

INTRODUCTION

Addressing a Crisis through Law: EU Emergency Legislation and its Limits in the Field of Asylum

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The Common European Asylum System (CEAS) has been in a situation of protracted crisis. This has hampered its process of reform and has urged the European Commission to launch a new Pact on Migration and Asylum, in order to offer a 'fresh start' to 'build a system that manages and normalises migration for the long term.' While an emergency-driven approach has surfaced as a mandatory route for the future of the CEAS, what does constitute a situation of emergency in EU asylum law? In an attempt to unpack the evolution and understanding of the concept of 'emergency' in EU asylum law, the paper argues that the parameters to determine the existence of a situation of emergency have been politically controversial and purposefully left open-ended. This has consequences at the level of EU legislative responses. In particular, the paper will illustrate the potential and limits of the EU emergency legislation in the field of asylum and aims to explain how this legislation impacts both the ordinary legislation at the regulatory level as well as the legislative autonomy of the Member States in situations of emergency. Ultimately, the paper discusses whether the recently proposed legislative instruments, which are designed to address situations of crisis in the field of asylum, are well suited for this role.

Keywords: crisis; emergency legislation; derogations; asylum; migration; EU

1. Introduction: the Common European Asylum System and the Rise of an Emergency-Driven Approach

Ever since the migratory pressures of 2015,¹ the Common European Asylum System (CEAS), designed to harmonise across the European Union (EU) the procedures and rights for those who apply for international protection,² has been in a situation of crisis. This has been exacerbated by institutional unresponsiveness,³ a law-making stalemate⁴ and an implementation deficit acknowledged by the European Commission itself.⁵ The rapid spread of COVID-19 in Europe⁶ has significantly contributed to the deterioration of the protracted

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¹ In this connection, the former United Nations Secretary-General, Ban Ki-Moon, in his address to the Italian government in Rome, *UN Daily News*, 16 October 2015, even talked about 'the biggest refugee and migration crisis since the end of the Second World War' available at: www.un.org/News/dh/pdf/english/2015/15102015.pdf, all website have been accessed on 30 December 2021.

² The literature on the CEAS is abundant: for the emergence of an EU competence in the field of asylum see *inter alia* Olga Sidorenko-Ferguson, *The Common European Asylum System. Background, Current State of Affairs, Future Direction* (Springer, 2007); for the most recent developments see especially Evangelia Tsourdi and Cathryn Costello, 'The Evolution of EU Law on Refugees and Asylum' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd ed, Oxford University Press, 2021) 793–823.

³ See Daniel Thym, 'The "Refugee Crisis" as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53(6) *Common Market Law Review* 1545. See also Agustín José Menéndez, 'The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration' (2016) 22 *European Law Journal* 388.

⁴ See, *inter alia*, Salvatore Nicolosi, 'The Reform of the Common European Asylum System: Between Diplomatic Stalemate and Normative Short Sightedness' (2019) 68 *Public Law Quarterly* 521.

⁵ Commission, 'Towards A Reform Of The Common European Asylum System and Enhancing Legal Avenues To Europe' (Communication) COM(2016) 197, 6 April 2016, 2.

⁶ In the week of 1 – 7 November As of 21 May 2021, the overall epidemiological situation in the EU/EEA was characterised by a high and rapidly increasing overall case notification rate and a low but slowly increasing death rate, with 383.9 per 100,000, according to the European Centre for Disease Prevention and Control (ECDC), Weekly surveillance summary, available at: https://covid19-country-overviews.ecdc.europa.eu/#Weekly_surveillance_summaryhttps://www.ecdc.europa.eu/en/cases-2019-ncov-eueea. See also the COVID-19 Dashboard developed by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University and available at: <https://coronavirus.jhu.edu/map.html>.

situation of crisis in the CEAS. Admittedly, the ongoing health emergency, coupled with the migrant disembarkation impasse⁷ and the regrettable absence of dedicated EU-led search and rescue capacity, and with the recent, but not new,⁸ allegations about migrant pushbacks involving the European Border and Coast Guard Agency (FRONTEX),⁹ constitutes a perfect storm affecting in particular the CEAS, which is one of the weakest offcuts of the EU law fabric.

This situation has hampered the process of reform of the CEAS,¹⁰ and has urged the European Commission to launch a new Pact on Migration and Asylum, in order to offer a 'fresh start' to 'build a system that manages and normalises migration for the long term'.¹¹ The manifold crises have left their imprint on this process of reform and an emergency-driven approach has recently surfaced as a sort of mandatory route for the future of the CEAS. The 2015 Agenda on Migration¹² initiated a series of emergency-driven responses, of which the Council's Decisions on the relocation of asylum seekers from Greece and Italy are a clear example.¹³ The new 2020 Pact on Migration and Asylum incorporates this emergency-driven approach, which is normatively elaborated in a crisis management system consisting of two instruments that will be further analysed: a Recommendation on Migration Preparedness and Crisis Blueprint¹⁴ and a Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum.¹⁵

However, what does constitute a crisis or a situation of emergency? In an attempt to shed light on one of the trends in the common policies on asylum and migration, this paper aims to unpack the understanding of the concept of 'emergency' in EU asylum law and how this emergency has been addressed through European law. While mostly linked with the influx of third country nationals, the parameters to determine the existence of a situation of emergency have been politically controversial and purposefully left open-ended. The concept has not been constructed on the basis of pre-defined or objective criteria and even when objective criteria are invoked, there is no clarity as to whether the notion of crisis or emergency should be evaluated on an absolute or a relative basis.¹⁶ This has consequences at the level of legal and political responses. In particular, this impacts both the ordinary legislation at the regulatory level as well as the legislative autonomy of the Member States in situations of emergency, as national authorities will be, in fact, limited in adopting unilateral emergency measures derogating from EU law. Both aspects will be taken into consideration, in view to explain how the emergency has been addressed by EU law (Section 2) and also to clarify if national authorities can still adopt unilateral emergency measures when there is an emergency legislative framework set out at the European level (Section 3)

⁷ Sergio Carrera and Roberto Cortinovis, 'Search and Rescue, Disembarkation and Relocation Arrangements in the Mediterranean. Sailing Away from Responsibility?' (CEPS, June 2019) <<https://www.ceps.eu/ceps-publications/search-and-rescue-disembarkation-and-relocation-arrangements-in-the-mediterranean/>>.

⁸ For further references see Roberta Mungianu, *Frontex and Non-Refoulement. The International Responsibility of the EU* (Cambridge University Press, 2016).

⁹ Nick Waters and others, 'Frontex at Fault: European Border Force Complicit in "Illegal" Pushback' Bellingcat (Bellingcat, 23 October 2020) <<https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-implicit-in-illegal-pushbacks/>>.

¹⁰ Thym (n 3).

¹¹ European Commission, 'On a New Pact on Migration and Asylum' (Communication) COM(2020) 609, 23 September 2020. For preliminary observations see Steve Peers, 'First Analysis of the EU's New Asylum Proposals' (EU Law Analysis, 25 September 2020) <<http://eulawanalysis.blogspot.com/2020/09/first-analysis-of-eus-new-asylum.html>>.

¹² European Commission, 'A European Agenda on Migration' (Communication) COM(2015) 240, 13 May 2015.

¹³ Council Decision 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L239/146; Council Decision 2015/1601 of 22 September establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L248/80.

¹⁴ European Commission, Recommendation on an EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint), C(2020) 6469, 23 September 2020.

¹⁵ Commission, Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613, 23 September 2020. For detailed comments see European Council on Refugees and Exiles (ECRE), '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' (ECRE, 2 March 2021) <<https://ecre.org/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/>>.

¹⁶ Evangelia Tsourdi, 'Solidarity in EU Asylum Policy: From an Emergency-driven Approach to the Fair Sharing of Responsibility' (2019) 24 *Challenge Europe* 85, 87. While for the purposes of the paper the concept of crisis is used interchangeably with the term 'emergency,' it is worth noting that in the literature, the use of expressions such as 'refugee crisis' or the conceptual link between high number of arrivals and emergency has been critically seen and contested. For instance, Xavier Alcalde, 'Why the Refugee Crisis is not a Refugee Crisis' (2016) 29 *Peace in Progress* 1.

Accordingly, before discussing in more detail the structured approach to a situation of emergency in the light of the new Pact on Migration and Asylum (Section 4), this paper aims to track the evolution of the concept of emergency in European asylum law by critically analysing the definitions contained in the CEAS legal toolbox. This will help to carve out a common understanding about how a situation of emergency has been constructed and interpreted. In this connection, particular attention will be paid to the heuristic role played by the Court of Justice of the EU in interpreting the relevant legislative provisions. Ultimately, the paper discusses whether the recently proposed legislative instruments, which are designed to address situations of crisis in the field of asylum, are well suited for this role.

2. Regulating the 'Emergency' in EU Asylum Law

The literature has generally identified two models that can address the challenges posed to the legal system by a situation of emergency. The first model, known as the 'extra-legal measures model', used in particular by Oren Gross, posits that emergency powers are used outside the legal order.¹⁷ According to the second model, known as the 'accommodations model', mostly supported by David Dyzenhaus, it is suggested instead to 'govern through law in an emergency' thereby bringing a situation of crisis within the legislative framework.¹⁸

While stressing that neither model necessarily accounts for the reality of how legal systems should deal with emergencies, especially in a multilevel setting such as the EU legal order, it is worth recalling that EU law generally allows authorities involved at various levels of EU administrative governance to take urgent measures to face particular crises 'even by derogating from the applicable legislative provisions'.¹⁹ In an earlier ruling, the Court of Justice confirmed that the European Commission, as the executive of the EU, enjoys wide discretion in order to be able to continually monitor the implementation of policies and 'act with urgency as the situation requires'.²⁰ On another occasion, the Court of Justice implied that Member States may temporarily cease to comply with their EU law obligations if confronted with *force majeure* circumstances.²¹ As has been emphasised, some emergencies may be completely unforeseeable, whereas other emergencies may cause imminent threats to the system but can be addressed by specific mechanisms already in place to respond to such threats.²² The qualification of what may count as a situation of emergency or *force majeure* is important to determine what types of measures can be adopted to address such a situation and authorise any possible derogations from EU law by the Member States, as will be discussed in Section 3.

In EU asylum law, a situation of emergency has usually been linked to the influx of third country nationals. This approach is rooted in the mass movement of asylum seekers that originated in the late 1990s as a consequence of the Kosovo crisis, when Member States of the EU offered temporary protection under a Humanitarian Evacuation Programme proposed by the United Nations High Commissioner on Refugees (UNHCR).²³ Unsurprisingly, one of the first instruments adopted in this field at the European level was specifically aimed at coping with mass arrivals of third country nationals, namely the 2001 Temporary Protection Directive (TPD).²⁴

Before analysing how the TPD delineated and aimed to address a situation of emergency, it is also worth mentioning that, since the Treaty of Amsterdam, EU primary law has enshrined a legal basis, now Article 78 (3) of the Treaty on the Functioning of the EU (TFEU), establishing the competence of the Council to adopt provisional legislative measures in a situation of emergency in the field of asylum.²⁵

¹⁷ Oren Gross, 'Extra-Legality and the Ethic of Political Responsibility' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008) 62.

¹⁸ David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006).

¹⁹ Filipe Britos Bastos and Anniek De Ruijter, 'Break or Bend in Case of Emergency?: Rule of Law and State of Emergency in European Public Health Administration' (2019) 10(4) *European Journal of Risk Regulation* 610.

²⁰ Case C-23/75 *Rey Soda v Cassa Conguaglio Zucchero* [1975] ECR 1279, 1300.

²¹ Case C-101/84 *Commission v. Italy* [1985] ECR 2629, para 16.

²² Britos Bastos and De Ruijter (n 19) 613.

²³ Council of the EU, Doc. 11808/99.

²⁴ Council of the European Union, 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, 7 August 2001, [2001] OJ L 212/12. See the Commentary by Achilles Skordas in Kay Hailbronner and Daniel Thym, *EU Immigration and Asylum Law. A Commentary* (2nd edn, Nomos Verlagsgesellschaft mbH & Co. KG, 2016) 1054–1090.

²⁵ Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/47–390.

2.1. The Qualification of an Influx of Third Country Nationals as an Emergency

The Temporary Protection Directive (the TPD) constituted the first instrument that, while attempting to identify a situation of emergency, provided a legislative framework to respond to such an emergency. Adopted in 2001, the TPD aimed to provide displaced persons from non-EU countries, who are unable to return to their country of origin, with temporary protection, by setting a comprehensive framework to deal with mass influx situations.²⁶

Article 2 (a) of the TPD defines temporary protection as:

a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.

While emphasising the exceptional nature of the temporary protection procedure, such a definition implied that a situation of emergency could be identified with a 'mass influx' of third country nationals who cannot be returned to their country of origin. Article 2 (d) of the TPD defined 'mass influx' as the arrival of large numbers of displaced persons, who come from a specific country or geographical area, either as a consequence of spontaneous migratory flows or an aided evacuation programme.

The situation of emergency was, therefore, qualified on the basis of a threefold criterion. This includes an element of magnitude requiring, on the basis of Article 5 (4) of the TPD, consideration of the scale of the movements of displaced persons. This element can be complemented by a parameter of imminence, requiring the expectation of a mass arrival of displaced persons. A second element is the geographical nature of the displaced persons, who should come from the same geographical area or from a specific country. This element excludes from the scope of temporary protection those displaced persons who come from different geographical regions in mixed migratory flows.²⁷ In addition, a third element, on which the possible activation of the TPD was conditional, refers to the impact of this mass influx on the functioning of the national asylum system. In particular, the temporary protection framework was designed to avoid the negative consequences on the applicants for international protection and to promote the smooth processing of their individual claims in an appropriate way.

Temporary protection arrangements are pragmatic 'tools' of international protection. They are complementary to the international refugee protection regime, being used at times to fill gaps in that regime as well as in national response systems and capacity. These arrangements have a long history as an emergency response to the large-scale movement of asylum seekers, providing immediate protection from *refoulement* and also providing basic minimum treatment. Such arrangements allow for admission to the territory for the people in question, including through disembarkation for boat arrivals, and include mechanisms for the identification of persons with specific vulnerabilities or protection needs, which call for a more particularised response.²⁸

The criteria set out in the TPD, however, do not provide reliable objective guidance to determine the existence of a mass influx of displaced persons. As clearly highlighted by Nuria Arenas, 'mass influx is an undetermined legal concept' that will require an institutional margin of appreciation.²⁹ Pursuant to Article 5 (1) of the TPD, the qualification of a situation as a mass influx had to be based, in fact, on a Decision to be adopted by

²⁶ For further references see European Commission, 'Study on the Temporary Protection Directive, Final Report' (European Commission, January 2016) <https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection_en>. For a broader analysis see Meltem Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill Nijhof, 2017), for a critique see Salvatore Nicolosi, 'Let Sleeping Dogs Lie? The Doctrine of Temporary Protection in European Union Asylum Law' in Dina Siegel and Veronika Nagy (eds), *The Migration Crisis? Criminalization, Security and Survival?* (Eleven International Publishing, 2018) 219–239.

²⁷ The International Organization on Migration (IOM), *Glossary on Migration* (IOM 2019) 141–142, defines 'mixed movements' or 'mixed flows' as 'a movement in which a number of people are travelling together, generally in an irregular manner, using the same routes and means of transport, but for different reasons.' This, therefore, includes refugees, asylum-seekers, economic migrants and other types of migrants. For references see Paula García Andrade, 'Initiatives of EU Member States in Managing Mixed Flows in the Mediterranean and the EU Distribution of Competences' in Claudio Matera and Amanda Taylor (eds.), *The Common European Asylum System and human rights: enhancing protection in times of emergencies* (Asser Institute, 2014) 51–63.

²⁸ See in this regard UNHCR, 'Guidelines on Temporary Protection or Stay Arrangements' (UNCHR, February 2014) <<https://www.unhcr.org/542e99fd9.pdf>>.

²⁹ Nuria Arenas, 'The Concept of "Mass Influx of Displaced Persons" in the European Directive Establishing the Temporary Protection System' (2005) 7 *European Journal of Migration and Law* 435, 438.

qualified majority by the Council, acting on a proposal from the European Commission. The Commission also had to examine any request by a Member State which had submitted a proposal to the Council.

Despite the TPD's alleged potential,³⁰ the requests by some Member States to cope with the migratory flows which originated in the aftermath of the Arab Spring's revolutions³¹ and the existence of a mass influx of Syrians in 2015,³² the TPD has never been activated. Accordingly, in 2016, the European Commission published a Study concluding that, instead of 'spending political capital' in amending the TPD, some elements of this instrument could be incorporated into the legislative proposals for the reform of the CEAS.

Nevertheless, despite the lack of practical implementation, the legislative model of the TPD contributed to set the background for the design of the future legislative responses to a situation of emergency. The TPD, in fact, confirms two elements: firstly, a situation of emergency in EU asylum law is identified by mass arrivals of third country nationals; secondly, an *ad hoc* EU legislative framework is necessary to govern the emergency through law at the European level and this framework is distinct from the regular one in force. In other words, and as will be explained in section 2.2, an EU *ad hoc* legislative framework functions as a *lex specialis*, allowing temporary derogations from ordinary EU law rules.

2.2. EU Competence to Adopt Provisional Emergency Measures

The TPD constituted the first harmonised approach aimed at regulating, through a common EU legislative framework, the responses to an emergency in the field of asylum. However, as mentioned above, Article 78 (3) TFEU sets out a specific competence for the Council to adopt provisional measures in the case of a situation of emergency affecting one or more Member States. The provision establishes that:

In the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

The provision confirms the qualification of an influx of third country nationals as an 'emergency situation', although Article 78 (3) suggests that it would require at least a 'sudden' inflow of third country nationals which is obviously less than the 'mass influx' required under the TPD. This Directive is covered by Article 78 (2) (c) TFEU and aims to harmonise a regime of temporary protection in the case of mass influxes. By contrast, Article 78 (3) TFEU refers to the need to have resort to provisional emergency legislation in support of one or more Member States in difficulties, leaving discretion to the Council, upon a proposal by the European Commission, to adopt the measures that could be considered most appropriate. Apart from these constitutional differences, both legislative mechanisms entail exceptional procedures allowing the temporary setting aside of the ordinary EU rules. Article 78 (3) leaves to the legislature the choice of the most appropriate legislative measures. This legal basis has only been implemented once with the adoption of the two Council Decisions of September 2015, establishing provisional emergency relocation plans for asylum seekers who had arrived in Greece and Italy since March 2015. Very recently Article 78 (3) has been used to propose provisional emergency measures due to situation of crisis at the borders with Belarus.³³

Both the TPD and the provisional measures adopted under Article 78 (3) TFEU constitute an example of a *lex specialis* with temporary derogating effects from the ordinary legislation. This emergency legislation is limited *ratione materiae*, as it applies only in a situation characterised by a sudden inflow of nationals of third countries to one or more Member States; *ratione temporis*, as it clearly needs to indicate the period of time during which these measures will be applicable; and *ratione personae*, as the measures address a specific category of third country nationals.³⁴

³⁰ In this regard, see in particular Meltem Ineli-Ciger, 'Time to Activate the Temporary Protection Directive. Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe' (2016) 18(1) European Journal of Migration and Law 1.

³¹ Bruno Nascimbene and Alessia Di Pascale, 'The "Arab Spring" and the Extraordinary Influx of People who Arrived in Italy from North Africa' (2011) 13(4) European Journal of Migration and Law 341.

³² According to the European Asylum Support Office (EASO), 'for the first ten months of 2015 the total number of applications (...) already exceeded the 1 million mark'. See EASO, 'Asylum Trends' (EASO, October 2015) <<https://www.easo.europa.eu/sites/default/files/public/LatestAsylumTrends20151.pdf>>.

³³ European Commission, Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM(2021) 752 final, 1 December 2021.

³⁴ In the case of the 2015 Council Decisions, these include those asylum seekers whose applications were likely to have over a 75 per cent success rate based on the latest available updated Eurostat quarterly data for first instance decisions at the domestic level. See Decision 2015/1523 Art 3 (2) and Decision 2015/1601 Art 3 (2).

It is also worth emphasising that, in contrast to the TPD, which has never been implemented, the application of the provisional measures under Article 78 (3) has also provided the Court of Justice with an opportunity to clarify the relationship between the ordinary and the emergency legislation and to contribute as well to the interpretation of the notion of emergency in EU asylum law. On the first point, the fierce ‘arm wrestling’ between Slovakia and Hungary, which both sought annulment of Council Decision (EU) 2015/1604, and the EU institutions, allowed the Court to emphasise the need to respond swiftly to a particular emergency situation facing Member States. To this aim, the Court, while comparing the procedures under Articles 78(2) and 78(3) TFEU respectively, concluded that the ‘emergency’ referred to in the latter provision is to be understood as a crisis that demands a response in the short term, stressing that the measures adopted on the basis of Article 78 (3) TFEU must be circumscribed, limited to responding swiftly and effectively to a specific crisis.³⁵ *A contrario*, the purpose of Article 78 (2) TFEU would be to normalise the asylum policy so as to prevent sudden situations of emergency from adversely impacting on the area of policy. This is the approach that has been recently proposed by the European Commission in the New Pact on Migration and Asylum that will be discussed in greater detail in Section 3 below.

As to the qualification of the situation of emergency, the Court clarified that ‘an inflow of nationals of third countries on such a scale as to be unforeseeable may be classified as ‘sudden’ for the purposes of Article 78(3) TFEU, even though it takes place in the context of a migration crisis spanning a number of years, inasmuch as it makes the normal functioning of the EU common asylum system impossible.³⁶ The Court of Justice, therefore, paid particular attention to the disruptive effects on the functioning of the CEAS in order to determine the situation of emergency. These effects can be due also to the systemic deficiencies in the national asylum systems that would prevent the transfer of an asylum seeker to the ‘Member State responsible’ within the meaning of the Dublin Regulation.³⁷

In this connection, it is interesting to stress that in *Khlaifia and others* the European Court of Human Rights (ECtHR) also acknowledged the difficulties that an arrival ‘en masse’ of migrants, in that particular case from North Africa, ‘undoubtedly’ created at the organisational, logistical and structural levels for the host States, in that specific case Italy. The Italian authorities were, in fact, supposed to meet a combination of requirements, ‘as they had to rescue certain vessels at sea, to receive and accommodate individuals arriving on Italian soil, and to take care of those in particularly vulnerable situations’.³⁸ The ECtHR recognised the excessive burden imposed on the national authorities if they were required to interpret a significant number of factors, whether political, economic or social, which gave rise to such a major migration crisis and to foresee the scale and timeframe of an influx of migrants. In conclusion, the ECtHR recognised that, as a result of the arrival of exceptionally high numbers of migrants, the State authorities were burdened with a large variety of tasks, as they had to ensure the welfare of both the migrants and the local people and to maintain law and order. Admittedly, the same rationale informed the approach of the CJEU to the factors that contribute to define a situation of emergency in EU asylum law.

It is especially in the light of this specific element that EU competence to adopt specific emergency measures offers the added value to prevent Member States from reacting to a crisis through unilateral measures or actions that can result in the setting aside of EU law rules. This will be discussed in more depth in Section 3.

3. EU Emergency Legislation and National Measures: The Boundaries Set by the Court of Justice

The competence of the EU to adopt specific emergency measures plays an essential role in preventing Member States from arbitrarily and unilaterally derogating from EU rules because of a situation of emergency. Crisis situations may, in fact, constitute the pretext to circumvent compliance with EU law obligations.³⁹ In this connection, the existence of a specific EU legislative framework addressing emergency situations is to be read in the light of the doctrine of derogations in EU law. Most policy areas contemplate possible derogations

³⁵ Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* ECLI:EU:C:2017:631, para 77.

³⁶ Joined Cases C-643/15 and C-647/15, paras 114–115.

³⁷ Joined Cases C-411/10 and C-493/10 *N. S. and M. E. and Others* ECLI:EU:C:2011:865, para 94.

³⁸ *Khlaifia and others v Italy*, Appl No 16483/12, (ECtHR, 15 December 2016) paras 179–180. For a commentary see Johanna Günther, ‘Collective Expulsion and the Khlaifia Case: Two Steps Forward, One Step Back’ (Verfassungsblog, 16 December 2016) <<https://verfassungsblog.de/collective-expulsion-and-the-khlaifia-case-two-steps-forward-one-step-back/>>.

³⁹ In this regard, see Pablo Martín Rodríguez, ‘A Missing Piece of European Emergency Law: Legal Certainty and Individuals’ Expectations in the EU Response to the Crisis’ (2016) 12(2) *European Constitutional Law Review* 265.

from the ordinary legislative framework and EU asylum law is not an exception in this regard.⁴⁰ Member States, normally on grounds of public security or public order, can rely on the derogations regulated at the EU level to deviate from ordinary legislation.

Recent case law offers an interesting opportunity to investigate in more detail, in the context of EU emergency legislation, the scope of these derogations, in particular Article 72 TFEU, concerning the responsibility of Member States for the maintenance of law and order and the safeguarding of internal security. In the recent infringement procedure against the Czech Republic, Hungary and Poland, on the failure to fulfil their obligations stemming from the measures adopted on the basis of Article 78 (3) TFEU, namely the Relocation Decisions, the Court was afforded a chance to clarify whether and under what conditions a Member State may rely on Article 72 TFEU to disapply decisions adopted on the basis of Article 78(3) TFEU.⁴¹

In this regard, it is worth recalling that one of the arguments of the parties, in particular Poland, was that Article 72 TFEU 'is a rule... under which the prerogatives of the Member States in the field of maintenance of law and order and safeguarding of internal security take precedence over their obligations under secondary law'.⁴² According to such an interpretation, a Member State could invoke that provision in order not to implement an Act adopted under Title V of the Treaty each time it considers that there is a risk, even a potential risk, to the maintenance of law and order and the safeguarding of internal security for which it bears responsibility.⁴³ The Court did not hesitate to highlight the dangers of such an interpretation by recalling that 'although it is for the Member States to adopt appropriate measures to ensure law and order on their territory and their internal and external security, it does not follow that such measures fall entirely outside the scope of European Union law'.⁴⁴ The Court, therefore, confirmed that Article 72 TFEU cannot be regarded as a general exception clause allowing Member States to derogate from EU law obligations. More specifically, the Court concluded that, based on settled case law, the derogation provided for in Article 72 TFEU must be interpreted strictly. The Court further added that Member States are not allowed to unilaterally invoke Article 72 to derogate from EU law based on law and order considerations without any oversight by the institutions of the European Union. Finally, the Court held that reliance on Article 72 was not justified as secondary legislation in the field of asylum already includes provisions allowing Member States the possibility to derogate from their obligations under those instruments to safeguard internal security in a case of emergency.

The reasoning of the Court is particularly relevant in that it confirms that a system of derogations from EU law must be viewed in its interaction with the EU legislation itself. In other words, as has been emphasised, the possibility to invoke Article 72 TFEU is outlawed when the relevant EU secondary legislation already provides a framework, which adequately ensures the protection of States' security concerns, 'Member States, thus, do not have a *carte blanche* to adopt emergency derogation measures on the basis of Article 72 TFEU'.⁴⁵

A twofold consideration ensues from the CJEU reasoning. Firstly, the possibility to harmonise EU emergency measures has the advantage of keeping the legal order more cohesive and avoiding unilateral and arbitrary derogations at the national level. This helps to explain why particular attention has been paid in the new Pact to the regulation of possible derogating measures in the case of crisis or *force majeure* situations, as will be illustrated in Section 4. Secondly, as has been stressed by the CJEU on another occasion, even in the absence of harmonising measures, the Member States can in principle decide the emergency measures to adopt, provided that these do not go beyond what is necessary to secure the protection of security interests.⁴⁶

⁴⁰ ECRE, 'Derogating from EU asylum law in the name of "emergencies": The legal limits under EU law' (ECRE, June 2020) <https://www.ecre.org/wp-content/uploads/2020/06/LN_6-final.pdf>. See the Annex therein for an overview of the relevant derogating provisions from EU asylum law as well as the grounds for derogation.

⁴¹ Joined Cases C-715/17, C-718/17 and C-719/17 *European Commission v Republic of Poland and others* ECLI:EU:C:2020:257. See for a commentary, Jonas Bornemann, 'Coming to Terms with Relocation: the Infringement Case Against Poland, Hungary and the Czech Republic' (EU Immigration and Asylum Law and Policy Blog, 17 February 2020) <<https://eumigrationlawblog.eu/coming-to-terms-with-relocation-the-infringement-case-against-poland-hungary-and-the-czech-republic/>>.

⁴² Joined Cases C-715/17, C-718/17 and C-719/17 (n 41) para 137.

⁴³ *ibid.*

⁴⁴ *ibid.*, para 143.

⁴⁵ ECRE (n 40) 4.

⁴⁶ Case C-73/08 *Nicola Bressol and others*, [2010] ECR I-2735, ECLI:EU:C:2010:181, para 71.

4. Emergency Measures and Legislative Reforms: The Crisis Management Mechanism in the New Pact on Migration and Asylum

The New Pact on Migration and Asylum reflects a regulatory model to address emergency situations, which draws on the former and now abandoned Dublin IV proposal.⁴⁷ The Commission has fine-tuned its emergency-driven approach to EU asylum law with a more sophisticated framework which does not only propose a reactive framework, like the one underpinned by the TPD or the emergency measures under Article 78 (3) TFEU, but also adds a preventive mechanism. The whole machinery has been already criticised by scholars⁴⁸ as well as civil society⁴⁹ and its analysis is, therefore, essential to understand its potential and limits for the whole reform of the CEAS.

4.1 The Preventive Mechanism: Questioning the Added Value

The crisis prevention mechanism proposed in the New Pact has more of an operational nature consisting of the synergic activation of all crisis management tools, including the Civil Protection Mechanism (UCPM) and its Emergency Response Coordination Centre (ERCC),⁵⁰ and is supported by a soft law framework based on the Recommendation on Migration Preparedness and Crisis Blueprint.⁵¹ These operational tools are intended to provide the European Commission with timely and updated information to determine the existence of a situation of crisis and offer a framework for a coordinated and preventive European approach. In this regard, the cooperation by different actors, including the European Commission, the Council, the European External Action Service and Agencies such as the European Asylum Support Office (EASO), the European Border and Coast Guard Agency (FRONTEX), the European Law Enforcement Agency (EUROPOL), the European Agency for the operational management of the large-scale IT systems in the field of security and justice (eu-LISA) and the Fundamental Rights Agency (FRA), as well as Member States that will constitute a 'Network', is crucial to support the implementation of the Migration Preparedness and Crisis Blueprint. This Network should appoint Points of Contact in each Member State that must be able to exchange information and coordinate with the Network to establish the measures to be possibly adopted in case of any risk of crisis. The configuration of the Network also reflects the increasing phenomenon of 'agencification' in EU asylum law and confirms the urgent need for an effective oversight over the mandate of the Agencies involved.⁵²

This machinery established by the new proposal will require a twofold phase. The first stage is aimed at providing early warning/forecasting based on timely and adequate information. The second stage, to be activated by the Commission at the request of an interested Member State, should be applicable to any situation or development occurring inside the EU or in a third country having an effect and putting particular strain on any Member State's asylum, migration or border management system or having such potential. As has been pointed out, it is particularly 'puzzling' the broad definition of 'crisis' as 'any situation or development occurring inside the EU and in a third country having as an effect and putting strain on any Member State's asylum, migration and border management system, or having such potential.'⁵³ This definition goes, in fact, beyond the circumstances defined in the Proposal for a Regulation addressing

⁴⁷ Commission, Proposal for a Regulation of the European Parliament and of the Council 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 (recast), COM(2016) 270 final.

⁴⁸ See e.g. Meltem Ineli-Ciger, 'What a Difference Two Decades Make? The Shift from Temporary to Immediate Protection in the New European Pact on Asylum and Migration' (EU Immigration and Asylum Law and Policy Blog, 11 November 2020) <<https://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/>>.

⁴⁹ Amnesty International, 'The Proposed Crisis Regulation' (Amnesty International, 4 March 2021) <<https://www.amnesty.eu/wp-content/uploads/2021/03/AI-position-paper-on-Crisis-Regulation.pdf>>. When an emergency overwhelms the response capabilities of a country in Europe and beyond, a country can request assistance through the UCPM. The ERCC coordinates the delivery of assistance to disaster stricken countries, such as relief items, expertise, civil protection teams and specialised equipment, see the factsheets available at: <https://ec.europa.eu/echo/what/civil-protection/emergency-response-coordination-centre-ercr_en>.

⁵⁰ See Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism [2013] OJ L347/924.

⁵¹ C(2020) 6469 (n 14).

⁵² See more generally David Fernández-Rojo, *EU Migration Agencies. The Operation and Cooperation of FRONTEX, EASO and EUROPOL* (Edward Elgar, 2021).

⁵³ European Parliament's Directorate for Citizens' Rights and Constitutional Affairs, Policy Department for Citizens' Rights and Constitutional Affairs, 'The European Commission's legislative proposals in the New Pact on Migration and Asylum' (July 2021), available at: <[https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2021\)697130](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)697130)> 129.

situations of crisis and *force majeure* in the field of migration and asylum.⁵⁴ The rationale for this different and broader notion of crisis in the framework of the Blueprint is not explained, despite ‘the clear linkage established in the proposal between the monitoring and forecasting activities carried out in the framework of the Blueprint and the assessment of a situation of crisis by the Commission.’⁵⁵

While at a theoretical level this preventive phase may indeed play a crucial role in mobilizing the necessary resources, its practical relevance is questionable. In particular, it risks adding an unnecessary administrative burden, especially in light of the fact that the ERCC already provides timely mapping of any situations that can create difficulties at the borders of the EU in terms of migratory pressure. As has been argued, in fact, civil protection is a policy on the rise by which the EU provides tangible solidarity in crisis situations, including migratory pressure situations.⁵⁶

4.2 The Reactive Mechanism: Towards a Full Harmonisation of Emergency Legislation?

The core of the crisis management machinery is the proposed Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum.⁵⁷ This instrument pursues a twofold goal. On the one hand, it aims to ensure that the model of solidarity established in the new Asylum and Migration Management Regulation (AMMR)⁵⁸ can be adapted to a crisis caused by a large number of irregular arrivals and to provide a framework, by means of derogation, for Member States to react to situations of crisis and *force majeure*. On the other hand, this instrument, just as the former TPD did, grants immediate protection status, entailing the rights and benefits of subsidiary protection, to the third country nationals.

Before analysing in-depth how the concept of emergency is understood and unpacked in this new crisis management mechanism, it is worth stressing that such a Regulation establishes an in-built crisis management tool to avoid *ad hoc* solutions such as those which have recently been designed for example for disembarkations, following search and rescue operations.⁵⁹ A relevant institutional innovation is that the new Regulation provides the European Commission instead of the Council with the competence to trigger the mechanism by adopting an implementing act activating the granting of immediate protection status. Unless the situation of crisis is extremely serious, the Commission needs to act with the assistance of committees of representatives from EU countries.⁶⁰ This is a significant change since situations of crisis might determine the adoption of emergency executive powers, thereby remedying a lacuna in EU law, which was formerly relying on the Council’s discretion. The attribution of such a specific competence to the European Commission, as the executive branch of the EU, also contributes to the better systemisation of the character of exceptionality of this emergency legislation compared with ordinary legislation. The new Regulation will, in fact, provide a temporary framework derogating from the ordinary rules on border asylum procedures, border return procedures, or the time limit to register asylum applicants by especially extending the time limits.

The proposal also gives discretion to the European Commission to qualify a situation as a ‘crisis’ on the basis of substantiated information, gathered on the basis of the EU mechanism for Preparedness and Management of Crises related to Migration. In this connection, Article 1(2)(a) of the proposal defines crises as:

exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its 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, or an imminent risk of such exceptional situations of mass influx.

⁵⁴ Proposal (n 15).

⁵⁵ European Parliament’s Study (n 53) 129.

⁵⁶ For further references see Marie Walter-Franke, ‘Europe to the rescue: The Missing Piece in EU Migration Management is Civil Protection’ (Hertie School, 14 July 2020) <<https://opus4.kobv.de/opus4-hsog/frontdoor/index/index/docId/3584>>.

⁵⁷ Proposal (n 15).

⁵⁸ Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management, COM(2020) 610 final. For comments see Francesco Maiani, ‘A “Fresh Start” or One More Clunker? Dublin and Solidarity in the New Pact’ (EU Immigration and Asylum Law and Policy Blog, 20 October 2020) <<https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/>>.

⁵⁹ Cf. Violeta Moreno-Lax, ‘The EU Humanitarian Border and the Securitization of Human Rights: The “Rescue-through-Interdiction/Rescue-without-Protection” Paradigm’ (2018) 16(1) Journal of Common Market Studies 119–140.

⁶⁰ Proposal (n 15), Art 5. For references to the system of ‘comitology’ see Carl Fredrik Bergström and Dominique Ritleng (eds), Rulemaking by the European Commission: the New System for Delegation of Powers (Oxford University Press, 2016).

This definition also confirms in Article 1(2)(a) that 'such situations are covered by the proposal only if it is demonstrated that they would have serious consequences for the functioning of the Common European Asylum System or the Common Framework as set out in the proposed Regulation on Asylum and Migration Management.' It is also necessary to clarify that such a definition should be read in conjunction with the concept of 'migratory pressure' codified in the proposal for the AMMR. This, in fact, limits itself to refer to 'a large number of arrivals of third country nationals or stateless persons ... that place a burden even on well-prepared asylum and reception systems and require immediate action'.⁶¹

In an attempt to add more clarity to the former efforts to define a situation of crisis, the proposal confirms the criteria of magnitude and imminence, already introduced in the context of the TPD, acknowledges that search and rescue operations at sea can result in situations of crisis because of the disembarkation of migrants, and clarifies that the number of migrants must be disproportionate to the population and GDP (Gross Domestic Product) of the Member State. As has been highlighted,⁶² whilst this additional specification can contribute to provide more guidance about the determination of a situation of crisis, more clarity might be necessary to qualify the situation of crisis in light of the impact which the influx of third country nationals has on the national asylum system. This will favour the integration of the most recent CJEU case law on the Relocation Decisions as well as the parameter of human rights protection set out by the European Court of Human Rights. As a result, the new definition does not depart from a 'broad and open-ended' conceptualisation,⁶³ thereby leaving a wide margin of discretion to the European Commission to determine if a situation qualifies as a crisis.

Another controversial point in the proposal is linked with the provisions concerning *force majeure*.⁶⁴ According to the proposal, Member States could determine that, on account of *force majeure*, it was not possible to observe the normal time limits for registering asylum applications, applying the process for determining the responsibility for asylum applications, or offering 'solidarity' to other Member States. In cases of *force majeure*, the proposal doubles the time limits for determining the responsibility for asylum applications and suspends the transfers and solidarity measures (the latter only for a maximum of six months). However, the proposal does not provide a definition of events of *force majeure* but limits itself to stress, in Recital 7, that these should constitute 'abnormal and unforeseeable circumstances outside the control of Member States, the consequences of which could not have been avoided in spite of the exercise of all due care.' Accordingly, such circumstances should render it impossible to comply with the time limits set out in the AMMR. An example expressly mentioned in the proposal refers to the situation experienced as a result of the COVID-19 pandemic, which has impacted on the length of asylum procedures in most Member States.⁶⁵

This understanding of *force majeure* reiterates the definition coined in case law of the CJEU,⁶⁶ which also highlighted that since the concept 'does not have the same scope in the various spheres of application of EU law, its meaning must be determined by reference to the legal context in which it is to operate'.⁶⁷ While it is to a certain extent reasonable not to provide a strict and limited typology of circumstances of *force majeure* that could create difficulties for Member States to comply with EU law obligations, there are risks in a flexible understanding of the concept too. Member States are, in fact, given wide discretion in determining *force majeure* situations. It is worth recalling, for example, the decision by the Greek government, following the increase of arrivals in Evros at the border with Turkey, to suspend the submission of asylum applications for at least one month, extended for an additional month.⁶⁸ The Greek authorities justified the decision with reference to 'the extraordinary circumstances of the urgent and unforeseeable necessity to confront an asymmetrical threat to national security, which prevails over the reasoning for applying the rules of EU law and international law on asylum procedures'.⁶⁹ Similar situations or political reactions must be constrained

⁶¹ Proposal for a Regulation on asylum and migration management (n 58), Art 2 (w). See in this regard the recent Study by the European Parliament (n 53).

⁶² Ineli-Ciger (n 48).

⁶³ See European Parliament's Study (n 53) 126.

⁶⁴ Proposal (n 57), Art 7.

⁶⁵ See ECRE, 'Covid19 Measures Related to Asylum and Migration Across Europe' (ECRE, 5 May 2020) <<https://www.ecre.org/wp-content/uploads/2020/05/COVID-INFO-5-May-.pdf>>.

⁶⁶ Case C-640/15 *Tomas Vilkas* ECLI:EU:C:2017:39 para 53.

⁶⁷ *ibid*, para 54.

⁶⁸ See Achilles Skordas, 'The Twenty-Day Greek-Turkish Border Crisis and Beyond: Geopolitics of Migration and Asylum Law' (EU Immigration and Asylum Law and Policy 5 May 2020) <<http://eumigrationlawblog.eu/the-twenty-day-greek-turkish-border-crisis-and-beyond-geopolitics-of-migration-and-asylum-law-part-i/>>. See also an English version of the Greek Decree, available at: <<https://docs.google.com/document/d/1yA782Vi56Knhs2yVehXgkMYQeCieaPq5coWNHqh6xs/edit>>.

⁶⁹ Act of Legislative Content, Suspension of the submission of asylum applications, 2 March 2020 (English translation), available at: <<http://odysseus-network.eu/news/translation-of-the-greek-decree-on-asylum-at-the-turkish-border-in-english/>>.

by an instrument adopted at the EU level to deal with emergencies; however, the proposed Regulation seems to provide an incentive for such national derogations.⁷⁰ Accordingly, this makes more compelling the need to circumscribe the limits and the exceptional nature of the possible derogations so as to avoid a continuing failure by Member States to comply with their obligations for unnecessarily protracted periods of time and possibly to submit as well, as has been argued, *force majeure* derogations to prior authorisation by the European Commission.⁷¹

While the proposed instrument constitutes an improvement compared with the TPD and the *ad hoc* solutions implemented in the light of the 2015 Agenda on Migration, there are also some other points of concern and amendments will be necessary. Firstly, the overall added value has been questioned, owing, in particular, to the absence of a proper impact assessment accompanying the proposal, which leaves the proposed instrument without a clear justification.⁷² Secondly, the extension of the time limits for asylum border procedures would mean, in practice, that in situations of mass influx, the receiving Member State would need to process large numbers of applicants at the border, keeping applicants there for a considerably long time. Under the proposal, in fact, the maximum duration of the border return procedures, including detention, is extended by an additional period of 8 weeks, meaning that an individual could be held up in the border return procedures for up to 20 weeks. This period can be preceded by 20 weeks of detention in the border asylum procedures, meaning that a person could be held in detention in the border asylum and return procedures for up to 40 weeks. This implies that when a situation of crisis is declared, a higher number of people may be subject to detention for around 10 months. Such a circumstance will contrast with the recent case law of the CJEU which, in its ruling on the infringement procedures against Hungary, highlighted the unlawfulness of the practice of systematic detention of applicants for international protection in a transit zone placed at the border fence between Hungary and Serbia.⁷³

Overall, in the light of such controversial issues, the proposal seems to perpetuate rather than solve a situation of crisis, putting an undue burden on frontline Member States. These Member States will even have, in fact, an incentive to derogate from their EU law obligations under the ordinary EU asylum legislation.

5. Concluding remarks

The emergency-driven approach characteristic of the emerging governance of EU asylum law discloses its potential as well as its limits. If, on the one hand, an EU legislative framework aimed at addressing situations of crisis can prevent the arbitrary and unilateral recourse to national derogations from EU law obligations, on the other hand, it is crucial that this framework is based on a principled approach.

This would require the circumscribing of the spectrum of application of the emergency measures and the clarification of the relationship between these measures and the ordinary CEAS legal toolbox. At present, the proposal for a Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum offers a precarious set of derogations which makes its coexistence with the other legislative proposals difficult, and its implementation may result, as already described, in the perpetuation of a situation of crisis.

This is exacerbated by the short-sighted approach to regular migration and the unambitious view concerning shifting the paradigm of cooperation with third countries so as also to address the root causes of migratory flows to Europe. In other words, emergency legislation can be, in principle, the appropriate analytical framework to deal with the EU response to a crisis for one main reason: the migratory pressure has put the EU and its Member States in a situation of necessity, for which no adequate legal means of reaction was foreseen. However, until a tool is designed to address the root causes of the migratory flows and to establish an effective cooperation with third countries in terms of regular migration and not only on return and readmission, one can expect that migratory pressures will become routine, at least for certain frontline States. There is, therefore, the need to prevent an exceptional legislative framework designed to manage the emergency from leading to a sort of institutionalised exceptionalism in EU asylum law.

Competing Interests

The author has no competing interests to declare.

⁷⁰ As has been stressed by the European Parliament's Study (n 50) 138, 'the conceptual fuzziness and malleability of the notion of crisis and force majeure do not allow the circumscription of the specific set of circumstances that would trigger the application of the proposed derogations in the field of asylum and return.'

⁷¹ Maiani (n 58).

⁷² ECRE (n 15) 6.

⁷³ Case C-808/18 *European Commission v Hungary* ECLI:EU:C:2020:1029.

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