03 2022

When is a crisis a crisis, when is a refugee worthy of protection?

Monika Mokre

The political mode of the last years has been the mode of crisis. While we arguably still live in the Covid crisis (despite repeated announcements of its end) the Ukraine crisis has been proclaimed.

Obviously, a crisis is not a natural phenomenon, but any kind of phenomenon needs a crisis discourse to become a crisis. Usual parts of such a discourse are imminent danger and historical uniqueness. The Covid discourse as well as the Ukraine discourse include these elements – human lives are at stake at a hitherto (or, at least, in recent times) not experienced scale.

As in every other crisis discourse, this assessment can be contested: Why is the Covid pandemic so much worse than Ebola? Why is the war in Ukraine so much worse than the ones in Syria or Yemen? Arguments of this kind are frequently rejected as "whataboutism", "the technique or practice of responding to an accusation or difficult question by making a counter-accusation or raising a different issue", according to the Oxford dictionary. And, in fact, it is, in many cases, cynical as well as useless to downplay one situation of human suffering by mentioning that there are several other similar situations. At the same time, the systematics

of crisis discourses are obvious. To put it in a nutshell: As discourses of the Global North are worldwide hegemonic, a crisis is a critical situation affecting the Global North.

This usual pattern has worked very well regarding the Covid crisis. The Ebola comparison was only brought up by a minority; for the general public in the Global North, it goes without saying that this has been a never experienced crisis – as it has never been experienced by this general public.

The discourse on the Ukraine crisis is facing more difficulties. The current mass influx of refugees in the EU is not a really new phenomenon but could rather be understood as a repetition of the situation in 2015. This, however, poses a considerable problem to EU politicians who have claimed in the years since 2015 that the so-called "welcome culture" which took place during some weeks in this year must never be repeated. Thus, it needs some discursive creativity to clearly differentiate the acceptance of large numbers of Ukrainian refugees in 2022 from the acceptance of large numbers of Syrian refugees in 2015.[1]

Part of this differentiation is that the people coming now are "our fellow Europeans", people with similar values as we have – whatever these values might be; this part of the evocation of values usually remains unclear. This, however, is a rather new narrative. Until some weeks ago, there was no common agreement that the Ukraine does "belong to us". Anti-slavic ressentiments (that are now exclusively activated with regard to the Russian Federation) have hitherto played an important role in discourse on Ukraine in Western and Central Europe. Furthermore, Ukraine was seen (with some plausibility) as a non-democratic or, at least, not fully democratic state showing now and again pro-Russian sympathies observed with mistrust by the EU.

Furthermore, it is emphasized that now “womenandchildren” are coming while, in 2015, mostly young men came to the EU. And “womenandchildren” are by definition vulnerable victims while young men are (at least potential) perpetrators and criminals. One should mention at this point that also in 2015 a differentiation between “real”, worthy refugees and other refugees took place – in this case mostly between Syrian refugees who allegedly were the only ones who had a real reason to flee and were, furthermore, well educated people, and all the other ones, especially refugees from Afghanistan. Thus, generally, we can see a classical intersectional form of differentiation and discrimination of refugees based on gender, race and nationality as well as class.

The Temporary Protection Directive

However, there is a really new phenomenon in 2022, not regarding refugees themselves but regarding the legal approach of the EU to refugees. For the first time, a directive has been used which was already issued in 2001, the “Temporary Protection Directive”[2]. This directive was conceived due to the Yugoslav wars, or, more concretely since the EU had been unable to act unilaterally with regard to the influx of refugees of Kosovo at the end of the 1990s. It has never been implemented until 2022 due to the same inability. Thus, the really interesting question now is why it has suddenly become possible to implement this directive within some weeks.

The Tempory Protection Directive should provide a pragmatic and effective solution for times in which the asylum systems of Member States are overwhelmed by the number of refugees. For a period of one to three years, those concerned by the directive shall hold a residence permit including the right to accommodation,

health services, social services, education, and access to the labour market. In order to distribute the burden of this situation, displaced persons can be transferred between Member States if the respective Member States as well as the persons concerned agree.

In its procedures, the Directive follows the usual legislative procedure of the EU: The existence of a mass influx of refugees must be established in a proposal by the Commission which is then decided upon by the the Council of the European Union with qualified majority voting (i.e., a majority of states representing a majority of the population of the EU).

From 2001 to 2022, the Directive has never been used although its implementation was discussed three times: In 2011, Italy and Malta called for its activation due to the high influx of refugees in the aftermath of the Arab Spring, especially from Libya. In the crisis of 2015, UNHCR and some Members of the European Parliament proposed to make use of it. And in 2021, EU foreign policy official Josep Borrell discussed the possibility of invoking the directive to aid Afghan refugees following the US withdrawal from Afghanistan. In none of these cases, the European Commission saw the need for a proposal, probably due to the resistance of those Member States not directly affected by the situation.

Due to its obvious dysfunctionality, the Commission proposed in 2020 to repeal the directive and to replace it by a regulation[3] as part of the foreseen “Pact on Asylum and Migration”. This pact has been prepared by the European Commission since 2019, presented to the Council of the EU in fall 2020 – and not implemented up to now. This shows that the EU has still a long way to go to a common asylum policy – which is rather good news if this common asylum policy is meant to be organized according to this proposal of the Commission[4].

The proposal was aptly summarized by Margaritis Schinas, the Vice President of the European Commission, as a "three-story house"[5]. The goal of this building project is to ensure that as few people as possible get to the top floor. The first floor consists of partnerships with non-EU countries, which should encourage people to stay where they already are. The activities to date in this regard make it seem likely that this is about border protection and preventing mobility, not sustainable improvement of living conditions. The second floor consists of even tighter external borders of the EU, with comprehensive health and security controls including fingerprint registration. For people from countries with a lower recognition rate than 20% in EU average, a fast-track procedure at the border is foreseen. It seems unlikely that any of these fast-track procedures would lead to a positive decision. If refugees do manage to get to the third floor, solidarity between member states will be called upon. Since a distribution of refugees among the member states is simply not enforceable, the problem is to be solved via financial transfers: Countries that take in refugees will receive money, those that do not will pay. One form of payment should be so-called repatriation sponsorships - countries that do not take in refugees finance the deportation of rejected asylum seekers for other countries.

The regulation replacing the Temporary Protection Directive should be part of this pact. It could be implemented by the Commission without inclusion of the Council and would focus on the respective Member State facing a mass influx of refugees. It would allow this Member State to warrant temporary protection without asylum procedures for those under temporary protection. It would, on the other hand, allow for fast-track procedures at the border for all persons from countries with less than 75% positive asylum decisions in EU average. At the moment, this would mean

that only people from Venezuela, Syria, and Eritrea would have a chance for a proper asylum procedure.

Equally to the whole "Pact on Asylum and Migration", this regulation has not been issued yet; instead, the Directive of 2001 has now been activated in an incredibly short time. For once, the EU has shown an ability to speak with one voice, overcoming at this point the nationalism of the Member States. It is easy to understand the reasons for this unprecedented situation: First, an external enemy has always been the most effective means to create and re-enforce a feeling of collective identity. Even the preamble of the Council Decision refers to the invasion undermining "European and global security". Secondly, this new influx of refugees concerns first and foremost those countries who have always been opposed to every form of EU solidarity in accepting refugees, i.e., the Višegrad states Hungary, Poland, Czech Republic, and Hungary as well as Austria.

Thus, while it is laudable and of utmost importance that Ukrainian citizens will be able to enjoy temporary protection in the EU, EU policies of the last weeks do not show a rejection of nationalist principles but, rather, a new application of them, enlarged by EU supra-nationalism. Again, EU refugee politics do not focus on people in danger but on its own interests. For the time being, these interests have shifted – from a general rejection of refugees to the protection of a specific group of refugees.

Who has the right to protection?

And this group is very specific. It includes Ukrainian citizens, persons under international protection in Ukraine and the families of these two groups. Persons with a permanent residence in the

Ukraine who “are unable to return in safe and durable conditions to their country of origin” should also get protection – either according to the Council Decision or in another national form. For persons with a temporary residence in Ukraine not able to return safely to their country of origin – e.g., students or workers, but also asylum seekers, the – legally not binding – introduction to the Decision recommends that they should at least be allowed visa free entry in the EU in order to return to their country of origin. Actually, this part is a bit confusing as, probably, people who cannot safely return to their country of origin will have a very limited interest in this return. People with a – permanent or temporary – residence in the Ukraine who could return to their country of origin without being in danger are not mentioned at all. Thus, people who have spent their whole life or most of their life in Ukraine are not seen in need of protection[6].

As is prescribed in the procedures, this decision is based on a proposal of the Commission. However, this proposal was much broader: It included everybody “unable to return in safe and durable conditions to their country of origin” as well as everybody with permanent residence in Ukraine, irrespectively of the conditions in the country of origin[7].

It is colported that the limitations of the decision have been demanded by the very same states who requested the implementation of the directive, namely the neighbouring Višegrad states. While support by other EU Member States is needed to deal with the high influx of refugees, the opportunity is also used to filter refugees and to close once again the borders to many of them, especially BiPoC.

A considerable part of the population of Ukraine does not hold Ukrainian citizenship, e.g, 76.000 foreign students, nearly a quarter

of them from Africa. From the beginning, they were discriminated against in evacuation procedures – black women and children have been left behind to make place for Ukrainian citizens, fascist groups in Ukraine and Poland have attacked them. Romania closed very quickly its borders for non-Ukrainian citizens and African refugees coming to Poland are detained in closed facilities[8]. And, also in Poland, those supporting Ukrainian refugees are celebrated as heroes while those helping refugees stuck at the border to Belarus are criminalized[9].

It should also be mentioned that about 400.000 Roma live in Ukraine who also face racist discrimination including fascist attacks when trying to cross borders. Furthermore, according to UN figures, about 30.000 of them do not have documents; thus, their chance of being accepted under the conditions of the directive are slim[10].

Finally, it remains to be seen how the mass influx of refugees from Ukraine will affect those from other countries asking for asylum in the EU. Especially in this regard, it is important that the directive is still in force and not the foreseen regulation. But also without these stipulations, more and more asylum claims have been decided negatively after a very superficial assessment of flight reasons even before the war – at least in Austria.

Without any doubt, the decision to activate the Directive on Temporary Protection is an important step here. But there is also no doubt that the limitations of this decision are driven more by nationalist and supranationalist concepts and interests than by a truly universal understanding of human rights – including the rights of those who, out of which reason ever, are not residents of the country of which they hold the citizenship. The European Union understands the “four mobilities” including mobility of

persons, as one of its most important values and achievements. But when it comes to the protection of refugees and the rights of migrants in the EU, individual mobility leads to exclusion. Third country citizens in the EU lose their right to citizenship in a Member State when they spend some time in another Member State. Afghan refugees who spent their whole life in Iran do not receive protection as they are not persecuted in their country of origin. And now, the Council of the European Union simply ignores the plight of those who decided voluntarily to make Ukraine their new home.

The Member States have the right to go beyond the Council decision in their protection of refugees. They can accept non-Ukrainian refugees of Ukraine under the same conditions as Ukrainian citizens or provide them with a form of national protection. It remains to be seen how this possibility will be used. Nowadays, it looks as if, e.g., the Netherlands and Germany would provide some protection for these refugees. Austria has already issued a law on the base of the Council decision which does not more than fulfil the minimum requirements of this decision[11]. This probably made it possible to implement the directive without protest of right-wing parties – in this vein, the Austrian FPOe recently published the slogan: "War refugees, yes, hidden mass migration, no." And an in an informal meeting in the Austrian Ministry of Interior Affairs, there was consensus not to speak about refugees from Ukraine but about displaced persons. Two ways of saying that Ukrainians are different and that no other refugee should hope for similar conditions when demanding protection in Austria. The German term for displaced persons, "Vertriebene", shows this intention even more clearly: This term is usually used for members of the German speaking minorities in Eastern Europe who had to flee after WW2.

Still, the differentiation between different classes of refugees is not accepted by everybody: When French railways decided to give out free tickets to Ukrainian citizens, the railway workers at Gare du Nord in Paris implemented this decision in a slightly different way. “Those fleeing from war or poverty have the right to the same form of reception. The railway workers, as the whole working class, come from all over the world. They decided together to distribute tickets to all refugees asking for them.”[12]

---

[1] Cf.: https://www.diepresse.com/6112113/denken-sie-jetzt-nicht-an-2015

[2] 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; https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF

[3] Proposal for a Regulation of the European Parliament and of The Council addressing situations of crisis and force majeure in the field of migration and asylum, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0613&from=EN

[4] Cf. https://www.transform-network.net/blog/article/report-from-fortress-europe-the-annulment-of-the-right-to-asylum-by-the-european-union-and-its-me/

[5] https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1736

[6] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2022.071.01.0001.01.ENG

[7] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0091&qid=1646384923837

[8] https://www.independent.co.uk/news/world/europe/ukraine-refugees-detention-international-students-b2041310.html

[9] https://www.independent.co.uk/news/world/europe/ukraine-russia-refugees-poland-belarus-border-b2034859.html; https://www.theguardian.com/global-development/2022/mar/25/poland-detains-activists-accused-of-smuggling-migrants-over-belarus-border

[10] https://ukraine.un.org/en/106824-about-30000-roma-ukraine-have-no-documents-story-roma-activist

[11] http://www.asyl.at/files/576/20220308vertriebenenvo.pdf

[12] https://journal.lutte-ouvriere.org/2022/03/16/gare-du-nord-paris-non-au-tri-entre-les-refugies_238598.html?fbclid=IwAR0qvrqaxTy-P_pkDJoEfDXrrEJ6GrAuBWmzqyVFEA6lPF_3RPyl118wW5U