ethnicity cannot be justified under any circumstances. Accordingly, incidents of people prevented from leaving Ukraine because of their appearance clearly amount to prohibited discrimination under the ECHR and the respective case law. Similarly, the discrimination of Ukrainian Roma could not be justified on any account. Roma, despite possessing the Ukrainian citizenship, have reportedly faced severe discrimination when fleeing the war compared to other Ukrainians. The European Roma Rights Centre (ERRC) reported a series of human rights violations, including the discrimination of Roma fleeing Ukraine at the borders, their subjection to ethnic profiling and verbal abuse, their segregation and the refusal of humanitarian assistance, which would clearly amount to discrimination (ERRC 2023).

When nationality is the reason for the differential treatment, states will have to bring 'weighty reasons' for justification. Again, there is a need to distinguish between two different scenarios: First, the differential treatment of Ukrainians compared to non-nationals other than Ukrainians displaced because of the conflict in Ukraine; and second, the differential treatment of Ukrainians compared to other persons fleeing an armed conflict in the world.

Regarding the first scenario, Art 2 (1) of the Council Implementing Decision for the activation of the TPD foresees that Member States have to grant protection to Ukrainian nationals residing in Ukraine before 24 February 2022 and their family members and stateless persons, and nationals of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022 and their families. In Art 2 (2), the decision, however, leaves it open to Member states to apply the TPD or 'adequate protection under national law' for stateless persons without refugee status and third-country nationals with permanent residence in Ukraine who are unable to return in safe and durable conditions to their country of origin. In a Communication on providing operational guidelines on the implementation of the TPD the Commission detailed that such national protection 'does not have to entail benefits identical to those attached to temporary protection' but must extend to certain minimum rights to ensure a dignified standard of living, notably residency rights, access to means of subsistence and accommodation, emergency care and adequate care for minors (European Commission 2022a, 3). As has been pointed out, most Member states have extended the scope of application of the TPD to the aforementioned people, yet not all did so. Again, so far, no cases have

been brought addressing eventual discrimination that might arise in this regard on the basis of nationality or other status. A different scenario where nationality as ground for differential treatment might become relevant is when Russian deserting the army or the oppressive regime, are prevented from entering the EU territories, which gives raise to severe human rights issues in itself (Grundler and Guild 2022). While the conflict in Ukraine is the common denominator and source for the displacement of Ukrainians and Russians are likely to be treated differently when seeking access to protection and to rights. Kienast et al. have even argued that there would be 'an obligation of EU Member states to grant visas in order to compensate the negative distinction caused by the visa requirement imposed on them in contrast to Ukrainian victims of the conflict' (Kienast et al. 2022). In September 2022 the EU suspended the visa facilitation agreement with Russia (Council of the European Union 2022a) and the Commission issued new guidelines on visa procedures and border controls for Russian citizens foreseeing greater security scrutiny on visa issuance to Russians especially related to applying any humanitarian derogations from the Schengen Code provisions (European Commission 2022b). Despite the EU`s approach to continue to issue short term visa for Russians, the Baltic states, Poland and the Czech Republic imposed far reaching restrictions leading to an effective entry ban for most Russian citizens to the EU (euronews 2022). While visa facilitation on the basis of nationality are considered legitimate under greater immigration policy aspirations, general blanket bans which imply an automatic refusal of a Schengen visa to a person belonging to a certain nationality as the refusal to honor Schengen visa issued by other Member states to a certain nationality is not foreseen by the Schengen Visa Code. The latter, in Art 32 (1) includes not only an exhaustive list of reasons to refuse a Schengen visa but also foresees a right to appeal a refusing decision in Art 32 (3). Arguably, by denying Russian citizens to be issued a visa or entry to territory despite being in possession of a valid Schengen visa on grounds of nationality and arguably ethnicity as most Russian citizens are likely to be of Russian ethnicity may fall under the application of Article 14 ECHR (Ganty 2022).

The second scenario as described above relates to Ukrainians forcibly displaced and the proportionality of the differential treatment they enjoyed under the application of the TPD compared to other people displaced by conflict. Following the analysis made in Part 1, the proportionality *strictu sensu* concerns the balance between the rights of the individual and the state interest. The state interest in granting Ukrainians immediate access to protection was, as has been already explained, the necessity to protect national asylum procedures due to the mass influx of people. The state

interest in not granting the same rights to persons seeking protection other than Ukrainians can be argued by general reference to the state´s monopole in regulating migration and access to procedures. As has been explained in the beginning of the paper, the EU´s migration and asylum policy has been primarily shaped by deterrence and containment approaches in the last decades. Push-backs are a practice commonly applied in order to prevent access to the territory and thereby to procedures. While the prohibition of *refoulement* and the illegality of these practices has already been confirmed by the ECtHR (ECtHR 2012a), the number of cases decided does not reflect the scope of the practice and lately, the Court has applied increasingly strict standards to cases related to the irregular entry to EU Member states (ECtHR 2020b, paras. 242-243). Accordingly, in these cases the application of Art 14 ECHR could open an additional way to address the situations at the EU's external borders. The application of Art 14 ECHR does not necessarily presuppose a breach of substantive provisions of the ECHR but can be triggered as soon as the facts of the case fall withing their ambit (Arnadóttir 2003, 35). Accordingly, it might be argued that in cases where a Member state allows entry of Ukrainians while actively preventing other third country nationals from seeking protection (see e.g. HRW 2022), Art 14 ECHR could be triggered and applied even if no violations of *non-refoulement* obligations can be found. At least the margin of appreciation for the state would be narrow, as discrimination based on the grounds of nationality (if not race and ethnicity) could be invoked.

Conclusions

As has become clear in the analysis above, the right to non-discrimination only plays a peripheral role in debates about migration control and has not been sufficiently addressed by human rights bodies and courts in immigration related cases. And indeed, it is arguably difficult to distinguish between justified differential treatment and discrimination for the purposes of human rights law, when the context, i.e. the wider field of immigration control, is inherently shaped by inequalities, perpetuated perceptions and hierarchies. Additionally, immigration is a highly politicized field and tensions between sovereign rights of states and human rights might hinder human rights bodies and courts keen to maintain their legitimacy in the view of states and governments to exercise their judicial scrutiny. Yet, immigration policies and migration control measures are today at the frontline of general racialized political tendencies and non-discrimination norms might become essential frameworks to address and eventually challenge these processes. In the field

of forced displacement, the Ukrainian case might be seen as exemplary for the politization of refugee law. In the reasoning the differential treatment of people in need of protection is put on the foreground on the basis of nationality but decisive factors in the background are rooted in racial and ethnic considerations. Generally, refugees and forcibly displaced persons face considerable limitations in accessing their rights and to claim violations of their rights. The application of non-discrimination norms does not pave the way to access the judiciary and most likely, the scenarios for their application are limited as well. Still, to recognize the discrimination perspective in the discourse on refugee protection in legal terms, contributes to the necessary debate about the legitimacy of policy choices.

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