



Ordine internazionale e diritti umani

International Legal Order and Human Rights
Ordenamiento Jurídico Internacional y Derechos Humanos
Ordre Juridique International et Droits de l'Homme
Diretta da Claudio Zanghì, Lina Panella, Carlo Curti Gialdino

EDITORIALE
SCIENTIFICA

Gli Speciali

Luglio 2023

CRISI MIGRATORIE

Nuove sfide per i diritti umani

www.rivistaoidu.net

Rivista telematica - ISSN 2284-3531

Registrazione al Tribunale di Roma n. 46/2014 del 10 marzo 2014

ORDINE INTERNAZIONALE E DIRITTI UMANI

Gli Speciali

Direttori CLAUDIO ZANGHÌ, LINA PANELLA, CARLO CURTI GIALDINO

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Supplemento al n. 3/2023
luglio 2023
ISSN 2284-3531



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LETIZIA SALVO*

IMPLEMENTATION AND LIMITS OF DIRECTIVE 55/2001/EC IN FAVOR OF UKRAINIAN DISPLACED PERSONS

SUMMARY: 1. The European Union's competences on immigration and asylum. - 1.1. International protection in the Common System of the Union. - 1.2. The innovative approach of the New Pact on Migration and Asylum. - 2. The reception of displaced Ukrainians in the European Union. - 3. The application of Decision (EU) 2022/382 and its limits. - 4. Conclusions.

1. *The European Union's competences on immigration and asylum*

With the adoption of the Lisbon Treaty in 2007, in force since 2009, the Union's competences in the field of immigration and asylum have been strengthened. Indeed, the TEU¹ recalls the Union's role in offering «*its citizens an area of freedom, security and justice without internal borders, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration, crime prevention and the fight against crime*».

In furtherance of this objective, Title V of the TFEU regulates policies on border controls, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation².

With a view to establishing an area of freedom, security and justice, while respecting fundamental rights and taking into account the legal orders of the different legal traditions of the Member States, the objectives set out in Article 67 TFEU require the Union to ensure the absence of controls on persons at internal borders and to develop a common policy on asylum, immigration and external border control that is based on solidarity between Member States and fair towards third-country nationals and stateless persons. The level of security guaranteed must be high and include measures of coordination and cooperation between police, judicial and other competent authorities, as well as through mutual

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¹ Article 3 par. 2 TEU.

² European Parliament, Thematic notes on the European Union, *An area of freedom, security and justice*, June 2022.

recognition of criminal judicial decisions and, if necessary, approximation of criminal legislation³.

Connected to these common policies are those related to immigration, which are developed through internal EU legislation and through interventions at the international level, such as political dialogue, partnerships, cooperation or international agreements between EU member States and third countries of origin or transit of foreigners. Specifically, Articles 77, 78⁴ and 79 TFEU regulate border control, the granting of an appropriate status to third-country nationals in need of international protection within the framework of the Common European Asylum System, the regulation of so-called legal immigration, the fight against illegal immigration and human trafficking.

In consolidating and strengthening these policies, the important provisions of the Charter of Fundamental Rights of the European Union⁵ also intervene, such as Article 15 par.3, which deals with foreigners, recognising them, when working in the territory of the member States, working conditions equivalent to those of EU citizens. Furthermore, Article 21 of the Charter prohibits any form of discrimination in the application of the Treaties.⁶

As has been observed⁷, therefore, the Charter of Fundamental Rights «projects the citizen of each member State beyond its national borders», but also welcomes those who do not belong to the States of the European Union.

³ Article 67 (ex Article 61 TEC and ex Article 29 TEU) Consolidated version of the *Treaty on the Functioning of the European Union* - Part Three: *Union policies and internal actions* - Title V: *Area of Freedom, Security and Justice* - Chapter 1: *General provisions*, in eur-lex.europa.eu.

⁴ Article 78 TFEU, ex Articles 63, pt. 1 and 2 and Article 64 par. 2 TEC.

⁵ For the purposes of the use of the Union's competences, it is useful to mention Article 289 par. 1 TFEU, which provides that on a proposal from the Commission, the European Parliament and the Council shall use the ordinary legislative procedure for the joint adoption of a regulation, directive or decision. The same procedure is set out in Article 294 TFEU. Also relevant to legislative action are the fundamental rights declared by the Charter in Article 6 par. 1 TEU, which are often used to fill in gaps in secondary legislation and to interpret restrictively provisions that allow member States to exempt certain foreigners from the enjoyment of fundamental guarantees. This article states that The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted on 12 December 2007 in Strasbourg, which shall have the same legal value as the Treaties. In Article 51, the Charter extends its application to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and in compliance with the limits of the competences conferred upon the Union in the Treaties, although specifying in the second paragraph that this provision does not extend the scope of Union law beyond its competences. As Anna Pitrone has observed, in the light of this interpretative evolution, national rules affecting matters regulated at European level represent an implementation, albeit direct, of EU law and can therefore be submitted to the Court for examination as to their conformity with the Charter and the protection of fundamental rights. In other words, the coincidence of the subject-matter of the national provisions with the subject-matter of the European provisions, or the coincidence of the aim pursued by the latter, is sufficient for the necessary link for the Charter to be applicable. A. PITRONE, *Regimi speciali in materia di ingresso e soggiorno di cittadini di paesi terzi nell'Unione europea*, Napoli, 2018, p. 48 ss.

⁶ Consider also Article 20 of the Charter of Fundamental Rights, as the Explanations specify the correspondence to the general principle of equality, in which the same treatment must be guaranteed for similar situations, recognised in all European constitutions and enshrined in the Judgment of the Court of Justice of 8 October 1980, Case C- 810/79, *Peter Überschär v. Bundesversicherungsanstalt für Angestellte*, in ECLI:EU:C:1980:228.

⁷ E. TRIGGIANI, *Le regole per la costruzione di una società integrata*, in ID. (ed.), *Europe and the Mediterranean. Le regole per la costruzione di una società integrata*, in *Atti del XIV Convegno della SIDI, Bari, 18-19 giugno 2009*, Napoli, 2010, p. 95 ff.

1.1 International protection in the Common System of the Union

As governed by Articles 67 par. 2 and 78 par. 3 TFEU, the Union envisages the development of a common international protection system aimed at offering an appropriate status to any third-country national in need, provided the prerogative of compliance with the Geneva Convention of 28 July 1951 relating to the Status of Refugees and its Additional Protocol⁸ is respected, such a system must guarantee a high level of protection and respect for the principle of non-refoulement⁹. Furthermore, the Union's policies must be governed by the principle of solidarity and fair sharing of responsibility between the member States, including in financial terms, through appropriate measures¹⁰.

To date, several acts making up the Common European Asylum System have been adopted¹¹; among them: Directive 2011/95/EU (the so-called Qualification Directive)¹², which aims both to ensure that member States use shared criteria through the approximation of legislation on the essential conditions of refugee status and subsidiary protection status, in order to identify individuals who are genuinely in need of international protection, and to ensure a minimum level of services available to them in all member States.

Similarly, member States should be able to support more favourable provisions than the rules laid down in the directive for third-country nationals or stateless persons seeking international protection from a member State, while respecting fundamental rights and complying with the principles recognised in particular in the Charter of Fundamental Rights of the European Union¹³, in particular in guaranteeing full respect for human dignity, the right to asylum of asylum seekers and their accompanying family members. Directive 2013/32/EU (the so-called Asylum Procedures Directive)¹⁴ applies to applications for international protection lodged on the territory, at the border, in territorial waters or in transit zones of member States, as well as to procedures for withdrawing international protection.

⁸ Protocol relating to the Status of Refugees adopted in New York on 31 January 1967, entered into force on 4 October 1967 and made executive in Italy by Law No. 95 of 14/02/1970 (G.U. No. 79 of 28/03/1970).

⁹ The principle of non-refoulement, Article 33 of the 1951 Geneva Convention Relating to the Status of Refugees, states that: «No Contracting State shall expel or return, in any manner whatsoever, a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a social group or political opinion». The prohibition of forced repatriation is widely accepted as part of customary international law and is therefore respected even by states that are not parties to the 1951 Refugee Convention.

¹⁰ Article 80 TFEU.

¹¹ Known as SECA or CEAS (Common European Asylum System).

¹² Directive 2011/95/EU (so-called *Qualification Directive*) of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), in *Official Journal of the European Union*, No L 337 of 20 December 2011, p. 9.

¹³ In particular to promote the application of Articles 1, 7, 11, 14, 15, 16, 18, 21, 24, 34 and 35 of the Charter of Fundamental Rights of the European Union.

¹⁴ Directive 2013/32/EU (so-called *Procedures Directive*), of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection status (recast), in *Official Journal of the European Union*, No. L 180 of 29 June 2013, p.60.

Dir. 2013/33/EU (the so-called Reception Directive)¹⁵, lays down rules on the reception of applicants for international protection and is therefore applicable to all third-country nationals and stateless persons applying for international protection in the territory of a member State, provided they are allowed to stay there as applicants; it is also applicable to family members, if they are included in the application for international protection under national law. This directive does not apply in the event of the application of the provisions of 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. The purpose of the latter directive¹⁶ is to lay down minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin, and to promote a balance of efforts between the member States in receiving displaced persons and bearing the consequences of receiving them.

All the directives mentioned here play an important role, since they are placed as instruments implementing the Geneva Convention, which constitutes the «cornerstone of the international legal framework for the protection of refugees»¹⁷. Although transposed through different national provisions within each member State, they give effect in EU law to the rules on refugees laid down in this Convention. This implies that the directives cited must be interpreted in accordance with the provisions of the Convention itself¹⁸. The CEAS is then complemented by two regulations: Regulation (EU) No. 604/2013¹⁹ which establishes 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, and Regulation (EU) No. 603/2013²⁰, which establishes Eurodac, a central system useful for comparing fingerprints. Operational measures are instead regulated by the recent Reg. (EU) 2021/2303²¹ establishing the European Union Asylum Agency.

The Agency participates in the function of guaranteeing the effective and uniform application of Union asylum legislation in the member States, in full respect of fundamental rights, by ensuring that assessments of applications for international protection in the Union are convergent and by coordinating and strengthening practical cooperation and the exchange of information. Article 14 of the same regulation presents a monitoring mechanism for the Agency, which can improve the functioning of the CEAS especially in

¹⁵ Directive 2013/33/EU (so-called *Reception Directive*) of the European Parliament and of the Council of 26 June 2013 laying down *standards for the reception of applicants for international protection (recast)*, in *Official Journal of the European Union* No. L 180 of 29 June 2013, p. 96.

¹⁶ Council Directive 2001/55/EC (the so-called *Displaced Persons Directive*) 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, in *Official Journal of the European Union* L 212 of 7 August 2001, p. 12.

¹⁷ Recital 4 of dir. 2011/95.

¹⁸ S. AMADEO, F. SPITALERI, *Il diritto dell'immigrazione e dell'asilo dell'Unione Europea*, Torino, 2019, p. 54.

¹⁹ Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 in *Official Journal of the European Union* No. L 180 of 29 June 2013, p.31 (so-called *Dublin III Reg.*).

²⁰ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 in *Official Journal of the European Union* No. L 180 of 29 June 2013, p. 1.

²¹ Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Asylum Agency and repealing Regulation (EU) No 439/2010.

cases where member States' asylum and reception systems are under disproportionate pressure. In addition to its technical and practical support and in the fulfilment of its mandate, the Agency is a specialised centre by virtue of its independence and the scientific and technical quality of the assistance it provides and the information it collects and disseminates, the transparency of its procedures and the way it operates²².

Finally, Reg. No. 516/2014²³ establishes the Asylum, Migration and Integration Fund, so called FAMI, aimed at improving solidarity and responsibility management between the member States "most exposed to migration and asylum flows."²⁴ Furthermore, this regulation establishes the objectives of financial support and their distribution for the activities of the European Migration Network, the eligible actions and their general implementation framework, the principles and the mechanism for setting common EU resettlement priorities.

1.2 *The innovative approach of the New Pact on Migration and Asylum*

Past events relevant to migratory flows have shown an inefficiency of European legislation or its transposition by member States. The substantial diversity of reception arrangements still poses a challenge for member States, some called upon to manage the phenomenon at external borders, others trying to monitor the unauthorised movement of migrants on their territory, still others dealing with arrivals by land and sea or the problem of overcrowding in reception centres. The need to reform the Union's asylum rules is therefore a normal consequence of the uneven treatment of asylum seekers in EU member States, as well as of significant differences in positive asylum decisions between countries.

For these reasons, the Commission has proposed a package of reforms to the common asylum system²⁵ contained in the New Pact, with the aim of enabling the creation of a system that allows for the management and normalisation of migration in the long term, underpinned by European values and international law.

It is thus necessary to establish a new European framework that can provide an adequate response to today's crises by restoring dignity and protection to those who flee their countries and reach the territory of the Union, and it is also necessary to strike a balance that provides for a proportionate solidarity contribution from the States. In fact, the pact envisages the establishment of a shared management system of the external borders, with checks on the identity, health and safety of migrants, a core set of rules to streamline and coordinate asylum and return procedures, and a solidarity mechanism in response to migratory pressure. The establishment of European governance would ensure better management of asylum and migration policies, allowing for the creation of beneficial partnerships of the European Union with third countries from which the largest migration flows depart and transit. This would require joint action without implementation gaps, aiming at promoting legal and safe channels for those in need of protection and including

²² Article 1 reg. cit., p. 11 f.

²³ Regulation (EU) No. 516/2014 of the European Parliament and of the Council of 26 June 2013 in Official Journal of the European Union No. L 150 of 20 May 2014, p. 1 ff.

²⁴ Art. 3 par. 2 lett. a).

²⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A new pact on migration and asylum*, COM (2020) 609 final, Brussels, 23/09/2020.

an interdependence of member States to ensure 'full, transparent and coherent' implementation²⁶ ".

On 29 September 2021, one year later, the Commission presented a report on the adoption of the New Pact on Migration and Asylum²⁷, also proposing a renewed EU Action Plan²⁸ against smuggling of migrants and a Communication on the implementation of the EU Employer Sanctions Directive²⁹. In addition to the intention to develop a common, orderly and sustainable approach to migration that emerged from the New Pact, this latest Communication³⁰ also aims to reduce irregular migration by preventing the organised exploitation of migrants.

The report takes into account the slow progress in the negotiations on the pact, proposing improved measures to be used in order to achieve the planned objectives, taking stock of the impact suffered by the pandemic and including the strengthening of the role of European agencies in providing both financial support and support for unauthorised movement within the EU, while also noting progress on integration and inclusion.

2. The reception of displaced Ukrainians in the European Union

24 February 2022 is the symbolic date of the beginning of the "unprovoked and unjustified"³¹ invasion of the Russian Federation into Ukraine, an act strongly condemned by the European Council³² for its blatant violation of international law and the principles of the United Nations Charter, calling it to account for its grave actions for the destruction caused and the loss of human lives that will result. The aggression, which is still ongoing, has undermined European and global security and stability in a scenario already weakened by the Covid-19 pandemic crisis, causing some six million refugees to flee Ukrainian territory³³. The severe humanitarian crisis prompted the European Union to seek timely and effective solutions to support Ukraine and its citizens.

In this respect, on 4 March 2022, the Council of the European Union, through the adoption of Decision (EU) 2022/382³⁴, implemented for the first time Directive

²⁶ COM (2020) 609 final of 23/09/2020, cited above, p. 2.

²⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Report on Migration and Asylum, COM (2021) 590 final, Brussels, 29/09/2021, which on its implementation takes into account the preparation of a roadmap detailing the essential steps for its achievement. The latest version of the roadmap is contained in Annex 1 of the aforementioned Communication COM (2021) 590 final, Brussels, 29/09/2021.

²⁸ European Commission, *A renewed EU action plan against migrant smuggling (2021-2025)* – COM (2021) 591, Brussels, 29/09/2021.

²⁹ European Commission, *Minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, COM-2021-592, Brussels, 29/09/2021.

³⁰ *Ibid.*

³¹ Recital 3 of Decision (EU) 2022/382.

³² EUCO 18/22, European Council Conclusions on Russia's unprovoked and unjustified military aggression against Ukraine of 24 February 2022.

³³ UNHCR, Operational Data Portal on Ukraine Refugee situation on August 2022.

³⁴ Council Implementing Decision (EU) 2022/382 determining the existence of a mass influx of displaced persons from Ukraine pursuant to Article 5 of Directive 2001/55/EC and resulting in the introduction of temporary protection, in *Official Journal of the European Union* No. L 71/1 of 4 March 2022.

2001/55/EC³⁵ on 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.

Many observe that in the past there has been no shortage of requests, later rejected, for the activation of Directive 2001/55/EC³⁶, from the hostilities that broke out in North African countries to the mass displacements of the so-called Arab Spring in 2011, migratory phenomena that, as noted³⁷, particularly affected Italy³⁸, which adopted temporary protection measures in the absence of EU intervention. Another example is that of the so-called migrant crisis of 2015 - 2016, which saw thousands of people fleeing the conflict in Syria flow into Turkey, Greece and Italy, contributing to exacerbate the shortcomings of a system that put the very principles of solidarity, reception and protection of migrants out of balance. Not least in view of these past examples³⁹, the failure to implement Directive 2001/55/EC due to the lack of the necessary political consensus among member States led the Commission to envisage, in the New Pact on Migration and Asylum, its repeal and the adoption of a new control framework focused on 'immediate protection' to protect the EU's external borders⁴⁰.

As a result of the above, and on the basis of the provisions of Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and giving effect to the introduction of immediate temporary protection, it is possible to highlight two main reasons that prompted the Council, acting on a proposal from the Commission, to trigger the activation of the Directive more than two decades after its adoption. Firstly, consideration of the disproportionate number of displaced persons, estimated⁴¹ on 4 March at between 2.5 and 6.5 million as a result of the armed conflict and which had already reached two million within the first week of the start of the Russian military invasion of Ukraine; secondly, the application of Directive 2001/55/EC would have given an advantage to the member States, given that the rights accompanying this

³⁵ 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, in *Official Journal of the European Union* No. E L 212 of 7 August 2001, p. 12 ff.

³⁶ M. DE FILIPPO, M.A. ACOSTA SANCHEZ, *La protezione temporanea, da oggetto misterioso a realtà operativa: aspetti positivi, criticità, prospettive*, in *Ordine internazionale e diritti umani*, 2022, p. 926 ff.

³⁷ B. NASCIBENE, *Situazioni di crisi e protezione internazionale. Quale ruolo per il diritto dell'Unione europea*, in *AISDUE Posts*, IV (2022), aisdue.eu, Articles Section, no. 9. 29 October 2022, AISDUE Notebooks.

³⁸ With the Prime Ministerial Decree of 12 May 1999, the Italian government adopted temporary protection measures for refugees from war zones in the Balkans. The Prime Ministerial Decree of 5 April 2011, adopted temporary protection measures for foreign citizens who had fled from North African countries. The legal basis for these measures is Article 20 of Legislative Decree No. 286 of 25 July 1998 (T.U. of the provisions concerning the discipline of immigration and rules on the condition of foreigners).

³⁹ See M. INELI - CIGER, *Time to Activate the Temporary Protection Directive, Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe*, in *European Journal of Migration and Law*, 2016, p. 1 ff.

⁴⁰ Proposal for a Regulation of the European Parliament and of the Council on crisis and force majeure situations in the area of migration and asylum, Doc. COM (2020) 613 final, 25 September 2020, on which see below, par. 6.

⁴¹ Recital 6, Decision (EU) 2022/382.

protection limit the need for displaced persons to seek international protection immediately, thus avoiding a possible overloading of the member States' asylum systems⁴².

3. *The application of Decision (EU) 2022/382 and its limits*

At this point, it is necessary to draw attention to certain limitations of Implementing Decision (EU) 2022/382, which - while providing for the implementation of Directive 2001/55/EC in accordance with the modalities autonomously foreseen in the domestic laws of the States - contains limitations first of all with reference to its subjective scope. In wishing to encompass the commitment of all the States involved to guarantee the temporary protection of individuals who have fled Ukraine, the Commission and the Council have delineated a differentiated protection regime *ratione personae*. This state discretion in the scope of application poses critical issues.

Under the terms of the Implementing Decision, member States grant temporary protection to the following categories of displaced persons⁴³: a) Ukrainian nationals residing in Ukraine on 24 February 2022; b) stateless persons and nationals of third countries other than Ukraine, who were enjoying international or equivalent national protection in Ukraine before 24 February 2022; c) family members of the persons referred to in (a) and (b), as referred to in para. 4, provided that the family was already reunited and residing in Ukraine on 24 February 2022. Article 1(2) then leaves it to the member States to decide whether to grant those permanently residing in Ukraine - stateless persons and nationals of third countries other than Ukraine who were lawfully residing there before 24 February 2022 on the basis of a permanent residence permit, if unable to return under safe and stable conditions to their country of origin - temporary protection or an appropriate form of national protection, apparently excluding their family members without such a permit. Para. 3 of the same article recognises the "possibility" for member states to apply the decision also to other persons who were legally residing in Ukraine and cannot return to their country or region of origin, including persons who were in Ukraine for study or work purposes⁴⁴ at the time of the invasion. Also as a discretionary measure, the decision gives member States the possibility to admit displaced persons who had fled Ukraine not long before the invasion, or who were on holiday on the territory of the Union and unable to return to Ukraine⁴⁵.

⁴² Recital 16, Decision (EU) 2022/382. In the same: «In addition, Ukrainian nationals, as visa-free travellers, have the right, after being admitted to the territory, to move freely within the Union for a period of 90 days. On this basis, they can choose the Member State where they wish to enjoy temporary protection rights and join family and friends through the important diaspora networks that currently exist throughout the Union. This will facilitate in practice the balancing of efforts between Member States, thus reducing the pressure on national reception systems. Once a Member State has issued a residence permit in accordance with Directive 2001/55/EC, the person enjoying temporary protection, while having the right to travel within the Union for 90 days within a 180-day period, should only be able to avail himself or herself of the rights deriving from temporary protection in the Member State which issued the residence permit. This should not affect the possibility for a Member State to decide to issue a residence permit at any time to persons enjoying temporary protection under this Decision».

⁴³ Art. 1 par. 1 Decision (EU) 2022/382.

⁴⁴ Recital 13 Decision (EU) 2022/382.

⁴⁵ Recital 14 Decision (EU) 2022/382.

Returning to Directive 2001/55/EC, Article 5 par. 2 lett. a) and par. 3 lett. a) require a description of the specific groups of persons to whom temporary protection applies.

However, while taking account of different situations, the provisions of the directive appear to refer only to Ukrainian nationals, thus excluding other individuals who, regardless of nationality, are lawfully resident in Ukraine to whom the member States may decide whether to grant temporary protection or another type of protection. Moreover, the terms 'country of origin' and 'region of origin' are not specified in the directive⁴⁶, leaving it to the Council to extend protection to other persons whose displacement originates from a given country, regardless of their nationality or habitual residence.

As has been noted⁴⁷, in confirmation of this, Article 2 par. 1 of Decision (EU) 2022/382 equates displaced Ukrainian nationals with displaced persons who are "beneficiaries of international protection in Ukraine" and displaced "family members", who are evidently not Ukrainian nationals. In the implementing decision, the notion is attributed to the country of citizenship or habitual residence of the displaced persons⁴⁸, referring to temporary or nationally appropriate protection for "permanent residents", and any other form of protection for "other displaced persons"⁴⁹, both only in the impossibility of a safe return to their country or region of origin. Recital 13 of the decision similarly supports the admission of displaced persons into the EU on humanitarian grounds in order to guarantee them safe passage to return to their country or region of origin. In these cases⁵⁰, to understand the country of origin as the country of displacement and not as the country of citizenship or habitual residence would deprive the provisions of meaning, both because all displaced persons have left a country (Ukraine) to which it is not possible to return because of the ongoing war, and because to equate the country of origin with Ukraine would be senseless and dangerous. Confirmation of this observation is reiterated in the Commission document "Operational guidelines for the management of the external borders in order to facilitate the crossing of the European Union-Ukraine borders"⁵¹, in which by country of origin, no reference is made to the country of displacement if it is different from the country of citizenship or habitual residence.

As argued in the doctrine⁵², those who could benefit from international protection are granted temporary protection, permanent residents could instead be granted 'adequate' national protection and only if they are unable to return to their country of origin, not to mention the fact that for family members of the latter, there is no support provided. One also wonders why the protection of non-permanent resident displaced persons is subject to the discretion of member States and only if there are no obstacles to their return. Given the serious humanitarian crisis, solidarity should instead be shown in consideration of all displaced persons from Ukraine eligible for the same form of protection. The limitation of Decision (EU) 2022/382 thus appears to be that of making a distinction between 'displaced

⁴⁶ S. PEERS, *Temporary Protection for Ukrainians in the EU? Q and A*, in *European Union Law Analysis*, supra, 4 March 2022.

⁴⁷ G. MORGESE, *L'attivazione della protezione temporanea per gli sfollati provenienti dall'Ucraina: Old but Gold?*, in *AISDUE, il Blog di Aisdue BlogDUE*, aisdue.eu, Bari, 9 marzo 2022.

⁴⁸ Art.2 par. 2 Decision (EU) 2022/382.

⁴⁹ Art.2 par. 3 Decision (EU) 2022/382.

⁵⁰ G. MORGESE, *L'attivazione della protezione temporanea per gli sfollati provenienti dall'Ucraina: Old but Gold?* cit., p.3.

⁵¹ Document approved on the same day as Implementing Decision (EU) 2022/382, entitled Communication from the Commission Operational guidelines for the management of external borders in order to facilitate the crossing of EU borders - Ukraine 2022/C 104 I/01 in the *Official Journal of the European Union* of 04/03/2022.

⁵² G. MORGESE, *L'attivazione della protezione temporanea per gli sfollati provenienti dall'Ucraina: Old but Gold?* cit., p. 4.

persons and displaced persons⁵³, failing to give due consideration to those, often the most defenceless, who, not being Ukrainian nationals but having resided on the same territory until 24 February 2022, are not eligible for State protection. In the final analysis, it should be considered that differential treatment would not only affect the personal situation of displaced persons, but also affect burden-sharing among member States, since Ukrainian nationals represent the largest number of displaced persons and they are given a choice as to which State they can enjoy protection in. As the President of the Commission urged member States in relation to the migration crisis in 2020, «Everyone must step up and take responsibility»⁵⁴, only in this way will it be possible to realise the “humane” and “humanitarian” approach⁵⁵ desired.

4. Conclusions

The latest updates tell us that 13,379,780 refugees have fled Ukraine since 24 February 2022, and a further 6.6 million have been internally displaced within the country⁵⁶.

Over 4.8 million refugees are Ukrainians registered with temporary protection or similar measures in the European Union⁵⁷. At the moment, it is not yet possible to have an account of the actual victims of the conflict that shows no sign of stopping. While peace talks still seem to be far off, on 3 October the Duma ratified treaties to annex the republics of Donetsk and Luhansk and the territories of Kherson and Zaporizhzhia to the Russian Federation through a referendum of dubious regularity in which the territories devastated by the aggression would have participated.

The European Union has tried to live up to the critical issues raised by the migratory pressures of previous years, failing to achieve all its objectives due to the failure of member States to fulfil their responsibilities. In view of the dramatic number of displaced persons and the serious social and territorial context caused by the ongoing militarised conflict on the territory of Ukraine, it is possible to consider that the peaceful action offered by the European Union in support of Ukrainian displaced persons should be pursued regardless of the recognition of citizenship status and expanded, thus admitting all persons in need to temporary protection without any discrimination. Moreover, the application of the existing instruments could enable them to be improved and, at the same time, represent a great opportunity for the member States of the European Union to show genuine solidarity with the humanitarian crisis perpetrated and to redeem their institutional role in relation to the migratory phenomenon in the international arena and in the public eye.

ABSTRACT: *Implementation and limits of Directive 55/2001/EC in favor of Ukrainian displaced persons*

⁵³ Ibid.

⁵⁴ Speech by President Von der Leyen on the State of the Union 2020.

⁵⁵ Ibid.

⁵⁶ Data retrieved from [unhcr.org](https://www.unhcr.org), updated and viewed on 3/10/2022.

⁵⁷ UNHCR, Operational Data Portal, Ukraine refugee situation updated 27/12/2022.

The contribution deals with the analysis of the Implementing Decision (EU) 2022/382, which implemented the Directive on temporary protection, applied for the first time in support of displaced Ukrainians, on the basis of the methods independently provided for in the internal legal systems of the States.

The paper emphasizes some limitations, first of all with reference to the subjective scope of application of the decision, which includes only Ukrainian citizens or citizens of other States that enjoy international protection in Ukraine, thus excluding other individuals who, regardless of citizenship, legally residing in Ukraine, to whom the Member States will be able to decide whether to grant temporary protection or another type of protection.

State discretion on the scope of application *ratione personae* is likely to have repercussions, including on the sharing of burdens between Member States.