

The EU's response to Covid-19 between sovereignty, public health and fundamental rights: Some remarks on the functioning of the Schengen area and the Common European Asylum System

La réponse de l'UE au Covid-19 entre souveraineté, santé publique et droits fondamentaux: Quelques remarques sur le fonctionnement de l'espace Schengen et du régime d'asile européen commun

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Abstract

This paper examines the European Union's response to the Covid-19 pandemic and its impact on the common systems of asylum and migration governance while questioning the delicate balance between sovereignties, public health needs and migrants fundamental rights. If public health reasons provide a legal justification for the measures taken, the measures introduced by the EU Member States also produced various side effects. On the one hand, the multiplicity and variety of unilateral national reactions contributed to the already fragmented and flawed implementation of the Schengen and the Dublin frameworks. On the other hand, some of those measures significantly affected fundamental rights of migrants, including asylum seekers. Responding to these findings will require, in the short term, a strict control of fundamental rights by the Courts and, in the long term, a reconstruction of the common policies both on the free movement of persons and on asylum and migration.

Résumé

Cet article offre une analyse des réponses de l'Union européenne à la pandémie Covid-19 et de leurs répercussions sur la politique commune en matière d'asile et d'immigration. Telle analyse interroge l'équilibre délicat entre les souverainetés, les besoins de santé publique et les droits fondamentaux des migrants. S'il est vrai que des raisons de santé publique ont fourni une justification aux mesures prises, ces mesures ont produit divers effets secondaires. D'une part, la multiplicité et la variété des réactions unilatérales des États membres ont contribué à la mise en œuvre déjà très fragmentée des cadres juridiques de Schengen et de Dublin. D'autre part, certaines de ces mesures ont eu des répercussions importantes sur les droits fondamentaux des migrants, y compris des demandeurs d'asile. La réponse à ces constats nécessitera, à court terme, un contrôle strict des droits fondamentaux par les juridictions et, à long terme, une reconstruction des politiques communes, tant en matière de libre circulation des personnes, qu'en matière d'asile et d'immigration.

I. Mobility and the EU: The EU Response to Covid-19

Covid-19 hit the European Union (EU) at its very heart: free movement of persons, one of the four fundamental freedoms of EU law, along with those of goods, services and capital. Due to the countermeasures introduced by governments, millions of Europeans have experienced serious repercussions on what it is probably their most appreciated right.¹ Yet, restrictive measures severely affected the rights of third-country nationals. By affecting mobility in such a crucial manner, Covid-19 has not only generated a new crisis within the EU, it has also aggravated other pre-existing crises: those of the Schengen area and the Common European Asylum System (CEAS).²

The origins of such crisis can be traced back to the beginning of 2020. On 30 January 2020, the General Director of the World Health Organization (WHO) declared Covid-19 a “public health emergency of international concern.”³ Later – on 11 March 2020 – the WHO officially acknowledged the outbreak of a global pandemic.⁴ Along with China, the initial area of the Coronavirus outbreak, Europe rapidly became one of the most affected regions worldwide, in terms of both contagion rate and mortality.⁵

Confronted with the unprecedented outbreak, Member States called on the EU to draw a common response. In the conclusions of the European Council of 10 March 2020, the Heads of State and Government expressed “the need for a joint European approach and a close coordination with the European Commission.”⁶ Despite such call for EU-driven unity, however, European governments acted unilaterally. While facing the growing pace of the contagion, Member States

¹ According to the 2018 Eurobarometer, nearly two thirds of Europeans feel positive about intra-EU migration and mobility of EU citizens. This opinion about freedom of movement has been steadily growing over the years. See “Standard Eurobarometer 89. Europeans’ opinion of the priorities of the European Union,” European Commission, March 2018, notably 33. See also Jean-Yves CARLIER and Elspeth GUILD (eds), *The Future of Free Movement of Persons in the EU*, Brussels, Bruylant, 2006.

² The term “crisis” can have several meanings. It is used here in its classical meaning, which derives from the ancient Greek language. In Greek, the word *κρίση* refers to the action or ability to separate, distinguish, or decide, in particular with respect to the outcome or resolution of a war. In medicine, the word “crisis” denotes “a moment during a serious illness when there is the possibility of suddenly getting either better or worse” (Cambridge English Dictionary). It is also “a time when a difficult or important decision must be made” (Oxford English Dictionary). We use it here in this sense. In other words, a crisis is not inherently negative. The terms European “migration” crisis or “refugee” crisis refer to the period of time between 2014 and 2016 characterised by a large number of arrivals of migrants to Europe and by a difficulty for the European authorities to take the necessary decisions, resulting in increased dysfunctionality in European migration law and policy. For an appraisal of the role of law in migration governance during the so-called refugee crisis, among others, see Jean-Yves CARLIER, François CRÉPEAU and Anna PURKEY, “From the European ‘Migration Crisis’ to the Global Compact for Migration: A Political Transition Short on Legal Standards,” *McGill Journal of Sustainable Development* 16:2 (2020).

³ WHO, “Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV),” 30 January 2020.

⁴ WHO, “WHO Director-General’s opening remarks at the media briefing on Covid-19,” 11 March 2020.

⁵ According to the WHO’s data, at the time of writing (April 2021), with over 50 million confirmed cases, Europe represents the second most affected area in the world, following the Americas. In terms of single countries death rate, within the 10 most affected countries in the world, five are European (France, UK, Italy, Spain and Germany). For detailed data and statistics, see WHO, Coronavirus Disease (Covid-19) Dashboard.

⁶ European Council, Conclusions by the President of the European Council following the video conference on Covid-19, 10 March 2020.

resorted to individual emergency measures, often introduced beyond the existing EU legal and procedural frameworks.

It must be pointed out that, when it comes to human health and civil protection, the Union has only a limited competence to support, coordinate or supplement Member States' actions.⁷ This means that the European institutions have a narrow capacity to intervene, the actual competence to protect public health being under Member States' command; consequently, in the absence of any significant EU coordination, unilateral measures adopted by national governments could lead to chaos and incoherence, especially in a situation of emergency.⁸

Nevertheless, building on this limited competence, the EU has developed common instruments to be triggered in case of natural or man-made emergencies and calamities (so-called EU disaster law).⁹ The Union Civil Protection Mechanism, established in 2013, can be mentioned as an example in this respect.¹⁰ Aimed at developing an effective system of prevention of, and reaction to, emergencies – including health-related ones – it was employed in 2014 during the Ebola virus epidemic in West Africa for the coordination of medical assistance and national public health expertise.

Despite the existence of common instruments, the Covid-19 pandemic has certainly shown the weakness of the Union in terms of a coordinated response. It is not unintentionally that, in her speech on the state of the Union 2020, the President of the Commission Ursula von der Leyen underlined the need to build “a stronger European health Union” and that time has come to “discuss the question of health competences.”¹¹ The second and third pandemic waves have prompted a more coordinated response, paving the way for EU-led initiatives launched between the end of 2020 and the beginning of 2021.¹² These include, *inter alia*, the promotion of a synchronised EU-wide vaccination campaign, the monitoring and supervision of the production and supply of Covid-19 vaccines as well as the mutual recognition of vaccination (so-called EU vaccination passport

⁷ Art. 6, respectively (a) and (f), TFEU.

⁸ On this topic, see Stephen COUTTS, “Citizenship, Coronavirus and Questions of Competence,” *European Papers, European Forum, Insight*, 25 April 2020.

⁹ For an overview of the EU legal institutional framework in this area, see Inge GOVARE and Sara POLI, *EU Management of Global Emergencies. Legal Framework for Combating Threats and Crisis* (Leiden/Boston: Brill-Nijhoff, 2014); Mark FLEAR, *Governing Public Health. EU Law, Regulation and Biopolitics* (Oxford/Portland: Bloomsbury Publishing, 2015).

¹⁰ Decision No. 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, which, according to its Article 1, “lays down rules on epidemiological surveillance, monitoring, early warning of, and combating serious cross-border threats to health, including preparedness and response planning related to those activities, in order to coordinate and complement national policies.” See also Decision No. 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No. 2119/98/EC.

¹¹ European Commission, State of the Union Address by President von der Leyen at the European Parliament Plenary, “Building the World we Want to Live in: A Union of Vitality in a World of Fragility,” SPEECH/20/1655.

¹² For an overview of how national legal and political systems have reacted or adapted to the pandemic one year after its spreading, see Joelle GROGAN, “Power and the Covid-19 Pandemic – Introduction & List of Country Reports”, in *VerfassungsBlog*, 22 February 2021.

or certificate).¹³ In addition, common actions have also been carried out in order to overcome the severe economic impact of the pandemic.¹⁴

In principle, such interventions may be welcomed as an attempt to face a common threat in the name of the principles of sincere cooperation, mutual trust and solidarity. However, when it comes to the protection of its own territory and population, the individual conducts of the Member States remain paramount, as it is mainly unilateralism that informs the management of borders in response to the risks posed by the pandemic.

II. Unilateralism in Times of Crisis

Internally to the EU, the reaction to Covid-19 has been characterised by a reaffirmation of State sovereignty, which the governments primarily expressed with defensive measures of control over their borders. Aimed at containing human mobility, this approach has been marked by strong unilateralism and informalisation in the decision-making. In the name of the emergency, national measures towards migrants (whether European citizens or third country nationals) have been taken in a legally questionable manner, affecting the rule of law and, in particular, legal principles such as transparency, and legal and procedural certainty.¹⁵

Methodologically, it can be argued that the restrictive measures taken in response to Covid-19 somehow resemble those adopted by some Member States during the refugee crisis, although with obvious differences in terms of intensity and impact on mobility rights.¹⁶ A parallel can be drawn between the two crises in so far as –

¹³ The initiatives envisaged by the European Commission are illustrated in its communication titled “A united front to beat Covid-19” of January 2021. See COM(2021)35 final, 19 January 2021. However, some of the actions promoted by the Commission have been subject to criticism. The EU vaccination plan, in particular, has not been uncontroversial, especially due to the delays and problems in the supply of vaccines by the pharmaceutical company AstraZeneca. Among the several critical reactions, various parliamentary questions have been addressed to the Commission by Members of the European Parliament. See priority question for written answer P-000468/2021 to the Commission, “Publication of EU contracts with vaccine manufacturers”, 26 January 2021; priority questions for written answer P-000514/2021 and P-000515/2021 to the Commission, “The EU’s vaccine purchasing programme”, 27 January 2021.

¹⁴ An overview of the “polymorph” characterisation of the EU response to the pandemic is provided in Estelle BROSSET, “Quand l’urgence de santé publique fait son entrée parmi les catastrophes en droit de l’UE,” *European Papers*, Vol. 5, 2020, No. 1, 25 April 2020, pp. 403-409. For an analysis of the financial measures envisaged by the EU, see Jonatan ECHEBARRIA FERNÁNDEZ, “A Critical Analysis on the European Union’s Measures to Overcome the Economic Impact of the Covid-19 Pandemic,” *European Papers*, Vol. 5, 2020, No. 3, 16 January 2021, pp. 1399-1423; Emanuel CASTELLARIN, “The European Union’s Financial Contribution to the Response to the Covid-19 Crisis: An Overview of Existing Mechanisms, Proposals Under Discussion and Open Issues,” *European Papers*, Vol. 5, 2020, No. 2, 23 July 2020, pp. 1021-1044.

¹⁵ For a discussion on the principle of the rule of law in the field of migration, see, Francesco Luigi GATTA, “Migration and the Rule of (Human Rights) Law: Two ‘Crises’ Looking in the Same Mirror,” *Croatian Yearbook of European Law & Policy* 15, No. 1 (2019): 99-133.

¹⁶ For an analysis of the refugee crisis, its features and effects, see, among others, Idil ATAK and François CRÉPEAU, “Managing Migrations at the External Borders of the European Union: Meeting the Human Rights Challenges,” *European Journal of Human Rights* (2014): 601; Marc BOSSUYT, “The European Union Confronted With an Asylum Crisis in the Mediterranean: Reflections on Refugees and Human Rights Issues,” *European Journal of Human Rights* (2015): 581; Vincent CHÉTAIL, “Looking Beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System,” *European Journal of Human Rights* (2016): 584; Daniel THYM, “The ‘Refugee Crisis’ as a Challenge of Legal Design and Institutional Legitimacy,” *Common Market Law Review* (2016): 1545.

in 2015 as well as in 2020 – a critical situation led the Member States to a “disapplication” of – or, at least, a deviation from – existing EU rules, thereby generating frictions between the Dublin and Schengen legal regimes.¹⁷ This further suggests that, in the face of a crisis, European governments seem more prone to act unilaterally, protecting their own interests and priorities, rather than reacting within a coordinated approach and in compliance with the EU common legal framework.

The EU institutions, for their part, have responded to the pandemic with a vast array of soft law instruments – mainly in the form of Commission communications and guidelines – in a weak attempt to restore an appearance of coherence and coordination.¹⁸ The Commission, in particular, on numerous occasions has called on the Member States for a coherent and coordinated management of restrictions to free movement in response to the pandemic: for example, in January 2021, it stressed the lack of justification and proportion of border closures and blanket bans on travel.¹⁹ However, as shown by the recent contrast with some Member States, order and cohesion in the EU area of freedom, security and justice seem far to be achieved and restored.²⁰

As the following paragraphs illustrate, this bias for unilateralism clearly emerges in relation to the measures adopted by the Member States amidst the spread of Covid-19 as for both the Schengen (A) and CEAS (B) frameworks.

A. IMPACT OF COVID-19 ON INTERNAL BORDERS AND FREE MOVEMENT OF PERSONS

The 2020 pandemic represented another stress test for the European system of free movement of persons and integrated border management. Yet, this is not the first time that public health-related restrictions have been introduced, as EU law allows to do that.

First, as regards the “classic” free movement of persons, i.e. EU citizens’ residence or stay in another Member State, the restriction based on public health has been expressly referred to in primary and secondary European Community law since the birth of the free movement of persons. During the 1990s, the restriction based on such grounds was sometimes invoked to limit the free movement of people living with HIV/AIDS. Moreover, this was quickly abolished by the

¹⁷ This is witnessed by the case law of the CJEU. See CJEU, 13 December 2018, *Touring Tours und Travel GmbH and Sociedad de Transportes SA*, Joined Cases C-412/17 and C-474/17, EU:C:2018:1005. However, the Court refuses to equate an internal border on which controls have been re-established with an external border, see, in this regard, CJEU, 19 March 2019, *Arib*, Case C-444/17, EU:C:2019:220.

¹⁸ For an analysis and an illustration of the advantages and disadvantages of the “EU Covid-19 soft law”, see Oana STEFAN, “Covid-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda,” *European Papers*, Vol. 5, 2020, No. 1, pp. 663-670.

¹⁹ “A united front to beat Covid-19”, COM(2021)35 final, cit., pp. 8-9.

²⁰ The Director-General of DG Justice at the Commission, Salla Saastamoinen addressed several reprimand letters to Member States suggesting less restrictive measures equally protective of public health (Belgium, Germany, Denmark, Sweden and Hungary). For instance, for the case of Belgium, see: “Belgium justifies non-essential travel ban in letter to Commission”, *The Brussels Times*, 4 March 2021.

concerned authorities (Bavaria in Germany), under the pressure exercised by the European Commission.²¹ Nowadays, in EU law, this limit is found in Article 45 of the Treaty on the Functioning of the European Union (TFEU), along with those based on reasons of public policy and public security.

It also appears in Article 29 of Directive 2004/38, which states that “the only diseases justifying measures restricting freedom of movement shall be diseases with epidemic potential as defined by the relevant instruments of the WHO and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.”²² On the one hand, by examining Article 29, one can acknowledge that Covid-19 is officially recognised as a pandemic by the WHO (see *supra*). On the other hand, even if this were not or no longer the case, one can consider that Covid-19 is among those “infectious diseases or contagious parasitic diseases” that may (or can) be subject to the limit of free movement of persons if the disease is “the subject of protection provisions applying to nationals of the host Member State.” This principle of equality and equivalence stems from the judgment of the Court of Justice of the EU (CJEU) in the case *Adoui and Cornuaille*.²³ This judgment concerned limitations on the free movement of persons based on public order, but its lesson can be extended to limitations based on public health. As a consequence, a Member State which does not take containment measures in respect of its nationals on its territory could hardly justify the re-establishment of border controls within the EU.

Second, as regards border management, the same definition contained in Article 29 of Directive 2004/38 can be found in Article 2(21) of the Schengen Borders Code (SBC). According to this latter provision, ‘threat to public health’ means any disease with epidemic potential as defined by the International Health regulations of the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States.²⁴ However, when it comes to the temporary reintroduction of internal border controls, Article 25 SBC does not refer to public health: temporary border control reintroductions are allowed as long as they are necessary to tackle foreseeable events causing serious threat to public policy or internal security. Article 28 SBC further allows the reintroduc-

²¹ On this topic, see Jean-Yves CARLIER, in association with Graciela SCHIFFINO, *The Free Movement of Persons Living with HIV/AIDS* (Luxembourg: Office for Official Publications of the European Communities, 1999); Aart HENDRIKS, “The Right to Freedom of Movement and the (Un)lawfulness of AIDS/HIV Specific Travel Restrictions from a European Perspective,” *Nordic Journal of International Law* (1990): 189 ff; Junia VAN OVERBEEK, “AIDS/HIV Infection and the Free Movement of Persons within the European Economic Community,” *Common Market Law Review*, (1990): 191 ff.

²² Directive 2004/38/EC of the European Parliament and the of Council, of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, 77). For a comment, including related to Covid-19, see Estelle BROSSET, in Anastasia LIOPOULOU-PENOT (ed.), *Directive 2004/38 relative au droit des citoyens de l’Union et des membres de leurs familles. Commentaire article par article* (Bruylant, 2020): 455.

²³ ECJ, judgment of 18 May 1982, *Adoui v Belgian State and City of Liège and Cornuaille v Belgian State*, Joined Cases 115 and 116/81, EU:C:1982:183.

²⁴ Art. 2(21) Regulation 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 (Schengen Borders Code) (OJ L 77, 23.03.2016, p. 1).

tion of controls on the basis of unforeseen or unforeseeable situations, where “a serious threat to public policy or internal security in a Member State requires immediate action to be taken.” These complementary provisions differ in relation to the procedure for reinstating controls, in terms of requirements such as prior notification of the planned reintroduction of controls, its maximum duration and the specific duty of motivation.²⁵

Building on this legal framework, from 2015 onwards, several Member States have repeatedly prolonged the reintroduction of internal borders control, mainly for reasons related to migration or terrorism.²⁶ Quite often this has not been done in compliance with the prescribed procedural requirements. This continuous series of reintroductions of controls was possible because Member States managed to circumvent the limits and conditions laid down by EU law, either by changing the legal basis for reintroducing controls or by grounding them, each time, on slightly different justifications. In some cases, controls were even reinstated without prior notification, or only on the basis of a generic reasoning, referring to vague and rather abstract threats, such as the asylum seekers' secondary movements.²⁷

By examining the widespread non-compliance with EU rules, one may argue that the Schengen area was already in a situation of crisis before the outbreak of the pandemic. As an attempt to draw attention to the misuse of the SBC rules, in March 2016 the European Commission released a communication – evocatively titled “Back to Schengen” – calling on the Member States to restore the regular functioning of the area.²⁸ It addressed, in particular, “the costs of non-Schengen” underlying the negative consequences of the reintroduction of internal borders control in terms of economic, political and social repercussions on the EU as a whole.²⁹

²⁵ For an overview of the evolution of the EU legal regime concerning border controls and the area of freedom, security and justice, see Bruno NASCIBENE, “The European Union: An Area for Freedom, Security and Justice,” in *The History of the European Union: Constructing Utopia*, Giuliano AMATO, Enzo MOAVERO-MILANESI, Gianfranco PASQUINO and Lucrezia REICHLIN (eds), Oxford, Hart, 2019; Daniel THYM, “The Schengen Law: A Challenge for Legal Accountability in the European Union,” *European Law Journal* 8, No. 2, 2002; Marie DE SOMER, “Schengen and Internal Border Controls,” *From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration*, Marie DE SOMER, Philippe DE BRUYCKER and Jean-Louis DE BROUWER (eds), Brussels: European Policy Centre, 2019.

²⁶ Germany was the first Member State to reintroduce border controls in 2015 due to “big influx of persons seeking international protection.” It was soon followed by Austria, Slovenia, Hungary, as well as Malta due to “smuggling of illegal migrants” and Sweden because of “unprecedented influx of persons.” Detailed data and information may be found in the European Commission's document “Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 *et seq.* of the Schengen Borders Code,” available online and regularly updated at ec.europa.eu.

²⁷ A close analysis of the justifications provided by the Member States is conducted by Sergio CARRERA, “The State of the Schengen Area in the Light of the 2019 European Parliament Election,” *RSCAS Policy Papers* 12 (2019).

²⁸ European Commission, “Back to Schengen. A Roadmap,” Brussels, 4 March 2016, COM(2016)120 final.

²⁹ For an analysis of the 2015-2016 crisis of the Schengen area see, *inter alia*, Elspeth GUILD, Evelien BROUWER, Kees GROENENDIJK and Sergio CARRERA, “What is Happening to the Schengen Borders?,” *CEPS Papers in Liberty and Security in Europe* 86 (2015); Steve PEERS, “Can Schengen be Suspended because of Greece? Should it be?,” *EU Law Analysis*, 2 December 2015; Michela CECCORULLI, “Back to Schengen: The Collective Securitisation of the EU Free-border Area,” *West European Politics Journal* 42, No. 2 (2019): 302-22; Bernard RYAN, “The Migration Crisis and the European Union Border Regime,” in *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law*, Marise CREMONA and Joanne SCOTT (eds), Oxford, Oxford University Press, 2019.

As it has been highlighted, such an approach by the EU Member States poses significant issues in terms of compliance with EU law, especially with reference to relevant principles, such as those of proportionality, transparency, legal and procedural certainty.³⁰ What is more, this approach essentially overturned into an ordinary mechanism a legal framework that was conceived as temporary and exceptional: the exception has thus become the rule.

Although repeatedly criticised by the EU institutions, the instrumental use of the Schengen rules by the Member States has never been effectively challenged. On various occasions, the European Parliament has expressed its concern as regards the malfunctioning of the Schengen area.³¹ As for the Commission, despite its monitoring tasks, it has never gone further than adopting political declarations and non-binding acts, without taking any concrete measure, such as an action for failure to fulfil obligations, against these legally dubious practices.³²

This fragmentation in the application and compliance with the Schengen rules has been exacerbated by the Covid-19 crisis.³³ Several Member States have opted for the reintroduction of controls at their internal borders, relying on different legal bases and invoking different reasons, either as a new means of limiting the contagion or as an additional justification referred to pre-existing and already ongoing controls. Sometimes, multiple justifications have been used together, too often without a clear or demonstrated nexus of causality. For example, Austria invoked the “risk of Coronavirus causing additional migrant movements”.³⁴ Moreover, the national authorities have implemented these measures following different temporal and territorial scopes. In the latter case, in particular, Member States have opted either for a full closure – covering the entirety of their national borders – or they have only focussed on some specific segments of their borders leaving others untouched (e.g. airports).

While the very initial impact of the pandemic on the Schengen area has been limited – involving few Member States and only specific geographical areas –, it then gradually but quickly became a widespread issue. At the time of the outbreak of Covid-19, only some States of the Schengen area “closed” segments of their borders. For instance, in March 2020, Switzerland, France and Austria notified

³⁰ On this subject see, among others, Henri LABAYLE, “La suppression des contrôles aux frontières intérieures de l’Union,” in *Les frontières de l’Union européenne*, ed. Claude Blumann (Bruxelles: Bruylant, 2013), 20 ff.

³¹ See, for example, European Parliament, Resolution of 30 May 2018 on the annual report on the functioning of the Schengen area, 2017/2256(INI), § 10.

³² See, for example, European Commission, “Preserving and Strengthening Schengen,” Brussels, 27 September 2017, COM(2017) 570 final.

³³ For an analysis of the impact of Covid-19 on the Schengen legal regime, see: Stefano MONTALDO, “The Covid-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area: Never Let a Serious Crisis Go to Waste”, *European Papers*, 25 April 2020, 1-9; Aude BOUVERESSE, “La libre circulation des personnes à l’épreuve de la Covid-19: *extremis malis extrema remedia?*”, *Revue trimestrielle de droit européen*, 2020, 509-530 and European Parliamentary Research Service, “The impact of coronavirus on Schengen borders”, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649347/EPRS_BRI\(2020\)649347_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649347/EPRS_BRI(2020)649347_EN.pdf).

³⁴ For an overview of the reintroductions of border controls in the Covid-19 period, see European Commission, “the Covid-19 Emergency”. The full and detailed list of notifications can be consulted online at https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en.

the reintroduction of internal border controls with regard to the land border with Italy – at that time, the most affected country in terms of pace of contagion. A domino effect soon followed, with other Member States, such as Hungary, Germany and the Czech Republic, reintroducing border controls with regard to Austria, Slovenia, France, Switzerland (i.e. neighbouring countries with Italy). Lithuania was the first Member State, in mid-March 2020, to introduce a “full” closure of its borders, notifying the reintroduction of controls with regard to all internal borders due to Covid-19. It was soon followed by Norway, Spain and Finland, controlling all land borders.

As of March 2021, one year after the outbreak of the pandemic, full or partial internal border controls are in place in eleven States of the Schengen area. The vast majority of them justifies the measure with “the context of Covid-19” while others – among which France and Sweden – invoke indistinctly, as a justification, the reasons of “terrorist threats”, “secondary movements” and “the situation at the external borders”. Overall, since March 2020, the Commission has been notified a total of 143 times the temporary reintroduction of internal border controls by Member States, pursuant to Article 25 and 28 *et seq.* SBC. Altogether, this figure corresponds to more than a half of the total amount of notifications received since 2006, thereby neatly reflecting the dramatic impact of the pandemic on the functioning of the Schengen area.³⁵

The management of controls at air borders equally depicts a situation of disorder and lack of coordination. While some Member States have opted for reintroducing controls at all national airports (e.g. Hungary, with controls at “all air borders,” during March-April 2020, and from May until November of the same year), others have notified the temporary reintroduction of controls with regard to specific countries only. Germany, for example, in March-April 2020 reintroduced controls at air borders with Italy, France and Spain, where the contagion at that time was growing particularly quickly. In June, it lifted the controls at air borders with all countries except Spain. On the contrary, some countries, such as Portugal, have chosen not to reintroduce internal controls at airports.³⁶ Although right after the first wave of the pandemic the EU institutions had tried to re-launch intra-EU circulation, the state of exceptions related to internal border controls have been more complicated than ever.³⁷

Overall, in terms of justification, when associated with the containment of the pandemic, these measures do not appear questionable. The serious collective risk connected to the spread of Covid-19, indeed, seems to fit the notions of public policy and internal security, also in consideration of the case law of the CJEU in

³⁵ *Ibidem.*

³⁶ *Ibidem.*

³⁷ European Commission, “Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls”, OJ C 169, 15 May 2020, pp. 30-37.

these matters.³⁸ They further appear to be justified in terms of compliance with the principles of necessity and proportionality, which have also been addressed by the European Commission with the orientation given in its guidelines for border management.³⁹ The Commission acknowledged that temporary reintroductions of border controls may represent “a reaction to the risk posed by a contagious disease”⁴⁰ and underlined the need for “discouraging outgoing travel of EU citizens and other persons residing in the EU+ area” since “international movements of people create conditions which facilitate the spread of the virus across borders.”⁴¹ At the same time, however, it has repeatedly highlighted that derogations to the Schengen framework produce serious repercussions on free movement of people, goods and services.

Ultimately, if the Covid-19 crisis in itself represents a justified circumstance for the reinstatement of controls at internal borders, it also risk becoming another factor that further contributes to the fragmentation of the Schengen legal framework.⁴² The uncertainty surrounding the evolution of the pandemic, coupled with the variety of unilateral measures adopted at the domestic level and non-compliant with the relevant EU rules, encourage a possibly even more complex scenario regarding border and migration management in the EU. Additionally, the lack of a centralised EU competence to effectively deal with public health and emergency situations is an institutional factor that hinders a coherent and coordinated EU action.

What is more, besides the unintended consequences on the existing legal framework, such factors further complicate the announced, and yet debated, reform of the Schengen legal regime in respect of the reintroductions of internal border controls.⁴³ While the proposal for a regulation amending the SBC – put forward by the Commission in 2017 – has already encountered the criticism of the Euro-

³⁸ For the notion of public order see, for example, CJEU, 13 September 2016, CS, Case C-304/14, § 38, and the case law referred to therein, in relation to public order and the free movement of persons. For the notion of internal security, see, for example, ECJ, 10 July 1984, *Campus Oil*, Case C-72/83, § 34.

³⁹ European Commission, “Guidelines for border management measures to protect health and ensure the availability of goods and essential services,” Brussels, 16 March 2020, C(2020) 1753. For an analysis in terms of Schengen’s underlying institutional dynamics see Luc LEBOEUF, “La protection de la santé publique et la fermeture des frontières de l’Union. La crise sanitaire, révélatrice des dynamiques de gestion de l’espace Schengen?”, *Revue des Affaires Européennes*, 1, 2020, p. 92.

⁴⁰ *Ibidem*.

⁴¹ European Commission, “Covid-19, Temporary restriction on non-essential travel to the EU”, Brussels, 16 March 2020, COM(2020) 115 final. See also the “Re-open EU” website that, in all the languages of the Union, informs of the health situation and the most important measures, <https://reopen.europa.eu/en/>.

⁴² In the communication “A New Pact on Migration and Asylum”, 23 September 2020, COM(2020) 609 final, the European Commission states: “concerns about existing shortcomings have contributed to the triggering of temporary internal border controls. The longer these controls continue, the more questions are raised about their temporary nature, and their proportionality. Temporary controls may only be used in exceptional circumstances to provide a response to situations seriously affecting public policy or internal security. As a last resort measure, they should last only as long as the extraordinary circumstances persist: for example, in the recent emergency circumstances of the Covid-19 pandemic, internal border control measures were introduced but most of them have now been lifted” (p. 14).

⁴³ For an analysis of the legal framework relating to the abolition of internal border controls, see: Alessia DI PASCALE, “Respingimento dello straniero e controlli delle frontiere interne ed esterne nel diritto dell’UE”, *Diritto, Immigrazione e Cittadinanza*, n. 2/2020, pp. 1-47.

pean Parliament, the Council still needs to take its position.⁴⁴ An already complicated reform seems to have been further impaired by the pandemic.⁴⁵

Yet the Covid-19 emergency has not only provoked significant repercussions on the Schengen framework, but also on the Dublin regime and the overall functioning of the CEAS.

B. IMPACT OF COVID-19 ON THE COMMON EUROPEAN ASYLUM SYSTEM AND APPLICATIONS FOR INTERNATIONAL PROTECTION

The pandemic provoked adverse consequences on Member States' asylum systems. In general, national asylum offices, as many other public services, closed their doors, implemented physical distancing measures of their employees or resorted to telework. This resulted in a severe disruption, and even suspension, of asylum-related procedures: registration and processing of asylum applications, individual interviews and hearings in the context of judicial proceedings have been affected.⁴⁶

The impact of the pandemic is illustrated by looking both at the challenges posed on access to international protection (1) and on movements of asylum seekers internally to the EU in the forms of intra-EU Dublin transfers and relocation (2).

1. *Impact of Covid-19 on Access to International Protection*

The spreading of Coronavirus has posed major obstacles on asylum seekers wishing to seek international protection in Europe. Numbers are clear in this respect: according to the data released by the European Asylum Support Office (EASO) in February 2021, applications for asylum in the 27 EU Member States plus Norway and Switzerland decreased by 31% compared to 2019, down to the lowest level since 2013.⁴⁷ This decline in asylum applications is due to the emergency travel restrictions introduced by the EU governments: in the first months of 2020, accelerated by the travel ban unilaterally imposed by the US towards EU citizens, the reinforcement of controls at the EU external borders turned, *de facto*, into their closure, leading to a drastic decrease of international circulation.⁴⁸ The

⁴⁴ European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border controls at internal borders, 27 September 2017, COM(2017) 571 final. See also, European Council, "Schengen Internal Border Controls: Council Agrees Negotiating Mandate on the Amendment of the Schengen Borders Code," Press release, 19 June 2018.

⁴⁵ The proposal is currently in deadlock. For an analysis, see Marie DE SOMER, "Schengen: Quo Vadis?", *European Journal of Migration and Law* 22 (2020): 178-97. In the New Pact on Migration and Asylum, the European Commission proposes the establishment of a Schengen Forum "to foster concrete cooperation and ways to deepen Schengen through a programme of support and cooperation to help end internal border controls" (p. 15).

⁴⁶ EASO, "Covid-19 Emergency Measures in Asylum and Reception Systems," 2 June 2020.

⁴⁷ EASO, EU Asylum Decision Exceed Applications for First Time since 2017 due to Covid-19, 18 February 2021. According to the data, 461.300 applications were lodged in 2020, compared to 671.200 in 2019.

⁴⁸ For a discussion on the introduction of border controls in the light of the principle of solidarity, see Luisa MARIN, "The Covid-19 Crisis and the Closure of External Borders: Another stress-test for the challenging construction of solidarity within the EU?", *European Papers*, Vol. 5, 2020, No. 2, pp. 1071-1086.

EU's isolation from the rest of the world has been confirmed by the European Commission in March 2020 when it recognised that “the EU's external border should act as a security perimeter.”⁴⁹

Under EU law, (non-resident) third-country nationals can be refused entry into the EU territory if they represent a threat to public policy or internal security, but also to public health, according to Articles 2(21), 6(1) and 14 SBC. This latter provision includes the same definition of risk to public health as that used for the free movement of persons within the EU, i.e. any disease with epidemic potential if it is “the subject of protection provisions applying to nationals of the Member States.”⁵⁰ In any case, the decision to refuse the entry shall be in compliance with the principle of proportionality and non-discrimination.

Against this background, access to international protection in the EU has been undermined, on the one hand, by obstacles to humanitarian operations at sea, such as the closure of ports and the enforcement of travel bans, and, on the other, by the restrictions on incoming mobility, which resulted in a drastic decrease in the implementation of the few legal pathways available for international protection seekers, such as resettlement.

Regarding the obstructionism to search and rescue activities at sea, during the Covid-19 emergency, individual actions taken by some frontline Member States negatively impacted humanitarian operations. Italy provides an emblematic example in this respect: the inter-ministerial decree adopted on 7 April 2020 unilaterally and indiscriminately declared “the impossibility of guaranteeing a place of safety to vessels flying foreigner flags.”⁵¹ While such measure was based on the emergency health situation, one might wonder who has to strike a balance between the right to health (which, under both the Italian Constitution and EU law, belongs to each individual, irregular migrants included) and the right to be disembarked in a place of safety.⁵²

The “protection” of Italian ports during 2020 has also been ensured with *ad hoc* solutions for the migrants' disembarkation: some rescue vessels have been allowed to disembark (e.g. the *Mare Jonio*), while other vessels have served as

⁴⁹ European Commission, “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,” Brussels, 30 March 2020, C(2020) 2050 final.

⁵⁰ Art. 2(21) SBC.

⁵¹ Italian Minister of Infrastructure and Transport, in cooperation with the Minister of Foreign Affairs and International Cooperation, the Minister of the Interior and the Minister of Health, Inter-ministerial Decree R.0000150 of 7 April 2020. For an analysis of the legality of the decree, see Andrea Maria PELLICONI and Marco GOLDONI, “La banalità dei porti chiusi per decreto. Osservazioni sui profili di legittimità del decreto interministeriale 150/2020”, *Diritto, Immigrazione e Cittadinanza*, 2 (2020): 219-231.

⁵² See, respectively, Art. 32 of the Italian Constitution and Art. 35 of the EU Charter of fundamental rights. For a discussion on the need for a predictable solution for disembarkation of rescued refugees in the Mediterranean see Jasper VAN BERCKEL, “Taking onboard the issue of disembarkation: the Mediterranean need for responsibility-sharing after the Malta declaration”, *European Journal of Migration and Law*, (2020): 492-517.

“quarantine” boats (e.g. *Sea Watch*).⁵³ It has to be noted that disembarkation issues are not new in the EU. Similar issues date back at least to 2018 when no public health-related emergency could justify the unilateral measures adopted by the Italian government. Back then, rescue vessels were systematically banned from the Italian ports and left offshore for days, waiting for a Member State to come forward and agree to relocate the migrants on board.⁵⁴ In September 2019, disembarkation issues were addressed with negotiations on an *ad hoc* basis which led to the Malta declaration, adopted by Germany, France, Italy and Malta in order to establish a solidarity mechanism and a controlled emergency procedure for migrants rescued in the Mediterranean.⁵⁵ With the Covid-19 crisis, however, the issue of disembarkation regained momentum: Italian and Maltese authorities prevented migrants from being disembarked (both from NGO rescue vessels and private ones) and kept them on board in a situation of “forced isolation” in order to monitor and prevent the possible spread of the virus.⁵⁶

Similar measures may be justified with the protection of public health. At the same time, they are problematic in so far as they entail forms of deprivation of personal liberty, which amount to a *de facto* confinement for several days, possibly in breach of relevant human rights guarantees such as Article 5 of the European Convention on Human Rights (ECHR). While in the 2016 Grand Chamber judgment *Khlaifia and Others v. Italy* the Court of Strasbourg acknowledged a violation of Article 5 ECHR in respect of the detention of migrants kept on vessels, its recent restrictive case-law on the same provision, as applied to migrants and asylum seekers, may suggest otherwise.⁵⁷ In *J.R. and Others v. Greece*, for example, the applicants’ confinement in an ‘hotspot’ on the island of Chios – aimed at their removal from Greece under the EU-Turkey Statement – was not considered arbitrary nor unlawful, despite this detention lasting for a period of one month.⁵⁸ In *Ilias and Ahmed v. Hungary*, the applicants’ confinement for 23 days in a transit zone at the Serbian-Hungarian borders was even considered by the Grand Chamber as falling outside the scope of application of Article 5 ECHR. The European Court of Human Rights had indeed considered that the applicants had not been deprived of their liberty within the meaning of the ECHR, in particular because they had the possibility of going to Serbia where their asylum applications would have been examined in accordance with international law.⁵⁹ On the contrary, more recently,

⁵³ “Sea-Watch 3, Mare Jonio land in Sicily with 278 migrants,” *Info-migrants*, 22 June 2020; ASGI, «Diritti in rotta. L’esperimento delle navi quarantena e i principali profili di criticità», *Report*, 23 April 2021.

⁵⁴ Eugenio CUSUMANO and Kristof GOMBEER, “In deep waters: The legal, humanitarian and political implications of closing Italian ports to migrant rescuers”, *Mediterranean Politics*, 25:2 (2020): 245-253.

⁵⁵ For a legal analysis of the content and the features of the declaration, see Eleonora FRASCA and Francesco Luigi GATTA, “The Malta Declaration on search & rescue, disembarkation and relocation: Much Ado about Nothing”, *EU Migration Law blog*, 3 March 2020.

⁵⁶ See European Council on Refugees and Exiles (ECRE), “Med: 180 Quarantined on Italian ship while NGO takes legal actions against Maltese decision-makers”, 24 April 2020; European Council on Refugees and Exiles (ECRE), “Med: 78 to quarantine on Italian Ship, 163 still stranded amid spike in departures and depleted rescue capacities”, 15 May 2020.

⁵⁷ Eur. Ct. H.R. [GC], judgment of 15 December 2016, *Khlaifia and others v. Italy*, Appl. No. 16483/12.

⁵⁸ Eur. Ct. H.R., judgment of 25 January 2018, *J.R. and Others v. Greece*, Appl. No. 22696/16. See also Eur. Ct. H.R., judgment of 3 October 2019, *Kaak and Others v. Greece*, Appl. No. 34215/16, where the Court equally excluded the existence of a prolonged and arbitrary detention with regard to the applicants kept in the same Greek ‘hotspot’.

⁵⁹ Eur. Ct. H.R. [GC], judgment of 21 November 2019, *Ilias and Ahmed v. Hungary*, Appl. No. 47287/15.

in a case also relating to the situation at the border between Hungary and Serbia, the Court of Luxembourg (CJEU) ruled that persons in the transit zone of Röszke in Hungary are held in detention.⁶⁰ The Court recalls that the UNHCR Guidelines define the detention of asylum seekers as “the deprivation of liberty or confinement in a closed place which an asylum seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities’ and that ‘[the distinction] between deprivation of liberty (detention) and lesser restrictions on movement is one of degree or intensity and not one of nature or substance’.”⁶¹ Consequently, measures restricting the freedom of movement of migrants and asylum seekers could, if unjustified and disproportionate, be sanctioned as illegal detention measures.

Treatment (as well as non-treatment) of migrants during the Covid-19 emergency may raise additional human rights issues. Domestic measures have often been implemented regardless of the fact that, among migrants kept in isolation, there were asylum seekers, including unaccompanied minors who were denied access to asylum procedures and the right to an effective remedy.⁶²

When it comes to protection seekers that, instead of embarking on perilous journeys may benefit of the (few) available legal pathways to enter the EU, it can be noted that Covid-19 had an equally severe impact. Resettlement operations, in particular, had been suspended during the 2020 first wave of the pandemic, with scheduled departures and interviews being put on hold. The European Commission itself certified that Covid-19 has had “a disruptive effect on resettlement.”⁶³ The second and third waves of the pandemic, coupled with the emergence of new variants of the virus – especially in some African countries – do not allow for an excessive optimism about the relaunch of resettlement operations (let alone of operations commensurate to the ever-growing resettlement needs), at least in the near future.

Such adversities must be placed within the broader context of humanitarian admission schemes and the most recent developments in this field.⁶⁴ These developments (or, one might say, lack of developments) have been the object of both judicial litigation (with the humanitarian visa cases) and of tentative legislative reforms (the 2016 Commission’s proposal for a Union resettlement framework,⁶⁵ the 2018 European Parliament’s resolution on a European humanitarian

⁶⁰ CJEU [GC], judgment of 14 May 2020, Case C-924/19 PPU et C-925/19 PPU, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, EU:C:2020:367.

⁶¹ *Ibidem*, § 220, we emphasize in italics. In fact, this formulation comes from ECtHR, 6 November 1980, *Guzzardi v. Italy*, Appl. No. 7367/76, § 93 and 25 June 1996, *Amuur v. France*, Appl. No. 19776/92, § 42.

⁶² See, for instance, Amnesty International, “Malta, further information: asylum-seekers allowed to disembark,” 9 June 2020, Index number: EUR 33/2497/2020.

⁶³ European Commission, “Covid-19: Guidance on the implementation of relevant EU provisions”.

⁶⁴ For an appraisal of the legal challenges related to humanitarian visas and humanitarian admission programmes, including resettlement and access to asylum procedures, see Marie-Claire FOLETS and Luc LEBOEUF, *Humanitarian Admission to Europe: The Law Between Promises and Constraints*, Baden-Baden/Oxford, Nomos/Hart, 2020; Violeta MORENO-LAX, *Assessing Asylum in Europe Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford, Oxford University Press, 2017.

⁶⁵ Commission, Proposal for a regulation establishing a Union Resettlement Framework and amending Regulation (EU) No. 516/2014 of the European Parliament and the Council, 13 July 2016 COM(2016) 468 final.

visa,⁶⁶ the more recent Commission recommendation on legal pathways released together with the New Pact on Migration and Asylum).⁶⁷ While the proposed reforms on legal pathways to the EU have essentially failed, or are still on hold, the two European Courts had a (restrictive) say on the issuing of humanitarian visas in two occasions: first, the CJUE and then the Court of Strasbourg.⁶⁸ With the inadmissibility decision in *M.N. and Others v. Belgium*, the Grand Chamber of the ECtHR established that a request for a humanitarian visa lodged at an embassy of a Member State located outside the EU does not establish a jurisdictional link with that same Member State under Article 1 ECHR, thereby excluding the protection under its Article 3. This decision witnesses the problem of the lack of – to use the Grand Chamber's words in *N.D. and N.T. v. Spain* – “genuine and effective access to means of legal entry” for international protection seekers,⁶⁹ suggesting that the responsibility to establish and implement safe access to asylum procedures lies with the States.

It is thus in this already complicated framework, that the Covid-19 crisis has contributed to the slowing down or even interruption of humanitarian admission programmes, thereby exacerbating the issue of the lack of safe and legal access to asylum procedures in the EU.⁷⁰ This could lead to an increase in irregular movements coupled with growing obstacles and dangers for migrants.

2. Impact of Covid-19 on the so-called Dublin transfers and the relocation of asylum seekers

The pandemic has shown its consequences also with regard to the intra-EU transfers of asylum seekers, or so-called Dublin transfers, imposing their suspension. On the other hand, the difficulties faced by frontline countries in terms of proper reception conditions have also prompted the launch of some – limited – *ad hoc* relocation initiatives.

As for the Dublin transfers, Covid-19 affected the regular functioning of the CEAS, in so far as Member States unilaterally ceased to transfer asylum seekers

⁶⁶ European Parliament resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas [2018/2271(INL)].

⁶⁷ Within the New Pact on Asylum and Migration, the Commission has adopted a recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, Brussels, 23 September 2020 C(2020) 6467 final. For a discussion on humanitarian programmes see: Luc LEBOEUF, “Legal Pathways to Protection: Towards a Common and Comprehensive Approach?”, *EU Migration Law blog*, 3 December 2020. For a discussion of legal pathways besides humanitarian reasons, see: Jean-Baptiste FARCY and Sylvie SAROLEA, “Legal migration in the “New Pact”: modesty or unease in the Berlaymont?”, *EU Migration Law blog*, 11 February 2021.

⁶⁸ CJEU [GC], judgment of 7 March 2017, Case C-638/16 PPU, *X and X v État belge*, EU:C:2017:173. Eur. Ct. H.R. [GC], decision on Admissibility of 5 May 2020, *M.N. and Others v. Belgium*, Appl. No. 3599/18. See Jean-Yves CARLIER, Laura COOLS, Eleonora FRASCA, Francesco Luigi GATTA and Sylvie SAROLEA, “Humanitarian Visa: Does the Suspended Step of the Stork Become a Hunting Permit?”, *Cahiers de l'EDEM*, June 2020; Sabine CORNELOUP, “Visa humanitaire et champ d'application spatial de la CEDH. Les limites de l'encadrement conventionnel en cas de gestion extraterritoriale des migrations”, *Revue critique de droit international privé*, 2020, p. 747; Peggy DUCOULOMBIER, “Coup d'arrêt à l'extension de la juridiction extraterritoriale des États parties à la Convention européenne des droits de l'homme”, *Revue trimestrielle des droits de l'homme*, 2021, p. 77.

⁶⁹ Eur. Ct. H.R. (GC), judgment of 13 February 2020, *N.D. and N.T. v. Spain*, § 201.

⁷⁰ For an analysis of the principle of *non-refoulement* in the framework of the Covid-19 pandemic, see Salvo NICOLSI, “Non-refoulement during a health emergency”, *EJILTalk*, 14 May 2020.

and process asylum applications.⁷¹ Such repercussions have also been induced by the fact that the pandemic occurred in a context of legal vacuum. Despite the attempt to intervene and preserve uniformity and coherence, while asserting that certain provisions of EU law could be used, the European Commission itself, in its guidelines on Covid-19 and asylum, admitted that “the current legislation does not foresee the specific consequences resulting from a pandemic situation.”⁷²

During the initial phase of the Covid-19 outbreak, some Member States, which were not yet so severely affected by the contagion, suspended their Dublin transfers to Italy, where, on the contrary, the virus was rapidly spreading. Similar conducts then multiplied in other Member States, leading to a disruption of the system. On 26 January 2021, the German Federal Administrative Court requested a preliminary ruling to the CJEU to clarify whether an administrative suspension of the enforcement of a deportation order due to the actual impossibility of deportation as a result of the Covid 19 pandemic is suitable to interrupt the transfer deadline provided for in Art. 29 (1) Dublin III Regulation.⁷³

While waiting for the response of the CJEU, in our opinion, there are only two ways of interpreting such suspensions. The first one is the application of Article 17(1) of the Dublin III Regulation, that is to say, the sovereignty clause, which allows a State, “by way of derogation” to “decide to examine an application for international protection... even if such examination is not its responsibility” under the Regulation. However, this provision is not intended for a general and temporary suspension of any application, but for individual cases. The second possibility of suspension is the application of Article 3(2), which reads, “where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment.”⁷⁴ In light of such provision, as well as of the circumstances (e.g. the strictly enforced measures limiting people’s movement, the shutdown of any non-essential business and the general pressure on the health care system), Italy could have been regarded, at that moment, as a country where there are “systemic flaws” in the asylum procedures.

Besides suspending Dublin transfers, Member States have also proactively taken exceptional measures for the prevention of Covid-19 with regard to the reception

⁷¹ Under Regulation (EU) No. 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 (*OJ* L180, 29.06.2013, 31) (“Dublin III Regulation”), the international protection application of asylum seekers must be processed by the Member State that, according to the Dublin responsibility criteria, is responsible for their entry into European territory (Art. 1). In the majority of cases, this is the country whose border the applicant has irregularly crossed by land, sea or air, having come from a third country (Art. 13).

⁷² European Commission, “Covid-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement,” Brussels, 16 April 2020, C(2020) 2516 final, 2.

⁷³ Case reference: BVerwG 1 C 52.20, not yet registered. See “Interruption of the Dublin III transfer deadline due to Covid 19 pandemic”, *migrationrechts.eu*, 28 January 2021, www.asyl.net/rsdb/m29259/.

⁷⁴ Art. 3(2) Dublin III Regulation.

conditions of asylum seekers, without such measures being regulated by the EU asylum *acquis*. Fighting the spread of the virus, indeed, has posed additional difficulties on national reception systems that were already under strain. On the Greek islands, for example, overcrowding and, therefore, proximity of asylum seekers, including vulnerable ones, has been a reality for a long time. In such conditions, observing the most basic norms to prevent Covid-19 had been simply not possible.⁷⁵ In such context, on 4 March 2020, the Commissioner for Home Affairs addressed a “political call on Member States to show solidarity with Greece, also in the form of finding solutions for the unaccompanied minors in the islands.”⁷⁶

Against this background, emergency measures have been put in place in the form of *ad hoc* relocation of mainly, but not only, unaccompanied minors from the Greek islands. In view of making sustainable this scheme, the EU Fundamental Rights Agency (FRA) attracted attention to the continuity between this emergency relocation scheme and the previous ones.⁷⁷ This bias against emergency measures, stemming from an unbalanced power of the executives, already arose during the 2015 refugee crisis, in order to correct, at least temporarily, the pitfalls of the CEAS. In response to the call of the Commission, a proposal of Resolution on the relocation of vulnerable persons from refugee camps in Greece was presented at the Belgian Chamber of Representatives and the first group of migrants were relocated in May 2020.⁷⁸

III. Concluding Remarks

The future is what matters most. As a French author said in a novel devoted to the cholera epidemic in Europe in the 19th century, “Once cholera has been defeated, there will be mirrors to face.”⁷⁹ Similarly, the discussed situation raises two main issues for the future.

In the short and medium term, there will be legal proceedings. Measures relating to border control, both internal and external to the EU, will be subject to the careful scrutiny of courts. European courts will have their role to play. In very similar terms, the two presidents of the European courts, questioned in June 2020 by the magazine *Europe*, stated that derogations (both from the EU law of free movement and from the ECHR⁸⁰) are likely to give rise to litigation on the

⁷⁵ On this topic, see Evangelia (Lilian) TSOUDI, “Covid-19, Asylum in the EU, and the Great Expectations of Solidarity”, *International Journal of Refugee Law*, 32:2 (2020) 374-380.

⁷⁶ European Commission, “Extraordinary Justice and Home Affairs Council: Commission Presents Action Plan for Immediate Measures to Support Greece,” Press release, 4 March 2020.

⁷⁷ FRA, “Relocation of Unaccompanied Children from Greece-FRA Input on the Initiative of the European Commission and a Group of Member States to Relocate Unaccompanied Children,” 17 March 2020.

⁷⁸ Resolution proposal presented to the Belgian Chamber of representatives on relocation of vulnerable persons from Greek refugee camps, approved on 6 May 2020. For press coverage, see Tom GUILLAUME, “La Belgique devrait accueillir des mineurs vivant dans les camps de réfugiés grecs”, *Libre.be*, 6 May 2020.

⁷⁹ Jean GIONO, *Le Hussard sur le toit* (Paris: Gallimard, 1951).

⁸⁰ As of April 2021, 10 Member States of the Council of Europe have made use of Article 15 ECHR. This provision, titled “Derogation in time of emergency”, allows States to take measures derogating from certain rights and obligations established under the Convention. The full list of countries and notifications under Article 15 ECHR is available

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question of proportionality of these measures in relation to the legitimate public health objective. The President of the CJEU added that “times of crisis cannot justify any abdication by judges, especially constitutional ones, in their fundamental role as guardians of the rule of law.”⁸¹

As a sign that predictions will come true, Covid-19 has already made its way to Strasbourg: in *Mailloux v. France*, decided in November 2020, the Court delivered its first decision on Covid-19 measures.⁸² The applicant complained about the measures introduced by the French government in response to the pandemic, invoking, *inter alia*, a violation of Articles 2, 3 and 8 of the Convention. The Court did not assess the complaint substantively, declaring the application inadmissible *ratione personae*, as the applicant did not fulfil the requirements of victim status under Article 34 ECHR. Yet, this is the first, but certainly not the last, case that challenges the pandemic-related measures adopted by States. One can expect that more litigation will follow, including with regard to migrants and asylum seekers as a matter of fact, in the case *Feilazoo v. Malta*, decided in March 2021, the Court found, *inter alia*, a violation of Article 3 ECHR due to the conditions of detention of a Nigerian national, being detained together with asylum seekers kept in Covid-19 quarantine.⁸³

In the longer run, there will be critical political decisions to be made. More than a threat in itself to the free movement of persons within the EU and to the EU’s asylum and migration policy, the Covid-19 crisis reveals the flaws of the European system in terms of health protection and border controls, both as regards the exceptions to the abolition of controls at the EU’s internal borders and migration policy at the EU’s external borders.⁸⁴ The numerous interventions of Member States themselves show the weaknesses of the EU in this area. Without being an ultimate failure of what has already been built in terms of freedom of movement in the EU, the Covid-19 crisis is an opportunity to amend and improve this policy; a way to see the “crisis” as “a moment when there is the possibility of suddenly getting better”.⁸⁵

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and regularly updated on the website of the Council of Europe, at the following address: <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354>.

⁸¹ Koen LENAERTS, President of the CJEU, and Linos Alexandre Sicilianos, President of the ECtHR, *Europe*, 6 June 2020, 7, 9 (in French, own translation).

⁸² Eur. Ct. H.R., decision on the admissibility of 5 November 2020, *Mailloux v. France*, Appl. No. 18108/20.

⁸³ Eur. Ct. H.R., judgment of 11 March 2021, *Feilazoo v. Malta*, Appl. No. 6865/19.

⁸⁴ During the drafting of this text, a series of communications and legislative proposals have been advanced by the European Commission, summarised in the communication “A new Pact on Migration and Asylum”, 23 September 2020, COM(2020)609 final. Some of those proposals partially take into account the consequences of the Covid-19 crisis. See the collection of articles directed by Daniel Thym on the Odysseus network blog, <https://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-daniel-thym/>

⁸⁵ Part of the definition of the word crisis in the *Cambridge English Dictionary*, *op. cit.* See also Dominique Ritleng, “L’Union européenne et la pandémie de Covid-19: de la vertu des crises”, *Revue trimestrielle de droit européen*, 2020, p. 483.