

Health Emergency and Asylum Law in the European Union

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ABSTRACT

The rapid spread of COVID-19 in Europe has led to the further deterioration of the crisis concerning the application of the provisions of European Union (EU) asylum law in most Member States. Accordingly, this article aims to shed light on the impact that the health emergency is having on the Common European Asylum System (CEAS). This requires a twofold legal analysis. First, the article discusses whether health emergencies, like that caused by COVID-19, should affect the scope of States' obligations stemming from the CEAS, such as the principle of *non-refoulement* and access to asylum procedures. In this connection, it reviews, in light of international law obligations and the EU border control regime, the policy responses and legislative measures adopted by EU Member States during the first few weeks of the pandemic that resulted in the closure of borders to asylum seekers. Secondly, the article investigates whether the CEAS legal toolbox contains adequate provisions that can be applied in emergency situations. Thus it analyses the impact of the health emergency on reception conditions for asylum seekers. Based on the findings of this twofold analysis, it is concluded that certain rights, such as the right to seek asylum, cannot be suspended – not even during a situation of health emergency – and that it is all the more urgent to redesign a CEAS that takes account of the challenges posed by future situations of health emergency.

1. INTRODUCTION

The rapid and ongoing spread of the COVID-19 disease in Europe¹ has significantly contributed to the deterioration of the protracted situation of crisis in the Common European Asylum System (CEAS). This situation of crisis should be understood as the consequence of the inability of the European Union (EU) to cope effectively with large influxes of migrants through

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1 The end of the first full week of 2022 (week ending Sunday 9 January 2022) was characterized by a high overall case notification rate, which increased rapidly in January 2022, and an elevated but stable death rate. The overall COVID-19 case notification rate for the European Union (EU)/European Economic Area was 2,008 per 100,000 people: see European Centre for Disease Prevention and Control (ECDC), 'Country Overview Report: Week 3 2022' <https://covid19-country-overviews.ecdc.europa.eu/#Weekly_surveillance_summary> accessed 19 January 2022. See also Center for Systems Science and Engineering, Johns Hopkins University, 'COVID-19 Map' <<https://coronavirus.jhu.edu/map.html>> accessed 19 January 2022.

a fundamental paradigm change in the normative setup of the CEAS,² designed to harmonize across the EU the procedures and rights for those who apply for international protection.³ The migratory pressures of 2015⁴ have, in fact, exacerbated the institutional unresponsiveness, law-making stalemate, and implementation deficit of the CEAS.⁵ This situation has hampered the process of reforming the CEAS, and has led 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.’⁶

Admittedly, the health emergency constitutes a perfect storm that particularly affects the CEAS, one of the weakest parts of the EU legal fabric. When, on 13 March 2020, the World Health Organization (WHO) confirmed that Europe had become the centre of the new pandemic,⁷ the EU and its Member States adopted an array of measures to contain the spread of the health emergency that had ‘a significant impact on many spheres of state and individual functioning.’⁸ Unsurprisingly, the health emergency offered several Member States a pretext for a further tightening of immigration and asylum policies,⁹ driven by responses that are not only ethically questionable but also legally untenable, in the sense that they encroach upon the essential rights of migrants and asylum seekers in the EU. Border controls and suspensions of entry and exit in the short term, as well as delays and disruptions in access to asylum procedures and other services for migrants in the long term, have affected mobility regimes across the EU. While the impact of border controls on free movement – as well as the implications of the measures adopted at the external borders – has generated much academic debate,¹⁰ the analysis that follows reflects on the capacity of the CEAS legal toolbox to respond to the stresses caused by

- 2 See eg Florian Trauner, ‘Asylum Policy: The EU’s “Crises” and the Looming Policy Regime Failure’ (2016) 38 *Journal of European Integration* 311.
- 3 The literature on the CEAS is abundant: see especially Evangelia (Lilian) Tsurudi and Cathryn Costello, ‘The Evolution of EU Law on Refugees and Asylum’ in Paul Craig and Grainne de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021).
- 4 In this connection, the former United Nations (UN) Secretary-General, Ban Ki-Moon, in his address to the Italian government in Rome, spoke about ‘the biggest refugee and migration crisis since the end of the Second World War’: see ‘In Rome, Ban Says Refugee and Migration Crisis Is a “Defining Moment for Europe and the World”’ (*UN Daily News*, 15 October 2015) <<https://news.un.org/en/story/2015/10/512722-rome-ban-says-refugee-and-migration-crisis-defining-moment-europe-and-world>> accessed 8 August 2022.
- 5 See Daniel Thym, ‘The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy’ (2016) 53 *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.
- 6 European Commission, ‘Communication to the European Parliament, the Council, the Economic and Social Committee, the Committee of the Regions on a New Pact on Migration and Asylum’ COM(2020) 609 final (New Pact on Migration and Asylum). 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>> accessed 9 August 2022.
- 7 ‘Coronavirus: WHO Says Europe Has Become the Epicentre for Coronavirus’ (*BBC News*, 13 March 2020) <<https://www.bbc.com/news/av/health-51881641>> accessed 9 August 2022.
- 8 Anna Doliwa-Klepacka and Mieczysława Zdanowicz, ‘The European Union Current Asylum Policy: Selected Problems in the Shadow of COVID-19’ (2022) 35 *International Journal for the Semiotics of Law* 1001, 1002.
- 9 See United Nations High Commissioner for Refugees (UNHCR), ‘COVID-19 Platform: Temporary Measures and Impact on Protection’ <https://im.unhcr.org/covid19_platform/#_ga=2.66742638.1789881933.1594899720-611184440.1594056193> accessed 9 August 2022. For references, see Gaia Pianigiani and Emma Bubola, ‘As Coronavirus Reappears in Italy, Migrants Become a Target for Politicians’ *New York Times* (20 August 2020) <<https://www.nytimes.com/2020/08/28/world/europe/coronavirus-italy-migrants.html>> accessed 9 August 2022. See also European Migration Network (EMN), ‘The Impact of COVID-19 in the Migration Area in EU and OECD Countries’ (*Organisation for Economic Co-operation and Development*, 2021) <<https://www.oecd.org/migration/mig/00-eu-emn-covid19-umbrella-inform-en.pdf>> accessed 9 August 2022; Sergio Carrera and Ngo Chun Luk, ‘Love Thy Neighbour? Coronavirus Politics and Their Impact on EU Freedoms and Rule of Law in the Schengen Area’ (2020) No 2020–04 CEPS Papers in Liberty and Security in Europe <https://www.ceps.eu/download/publication/?id=26923&pdf=LSE2020-04_Love-thy-neighbour.pdf> accessed 9 August 2022. For broader references to travel restrictions and border closures adopted in response to the pandemic, see Meghan Benton and others, ‘COVID-19 and the State of Global Mobility in 2020’ (*Migration Policy Institute*, 2021) <<https://www.migrationpolicy.org/research/covid-19-state-global-mobility-2020>> accessed 9 August 2022.
- 10 See eg Jorrit Rijpma, ‘COVID-19, Another Blow to Schengen?’ (2020) 27 *Maastricht Journal of European and Comparative Law* 545; Luisa Marin, ‘The COVID-19 Crisis and the Closure of External Borders: Another Stress-Test for the Challenging Construction of Solidarity within the EU?’ (2020) 5 *European Papers* 1071.

the health emergency. Less attention has been paid to this aspect, yet it is of utmost significance given the ongoing process of reforming the CEAS.

In order to explain how the CEAS legal framework is able to respond to a health emergency, the article pursues a twofold analysis. First, it discusses whether health emergencies, like that caused by COVID-19, should affect the scope of States' obligations stemming from the CEAS, such as the principle of *non-refoulement* and access to asylum procedures. In this connection, it reviews, in light of international law obligations and the EU border control regime, the policy responses and legislative measures adopted by EU Member States during the first few weeks of the pandemic (mainly from March to April 2020) that resulted in the closure of borders to asylum seekers.¹¹ Secondly, the article investigates whether the CEAS legal framework contains adequate provisions that can be applied in situations of emergency. Thus it analyses the impact of the health emergency on reception conditions for asylum seekers and illustrates the guarantees that must be ensured during the refugee status determination process, while, simultaneously, the spread of the disease is being managed within refugee camps. From this perspective, the article critically focuses on the difficulties of applying this set of guarantees in 'hotspot' facilities, particularly in the Greek islands, where pandemic-related restrictions on the freedom of movement of asylum seekers persisted even after the initial phase of the pandemic.

The insights of this research, which takes into account findings of the most recent case law at national and European levels, show the extent to which health emergencies can allow possible derogations from the existing legal framework and how the CEAS toolbox is able to respond to such emergencies. This is especially relevant as regards essential rights and entitlements for applicants for international protection, who are clearly members 'of a particularly underprivileged and vulnerable population group in need of special protection.'¹²

2. BORDER CLOSURES AND ACCESS TO ASYLUM IN THE EUROPEAN UNION

In the first weeks after the pandemic broke out in early 2020,¹³ States adopted unilateral restrictive measures, implicating important limitations on free movement within EU Member States' territories and across their international borders. Such a scenario offered many governments a pretext for curbing migratory flows, restricting *ipso facto* the right to seek asylum, understood in particular as access to asylum procedures. Additionally, such an approach undermined the consistent application of EU rules in the field of asylum. It is therefore crucial to review certain State practices to gather evidence as to whether health emergencies should affect the scope of States' obligations stemming from the CEAS, such as the duty to ensure access to asylum procedures, thereby allowing national authorities to derogate from the CEAS legal framework.

In an attempt to preserve the legal obligations ensuing from the CEAS and to contain the proliferation of unilateral responses to the pandemic,¹⁴ on 16 March 2020, the European Commission invited the European Council to adopt a 'Temporary Restriction on Non-Essential Travel' from third countries into the Schengen area with immediate effect 'at all parts of the EU's

11 These measures are collected through the Asylum Information Database (AIDA), a database managed by the European Council on Refugees and Exiles (ECRE) that contains information on asylum procedures, reception conditions, detention, and the content of international protection across 23 countries, as well as country and comparative reports: see ECRE, 'Asylum Information Database' <<https://asylumineurope.org>> accessed 9 August 2022.

12 *MSS v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011) para 251.

13 See 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19' (*World Health Organization*, 11 March 2020) <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>> accessed 19 January 2022.

14 On this point, see Elspeth Guild, 'Covid-19 Using Border Controls to Fight a Pandemic? Reflections from the European Union' (2020) 2 *Frontiers in Human Dynamics* 1.

external borders' (now known as the 'EU Travel Ban').¹⁵ The European Council accepted this proposal at its meeting of 17 March 2020.¹⁶ As a consequence, most Schengen States parties adopted measures giving effect to the EU Travel Ban and the Commission adopted guidelines to implement the ban,¹⁷ making it clear that third-country nationals, who are persons in need of international protection or for other humanitarian reasons, can be authorized to enter the EU, despite the closure of the EU's external borders. Many Member States even declared a state of emergency or exception, with Estonia, Latvia, and Romania also informing the Secretary General of the Council of Europe of their intentions to derogate from their obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),¹⁸ pursuant to article 15 of the ECHR.¹⁹

However, notwithstanding the Commission's recommendation not to apply the temporary restrictions to persons in need of international protection, access to EU territory for the purpose of applying for asylum was discontinued in many Member States. Only Bulgaria, Ireland, Luxembourg, and Romania clearly directed that persons in need of international protection or for other humanitarian reasons were able to enter their territory.²⁰ In many Member States, the right to asylum was *de jure* or *de facto* suspended.²¹ These measures, including the suspension of registrations of new asylum claims, naturally resulted in a progressive reduction in the number of applications lodged within the EU.²²

Before discussing the ability of the CEAS to respond to the health emergency, it is worth stating that the suspension of the right to apply for asylum is problematic in terms of compatibility with existing international and European law obligations, especially those stemming from the Convention relating to the Status of Refugees (Refugee Convention),²³ the Charter of Fundamental Rights of the European Union (EU Charter),²⁴ and the relevant provisions of the CEAS. In particular, some practices and measures adopted by specific Member States cast serious doubts on their compatibility with the principle of *non-refoulement*. This principle is enshrined not only in article 33 of the Refugee Convention, but also in article 7 of the International Covenant on Civil and Political Rights²⁵ and in article 3 of the ECHR. As well as constituting 'the cornerstone of international refugee protection'²⁶ as a corollary of the prohibition of torture

- 15 European Commission, 'Communication to the European Parliament, the European Council and the Council: COVID-19: Temporary Restriction on Non-Essential Travel to the EU' COM(2020) 115 final. For a thorough legal assessment, see Daniel Thym, 'Travel Bans in Europe: A Legal Appraisal' (*EU Immigration and Asylum Law and Policy*, 18 March 2020) <<https://eumigrationlawblog.eu/travel-bans-in-europe-a-legal-appraisal-part-i/>> accessed 9 August 2022.
- 16 European Council, 'Conclusions by the President of the European Council Following the Video Conference with Members of the European Council on COVID-19', Press Release (17 March 2020) <<https://www.consilium.europa.eu/en/press/press-releases/2020/03/17/conclusions-by-the-president-of-the-european-council-following-the-video-conference-with-members-of-the-european-council-on-covid-19/>> accessed 9 August 2022.
- 17 European Commission, 'COVID-19: Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy' (Communication) C(2020) 2050 final.
- 18 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 (European Convention on Human Rights, ECHR).
- 19 See Sean Molloy, 'Covid-19 and Derogations before the European Court of Human Rights' (*Verfassungsblog on Matters Constitutional*, 10 April 2020) <<https://verfassungsblog.de/covid-19-and-derogations-before-the-european-court-of-human-rights/>> accessed 10 August 2022.
- 20 See Carrera and Chun Luk (n 9) annex II.
- 21 ECRE, 'COVID-19 Measures related to Asylum and Migration across Europe' (Information Sheet, 5 May 2020) <<https://www.ecre.org/wp-content/uploads/2020/05/COVID-INFO-5-May-.pdf>> accessed 19 January 2022.
- 22 See European Asylum Support Office (EASO), 'Latest Asylum Trends' <<https://www.easo.europa.eu/latest-asylum-trends>> accessed 19 January 2022.
- 23 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).
- 24 Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (EU Charter) art 18.
- 25 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
- 26 UNHCR, 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and Its 1967 Protocol' (2007) para 5.

and inhuman and degrading treatment, this principle is accepted by the international community as a whole as a norm from which no derogation is permitted, having also attained the status of a peremptory norm of international law (*jus cogens*), as stated by the United Nations High Commissioner for Refugees (UNHCR)²⁷ and the most recent doctrine.²⁸ In EU law, protection from *refoulement* has a strong legal basis in article 78 of the Treaty on the Functioning of the European Union (TFEU),²⁹ in combination with articles 4 and 19 of the EU Charter. In addition, article 18 of the EU Charter enshrines the right to asylum, which – despite its amorphous legal scope³⁰ – consolidates the constitutional primacy of the Refugee Convention in the EU legal order. Accordingly, border closures can never be absolute as there are international law norms that always require at least an examination of any request to cross a border.³¹ The EU system of border management itself, which is based on the Schengen Borders Code,³² does not contemplate border closures but establishes a sophisticated system of controls that is to be implemented by the Member States.³³ In other words, national competent authorities have to perform an individualized verification of the authorization to enter the Schengen borders, since absolute border closures – where all persons would automatically be prevented from crossing – are prohibited.

These brief considerations concerning the EU border control regime and core international law norms are necessary to indicate the benchmarks for three specific practices, which – while not necessarily related to the pandemic – have been particularly exacerbated by the health emergency and have created tensions with international and EU law obligations. These practices are critically reviewed in the following sections and confirm how national governments have used the pandemic as a pretext for curbing migratory flows, thereby deviating from core legal obligations.

2.1 Closure of ports and denial of disembarkation

The instrumentalization of the health emergency as a means to control migration is particularly epitomized by the measures adopted by certain EU Member States that resulted in a denial of disembarkation to migrants in the territory of those States. In this connection, Italy regrettably offers the most conspicuous practice, and is also noteworthy for its judicial developments.³⁴

In an attempt to manage the health emergency, through Inter-Ministerial Decree No 150, adopted on 7 April 2020,³⁵ the Italian government declared that Italian ports do not fulfil the requisite conditions for classification and definition as a ‘place of safety’, according to the International Convention on Maritime Search and Rescue (SAR Convention).³⁶ The text of the

27 UNHCR Executive Committee Conclusion No 79 (XLVII), ‘General Conclusion on International Protection’ (1996).

28 See Cathryn Costello and Michelle Foster, ‘Non-Refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test’ (2015) 46 *Netherlands Yearbook of International Law* 273.

29 Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).

30 For a critical analysis, see Salvatore Fabio Nicolosi, ‘Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union’ (2017) 23 *European Law Journal* 94.

31 See Vincent Chetail, ‘Crisis without Borders: What Does International Law Say about Border Closure in the Context of Covid-19?’ (2020) 2 *Frontiers in Political Science* 1.

32 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders [2016] OJ L77/1 (Schengen Borders Code) art 2(10), (11) (definitions of ‘border control’ and ‘border checks’, respectively).

33 Philippe De Bruycker, ‘The COVID Virus Crisis Resurrects the Public Health Exception in EU Migration Law’ (2021) 2 *Frontiers in Political Science* 1. Pursuant to art 291 of the TFEU (n 29), ‘Member States shall adopt all measures of national law necessary to implement legally binding Union acts’.

34 See Anuscheh Farahat and Nora Markard, ‘Closed Ports, Dubious Partners: The European Policy of Outsourcing Responsibility’ (Study Update, Heinrich Böll Stiftung European Union 2020) <<https://eu.boell.org/en/2020/05/25/closed-ports-dubious-partners>> accessed 10 August 2022.

35 Inter-Ministerial Decree No 150 of 7 April 2020 (Italy) <<http://www.immigrazione.biz/legge.php?id=1005>> accessed 19 January 2022.

36 International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97 (SAR Convention).

most relevant international documents, including the SAR Convention and the International Convention for the Safety of Life at Sea (SOLAS Convention),³⁷ does not expressly define the concept of a ‘place of safety’. The International Maritime Organization’s Guidelines on the Treatment of Persons Rescued at Sea (IMO Guidelines),³⁸ accompanying the amendments of 2004 to these two conventions,³⁹ provide more clarity as they define ‘place of safety’ as a ‘place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met.’⁴⁰

The Italian decree, which in effect determined a closure of Italian ports, was justified by the alleged presumption that the disembarkation of migrants could endanger the effectiveness of the measures adopted to manage the COVID-19 pandemic. What is more, the rationale behind such a measure would be the risk of being unable to ensure for persons rescued at sea the absence of threat to their lives, the fulfilment of their primary needs, and access to fundamental services.

The Maltese government echoed the Italian decree with an analogous measure entailing the closure of its ports based on a similar rationale, namely that ‘it is presently not possible to ensure the availability of a safe place on the Maltese territory, without compromising the efficiency/functionality of the national health, logistic and safety structures, which are dedicated to limiting the spread of the contagious disease, as well as to provide assistance and care to COVID-19 patients’⁴¹

The question therefore arises whether extraordinary circumstances, such as serious health emergencies that can have major impacts on a national health system, may constitute a ground for legitimate derogation from international obligations, such as those arising from the principle of *non-refoulement*. It is worth stressing that this principle also entails the prohibition of the rejection of entry⁴² or non-admission at the border,⁴³ including at sea.⁴⁴ This follows from a literal interpretation of article 33(1) of the Refugee Convention, which refers to expulsion or return (*refoulement*) ‘in any manner whatsoever’. Asylum seekers are, therefore, also protected from *refoulement* when they are located on a ship in distress close to the State’s territorial sea and they manifest the intention to ask for international protection. This was confirmed by the United Nations Human Rights Committee in a decision on 27 January 2021, stressing that Italy had failed to respond promptly to various distress calls from a boat (carrying more than 400 migrants) that was sinking in international waters.⁴⁵

The principle of *non-refoulement* does not allow any derogation, not even in times of a public health emergency. State measures aimed at preventing the arrival of asylum seekers cannot be justified, not even on the ground that the State does not fulfil the requirements to be considered

37 International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS Convention).

38 Maritime Safety Committee, International Maritime Organization (IMO), ‘Guidelines on the Treatment of Persons Rescued at Sea’, IMO doc MSC 78/26/Add.2 (20 May 2004) (IMO Guidelines) paras 6.12–6.15.

39 See Maritime Safety Committee, IMO, ‘Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, as Amended’, IMO doc MSC 78/26/Add.1 (20 May 2004); Maritime Safety Committee, IMO, ‘Amendments to the International Convention for the Safety of Lives at Sea, 1974, as Amended’, IMO doc MSC 78/26/Add.1 (20 May 2004).

40 See Martin Ratcovich, ‘The Concept of “Place of Safety”: Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?’ (2015) 33 Australian Yearbook of International Law 81.

41 ‘Malta Shuts Its Ports to Asylum Seekers, Citing COVID-19 Pandemic’ *Times of Malta* (9 April 2020) <<https://timesofmalta.com/articles/view/malta-says-it-cannot-guarantee-migrant-rescues.784571>> accessed 19 January 2022.

42 Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 274ff.

43 UNHCR, ‘Advisory Opinion’ (n 26) para 7.

44 *ibid* para 24.

45 UN Human Rights Committee, *AS, DI, OI and GD v Italy*, UN doc CCPR/C/130/D/3042/2017 (4 November 2020).

a place of safety for asylum seekers.⁴⁶ Apart from being unlawful, this practice is also highly questionable for three main reasons. First, it is extremely doubtful that the disembarkation of migrants or their admission to the territory, especially where it is not a large-scale influx, can significantly worsen the functionality of the health system. Secondly, denying disembarkation or entry to the territory could worsen the precarious conditions of migrants, thereby forcing them to stay either in overstretched camps at international borders or in a protracted situation of distress at sea. The illegality of the latter situation was affirmed by the Italian Supreme Court of Cassation in the *Rackete* case.⁴⁷ In that case, Carola Rackete, a former *Sea-Watch 3* captain, was arrested after allegedly hitting a finance police vessel as she defied a ban in order to disembark 40 migrants on the island of Lampedusa, saying she was afraid some might commit suicide after being at sea for 17 days, following a rescue off Libya. On that occasion, the court also clarified that the notion of 'safe place' cannot be limited to the physical protection of people, but necessarily includes respect for their fundamental rights.⁴⁸

Thirdly, the Refugee Convention, unlike other human rights treaties, does not contain any derogation clause for times of national emergencies. Even conceding that a health emergency can create risks for the lives of migrants, it is all the more essential to take action to protect their fundamental rights, including the right to health, rather than simply denying them access to the State territory.

2.2 Detention and rejection at the borders

Another controversial practice has been documented at the borders between Hungary and Serbia. Following the declaration of a state of emergency, the right to apply for asylum was suspended in Hungary.⁴⁹ However, according to pre-existing Hungarian legislation, known as the 'Stop Soros Law', applications for international protection made by persons who arrived in Hungary after having passed through a 'safe transit country', which purportedly includes Serbia,⁵⁰ were to be rejected without an examination of the merits of their applications.⁵¹

In order to implement this law, Hungary kept asylum seekers in the Röske transit zone, insisting that asylum seekers must be readmitted to Serbia. In this connection, after its 2017 visit to the Tompa and Röske transit zones, the Council of Europe's Anti-Torture Committee (CPT) published a 2018 report confirming that 'the overall design of the transit zones is far too carceral', resulting in an environment that is not suitable to accommodate asylum seekers,

46 Eugenio Cusumano and Kristof Gombeer, 'In Deep Waters: The Legal, Humanitarian and Political Implications of Closing Italian Ports to Migrant Rescuers' (2020) 25 *Mediterranean Politics* 245. Cusumano and Gombeer argue that '[a]lthough closing ports is not necessarily unlawful under maritime, human rights and European law, this policy entails severe humanitarian externalities': 245. These can result in violations of international legal obligations.

47 Supreme Court of Cassation (Criminal Section III), Case No 6626 (20 February 2020).

48 *ibid* para 9.

49 Marton Dunai and Krisztina Than, 'Hungary's PM Wins Emergency Powers to Fight Coronavirus' (*Reuters*, 30 March 2020) <<https://www.reuters.com/article/us-health-coronavirus-hungary-law/hungarys-pm-wins-emergency-powers-to-fight-coronavirus-idUSKBN21H21T>> accessed 10 August 2022.

50 It is worth noting that the Constitutional Court of Croatia concluded that there is no clear evidence to establish with sufficient certainty that Serbia is a safe third country: see Constitutional Court of Croatia, Decision No U-III-4865/2018 (4 March 2021).

51 Act LXXX of 2007 on Asylum (Hungary) (Asylum Act); Government Decree No 301/2007 (XI 9) on the Implementation of Act LXXX of 2007 on Asylum (Hungary) (Asylum Government Decree); Government Decree No 191/2015 (VII 21) on the National List of Safe Countries of Origin and Safe Third Countries (Hungary) (Safe Country Government Decree). These amendments are summarized in Hungarian Helsinki Committee, 'Building a Legal Fence: Changes to Hungarian Asylum Law Jeopardise Access to Protection in Hungary' (Information Note, 7 August 2015) <<https://helsinki.hu/wp-content/uploads/HHC-HU-asylum-law-amendment-2015-August-info-note.pdf>> accessed 9 August 2022. For references, see Boldizsár Nagy, 'From Reluctance to Total Denial: Asylum Policy in Hungary 2015–2018' in Vladislava Stoyanova and Eleni Karageorgiou (eds), *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis* (Brill 2019).

especially families and children.⁵² This has been confirmed by the Court of Justice of the European Union (CJEU). Following the Opinion of Advocate General Pikamäe in its ruling in *FMS*,⁵³ the CJEU highlighted that holding asylum seekers in a camp on the border with Serbia qualifies as unlawful detention, because the applicants were unable to leave lawfully without exposure to penalties or the potential loss of the chance to obtain refugee status.⁵⁴ From this perspective, the judgment is particularly significant in that the CJEU assumed a divergent position from its Strasbourg counterpart. In fact, in a similar case, *Ilias and Ahmed v Hungary*, while finding a violation of article 3 of the ECHR, the European Court of Human Rights (ECtHR) did not conclude that the situation in the Röszke transit zone constituted a violation of the right to liberty and security under article 5 of the ECHR.⁵⁵

Despite the fact that, following the CJEU's ruling, the Hungarian authorities moved 300 people to semi-open facilities and declared that the transit zones would be abolished,⁵⁶ Hungary does not seem to have changed its migration policy, especially in view of the health emergency. In fact, on 17 June 2020, a new regulatory system was adopted by Act LVIII of 2020 (Hungary) on the transitional rules and epidemiological preparedness related to the cessation of the state of danger.⁵⁷ Under this new system, asylum applications can only be lodged at Hungarian embassies located in non-EU Member States having borders with Hungary, and – in the case of irregular border crossings – the police will direct migrants to such embassies if they express the intention to apply for asylum.⁵⁸ At a political level, this new law was backed up by strong statements from Prime Minister Viktor Orbán, who declared that the arrival of illegal migrants in Hungary during the coronavirus pandemic is a sort of biological threat.⁵⁹

Such a practice is highly controversial as it creates the prospect of a blatant risk of violation of the principle of *non-refoulement*. As UNHCR has stated: 'States have the legitimate right to control their borders, in a manner which is consistent with their obligations under international law, including the principle of *non-refoulement* and respect for the right to seek and enjoy asylum.'⁶⁰ Apart from being ignominious conduct, targeting migrants as a biological threat to the State collides with human rights obligations that require compliance and respect,

52 Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Council of Europe, *Report to the Hungarian Government on the Visit to Hungary Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 26 October 2017* (CPT/Inf (2018) 42, 18 September 2018) <<https://www.coe.int/en/web/cpt/-/hungary-anti-torture-committee-observed-decent-conditions-in-transit-zones-but-criticises-treatment-of-irregular-migrants-when-pushed-back-to-serbia>> accessed 10 August 2022.

53 Joined Cases C-924/19 PPU and C-925/19 PPU *FMS v National Directorate General of Immigration Law Southern Great Plains Regional Directorate* ECLI:EU:C:2020:294.

54 Joined Cases C-924/19 PPU and C-925/19 PPU *FMS v National Directorate General of Immigration Law Southern Great Plains Regional Directorate* ECLI:EU:C:2020:367, paras 280ff. For a commentary, see Boldizsár Nagy, 'A – Pyrrhic? – Victory Concerning Detention in Transit Zones and Procedural Rights: FMS and FMZ and the Legislation Adopted by Hungary in Its Wake' (*EU Immigration and Asylum Law and Policy*, 15 June 2020) <<https://eumigrationlawblog.eu/a-pyrrhic-victory-concerning-detention-in-transit-zones-and-procedural-rights-fms-fmz-and-the-legislation-adopted-by-hungary-in-its-wake/>> accessed 10 August 2022.

55 *Ilias and Ahmed v Hungary* App No 47287/15 (ECtHR, 21 November 2019).

56 Zoltán Kovács, 'Gergely Gulyás on the European Court of Justice's New Ruling on Immigration: It's Dangerous for All of Europe' (*About Hungary*, 21 May 2020) <<http://abouthungary.hu/blog/gergely-gulyas-on-the-european-court-of-justices-new-ruling-on-immigration-its-dangerous-for-all-of-europe/>> accessed 10 August 2022.

57 See National Gazette No 144 (17 June 2020) 3653 <<https://magyarokozlony.hu/dokumentumok/b18d1fb3c742aa2bd183b15a32fe4425e603f2c2/megtekintes>> accessed 19 January 2022. See also the implementing decrees: Government Decree No 292/2020 (VI 17) on the Designation of Embassies in Connection with the Statement of Intent to Lodge an Application for Asylum; Minister of Interior Decree No 16/2020 (VI 17) on the Procedure related to the Statement of Intent to Lodge an Application for Asylum.

58 See Act LVIII of 2020 (Hungary) s 21(2), which provides that: 'The police shall direct the foreigner who had crossed the state border of Hungary in an illegal manner to the Hungarian Embassy located in the neighbouring country from which they had crossed the border, if he/she indicated the intent to submit an asylum application before the police.'

59 See 'Orbán: All Illegal Migrants Pose Health and "Biological" Risks, to be Averted "at All Cost"' (*Hungary Today*, 7 August 2020) <<https://hungarytoday.hu/orban-migrants-health-risk/>> accessed 10 August 2022.

60 UNHCR, 'UNHCR Position on Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger' (June 2020) <<https://www.refworld.org/docid/5ef5c0614.html>> accessed 10 August 2022.

regardless of the difficulties States may experience. In its recent case law, the ECtHR has also made clear that ‘the problems which States may encounter in managing migratory flows or in the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto.’⁶¹ This practice also includes measures resulting in rejection at the borders of applicants for international protection who are not in possession of a medical certificate, as was required, for example, by a decree of the Austrian Ministry for the Interior.⁶²

By virtue of the principle of *non-refoulement*, States must ensure admission of asylum seekers to their territory, at least on a temporary basis, in order to determine their status and protection needs, and to seek international support for the sharing of this responsibility.

2.3 Pushback operations

The health emergency has also seen a recrudescence of pushback operations. These are a set of unlawful State measures by which migrants are forced back over a border, generally immediately after crossing, without consideration of their individual circumstances, and without any possibility of applying for asylum or appealing against deportation measures. These operations are contrary to, *inter alia*, the prohibition of collective expulsions enshrined in article 4 of Protocol 4 to the ECHR⁶³ and article 19 of the EU Charter. Recently, the practice has attracted more attention, as a consequence of the ruling of the ECtHR in *ND and NT v Spain*,⁶⁴ and the problematic developments at the Greek border with Turkey in Evros, with the consequent suspension of the submission of asylum applications for at least one month, extended for an additional month, owing to the health emergency.⁶⁵

The COVID-19 crisis has contributed to fuelling pushback operations across the EU. The pandemic, in fact, provided a justification for Greece to continue to engage in practices that included deportations from several Greek islands.⁶⁶ It was also reported that, for the first time, Cypriot authorities pushed back a boat carrying 115 Syrians, 69 of whom were children, using the COVID-19 disease as justification for the measure.⁶⁷ Croatia adopted a similar approach. As the entry point to the EU from the Western Balkans route, it has experienced an increased number of border crossing attempts that have often resulted in violent pushbacks of migrants, including unaccompanied children, at the borders with Serbia and Bosnia.⁶⁸

61 *ND and NT v Spain* App Nos 8675/15 and 8697/15 (ECtHR, 13 February 2020) paras 169–70.

62 ECRE, ‘COVID-19 Measures related to Asylum and Migration across Europe’ (Information Sheet, 23 April 2020) <<https://www.ecre.org/information-sheet-23-april-2020-covid-19-measures-related-to-asylum-and-migration-across-europe/>> accessed 10 August 2022.

63 Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than Those Already Included in the Convention and in the First Protocol Thereto (adopted 16 September 1963, entered into force 2 May 1968) ETS No 46 (Protocol 4) art 4.

64 *ND and NT* (n 61). See the analysis by Daniel Thym, ‘A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR’s *ND and NT* Judgment on “Hot Expulsions”’ (*EU Immigration and Asylum Law and Policy*, 17 February 2020) <<https://eumigrationlawblog.eu/a-restrictionist-revolution-a-counter-intuitive-reading-of-the-ecthrs-n-d-n-t-judgment-on-hot-expulsions/>> accessed 10 August 2022.

65 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/>> accessed 10 August 2022. For an English version of the Greek decree, see ‘Act of Legislative Content: Suspension of the Submission of Asylum Applications’ <<https://docs.google.com/document/d/1yA782Vi56KInhs2yVehXgkMYQeCieaPqScoWNHqh6xs/edit>> accessed 10 August 2022.

66 See ‘Monthly Reports’ (*Aegean Boat Report*) <<https://aegeanboatreport.com/monthly-reports/>> accessed 10 August 2022. For further references, see Evangelia (Lilian) Tsourdi and Niovi Vavoula, ‘Killing Me Softly? Scrutinising the Role of Soft Law in Greece’s Response to COVID-19’ (2021) 12 *European Journal of Risk Regulation* 59.

67 See Hungarian Helsinki Committee, ‘Country Report: Access to the Territory and Push Backs’ (*Asylum Information Database*, 25 April 2022) <<http://www.asylumineurope.org/reports/country/cyprus/access-territory-and-push-backs>> accessed 10 August 2022.

68 Border Violence Monitoring Network, ‘Special Report: COVID-19 and Border Violence along the Balkan Route’ (12 May 2020) <<https://www.borderviolence.eu/special-report-covid-19-and-border-violence-along-the-balkan-route/>> accessed 10 August 2022. For a general overview of the legal framework on asylum in Croatia, see Iris Goldner Lang, ‘Croatia and EU Asylum Law: Playing on the Sidelines or at the Centre of Events?’ in Stoyanova and Karageorgiou (eds) (n 51).

As has been argued, '[t]he implementation of such practices is nothing new in the field of migration management'.⁶⁹ However, the ongoing pandemic can dangerously legitimize measures that, in light of the situation of emergency, contradict the tenor of international obligations, exposing vulnerable people, such as asylum seekers, to further risks of deprivation and human rights abuses. In its legal consideration of the European Commission guidelines, UNHCR stressed that alternative solutions to denial of entry must be considered, such as isolation or quarantine, to 'enable authorities to manage the arrival of asylum-seekers in a safe and orderly manner, while respecting the right to asylum and the principle of *non-refoulement*'.⁷⁰ This recommendation is also in line with the provisions of EU asylum law: article 13 of the Reception Directive establishes that 'Member States may require medical screening for applicants on public health grounds'.⁷¹ This can be regarded as a specific measure compatible with the need of Member States to respond to the COVID-19 emergency. Nonetheless, in no way does it allow derogation from the obligations established in article 17(2) of the same directive, requiring Member States to 'ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health'.

The following part examines whether the CEAS legal framework is equipped to respond to the stresses caused by health emergencies and what normative adjustments, in light of the New Pact on Migration and Asylum,⁷² can be made.

3. HEALTH EMERGENCIES AND THE FUNCTIONING OF THE COMMON EUROPEAN ASYLUM SYSTEM

Entering the EU during a situation of health emergency has proved difficult, but lodging an asylum application and going through the asylum procedures has also created obstacles for those migrants already in the EU. The adoption by Member States of emergency measures calling for social distancing has slowed, if not entirely paralysed, the procedures for the determination of refugee status. As well as suspending new registrations, some Member States have put various asylum procedures, ranging from interviews to decisions, on hold.⁷³

Although such a situation can, in principle, be justified as compatible with the rationale of the lockdown measures adopted to manage COVID-19, it goes against the CEAS legal toolbox as it can negatively impact the situation of asylum seekers, whose status is likely to remain unsettled for even longer.⁷⁴ It is, therefore, even more urgent to test the capacity of the CEAS to respond to situations of health emergency.

Acknowledging the direct consequences of this situation of emergency for the ways in which EU asylum and return rules are implemented by Member States, the Commission published, on 16 March 2020, guidelines on the implementation of relevant EU provisions in the area

69 Marika Carlucci, 'Europe, Migration and Covid-19: Turning Point or Consolidation of the Status Quo?' (Discussion Paper) (*International Development Research Network*, 2020) 4 <<https://idrn.eu/wp-content/uploads/2022/04/Europe-Migration-and-Covid-19.pdf>> accessed 9 August 2022.

70 UNHCR, 'Legal Considerations with regard to the EU Commission's Guidelines for Border Management Measures to Protect Health and Ensure the Availability of Goods and Essential Services' (18 March 2020) 2 <<https://www.refworld.org/docid/5e7882484.html>> accessed 19 January 2022.

71 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96 (Reception Directive).

72 New Pact on Migration and Asylum (n 6).

73 ECRE, 'COVID-19 Measures related to Asylum and Migration across Europe' (Information Sheet, 28 May 2020) <<https://www.ecre.org/information-sheet-28-may-2020-covid-19-measures-related-to-asylum-and-migration-across-europe/>> accessed 10 August 2022. Belgium and France, for example, suspended registration activities, even if for a limited time.

74 For general information about the length of asylum procedures across the EU, see AIDA, 'The Length of Asylum Procedures in Europe' (October 2016) <<https://www.ecre.org/wp-content/uploads/2016/10/AIDA-Brief-DurationProcedures.pdf>> accessed 9 August 2022.

of asylum and return procedures and on resettlement.⁷⁵ As to asylum, the guidelines address different aspects of refugee status determination. They are predicated on the assumption that the continuity of procedures must be ensured as far as possible, while at the same time fully safeguarding the protection of people's health and fundamental rights. While these guidelines are mostly in line with UNHCR recommendations,⁷⁶ it is crucial to clarify whether the Commission's guidelines can provide a litmus test to determine whether the CEAS is able to respond to health emergencies. Overall, far from derogating from the existing legislation in force, the guidelines – which are a soft law instrument and therefore non-binding on Member States – recommend the effective implementation of the existing provisions of the CEAS toolbox that are specifically relevant in particular circumstances, such as the large-scale influx of third-country nationals and also health emergencies.

These provisions essentially concern asylum procedures, Dublin transfers, and reception conditions. The impact of the health emergency on 'hotspots', especially in Greece, remains a matter of concern.⁷⁷ These issues are dealt with in greater detail in the following sections, in an attempt to flag State practice that departs from obligations prescribed under EU law.

3.1 Asylum procedures in emergency situations

As regards asylum procedures, the European Commission's guidelines allow the application of the derogation provisions enshrined in the existing legislation, recommending the application of articles 6(5) and 31(3)(b) of the Asylum Procedures Directive.⁷⁸ Respectively, these permit possible extensions of the timeframe for registration and examination of asylum applications.⁷⁹ They are provisions specifically designed for situations of emergency, most notably identified with mass arrivals of asylum seekers that can create difficulties in the normal functioning of national asylum systems. However, as the Commission's guidelines imply, nothing prevents such provisions from also being applied by analogy to other situations of emergency, like the pandemic, as this also has an impact on the normal functioning of State asylum systems.

Accordingly, the suspension of the registration of asylum applications, adopted at the beginning of the emergency by countries such as Belgium, France, and Greece,⁸⁰ cannot be justified. The existing EU legal framework for asylum interviews also allows some flexibility. As reported by the European Asylum Support Office (EASO), at least 17 countries 'discontinued personal interviews during the emergency measures', with some countries, such as Finland, Ireland, and Sweden, temporarily cancelling interviews with asylum seekers, while the vast majority of countries introduced adjustments, including videoconferencing.⁸¹ These arrangements naturally must be set up with due regard to data protection.

75 European Commission, 'COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement' (Communication) C(2020) 2516 final.

76 UNHCR, 'Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic' (9 April 2020) <<https://www.refworld.org/docid/Sede06a94.html>> accessed 19 January 2022.

77 See Regulation 1896/2019 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (Frontex) [2019] OJ L295/1. Pursuant to art 2(23), a 'hotspot' is defined as 'an area created at the request of the host Member State in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders'. For references, see Federico Casolari, 'The EU's Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?' (2015) 25 *Italian Yearbook of International Law* 109.

78 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60 (Procedures Directive).

79 In particular, registration can be extended to 10 working days when it is not possible for national authorities to respect the three-day or six-day time limit for registration as a result of the COVID-19 situation. Art 31(3)(b) allows Member States to extend the six-month period for concluding the examination of applications by a period not exceeding a further nine months.

80 See ECRE, 'COVID-19 Measures related to Asylum and Migration across Europe' (n 73).

81 EASO, 'COVID-19 Emergency Measures in Asylum and Reception Systems' (2 June 2020) 9ff <<https://www.easo.europa.eu/sites/default/files/covid19-emergency-measures-asylum-reception-systems.pdf>> accessed 19 January 2022.

Nonetheless, it is worth stressing that, according to article 14(2)(b) of the Procedures Directive, the interview can even be omitted, when ‘the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control’. This can certainly include health issues, as the provision provides for the determining authority to ‘consult a medical professional to establish whether the condition that makes the applicant unfit or unable to be interviewed is of a temporary or enduring nature’. The risk of being positive to COVID-19, therefore, can be a valid circumstance for omission of the interview. However, in light of article 14(4), it is crucial to stress that the absence of a personal interview must not adversely affect the decision of the determining authority. In addition, according to article 14(2)(a), the interview can be omitted when ‘the determining authority is able to take a positive decision with regard to refugee status on the basis of evidence available’.

A dynamic interpretation of the Procedures Directive confirms that, in a situation of emergency, the *effet utile* of the EU legal provisions must be preserved. Apart from applying possible derogations in the timeframe, in a situation of emergency the legal provisions must be adapted to changing needs in order to achieve the intent of the legislation.⁸² This would therefore require the adoption of a positive decision for those applications whose documentary evidence shows that objective circumstances indicate that the applicants are at risk in their country of origin. Accordingly, interviews can only be carried out where they are considered indispensable and in order to further substantiate a particular application.

3.2 Suspension of Dublin transfers

Another area of EU asylum law that has been influenced by the pandemic is the Dublin system that determines the State responsible for an asylum application lodged in the Schengen area.⁸³ This system entails the transfer of asylum applicants to the EU Member State that, according to the hierarchy of criteria set out in chapter III of the Dublin III Regulation,⁸⁴ is to be considered responsible. The mechanism has been strongly criticized for the lack of solidarity it reveals between EU Member States and for exposing front-line States, such as Greece and Italy, to the responsibility for dealing with most of the asylum applications lodged in the EU.⁸⁵

The health emergency delivered an additional blow to the malfunctioning system. Despite stressing the importance of cooperation for the smooth functioning of the Dublin system, based on the objective difficulties of performing Dublin transfers during the health emergency, the European Commission took a pragmatic approach and provided for the temporary suspension of Dublin transfers.⁸⁶ This recommendation was driven by the approach taken by some Member States, such as Germany and Italy, that, since February 2020, had suspended all Dublin flights.⁸⁷ In practice, due to air traffic restrictions, only a few transfers were implemented.⁸⁸ The resumption of transfers was of crucial relevance because, as emphasized by the European Commission’s guidance, ‘where a transfer to the responsible Member State is not carried out within the

82 In this sense, see Case C-218/85 *Association Comité Économique Agricole Régional Fruits et Légumes de Bretagne v Le Champion* [1986] ECR 3513.

83 Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31 (Dublin III Regulation).

84 *ibid.*

85 See in this regard Francesco Maiani, ‘The Reform of the Dublin System and the Dystopia of “Sharing People”’ (2017) 24 *Maastricht Journal of European and Comparative Law* 622.

86 C(2020) 2516 final (n 75) 7.

87 EASO, ‘COVID-19 Emergency Measures’ (n 81) 13. Italy was the first Member State to officially announce the suspension of Dublin transfers in a circular letter of 25 February 2020.

88 EMN, ‘Special Annex to the 30th EMN Bulletin, EU Member States and Norway: Responses to COVID-19 in the Migration and Asylum Area January–March 2020’ (March 2020) <<https://emnbelgium.be/sites/default/files/publications/30th%20EMN%20Bulletin%20annex%20COVID-19.pdf>> accessed 10 August 2022.

applicable time limit, responsibility shifts to the Member State that requested the transfer pursuant to article 29(2) of the Dublin III Regulation.⁸⁹

In this connection, no derogation rule is enshrined in the Dublin III Regulation, with the consequence that, since the transfer to the responsible State could not be executed, the responsibility shifted to the Member State where the applicant was staying.⁹⁰ However, a decision of the Dutch Council of State made it clear that ‘the fact that the transfer cannot be performed at this time is a temporary, factual impediment.’⁹¹ Accordingly, the Council of State confirmed that Member States can proceed with the determination of the State responsible and that the temporary suspension of the transfer does not automatically entail the responsibility shift. However, in a later ruling, the Court of The Hague refrained from reiterating the conclusions of the Dutch Council of State, specifying that, even though the COVID-19 pandemic had rendered transfers impossible, it would not make a provisional injunction to ensure the execution of a transfer, as this would be in contravention of the Dublin III Regulation and the European Commission guidance.⁹² This ruling thus confirmed that, at least in the view of the Court of The Hague, the Dublin III Regulation does not allow extensions of the transfer deadline in health emergencies.

Similarly, a German Administrative Court confirmed that the health emergency is not a sufficient condition to derogate from the general time limits set out in article 29(2) of the Regulation and that, therefore, if a transfer is not carried out within these time limits, responsibility shifts to the Member State that requested the transfer.⁹³ Nonetheless, it is worth noting that the court’s reasoning was significantly open to the possibility of derogation from the set time limits in order to preserve the applicant’s protection interest. This could have been in the case of an entry ban in the responsible Member State or the health situation therein. Interestingly, in a case concerning the transfer to Spain of a family with children, while following a similar *ratio decidendi* based on the need to protect the applicants’ rights, the Regional Court of Brno in the Czech Republic stressed the need to apply the discretionary clause in article 17 of the Dublin III Regulation for humanitarian and solidarity reasons during the COVID-19 pandemic.⁹⁴ Pursuant to such a provision, a Member State would be competent on humanitarian grounds to examine an application for international protection lodged with it, even if such examination is not its responsibility.⁹⁵ In fact, the approach followed by the Regional Court of Brno underscores that while – as emphasized by other courts – the health emergency is not a sufficient condition to derogate from the responsibility criteria established by the Dublin III Regulation, it constitutes a context in which Member States may consider the application of the discretion clause.

This interpretation is particularly significant since it suggests that it is imperative, in a situation of emergency, that State authorities carefully consider the risks linked to the transfer of asylum seekers to the responsible Member States. According to the major tenets of the ruling of the CJEU in *NS* and *ME*,⁹⁶ confirming the earlier Dublin jurisprudence of the ECtHR, the carrying out of transfers to States that experience systematic deficiencies in the national asylum system has to be suspended in order not to expose the applicants to risks of violations

89 C(2020) 2516 final (n 75) 8.

90 *ibid.* The Commission highlighted that this situation impacted more than 1,000 cases between 25 February and 17 April 2020, affecting at least six Member States.

91 Dutch Council of State (*Raad van Staat*) Decision No 202001915/1/V1 (8 April 2020).

92 Court of The Hague (*Rechtbank Den Haag*) Decision No 20.6494 (21 April 2020). See also Court of The Hague, Decision No 20.7482 (29 May 2020).

93 Administrative Court of Greifswald, Decision No 3 A 1865/19 HGW (28 August 2020).

94 Regional Court of Brno, Case No 41 Az 21/2020-83 (21 September 2020) <http://www.nssoud.cz/files/EVIDENCNI_LIST/2020/002141Az_2000083_20210203104556_prevedeno.pdf> accessed 10 August 2022.

95 Dublin III Regulation (n 83) art 17. For an analysis, see Silvia Morgades-Gil, ‘The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses after the Interpretations of the ECtHR and the CJEU?’ (2015) 27 *International Journal of Refugee Law* 433.

96 Joined Cases C-411/10 and C-493/10 *NS v Secretary of the State for the Home Department* and *ME v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* ECLI:EU:C:2011:865.

of fundamental rights.⁹⁷ Member States should therefore consider the impact inflicted by the COVID-19 crisis on the asylum system and procedures of the requested responsible State before executing a transfer.

More recently, the CJEU pointed out that the EU legislation did not consider that the material impossibility of executing the transfer decision was a justification for the interruption or suspension of the transfer period. On the contrary, it concluded that the transfer period provided in the Dublin III Regulation is not interrupted when the competent authorities of a Member State adopt a revocable decision to suspend the execution of a transfer decision, on the grounds that such execution is materially impossible due to the COVID-19 pandemic.⁹⁸

3.3 Reception conditions and ‘hotspots’

The situation of a health emergency involving a highly contagious disease has a direct impact on the reception conditions of asylum seekers. Many reception centres are not adequately equipped to allow reception and accommodation in such circumstances,⁹⁹ in which medical screening is of paramount importance.

Specific provisions of the Reception Directive, such as article 13, provide for Member States to adopt measures for medical screening of applicants on public health grounds. This possibility is also supported by UNHCR,¹⁰⁰ provided that the measures respect fundamental rights and the principles of proportionality, necessity, and non-discrimination. However, as highlighted above in section 2.2, the admission of an asylum seeker to any territory cannot be made conditional on the possession of a medical certificate, because alternative precautionary measures can be adopted at the port of entry to ensure appropriate medical screening.

Other measures, including quarantine and isolation, have been used by many countries,¹⁰¹ with some Member States creating special emergency accommodation. This was the case in the Netherlands where, after registration, asylum seekers were housed in a temporary emergency shelter in Zoutkamp instead of being admitted to the reception facilities of the Central Agency for the Reception of Asylum Seekers. A similar approach was pursued by Belgium, the Czech Republic, Denmark, France, Germany, Greece, and Ireland, while self-isolation areas were created in existing structures in Austria, Cyprus, France, and Ireland.¹⁰² Regrettably, however, it must be noted that the recent Italian practice of deporting and quarantining in specific ships those asylum seekers who had already been admitted to the territory, and had tested positive for COVID-19, has raised serious legal concerns.¹⁰³ This practice, which has been systematically implemented since the outbreak of the pandemic, constitutes discriminatory treatment that unlawfully differentiates on the ground of nationality and results in an undue limitation on the right to liberty and freedom of movement protected by Italian and European norms.¹⁰⁴

It must be stressed that the EU legal framework applying to the reception conditions of asylum seekers establishes a legal obligation upon Member States to ensure access to housing,

97 See *MSS* (n 12). See also *Tarakhel v Switzerland* App No 29217/12 (ECtHR, 4 November 2014) for the particular risks concerning the transfer of especially vulnerable groups of migrants, such as families with minors.

98 Joined Cases C-245/21 and C-248/21 *Federal Republic of Germany v MA, PB, LE* ECLI EU:C:2022:709.

99 Karolína Babická, ‘The COVID-19 Measures Impact on the Rights of Migrants and Refugees in the EU’ (*Opinio Juris*, 29 June 2020) <<http://opiniojuris.org/2020/06/29/the-covid-19-measures-impact-on-the-rights-of-migrants-and-refugees-in-the-eu-access-to-the-right-to-seek-asylum-and-reception-and-living-conditions/>> accessed 10 August 2022.

100 UNHCR, ‘Legal Considerations with regard to the EU Commission’s Guidelines’ (n 70) 2.

101 EASO, ‘COVID-19 Emergency Measures’ (n 81) 16.

102 *ibid* 17.

103 Associazione per gli Studi Giuridici sull’Immigrazione, ‘Illegali e Discriminatori i Trasferimenti Coercitivi sulle “Navi Quarantena” [Illegal and Discriminatory Coercive Transfers on ‘Quarantine Ships’]’ (9 October 2020) <<https://www.asgi.it/notizie/stranieri-navi-quarantena-illegali-trasferimenti/>> accessed 10 August 2022.

104 *ibid*. See also ‘Diritti in Rotta: L’Esperimento delle Navi Quarantena e i Principali Profili di Criticità’ [Rights en Route: The Quarantine Ships Experiment and the Main Critical Issues] (*Associazione per gli Studi Giuridici sull’Immigrazione*, 7 April 2021) <<https://www.asgi.it/allontamento-espulsione/navi-quarantena-esperimento/>> accessed 10 August 2022.

food, health care, and employment, as well as medical and psychological care.¹⁰⁵ This requires that, even in situations of emergency, asylum seekers' rights to health – and especially to emergency health care – must be preserved. This is an essential guarantee because the COVID-19 crisis can, in fact, further compromise the vulnerability of asylum seekers, particularly those who are in conditions of detention. In international human rights law, the right to the 'highest attainable standard of physical and mental health' is a right of everyone, irrespective of nationality or immigration status.¹⁰⁶ Article 19 of the Reception Directive requires that applicants receive the necessary health care, which must include, at the very least, emergency care and essential treatment of illnesses and serious mental disorders. Member States should take all necessary measures to ensure that such health care includes, where necessary, treatment for COVID-19.

In particular contexts, such as the refugee camps ('hotspots') on the Greek islands, effective implementation of the highest attainable standard of physical and mental health would, in practice, require immediate evacuation. Because of the unhygienic conditions and the overcrowding, these hotspots, located on Lesbos, Chios, Kos, Samos, and Leros, posed a real threat to public health.¹⁰⁷ With a total capacity for 6,097 people and a population of almost 37,250 people at the end of May 2020, these refugee camps certainly constituted an ideal reservoir for the proliferation of COVID-19.¹⁰⁸ As has been emphasized, 'in case of widespread transmission, the local health structures' capacity to respond will be limited for the critically ill'; on Lesbos, for instance, there was 'one general hospital with only 6 beds ready and one ward to receive 20 persons'.¹⁰⁹

The call for immediate evacuation was even more urgently echoed by the ECtHR where, in *EI v Greece*, it ordered interim measures to ensure the immediate transfer of several people from the hotspot in Moria (Lesvos), in order to protect the applicants from the risk of inhuman or degrading treatment, incompatible with article 3 of the ECHR, and to ensure for the applicants medical treatment in accordance with the requirements of their physical and mental health.¹¹⁰ Additionally, the ECtHR required the Greek government to explain 'which measures have been taken or are planned to be put in place at the hotspots in relation to the COVID-19 risk, in particular for vulnerable people'.¹¹¹ This decision followed another set of decisions issued by the ECtHR on interim measures ordering the Greek authorities to undertake the evacuation of the applicants from the hotspots due to the health emergency.¹¹² These decisions stress that the measures taken by the Greek government to prepare the hotspots against the risk of COVID-19 were inadequate and exposed asylum seekers to the risk of serious harm.

In assessing the situation evolving in the hotspots, and the imperative need to tackle the threat of COVID-19, in April 2020, Greece had already recognized the urgent need to decongest the camp structures, in combination with safeguarding hygiene requirements. However,

105 For a thorough analysis, see Lieneke Slingenberg, *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality* (Hart Publishing 2016).

106 See International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

107 Amnesty International, 'Greece: Move Asylum Seekers, Migrants to Safety' (25 March 2020) <<https://www.amnesty.eu/news/greece-move-asylum-seekers-migrants-to-safety/>> accessed 10 August 2022. See also the commentary by Apostolos Veizis, "'Leave No One Behind" and Access to Protection in the Greek Islands in the COVID-19 Era' (2020) 58 International Migration 264.

108 UNHCR, 'Aegean Islands Weekly Snapshot: 27 April–3 May 2020' (4 May 2020) <<https://reliefweb.int/report/greece/greece-aegean-islands-weekly-snapshot-27-april-3-may-2020>> accessed 19 January 2022. For further analysis, see Evangelia (Lilian) Tsourdi, 'COVID-19, Asylum in the EU, and the Great Expectations of Solidarity' (2020) 32 International Journal of Refugee Law 374.

109 Veizis (n 107) 264.

110 *EI v Greece* App No 16080/20 (ECtHR, 16 April 2020).

111 *ibid.*

112 *cf MA v Greece* App No 15782/20 (ECtHR, 7 April 2020); *MA v Greece* App No 15192/20 (ECtHR, 26 March 2020).

only limited results can be reported as, in April 2021, the Greek hotspots still housed around 9,650 migrants.¹¹³ Instead, as emphasized, the EU organized small-scale, ad hoc relocation.¹¹⁴

Surprisingly, while highlighting that, according to article 18(9) of the Reception Directive, Member States may exceptionally set different modalities for material reception conditions ‘in duly justified cases’ and ‘for a reasonable period which shall be as short as possible,’ the Commission’s guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement did not restate the need to evacuate the Greek hotspots. The legal framework set out by the Reception Directive allows different modalities for reception conditions that may be based on the vulnerability assessment of the applicants or the lack of housing capacity that would normally be available, exactly as in the case of the Greek hotspots.

Finally, despite the difficulties for Member States in managing the reception of asylum seekers, EU law requires that a dignified standard of living be ensured from the moment a migrant applies for asylum.¹¹⁵ These standards go beyond access to health care and include other relevant rights that, regrettably, have been on hold in a few countries, owing to the health emergency. In Hungary and Poland, for instance, many asylum seekers and beneficiaries of international protection lost their jobs and therefore experienced difficulties in securing housing and paying rent. Also, the right to access education was discontinued because of the lack of the necessary digital equipment to access online lessons.¹¹⁶

Interestingly, some good practices that could be normatively facilitated at the European level – even in normal conditions – were introduced by some governments. Portugal decided that all immigrants with pending residence permit applications would receive permission for temporary residence and have access to the same rights as all other citizens, including social support. These measures also applied to asylum seekers.¹¹⁷ Further, the French government allowed the right to work as doctors to be extended to those refugees who had graduated outside Europe and had worked as a physician or pharmacist before reaching Europe, thereby contributing to the support of the French public health system.¹¹⁸

In Italy, the Civil Court of Naples granted a Pakistani applicant a residence permit on humanitarian grounds, based on security concerns resulting from the poor management of the COVID-19 pandemic in the country of origin, coupled with the scarcity of public primary care services. The decision was also motivated by the applicant’s very good level of integration in Italian society and his lack of meaningful links with his country of origin. Accordingly, the court concluded that, if returned to Pakistan, the applicant would face a serious risk to his right to health as, due to his social and economic situation, he would have limited or no access to adequate care.¹¹⁹

These examples of emergency-driven integration are a valuable step in the right direction, as they contribute to conveying the powerful message that migrants are not a burden or a biological threat, but rather an active resource for the host society.¹²⁰

113 UNHCR, ‘Aegean Islands Weekly Snapshot: 19–25 April 2021’ (27 April 2021) <<https://data2.unhcr.org/en/documents/details/86387>> accessed 19 January 2022.

114 Tsourdi (n 108).

115 Case C-179/11 *Cimade and GISTI v Minister of the Interior, Overseas Territories, Local Authorities and Immigration* ECLI:EU:C:2012:594; Case C-79/13 *Federal Agency for the Reception of Asylum Seekers v Saciri* ECLI:EU:C:2014:103.

116 ECRE, ‘COVID-19 Measures related to Asylum and Migration across Europe’ (n 73) 16.

117 Joana Gorjão Henriques, ‘Governo Regulariza Todos os Imigrantes Que Tenham Pedidos Pendentes no SEF’ [Government Regularizes All Immigrants with Pending Residence Applications with the Portuguese Immigration and Border Service] (*Público*, 28 March 2020) <<https://www.publico.pt/2020/03/28/sociedade/noticia/governo-regulariza-imigrantes-pedidos-pendentes-sef-1909791>> accessed 10 August 2022.

118 ECRE, ‘COVID-19 Measures related to Asylum and Migration across Europe’ (n 73) 16.

119 Court of Naples (*Tribunale di Napoli*), Decision No 23602/2018 (25 June 2020).

120 For further analysis, see Emanuela Pistoia, ‘Social Integration of Refugees and Asylum Seekers through the Exercise of Socio-Economic Rights in European Union Law’ (2018) 3 *European Papers* 781.

4. CONCLUSION

The COVID-19 health emergency has had a significant impact on asylum seekers and the application of the CEAS legal toolbox. Nonetheless, its relevance goes beyond the current situation, as it offers the opportunity to reflect on a twofold issue. On the one hand, the COVID-19 crisis contributes to an understanding of the limits imposed by international and European law on State measures adopted to tackle the emergency. On the other hand, it provides a timely setting in which to reflect on whether the CEAS toolbox is sufficiently equipped with the provisions to address situations of emergency.

From the first perspective, this research confirmed that States are under a legal obligation to preserve the right to asylum, as this is a corollary of the absolute prohibition of *refoulement*, which applies even in times of a health emergency. This means that State authorities are legally obliged to allow a migrant who seeks asylum to lodge an application.¹²¹ The CJEU has stressed such an obligation in two cases concerning Hungary, making it clear that access to the asylum procedure must always be guaranteed.¹²² More pragmatically, as underscored by UNHCR, if asylum seekers are rejected at the borders, they will find themselves in an uncontrolled situation of 'orbit' that is likely to contribute to the spread of the disease.¹²³

From the second perspective, two observations are made regarding the CEAS toolbox. First, the legal framework provides for derogation measures in cases of emergency and it is thus mandatory that EU Member States confine their actions to the flexibility already provided by EU law. Ad hoc State measures that depart from this framework are to be considered unlawful, as they risk undermining the uniform application of EU law. Secondly, and in view of future developments in the field of EU asylum law, the health emergency has inevitably influenced the process of reform of the CEAS. Accordingly, the emphasis on an emergency-driven approach became a compulsory element of the New Pact on Migration and Asylum.¹²⁴ This constitutes the political platform for relaunching the process of reform and strengthening the ability of the CEAS to respond to situations of emergency. In particular, the Pact includes a proposal for a legislative instrument aimed at providing temporary and extraordinary measures in situations of crisis or *force majeure*.¹²⁵ Such an instrument would provide for possible exceptions to the legislative framework on asylum procedures and solidarity mechanisms, allowing, for instance, flexibility regarding deadlines for the registration of asylum applications and the carrying out of transfers to the responsible State. Apart from this specific instrument, the ongoing health emergency has also influenced the proposal for a Screening Regulation.¹²⁶ This new instrument would formalize the existing practice already applied in the Greek hotspots¹²⁷ by establishing pre-entry screening applicable to all third-country nationals who arrive at the external border without having fulfilled the entry conditions, or after disembarkation following a search and rescue operation. In this regard, the proposal introduces a compulsory health check. As has

121 *Ilias and Ahmed* (n 55).

122 Case C-406/18 *PG v Hungarian Immigration and Asylum Office* ECLI:EU:C:2020:216, para 56; Case C-564/18 *LH v Hungarian Immigration and Asylum Office* ECLI:EU:C:2020:218.

123 UNHCR, 'Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response' (16 March 2020) <<https://www.refworld.org/docid/5e7132834.html>> accessed 19 January 2022.

124 New Pact on Migration and Asylum (n 6) s 3, 10.

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

126 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817' COM(2020) 612 final (Screening Regulation).

127 Lyra Jakulevičienė, 'Re-Decoration of Existing Practices? Proposed Screening Procedures at the EU External Borders' (*EU Immigration and Asylum Law and Policy*, 27 October 2020) <<https://eumigrationlawblog.eu/re-decoration-of-existing-practices-proposed-screening-procedures-at-the-eu-external-borders/>> accessed 10 August 2022.

been emphasized,¹²⁸ this is a new feature, even though the Schengen Borders Code already allows border guards to carry out border checks on a non-systematic basis to ensure that third-country nationals do not present a threat to the public health of a Member State.¹²⁹

In conclusion, it is essential to reiterate that situations of crisis, such as those determined by a health emergency, can certainly create difficulties in Member States as regards the application of asylum rules and refugee rights. While the CEAS toolbox provides some flexibility to adapt to a situation of emergency, it is essential to bear in mind the major risks linked to the ability of Member States to correctly implement and enforce the emergency regulatory framework of the CEAS. A few points are noted in this regard. First, public health considerations have become prominent in the design of European and national asylum policies. However, it is crucial that these considerations do not permit unlawful actions that infringe upon existing core legal obligations, such as the right to seek asylum and the prohibition of *refoulement*. On the contrary, the health emergency must be considered as an opportunity to ensure an adequate level of protection for vulnerable asylum seekers. In this regard, it must be reiterated that article 35 of the EU Charter guarantees the right of access to preventive health care and the right to benefit from medical treatment.

Secondly, the difficulties created by the impact of the health emergency on the reception facilities and the asylum systems of certain Member States, such as Greece, call for greater responsibility sharing. The system for the international protection of refugees is embedded in a general principle of solidarity that requires international cooperation in order to ensure satisfactory solutions for refugees. Such a duty of cooperation is even more compelling within a process of integration, like that of the EU, where 'solidarity is the lifeblood'.¹³⁰ The COVID-19 crisis is a valuable opportunity for concrete actions and proposals to establish a future-proof system, departing from mechanisms such as the current Dublin III Regulation that impose heavier burdens on front-line States. A fairer distribution of asylum applications across the EU, taking into account the integration potential of asylum applicants, as well as the reception conditions of Member States, must be a default option. This will ensure flexibility and resilience in the CEAS during normal times and not only in situations of emergency.

128 Marguerite Arnoux-Bellavitis, 'The Influence of COVID-19 on the European Asylum and Migration Policy: Making Health a Priority while Ensuring Respect for Fundamental Rights' (*Institute of European Democrats*, 2020) <https://www.iedonline.eu/download/geopolitics-values/26-Arnoux-Bellavitis_-_The_influence_of_covid_19_on_the_EU_asylum_and_migration_policy-FINAL.pdf> accessed 9 August 2022.

129 Schengen Borders Code (n 32) art 8.

130 Joined Cases C-715/17, C-718/17, and C-719/17 *European Commission v Poland, Hungary and Czech Republic* ECLI:EU:C:2019:917, para 253.