



# The Russian invasion of Ukraine and the Czech Supreme Administrative Court

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## Abstract

The presented paper is devoted to the Czech Supreme Administrative Court's approach to the Russian invasion of Ukraine from the perspective of deciding asylum issues. Specifically, the author focuses on the principle of non-refoulement and breaking the standard rules of administrative court proceedings and Ukraine as a safe country of origin. Finally, the author describes a relatively recent Czech Supreme Administrative Court's ruling in which it addressed the issue of including temporary protection within the international protection system.

## Keywords

Russia-Ukrainian conflict, Czech Supreme Administrative Court, non-refoulement, safe country of origin, temporary protection

## Introduction

It certainly goes without saying that the Russian invasion of Ukraine, which began on the morning of 24 February 2022, represents the largest armed conflict on European soil since the end of the Second World War. Along with unimaginable horrors and human and material losses, this invasion has also resulted in the largest modern refugee wave to date, which the old continent and, above all, the Member States of the European Union have had to deal with. In this article, the author mainly presents the principle of non-refoulement, the concept of safe country of origin and the approach of the Czech Supreme Administrative Court to their application in the context of the Russian-Ukrainian war. Finally, the author presents a relatively recent judgment of the Czech Supreme Administrative Court regarding the inclusion of temporary protection in the international protection system and the resulting procedural advantages for applicants for temporary protection (namely Ukrainian refugees).

## The principle of non-refoulement

Under the principle of non-refoulement, no person may be “*forcibly, directly or indirectly transferred (returned) to a country or area where he or she would be at risk of being subjected to human rights violations*” (Wouters, 2009, 25). In this general sense, the principle is then further specified in relevant (mainly international law) but also other legal instruments. In general, the

sources in which the principle is contained can be divided into refugee law sources and human rights law sources, or into international law sources with universal applicability and regional sources, or into hard law and soft law sources.

### Historical development of the principle

The idea of a prohibition of refoulement is relatively new. It was only in the first half of the 19th century that the concept of asylum and the principle of non-refoulement for political dangers began to take concrete shape. In 1905, the United Kingdom enacted the so-called Aliens Act,<sup>1</sup> which, among other things, made it obligatory to grant entry to persons fleeing persecution on political or religious grounds. However, it was not until the First World War and the associated mass displacement of people that the principle of non-refoulement began to take hold in the international environment. The principle first appeared in the 1933 Convention Relating to the International Status of Refugees, but its scope was very limited and its practical significance was not very wide, as only eight states ratified it, three of them with reservations (Goodwin-Gill & McAdam, 2007, 202).

Global conflict, this time Second World War, again contributed to another shift. In 1946, the United Nations took the position that refugees who had serious reason to fear going back to their country of origin could not be returned. That same year, the International Refugee Organization was founded to provide assistance to the millions of people who had been forced to resettle as a result of the war (Haraszti, 1960, 378). In view of the fragmented legal framework, with different categories of refugees regulated by different documents after the Second World War (Weis, 1967, 39), the United Nations Economic and Social Council (ECOSOC) established an ad hoc Commission on Homelessness and Related Problems in 1949.<sup>2</sup> It was mandated to produce a revised document that would uniformly regulate the international status of refugees and stateless persons based on Article 14 of the Universal Declaration of Human Rights (Goodwin-Gill & McAdam, 2007, 203–204).<sup>3</sup> The result of the Commission's work was the Convention Relating to the Status of Refugees (more commonly referred to as the Geneva Convention, after the city of its adoption), adopted in 1951,<sup>4</sup> and its art. 33, which expressed the principle of non-refoulement. The Office of the United Nations High Commissioner for Refugees was established in 1950 to oversee the implementation of the Geneva Convention.<sup>5</sup>

The basic expression of the principle of non-refoulement can thus be said to be embodied in the 1951 Geneva Convention, according to art. 33(1) of which “*No Contracting State shall expel or return („refouler“) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*”. The Convention, later supplemented by the so-called New York Protocol of 1967,<sup>6</sup> became the basis of international refugee law. It

<sup>1</sup> Online: <https://www.legislation.gov.uk/ukpga/Edw7/5/13/contents/enacted>

<sup>2</sup> UN. United Nations Economic and Social Council (ECOSOC). *Resolution No. 248 (IX)*. 1949.

<sup>3</sup> Art. 14(1) Universal Declaration of Human Rights:

Everyone has the right to seek and to enjoy in other countries asylum from persecution.

<sup>4</sup> Convention relating to the Status of Refugees of 28 July 1951 (in the Czech Republic publ. under no. 208/1993 Coll.).

<sup>5</sup> Cf. art. 35 of the Geneva Convention.

<sup>6</sup> Protocol Relating to the Status of Refugees to the Convention relating to the Status of Refugees of 31 January 1967 (also published in the Czech Republic under No. 208/1993 Coll.).

defined the conditions under which a person becomes a refugee, when they cease to be a refugee and what rights they enjoy. The fundamental obligation it imposed on states, from which states cannot derogate, is precisely the obligation to respect the principle of non-refoulement.<sup>7</sup> Even today, the continuing importance of the Geneva Convention and its place at the heart of international refugee protection has been confirmed by its contracting parties, for example, in their 2002 Declaration.<sup>8</sup>

However, the Geneva Convention is of course not the only document determining the content of the principle of non-refoulement. The prohibition of refoulement has gradually spread to the field of international human rights law as part of the prohibition of torture and inhuman or degrading treatment or punishment. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>9</sup> explicitly mentions the principle in its art. 3. Mention should also be made of art. 7 of the 1966 International Covenant on Civil and Political Rights<sup>10</sup> and certainly art. 3 of the 1950 European Convention on Human Rights (ECHR)<sup>11</sup> (which will be discussed in more detail below), which prohibit subjecting anyone to torture or to inhuman or degrading treatment or punishment. The supervisory bodies of these treaties have subsequently interpreted these provisions to include a prohibition on refoulement in the event that a person would be subjected to treatment contrary to these articles.<sup>12</sup>

## Europe

When analysing the legal regulation of the principle of non-refoulement on the European continent, it should be borne in mind that two regional formations exist side by side. It is therefore necessary to distinguish between what European States are obliged to do as parties to the Euro-

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<sup>7</sup> Cf. art. 42(1) of the Geneva Convention.

<sup>8</sup> UN. The United Nations General Assembly. *Resolution 57/187*. 2002. point 4.

<sup>9</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (publ. under No. 143/1988 Coll.).

Art. 3:

(1) No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

<sup>10</sup> International Covenant on Civil and Political Rights of 16 December 1966 (publ. under No. 120/1976 Coll.).

Art. 7:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

<sup>11</sup> European Convention on Human Rights of 4 November 1950 (publ. under No. 209/1992 Coll.)

Art. 3:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

<sup>12</sup> The Human Rights Committee, established under art. 28 of the Covenant, is the supervisory body of the Covenant. The Committee first interpreted art. 7 of the Covenant to include the prohibition of refoulement in General Comment No. 20 – see Human Rights Committee, *General Comment No. 20 of 10 March 1992*, para. 9. As regards the interpretation of the supervisory body of the European Convention, the European Court of Human Rights, see below for more information.

pean Convention on Human Rights and, therefore, as members of the Council of Europe, as opposed to what they must do as members of the European Union. At present, the European Union consists of 27 Member States, while the Council of Europe consists of 46 Member States. All the Member States of the European Union are also members of the Council of Europe. It should only be mentioned in passing that the European Union has not yet become a party to the European Convention on Human Rights.<sup>13</sup>

### Council of Europe and the European Convention on Human Rights

The ECHR does not expressly provide for a prohibition of non-refoulement (Furramani & Bushati, 2022). It has already been noted above that the supervisory bodies have, over time, interpreted the general provisions containing the prohibition of torture, inhuman or degrading treatment or punishment as including a prohibition on refoulement in the event that a person would be subjected to treatment contrary to these articles. In connection with the Council of Europe and the European Convention on Human Rights, we refer to the European Court of Human Rights (ECtHR), in connection with the supervisory authority, which has thus inferred from art. 3 in particular, in combination with art. 1 of the Convention. A landmark decision in this regard is the ECtHR's 1989 decision in *Soering v. the United Kingdom*,<sup>14</sup> in which the ECtHR addressed the principle of non-refoulement and concluded that the return or extradition of a person by a Contracting State for the purpose of carrying out the death penalty is contrary to art. 3 ECHR. The ECtHR then returned to the conclusions of *Soering v. the United Kingdom* more than twenty years later in *T.I. v. the United Kingdom*, in which it upheld the absolute prohibition on returning persons if they are to be subjected to inhuman treatment within the meaning of art. 3 ECHR.<sup>15</sup> The gravity of the ECtHR's findings in this case resonates to this day, as they have been adopted by the European Union and the essential elements of "serious harm" as defined by the ECtHR have subsequently been incorporated into Article 15 of the Qualification Directive in the context of subsidiary protection, extending safeguards beyond those qualifying as refugees.

Other cases in which the ECtHR has confirmed that persons cannot be returned to another state if they face inhuman treatment under its jurisdiction include *Hirsi Jamaa and others v. Italy*,<sup>16</sup> *Saadi v. Italy*<sup>17</sup> and *Vilvarajah and others v. UK*.<sup>18</sup>

Furthermore, the ECtHR's decision in *M.S.S. v. Belgium and Greece*, according to which Belgium violated art. 3 and 13 ECHR and both directly and indirectly violated the principle of non-refoulement, was crucial. Belgium returned the applicant for international protection

<sup>13</sup> On this point, cf. in particular the negative opinion of the Court of Justice, which found that the Agreement on the Accession of the European Union to the European Convention on Human Rights was not compatible with art. 6(2) TEU or with the Protocol (No 8) to art. 6(2) TEU on the Accession of the Union to the European Convention on Human Rights (Opinion of the Full Court of 18 December 2014, C-2/13, EU:C:2014:2454).

<sup>14</sup> *Soering v. the United Kingdom* App no 14038/88 (ECtHR, 7 July 1989).

<sup>15</sup> *T.I. v. the United Kingdom* App no 43844/98 (ECtHR, 7 March 2000); *Cruz Varas v. Sweden* App no 15576/89 (ECtHR, 20 March 1992); *Ahmed v. Austria* App no 25964/94 (ECtHR, 17 December 1996).

<sup>16</sup> *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012).

<sup>17</sup> *Saadi v. Italy* App no 37201/06 (ECtHR, 28 February 2008).

<sup>18</sup> *Vilvarajah and Others v. the United Kingdom* App no 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 30 October 1991).

to Greece, thereby subjecting the applicant to inhuman and degrading treatment consisting of detention in inhuman conditions in Greek detention facilities and, subsequently, of the applicant living on the streets. Greece has also been known for its practice of not allowing potential applicants for international protection access to asylum procedures and returning them directly to their country of origin or returning them to Turkey, thereby also indirectly exposing the applicants to the risk of refoulement by Belgium.<sup>19</sup>

Art. 3 ECHR operates absolutely,<sup>20</sup> so exceptions to the principle of non-refoulement cannot be applied as in the application of the Geneva Convention. On the other hand, the substantive scope of protection is narrower than in the Geneva Convention – it provides protection against torture, inhuman or degrading treatment or punishment. On the other hand, the prohibited conduct is not linked to exhaustively listed grounds as in the provision of protection from persecution under the Geneva Convention. The parameters that must be met in a particular case in order to meet the definition of inhuman treatment within the meaning of Article 3 ECHR have been elaborated by the ECtHR in, for example, *Ireland v. the United Kingdom*.<sup>21</sup>

## European Union

The Common European Asylum System (CEAS) is based on international refugee law and international human rights law, in particular the Geneva Convention.<sup>22</sup> It therefore does not create a new system of protection, but fills gaps in the international legal system and builds on international legal instruments – in particular the Geneva Convention.<sup>23</sup>

The need to regulate asylum and migration issues at EU level arose with the creation of the single market and the free movement of people within the EU. The abolition of border controls has led to the movement of refugees between Member States and an increase in their numbers. Thus, the motivation for states to align their commitments in this area was not to increase refugee protection, but rather to protect their own economic and security interests. The issue of refugees was first regulated by international treaties, mainly concerning visa policy<sup>24</sup> and asylum.<sup>25</sup> With the Maastricht Treaty, the issue of asylum became part of EU law under the so-called third pillar (intergovernmental cooperation). In 1997, the Treaty of Amsterdam brought this area under the first pillar, making it part of Community law and thus falling under the competence of

<sup>19</sup> *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

<sup>20</sup> *Chahal v the United Kingdom* App no 22414/93 (ECtHR, 15 November 1996).

<sup>21</sup> *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978).

<sup>22</sup> Cf. Article 78 of the Treaty on the Functioning of the European Union and Article 18 of the EU Charter of Fundamental Rights.

<sup>23</sup> See also, for example, points 3, 4 and 17 of the preamble to the Qualification Directive.

<sup>24</sup> Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. OJ L 239, 22.9.2000, p. 19–62.

<sup>25</sup> The Schengen acquis – Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention. OJ C 254, 19.8.1997, p. 1–12. The Dublin Convention introduced a system for designating a single responsible State for the examination of an application. However, at a time when national asylum systems were not harmonised, returning persons to a State responsible for a decision whose protection system did not comply with the international law obligations of the Geneva Convention could amount to a violation of the prohibition of refoulement.

the European Community.<sup>26</sup> On the basis of the then existing legislation (art. 63 of the Treaty establishing the European Community), the Council of the European Union was empowered to adopt measures<sup>27</sup> to establish a Common European Asylum System,<sup>28</sup> the so-called minimum standards.

A significant change in the area of asylum was brought about by the Lisbon Treaty,<sup>29</sup> which removed the pillar structure and brought the area of asylum and immigration, together with judicial and criminal cooperation, into Title V of the Treaty on the functioning of the European Union (TFEU) under the title “Area of Freedom, Security and Justice”. Art. 78 TFEU became the new basis for the EU’s asylum policy. The Lisbon Treaty’s contribution to the field of asylum, and in particular to respect for the principle of non-refoulement is also the transposition of the EU Charter of Fundamental Rights into primary law.<sup>30</sup>

From a general perspective, the process of building the Common European Asylum System took place in two phases. The starting point was, of course, the national asylum systems. The first phase involved the adoption of minimum standards, i.e. achieving at least basic harmonisation. The legal basis for this phase was the Treaty establishing the European Community, specifically art. 63 thereof. The second phase consisted of raising these achieved standards. The legal basis for this phase is the TFEU, specifically art. 78 thereof. The direction of the CEAS and the rough outline of harmonisation measures were first regularly contained in documents of a political nature, which generally provided a longer-term perspective and were thus the conceptual building blocks of the CEAS. These key documents include the 1999 Tampere European Council Conclusions, the 2004 Hague Programme, the 2007 Green Paper on the future Common European Asylum System, the 2009 Stockholm Programme and the 2014 Post-Stockholm Programme.

At the moment, the principle of non-refoulement is therefore regulated in primary law by art. 78 TFEU<sup>31</sup> and art. 19(2) of the EU Charter of Fundamental Rights.<sup>32</sup> Secondary legal norms

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<sup>26</sup> This area has been expressly included in the new Title IV. of Treaty establishing the European Community under the heading “Visas, asylum, immigration and other policies related to free movement of persons”.

<sup>27</sup> These measures were adopted unanimously by the Council under art. 67 of the Treaty establishing the European Community during the five years following the entry into force of the Amsterdam Treaty. However, unanimity made agreement on the measures difficult and led to the adoption of only basic, low standards. The Nice Treaty of 26 February 2001 allowed for a qualified majority procedure for the adoption of further measures in this area. Cf. the newly modified art. 67(5) of the Treaty establishing the European Community.

<sup>28</sup> The term “Common European Asylum System” did not appear in the Treaty establishing the European Community, but was introduced only by the 1999 Tampere European Council Conclusions, as an objective of the measures adopted on the basis of art. 63 of the Treaty establishing the European Community.

<sup>29</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–271.

<sup>30</sup> Cf. in particular art. 18 of the EU Charter of Fundamental Rights.

<sup>31</sup> Art. 78(1): The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

<sup>32</sup> Art. 19(2): No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

dealing with asylum and refugee issues form the so-called Common European Asylum System. This consists of the Qualification Directive,<sup>33</sup> the Dublin Regulation,<sup>34</sup> the Procedural Directive,<sup>35</sup> the Reception Directive<sup>36</sup> and Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 (establishing ‘Eurodac’ for the comparison of fingerprints).

The Union legislation builds on the already existing international law obligations of Member States regarding the principle of non-refoulement, which is based on the already mentioned art. 78 TFEU or Article 21 of the Qualification Directive.<sup>37</sup> It has also been confirmed by the Court of Justice of the European Union<sup>38</sup> that the Qualification Directive was adopted as a guide for Member States in the interpretation and application of the Geneva Convention. This is the basis for the formal element of mutual trust between Member States, on which the whole Common European Asylum System is built.

## Czech Republic

According to art. 1(2) of the Constitution of the Czech Republic, the Czech Republic respects its obligations under international law. The principle of non-refoulement can therefore be generally defined as an international legal obligation with primacy of application. According to the Czech Constitutional Court, non-refoulement is one of the rights where derogation is not permitted and is guaranteed not only by treaty instruments (the aforementioned art. 3 of the Convention against Torture, art. 7 of the International Covenant on Civil and Political Rights, art. 3 of the ECHR), but at the same time it is also a norm of general international law of a mandatory nature.<sup>39</sup> The Czech Supreme Administrative Court also refers to the official interpretation of the Office of the United Nations High Commissioner for Refugees, according to which non-refoulement is part of customary international law and therefore binding on all States.<sup>40</sup> The Supreme Administrative Court understands non-refoulement in two senses. In a narrower sense,

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<sup>33</sup> 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. OJ L 337, 20.12.2011, p. 9–26.

<sup>34</sup> 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. OJ L 180, 29.6.2013, p. 31–59.

<sup>35</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. OJ L 180, 29.6.2013, p. 60–95.

<sup>36</sup> 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. OJ L 180, 29.6.2013, p. 96–116.

<sup>37</sup> Art. 21(1): Member States shall respect the principle of *non-refoulement* in accordance with their international obligations.

<sup>38</sup> Judgment of 2 March 2010, *Abdulla and Others v Germany*, C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105.

<sup>39</sup> Resolution of the Constitutional Court of 21 December 2004, II. ÚS 543/03.

<sup>40</sup> Judgment of the Supreme Administrative Court of 14 June 2007, 9 Azs 23/2007-64, judgment of the Supreme Administrative Court of 26 July 2007, 2 Azs 30/2007-69, judgment of the Supreme Administrative Court of 19 September 2007, 1 Azs 40/2007-129.

it understands non-refoulement as enshrined in art. 33 of the Geneva Convention and, in a broader sense, it understands non-refoulement according to art. 3 of the ECHR, the case law of the ECtHR (mainly on art. 3, 1 and 8 of the ECHR), Article 3 of the Convention against Torture, Article 7 of the International Covenant on Civil and Political Rights, and possibly in the light of other international instruments<sup>41</sup> to which the Czech Republic is bound. Recent decisions of the Supreme Administrative Court show that at the moment the principle of non-refoulement is mainly based on the ECHR and the related case law of the ECtHR – see the recent decisions of the Supreme Administrative Court cited in the following passages of this article.

At national level, the principle is enshrined in five procedures; firstly, there are the procedures for granting international protection in the form of asylum or subsidiary protection under Act No. 325/1999 Coll., on Asylum; secondly, the procedure for granting temporary protection under Act No. 221/2003 Coll. on Temporary Protection of Aliens; thirdly, non-refoulement is a ground preventing departure in the context of a decision on administrative expulsion of an alien, which is regulated by Act No. 326/1999 Coll., on the Residence of Foreigners in the Territory of the Czech Republic; fourthly, the obligation arises for the state authorities to take into account the principle of non-refoulement in the framework of extradition proceedings regulated by Act No. 104/2013 Coll., on International Judicial Cooperation in Criminal Matters; and fifthly, it is the criminal courts that take into account non-refoulement when assessing the admissibility of imposing a sentence of expulsion under Act No. 40/2009 Coll., the Criminal Code.

As already mentioned, the Czech Republic, pursuant to art. 1(2) of the Constitution of the Czech Republic, complies with its obligations under international law. The purpose of this provision is that, by observing the rules of international law (whether customary, treaty or otherwise), the Czech Republic should contribute to the harmonious and predictable functioning of the international community as far as possible.<sup>42</sup> Thus, in order to fulfil art. 1(2) of the Constitution of the Czech Republic, it is necessary that any entity, the conduct of which is attributable to the Czech Republic, must behave in a manner conducive to its fulfilment.<sup>43</sup> In view of the above-mentioned proceedings in the framework of which non-refoulement is contained and which may be interrelated or not even precluded from overlapping,<sup>44</sup> it is necessary to point out one of the fundamental practical consequences of the applicative primacy of the international law obligation of non-refoulement. The priority application of international law must always occur in the proceedings and before the authority where that fact first comes to light. If the constitutional principle of priority of application of an international convention applies generally, it applies in principle at all times and at every moment. It cannot be inferred restrictively from any provision that its application should be tied to a specific point in time, and no authority can therefore legitimately disregard an international obligation of which it is or should be aware and postpone its application or refer it to a later point in time or to another authority. If, therefore, a strict application of a national rule of law should inevitably lead to the possibility that a person might be extradited to a country where their life or personal liberty would be threatened

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<sup>41</sup> Judgment of the Supreme Administrative Court of 26 March 2008, 2 Azs 71/2006-82, judgment of the Supreme Administrative Court of 11 February 2009, 1 Azs 107/2008-78.

<sup>42</sup> Cf. also the preamble of the Constitution of the Czech Republic, in which the Czech Republic declares itself a member of the family of European and world democracies.

<sup>43</sup> Judgment of the Supreme Administrative Court of 26 March 2008, 2 Azs 71/2006-82, judgment of the Supreme Administrative Court of 30 September 2010, 7 Azs 42/2010-146.

<sup>44</sup> E.g. § 80(3)(b) of the Criminal Code.

or where they would be subjected to torture, inhuman or degrading treatment or punishment, and such an interpretation would at the same time amount to a violation of either art. 33 of the Geneva Convention or art. 2, art. 3 of the ECHR, the authority applying the national norm must depart from it and instead choose an interpretation of the relevant provisions that takes into account the imperative to protect fundamental human rights and freedoms. Preference will thus be given to an internationally consistent interpretation of the national rule, according to which the State in which the refugee seeks protection is obliged to prevent their return to a country where their life would be in danger.<sup>45</sup>

### **The non-refoulement principle, the Czech Supreme Administrative Court and the Russian invasion of Ukraine**

The Czech administrative justice system is based, among other things, on three basic provisions, which are § 75(1), (2) and § 109(5) of the Code of Administrative Justice Procedure (CoAJP).<sup>46</sup> Pursuant to § 75(1) CoAJP, “*when reviewing a decision, the court shall base its decision on the facts and legal situation that existed at the time of the administrative authority’s decision*”.<sup>47</sup> Pursuant to § 75(2) CoAJP, “*the court shall review the contested parts of the decision within the limits of the points of appeal.*” [...] Finally, pursuant to § 109(5) CoAJP, “*the Supreme Administrative Court does not take into account facts which the complainant has raised after the contested decision was issued.*”

However, in the field of international protection, the provision of § 75(1) CoAJP is excluded and art. 46(3) of the Procedural Directive is directly applicable, according to which Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to the Qualification Directive, at least in appeals procedures before a court or tribunal of first instance. The Supreme Administrative Court therefore bases its review in international protection cases on the factual and legal situation on the date of the contested decision of the Regional Court, not on that of the administrative authority as in the standard application of § 75(1) CoAJP.

However, long before the outbreak of the Russian-Ukrainian crisis, the Supreme Administrative Court had already made exceptions to these two rules in its case law. These procedural rules can be broken by another norm that enjoys primacy of application, namely the ECHR and the resulting principle of non-refoulement. With regard to the breaking of § 75(1) CoAJP, the Supreme Administrative Court has already stated in its judgment of 24 August 2010, 5 Azs 15/2010-76, that art. 10 of the Constitution and art. 2 and 3 of the ECHR take precedence over this provision, “*which must be interpreted in the light of the international law principle of “non-refoulement” as establishing the obligation of the Czech Republic not to expose any*

<sup>45</sup> Judgment of the Supreme Administrative Court of 14 June 2007, 9 Azs 23/2007-64, judgment of the Supreme Administrative Court of 19 September 2007, 1 Azs 40/2007-129, judgment of the Supreme Administrative Court of 1 August 2013, 6 As 28/2013-38.

<sup>46</sup> Act No. 150/2002 Coll., Code of Administrative Justice Procedure, as amended. In this article, this Act will be referred to as “CoAJP”. The Code of Administrative Justice Procedure is the fundamental act of administrative justice in the Czech Republic.

<sup>47</sup> The Czech administrative procedure is basically a two-instance procedure. The decision-making period of the administrative authority is therefore the decision-making period of the appellate administrative authority.

*person subject to its jurisdiction to any harm that would consist of endangering life or being subjected to torture or inhuman or degrading treatment or punishment, for example, by being expelled or otherwise forced to travel to a country where such harm would be threatened.”*

The Supreme Administrative Court then followed up on these conclusions and extended them in relation to the exception to the rule of § 109(5) CoAJP as well, for example, in judgments of 10 September 2015, 2 Azs 163/2015-28, of 13 November 2019, 6 Azs 170/2019-50, of 12 February 2021, 2 Azs 43/2020-27, or of 29 April 2021, 10 Azs 414/2020-41. This procedure was also confirmed by the Constitutional Court in its ruling of 19 May 2020, III ÚS 3997/19.

After 24 February 2022, the Supreme Administrative Court was confronted with the question of how to deal with the fact that the decisions of the regional courts challenged by the cassation complaint<sup>48</sup> were issued before that date, at a time when the invasion of Ukraine had not started yet, and thus the regional courts could not take it into account. In judgments handed down after 24 February 2022, the Supreme Administrative Court has consistently taken a positive approach to the question of whether to take account of the war in Ukraine, even though it occurred after the contested judgments of regional courts were handed down, on the ground that the forced return of the applicants<sup>49</sup> to their country of origin might be contrary to the principle of non-refoulement. In cases where the Supreme Administrative Court did not find any other error on the part of the regional court or the administrative authority (typically the Ministry of the Interior), taking into account the change of circumstances in Ukraine led to the annulment of the contested judgment of the regional court and the decision of the administrative authority (see judgments of 10 March 2022, 10 Azs 537/2021-31, of 11 March 2022, 6 Azs 306/2021-49, of 24 March 2022, 1 Azs 36/2022-31, of 31 March 2022, 9 Azs 13/2022-32, of 7 March 2022, 4. 2022, no. 4 Azs 324/2021-46 and 8 Azs 55/2022-25, of 8. 4. 2022, 5 Azs 86/2021-33, and of 14. 4. 2022, 5 Azs 212/2020-44). However, it must be emphasized that the Supreme Administrative Court proceeds in this way only in cases where regional court decided the case on the merits. The Supreme Administrative Court follows a different procedure in cases where regional court dismissed the action or discontinued the proceedings on procedural grounds (judgment of 25 March 2022, 5 Azs 14/2022-25). It has also followed a consistent procedure in its case law issued after 24 February 2022 in cases of Ukrainian applicants for international protection in situations where it finds other grounds for annulling the contested judgment of the regional court and, at the same time, the contested decision of the administrative authority. For the time being, in no such decision has the Supreme Administrative Court failed to instruct the administrative authority that, in addition to correcting the errors of the previous procedure for which the Supreme Administrative Court annulled its decision, it is also obliged to take into account the current situation in Ukraine related to Russia’s military aggression (see judgments of 25 February 2022, 5 Azs 82/2020-64, of 8 March 2022, 10 Azs 524/2021-32, of 25 March 2022, 8 Azs 336/2021-33; the same remark is also contained in the judgment of 17 March 2022, 1 Azs 16/2021-58, by which the Supreme Administrative Court rejected the Ministry’s cassation complaint, i.e. a cassation complaint filed in the opposite order to the majority of cases, because it was filed by an administrative authority).

<sup>48</sup> In the Czech Republic, a cassation complaint is an appeal against a final decision of a regional court in the administrative justice system, which is heard by the Supreme Administrative Court – cf. § 102 CoAJP.

<sup>49</sup> Applicant is referred to in the Czech Republic as a complainer. It is the person who lodged the cassation complaint – cf. again § 102 CoAJP.

Long before the Russian-Ukrainian war, the Extended Chamber of the Supreme Administrative Court<sup>50</sup> had also already recognized the breaking of the rule enshrined in § 75(2) CoA-JP in international protection cases, according to which the court reviews the contested statements of the decision within the limits of the pleas in law (see judgment of 8 March 2011, 7 Azs 79/2009-84) b because of the primacy of the ECHR and the resulting principle of non-refoulement. According to the Extended Chamber, the regional courts “*may not disregard, even beyond the pleas in law, if there are grounds for protecting the applicant from imminent serious harm in the country of origin which the defendant has failed to take into account in a situation where no further proceedings in which protection could be granted are envisaged. The findings in that regard are, as a rule, based on the applicant’s statements in the application or at the interview and on facts established about the country of origin in the proceedings or known from other proceedings or known generally. Thus, if the court has knowledge that it is necessary to grant the asylum seeker subsidiary protection pursuant to § 14a of the Asylum Act, since failure to do so would be a violation of the principle of non-refoulement and protection can no longer be granted in other proceedings, it shall annul the defendant’s (administrative authority’s) decision without that fact having to be expressly pleaded in the application.*” This exception applies not only to the proceedings before regional courts, as it follows from the case law of the Supreme Administrative Court that it is also obliged to take into account any errors of the administrative authority or regional court which could lead to a violation of the principle of non-refoulement. Therefore, in such cases, the Supreme Administrative Court is not bound only by the objections set out in the cassation complaint (judgment of 3 October 2018, 6 Azs 300/2018-23). Regional courts have consistently, and since before the pilot judgment of the Supreme Administrative Court No. 10 Azs 537/2021-31 was issued, taken into account the change of circumstances in Ukraine, even if the applicants themselves do not allege a change of circumstances in their action.<sup>51</sup> The Supreme Administrative Court consistently does so in cases where that fact is not included among the objections to the cassation complaint.<sup>52</sup>

In conclusion, it should be noted that the Supreme Administrative Court did not take into account which side of the conflict the asylum seekers stood, if any. For example, in the pilot judgment No. 10 Azs 537/2021-33, the Supreme Administrative Court annulled the decision not to grant asylum to a Russian-speaking citizen of Ukraine who had politically sided with the pro-Russian side during the Ukrainian revolution in 2013 and 2014. He worked in companies with Russian capital and worked as a “minder” at anti-government demonstrations, stopping anti-government rallies and pushing demonstrators out of the area, for which he was paid.<sup>53</sup>

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<sup>50</sup> The Extended Chamber of the Supreme Administrative Court is a special chamber consisting of 7 or 9 judges (cf. § 16(1) and (3) CoAJP). It decides in cases where one of the standard (three-member) chambers of the Supreme Administrative Court reaches a legal opinion that differs from the legal opinion already expressed in a decision of the Supreme Administrative Court (cf. § 17(1) CoAJP). The Extended Chamber therefore acts as an important unifier of the Supreme Administrative Court’s case law and thus of the entire Czech administrative justice system.

<sup>51</sup> This applies to the judgment of the Regional Court in Hradec Králové – Pardubice of 2 March 2022, 36 Az 3/2021-47, and the judgments of the Regional Court in Brno, 41 Az 9/2021-36, 41 Az 12/2021-34, 22 Az 24/2021-38, 22 Az 36/2021-28 and 41 Az 21/2021-42.

<sup>52</sup> Supreme Administrative Court judgments 10 Azs 537/2021-31, 6 Azs 306/2021-49, 4 Azs 324/2021-46, 8 Azs 55/2022-25, 5 Azs 86/2021-33 and 5 Azs 212/2020-44.

<sup>53</sup> Cf. point 2 of judgment 10 Azs 537/2021-33.

## Change of the security situation in Ukraine as a judicial notice

The regional courts and the Supreme Administrative Court also had to consider whether the ongoing conflict in Ukraine is a well-known fact that does not need to be proved. Facts of common knowledge (so-called judicial notice), similarly to facts known to an administrative authority from official activity (§ 50(1) of the Administrative Procedure Code),<sup>54</sup> are objectified, largely undisputed facts that are not, in principle, proven in court or administrative proceedings. However, the parties to the proceedings may dispute the content of the judicial notices (as well as facts known to the administrative authority from official activity) by their allegations, and may also propose evidence be submitted to prove their different allegations. Judicial notice may be known to everyone or to a wide range of persons at a certain place and time (the Supreme Administrative Court has interpreted this concept at length, for example, in its judgment of 12 April 2011, 1 As 33/2011-58).

There is a consensus among the regional courts<sup>55</sup> and the Supreme Administrative Court<sup>56</sup> that the conflict in Ukraine is indeed such a judicial notice.

## Ukraine as a safe country of origin

### General on the safe country of origin concept

The safe country of origin concept is a controversial part of European asylum law. The possibility for Member States to designate a country as a so-called safe country of origin by their national standards stems from Article 37 of the Procedural Directive.

Member States have started to apply the concept of safe countries of origin as a means to distinguish between applications for international protection that are well-founded and those that are not and, as a result, to speed up asylum procedures. The logic behind this concept is that, if a person comes from a country that does not generate a high number of refugees, it is likely that the person will not face persecution in that country either (Hunt, 2014, 502). At the beginning of the 1990s, the number of applications for international protection increased rapidly, and the ministers of the Member States adopted the so-called London Resolution,<sup>57</sup> which laid the foundations for the concept of safe countries of origin.

### The concept of safe country of origin

A country is a country of origin in relation to an applicant for international protection if the applicant is a national or stateless person and has previously resided in that country on a regular

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<sup>54</sup> Act No. 500/2004 Coll., Administrative Procedure Code, as amended. In the Czech Republic, the Administrative Procedure Code is the fundamental act for all administrative proceedings.

<sup>55</sup> See judgments of the Regional Court in Brno 41 Az 9/2021-36, 41 Az 12/2021-34, 22 Az 24/2021-38, 22 Az 36/2021-28 and 41 Az 21/2021-42.

<sup>56</sup> See the cited judgments of the Supreme Administrative Court 10 Azs 537/2021-31, 6 Azs 306/2021-49, 1 Azs 36/2022-31, 9 Azs 13/2022-32, 4 Azs 324/2021-46, 8 Azs 55/2022-25, 5 Azs 86/2021-33, 5 Azs 212/2020-44 and 5 Azs 14/2022-25.

<sup>57</sup> Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum (“London Resolution”), points 6–8.

basis.<sup>58</sup> The criteria that a safe country of origin must meet are contained in Annex I to the Procedural Directive, which follows on from art. 37(1) thereof. According to the Annex, a country is considered to be a safe country of origin if it can be demonstrated, on the basis of the legal situation there, the application of the law within the democratic system and the general political situation, that it is free from persecution as referred to in art. 9 of the Qualification Directive, torture or inhuman or degrading treatment or punishment and the threat of arbitrary violence in the event of international or internal armed conflict. This assessment shall take into account, inter alia, the extent to which protection against persecution or ill-treatment is provided through:

- a) the relevant laws of the country and how they apply;
- b) observance of the rights and freedoms set out in the ECHR or the International Covenant on Civil and Political Rights or the Convention against Torture, in particular those rights which cannot be derogated from under art. 15(2) of ECHR;
- c) observance of the principle of non-refoulement under the Geneva Convention;
- d) a system of effective remedies against violations of these rights and freedoms.

If the applicant comes from a country designated as safe, they still have the opportunity to provide the State with compelling reasons why that country is not safe in relation to them and the concept cannot be applied.<sup>59</sup> When taking into account the *de facto* protection of human rights in countries of origin, Member States rely in particular on information from other Member States, the European Asylum Support Office, the Office of the United Nations High Commissioner for Refugees, the Council of Europe and other relevant international organizations.<sup>60</sup> In the light of the above, it can be concluded that both aspects of mutual trust apply here – both formal trust and trust *in concreto* are assessed. The Procedural Directive does not contain, mainly for political reasons (ECRE, 2015, 2), a list of countries that can be considered safe countries of origin. However, in the framework of the implementation of the Procedural Directive into national law, some Member States have proceeded to draw up their own national lists of countries they consider safe countries of origin. These national lists, however, contain derogations that could result in countries being judged as safe or otherwise in quite different ways by Member States. The main differences in such national systems include, for example, whether States differentiate the definition of persecution in the country of origin according to the gender of the applicant or which Member State authority is competent to issue such lists (AEDH et al., 2016, 6). In addition, there are states in the European Union that do not apply this concept at all (e.g. Spain, Italy, Poland, and Sweden) (Orav, Apap, 2017, 3). In view of this, and also in response to the refugee crisis in Europe, a proposal was therefore made by the European Commission in 2015 to issue a regulation harmonizing this area and creating a common list of safe countries of origin for Member States (European Commission, 2015). However, this proposal was not implemented and was eventually withdrawn in 2019 (European Commission, 2019).

### Procedural consequences

If the applicant for international protection comes from a safe country of origin, the state then considers the application to be unfounded within the meaning of art. 32(2) in conjunction with art. 31(8)(b) of the Procedural Directive. The Member States are thus not obliged to decide on

<sup>58</sup> Art. 36(1) Procedural Directive.

<sup>59</sup> Art. 36(1) Procedural Directive.

<sup>60</sup> Art. 37(3) Procedural Directive.

the merits of the application for international protection, since it is presumed that the applicant could have been granted protection by his home state (Boeles et al., 2014, 280). Where Member States apply the concept of safe countries of origin, this practice is also mirrored in procedural terms – states then examine the specific application in an “accelerated procedure”, but are still obliged to follow the principles and principles set out in Chapter II of the Procedural Directive.<sup>61</sup> In contrast to the previous arrangement, under art. 14 of the Procedural Directive, applicants are guaranteed the opportunity to participate in a personal interview on their application, where they can also present compelling reasons why their country of origin cannot be considered safe in their case. If the applicant does so, the state must then refute the applicant’s claims, otherwise it would violate the principle of non-refoulement by returning the applicant.<sup>62</sup> According to the European Association for the Defence of Human Rights (AEDH), such accelerated procedures do not provide applicants with sufficient procedural guarantees that their application will be considered individually; furthermore, they can violate the principle of equality before the law, as applicants may have unequal (procedural) rights depending on their origin (Orav, 2021, 3, 7). The CJEU<sup>63</sup> has also commented on such criticisms, according to which the acceleration of the international protection procedure does not discriminate against applicants according to their country of origin, but only if they are allowed to exercise all the rights that EU legislation grants to applicants under the ordinary procedure.

### **Ukraine as a safe country of origin in the Czech Republic**

With the entry into force of Decree No. 68/2019 Coll., which amended Decree No. 328/2015 Coll., Ukraine was added to the list of safe countries of origin regulated by Decree No. 328/2015 Coll., which implements the Asylum Act and the Act on Temporary Protection of Aliens, with the exception of the Crimea peninsula and parts of the Donetsk and Luhansk regions under the control of pro-Russian separatists (Article I of the amending Decree, § 2, point 24 of the Decree). Thus, as of 23 March 2019, the Czech Republic considered most of Ukraine to be a safe country of origin. Next, the article will focus on how the administrative courts have treated this fact after 24 February 2022.

The amending Decree entered into force on 23 March 2019. For the Ministry, this meant a change in the procedure for applications for international protection submitted as of that date by those Ukrainians coming from the part of Ukraine defined in the Decree as safe (i.e. except for the above-mentioned Crimea peninsula and the parts of the Donetsk and Luhansk regions under the control of pro-Russian separatists). In accordance with art. 16(2) of the Asylum Act, it is necessary to assess whether the applicant has rebutted the presumption of safety in their case – i.e. whether they have demonstrated that Ukraine cannot be considered a safe country of origin in their case – before examining the merits of their application.<sup>64</sup>

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<sup>61</sup> Art. 31(8)(b) Procedural Directive.

<sup>62</sup> *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008), paragraph 129.

<sup>63</sup> Judgment of 31 January 2013, *H.I.D. and B. A v Refugee Applications Commissioner and Others*, C-175/11, EU:C:2013:45, points 74 and 75.

<sup>64</sup> § 16(2) of the Asylum Act reads: An application for international protection shall also be rejected as manifestly unfounded if the applicant for international protection comes from a state which the Czech Republic considers to be a safe country of origin, unless the applicant for international protection proves that in his/her case this state cannot be considered such a country.

The material conditions for determining that a country of origin is safe are set out in Annex I of the Procedural Directive. According to the Directive, a country is considered a safe country of origin if it can be demonstrated, “*on the basis of the legal situation there, the application of the law within the democratic system and the general political situation, that it is free from persecution as referred to in Article 9 of the Qualification Directive, torture or inhuman or degrading treatment or punishment and the threat of arbitrary violence in the event of international or internal armed conflict.*” The substantive conditions are transposed into Czech law by § 2(1) (k) of the Asylum Act, which must be interpreted in a euroconformist manner. According to this provision, the safe country of origin is the state “*of which the alien is a national or, in the case of a stateless person, the state of last permanent residence,*”

1. in which persecution, torture or inhuman or degrading treatment or punishment and the threat of arbitrary violence on account of international or internal armed conflict are generally and systematically avoided,
2. which its citizens or stateless persons do not leave for reasons referred to in § 12 or 14a,
3. which has ratified and complies with international human rights and fundamental freedoms treaties, including standards on effective remedies; and
4. which enables the activities of legal entities that monitor the human rights situation.

The Regional Court in Brno stated shortly after the invasion that one of the material conditions, namely that there is no threat of arbitrary violence on the territory of the state in the event of an international or internal armed conflict, is no longer met by Ukraine with regard to the Russian-Ukrainian war (judgment of 2 March 2022, 41 Az 9/2021-36).

The conclusion that this security criterion is no longer fulfilled in the current situation was confirmed by the Supreme Administrative Court shortly after the outbreak of the conflict, for example, in judgments of 7 April 2022, 4 Azs 324/2021-46 and 8 Azs 55/2022-25. In subsequent case law, the Supreme Administrative Court has held that Ukraine can no longer be considered a safe country of origin in all cases where a Ukrainian’s application was considered manifestly unfounded within the meaning of § 16(2) of the Asylum Act.

Finally, the author adds that, formally, the Czech Republic still considers Ukraine, with the exception of the Crimea peninsula and parts of the Donetsk and Luhansk regions under the control of pro-Russian separatists, to be a safe country of origin, as Decree 328/2015 Coll. has still not been amended. At the moment (more than a year after the start of the invasion), a change in the decree is still being prepared to remove Ukraine from the list of safe countries of origin.<sup>65</sup>

### **Temporary protection is a type of international protection**

Finally, the author considers it appropriate to draw attention to another judgment of the Czech Supreme Administrative Court,<sup>66</sup> in which the Supreme Administrative Court dealt with the institution of the temporary protection of Ukrainian refugees in connection with the procedure of the responsible authorities (in this case, the Regional Assistance Centre for Ukraine).<sup>67</sup> In that

<sup>65</sup> Draft Decree amending Decree No. 328/2015 Coll., implementing the Asylum Act and the Act on Temporary Protection of Aliens, as amended by Decree No. 68/2019 Coll. Online: <https://odok.cz/portal/veklep/material/KORNCP59PK1T/>.

<sup>66</sup> Judgment of the Supreme Administrative Court of 2 February 2023, 10 As 290/2022-30.

<sup>67</sup> Regional Assistance Centres for Ukraine are centres coordinated by the Ministry of the Interior and operating in every regional town of the Czech Republic. Their primary task is to provide assistance to persons fleeing the armed

judgment, the Supreme Administrative Court dealt with two essential issues, namely whether the court proceedings concerning temporary protection can be regarded as a matter of international protection pursuant to § 35(5) CoAJP<sup>68</sup> and whether the alien can therefore be represented by the Organization for Aid to Refugees in such proceedings.<sup>69</sup> In this judgment, the Supreme Administrative Court answered the first question in the affirmative, which conditioned the affirmative answer to the second question, that temporary protection should be understood as a type of international protection within the meaning of § 35(5) CoAJP.

As indicated above, the Supreme Administrative Court first of all [reproached](#) the Regional Court for relying solely on national (Czech) law in determining whether temporary protection can be included under international protection. The concept of international protection in § 35(5) CoAJP must be defined primarily in the light of European Union law (and primary law at that). In particular, the Supreme Administrative Court constructed its reasoning as follows.

According to the Supreme Administrative Court, temporary protection can be most generally characterized as “*a flexible instrument of international protection, which provides refuge for a limited period of time to persons fleeing a humanitarian crisis*” (Ineli-Ciger & Skordas, 2019).<sup>70</sup> The contemporary European concept of temporary protection has its origins as consequence of the war in the disintegrating Yugoslavia. Following the experience of providing temporary shelter to refugees from the countries of the former Yugoslavia, it was the EU Member States that agreed in July 2001 to adopt Directive 2001/55/EC on temporary protection<sup>71</sup> and transpose it into their national legislation. This is probably the only international formalized temporary protection regime to date.

However, the concept of “international protection” is already dealt with in primary EU law, which places all the regimes compared by the Regional Court (asylum, subsidiary protection and temporary protection – author’s note) in one system and gives them a common basis. How-

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conflict in Ukraine with applications for temporary protection and to provide accommodation in cases where they have no accommodation of their own.

<sup>68</sup> § 35(5) CoAJP: If a party seeks judicial protection by bringing an action in the matter of international protection, a decision on administrative expulsion, a decision on the obligation to leave the territory, a decision on the detention of a foreigner, a decision on the extension of the duration of the detention of a foreigner, as well as other decisions resulting in the restriction of the personal freedom of a foreigner, he or she may also be represented by a legal person established on the basis of a special law, whose activities, as specified in the statutes, include the provision of legal assistance to refugees or foreigners. The legal person shall be represented by an authorised employee or member of the legal person who has a university degree in law required by special regulations for the practice of the legal profession. The provisions of this paragraph on the representation of a foreigner by a legal person shall also apply in cases where a directly applicable European Union regulation on the free movement of workers applies.

<sup>69</sup> The Organization for Aid to Refugees is a non-profit, non-governmental and humanitarian organization that has been operating in the Czech Republic since 1991. The main activities of the organisation include providing free legal and social counselling to applicants for international protection and other foreigners in the Czech Republic, organising educational programmes for the general and professional public and other activities aimed at supporting the integration of foreigners. Online: <https://www.opu.cz/en/>.

<sup>70</sup> The reference now used was also used by the Supreme Administrative Court in its judgment.

<sup>71</sup> 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. OJ L 212, 7.8.2001, p. 12–23.

ever, this definition, which the Regional Court otherwise rejected as irrelevant, is crucial to the present case.

The basis for the Common European Asylum System is currently (i.e. after the adoption of the Lisbon Treaty) art. 78 of the TFEU, which lists, among other things, the various measures that the EU legislator can take in this area, including the legal basis for a common regime of temporary protection for displaced persons in the event of a mass influx, in art. 78. Before that, however, art. 78(1) TFEU states that the European Union shall establish a common policy on asylum, subsidiary protection and temporary protection with a view to granting any third-country national in need of international protection an adequate status and ensuring respect for the principle of non-refoulement. This policy must be consistent with the Geneva Convention, the New York Protocol and other relevant treaties. Art. 78(1) TFEU makes no substantive distinction between asylum, subsidiary protection and temporary protection. On the contrary, art. 78(1) TFEU can more logically be seen as conceptualizing the relationship between the various regimes and the concept of international protection in precisely the opposite way to that of the referring court, in the sense that certain persons are in need of ‘international protection’ and are consequently granted a certain status, whether in the form of asylum, subsidiary protection or temporary protection. Similarly, the implementation of the Geneva Convention and the New York Protocol and the guarantee of the principle of non-refoulement are intended for all regimes, asylum, subsidiary and temporary protection (after all, this is explicitly confirmed, for example, in recital 3 of the Qualification Directive).

This is also how some Advocates General have described the relationship between international protection and its various forms in cases concerning the Common European Asylum System. For example, the opinion of Advocate General Bot: “*Protection deriving from refugee status must therefore, in principle, be considered first, since the EU legislator has included other forms of international protection considered ‘subsidiary’, ‘complementary’ or ‘temporary’ only to supplement the standards laid down in the [Geneva] Convention*”.<sup>72</sup> Advocate General Mengozzi’s opinion is similar: “*In the Qualification Directive system, refugee status and subsidiary protection status are specifically regarded as two distinct but closely linked components of the concept of international protection. Such an integrated approach makes it possible to interpret the provisions of that directive, supplemented by the regime introduced by Directive 2001/55/EC, which provides for temporary protection in the event of a mass influx of displaced persons [...], as a normative tendency towards a comprehensive system capable of covering any situation in which a third-country national or a stateless person who cannot be granted protection by his or her country of origin claims international protection on EU territory.*”<sup>73</sup>

It may also be added that the legal basis for the adoption of the Temporary Protection Directive was art. 63(2)(a) and (b) of the Treaty establishing the European Community (as it stood after the adoption of the Treaty of Amsterdam). This required the Council to adopt measures concerning refugees and displaced persons in terms of minimum rules for the temporary protection of displaced persons from third countries who are unable to return to their country of origin and of persons who are in need of international protection for other reasons (point (a)) and to promote a balanced distribution of the efforts involved in the reception of refugees and displaced persons and the consequences thereof among the Member States (point (b)). This provision was the only place where the EC Treaty referred to ‘international protection’ (the field of

<sup>72</sup> Opinion of the Advocate General of 7 November 2013, *H. N.*, C-604/12, EU:C:2013:714, point 44.

<sup>73</sup> Opinion of the Advocate General of 18 July 2013, *Diakité*, C-285/12, EU:C:2013:500, point 60.

asylum, on the other hand, was dealt with separately in the first paragraph of art. 63 of the EC Treaty, and it was only on the basis of art. 63(2)(a) of the EC Treaty, which referred primarily to ‘temporary protection’, that the concept of subsidiary protection in the original Qualification Directive came into being.<sup>74</sup>

Supplementary protection and temporary protection were thus founded on the same basis; in fact, supplementary protection was itself first “temporary protection”. The separate competence clauses for subsidiary and temporary protection were only introduced by art. 78(2) TFEU, after all the provisions envisaged had been ‘wrapped up’ in the single common policy described in art. 78(1) TFEU.

Finally, it can also be pointed out that even before the Lisbon Treaty came into force, the Supreme Administrative Court pointed out that the European asylum system cannot be reduced to a set of individual asylum directives. The individual provisions cannot be viewed in isolation, but must be interpreted in their interconnectedness (for example, the judgment of the Supreme Administrative Court of 15 August 2008, 5 Azs 24/2008-48). Although the Temporary Protection Directive is a somewhat “special relative”, it is still part of the same system (cf. recital 1 of the Directive).

Asylum, subsidiary protection and temporary protection are therefore much more intertwined than their definitions and formal separation in secondary law (and possibly their national implementation) suggest. For this reason alone, it is appropriate to include temporary protection matters (albeit so far granted only in a single case on the basis of EU Council Implementing Decision 2022/382) under the concept of an international protection issue. This is because, on the one hand, the Supreme Administrative Court gives priority to an interpretation of procedural rules which more effectively protects the rights of individuals (cf. resolution of the Extended Chamber Nad 202/2020) and, on the other hand, it places all the regimes of the Common European Asylum System side by side and does not make unjustified distinctions between them.

The Directive foresees that temporary protection will be applied in particular when a mass influx of persons threatens to overwhelm asylum systems (cf. the definition in art. 2 of the Directive quoted above). While it will then be formally possible to lodge an application for asylum or subsidiary protection (cf. art. 17(1) of the Directive), the Directive foresees that these applications will not be processed within a meaningful time (cf. art. 17(2) of the Directive: the examination of any asylum application pending before the expiry of the period of temporary protection is completed after the expiry of that period). In such a situation, temporary protection will effectively replace the protection that would otherwise be provided by the “standard” asylum system.

For all these reasons, the Supreme Administrative Court concluded that the concept of international protection as used in § 35(5) CoAJP must therefore also include temporary protection. It may be added that the logic of the above interpretation naturally also applies to other rules of CoAJP that deal with matters of international protection, i.e. § 31(2) CoAJP (decision of a single judge in the case of an action against a decision) and § 56(3) CoAJP (priority decision-making in matters of international protection).

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<sup>74</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. OJ L 304, 30.9.2004, p. 12–23.

## Conclusion

In this article, the author focused on the decision-making practice of the Czech Supreme Administrative Court (and partly of the regional courts deciding in administrative justice) in relation to the basic institutions of asylum law and the change of the security situation in Ukraine caused by the Russian invasion. In particular, the question of breaching § 75(1) and (2), § 109(5) CoAJ, the possibility of considering Ukraine as a safe country of origin and the status of temporary protection within the framework of international protection were answered, placing these issues in an international or European context. On the basis of the examined decisions of the regional courts and the Supreme Administrative Court, the author concludes that the Czech Supreme Administrative Court is basically consistent in relation to the war in Ukraine and the conclusions of the regional courts are also consistent with its views. At the same time, these conclusions are consistent with the international obligations of the Czech Republic. Moreover, the Supreme Court of Justice took the Russian-Ukrainian conflict into account immediately after its outbreak, issuing its pilot judgment 10 Azs 537/2021-33 on 10 March 2022, less than three weeks after the outbreak of the conflict.

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