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Chapter 15

Frontex Assisting in the Ukrainian Displacement – A Welcoming Committee at Racialised Passage?

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1. Introduction

Frontex, the European Border and Coast Guard Agency, has been in the centre of multiple investigations¹ for its involvement in human rights violations at the EU borders. In fact, the agency's Executive Director, Fabrice Leggeri, resigned² last week over allegations of misconduct related to pushbacks. The Agency is a

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1 Statewatch, 'Frontex investigations: what changes in the EU border agency's accountability?' (30 March 2021) <<https://www.statewatch.org/analyses/2021/frontex-investigations-what-changes-in-the-eu-border-agency-s-accountability/>> accessed 1 December 2022.

2 Jennifer Rankin, 'Head of EU border agency Frontex resigns amid criticisms' *The Guardian* (Brussels, 29 April 2022) <<https://www.theguardian.com/world/2022/apr/29/head-of-eu-border-agency-frontex-resigns-amid-criticisms-fabrice-leggeri>> accessed 1 December 2022.

central securitising agent³ in EU migration policy and is strongly associated with the policies of non-entrée,⁴ while its fundamental rights protection mechanisms have been deemed greatly ineffective. Most recently, the Greek Minister of Migration and Asylum stated in a public meeting with the Frontex Executive Director, that ‘Frontex is a security force not a welcoming committee’.⁵ Nevertheless, in response to the Ukrainian displacement, Frontex shows a diametrically opposite face.

A lot has been written and discussed so far regarding the asylum law and protection angle of the Ukrainian displacement crisis. Far less attention has been paid to the border management aspects of this crisis. The EU has adopted an open borders policy with respect to Ukrainian refugees. But does this mean that a border control agency, such as Frontex, does not have a role in this? And is this role completely distinct from ‘security’, in particular as regards non-Ukrainian nationals fleeing the war and the agency’s involvement in returns? Does the differential treatment of displaced non-Ukrainian nationals raise legal concerns?

2. Commission Guidelines – General policy on border management

On 04 March 2022 the Council adopted the historical implementing Decision⁶ to activate the Temporary Protection Directive (TPD)⁷, as an exceptional measure to provide immediate and temporary protection. The Commission followed issuing Operational Guidelines for external border

3 Mariana Gkliati and Jane Kilpatrick, ‘Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in FRONTEX Joint Operations’ [2021] 17(4) Utrecht Law Review 59.

4 James C. Hathaway and R. Alexander Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’ [1997] 10 Harv. Hum. Rts. J. 115.

5 Tweet from Giorgos Christides (8 April 2022) <https://twitter.com/g_christides/status/1512358854293655553> accessed 1 December 2022.

6 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 [2022] OJ L 71.

7 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 [2001] OJ L 212.

management⁸ to facilitate border crossings at the EU-Ukraine borders and Operational guidelines⁹ to clarify the scope and provisions of the Directive and the Council Decision. These guidelines are not legally binding but should provide the appropriate guidance for the uniform implementation of the Directive across the EU.

With respect to the management of borders and the movement of persons fleeing Ukraine, the Commission prompts member states to relax border checks as a result of exceptional and unforeseen circumstances, an option already available under the Schengen Borders Code¹⁰ (Articles 5(2)(b) and 9). The Commission notably remarks that ‘formalities must be reduced to a minimum because of the urgency of the situation’.

In fact, Ukrainians were already exempt from the requirement to be in possession of a short-stay visa for entering the Union on the basis of the 2017 visa liberalisation agreement¹¹ between Ukraine and the EU. Amongst the rights for beneficiaries of temporary protection is also the right to move to another EU country, prior to the issuance of a residence permit, and also to travel freely to another EU country after the residence permit is issued for 90 days within a 180-day period.

The Commission in its Guidelines advises member states to adopt facilitation measures for border management, including simplifying controls for certain categories of persons, such as vulnerable persons, and organising controls outside of border crossing points.

It further strongly recommends that the affected states make use of the support of Frontex in all activities carried out at their borders. In particular, technical and operational reinforcement by Frontex migration management support teams can be requested to reduce congestion and increase the fluidity of the traffic at the border.

8 Commission Communication Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders [2022] CI 104/1.

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

10 Regulation (EU) 2016/399 of The European Parliament and of The Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77/1.

11 European Commission, ‘European Commission welcomes the Council adoption of visa liberalisation for the citizens of Ukraine’ (Brussels, 11 May 2017) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_1270> accessed 6 May 2022.

Member States can ask for Frontex to support in the identification of the persons, including nationality screening and travel documents and COVID-certificate checks, and their registration and fingerprinting. The Commission also encourages member states to make use of the operational and logistical support of Frontex for the return of third country nationals that do not have a right to stay on the basis of the Temporary Protection Directive, which can, as the Commission notes, book seats on commercial flights or organise charter flights.

Frontex was also directed to give priority to requests of the affected member states to the Eurosur Fusion Services.¹² EUROSUR¹³ is a pan-European surveillance system coordinated by Frontex, which integrates all border surveillance facilities of the member states. The aim is to improve coordination in existing infrastructures, and extend their reach, in order to provide a more complete picture of the situation in real-time, and thus increase situational awareness and reaction capability. Information from all national state of the art technologies, including radar satellite imagery and drone mapping are collected in the Eurosur Fusion Services and processed to enhance detection capabilities, including predicting vessel positions. Frontex is now directing its attention to Ukraine as a priority, providing regular monitoring with tailored aerial surveillance, as well as satellite and other tailor-made imagery services of the frontier and pre-frontier areas of Ukraine to assist member states to assess the situation in real time.

3. Frontex at the Ukrainian borders

Frontex announced its readiness to provide its support from the first days of the conflict. It noted that it monitors the situation and it is ready to deploy¹⁴ standing corps officers within days in response to possible requests for support.

12 Frontex, 'Situational awareness and monitoring' <<https://frontex.europa.eu/we-know/situational-awareness-and-monitoring/information-management/>> accessed 1 December 2022.

13 Communication From The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions Examining the creation of a European Border Surveillance System (EUROSUR) (Brussels, 13 February 2008) <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0068:FIN:EN:PDF>> accessed 1 December 2022.

14 Frontex, 'Frontex ready to support Member States in light of situation in Ukraine'(25 February 2022) <<https://frontex.europa.eu/media-centre/news/news-release/frontex-ready-to-support-member-states-in-light-of-situation-in-ukraine-kZGGwq>> accessed 1 December 2022.

The first deployment of Frontex migration management support teams at the Ukrainian borders was decided even prior to the activation of the Temporary Protection Directive. Upon Romania's request, the agency announced the deployment¹⁵ in the country of 150 officers with 45 patrol cars and other equipment. According to the communication of the Commission, the Parliament and the Council on the European solidarity with refugees and those fleeing war in Ukraine,¹⁶ the first group of 49 Frontex staff was deployed at EU-Ukraine borders and the border with Moldova was supplemented by 162 staff. This reinforcement¹⁷ was part of land border surveillance operation Terra which takes place at the external borders of Romania and eleven other EU member states. In particular, border control officers and document experts were deployed to assist the Romanian authorities in the processing of migrants, including assisting in registration, identification and fingerprinting, and carry out border surveillance tasks. The agency stated that it also holds talks with other member states offering its deployment at other EU borders with Ukraine.

The agency has expanded its deployment in third countries neighbouring Ukraine. The Commission and the Council promptly concluded a status agreement with Moldova¹⁸ and launched its first joint operation in the country. Similarly to the joint operation in Romania, the aim of the operation¹⁹ is first of all, to provide technical and operational support to Moldova in the processing of persons, but also to perform other border-control tasks 'if needed'. The potential target of these additional border measures could conceivably be non-

15 Schengen Visa Information, 'Frontex to Support Romania by Sending 150 Officers at the Border With Ukraine' (3 March 2022) <<https://www.schengenvisainfo.com/news/frontex-to-support-romania-by-sending-150-officers-at-the-border-with-ukraine/>> accessed 1 December 2022.

16 Communication from The Commission to The European Parliament, The European Council, The Council, The European Economic And Social Committee And The Committee Of The Regions European solidarity with refugees and those fleeing war in Ukraine (Strasbourg, 8 March 2022) COM (2022) 107 final.

17 Frontex, 'Frontex to send additional officers to Romania' (2 March 2022) <<https://frontex.europa.eu/media-centre/news/news-release/frontex-to-send-additional-officers-to-romania-B4Nl2h>> accessed 1 December 2022.

18 Council of the European Union, 'Moldova: Council adopts decision to sign agreement for Frontex operational support in light of Russia's invasion of Ukraine' (17 March 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/03/17/moldova-council-adopts-decision-to-sign-agreement-for-frontex-operational-support-in-light-of-russia-s-invasion-of-ukraine/>> accessed 1 December 2022.

19 Frontex, 'Frontex sending standing corps officers to Moldova' (21 March 2022) <<https://frontex.europa.eu/media-centre/news/news-release/frontex-sending-standing-corps-officers-to-moldova-8KKC9T>> accessed 1 December 2022.

Ukrainians crossing the border, as discussed in the following sections.

According to the latest available information at the time of writing, 18 standing corps officers are deployed in Moldova. The deployment will expand to 84 standing corps officers and document inspection devices. It can be noted that Frontex had been cooperating with Moldova since 2008 in information exchange, risk analysis, research and development, training and operational coordination on the basis of a working arrangement.²⁰ Moldova already also takes part at the Frontex Risk Analysis Network (FRAN),²¹ which provides a platform for sharing knowledge, and carrying out joint risk analysis and intelligence activities.

According to the latest developments, the agency reached an agreement in April 2022 with the states neighbouring Ukraine for the activation of a VEGA project²² regarding the role of border guards at airports in detecting children at risk. The project aims at spotting children who may be victims of trafficking. In this framework, Frontex migration control teams apply standard operational procedures based on the VEGA Handbook,²³ which also provides useful guidelines on how to treat children at borders. Such guidelines include how to make a child feel ‘comfortable’ during an identification interview, spotting trouble signs during documents control and other border checks and noticing and communicating unusual behaviour of children and adults accompanying them.

The first Joint Operation VEGA Children was launched in 2015 and aimed at ‘Combating child trafficking and detection of children at risk on the move at air borders’ at nine European airports. More such operations have since taken place at airports around Europe also in collaboration with the International Organisation on Migration.²⁴ At its initial stage, the VEGA project

20 Frontex, ‘Moldova Working Arrangement’ (12 August 2008) <link> accessed 1 December 2022.

21 Frontex, ‘Situational awareness and monitoring’ <<https://frontex.europa.eu/we-know/situational-awareness-and-monitoring/strategic-analysis/>> accessed 1 December 2022.

22 Frontex, ‘Frontex publishes VEGA Handbook: Children at airports’ (28 August 2015) <<https://frontex.europa.eu/media-centre/news/news-release/frontex-publishes-vega-handbook-children-at-airports-bvtPly>> accessed 1 December 2022.

23 Frontex, *VEGA Handbook: Children at airports Children at risk on the move Guidelines for border guards* (Frontex 2015) <https://frontex.europa.eu/assets/Publications/Operations/VEGA_Children_Handbook.pdf> accessed 1 December 2022.

24 IOM, ‘IOM Joins Frontex Operation to Counter Child Trafficking’ (22 November 2021) <<https://georgia.iom.int/news/iom-joins-frontex-operation-counter-child-trafficking>> accessed 1 December 2022.

was focused on air border crossing points, but the intention of the agency has, since the beginning been to streamline similar projects at land and sea border surveillance operations. Today VEGA is not a stand-alone project anymore, but VEGA components can be activated in all Frontex operations.

Given that the majority of the population leaving Ukraine are women and children, the agency, following consultations with the relevant member states, decided to activate the VEGA components at the border crossing points across the Ukrainian borders with Slovakia, Romania, Moldova and Poland, as well as a few airports until the end of 2022. On 20 April Frontex deployed the first members of its own staff in a variety of locations as part of the VEGA component. Member Organisations of the Frontex Consultative Forum on Fundamental Rights have joined Frontex teams in the past to advise on the identification of vulnerable persons and potential victims of trafficking including children. The Consultative Forum chairs have recently announced a call for expression of interest to the member organisations for future cooperation with Frontex under the VEGA project.

Moreover, Frontex assists with the voluntary repatriation of third country nationals fleeing Ukraine. This concerns non-Ukrainians fleeing the war in Ukraine, which are not covered by temporary protection and are able and willing to return to their countries of origin. On 11 March Frontex announced that it had assisted with the return of roughly 400 people,²⁵ mainly families with children, to Tajikistan and Kyrgyzstan with two charter flights from Poland.

Finally, with respect to data management, it can be noted that Member states cannot use Eurodac and other EU large-scale databases for the registration of the personal data of beneficiaries of temporary protection (unless they apply for asylum), which has to be processed only through national data bases. This does not allow for interoperability, which the Commission views as a challenge. The Commission proposed to address this with the help of the European Asylum Agency (EUAA), ‘by for instance providing a platform for exchange of information’.²⁶ The proportionality of this measure should certainly be examined. There is no role explicitly envisaged for Frontex in this

25 Frontex, ‘First humanitarian return flights by Frontex’ (11 March 2022 <<https://frontex.europa.eu/media-centre/news/news-release/first-humanitarian-return-flights-by-frontex-r3mnqc>> accessed 6 May 2022).

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

regard.

4. A shift towards humanitarisation in language and policies

The agency seems to be adopting a more constructive role in dealing with the Ukrainian displacement, which is also vividly represented in the use of corresponding language in its communication.

No concerns have been expressed by observers so far regarding the direct or indirect involvement of the agency in any violations of the EU Charter with respect to persons fleeing the war in Ukraine, while there are no indications of its involvement in blocking the right to leave²⁷ for Ukrainian men. To the contrary, Frontex officers are giving out teddy bears²⁸ to Ukrainian children crossing the borders, as part of the “Secret Teddies Mission”.

The purpose of what would have otherwise been border surveillance operations is now to help ‘in processing the massive number of people’.²⁹ The objective of ‘combating irregular migration’ has morphed into ensuring ‘the effective and efficient management of the crossing³⁰ (...) and to avoid congestions at and around the borders, while maintaining a high level of security for the entire Schengen area.’

While press releases and Frontex reports, until now have been referring to ‘irregular migrants’ and ‘illegal border crossings’, the agency now refers to ‘people fleeing the conflict zone’.³¹ Finally, while the role of Frontex in forced

27 Pia Lotta Storf, ‘Ukraine’s Travel Ban, Gender and Human Rights Gendered Impacts of Conflict and the Right to Leave’ (Völkerrechtsblog, 18 March 2022) <<https://voelkerrechtsblog.org/ukraines-travel-ban-gender-and-human-rights/>> accessed 1 December 2022.

28 Frontex, ‘Teddy bears for Ukrainian children’ (20 March 2022) <<https://frontex.europa.eu/media-centre/news/news-release/teddy-bears-for-ukrainian-children-wcKMm4>> accessed 1 December 2022.

29 Frontex, ‘Frontex sending standing corps officers to Moldova’ (21 March 2022) <<https://frontex.europa.eu/media-centre/news/news-release/frontex-sending-standing-corps-officers-to-moldova-8KKC9T>> accessed 1 December 2022.

30 Commission Communication Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders [2022] CI 104/1.

31 Frontex, ‘Frontex ready to support Member States in light of situation in Ukraine’ (25 February 2022) <<https://frontex.europa.eu/media-centre/news/news-release/frontex-ready-to-support-member-states-in-light-of-situation-in-ukraine-kZGGwq>> accessed 1 December 2022.

removals has been heavily criticised,³² the returns that have been carried out so far in relation to the Ukrainian displacement are voluntary. “Return operations’ of ‘illegally residing third country nationals’ are renamed ‘humanitarian return flights’³³ for ‘people who have fled the war zone and wish to return to their countries of origin’ by Frontex and ‘repatriation’³⁴ and ‘assisted departures’ by the Commission.

5. Racialised border controls remain for non-Ukrainians

While we can safely speak of a relaxation of border controls, the EU has not adopted a fully open borders and protection policy. Pursuant to the Council Decision (Article 2(1)), the TPD applies to Ukrainian nationals and their family members, as well as nationals of other third countries and stateless persons who had received international or equivalent national protection in Ukraine before the invasion and their family members. It should be noted that the definition of family members is interpreted rather broadly including also unmarried partners in a stable relationship and dependent close relatives who lived together as part of the family unit, while the Commission calls upon the member states to ‘use their margin of appreciation in the most humanitarian way’.³⁵

Member states may extend the scope of protection to other categories of persons fleeing the war in Ukraine (Article 7(1) TPD), such as nationals of other third countries and stateless persons without a valid permanent residence permit. Member States receive encouragement³⁶ by the Commission to this

32 Statewatch, ‘Deportation Union: Rights, accountability and the EU’s push to increase forced removals’ (19 August 2020) <<https://www.statewatch.org/deportation-union-rights-accountability-and-the-eu-s-push-to-increase-forced-removals/>> accessed 1 December 2022.

33 Frontex, ‘First humanitarian return flights by Frontex’ (11 March 2022) <<https://frontex.europa.eu/media-centre/news/news-release/first-humanitarian-return-flights-by-frontex-r3mnqc>> accessed 1 December 2022.

34 Commission Communication Providing operational guidelines for external border management to facilitate border crossings at the EU-Ukraine borders [2022] CI 104/1.

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

36 *ibid*

end.

Stateless persons and nationals of other third countries who can prove their valid permanent residence in Ukraine and who are unable to return in safe and durable conditions to their country of origin shall also benefit from temporary protection (Article 2(2)).

This differentiation is also reflected in the plethora of reports³⁷ from the Ukrainian borders that shows discriminatory treatment of non-white people attempting to flee. According to Human Rights Watch,³⁸ black and Asian people were at various instances prevented from boarding trains and buses. Multiple accounts are reported of students and migrants from Africa, the Middle East, and Asia who face such racist, sometimes even violent, treatment in their attempt to flee. These challenges were also acknowledged by UNCHR,³⁹ that has appealed for access to protection to be afforded to everyone indiscriminately, while they have also been condemned by African leaders⁴⁰ and the African Union.⁴¹ The International Organisation for Migration and other UN bodies⁴² have called for the end of ‘discrimination and

37 ECRE, ‘EU Ukraine Response: EU Steps Up With Temporary Protection, Border Management Guidelines, Humanitarian Aid, and Support to Member States’ (11 March 2022) <<https://ecre.org/eu-ukraine-response-eu-steps-up-temporary-protection-border-management-guidelines-humanitarian-aid-and-support-to-member-states/>> accessed 1 December 2022.

38 Human Rights Watch, ‘Ukraine: Unequal Treatment for Foreigners Attempting to Flee Pattern of Blocking, Delaying Non-Ukrainians’ (4 March 2022) <<https://www.hrw.org/news/2022/03/04/ukraine-unequal-treatment-foreigners-attempting-flee>> accessed 1 December 2022.

39 UNHCR, ‘UNHCR mobilizing to aid forcibly displaced in Ukraine and neighbouring countries’ (1 March 2022) <<https://www.unhcr.org/news/briefing/2022/3/621deda74/unhcr-mobilizing-aid-forcibly-displaced-ukraine-neighbouring-countries.html>> accessed 1 December 2022.

40 Emmanuel Akinwotu and Weronika Strzyżyńska, ‘Nigeria condemns treatment of Africans trying to flee Ukraine’ *The Guardian* (28 February 2022) <<https://www.theguardian.com/world/2022/feb/28/nigeria-condemns-treatment-africans-trying-to-flee-ukraine-government-poland-discrimination>> accessed 1 December 2022.

41 Renata Brito, ‘Europe welcomes Ukrainian refugees — others, less so’ *Ap News* (28 February 2022) <<https://apnews.com/article/russia-ukraine-war-refugees-diversity-230b0cc790820b9bf8883f918fc8e313>> accessed 1 December 2022.

42 Rachael Reilly and Michael Flynn, ‘The Ukraine Crisis Double Standards: Has Europe’s Response to Refugees Changed?’ (Global Detention Project, 2 March 2022) <<https://www.globaldetentionproject.org/the-ukraine-crisis-double-standards-has-europes-response-to-refugees-changed>> accessed 1 December 2022.

racism against third country nationals fleeing Ukraine'.⁴³

While the control of identification, residence permits, and travel documents can be conceivable for non-Ukrainian third country nationals, the double standards⁴⁴ of the TPD cannot result in violations of human rights and exclusion from international protection all together. Even though students and other foreigners without a valid permanent residence permit do not fall in the scope of the TPD (Article 2(3)), their entitlements under the Refugee Convention and human rights law remain in effect.

Non-beneficiaries of temporary protection should be afforded entry to the territory pursuant the EU member states' obligation of *refoulement* under the EU Charter (Article 19), the ECHR (Article 3), the Refugee Convention (Article 33), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), and customary international law, and pursuant the obligation to provide access to asylum under the EU Charter (Article 18), and the Universal Declaration of Human Rights (Article 14). The Schengen Borders Code makes clear that border controls must be exercised without prejudice to refugees and people seeking international protection (Article 3(b)), while the European Border and Coast Guard Regulation repeatedly states that Frontex operations should be conducted in full respect of human and refugee rights.

All fleeing Ukraine should in fact be recognised as *prima facie* refugees⁴⁵ and be allowed access to protection, given that the objective circumstances in Ukraine, including carpet bombings and widespread targeting of civilian population, do not leave doubt as to the refugee character of the group.

The examples of exclusion that have been reported can also be in violation of the prohibition of discrimination included in Article 3 of the Refugee Convention, according to which, all provisions of the Convention shall apply without discrimination as to race, religion or country of origin. EU member states are also bound by the obligation of non-discrimination, as enshrined in

43 IOM, 'Discrimination and Racism Against Third Country Nationals Fleeing Ukraine Must End: IOM Director General' (3 March 2022) <<https://www.iom.int/news/discrimination-and-racism-against-third-country-nationals-fleeing-ukraine-must-end-iom-director-general>> accessed 1 December 2022.

44 Steve Peers, 'Temporary Protection for Ukrainians in the EU? Q and A' (EU Law Analysis, 27 February 2022) <<https://eulawanalysis.blogspot.com/2022/02/temporary-protection-for-ukrainians-in.html>> accessed 1 December 2022.

45 UNHCR, 'Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status' (5 June 2015) <<https://refweb.int/report/world/guidelines-international-protection-no-11-prima-facie-recognition-refugee-status>> accessed 1 December 2022.

the ICCPR (Articles 2(1) and 26), the ICESCR (Article 2(2)), the ICERD (Article 1(1)), the Charter of the United Nations (Articles 1(2) and 1(3)), the ECHR (Article 14 and Protocol 12), and the EU Charter (Article 21). The principle of non-discrimination under human rights law can be prohibited in such circumstances when other substantive rights are impaired in connection to the discriminatory treatment, such as the right to physical integrity or the right to non-refoulement.

Refugees from Ukraine that are not beneficiaries of temporary protection are being refused entry due to lack of the necessary documentation, most importantly a Schengen visa. Such visa requirements can more generally qualify as discrimination on the basis of nationality prohibited under human rights law, as has been argued by several authors including Mau,⁴⁶ Cholewinski,⁴⁷ van Houtum,⁴⁸ den Heijer⁴⁹.

Moreover, a compelling argument has been made that while nationality-based distinctions are not generally prohibited in the Refugee Convention, a differentiated visa requirement for different groups of refugees can be in breach of Article 7(1) read together with Article 3 of the Refugee Convention. By approaching visa requirements as a ‘treatment accorded to aliens generally’, subjection to such racialised admissions, which frustrates access to protection, can constitute discrimination either directly, on grounds of nationality, or indirectly on grounds of race or religion.⁵⁰ These arguments can apply by analogy to all border management authorities, including Frontex.

In practice member states can choose to extend the application of temporary protection or adequate protection under national law to additional categories of displaced persons not covered by the Council Decision, which are

46 Steffen Mau, ‘Mobility Citizenship, Inequality, and the Liberal State: The Case of Visa Policies’ [2010] 4(4) *International Political Sociology* 339.

47 Ryszard Cholewinski, ‘Borders and Discrimination in the European Union’ (Immigration Law Practitioners’ Association (ILPA) 2002) <https://www.antigone.gr/wp-content/uploads/library/selected-publications-on-migration-and-asylum/eu/en/borders_and_discrimination.pdf> accessed 6 May 2022 39-50, 65.

48 Henk van Houtum, ‘Human Blacklisting: The Global Apartheid of the EU’s External Border Regime’ [2010] 28(6) *Environment and Planning D: Society and Space* 957.

49 Maarten den Heijer, ‘Visas and Non-discrimination’ [2018] 20(4) *European Journal of Migration and Law* 470.

50 Maja Grundler, ‘Treatment Accorded to Aliens Generally’: Article 7(1) of the 1951 Refugee Convention as a Basis for Visa-Free Access to States Parties’ Territory? An Examination of the Prohibition of Nationality Discrimination in the Refugee Convention’ [2021] 33(3) *International Journal of Refugee Law* 469.

displaced for the same reasons and from the same country, upon immediate notification to the Council and the Commission.⁵¹

The Commission also sees this need for protection of the whole group fleeing Ukraine, strongly encouraging member states to extend temporary protection. Alternatively, the Commission, suggests that member states provide them immediate access to asylum procedures for the determination of their claims, and that they prioritise their cases. Accordingly, member states should make use of the possibility offered by the Schengen Borders Code (Article 6(1)) to authorise entry to third country nationals fleeing Ukraine who do not fulfil the entry conditions on humanitarian grounds, on grounds of national interest, as well as based on their international obligations stated above. This analysis is also supported by the Commission that explicitly states that ‘This wide derogation may be applied in the current crisis to allow entry to all those fleeing the conflict in Ukraine’.

6. Conclusion: remaining questions and future directions

The above analysis has shown that the incidents of discrimination at the borders cannot so much be attributed to poorly trained border guards. They reveal instead systemic problems related to the discriminatory application of the TPD. As pointed out, the differentiated treatment in the TPD and the Commission’s guidelines can lead to fragmentation⁵² of protection and discrimination, as well as practical difficulties at the borders that can affect the rights of individuals seeking international protection. As a result, member states can be held liable for violations of human rights and refugee law. Frontex faces similar risks to the extent that racialised passage can be connected to its obligations under the EU Charter and international customary law.

It can be specifically pointed out that the sharp differences in the language used by the agency in its communication of the Ukrainian crisis vis-à-vis other border emergencies, can act as an indication of discrimination in the work of the agency and the underlying assumptions that determine it. If the agency cannot provide a sound justification for this differentiation in language and message, as well as the differential treatment afforded to non-European nation-

51 Article 7 Temporary Protection Directive.

52 Sergio Carrera and others, ‘The EU grants temporary protection for people fleeing war in Ukraine: Time to rethink unequal solidarity in EU asylum policy’ in this collection.

als fleeing Ukraine, its actions cannot be considered neutral, and can, thus, be discriminatory in nature.

Even though the Commission encourages member states to relax border controls for everyone leaving Ukraine, the guidelines should be amended to include clear statements of the legal obligations of states under the Refugee Convention, the ECHR, the EU Charter, and other human rights instruments, and stress that member states must ensure safe passage and access to its territory for all refugees leaving Ukraine.

What has also been noted in this chapter is the constructive role of Frontex in assisting member states in the screening and registration of refugees, instead of blocking access to the territory. Even though, this is undoubtedly a positive development compared to the agency's prior record, one may not help but wonder why the assistance of the European Border Agency was called in in this regard rather than that of the EUAA, which is well-placed to reinforce the capacity of member states due to its specialised expertise. This is especially so, since the EUAA since early on announced that it has 130 experts⁵³ on stand-by to assist with screening, registration, information provision and asylum processing, if requested.

Focusing on Frontex, it should be highlighted that the primary stated aim of its operations at the Ukrainian borders is to help with processing and registration, while border control activities would be carried out if necessary. A child protection element is now streamlined in its operations in the region. The agency still carries out returns, which is in line with the securitisation orientation of the agency. However, in sharp contrast with its practice until now⁵⁴ the returns carried out in the Ukrainian context are (so far) voluntary in nature. Still, based on a case submitted⁵⁵ before the CJEU last year, concerning the treatment of minors during a Frontex return operation, doubts are conceivable as to whether all guarantees are being respected.

This is vastly distinct from the approach of 'combating irregular migration' and the agency's conduct in other parts of the EU border. While Frontex has,

53 Communication From The Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions European solidarity with refugees and those fleeing war in Ukraine (Strasbourg, 8 March 2022) COM(2022) 107 final.

54 Statewatch, 'Deportation Union: Rights, accountability and the EU's push to increase forced removals' (19 August 2020).

55 Not on our border watch, 'Stop border atrocities by the EU and Frontex: Stop illegal pushbacks. Not on our border watch!' <<https://www.notonourborderwatch.com/>> accessed 1 December 2022.

especially in the last years, become the symbol of securitisation and its operations raise serious human rights concerns, with respect to the Ukrainian displacement, the agency spreads the “message of warm welcome in the EU and of hope for a better future”.⁵⁶

It becomes apparent that the misorientation of the agency until now has not actually been the result of legal gaps or unclear obligations,⁵⁷ as has been argued by the Frontex Executive Director, but is rather a matter of political will and the direction given by the Commission and the Council. This shows that a change in the direction and the practices of the agency is indeed possible. The agency’s legal obligations are clear and the EBCG Regulation allows for a mandate to undertake such border management operations.

The last months have shown the potential of Frontex to evolve into a reliable border management actor that operates with efficiency, transparency, and full respect for human rights. Drawing from its experiences from dealing with the Ukrainian crisis, the agency can now borrow best practices from its own toolkit for other operations at the EU external borders at the Mediterranean and the Balkans. Concretely, we can expect a future role for the agency in the voluntary return of beneficiaries of temporary protection in dignity and safety, at the end of the temporary protection, unless refugee status has already been issued.

Even, in this new approach towards border management, the need for independent monitoring to ensure the principle of non-discrimination and the rights related to access to protection at the borders, and the rights of returnees during (even voluntary) returns remain acute.

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