

## **Subsidiary Protection for Ukrainian Asylum Seekers: A Practical Protection Measure For Europe’s Next Refugee Crisis**

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On the doorstep of ‘Fortress Europe,’ looms a refugee catastrophe. As conflict engulfs the country, newly created Ukrainian are idling in traffic jams, walking on foot, and utilizing any means at their disposal to reach safety in neighboring states to their West. With over [3.4 million Ukrainians](#) fleeing their homes in the wake of February 24th, 2022’s events, European Member States are already beginning to receive millions of internally displaced persons (IDPs) who have reached their borders. Senior American officials have warned that full-scale Russo-Ukrainian conflict could generate anywhere [between one and five million refugees](#), while Ukraine’s defense minister has proposed that the number may reach [three to five million Ukrainian refugees](#).

A migrant flow of such proportions has the propensity to generate a crisis unrivaled even by the 2015 refugee crisis which saw [1.3 Million refugees](#) enter Europe at its peak. Following [a successful regime of visa liberalization](#), Ukrainians may now travel to Schengen zone countries visa-free, meaning Ukrainians may enter EU Member States with speed and ease unparalleled in the contemporary European refugee experience. Since 2014, Poland (the easiest EU Member State to reach from Ukraine) has absorbed [over 2 Million displaced Ukrainians, granting many residence and work permits](#). With an escalating conflict threatening to displace millions more across Ukraine and into neighboring countries, EU Member states must adopt a comprehensive plan of migrant resettlement, integration, and protective status.

While it is doubtless that some migrants fleeing war in Ukraine shall qualify for some form of refugee status, many of those fleeing may not receive permanent protection. A [refugee](#) is defined by [the Geneva Refugee Convention](#) (Art. 1(A)(2)) and [the Recast EU Qualifications Directive](#) (Art. 2(d)) as someone who possesses “a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group.” Contemporary refugee law jurisprudence holds the prospective refugee’s ‘well founded fear of persecution’ to a two pronged test (the most common being the UNHCR’s bipartite approach). First, it must be a subjective and preferably experienced “[perception of risk \[...\] that is neither feigned nor overstated](#).” Second, this perception “[must be supported by an objective situation](#)” of persecutory risk in one’s country of origin.

While Ukrainian migrants may claim asylum in EU Member States under the grounds of persecution on the basis of nationality (Ukrainian), political opinion (European Union ascension aspirations), membership of a particular social group (pro-Ukraine, pro-Europe affiliation), or even religion (Ukrainian Orthodox), it is highly unlikely that many migrants will be able to demonstrate a sufficient and documented level of personal risk at the hands of Russian aggressors. With an entire country at war and ever-growing indiscriminate violence, subjective, personal risk to oneself grows harder to prove. This is particularly the case with Ukrainians who fled in the early days of conflict, who may not have experienced overt subjective risk to themselves in the mode of current refugee law application. Under similar grounds, [EU Member States have denied thousands of asylum claims](#) from Afghan migrants, although the objective risk to one’s life in Afghanistan stood at unparalleled heights. Legally speaking, Ukrainians that should otherwise receive full refugee status may be denied official asylum under the grounds of a lack of subjective harm. Further, from both a normative and legal perspective, it can be readily imagined that non-Ukrainian refugees fleeing Ukraine, who have already met lumbering resistance, shall have an ever-heightened difficulty in receiving refugee status or other rights of protection.

Beyond doubts surrounding EU Member State approval for refugee status, which has proven piecemeal at best, there is the issue of the lengthy and involved application and approval process entailed with its granter. Delays shall be inescapable, compounded by the complicated legal quagmire of a demonstrated subjective risk. Such delays in basic rights would leave Ukrainian asylum seekers in an untenable legal limbo.

While the EU Commission’s temporary protection status would seem to fill this need in responding to a massive influx of Ukrainian migrants without the delay of lengthy processing, its employment is improbable. Regulated by the Commission’s Temporary Protection Directive, its activation mechanism is “[complex and lengthy](#),” requiring a majority vote of the EU Council and extraordinary hardship that would be deemed detrimental to asylum determination in a given Member State. While temporary protection status was created in 2001 in response to the crisis in Kosovo, it has never once been invoked since even amidst the throes of the 2015 refugee crisis. Thus, there is severe doubt that the high threshold for implementation would be met even by a crisis of this scale.

The Polish model of residence and work permits provides a more practical solution to the imminent rush of Ukrainian migrants to Eastern EU Member States. Thus, an EU-wide policy of protective status loosely based on the successful Polish model finds a pertinent role in EU Member States’ toolkits. Fortunately, the EU possesses a little known protective status called subsidiary protection. Under normal circumstances, [subsidiary protection should be granted only after refugee status eligibility is assessed](#). However, a brewing migration crisis on EU Member States’ doorsteps with thousands of migrants spilling into EU jurisdiction within hours of Russia’s invasion provides a unique set of circumstances. Regulated by [the EU Qualifications Directive](#) (Directive 2011/95/EU), subsidiary protection exists to provide legal protection for those who do “not qualify as a refugee [yet who] would face a real risk of suffering serious harm” should they be returned to their country of origin (Art. 2(f)). In essence, subsidiary protection behaves similarly to temporary protection status, yet requires no executive European Union fiat. It also preempts the extensive backlog of refugee determination by its immediate granture. This alleviates refugee reception, while not disabling migrants from applying at a later time as refugees. Its recipients receive a “[renewable residence permit](#)” (Art. 24(2)) and other basic rights such as an authorization to work (including through self-employment)(Art. 26(1)), labor market training (Art. 26(2)), access to education (Art. 27), healthcare (Art. 30), and social assistance (Art. 29).

Ukrainians have proven ready to integrate into neighboring Eastern European countries, with many possessing a deep affinity for the European Union as a whole. Subsidiary protection status provides EU Member States bordering Ukraine and beyond the ability to easily and nearly automatically incorporate Ukrainian migrants into their societies and economies, without a lengthy process of legal deliberation. Beyond this, subsidiary protection provides a codified mechanism through which EU Member States may grant international protection status to Ukrainians fleeing a live war zone, without an overwhelmed application review and reception system. Like temporary protection status and unlike most iterations of refugee status, subsidiary protection provides elasticity in that migrants may easily return to Ukraine should conditions in Ukraine improve in years or months to come. In the meantime, however, Ukrainians desperately require international protection. EU Member States and the rest of the world are bound by international law to accept Ukrainian refugees (and other refugees from around the world, who find no equal amity upon European shores) should the need arise. Subsidiary protection provides a well-suited avenue to amnesty for Ukrainian refugees and an under-utilized tool for historically underprovisioned refugees from the Middle East and Sub-Saharan Africa, while averting contemporary issues in the

granting of refugee status. The invocation of subsidiary protection for Ukrainian refugees serves an opportunity for European Member States to manifest their stated commitments to human rights for refugees near and far, while setting precedent for refugees who have received no such warm welcome upon the buttresses of ‘Fortress Europe.’