

SYMPOSIUM ON UKRAINE AND THE INTERNATIONAL ORDER

UKRAINIANS IN FLIGHT: POLITICS, RACE, AND REGIONAL SOLUTIONS

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The situation of Ukrainians fleeing the Russian invasion exemplifies, as the organizers of this symposium note, both a shock to the international order and a powerful international response. Europeans, and Global North states more broadly, have welcomed Ukrainians with a generosity that sits in stark contrast to their treatment of the vast majority of contemporary refugees. This exceptional response demonstrates a key gap in the legal architecture, namely the absence of an international agreement on shared responsibility for hosting refugees. It also highlights a substantive shortcoming in international refugee law: its failure to protect most people fleeing armed conflict. In contrast, regional law from Africa and Latin America has for some time extended refugee protection to individuals escaping generalized violence. Beyond the substantive law, in many cases, regional protection is a preferable option for individuals fleeing violent conflict. In addition to these structural and substantive concerns, the exceptionally rapid and generous response to the Ukrainians demonstrates the deep politicization of international refugee policy and highlights the invidious role of race in the international legal order.

As of April 20, in the span of two months, more than a quarter of Ukraine's population had been forced to flee their homes.² Over five million Ukrainians had sought refuge in neighboring countries, and 7.1 million Ukrainians were internally displaced within their country's borders.³ This is the fastest displacement of people on record since World War II.⁴ Displaced Ukrainians have also been met with arguably the most effective and sympathetic reaction the modern world has ever seen.⁵ What is the role of refugee law in this powerful international response? As explained below, most Ukrainians do not fit the definition laid out in the 1951 UN Convention Relating to the Status of Refugees, and that treaty does not adequately address questions of responsibility sharing for large refugee flows, let alone mass movements of people most of whom are unlikely to qualify for refugee status.⁶

Exceptional Politics Create Generous Policy

The response to migrants from Ukraine demonstrates that international responsibility sharing in situations of mass displacement is deeply politicized, as it has been at least since the drafting of the 1951 Convention Relating to the Status of Refugees. The Convention gained salience during the Cold War as an instrument that could offer

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² UNHCR, *Operational Data Portal: Ukraine Refugee Situation*.

³ UNHCR, *Ukraine Situation: Flash Update #8*.

⁴ *Id.*

⁵ Elena Chachko & Katerina Linos, *Sharing Responsibility for Ukrainian Refugees: An Unprecedented Response*, LAWFARE (Mar. 5, 2022).

⁶ Katerina Linos & Elena Chachko, *Refugee Responsibility Sharing or Responsibility Dumping?*, CAL. L. REV. at 2–3 (forthcoming 2022).

highly visible evidence of the shortcomings of communism. The United States and other Western nations viewed refugees from Eastern Europe as symbols who “voted with their feet” in favor of Western politics and ideology.⁷ The response to the flight of Ukrainians, then, confirms what scholars of international migration law already knew: robust responsibility sharing, though not required by law, is possible when the politics point in the right direction.

Despite the absence of international legal standards on responsibility sharing in situations of mass displacement, the legal response to Ukrainians in the European Union has been rapid, generous, and highly exceptional.⁸ The political popularity of the Ukrainian cause catalyzed the implementation of the European Union’s Temporary Protection Directive, which has been on the books since 2001 but was not successfully invoked to assist Syrians fleeing the Assad regime.⁹ On March 4, 2022, the Council of the European Union approved the extension of temporary protection to all Ukrainians displaced on or after February 24 as a result of the Russian military invasion.¹⁰ The directive also protects family members of Ukrainians using a generous definition that includes dependent members of a family unit. The temporary status is valid for at least a year, and provides access to employment authorization, social welfare and housing, medical care, and, for Ukrainians under eighteen years old, education.¹¹ Perhaps most remarkably, the Temporary Protection Directive steps away from the approach of the Dublin Regulation, which requires asylum seekers to pursue their claim in the first European country they enter.¹² In contrast, the Directive allows Ukrainians to choose their own destination in Europe, permitting free travel throughout the EU before applying for protection.¹³

The generosity extends well beyond the Directive, with states opening borders to Ukrainians and providing free bus and train passage to safety in Europe.¹⁴ Volunteers from Europe and beyond have traveled to Ukraine’s borders to help the women and children who are fleeing, and many have opened their homes to Ukrainians.¹⁵ For right-wing politicians, the response to fleeing Ukrainians has been a radical flipping of the script. Matteo Salvini of the Italian far-right League party, whose anti-migrant rhetoric has been a cornerstone of his political success, is currently on trial for preventing migrant boats from landing at Italy’s ports when he was interior minister. In a complete about-face, Salvini visited a refugee reception center near the Polish border with Ukraine, offering Ukrainians fifty spaces on a bus to Italy and promising a convoy of buses and vans to transport “as many children and families as possible” to Italy.¹⁶ Hungarian Prime Minister Viktor Orbán closed the border with Serbia in 2015, constructing a razor wire fence to keep out migrants fleeing conflict, and in 2016 passed a law to authorize push-backs of migrants at land borders; the European Court of Justice found that practice to violate EU law. Orbán opened Hungary’s borders to Ukrainians and has provided substantial humanitarian support, stating, “We’re prepared to take care of them [Ukrainians], and we’ll be able to rise to the challenge quickly and

⁷ Gil Loescher, *The UNHCR and World Politics: State Interests v. Institutional Autonomy*, 35 INT’L MIGRATION REV. 33, 35 (2001).

⁸ Ralph Wilde, *Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, and Sociopathic, Racist Gaslighting*, OPINIO JURIS (Mar. 17, 2022).

⁹ Steve Peers, *Temporary Protection for Ukrainians in the EU? Q and A*, EU LAW ANALYSIS BLOG (Feb. 27, 2022).

¹⁰ 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 3 of Directive 2001/55/EC, and Having the Effect of Introducing Temporary Protection.

¹¹ Peers, *supra* note 9.

¹² Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person.

¹³ *Id.*

¹⁴ Steve Hendrix, *Biden Says the U.S. Will Take 100,000 Ukrainians. But How Many Will Go?*, WASH. POST (Mar. 26, 2022).

¹⁵ UNHCR Press Release, *Filippo Grandi, UNHCR’s Grandi praises Europe’s welcome for Refugees fleeing Ukraine* (Mar. 8, 2022).

¹⁶ Hannah Roberts, *Italy’s Matteo Salvini Recasts Himself as Champion of Ukraine’s Refugees*, POLITICO (Mar. 11, 2022).

efficiently.”¹⁷ In a legal analysis that would garner a failing grade on a refugee law exam, Orbán draws the distinction between Ukrainian “refugees” who “can get all the help” and migrants who “are stopped.”¹⁸

Though the United States has seen far fewer Ukrainians at its borders, the response has been equally rapid, generous, and exceptional. In early March, Homeland Security Secretary Alejandro Mayorkas awarded Temporary Protected Status to Ukrainians resident in the United States as of March 1, allowing them to remain and work for at least eighteen months.¹⁹ On March 11, U.S. Customs and Border Protection created an exception for Ukrainians to the Title 42 policy at the southern border.²⁰ Under that policy, nearly all migrants arriving at southern ports of entry or apprehended near the border have been sent back to Mexico, with very few exceptions.²¹ On March 24, President Biden promised to welcome 100,000 Ukrainians fleeing Russia “through the full range of legal pathways” including the U.S. Refugee Admissions Program.²² On April 21, President Biden announced the *Uniting for Ukraine* process through which Ukrainians can seek entry through humanitarian parole for up to two years.²³ He also promised to expand access to refugee resettlement for Ukrainians abroad, and has allocated over \$1 billion in funding for “those affected by Russia’s war in Ukraine” in addition to the nearly \$300 million already devoted to humanitarian assistance to displaced Ukrainians.²⁴

These rapid and generous responses demonstrate that the migrant-receiving states of the Global North are highly capable of marshalling vast resources to address mass movements of migrants. The support offered to Ukrainians demonstrates the ongoing institutional strength of the UN High Commissioner for Refugees and new-found, albeit potentially short-lived, solidarity among EU member states.²⁵ The verdict on international law is less clear. Is law governing state behavior on refugee protection or are states simply acting in their political interests? It may be that both law and politics are at play, but law should offer a minimum standard of protection on equal terms. In light of the generous response to Ukrainians, the failure to extend basic protections to Afghans and Syrians undermines law’s consistency through invidious racial distinctions. Australia, Europe, and the United States are able and willing to mobilize on a dime to protect Europeans who are standing up to an enemy power.

Regional Migration Law Includes Contemporary Reasons for Flight

Despite the media’s widespread use of the term “refugee” to describe humans fleeing the Russian invasion of Ukraine, the vast majority do not fit into the international legal definition of a refugee. The UN Refugee Convention requires that refugees establish a well-founded fear that they will be persecuted for one of five reasons: their race, religion, nationality, political opinion, or membership in a particular social group.²⁶ While a minority of

¹⁷ Amanda Coakley, *Hungary’s Orbán Defends Response to Ukraine War Refugees*, AL JAZEERA (Mar. 3, 2022).

¹⁸ *Id.* (see below for details on how most Ukrainians do not meet the refugee definition).

¹⁹ U.S. Dep’t of Homeland Security Press Release, [Secretary Mayorkas Designates Ukraine for Temporary Protected Status for 18 Months](#) (Mar. 3, 2022).

²⁰ Daniel M. Kowalski, *CBP Memo: Title 42 Exceptions for Ukrainian Nationals (Mar. 11, 2022)*, LEXIS-NEXIS LEGAL NEWSROOM (Mar. 18, 2022).

²¹ American Immigration Council, *A Guide to Title 42 Expulsions at the Border* (Oct. 15, 2021).

²² White House Press Release, [Fact Sheet: The Biden Administration Announces New Humanitarian, Development, and Democracy Assistance to Ukraine and the Surrounding Region](#) (Mar. 24, 2022).

²³ U.S. Dep’t of Homeland Security Press Release, [President Biden to Announce Uniting for Ukraine, a New Streamlined Process to Welcome Ukrainians Fleeing Russia’s Invasion of Ukraine](#) (Apr. 21, 2022).

²⁴ *Id.*

²⁵ Jacopo Barigazzi, *UN Refugee Chief Fears Solidarity with Fleeing Ukrainians May Curdle into Backlash*, POLITICO (Mar. 24, 2022).

²⁶ [1951 Convention Relating to the Status of Refugees](#), Art. I(A), July 28, 1951, 19 UST 6259 (*entered into force* Apr. 22, 1954).

those in flight from Ukraine might be individually targeted due to one of these grounds, most are fleeing armed conflict and generalized violence. This substantive inadequacy in responding to mass displacement in the face of armed conflict is compounded by the procedural challenges of processing individual claims to protection in a situation in which five million people have fled their home country within two months.

The substantive gap in protection for the Ukrainians demonstrates an important way in which international law is inadequate in addressing contemporary causes of forced migration: its failure to address mass displacement in response to armed conflict and generalized violence.²⁷ Regional migration law offers several examples of a modernized refugee definition responsive to these reasons for flight. The African Union's 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa extends refugee protection to

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.²⁸

Similarly, the 1984 Cartagena Declaration on Refugees expands the refugee definition used by several members of the Organization of American States to include

persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.²⁹

In Europe, the Temporary Protection Directive expands coverage beyond the Refugee Convention to include, "persons who have fled areas of armed conflict or endemic violence."³⁰

As in most situations of mass displacement, these regional offerings will be the most relevant legal standards for most refugees from the Ukraine. Neighboring countries consistently shoulder the greatest responsibility for hosting refugees; the conflict in Ukraine is no different. At last count, there were nearly three million Ukrainians in Poland; over 750,000 in Romania; well over 400,000 each in Hungary and Moldova; and nearly 350,000 in Slovakia.³¹ This geographic distribution is of course a result of proximity; many humans fleeing armed conflict choose to remain in the first safe country they enter. In addition, like many forced migrants in similar situations, Ukrainians expressed a preference for remaining close to home so that they can return as soon as it is safe to do so.³² In neighboring states, refugees are often able to communicate in a common language, and enjoy cultural commonalities that ease the challenges of adapting to life in a new country.³³ On an international level, generous responses on the part of neighboring countries and the stated desires of forced migrants should result in international support in the form of financial and technical assistance. While this support is usually forthcoming, it is not required by international law. Moreover, these optional

²⁷ UNHCR provides soft law guidance that would extend international protection to individuals fleeing from these scenarios. [UNHCR Executive Committee Conclusion No. 22, Protection of Asylum-Seekers in Situations of Large-Scale Influx](#), Art. I(1) (1981).

²⁸ [Convention Governing Specific Aspects of Refugee Problems in Africa](#), June 20, 1974, 1001 UNTS 45.

²⁹ [Cartagena Declaration on Refugees](#), Nov. 22, 1984, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1 (1984–85).

³⁰ [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](#), Art. 2(c)(i).

³¹ [UNHCR](#), *supra* note 2.

³² [Hendrix](#), *supra* note 14.

³³ Melissa Carlson, Laura Jakli & Katerina Linos, [Rumors and Refugees: How Government-Created Information Vacuums Undermine Effective Crisis Management](#), 62 INT'L STUD. Q. 671, 673 (2018).

charitable donations are often insufficient to adequately address the needs of host states and forced migrants.³⁴ A more effective international legal framework would ensure that responsibility for hosting refugees is shared evenly by host states and other members of the international community.

These progressive regional legal developments that extend protection to all humans fleeing armed conflict are not currently incorporated into international law. The regional substantive approach helps to solve the procedural problem; refugees fleeing armed conflict can be recognized based on their nationality and country of residence, avoiding the time-consuming individualized status determinations required under the current international definition of a refugee. Yet the application of this more responsive and effective definition is uneven because it is incorporated in regional law but not in international law. Taking advantage of this gap in international law, regional and national decisionmakers have protected Ukrainians fleeing armed conflict far more robustly than Syrians and Sudanese nationals fleeing similar violence.³⁵ Since flight from generalized violence is not a basis for refugee status under international law, states are able to make invidious race-based distinctions, often purportedly based on nationality, when deciding whom to protect. Unconstrained by international refugee law, these decisions violate foundational anti-discrimination provisions of international human rights law and threaten the legitimacy of the international protection system.

Racism and Fragility in International Migration Law

Many commentators have cried foul, noting in particular the racial and religious discrimination that appears to underpin the contrast between the generous welcome rapidly extended to Ukrainians and the treatment of protection seekers from the Global South.³⁶ While the international community's response is a success in terms of protecting Ukrainians fleeing Russia, it demonstrates the tenuous and fragile nature of international migration law. The flight of Ukrainians draws attention to two gaps in international migration law: the absence of a robust responsibility-sharing mechanism for situations of mass displacement and the narrow and outdated definition of a refugee. While regional migration law offers more modern forms of protection, this is a patchwork solution that depends on politics to function, a state of affairs that engenders racially suspect approaches.

What might a more coherent international legal framework offer? An expanded international refugee definition to cover situations of armed conflict and generalized violence would be a desirable starting point. An international agreement on shared responsibility for hosting refugees across the international community through financial and technical assistance for neighboring states as well as resettlement of refugees could enable those who prefer to remain close to home to do so safely while enabling onward movement for those who fear proximity to conflict. A highly functional international system, relying on sophisticated risk assessment and prediction methods, might anticipate and proactively respond to mass displacement by setting up systems that enable all individuals fleeing armed conflict to travel safely to protection. As a baseline expectation, anti-racist and anti-discrimination principles and methods should be at the heart of international legal instruments and institutions that offer protection to forced migrants.

³⁴ See, e.g., Michael R. Gordon, *Donors Offer \$2.4 Billion to Aid Syrian Civilians, But U.N. Says More Is Needed*, N.Y. TIMES (Jan. 15, 2014).

³⁵ See, e.g., Helena Smith, *Greek Government Blamed for Hunger Crisis in Refugee Camps*, GUARDIAN (Jan. 24, 2022); Jeffrey Gettleman & Monika Pronczuk, *Two Refugees, Both on Poland's Border. But Worlds Apart*, N.Y. TIMES (Mar. 14, 2022).

³⁶ See, e.g., *Wilde*, *supra* note 8.