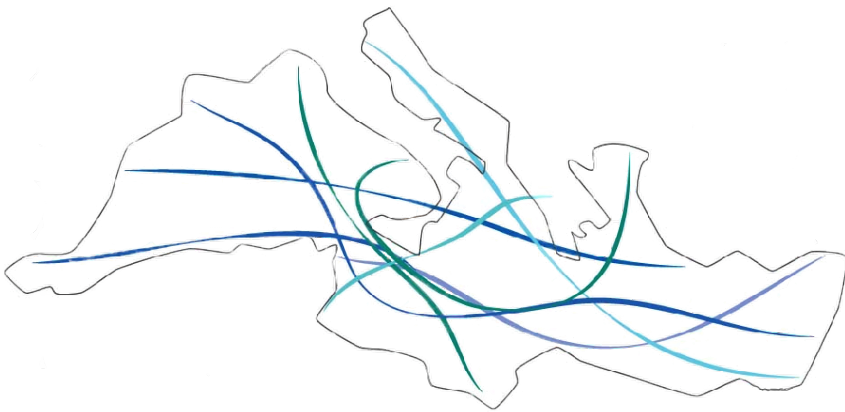


JOURNAL OF MEDITERRANEAN KNOWLEDGE

Editor in Chief, Giuseppe D'Angelo

ROSSANA PALLADINO

The “immediate protection” status under the new pact on migration and asylum: some remarks



ISSN: 2499-930X



MEDITERRANEAN KNOWLEDGE
International Centre for Studies & Research
www.mediterraneanknowledge.org

Palladino, R. (2021). "The "immediate protection" status under the new pact on migration and asylum: some remarks". *Journal of Mediterranean Knowledge*, 6(2), 361-382.

DOI: 10.26409/2021JMK6.2.10

Retrieved from

<http://www.mediterraneanknowledge.org/publications/index.php/journal/issue/archive>

Author: Rossana Palladino, Università di Salerno
rpalladino@unisa.it

Article received: 11 September 2021

Accepted: 5 November 2021

On the cover: *Routes* by ISIA Roma Design

© ICSR Mediterranean Knowledge 2021

Via Giovanni Paolo II n. 132, 84084 Fisciano, Italy



 - Peer Reviewed Journal

INDEXED IN
DOAJ

The “immediate protection” status under the new pact on migration and asylum: some remarks

Abstract

Responses to the crisis of the Common European Asylum System (CEAS), after a long period of impasse, currently lie in the New Pact on Migration and Asylum (European Commission, 23 September 2020). This essay will focus on the Proposal for a Regulation addressing situations of crisis and force majeure as part of the Commission package of proposals following the New Pact, and especially on the “immediate protection” status envisaged therein. Within the forms of international protection granted by the European Union law, this essay explores *in primis* such a new status in comparison with the “temporary protection” – which is intended to be repealed and however never triggered – and, *in secundis*, in the framework of the New Pact rationale, as characterized by the increasing of interstate solidarity mechanisms despite restrictions on the fundamental rights of asylum-seekers.

Keywords: Immediate protection, Temporary protection, Asylum seekers, New pact on migration and asylum, European Union.

El estatuto de "protección inmediata" en el marco del nuevo pacto sobre migración y asilo: algunas observaciones

Resumen

Las respuestas a la crisis del Sistema Europeo Común de Asilo (SECA), tras un largo periodo de estancamiento, se encuentran actualmente en el Nuevo Pacto sobre Migración y Asilo (Comisión Europea, 23 de septiembre de 2020). Este ensayo se centra en la Propuesta de Reglamento que trata las situaciones de crisis y de fuerza mayor como parte del paquete de propuestas de la Comisión tras el Nuevo Pacto, y especialmente en el estatuto de "protección inmediata" previsto en el mismo. En el marco de las formas de protección internacional concedidas por el derecho de la Unión Europea, este ensayo explora *in primis* ese nuevo estatuto en comparación con la “protección temporal” – que se pretende derogar y que, sin embargo, nunca se ha puesto en marcha – y, *in secundis*, en el marco de la lógica del Nuevo Pacto, caracterizada por el aumento de los mecanismos de solidaridad interestatal a pesar de las restricciones de los derechos fundamentales de los solicitantes de asilo.

Palabras clave: Protección inmediata, Protección temporal, Solicitantes de asilo, Nuevo pacto sobre migración y asilo, Unión Europea.

Lo status di “protezione immediata” previsto dal nuovo Patto sulla migrazione e l’asilo: alcune considerazioni.

Sinossi

La Proposta di Regolamento sulle situazioni di crisi e di forza maggiore - facente parte del pacchetto di proposte presentate dalla Commissione europea a seguito del “Nuovo Patto” sulla migrazione e l’asilo - prevede lo status di protezione internazionale, su cui si concentra il presente contributo. Nel quadro delle forme di protezione internazionale disciplinate dal diritto dell’Unione europea, tale nuovo status è analizzato, in *primis*, in raffronto alla “protezione temporanea” - destinata ad essere abrogata e, comunque, mai attivata - e, in *secundis*, in relazione alla logica del Nuovo Patto, caratterizzata dall’incremento dei meccanismi di solidarietà interstatale nonostante la compressione dei diritti fondamentali dei richiedenti asilo.

Parole chiave: Protezione immediata, Protezione temporanea, Richiedenti asilo, Nuovo patto sulla migrazione e l’asilo, Unione Europea.

The “immediate protection” status under the New pact on migration and asylum: some remarks

ROSSANA PALLADINO
Università di Salerno

1. Forms of International protection granted by the European Union law

The development of a “common policy on asylum, subsidiary protection and temporary protection” is a goal set by Article 78(1) of the Treaty on the Functioning of the European Union (TFEU) aimed at offering appropriate status to any third-country national requiring international protection, as well as at ensuring the principle of *non-refoulement*¹. In making this objective concrete, the secondary legislation adopted by the Institutions of the European Union (EU) to build up a Common European Asylum System (CEAS)² has been developed in accordance with the Geneva Convention of 28 July 1951 (and the Protocol of 31 January 1967) relating to the

The research has been carried out within the Italian PRIN 2017 “International Migrations, State, Sovereignty and Human Rights: Open Legal Issues” (Principal Investigator: Prof. Angela Di Stasi, prot. 20174EH2MR).

¹ Regarding the origins of the right to asylum, already in Ancient Rome and in Greece, as similar, at least as far as concerns its outcome, to the *exilium* institution (which gave any citizen who received a capital sentence the option to avoid execution by choosing exile), see Cherubini, 2015.

² It is mainly composed of Directive 2011/95/EU of 13 December 2011 (the Qualification Directive); Directive 2013/32/EU of 26 June 2013 (the Procedure Directive); Directive 2013/33/EU of 2 June 2013 (the Reception Directive); Directive 2001/55/EC of 20 July 2001 (the Displaced-persons Directive), as well as of Regulation (EU) 604/2013 of 26 June 2013 (the Dublin III Regulation) and Regulation (EU) 603/2013 of 26 June 2013 (the Eurodac Regulation). The entire System is undergoing reforms envisaged in the New Pact on Migration and Asylum.

status of refugees, constituting “the cornerstone”³ of the International legal regime for the protection of refugees (Amadeo, and Spitaleri, 2019; Cherubini, 2015; Del Guercio, 2016). This applies significantly to Directive 2011/95/EU (the Qualification Directive)⁴ in regulating the first form of international protection along the lines of the Geneva Convention. This is the refugee status to be granted, pursuant to Article 2(d) of the Directive 2011/95/EU, to “third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it...”. However, “exclusion clauses” (Article 12) may operate, as well as the refugee status may be revoked, ended or refused (Article 14). Unlike the Article 33(2) of the Geneva Convention – that denies the refugee the benefit, in such circumstances, of the principle of *non-refoulement*⁵ – the Qualification Directive must be

³ See, among others, the judgment of the Court of Justice of the European Union (Grand Chamber), 2 March 2010, *Aydin Salahadin Abdulla et al. v. Bundesrepublik Deutschland*, in joined cases C-175/08, C-176/08, C-178/08 and C-179/08, ECLI:EU:C:2010:105, para. 52. The Court stated that the provisions of the EU “Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria”.

⁴ Recital no. 4 of the Qualification Directive confirms that the Geneva Convention and the Protocol provide the cornerstone of the international legal regime for the protection of refugees. Moreover, recital no. 22 considers consultations with the United Nations High Commissioner for Refugees (UNHCR) as a “valuable guidance” for Member States when determining refugee status according to Article 1 of the Geneva Convention. Such a kind of relationship also laid down in the Charter of fundamental rights of the European Union, since – according to Art. 18 thereof – the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951.

⁵ At the core of the Geneva Convention, article 33 enshrines the principle of *non-refoulement* – also considered as a rule of customary law (Allain, 2001; Lauterpacht, Bethlehem, 2003) – prohibited however not in absolute terms since the benefit of such provision may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which

interpreted and applied in a way that observes the rights guaranteed by the Charter of Fundamental Rights of the European Union⁶, in particular Article 4 and Article 19(2) thereof, which prohibit in absolute terms torture and inhuman or degrading punishment or treatment irrespective of the conduct of the person concerned, as well as removal to a State where there is a serious risk of a person being subjected to such treatment. Accordingly, EU Member States may not remove, expel or extradite a foreign national where there are substantial grounds for believing that he will face a genuine risk, in the country of destination, of being subjected to treatment prohibited by Article 4 and Article 19(2) of the Charter⁷.

The case law of the Court of Justice of the EU has highlighted this point⁸, from which two considerations arise: *in primis*, within the system introduced by Directive 2011/95/EU, a person who satisfies the material conditions set out in Chapter III of that directive is, on that basis alone, a refugee for the purposes of Article 2(d) thereof and Article 1(A) of the Geneva Convention; *in secundis*, the Qualification Directive must be interpreted and applied in a way that observes the rights guaranteed by the Charter of Fundamental Rights of the European Union⁹. As a matter of fact, EU law provides more extensive international protection for the refugees concerned than that guaranteed by the 1951 Refugee Convention.

The protection offered by EU law is also more extensive from another point of view, given that the Qualification Directive even

he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

⁶ Pursuant to Article 6(1) of the Treaty on European Union (TEU) the Charter shall have the same legal value as the Treaties.

⁷ See, to that effect, Court of Justice of the European Union, judgment of 5 April 2016, *Aranyosi and Căldăraru*, joined cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paras. 86 to 88, and judgment of 24 April 2018, *MP (Subsidiary protection of a person previously a victim of torture)*, in case C-353/16, ECLI:EU:C:2018:276, para. 41.

⁸ Court of Justice of the European Union, judgment of 14 May 2019, *M. v. Ministerstvo vnitra and X., X., v. Commissaire général aux réfugiés et aux apatrides*, in joined cases C-391/16, C-77/17, and C-78/17, ECLI:EU:C:2019:403.

⁹ And certainly also by the European Convention on Human Rights (ECHR), taking into account the equivalence clause in Article 52, para. 3, of the Charter of Fundamental Rights, as well as Article 6, para. 3, of the Treaty on European Union (TEU).

grants for “complementary forms of protection”, in line with the objectives that were first set by the European Council of Tampere, envisaging the building of the European Area of Freedom, Security and Justice (Di Stasi, and Rossi, 2020; Carrera et al., 2020). Accordingly, the Qualification Directive also regulates the “subsidiary protection” status (McAdam, 2015) to be granted to “third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country” (Article 2(f)). This is a “subsidiary” form of protection, precisely because it is intended for third country nationals who do not qualify for refugee status but who are genuinely in need of international protection¹⁰.

For the purpose of its recognition, the “serious harms” are listed under Article 15 of the Qualification Directive¹¹, as shaped on Article 3 of the European Convention of Human Rights (ECHR) and therefore to be interpreted in the light of the jurisprudence of the Court of Strasbourg related to aliens¹², as well as in a manner consistent with the Charter of Fundamental Rights of the European Union¹³.

Even if the subsidiary protection scope does not extend to reasons not provided under Article 15, Member States, through their

¹⁰ Court of Justice of the European Union, judgment of 8 May 2014, *H.N. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, in case C-604/12, ECLI:EU:C:2014:302, para. 30 ff.

¹¹ a) the death penalty or execution; b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

¹² See Court of Justice of the European Union. judgment of 17 February 2009, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, in case C-465/07, ECLI:EU:C:2009:94, para. 28. On this topic, let me refer to Palladino, 2016.

¹³ See Court of Justice of the European Union (Grand Chamber), judgment of 19 December 2012, *Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, in case C-364/11, EU:C:2012:826, para. 43.

own legislation, might grant further forms of protection on a discretionary basis on compassionate or humanitarian grounds¹⁴.

Pending the request for international protection, the condition of the asylum-seeker is also considered by EU law, as the rules enshrined in Directive 2013/33/EU (the Reception Directive)¹⁵ apply for those third-country nationals or stateless persons who have “made an application for international protection in respect of which a final decision has not yet been taken” (Article 2(b) thereof)¹⁶. Generally, pursuant to Article 6(1), applicant for international protection is provided with a document certifying such status or testifying that he/she is allowed to stay on the territory of the Member State while the application is pending or being examined. Moreover, applicant “may move freely within the territory of the host Member State”. This provision, contained in Article 7, however, includes the possibility of limiting free movement within an area

¹⁴ See Court of Justice of the European Union (Grand Chamber), judgment of 18 December 2014, *Mohamed M'Bodj v. État belge*, in case C-542/13, ECLI:EU:C:2014:2452, para. 37.

¹⁵ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, *laying down standards for the reception of applicants for international protection (recast)*, OJ L 180, 29.6.2013. According to the recital no. 11, standards for the reception of applicants that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down. However, the Directive has not led to harmonization and the fragmented treatment of asylum seekers has become more acute with the “refugee crisis”, which has highlighted the deficiencies inherent in the reception system created by the Reception Conditions Directive (Silga, 2018). In October 2020, a provisional compromise text on a recast for the Reception Directive has been published: on the one hand, Member States will have more positive obligations to provide applicants with reception conditions; on the other hand, limits to applicant’s autonomy will increase (Slingenberg, 2020).

¹⁶ That provision makes no distinction as to whether or not the applicant is the subject of a procedure for transfer to another Member State under the Dublin III Regulation. Under that provision, the applicant is to retain that status provided that “a final decision has not yet been taken” on his or her application for international protection. According to the EU Court of Justice, a transfer decision does not constitute a final decision on an application for international protection, with the result that the adoption of such a decision cannot have the effect of depriving the person concerned of the status of ‘applicant’ within the meaning of Article 2(b). See judgment of 14 January 2021, *KS e MHK v. The International Protection Appeals Tribunal and o. and R.A.T. and D.S. v. Minister for Justice and Equality*, joined cases C-322/19 e C-385/19, ECLI:EU:C:2021:11.

assigned by the Member State, not affecting the unalienable sphere of private life and allowing sufficient scope for guaranteeing access to all benefits under the Reception Directive. Furthermore, Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection (Article 7(2)).

Finally (and we will focus on this point *infra* at the conclusive paragraph by analyzing the immediate status protection among the novelties that the New Pact envisages), even if “Member States shall not hold a person in detention for the sole reason that he or she is an applicant”¹⁷, the wide range of reasons why an applicant may be detained – especially the notion of “risk of absconding” – entails the *de facto* general use of this measure (Palladino, 2018).

2. Temporary Protection pursuant to Directive 2001/55/EC: a Union-level tool... failed to be applied.

The EU law provides for a further form of protection, namely the status of “temporary protection” as ruled by Directive 2001/55/EC¹⁸. Such Directive, currently in force, was adopted in a precise historical context, namely to face the events affecting the former Yugoslavia, especially the Kosovo¹⁹, and to manage displaced persons, with respect to whom it was necessary to grant an adequate and immediate form of protection (Kerber, 2002; Peers, 2006; Inel-Ciger, 2018).

The aim of the Directive 2001/55/EC is twofold: to establish “minimum standards”²⁰ for the granting of temporary protection “in

¹⁷ Pursuant to Article 8 (*Detention*) of the Reception Directive.

¹⁸ 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.

¹⁹ Cfr. the Preamble of the Directive.

²⁰ Pursuant to the former Article 63(a)(b) of the Treaty of the European Community (TEC), in order to harmonize national standards on temporary protection. Temporary protection differed greatly however from one Member State

the event of a mass influx of displaced persons” for third countries persons who can not return to their country of origin; to promote the balance of efforts among Member States that receive displaced persons and suffer the consequences of their reception.

As regards the first aspect, it is precisely through temporary protection that an exceptional measure is adopted in order to ensure rapid²¹ and *ad interim* protection²² to displaced persons. Pursuant to Article 2(c) of the Directive 2001/55/EC, defining the scope *ratione personae*, displaced persons means, “in particular”²³, persons who have fled areas of armed conflict or endemic violence and persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.

Unlike the 1951 Geneva Convention, which is implemented by means of individualised status determination, temporary protection is a “group-based protection”, which is used by states “to prevent the blocking of asylum systems, whilst also providing immediate protection to those in need” (European Commission, 2016, p. 4). Unlike the subsidiary protection, it is generally regarded as an exceptional measure only to be applied in situations of mass influx. The scope *ratione personae* coincides, therefore, with that of subsidiary protection, whereas the different regime pivots on the concept of “massive influx”, able to trigger the temporary protection. Such concept is defined in Article 2(2) of the Directive 2001/55/EC as “a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an

to another with regard to the status, the maximum duration, procedures gaining access to asylum procedures, and the rights and benefits.

²¹ The duration of temporary protection shall be one year, and it may be extended automatically by six monthly periods for a maximum of one year. Where reasons for temporary protection persist, the Council may decide to extend that temporary protection by up to one year.

²² Regarding the treatment granted by the Member States, persons benefiting of temporary protection status enjoy residence permits, are engaged in employed or self-employed activities, have access to suitable accommodation, receive assistance, social welfare, subsistence, medical care, and access to the education system (for those under 18 years).

²³ The term “in particular” makes the list of Article 2(c) non-exhaustive, and therefore makes it possible to further extend the causes of mass influxes – for instance, environmental causes – as also confirmed under Article 7.

evacuation programme”. There is an objectively clear element that the displaced persons must all come from a single country or from a specific geographical area. There is, however, a vague element as to “a large number” of displaced persons. In this regard, the assessment is not based on objective and previously identified factors, but it is up to the Council, which is competent – pursuant to Article 5 – to establish the existence of a massive influx of displaced persons, and to adopt by a qualified majority a decision introducing temporary protection. In this sense, it is a “Union level tool”, as the national authorities are not competent to trigger such form of protection, but the European Institutions solely are. The Council indeed takes its decision, on a proposal from the Commission²⁴ that indicates the specific groups of persons to whom the temporary protection will apply, the date on which the temporary protection will take effect, and the Member States’ reception capacity.

The Directive lays down indeed – and it is the second aspect cited above – a burden sharing mechanism. Article 25 pivots on the “spirit of Community solidarity” with which Member States receive persons who are eligible for temporary protection. On this rationale, Member States shall indicate their reception capacity, in figures or in general terms, and this information shall be set out in the Council Decision referred above. After that Decision has been adopted, the Member States may indicate additional reception capacity by notifying the Council and the Commission.

When the number of those who are eligible for temporary protection following a sudden and massive influx exceeds the reception capacity, the Council shall, as a matter of urgency, examine the situation and take appropriate action, including recommending additional support for the Member States affected.

In putting into practice the principle of solidarity envisaged under Article 80 of the TFEU²⁵, such a mechanism is to be regarded as an

²⁴ Which shall also examine any request by a Member State that it submits a proposal to the Council (cfr. Article 5(1) of the Directive). The European Parliament is excluded instead, as the Council is only required to inform the Parliament about its decision.

²⁵ According to which, the migration and asylum policies and their implementation “shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States...”. Among the different meanings of solidarity in the European regulatory framework,

unicum within the ECAS, to date structured on the Dublin system as an instrument allocating applicants between Member States on the basis of a hierarchy of criteria, not including an equitable distribution within Member States, in proportion to each Member State's capacity to receive applicants²⁶.

However, it cannot fail to be noted that the Directive 2001/55/EC has never actually been applied, despite requests by some Member States. Namely, in 2011, during the Arab Spring, Italy and Malta requested its activation following the high number of applications received from Tunisia posing serious strains on the national reception systems. Their requests were, however, not followed up on insofar as the Commission did not put forward a proposal to Council (European Commission, 2016, p. 13; Nascimbene, and De Pascale, 2011).

It is probable that the element that should have been positive in the Directive, namely a “flexible” definition of massive influx of displaced persons, was at the same time the element that had led to its non-activation. This is because its assessment is left to a political dimension, namely the arrangement among Member States inside of the Council, and the discretion of the Commission in submitting a proposal²⁷.

this guiding principle of immigration and asylum policies can be attributed a triple role (Morgese, 2018): preventive (as mutual assistance to improve the implementation, control and repression of violations); rebalancing (as mutual assistance between States to rebalance, in case of difficulty, the existing unequal distribution of common responsibilities); emergency (such as mutual assistance in emergency situations). The last role has been concretized in decisions nos. 2015/1523 and 2015/160117, adopted by the Council on the basis of Article 80 and Article 78, para. 3, of the TFEU.

²⁶ The Commission subsequently proposed to trigger the emergency response system envisaged under Article 78(3) of the TFEU via a temporary and emergency relocation mechanism for persons in clear need of international protection. On 9 September 2015, it also put forward a proposal to establish a permanent crisis relocation mechanism, amending the Dublin III Regulation, under Article 78(2). On the New Pact on Migration and Asylum and the solidarity mechanisms provided for therein, see Carta, 2021 and Russo, 2021.

²⁷ Discretion that is attributable to the very nature of the European Commission, which is completely independent in exercising its functions (Article 17 TEU).

3. From temporary protection to immediate protection within the Proposal for a Migration and Asylum Crisis Regulation. What changes?

The Proposal for a Regulation addressing situations of crisis and force majeure²⁸ (hereinafter Proposal for a Migration and Asylum Crisis Regulation) is part of the Commission package of proposals following the New Pact on Migration and Asylum²⁹, aimed at overcoming a long period of impasse (Chetail, et al. (Eds), 2016). Such Proposal establishes rules articulated in the provision of a series of necessary derogations from provisions set out in Asylum and Migration Management Regulation³⁰ and in Asylum Procedures Regulation³¹, as well as in recast Return Directive³² (Article 1 thereof). Most of the derogations concern the extension of the maximum duration for carrying out the envisaged procedures (i.e. the registration of applications for international protection; the screening of third-country nationals; the border procedure) in order to ensure that Member States are able to address particular difficulties in facing exceptional and unforeseeable situations.

A *situation of crisis* is to be understood as an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its

²⁸ European Commission, *Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum*, Brussels, 23.9.2020, COM(2020)613 final.

²⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *on a New Pact on Migration and Asylum*, Brussels, 23.09.2020, COM(2020)609 final.

³⁰ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]*, Brussels, 23.9.2020, COM(2020) 610 final.

³¹ European Commission, *Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, Brussels, 23.9.2020, COM(2020)611 final.

³² European Commission, *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals. A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018*, Brussels, 12.9.2018, COM(2018)634 final.

territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State’s asylum, reception or return system non-functional and can have serious consequences for the functioning of the Common European Asylum System or the Common Framework, or an imminent risk of such a situation (Article 1(2)).

Unlike situation of crisis, *force majeure* is not expressly defined in the proposed regulation. For this purpose, the recital no. 7 refers to abnormal and unforeseeable circumstances outside States’ control, the consequences of which could not have been avoided in spite of the exercise of all due care, and the explanatory memorandum recalls, by way of example, the Covid-19 pandemic and the political crisis witnessed at the Greek-Turkish border in March 2020³³. The lack of a precise definition entails its potential triggering in a number of hypotheses which depend on the Member States³⁴. As a matter of fact, unlike the crisis situation, which is approved and managed by the Commission, *force majeure* only requires Member States notification to the Commission, without any EU supervision, allowing access to the derogations provided.

Focusing on situation of crisis (only in which case immediate protection can be triggered), the proposed regulation provides for double set of derogatory rules: 1) derogations from solidarity mechanism (Article 2) as laid down in Articles 45-56 of the proposed Asylum and Migration Management Regulation³⁵; 2) derogatory rules concerning asylum and return procedures. Without, here, analyzing them in detail (see Fratea, 2021; Scissa, 2021; Villani, 2021), however an overall evaluation is worth of being carried out, in particular as regard as to the extension of the so-called border procedure, as well as of the migrants’ detention as critical issues.

³³ Cfr. Proposed Regulation COM(2020) 613 final, cit., p. 9.

³⁴ On the lack of a clear definition of *force majeure* and the related limit on the possibility for the Commission to verify compliance with the principle of proportionality of the measures adopted by the State in derogation from the ordinary rules, see Villani, 2021 and Amnesty International, 2021.

³⁵ Which aims to repeal the Dublin III Regulation in force.

By way of derogation from Article 41(2)(b) of Asylum Procedures Regulation, Member States may in a border procedure (the maximum duration of which may be prolonged by an additional period of maximum eight weeks) take decisions on the merits of an application in cases where the applicant is of a nationality, or, in the case of stateless persons, a former habitual resident of a third country, for which the proportion of decisions granting international protection by the determining authority is 75% or lower, in addition to the cases referred to in Article 40(1) of Asylum Procedures Regulation. This entails that a greater number of asylum seekers will be subjected to a procedure that raises considerable concerns in terms of treatment of persons, especially given restrictions on spatial mobility and restrictions on legal remedies (*amplius, infra* paragraph 4).

Moreover, regarding detention, according to Article 5(1)(c), in operating the return crisis management procedure, Member States must presume a risk of absconding of third-country nationals (Palladino, 2021) in addition to the four cases already listed in the recast Return Directive (Article 6(2)), when the person concerned is manifestly and persistently not fulfilling the obligation to cooperate with authorities at all stages of the return procedures. Beyond the border procedure, also the maximum period of detention of third-country nationals to be returned shall be prolonged by an additional period. Assuming that the proposed Regulation aims at simplifying procedures and at a more adequate management of the situations of crisis, these kind of provisions – based on the confinement of the crisis at the border and on the increasing of duration of the procedures, as well as on the extension of detention – do not have a completely coherent rationale, since they could even increase the pressure on border areas.

Summarizing, in order to tackle the ineffectiveness of the asylum, reception or return system of a Member State, in consideration of the large-scale influx of migrants, the core of the proposed “adaptations” concerns the expansion of timing of the procedures, the confinement of border management, as well as the extension of forms of deprivation of liberty of migrants, converging towards an assessment of the overall detriment of migrants’ rights.

3.1. *Scope and content*

In a crisis situation (which is the only case in which the immediate status protection applies, the imminent risk of such a situation and the force majeure being excluded), Member States may suspend the examination of application for international protection and grant “immediate protection status”, aimed to repeal the “temporary protection” under the Directive 2001/55/EC. Compared to the latter, some differences should be noted, starting from the scope *ratione personae*.

The number of persons who can benefit from immediate protection pursuant to Article 10 is more limited than the one referred to in Article 1(2)(a) defining the notion of existing situation of crisis. In other words, not all third-country nationals or stateless persons who have arrived in a Member State or landed on its territory as a result of search and rescue operations, in the context of a massive influx of displaced persons, will be eligible for this form of protection. Eligibility for immediate protection status is narrowly defined by reference to the existence of “exceptional situations of armed conflict”³⁶, thus it would not encompass some other

³⁶ It is limited to “displaced persons from third countries who are facing a high degree of risk of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are unable to return to their country of origin”. This concept echoes the jurisprudence of the Court of Justice in *Elgafaji* (cited above, paras. 34-35), according to which the term ‘indiscriminate’ implies “that it may extend to people irrespective of their personal circumstances”, and the word ‘individual’ must be understood “as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat...”. Moreover, in order to assess reasons of “indiscriminate violence in situations of armed conflict”, the Court stated that the systematic application by the competent authorities of a Member State of a criterion, such as a minimum number of civilian casualties injured or deceased, in order to determine the intensity of an armed conflict, without examining all the relevant circumstances which characterise the situation of the country of origin of the applicant for subsidiary protection, is contrary to the provisions of Directive

categories of persons, such as those fleeing, for instance, political persecutions or systematic human rights violations. Accordingly, the scope *ratione personae* of the immediate protection is narrower than that of temporary protection, since the Directive 2001/55/EC does not lay down such a specification in order to grant the status envisaged therein³⁷.

As to the content of the protection, it is defined by reference to the “effective access to all the rights” applicable to beneficiaries of subsidiary protection. This criterion of equivalence³⁸ ensures to beneficiaries of immediate protection status safeguard from refoulement, the right to receive information on the rights and obligations related to their status, freedom of movement within the territory of the Member State, the right to family unity, residence permits, access to employment and to education, access to healthcare, social welfare, and accommodation, rights regarding unaccompanied minors, assistance in case of repatriation³⁹.

However, the period of enjoyment of these rights could be very short, since the Commission implementing act (pursuant to Article 11(3) of the proposed regulation) shall remain in force for a period “not exceeding” – therefore even less than – one year⁴⁰. This period is much shorter than that set for temporary protection, since Article 4 of the Directive 2001/55/EC enshrines the duration of one year that may be extended automatically by six monthly periods for a maximum of one year and, where reasons for temporary protection

2011/95. Cfr. judgment of 10 June 2021, *CF, DN v. Bundesrepublik Deutschland*, in case C-901/19, ECLI:EU:C:2021:472.

³⁷ On a proposal for the introduction of “prima facie recognition”, see European Council on Refugees and Exiles, ECRE Comments on the Commission Proposal for a Regulation Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum COM(2020) 613, February 2021, p. 23.

³⁸ The prerequisites remain different, since the recognition of subsidiary protection is independent from the presence of a massive influx of third-country nationals or stateless persons which makes the asylum, reception, and returns system ineffective.

³⁹ See Chapter VII (*Content of International Protection*) of the Qualification Directive.

⁴⁰ Article 10(3) clarifies that Member States shall resume the examination of the applications for international protection that have been suspended after a maximum of one year.

persist, the Council may decide to extend that temporary protection by up to one year.

3.2. Trigger procedure

Trigger procedure represents an element of novelty compared to Directive 2001/55/EC on temporary protection, considering that a key-role is attributed to the European Commission, replacing the Council. The Commission shall, by means of an implementing decision, establish that there is a situation of crisis; define the specific country of origin, or a part of a specific country of origin, in respect of the displaced persons; establish the period during which applications for international protection of displaced person concerned may be suspended and immediate protection status shall be granted (Article 10(4) of the proposed Regulation). Pursuant to Article 12, the Commission shall be assisted by a Committees of representatives from EU countries, except in case of “duly justified imperative grounds of urgency”, where the Commission shall adopt immediately implementing acts, triggering the granting of immediate protection.

The view to shift the focus from the Council to the Commission (namely the “Community Institution” of the EU), could have its relevance in terms of practical activation of this form of protection, despite the temporary protection. However, this procedure of granting of immediate protection is peculiar if compared to other procedures envisaged concerning derogatory rules. Whereas Member States may derogate to the proposed Regulation on Asylum and Migration Management and to the proposed Asylum Procedures Regulation just notifying the Commission/the other Member States, their autonomy is reduced precisely in triggering immediate protection, that is in granting for rights to displaced persons.

Such trigger procedure clashes even more with the provisions of Article 3(7) of the proposed Regulation, according to which, a Member State may notify the Commission that it considers necessary to apply the rules on the delayed registration of asylum applications before the examination of this request by the Commission is concluded. In such a case, the Member State concerned may apply the derogatory rules from the day following the request as “immediate action”.

It should also be noted that, regarding the activation of temporary protection, a “key problem” has been deemed to be that Member States do not have the right to submit a proposal to the Council (European Commission, 2016, p. 20), since the Commission only might propose the activation of the mechanism. Consequently, it is questionable whether the Commission will take charge of triggering immediate protection (Inel-Ciger, 2020), rather than considering the reform as the occasion to strengthen the role of the “democratic institution” of the EU, the European Parliament, that does not play any role in the current procedure.

4. Some remarks on the immediate status protection in the framework of the New Pact rationale

The immediate status protection is a crucial element of the envisaged novel system for addressing situations of crisis and force majeure. It allows displaced people to enjoy certain rights immediately on the basis of an interim assessment linked to the mass influx of persons. Placed in the context of reforms envisaged by the New Pact on Migration and Asylum, it is pointed out that Article 10 of the Proposal for a Migration and Asylum Crisis Regulation lays down a category of “privileged asylum seekers” (Mouzourakis, 2021). In fact, among the measures to be introduced, a central role is attributed to screening and border procedure. In specifying third-country nationals who the screening procedure apply (those apprehended in connection with an unauthorised crossing of the external border of a Member State, and those disembarked in the territory of a Member State following a search and rescue operation) the proposed screening Regulation expressly encompasses those persons “regardless of whether they have applied for international protection”, considering that the screening shall also apply to all third-country nationals who submit for international protection at external border crossing points or in transit zones and who do not fulfil the entry conditions (Article 3). Under this new regime, even those who are asylum-seekers are not authorised to enter the territory of a Member State, during the screening which shall be conducted at locations situated at or in proximity to the external borders (Majcher, 2021; Marin, 2020).

These screening activities imply that asylum-seekers are generally detained (contrary to what has been said about asylum seekers, *supra* at paragraph 1) in principle for a maximum period of five days, that may be extended by a maximum of an additional 5 days, in case of need to carry out screening on a “disproportionate number of third-country nationals”⁴¹.

Following the screening, third-country nationals are routed to the appropriate procedure, be it a normal asylum procedure – that applies mainly to people coming from countries for which the rate of positive asylum decisions is higher than 20%, according to the last available yearly EU-wide average Eurostat data – or a border procedure for certain categories of applicants. As mentioned above, the latter procedure entails serious detriment of the rights of migrants and asylum-seekers, in terms of restriction to their mobility and increasing use of detention⁴², of restrictions on legal remedies⁴³; no protection from the safeguards of the Return Directive⁴⁴. As it generalizes the border procedure and the migrants’ detention, the triggering of the state of crisis entails even more serious restrictions on the fundamental rights of asylum seekers, whereas – according to the explanatory memorandum to the Asylum Procedure Regulation – the purpose of the border procedure is to quickly assess “abusive asylum requests” by applicants coming from third countries with a low recognition rate in order to “swiftly return those without a right to stay in the Union”⁴⁵.

⁴¹The Commission remarks in the explanatory memorandum to the new Proposal for a Screening Regulation that “the legal effects concerning the Reception Conditions Directive should apply only after the screening has ended”. This also seems to follow from Article 9(2) and (3) of the Proposal for a Screening Regulation that oblige Member States to identify special reception needs and provide adequate support.

⁴² According to Article 41(13) of the Asylum Procedure Regulation, all applicants will be kept at or in proximity to the external border or transit zones.

⁴³ Pursuant to Article 53(9) of the Asylum Procedure Regulation, applicants will be provided with only one level of appeal.

⁴⁴ Article 41a (7) of the Asylum Procedure Regulation.

⁴⁵ The European Committee of the Regions has highlighted that asylum-seekers would not remain in transit zones (as the situation in the transit zone is a situation of deprivation of liberty) for an “unreasonably long” timeframe of 20 weeks. It reminds the judgment on the Hungarian transit zone of 14 May 2020, where the Court of Justice of the European Union (CJEU) stated that the “specific procedures

It is therefore desirable, during the negotiation phase of the proposed Regulation, shifting from an “interstate solidarity” (Carrera, 2020; Morgese, 2020; Maiani, 2020) to a human-based approach, which entails that, in a situation of crisis, immediate protection status could be more widely guaranteed to ease the pressure, to allow easier management of the crisis by relieving the country of first entry. In this perspective, EU legislator should broaden the number of those eligible for immediate protection, currently narrowly defined by reference to the existence of “exceptional situations of armed conflict”. Furthermore, it would be preferable for Article 10 to be triggered automatically as a consequence of the situation of crisis declaration, despite the awareness that overall the proposed Regulation presents some highlighted issues that makes the provision on immediate protection status a too weak positive element, without a general paradigm shift.

References

- Allain, J. (2001). The jus cogens Nature of non-refoulement. *International Journal of Refugee Law*, 4, 533-558.
- Amadeo, S. and Spitaleri, F. (2019). *Il diritto dell’immigrazione e dell’asilo dell’Unione europea*. Torino: Giappichelli.
- Amnesty International, European Institutions Office (2021). *Position Paper*, 4 March.
- Arenas, N. (2005). The Concept of ‘Mass Influx of Displaced Persons’ in the European Directive Establishing the Temporary Protection System. *European Journal of Migration and Law*, 7, 435-450.
- Borraccetti, M. (2021). Il nuovo Patto europeo sull’immigrazione e l’asilo: continuità o discontinuità col passato? *Diritto, Immigrazione e Cittadinanza*, 1, 1-27.
- Carrera, S. (2020). Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum. *CEPS Policy Insights*, 22, 1-18.
- Carrera, S., et al. (eds) (2020). *20 Years Anniversary of the Tampere Programme. Europeanisation Dynamics of the EU Area of Freedom, Security and Justice*. Florence: European University Institute.

[at the border] must be carried out within a reasonable time” and states that already after four weeks, entry to the regular procedure must be granted. See European Committee of the Regions, 143rd plenary session, 17-19 March 2021, Opinion *New Pact on Migration and Asylum*.

- Carta, M.C. (2021). Il 'nuovo' Patto europeo sulla migrazione e l'asilo: recenti sviluppi in materia di solidarietà ed integrazione. *Freedom, Security & Justice: European Legal Studies*, 2, 9-42.
- Cherubini, F. (2015). *Asylum in the European Union*. London-New York: Routledge.
- Chetail, V., et al. (Eds) (2016). *Reforming the Common European Asylum System: The New European Refugee Law*. Leiden-Boston: Brill.
- Cornelisse, G. and Reneman, M. (2021). Border procedures in the Commission's New Pact on Migration and Asylum. A case of politics outplaying rationality? *European Law Journal*, 1, 1-18.
- Del Guercio, A. (2016). *La protezione dei richiedenti asilo nel diritto internazionale ed europeo*. Napoli: Editoriale Scientifica.
- Di Stasi, A. and Rossi, S. (2020). *Lo Spazio di libertà, sicurezza e giustizia. A vent'anni dal Consiglio europeo di Tampere*. Napoli: Editoriale Scientifica.
- European Commission, Directorate-General for Migration and Home Affairs. (2016). *Study on the Temporary Protection Directive. Final Report*. Luxembourg: Publications Office of the European Union.
- Fratea, C. (2021). La proposta di regolamento concernente le situazioni di crisi e di forza maggiore: un limitato progresso rispetto alla direttiva sulla protezione temporanea. *I post di AISDUE*, III, 165-182.
- Inel-Ciger, M. (2018). *Temporary Protection in Law and Practice*, Leiden-Boston: BRILL.
- Inel-Ciger, M. (2020). What a difference two decades make? The shift from temporary to immediate protection in the new European Pact on Asylum and Migration. <https://eumigrationlawblog.eu>.
- Kerber, K. (2002). The Temporary Protection Directive. *European Journal of Migration and Law*, 4, 193-214.
- Lauterpacht, E. & Bethlehem, D. (2003). *The scope and content of the principle of non-refoulement: Opinion*. In Feller, E., Türk, V., Nicholson, F. (Eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge: Cambridge University Press, 87-177.
- Maiani, F. (2020). A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact. *EU Immigration and Asylum Law and Policy*, eumigrationlawblog.eu.
- Majcher, I. (2021). Creeping Crimmigration in CEAS Reform: Detention of Asylum-Seekers and Restrictions of Their Movement under EU Law. *Refugee Survey Quarterly*, 40, 82-105.
- Marin, L. (2020). The 2020 proposals for pre-entry screening and amended border procedures: a system of revolving doors to enter (and leave) Europe?. *ADiM Blog, Analyses & Opinions*, November 2020.
- McAdam, J. (2015). The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime. *International Journal of Refugee Law*, 17, 461-516.
- Morgese, G. (2020). La 'nuova' solidarietà europea in materia di asilo e immigrazione: molto rumore per poco?. *Federalismi.it*, 35, 16-47.
- Morgese, G. (2018). *La solidarietà tra gli Stati membri dell'Unione europea in materia di immigrazione e asilo*. Bari: Cacucci.
- Mouzourakis, M. (2021). More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of 'asylum seeker' status. *European Law Journal*, 1, 1-10.

- Nascimbene, B. & Di Pascale, A. (2011). The Arab Spring and the Extraordinary Influx of People Who Arrived in Italy from North Africa. *European Journal of Migration and Law*, 4, 341-360.
- Palladino, R. (2021). Patto sulla migrazione e l'asilo: verso nuove regole sui rimpatri. AA.VV. *Annuali AISDUE*, Volume II, 467-480.
- Palladino, R. (2018). *La detenzione dei migranti: regime europeo, competenze statali e diritti umani*. Napoli: Editoriale Scientifica.
- Palladino, R. (2016). "La tutela dei migranti irregolari e dei richiedenti protezione internazionale (artt. 3, 5, 8 e 13 CEDU; art. 4, Protocollo 4)". In A. Di Stasi (ed.), *CEDU e ordinamento italiano. La giurisprudenza della Corte europea dei diritti dell'uomo e l'impatto nell'ordinamento interno (2010-2015)*. Milano: Wolters Kluwer-CEDAM.
- Peers, S. (2006). "Temporary Protection". In Peers, S. and Rogers, N. (eds.) *EU Immigration and Asylum Law*. Leiden-Boston: BRILL.
- Russo, T. (2021). Quote di ricollocazione e meccanismi di solidarietà: le soluzioni troppo 'flessibili' del Patto dell'Unione europea su migrazione e asilo. *Freedom, Security & Justice: European Legal Studies*, 2, 281-304.
- Silga, J. (2018). The fragmentation of reception conditions for asylum seekers in the European Union: Protecting fundamental rights or preventing long-term integration?. *Freedom, Security & Justice: European Legal Studies*, 3, 87-115.
- Scissa, C. (2020). The (new) Commission's approach on temporary protection and migration crisis. *ADiM Blog*, 1-8. <http://www.adimblog.com>.
- Slingeberg, L. (2020). Political Compromise on a Recast Asylum Reception Conditions Directive: Dignity Without Autonomy?. <https://eumigrationlawblog.eu/>.
- Villani, S. (2021). Il fenomeno migratorio oltre l'ordinario: riflessioni sulla proposta della Commissione circa un solido sistema di preparazione e di risposta alle crisi e alle situazioni di forza maggiore. *Freedom, Security & Justice: European Legal Studies*, 2, 388-413.