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**The Impact of the COVID-19 Crisis on Migration
and Asylum Law and Policy in the EU and its
Member States**

Dissertation with a view to
obtaining the degree of Master's in
Law- Specialization of International
and European Law

Dissertation supervised by Professor Veronica Corcodel

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Por que foi que cegamos? Não sei, talvez um dia se chegue a
conhecer a razão. Queres que te diga o que penso? Diz!
Penso que não cegamos, penso que estamos cegos.
Cegos que veem. Cegos que, vendo, não veem.

(José Saramago, Ensaio sobre a Cegueira)

Agradecimentos

Primeiramente, gostaria de agradecer à minha Professora e orientadora. O processo de escrita desta dissertação foi marcado por momentos altos e baixos, e a Professora Veronica foi uma constante na minha inconstância; sem a Professora, nada disto seria possível.

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À minha tia e à minha prima, são um pilar muito importante na minha vida. São a minha família e que bom que é tê-las como porto seguro.

Ao Miguel, que me apoia e incentiva e a ir mais além e que festeja cada vitória minha como se dele fosse. Que continuemos a partilhar esta caminhada da vida, sempre lado a lado.

Um especial agradecimento aos meus amigos de todas as horas. Amigos são a família que escolhemos, e eu não poderia ter escolhido melhor família.

Abstract

This dissertation intends to provide some answers about how the outbreak of COVID-19 had a direct impact on the practices of Migration Control.

Thus, the present study seeks to analyze the possible impact of the COVID-19 crisis on global migration. The issue of Migration Control is quite complex; even though it is premature to anticipate the medium-and long-term effects.

In this dissertation, I will analyze the types of legal actions that have been brought before European courts during the pandemic. To achieve this point, I will examine whether the premises under International Human Rights Law and European Law has played a fundamental role in the regulation of Migration Control within the context of the COVID-19 crisis.

In doing so, I will focus on several legal actions that have been brought before European courts during the pandemic, by analyzing the final decision and various human rights violations that took place at the time.

Key-words: Migration; Refugees; Asylum-seekers; Human Rights; European Union; International Law; European Law; European Refugee Law; COVID-19; Pandemic.

Resumo

Esta dissertação pretende dar algumas respostas sobre a forma como a COVID-19 teve um impacto direto sobre as práticas de Controlo da Migração.

Assim, o presente estudo procura ver o possível impacto da crise do COVID-19 na migração global. A questão do Controlo das Migrações é bastante complexa; embora seja prematuro antecipar os efeitos a médio e longo prazo.

Nesta dissertação, vou analisar os tipos de ações legais que foram intentadas nos tribunais europeus durante a pandemia. Para alcançar este ponto, vou examinar se as premissas do Direito Internacional dos Direitos Humanos e do Direito Europeu desempenharam um papel fundamental no Controlo das Migrações no contexto da crise da COVID-19.

Ao fazê-lo, centrar-me-ei em vários processos jurídicos que foram intentados nos tribunais europeus durante a pandemia, analisando a decisão final e várias violações dos direitos humanos que tiveram lugar na altura.

Palavras-chave: Migração; Refugiados; Requerentes de Asilo; Direitos Humanos; União Europeia; Direito Internacional; Direito Europeu; Direito Europeu dos Refugiados; COVID-19; Pandemia

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O corpo da dissertação ocupa um total de 159 360 caracteres.

The body of the dissertation occupies a total of 159 360 characters.

*“Migrants and refugees have been vilified as a source of the virus – and then denied access to medical treatment (...). We must act now to **strengthen the immunity of our societies against the virus of hate**. That’s why I’m appealing today for an all-out effort to end hate speech globally.*

*I call on political leaders to show solidarity with all members of their societies and build and **reinforce social cohesion**.*

I call on educational institutions to focus on digital literacy at a time when billions of young people are online – and when extremists are seeking to prey on captive and potentially despairing audiences.

I call on the media, especially social media companies, to do much more to flag and, in line with international human rights law, remove racist, misogynist and other harmful content.

*I call on civil society to **strengthen outreach to vulnerable people**, and religious actors to serve as models of mutual respect.*

And I ask everyone, everywhere, to stand up against hate, treat each other with dignity and take every opportunity to spread kindness.”

(Antonio Guterres, UN Secretary-General’s Global Appeal to Address and Counter COVID-19 Related Hate Speech, 8 May 2020)

List of Acronyms and Abbreviations

EU European Union

UN	United Nations
EC	European Commission
MS	Member States
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
TFUE	Treaty on the Functioning of the European Union
IOM	International Organization for Migration
FRONTEX	European Boarder and Coast Guard Agency
IOM	International Organization for Migration
ECRE	European Council on Refugees and Exiles
EASO	European Asylum Support Office
NGO	Non-Governmental Organization
UNHCR	United Nations High Commissioner for Refugees
CEAS	Common European Asylum System

Chapter 1: Introduction and Methodology

1.1 Positionality

First, I would like to clarify that I consider myself a fortuitous European citizen. I am a privileged Portuguese citizen from a middle-class family from Viseu, a small city in the countryside of Portugal; however, when I was four, I moved to a city in the coast - Aveiro - and

I grew up there. During my academic journey, I have met some refugees, especially during my semester abroad in Germany, under the Program Erasmus +; and at the time, in 2017, I had the opportunity to join a local Association to volunteer with refugees, the majority of them from Syria. My interest in Human Rights and International Migration grew significantly more following this time.

I am aware that the arguments and conclusions that I have built, as well as and the I conducted, in the process of writing this dissertation were carried out from a privileged position. In any circumstances have I been a victim of a violation of basic Human Rights. While this dissertation was being written, I was in the comfort of my home trying to analyze legal procedures involved in a lot of people's lives – that were dependents on the fulfillment and application of the law – to survive.

Thus, I would never be able to describe in a neutrally and impartiality way the suffering and pain that these people are daily going through. Thus, the process of writing this thesis will be difficult, and I am conscious of the sensitive positionality I most likely sparked during my investigation. To avoid this, I made up for it by reflecting deeply on my assumptions every day. I think through greater humanization, great progress can be made in the future; I believe that it is up to each of us who can, to somehow contribute to a fairer world. It is necessary to denormalize the others suffering, in Jose Saramago's (1995) words: "*We did not go blind, Blind but seeing, Blind people who can see, but do not see.*" (Saramago, 1995).

1.2 Research Objective and Research Questions

The purpose of this dissertation emerged from being a human rights enthusiast and, during the period I lived in Thailand, I realized that, in fact, being born and growing up in a democratic society where our rights are guaranteed is a privilege.

I lived in Thailand for a year and, even before the outbreak of COVID-19, I had the chance to engage directly with processes that addressed and helped several refugees, the most of whom arrived in Thailand from Myanmar. I experienced frequent human rights breaches during the COVID-19 Pandemic, which made me wonder what would happen to many people who were citizens of nations where there was (and there is) ongoing disregard for human rights and their circumstances deteriorated as a result of the pandemic. Not only due to the lack of fundamental rights, but also because there was no healthcare infrastructure to handle the large number of COVID-19 cases that were daily reported. Nevertheless, access to health care is part of the fundamental human rights and it can be a socio-economic right as well, but also, health conditions can amount to inhuman and degrading treatment.

The purpose of this dissertation is to examine the effects of the EU and its Member States' pandemic responses to the conditions and vulnerabilities of migrants. In this line, the possible impacts of the COVID-19 crisis on the EU policies of migration control will be analyzed in detail. Special attention will be given to the way that EU law was mobilized to challenge practices of migration control during the pandemic, and lastly, to sum up the challenging practices, a reflection on the lessons that can be drawn from examining the practices of migration control during the COVID-19 pandemic crisis. The research of this dissertation had its focus on the European Union, as an institution marked by the defense of Human Rights, that influences the policies of the Member States and has competence over the migration policies of the MS.

Three related questions and one main question serve as the direction for the analysis:

How did the COVID-19 crisis shape the EU and Member States' policies of migration control?

This question was addressed through the following sub-questions:

SQ1: How can we analyze these policies in light of the contemporary promises and shortcomings of EU migration and asylum law?

SQ2: How were the EU law and the European Convention on Human Rights mobilized for challenging practices of migration control during the Pandemic?

SQ3: What lessons should be drawn from the analysis of policies and practices of migration control during the COVID-19 Pandemic Crisis?

1.3 Problem Statement and hypothesis

This dissertation examines how migration control practices have been conducted during the COVID-19 Pandemic. The practices of Migration Control that took place during the Pandemic were mostly marked by the disrespect of basic human rights. Under the context of the dissemination of the virus, thousands of migrants saw their request for asylum denied and reflected an international system pronounced by a failed multilateralism stuck in prioritizing the present status quo (Kysel & Thomas, 2020). Moreover, this health crisis brought up several issues, such as the frequent illegalities in the detention's centers; and failures of the European Union Migration Law, not protecting those in need. These events contributed to an (even more) unfair migration law system that did not protect those in need.

Within the post-Pandemic context, it is up to the actors in charge to instigate the chance for the progressive development of the law, however, and as it has been shown in the course of history - in different migration crisis -, the European Union did not act in a way to fulfill the protective promises and guarantees provided by the European Union migration and asylum law. Under the context of the COVID-19 Pandemic, many countries have modified their asylum procedures and implemented other actions such as remote registration¹, medical inspections, and quarantine measures. The number of new asylum claims registered worldwide throughout 2020 was deeply lower – around 45% - than in 2019². (*UNHCR - Global Trends in Forced Displacement – 2020*, 2020). The COVID-19 raised the issue of the emergency to reshape the international migration order and procedures, and it was, once again, time to rethink the EU approach towards migrants.

¹ “In 2020, UNHCR refugee registration numbers dropped to their lowest levels since 2012, and some 42 per cent lower than in 2019. The impact of these restrictions was most notable between March and April 2020, with a drop in registrations of 56 per cent from 71,900 to 31,700”. Available at: <https://www.unhcr.org/statistics/unhcrstats/60b638e37/global-trends-forced-displacement-2020.html>

² “In 2020, UNHCR refugee registration numbers dropped to their lowest levels since 2012, and some 42 per cent lower than in 2019. The impact of these restrictions was most notable between March and April 2020, with a drop in registrations of 56 per cent from 71,900 to 31,700”. Available at: <https://www.unhcr.org/statistics/unhcrstats/60b638e37/global-trends-forced-displacement-2020.html>

Hypotheses:

During the COVID-19 Pandemic, through a more restrictive border control, the EU and its Member States' have shaped the migration control policies. Under the context of the Pandemic, the EU Member States' have adopted a stricter border control, preventing migrants from achieving their territory.

This research must be performed through a wide range of lenses, as described in Chapter 1, in order to examine and comprehend the many elements of the phenomena in the case study, due to the sensitivity and complexity of the topic. Therefore, this study methodology aims to explain the reason why some Migration Control practices keep taking place and what can be done differently to change the status quo.

A theoretical research approach will be presented in order to respond to the research question and support the hypothesis hereby presented. In this dissertation, some legal cases that took place during the pandemic, will be analyzed; as well as most important legal instruments under International and European Migration Law and supporting literature with regard to the topic examined. The aim will be to create an extensive and practical analysis in terms of methodology.

To answer the research's major objectives, two key theoretical components will be used: theories and policies that have been used to control migration in pandemic times. Moreover, this thesis is structured into five chapters. Firstly, special attention is given to the history of the International Migration Order, which influenced how the structures and organizations welcomed refugees during the pandemic; an initial analysis of the International and European Migration law, as well as a brief reflection of the international migration context, before the pandemic, in order to examine some essential events that had an impact on the approach to migration during the Pandemic (see Chapter 2).

In the third Chapter an overview of the most common illegal practices that took place during the Pandemic, is provided. Following Chapter four, with a brief resume of the EU migration agenda and relevant case-law related to the migration control during the Pandemic, focusing on

the question of the adequacy of the Dublin Regulation. Several definitions and relevant elements will be examined, along with the oversimplified duality of the practices of migration control during the COVID-19 migration crisis. Within this research, it should be possible to identify possible existing gaps and determine why they remain, especially in the context of the Dublin Regulation's narrow interpretation and the burden it places in some particular EU Member States'. In this chapter, the focus will be on how the COVID-19 containment measures adopted by the EU and the Member States relate to the EU-relevant legislation in this section.

This dissertation will explore the repercussions that the closure of the external borders has had on the situation of migrants, displaced people and asylum seekers. On Chapter 4, an overview of the EU Migration Crisis Approach is pursued, by analyzing some legal cases that took place during the Pandemic, addressing major Human Rights violations. It is noteworthy to analyze these legal cases, as well as the instruments and decisions since they reflect the EU COVID-19 Migration Crisis Approach.

After having identified and addressed existing legal flaws, in the final Chapter, some reflections will be presented with the main reasons why and how the COVID-19 shaped the EU and its Member States' policies; considerations will be made on some specific situations, that were regarded as good practices for the EU border control, within the international legal framework.

1.4 Literature Review

Several authors have been developing research on the systemic difficulties that undocumented migrants have faced, in particular, focusing on sociocultural and structural impediments (Dang et al., 2012). The entry of unauthorized workers into Europe has not been curbed despite efforts at border security and immigration restrictions. Policy makers considered incomprehensible that unauthorized migrants continued to enter the country despite tight security measures (Bridget Vilog & Piosos III, 2021).

Ron Bridget T. Vlog and Carlos M. Piosos developed an argument based on the experiences of undocumented migrants who have been trying to maintain their way of life and remain in the European Union, and also debate on the use of legal violence against the state policies and restrictions put in place between February 2020 and May 2020 by the European Union to slow

the dramatic rise in COVID-19 infections. In order to prevent the spread of the virus, the national immigration policies, which already harm the security and health of illegal migrants, have been strengthened during the pandemic by a number of regulations and restrictions on travels.

Undocumented immigrants' lack of access to economic aid has further diminished their power. Although being legal and acceptable for the majority, these policies and government initiatives have consistently encouraged legal violence against undocumented workers. As a result of the state enforcing these laws, society replicates the customs and standards that normalize both – the privileges of law-abiding people and the suffering of unauthorized immigrants. In the literature, (Kate E. Murray and David M. Marx, 2013) the normalization of preconceptions against undocumented migrants is examined, uncovering a variety of reasons and variables, including the perception of the people in the host country concerning the concrete advantages and disadvantages of illegal immigration. Concern and mistrust of illegal migrants are fostered by anticipated real and symbolic threats, prejudiced attitudes, and even racism.

Migrants' lack of access to health care under the COVID-19 crisis is examined in a large body of literature. The author Sigrid L. (2021) argues that the Covid-19 crisis had a negative impact on refugees, it displaced people and migrants' access to health care was substantially forgotten. The legality of border closures with the view of limiting the spread of COVID-19 was called into question. Migrants' and displaced people were more vulnerable within the context of the Pandemic, as the access to health care was strongly impacted following the border closure. (Chetail, 2020; Gilman et al., 2020). The COVID-19 health crisis that emerged as a consequence of the COVID-19 Pandemic, brought to light the alarming everyday reality of detention centers, where asylum seekers and illegal migrants frequently experienced forced lockdowns and inhumane conditions (Fassin, 2020).

The management of border closure and the impact on migrants under international Law grounds is approached by Vicent Chetail (2020). Although States have a wide range of options in establishing how to manage their borders, people's ability to enter a country is not unregulated by law. Whether based on worldwide and regional conventions or codified in customary international law, the movement of people across borders is governed by a relatively extensive and intricate network of international legal standards. In this line, the author Elspeth Guild

(2020) examines the legal challenges brought by the COVID-19 Pandemic within the European Union context. There were not many indications of Member States collaboration or even advocacy for this EU obligation during the early stages of the COVID-19 epidemic. Considering the migration flow, it is clear that the EU's public health cooperation was deeply impacted by the border control response, which has resulted in an inconsistent and incoherent management of the border control.

In this research, the EU policies of migration control will be examined to understand in which way did the COVID-19 Pandemic shaped the EU and its member States. An analysis of the EU and its Member States' strategies and actions in relation to border control in the light of contemporary promises under the EU legal framework. The EU Migration legal framework, which already poses a threat to the security and health of unauthorized immigrants, has been tightened in response to the pandemic by a number of protocols and restrictions on mobility, and these restrictions had a deep impact on migrants' lives.

Chapter 2: International Protection and Asylum Law

Migration - a timeless debate

Throughout history, the timeless debate about Migration has been witnessed. Migration is now, more than ever, a daily debate in our society; however, it is not a recent issue, Migration has always existed and will continue to exist, it is up to the Society and the International Organizations to decide how to act. One of the great Greek tragedies - "*The Suppliants*"³ - reflects this reality. The whole plot revolves around whether or not a group of women will be given asylum. In this play - from the 5th century BC - the king and the Argos citizens argue throughout the Greek tragedy about whether these women should be given shelter. Two main points can be taken into account: the permanence of migration and the permanence of the debate. This play is from the 5th century BC - migration has always existed, and will continue to exist, including asylum migration. There is a debate between the need to protect individuals

³ "*The Suppliants*" - also called "*The Suppliant Women*" - is a play by Aeschylus and one of the great Greek tragedies, from the 5th century BC. The entire play is about these Suppliants, that are fifty women (the Danaids, the fifty daughters of Danaus) who fled North Africa, Syria, Libya, to Greece in the Aegean Sea, on the small island of Argos.

and the collective interest of the host society whose security is in danger. From this play we can see the timeless debates on migration and asylum.

Although there is no legal definition for migrants at the international level, the International Organization for Migration sets a definition for migrants, which covers refugees, economic migrants, and asylum seekers; and defines migrant as:

“A person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants (...).”⁴

In general, three narratives are central to the study of International Migration: migration has always existed and, indeed, will continue to exist; migration should be regulated by law - in particular, asylum migration; the 1951 Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees” (CJUE, 2013).

Under International Law, there is a paradoxical gap since there is an expressed right to emigrate and there is no right to enter – to immigrate. The 1948 United Nations Universal Declaration of Human Rights, Article 14 (1), states that: “Everyone has the right to seek and enjoy in other countries asylum from persecution”⁵. The 1948 Declaration provides, for the first time, the right to seek and enjoy asylum. Nevertheless, the Declaration remains a non-binding text and it does not provide the right to enter a third country.

The Right to Seek Asylum, firstly enshrined on the United Nations Universal Declaration of human Rights, was reinforced by the 1951 Convention Relating to the Status of Refugees. The 1951 Geneva Convention establishes a set of guidelines that are essential to structure the basis

⁴ International Organization for Migration. Who is a Migrant? Available at: <https://www.iom.int/who-migrant-0>

⁵ Universal Declaration of Human Rights (UDHR). Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

of International Refugee Law Protection – within which both can be found – the principle of non-refoulement⁶ and the definition of refugee⁷. The Geneva Convention states refugee as:

“Someone who is unable or unwilling to return their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.”.

The Principle of Non-Refoulement states that no one - disregarding the migration status – should be returned to a country in which there is a possibility to suffer from torture, punishment, inhuman or other degrading treatment. Under this Principle, States are prohibited to return individuals to the home-country when among the possibility of persecution, torture or inhuman treatment; thus, “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life of freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion”.

Under the context of the Pandemic, the effectiveness of the Principle of the Non -Refoulement was put into question. Did some violations of the Principle of Non-Refoulement took place on the grounds of the COVID-19 Pandemic?

Notwithstanding, the UNHCR declared that within the application of the Article 33 (2) it is required an “individualized determination by the country in which the refugee is [located] that he or she comes within one of the categories provided for”- in the Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating the Status of Refugees and its 1967 Protocol⁸.

The 1966 International Covenant on Civil and Political Rights, recognizes the right for any person to leave any country, including their own, citing on Article 12 that “Everyone shall be

⁶The Refugee Convention, 1951 - Article 33: Prohibition of Exclusion or return (‘Refoulement’). <https://www.unhcr.org/4ca34be29.pdf>

⁷The specific definition of a Refugee can be found in the Geneva Convention of July 28, 1951. Nowadays this definition is still accurate. Available at: <https://www.unhcr.org/4ca34be29.pdf>

⁸UNHCR. Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. Available at: <https://www.unhcr.org/4d9486929.pdf>

free to leave any country including his own”⁹. The 1967 Protocol Relating to the Status of Refugees abolished the geographical and temporal boundaries of the Refugee Convention, making it internationally enforceable¹⁰. Taking into account the way the COVID-19 Pandemic was managed, has interference with the obligation of Non-Refoulement under Article 33. Therefore, it is necessary to reflect on the increased difficulty to achieve the objectives and goals purposed under the Refugee Convention (Sukianto, 2022).

EU Asylum and International Migration Law

Overall, the debate within the Asylum and International Migration Law highlights the permanence and variability of migration. Asylum Migration becomes a right when a migrant’s¹¹ fundamental rights are in risk. At the EU level, the Article 18 of the EU Charter of Fundamental Rights states the Right to Asylum, citing that:

“The right to asylum shall be guaranteed with the due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the treaty on the Functioning of the European Union”.

Within the Treaty on the Functioning of the European Union (TFUE), the Articles 67(2), 78 and 80¹² sets a couple of provisions about the right to seek asylum. Thus, the European Union “shall frame a common policy on asylum” (article 67 (2)); by developing a “common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate

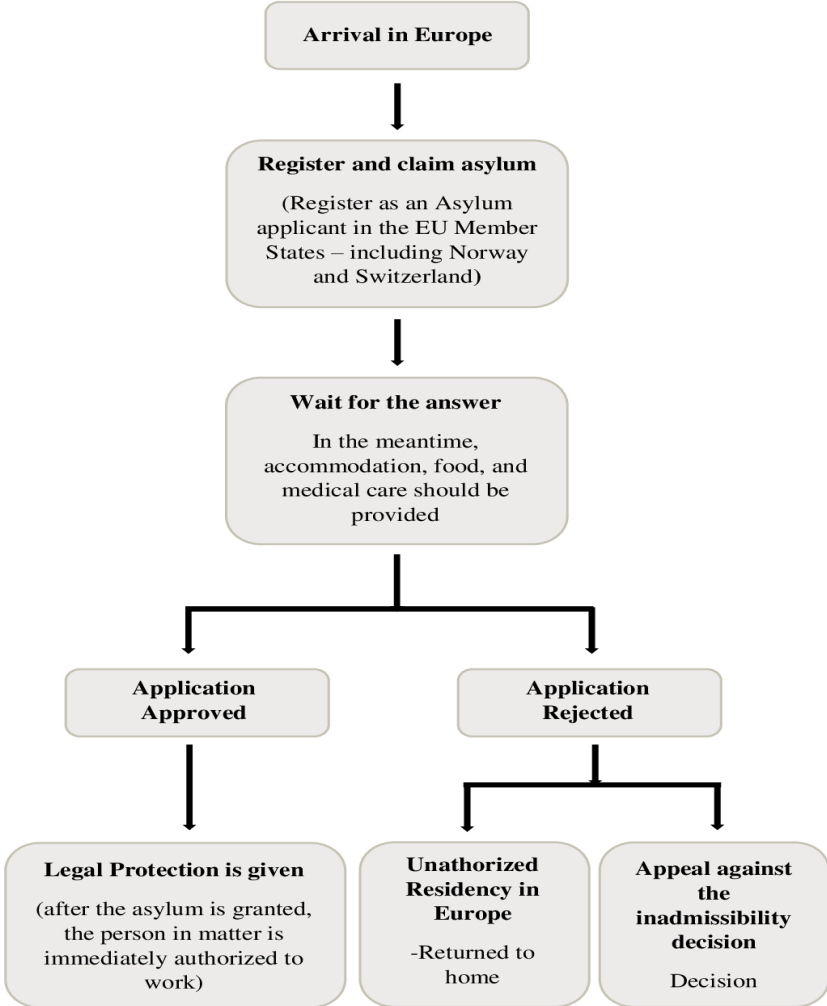
⁹ Article 12 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

¹⁰ Article 1 of the 1967 Convention and Protocol Relating to the Refugee Status, states that the Protocol “shall be applied by the States Parties hereto without any geographic limitation (...)”. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-relating-status-refugees>

¹² The article 80 of the Treaty on the Functioning of the European Union, states that “The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016ME%2FTXT>

status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement (...)”¹³ (article 78 of the TFEU).

Table 1 - Asylum procedure



Source: Made by the author.

As a cornerstone of the EU’s common asylum system, the Dublin Regulation determines which EU country is responsible for processing applications for international protection. The Dublin Regulation aims to determine which Member has the responsibility for analyzing an asylum application and assure that each claim gets a correct and fair evaluation in one Member State.

¹³ (...) This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”. Article 78 of the TFEU. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016ME%2FTXT>

Throughout the EU law, it is possible to find a range of legal provisions that protect the Refugee. In this regard, it is important to highlight the Directive on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted¹⁴. This Directive determines a set of steps for Member State to apply uniform standards for identifying individuals who are deeply seeking international protection and to guarantee that the minimum level of protection is provided in each Member State, - this Directive establishes the rules on the qualification of third country nationals¹⁵ as individuals or refugees' subjects to subsidiary protection. The aim is to provide the member States a set of essential elements to have in consideration with regards to the asylum policy.

2.1 The Pre-pandemic International Migration Context

International Migration Background

The European Union and its Member States have long-standing legal responsibilities to protect and promote the effectiveness and compliance of the human rights of all migrants, regardless of their immigration status. The EU, as such, is not a party to the Refugee Convention and also not a party to the ECHR; although both bodies of law are integrated to some extent within the EU law, that is part of the EU legal order.

In 2014, the UN Member States were called to reiterate this commitment, in the UN General Assembly Resolution 69/167 (protection of migrants) on 18th December - “reaffirming (also) that everyone has the right to (...) leave any country, including his or her own”¹⁶ (Ndubueze,

¹⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011. Official Journal of the European Union. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF>

¹⁵ The European Commission defines “third-country nationals” as “Any person who is not a citizen of the European Union within the meaning of the Article 20 (1) of TFUE (Treaty on the Functioning of the European Union), and who is not a person enjoying the European Union right to freedom, as defined in Art. 2(5) of the Regulation (EU) 2016/399 (Schengen Borders Code)”. Available at: https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/third-country-national_en.

¹⁶ UN General Assembly – Resolution adopted by the General Assembly on 18 December 2014 [on the report of the Third Committee (A/69/488/Ass.2 and Corr. 1)] 69/167. 69/167 Protection of migrants. Available at:

2015). It is important to have this moment in mind – which comes right before one of the most significant refugee crisis in the European Union – as the UN Member States reiterate their commitment to the defense and fulfillment of human rights. The year of 2015 was marked by a dramatic flow of migrants - throughout the year, the number increased steadily from about 5500 in January to a peak at over 221,000 in October on the southern coast of the Mediterranean - which brought the total number of refugees to 1.25 million during that year (UNHCR, 2016).

Over the time – with a massive and abrupt migration flow – this period was soon described as a crisis, the so-called “Migration Crisis”¹⁷. This crisis called for action by the need to be addressed by the domestic policies of the majority of the EU Member States, as well as the EU as a whole in order to find long-term solutions (Heisbourg, 2015). Over this period, the number of asylum applications increased significantly, putting the Common European Asylum System (CEAS) under pressure¹⁸.

This period made the EU re-think and unexpectedly reorganize the governance of international migration to Europe and the management of asylum seekers. There are, however, some legal frameworks that the EU has and could have been used. For instance, the Directive of Temporary Protection, that will be addressed and analyzed further in the next chapters.

The 2015 Migration Crisis has led to new tensions between the EU Member States and intensified those that already existed, which, as consequence – has resulted in a significant impact on the Union as a whole (Heisbourg, 2015). A migration crisis, more than a big challenge for the EU, has also raised defying challenges for public policies of democratic States.

https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_69_167.pdf

¹⁷ “Migration Crisis” is a term that refers to a period started in 2015 marked by a huge flow of migrants that arrived at the European Union borders. More than 1.25 million refugees arrived at the borders of the European Union countries, the majority, by fully packed boats crossing the Mediterranean. The number of migrants, which was initially huge, kept increasing during several months.

This term is used to refer to this period, beginning in January 2015. Even though the term “refugee crisis”/“migration crisis” is not neutral, it is frequently used as a reference to this period.

¹⁸ In 2015 there was reported a total number of 1 349 638 asylum applications for international protection. This number was registered in the 28 (at the time) EU Member States, plus Norway and Switzerland. The number recorded represents more than the double of migrants requesting asylum protection in the year before, in 2014. Available at: <https://euaa.europa.eu/sites/default/files/public/LatestAsylumTrends20151.pdf>.

2.2 The not-yet solved 2015 migration crisis – and the later (predictable) return

Without a doubt, the international Agenda has changed, and with that, a “new Europe” was necessary to act (Balibar, 2015). The 2015 European Agenda on Migration and Asylum has changed and, a new EU Migration chapter has born. The way that the EU conducted the Migration Agenda was significantly impacted by this crisis. Incontestably, it was a dramatic event that influenced the European Agenda on Migration and Asylum. The immigration topic was brought to the forefront of the agenda as a result of the crisis, which provided an ideal environment for the rise of the radical rights parties¹⁹.

The EU was prepared to receive refugees, but it was not prepared for the collapse that occurred in 2015. If there is an institution that is exemplary in the defense of human rights, it is the European Union. However, in sum – we have witnessed two actors that have failed: the EU has failed as institution; and some Member States have failed in complying with some diligences. The first, has failed mostly with regard to the EU-Turkey *statement*²⁰; secondly, some EU Member States have failed in welcoming refugees, such as Poland, Hungary, and Czech Republic²¹. It is important to highlight under this context that the “EU-Turkey Statement”.²²

What did we have (or not) learnt from this crisis?

The EU was still recovering and readjusting the migration policies when the health Crisis emerged, and with that, other Migration crisis. Thus, the answer to the question “Was the EU

¹⁹ “Amid a migrant crisis, economic inequality, growing disillusionment with the European Union and a sense of lost national identity, right-wing parties in a growing number of European countries have made electoral gains”. It is clear that the rise of the right-wing populist parties seems to be more likely a result of immigration becoming a significant challenge than it is of immigration being a greater issue on a national level; the majority of the right-wing populist parties in Europe prioritize the immigration issue - blaming migrants for the weak economic context and capitalizing on concerns about cultural deterioration and increased criminality. Available at: <https://www.nytimes.com/interactive/2016/05/22/world/europe/europe-right-wing-austria-hungary.html> .

²⁰ The EU-Turkey Statement stated on 18 March 2016 – a mutual agreement that Turkey should retain refugees coming from neighboring countries intending to reach Europe. In this way, the EU could control and manage, in a more effective, the refugees arriving in the EU Member States. Nevertheless, this agreement has represented the antagonism of what the EU has stated itself since always – an institution marked by the premise of the respect of human rights. Available at: https://ec.europa.eu/commission/presscorner/detail/el/MEMO_16_1494

²¹ The Court of Justice of the European Union (CJEU) stated, on 1 April 2020, that Poland, Hungary, and Czech Republic have failed under EU law (Article 5(2) 2015/1601 and 2015/1523) by refusing to integrate the migrant sharing scheme. Available at: <https://ecre.org/cjeu-poland-hungary-and-czech-republic-failed-to-fulfil-obligations-under-council-relocations-decisions/>.

ready to manage migration control towards a global pandemic?”, it seems easy to answer. Metaphorically, it is like a snowball, and it was big enough after the 2015 Migration Crisis and has been becoming bigger throughout time. Whence, when analyzing the migration practices Control during the pandemic, all the arguments were built under the narrative that Europe has been experiencing a Refugee crisis since 2015.

The solution provided by the EU did not contribute to an effective answer for the migration issue when addressing a migration flow. Thus, and as it will be analyzed in the next chapter, the lack of a permanent answer has its origins in the Turkish Government’s decision to quit the EU-Turkey agreement during the COVID-19 Pandemic, making border management even more difficult to manage under that context.

Chapter 3: Covid-19 - Migration boarder control

3.1 Migration control during COVID-19

On 16th of March 2020, the European Commission released a set of restrictions to fight against the new coronavirus disease²³; this press release comes in line with the global health context – after the global spread of the virus, the World Health Organization declared in March 2020, that we were under a Pandemic.²⁴ The document – “COVID-19: Temporary Restriction on Non-Essential Travel to the EU” – stated a range of rules and recommendations. For the EU Member States to implement a uniform action to contain the spread of the virus, the European Commission established and determined “Travel restrictions” – that would contribute to “drastically reducing incoming flows at the external borders of the Union, thereby also slowing transmission to other countries on travelers’ return and discouraging outgoing travel of the EU

²³ As defined by the World Health Organization, the “Coronavirus disease (COVID-19) is an infectious disease caused by the SARS-Cov-2 virus” and that people infected would experience “mild to moderate respiratory illness and recover without requiring special treatment. However, some will become seriously ill and require medical attention”. Available at: https://www.who.int/health-topics/coronavirus#tab=tab_1. (Retrieved on 29/01/2023)

²⁴ The first case was detected in December 2019 – and, with the quick spread of the virus, the World Health Organization has declared a “Public Health Concern on 30 January 2020”, and later in March – “to characterize the outbreak as pandemic on 11 March 2020”. Available at: <https://www.who.int/europe/emergencies/situations/covid-19> (Retrieved on 29/01/2023).

citizens and other persons residing in the EU+ area”²⁵. The “Temporary Travel restrictions” was intended to “all non-essential travel from third countries to the EU+ area”²⁶. (COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL, 2020).

Within the Schengen borders, any “nonessential travel” to the EU was suspended as well as throughout the European Union as well as the EU Member States governments have restored border controls. As a consequence, there was an “enforced immobility” (Groupe URD 2020), a movement that happened as an aftereffect of the way that the pandemic was driven. The impact these stringent limitations on international travel had on people’s lives has varied greatly and has been highly dependent on the position within global hierarchies of mobility prior to the pandemic (Heller, 2021). Reinforcement of inclusion policies towards migrants and displaced persons is needed, especially in an everyday more globalized world where “yet international cooperation has also facilitated new patterns of state governance that challenge the liberal world vision and undermine the effectiveness of human rights” (Gammeltoft-Hansen and Vedsted-Hansen 2017).

The border closures, implemented by the States to contain the spread of the virus, had a direct impact in the efficiency of the Asylum Systems and Procedures. At the height of the pandemic in 2020, around 154 countries had shut their borders, with 99 States making no exceptions for individuals seeking asylum (*UNHCR - Global Trends in Forced Displacement – 2020*, 2020).

Considering the issue of the asylum application procedures, the European Commission recommended that the European Union Member States should consider the scenario of numerous simultaneous applications as it is foreseen in Article 6(5) of the Procedure Directive as “simultaneous applications for international protection by a large number of third-country nationals or stateless persons make it very difficult in practice to respect the time limit (...)”.

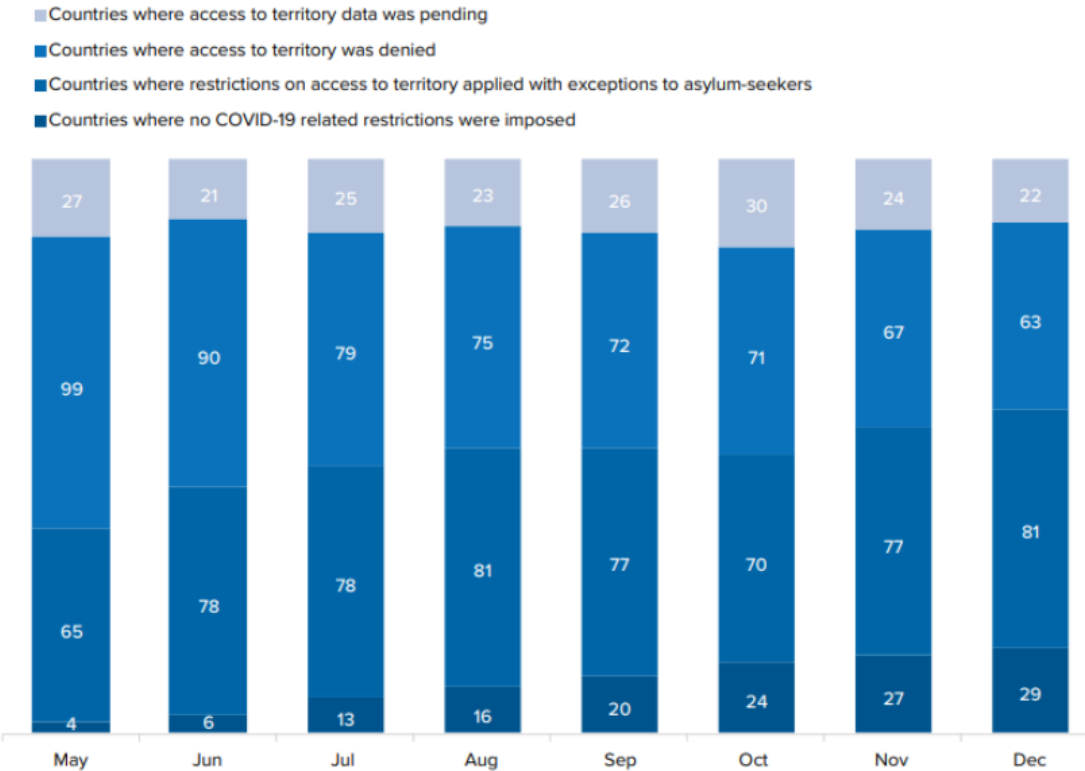
²⁵ The expression “in the EU+ area” includes all the Member States present in the Schengen area – such as Bulgaria, Cyprus, Romania and Croatia – and also other Non- EU Member States part of the Schengen area (Iceland, Switzerland, Norway and Lichtenstein). The “Schengen area” constitutes an area marked by freedom of movement, where there is not any type of border control.

²⁶ “(...) For such a temporary travel restriction to have the desired effect in terms of restricting to have the desired effect in terms of restricting the spread of the virus, exception need to be limited to travel for essential purposes.”. Communication from the Commission to the European Parliament, the European Council and the Council Covid-19: Temporary Restriction on Non-Essential Travel Restrictions. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0115>

This is due to the fact that the Procedures Directive²⁷ does not predict the Pandemic among the legal provisions (Marin, 2020).

As for the Dublin Regulation²⁸, the Article 17 (“Discretionary clauses”) paragraph 2, states that “The Member States in which an application for international protection is made (...) may, at any time before a decision is taken on the substance of an application, request another Member State to take charge of applications in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that Member States is not in principle responsible”.

Figure 1- Borders and mission of asylum-seekers | 2020



Source: UNHCR (Global Trends - Forced Displacement in 2020)

²⁷ 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). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>

²⁸ 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 (recast). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=en>

During the pandemic, the EU has faced legal challenges regarding its handling of migrants, particularly, in regard to the closure of borders, and the treatment of asylum seekers. Many countries implemented border closures and travel restrictions to curb the spread of the virus. We saw the reintroduction of border controls where previously there weren't any, such as within certain borders in the Schengen area, which makes movement for migrants much harder.

The closing of the EU's external and internal borders, the initial suspension of the Asylum process, and additional limitations in the Mediterranean were all brought in by COVID-19. The Schengen Borders Code does not, in theory, permit travel restrictions or the closing of a Member State's external borders; nonetheless, the Chapter II provides comprehensive regulations regarding the temporary reinstatement of border control at internal borders (Arts 25 -35). In terms of the external borders, the EU's authority initially lays in its ability to adopt "flanking measures" following the Schengen Agreement, but it has since evolved into a shared authority because Article 77 of the TFEU mandates that the Union shall create a strategy by following a framework on effectively monitoring border crossings; gradually implementing an integrated management system for external borders (Marin, 2020).

Under the Reception Conditions Directive, the Article 13²⁹ provides that health screenings may be required for public health purposes, in conformity with the fundamental rights and the principle of non-discrimination. Moreover, Art. 19 (1)³⁰ states that the EU Member States should deliver the required healthcare, including for the COVID-19 virus. Quarantine and isolation measures are allowed if they are grounded in the Member States law, and used in a reasonable, proportionate, and non-discriminatory approach (Marin, 2020). With this regard the authors Androula Pavli and Helena Maltezou advocate that “The results of screening must never be used as a reason or justification for deporting a refugee or a migrant from a country”³¹.

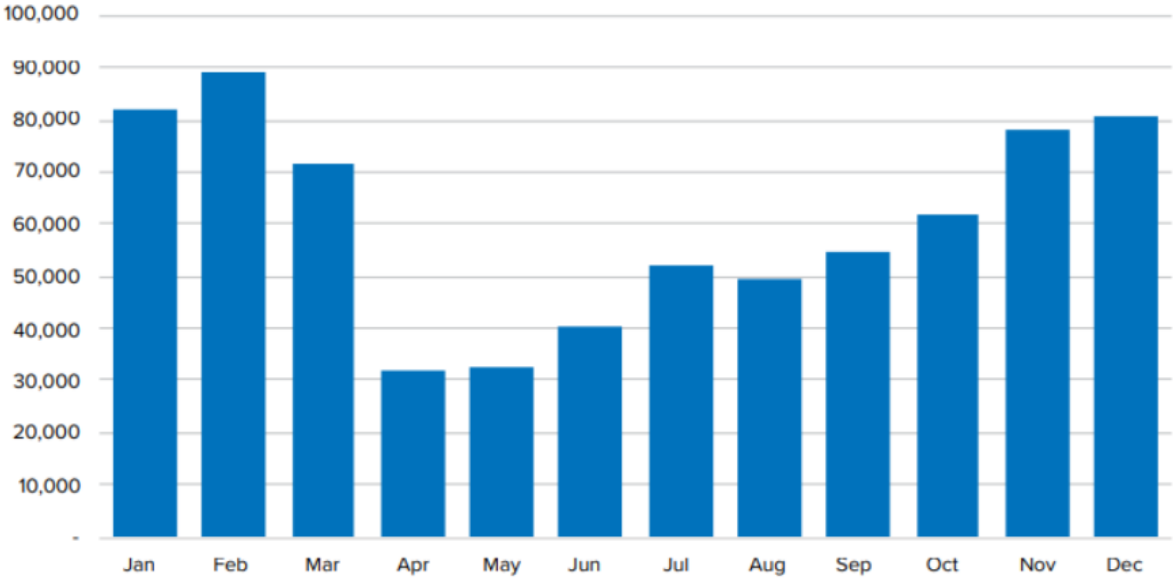
29 “Member States may require medical screening for applicants on public health grounds.” Article 13 (“Medical screening”). Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN>

30 “Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness (...)”. Article 19 (1) – (“Health care”). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN>

31 “(...) screening for infectious diseases among refugees and migrant patients in order to provide timely preventive and access to vaccinations and therapeutics.” Journal of Travel Medicine. “Health problems of newly arrived migrants and refugees in Europe”. Available at: <https://academic.oup.com/jtm/article/24/4/tax016/3095987>

Furthermore “screening of migrants and refugees for certain diseases is part of the prevention and control strategy for some EU countries and it should be considered in accordance with their national guidelines. Selection of specific infectious diseases for screening should be based on the symptoms presented by migrants during clinical examination” (Pavli & Maltezou, 2013).

Figure 2 - UNHCR refugee registration | 2020



Source: UNHCR (Global Trends - Forced Displacement in 2020)

Since the outbreak of the COVID-19 Pandemic refugee registration dropped drastically. The monthly refugee registration rate eventually returned to normal as the year went on, although with modified practices like remote registrations³². Throughout the COVID-19 crisis, we were constantly reminded of our interconnectedness – within our globalized world – in a globe gripped by a pandemic. The freedom of movement can mean much more than only unrestricted circulation. The freedom of movement within the EU’s internal borders, remain on the premises of the guarantee on the compliance of the principles of human rights. When the safety of one is in question, the safety of thousands also is. Within this dissertation we will examine the fact that under the context of the COVID-19 Pandemic, States have rejected large numbers of people

³² In addition to these numbers, dozens, if not hundreds of migrants who, under the context of the pandemic, were not registered – and, therefore, were sent back. The interviewed represented by the code EOL – working in an ONG in Lesbos – stated that this situation happened in the Greek Island of Lesbos – during the Pandemic. When many migrants arrived, they were not registered and, therefore, many “push backs” took place without any of these migrants being included in the official numbers of arrivals in the island.

at the border without even considering their eligibility for refugee. The COVID-19 Pandemic has brought attention to how crucial it is to promote regular, safe, and secure migration, - for both – the hosting societies and the migrants themselves (Freier Feline, 2020).

Different governments' approach with regard to the containment measures have prevented a homogeneous EU action concerning the migration management. It is important to reflect how the most vulnerable people are frequently affected by the overall context, the geopolitical management of migrants under an atypical context such as the pandemic creates, as a result of the context (under the State of Emergency), a regression of fundamental human rights. The outbreak of COVID-19 made all of us reevaluate some crucial, unresolved issues and brought to light issues that previously existed in our Society. So, the question arises: Borders or Human Rights? What is the EU's priority?

During the pandemic, we have seen that the EU Member States have used it as a pretext for shutting borders and increasing border surveillance and militarization, increasing pushbacks even more and making it harder for migrants to find legal pathways to enter a country. In addition to causing national borders to become more tightly guarded, COVID-19 has also been used to defend strict, questionable policies regarding refugees and immigrants (Hargreaves et al., 2020)

3.2 Closing Borders for migrants

The COVID-19 Pandemic has presented numerous challenges for migration control worldwide. Governments have had to balance the need to control the spread of the virus with the need to maintain border security and facilitate essential travel. Many countries closed their borders or severely restricted entry to non-residents during the pandemic. This has disrupted international travel and caused significant economic and social impacts.

“COVID-19 leaves a few lives and places untouched. But its impact is harshest for those groups who were already in vulnerable situations before the crisis. This is particularly true for many people on the move, such as migrants in irregular situations, migrants workers with precarious livelihoods, victims of trafficking in persons as well as people fleeing their homes because of persecution, war,

violence, human rights violations or disaster, whether within their own countries – internally displaced persons (IDPs) – or across international borders – refugee and asylum-seekers.”

(“Policy Brief: COVID-19 and People on the Move”,
United Nations, June 2020)

Border closures have limited access to basic needs and services, such as food, water, and healthcare, for people who are stranded at the border. This has violated the right to an adequate standard of living, as well as the prohibition of inhuman and degrading treatment³³. Several countries closed their orders and immigration offices during the pandemic, which has led to significant delays in processing asylum requested. Thus, this situation has resulted in many migrants being held in detention centers for extended periods of time, which can have a negative impact on their mental and physical health and well-being.

Due to the COVID-19 outbreak and the ensuing adoption of restrictive measures, such as movement restrictions and border closures, EU countries have implemented a number of administrative mechanisms that directly impact the services provided under the immigration and asylum procedures in an effort to stop the continuous spread of the virus. Some of the actions implemented by the EU Member States remained on the temporary suspension of asylum applications³⁴ (European Commission, 2021). Some countries have suspended the processing of asylum claims³⁵ or restricted access to asylum procedures during the pandemic, leaving vulnerable individuals in limbo at a risk of human rights abuses. As a result of the suspension of the asylum claims processes, in the EU, “applications dropped to just 8,730 in

³³ On the Preamble of the “Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment”, states that “Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>

³⁴ “Between January and October 2020, a total of 375,255 applications for international protection were lodged in the EU 27 Member States, according to Eurostat. This represents an approximate -35% decrease compared to the 578,580 applications lodged during the same time period in 2019. This drop largely due to the COVID-19 outbreak and the suspension of asylum-related activities.”. ECRE. Available at: <https://www.ecre.org/wp-content/uploads/2020/12/ECRE-COVID-information-sheet-Dec-2020.pdf>

³⁵ An asylum claim is a request made by an individual to be granted protection by a foreign government because they fear persecution in their home country.

April and 10,200 in May 2020, down from 34,737 in March and 61,421 in February” (Ghezelbash & Feith Tan, 2020). Under this context, the EU Commission suggested that exceptions for asylum seekers be made in border closures (Ghezelbash & Feith Tan, 2020). Some EU Member States have adopted more restrictive measures, such as Greece, Malta and Italy. These countries due to their geographical location, are more likely to receive refugees, and may have seen in the context of the Pandemic a pretext to strengthen border control.

The legitimacy of border closures is called into question in light of International Human Rights Law, as some of the most important legal jurisdictions that protect the migrants, are not guaranteed – such as the Principle of Non-Refoulement, the access to Asylum Procedures, the prohibition of collective expulsion and the Principle of Non-Discrimination (Lang et al., 2020). As stated in Article 3 (Non-Discrimination) of the Convention Relating to the Status of Refugees, the decisions regarding asylum seekers should always be taken free of any discrimination of religion, race, and country of origin (“The 1951 Convention Relating to the Status of Refugees (Rc) and the 1967 Protocol (Rp) Relating to the Status of Refugees” 2015). There is no doubt that the subsidiary protection is not ample enough³⁶. Notwithstanding, there has been some evolution in the protection of refugees and asylum seekers - both through binding and non-binding legislation; however, there is still some important improvements to be made.

Overall, the pandemic has created significant challenges for migrants seeking asylum, making it more difficult for them to access the protection and support to attend their needs. While some countries have introduced measures to help migrants during the pandemic, more needs to be done to ensure that they are able to access their rights and protections; reports of irregular deportations and human rights abuses supported by the argument of containing the spread of the COVID-19 virus, have arisen. In violation of international refugee law and maritime law, support has been denied to several refugees who were arriving in the EU by sea and, have been forced to return (Lupieri, 2021a).

³⁶ Subsidiary Protection is a legal status granted to individuals who do not qualify for a refugee status but face a real risk of serious harm if they return to their home country. The status provides certain rights and benefits, but it is only temporary and subject to further review; nevertheless, subsidiary protection is different from refugee status.

3.3 Quarantine – under the scope of the concept of *State of Exception*:

Since its beginning, the Pandemic has created a completely atypical scenario – it is easy to understand why since the whole world was fighting against an invisible thing. Under this atypical context, atypical decisions were taken by the governments’ which made some basic freedom human rights put in stand-by, such as quarantine. The term “quarantine” is defined by the Centers for Disease Control and Prevention’s (CDC), as the “separation and restriction of the movement of people who were exposed to a contagious disease to see if they become sick”(CDC, 2017). With a few examples in history and in a small dimension, it is difficult to categorize this phenomenon, by setting the boundaries when it is legal or not.³⁷

The measures adopted during the COVID-19 crisis, such as the practice of quarantine, took place under a “State of Exception” – an atmosphere somehow between politics and law. According to Giorgio Agamben, the “State of Exception” occurs when the combination of a set of activities – social, economic, political, and religious – are suspended (Agamben, 2004).

The French philosopher, Etienne Balibar, also talks about the “State of Exception”, when referring to the 2015 Refugee Crisis. Balibar argues that, while we were facing the migration crisis of 2015, the EU was facing a “State of Exception”; “more than other factors of accurate ideological and political conflict in Europe (like the politics of austerity), the migration crisis is still in the process of destroying the *consensus* on the constitutional “values” of the democratic state” (Balibar, 2015). Yet, still under the Pandemic context, the State of Exception is the ultimate test of a democratic State, which under a particular period and atypical context, democratic States are allowed to leave some basic human rights to be on-hold. The concept – State of Exception (“*Ausnahmezustand*”) – firstly developed by Carl Schmitt (1888-1985) - remains a crucial concept nowadays, as it was visible during the pandemic (Magshamhráin, 2022).

³⁷On the fourteenth century, the Black Death pandemic emerged the necessity of what was consider the first major quarantine execution; also, in 2014 Liberia faced an Ebola epidemic and isolation was one of the mechanisms used to fight against the virus, under the form of quarantine – and daily activities became scrutinized under the epidemic context. (Pellecchia, 2017).

In order to contain the spread of the COVID-19 virus, we have seen around the world numerous States that have declared the State of Emergency. This special legal regime derives from a “government declaration stating that because of some crisis, the normal workings of political and social life are suspended in the given jurisdiction.”³⁸. During the time of the COVID-19 Pandemic, we were towards a State of Exception; among other decisions that were imposed, quarantine was, indeed, a consequence of the State of Emergency imposed by the States, all over the world - and has emerged as the embodiment of what the State of Emergency can represent. The main argument falls under the fact that the practice of quarantine raises some doubts regarding its legal grounds and the fact that basic human rights have been placed on hold.

Under the context of the “State Emergency”, a legal case brought before the European Court of Human Rights, that took place in France, identified by the name “Ait Oufella v. France (no. 51860/20) and three other applications”³⁹ – represent the case of four applications related to pre-trial detentions that were automatically extended without a judge's approval during the COVID-19 pandemic due to the special context that takes place under the “State of Emergency”. In accordance with Article 5 of the Convention (right to liberty and security)⁴⁰ and Article 35 of the Convention (admissibility requirements)⁴¹, the Court informed the French Government of the applications and asked both parties questions.

The exceptional circumstances imposed by the sanitary measures to contain the spread of the virus – under the State of emergency - were extended and used as an excuse for greater control of migration – which has contributed to the rise of racism and xenophobia. In the end, the Pandemic has demonstrated the fragility of EU free movement, rules, raising issues of power, solidarity and trust in the system (Ramji-Nogales & Goldner Lang, 2021).

³⁸ Within the exception circumstances – the State of Emergency – “may alter government operations, order specific action by individuals, and suspend regular civil rights”. Available at: https://www.law.cornell.edu/wex/state_of_emergency.

³⁹ “Ait Oufella v. France (no. 51860/20) and three other applications”. Available at: <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2254879/20%22%5D,%22itemid%22:%5B%22001-211896%22%5D%7D>

⁴⁰ Article 5 (“Right to liberty and security”) – “Everyone has the right to liberty and security of person (...).”- Available at: https://www.echr.coe.int/documents/convention_eng.pdf

⁴¹ Article 35 (“Admissibility criteria”). Available at: https://www.echr.coe.int/documents/convention_eng.pdf

3.4 Quarantine Ships

Nonetheless, within the spectrum of the concept of “quarantine”, there is no official definition of the term “quarantine ship”; and the way it was understood leads to different interpretations and makes it unavoidable to question the legality of some practices that took place - under the quarantine ships – during the Pandemic. Several ethical and human rights considerations are raised by the quarantine practices that took place over the Pandemic. Indeed, “health and political power subordinate human rights in the name of a “State of Emergency”; and quarantine ships are reminiscent of such state of exception” (Meo & Bentivegna, 2021). Furthermore, practices such as quarantine ships “become an emblematic example where all the difficulties and the exceptionality of the emergency status are exacerbated” (Meo & Bentivegna, 2021). According to Paul Farmer, infections and inequalities are linked – in the context of a global health crisis, the response provided tends to exacerbate social disparities (Farmer, 2001). This is the case of quarantine ships and migrant’s management during the pandemic.

Quarantine ships and migrants’ management are both linked within the Pandemic context - numerous migrants were left in quarantine ships, as they were representing major health threat to States sovereignty. During the COVID-19 Pandemic, several quarantine ships were used to isolate individuals who had been exposed to or tested positive for the COVID-19 virus.

Starting from April 2020, in Italy, quarantine ships have emerged working in a limbo between containment mechanism - to avoid the spread of the COVID-19 - and as detention centers, at the same time⁴². Migrants were kept in these facilities in order to track the possibility of COVID-19 cases. Throughout the Pandemic, several quarantine ships were used to isolate individuals who had been exposed to or tested positive for COVID-19. Based on sanitary concerns, the quarantine ships can be identified as somehow being characteristic of geopolitical control of migratory movements during the pandemic⁴³. The lack of accurate information often

⁴² Due to the situation caused by the Pandemic, the Italian government said on April 7, 2020, that it was no longer able to accept refugees and asylum seekers. Therefore, with the Italian government’s decision to declare its ports unsafe and confine migrants in the so-called “quarantine ships” – justified within the context of hygienic-sanitary logic as an extreme measure to address an unrecognized sanitary emergence. Available at: <https://esthinktank.com/2022/02/10/hygienic-sanitary-humanitarianism-as-a-justification-for-migrants-deterrence-the-case-of-italian-quarantine-ships-during-covid-19/>

⁴³ Shortly after the World Health Organization have declared increased spread of the COVID-19 virus a public health emergency, States have implemented a variety of restrictive measures, extending from temporary bans on port access to discrimination between ships based on their nationality or on factual factors like prior ports calls in

tends to mislead to an unreal perception of the reality. Thus, one of the ways to be informed about the real situation is throughout human rights activists and human rights institutions (Meo & Bentivegna, 2021).

There have been several legal cases related to quarantine ships during the pandemic, including disputes over the conditions on the ships and the length of time individuals were required to remain on board⁴⁴. Some individuals have also challenged their detention on the ships, arguing that it was not necessary or that their rights were violated.

Rescue ship denied docking in Italy and Malta

Increased tensions were developed from Italy and Malta's refusal to permit the prompt disembarkation of rescued maritime migrants as a result of the pandemic. This was the case of the "Ocean Viking" – a rescue ship carrying migrants seeking asylum in Europe – where refugees got stuck in a limbo between Italy and Malta, as both countries were not allowing the ship to dock. Facing the impossibility to dock in the ports of Italy and Malta, the migrants were kept in quarantine on board of the ship for several weeks. This case drew a lot of media attention after many attempts of suicide by refugees on board (Info Migrants, 2020).

The Italian-Maltese Limbo

On 11 April 2020, allegedly the Armed Forces of Malta (AFM) approached a rubber boat that came within sight of Maltese shores and gave life jackets to migrants in need but did not let them land in Malta. Reportedly, the AFM provided the migrants with a new outboard motor, fuel, drinking water, and navigation equipment with directions towards Italy. It was also

contaminated areas. Available at: <https://www.ejiltalk.org/port-denials-and-restrictions-in-times-of-pandemic-did-international-law-lose-its-north/>

⁴⁴ The most notable instance that has attracted worldwide notice is the COVID-19 positive cases connected with the Diamond Princess cruise. The authorities implemented quarantine procedures on board the cruise, by locking the passengers in their cabins. This case clearly demonstrates that the States' effectiveness in fulfilling their international obligations when the quarantine expires is in conflict with International Law or does not have a basis in International Law, which highlights a number of legal challenges. Available at: <https://reader.elsevier.com/reader/sd/pii/S0964569121004786?token=2F668BC2DF5A440A7AF29D8B2BCB98B91A46AA02E4C68601E54BD7EEB1EF2B39D62C3DD101744172E77809B2F08F3E83&originRegion=eu-west-1&originCreation=20230305200107>

reported that a private Maltese vessel accompanied the boat, directing it to Sicily, Italy. One day later, on the 12th of April 2020, 101 refugees arrived in Pozzallo, Sicily. One of the passengers in the boat claimed the AFM denied entrance in the Maltese territory, for sanitary reasons, due to the COVID-19. This passenger stated “They came to us and said: Malta has a virus called corona if you’ve heard about it. We can’t take you there because everyone is sick in Malta. And Malta is small and can’t take all of you”. The passenger also said that “They gave us red life vests, a new engine and fuel and told us they would show us the route to Italy. Then they pointed guns at us and said: We give you 30 minutes:”⁴⁵.

These cases have raised questions about the responsibilities of countries to provide shelter and support for migrants in need. Under the context of the COVID-19 Pandemic, several Non-governmental organizations have claimed that Italy and Malta⁴⁶ have used the coronavirus outbreak as an excuse to block private rescue vessels from entering their ports (*Coronavirus Crisis Hampers Migrant Sea Rescues – DW – 04/17/2020*, 2020). Regarding this case, within a report from the OHCHR (United Nations Human Rights Office of the High Commissioner) it is stated that “following repeated place of safety requests to both the Italian and Maltese authorities, these migrants remained stranded on board the Ocean Viking for over one week before they were finally transferred by the Italian authorities to a private quarantine ship on 7 July and after multiple reports of mental distress and suicidal ideation, including attempts to jump overboard”(United Nations Human Rights Office of the High Commissioner, 2021). In this regard, within the report it is stated that “There have been several examples of delayed disembarkation involving rescues undertaken by humanitarian NGOs and merchant vessels”(United Nations Human Rights Office of the High Commissioner, 2021).

⁴⁵ “We give you 30 minutes”: Malta turns migrant boat away with directions to Italy”. 20 May 2020. Available at: <https://www.theguardian.com/global-development/2020/may/20/we-give-you-30-minutes-malta-turns-migrant-boat-away-with-directions-to-italy>

⁴⁶ Following the outbreak of the COVID-19 Pandemic – Malta and Italy – announced that they would close their ports. As a result of this decision, based on public health concerns, migrants trying to flee from the north of Africa to Europe, have stranded on the Mediterranean Sea. Available at: <https://www.thenewhumanitarian.org/news/2020/04/13/mediterranean-italy-malta-migrants-coronavirus>

At the EU level, the Regulation 656/2014⁴⁷, as a legal binding instrument⁴⁸, provides guidelines on Search and Rescue (SAR) missions and disembarkation. Within this Regulation the concept of “place of safety” emerges as the “location where rescue operations are considered to terminate and where the survivors’ safety of life is not threatened, where their basic human needs can be met and from which transportation arrangements can be made for the survivors’ next destination final destination, taking into account the protection of their fundamental rights in compliance with the principle of non-refoulement”.

Guaranteeing safety at sea - of those who are risking their own life – is rarely considered a priority. An age-old tradition imposes a responsibility on sailors all around to help people in need at sea in order to protect their lives. This customary obligation⁴⁹ was formalized into international treaties in the 20th century, stating the State responsibility for maritime security. In this regard, a State must command that the master of a ship flying its flag “provide help to any person encountered at sea in risk”, according with the Article 98 of the United Nation Convention on the Law of the Sea (UNCLOS), which was established in 1982. Moreover, the States are also required to comply with the International Convention for the Safety of Life at Sea (SOLAS), from 1974. (Passalacqua, 2018). The obligation to take people to a “place of safety” is a rule of international law that is asymmetrical. According to the International Convention on Maritime Search and Rescue – “place of safety” is a location where rescue operations are considered to terminate”⁵⁰. Therefore, there is, indeed, “the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees covered at sea” (UNHCR/IMO, n.d.)

⁴⁷ Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. Official Journal of the European Union. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0656>

⁴⁸ Regulations are legal binding instruments and “it must be applied in its entirety across the EU”. Available at: https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en

⁴⁹ Customary International Law is considered a source of International Law. Its origin is from a continuous practice that, as the time passed, was accepted as a law. (Available at: <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>)

⁵⁰ However, on the other side of the coin – in accordance with to International Law, States are not legally required to permit rescued victims to disembark on their ground. In consequence, States control who is allowed to enter their territory and who is not in compliance with the territorial sovereignty principle (Passalacqua, 2018).

3.5 Refugee Camps as Detention Centers: The case of the Greek Island of Lesbos

Under European Law – the EU law addresses the issue of detention and regulations on how to proceed under the case of detentions. Within the EU law a set of regulations define some guidelines for the case of migrants’ detention, such as – the Returns Directive, for irregular migrants; the provisions present in the CEAS instruments for asylum seekers and the Charter of the European Union Fundamental Rights. Regarding the European Convention on Human Rights, the right to liberty and security are determined in article 5⁵¹.

In Lesbos, Greece, in the refugee camp it was often reported, as a potential hotspot for the virus spread. After the first case was confirmed as the camp was keeping 13 000 asylum seekers and the fear of the spread of the virus was constantly argued by several NGOs. The camp, holding 13 000 refugees was initially built to host 3 000 refugees (The Guardian, 2020b). It was clear that the basic sanitary conditions were not granted, completely contrary to the narrative defended by the President of the European Commission: “We will make sure that people who have the rights to stay integrated and made to feel welcome. They have a future to build – and skills, energy, and talent.”(State of the Union Address by President von Der Leyen, 2020).

The residents of the Moria Camp⁵², in the Island of Lesbos. – were mandatory to act in accordance with new restrictions, in addition to the limitations that they were already forced to comply with. These restrictions were used under health concerns, with the pretext of avoiding the spread of the virus inside the camp. Several decisions were taken by the Greek Government and the local authorities.

⁵¹ European Convention on Human Rights. Available at: https://www.echr.coe.int/documents/convention_eng.pdf

⁵² The Moria Refugee Camp, located in the north-east of Mytilene, the capital of the Island of Lesbos, in Greece, is one of the biggest refugees’ camps in Europe. The camp was originally created to host Refugees arriving in Greece, fleeing from the war and persecution, during the so-called 2015 “Refugee Crisis”. The initial idea, when the camp was built, was to host around 3000 refugees; however, since its construction, the camp was representing a home for more than the double of refugees, and has been overwhelmed by thousands of refugees for years (Available at: <https://guitinews.fr/en/a-chaud-en/moria-refugee-camp/>)

In the context of the Pandemic, several measures were taken to avoid the spread of the virus inside the camp: wearing a mask for 24 hours became a routine for those living in the camp; leaving the camp for a couple of hours was possible for just a few people, from time to time⁵³. Pressure and emotional problems that had always been there were greatly intensified by the significant increase of the issues and limitations faced in Moria (Fenix, 2022c). Thus, some questions arise: “How can someone comply with social distancing in an overcrowded and under infrastructure camp? How can you ask people to constantly wash their hands if for much of each day there was no access to drinking water? How can people be asked to wear masks at all times if they are not distributed?”⁵⁴. The lack of access to basic means turned it more difficult to prevent the spread of the new Coronavirus. (Fenix Aid, 2021). The hierarchy of (im)mobility have temporarily reversed, as we have observed through the Global Pandemic. The very affluent classes that have gained the most from international migration are also the ones that have been able to secure themselves within the walls of their homes during the pandemic by remaining stationary (Heller, 2021).

Following the fire of the Moria Camp⁵⁵ and with the intention to contain the spread of the virus and trying to contain the “social and political environment on Lesbos Island – that was becoming increasingly hostile for the presence of thousands of asylum seekers” it was built another refugee camp – the geographical location was not from easy access, situated in the mountainous area of Antissa. (Fenix Aid, 2021). In a time calling for global solidarity, the EU Member States acted right on the opposite direction – a “war against the virus” quickly changed to a “war against the migrants”, under the context of the Pandemic (Migreurop, 2020). The COVID-19 crisis was used repeatedly by right-wing and ethno nationalist parties in Europe to racially define migration from the South as a public health threat (Reynolds, 2020).

In this line, the comments made by the head of the Legal party in Italy, Matteo Salvini reflect this anti-immigrant narrative: “An invasion of illegal migrants, a boom of infections, Sicily is collapsing”, adding that “We can’t afford that this land, after all its efforts and the success in

⁵³ Regarding this matter, the actor interviewed (identified by the code FLE), categorically said: “Those people living in refugee or detention camps were made much more vulnerable to Covid outbreaks because they often didn’t receive adequate protection gear or simply didn’t have the space to do social distancing. When they got sick, they often did not receive adequate health care, which is equivalent to unequal treatment”.

⁵⁴“The Hell of Lesbos: From Emergency to Emergency”, Fenix. Available at: <https://www.fenixaid.org/articles/the-hell-of-lesvos-from-emergency-to-emergency>

⁵⁵ On 8 September, during the night, a fire hit the refugee camp of Moria. The camp was nearly completely destroyed by the fire, leaving thousands of refugees without a place to stay. Available at: <https://www.msf.org/refugees-moria-must-be-evacuated-wake-destructive-fire>

the fight against the pandemic, finds itself in a difficult situation because of the lack of controls” (Gaia Pianigiani & Emma Bubola, As Coronavirus Reappears in Italy, Migrants Become a Target for Politicians, N.Y. TIMES (Aug. 28, 2020).). In this speech, migrants are implicitly pointed out as one of the reasons for the contagion of COVID-19. In this way, by blaming migrants for the spread of virus, the need for strict border control becomes even more legitimate, which, in a way, legitimizes the use of force at border control. However, this is thoroughly negated by data from the Italian health authorities showing coronavirus cases among new migrants to be “minimal” compared to infection numbers across the general population and residents who had travelled (Gaia Pianigiani & Emma Bubola, As Coronavirus Reappears in Italy, Migrants Become a Target for Politicians, N.Y. TIMES (Aug. 28, 2020).)

What initially might sound a good initiative – creating other camp, so the refugees could be in a place with better sanitary conditions, and to avoid the spread of the virus – it was, however, a way to commit more illegal practices (Fenix, 2022c). When the construction of the camp was concluded, the refugees that were arriving at the island were not getting registered in the database created to keep the refugees’ information on track; so, the records at the time did not reflect the reality of refugees arriving at the island (Fenix, 2022a). These actions were all taken under public health reasons, the camp built for the purpose of protecting the spread of the virus, but rather covert propaganda. The new camp was surrounded by forest and far from the island facilities, refugees were arriving and not being registered; thus, there were some that disappeared without any data being reported (Fenix, 2022a). Under the political position that the Greek government had adopted, this was yet another effort to restrict the asylum seeker.

Under the recent EU Action Plan on Integration and Inclusion, it is stated that “[A]lthough national governments are primarily responsible for creating and implementing social policies, the EU plays a key role in supporting Member State through funding, developing guidance and fostering relevant partnerships”(European Commission, n.d.). Thus, it might seem that the *onus* always falls under the country in the first place. Giving that “autonomy” to the Member State in matter, creates a scenario leaning to human rights violations, as the States sovereignty will always play a bigger role.

In a certain way, the new refugee camp was turned in a detention center, by reinforcing the border control under the Pandemic context, highlighting several human rights violations. Under

the article 5 – Right to liberty and security - of the ECHR, “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save (...)” in “the lawful detention of persons for the prevention of the spreading of infectious diseases (...)”. In this regard, Costello claims that immigration detention provisions are, however, less robust than those for other types of detention. The author, Cathryn Costello, as also argues that with respect to the Asylum Seekers, “have been targeted for detention”, although “international human rights law limits detention, its protections against immigration detention are weaker than in other contexts, as the state’s immigration control prerogatives are given away”⁵⁶. Somehow detention “is not an end in itself; it is a legal tool that is justified primarily by its role in enforcing border control” (Immigration Detention and COVID-19: Why Releasing Those in Detention Keeps Us All Safer | Oxford Law Blogs, 2020).

3.6 Push Backs: The Greek case

The new Refugee camp that was built In the Greek Island of Lesbos, rather than a structure built for the safety of refugees and the local population, turned into a hotspot for illegal practices. Most of the NGOs did not have access to this camp; it was located in the north of the island and was difficult to access and also difficult for the people to go the center of the island and contact with NGOs or the local authorities. Under these circumstances - some local ONGs at the Greek Island have reported some pushbacks (Border Violence Monitoring Network, 2020; Human Rights Watch, 2020).

The practice of governments turning away or returning asylum seekers or migrants at their borders without providing them proper protection has drastically increased during the Pandemic (Border Violence Monitoring Network, 2020). Pushbacks operations were carried out by several countries during the COVID-19 Pandemic, citing public health concerns as a reason. The pushbacks operations - are deliberate actions designed to physically stop migrants from entering the territory of destination – as a direct arrival action.⁵⁷ During the COVID-19

⁵⁶ “Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law”. Indiana Journal of Global Legal Studies. Available at: <https://www.jstor.org/stable/10.2979/indjglolegstu.19.1.257>

⁵⁷ *Pushbacks* operations may also take place on land at or near a border crossing. Border guards frequently use force or the threat of force to prevent migrants from approaching or crossing border, as well as to threaten those

pandemic, hundreds of migrants were sent back, without having the chance to seek asylum. The issue remained controversial, with some governments arguing that they have the right to protect their citizens' health, while others argue that push backs violate international human rights law. Among other arguments, several NGOs advocate that the brutality of pushbacks increased during the pandemic, whether that was because of Covid or not, but extremely violent and often deadly pushbacks from Greece, Croatia, and the so-called Libyan Coast Guard were witnessed (Human Rights Watch, 2022).

While violent border practices have made it difficult for migrants to actually enter Greek territory, those who have managed to do so have been denied access to the asylum procedure, which was suspended for several months, and faced discriminatory restrictions on their mobility within the country justified as anti-COVID-19 measures, forcing them to live in overcrowded camps like the infamous Moria where they were more likely to contract an infection (MSF, 2020). During the COVID-19 Pandemic, Greece introduced measures to prevent the spread of the virus, including closing its borders and suspending asylum application. In March 2020, Greece suspended the right to asylum for 30 days, mentioning sanitary reasons, withing the COVID-19 Pandemic. The Greek Ministry of Immigration and Asylum first stated policies specifically affecting asylum applicants on March 17. Facilities for the purposes of welcoming refugees were subject to stricter regulations in order to safeguard the Greek citizens and local staff against the infection (Reches, 2022).

The Greek government has mentioned Article 78(3) of the Treaty on the Functioning of the EU (TFUE) in this regard. Nevertheless, this provision permits the Council to adopt temporary measures in “the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries (...)”⁵⁸. Over and above that, individuals who enter a country illegally should not be punished if they immediately approach the authorities to request refuge. (UNHCR, 2020a)

who have already done sending them back to their country of origin. The Pushbacks operations inevitably lead to mass expulsions. Available at: UN Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, A/HRC/37/50, 26 February 2018, paras. 49-57.

⁵⁸Article 78 (3) of the TFUE states that “In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.”. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>

The measure adopted by the Greek Government led to a sharp increase in the number of migrants and asylum seekers attempting to enter Greece through irregular means, such as crossing border through the Evros River⁵⁹, which marks the country's eastern border with Turkey. It also pushed back thousands of asylum seekers who tried to cross the Greek borders. According to various human rights organizations and media reports, there were numerous instances of pushbacks by Greek authorities, in which migrants and asylum seekers have been forcibly returned to Turkey without access to legal representation. These pushbacks were criticized for violating international law and human rights, including the right to seek asylum and the Principle of Non-Refoulement, which prohibits states from returning individuals to places where they may face persecution or other serious harm. Pushbacks practices are prohibited under the Greek law and are incompatible with the right to seek asylum (United Nations General Assembly, 2020).

Several NGOs reported mass expulsions of asylum seekers through the Evros River from within Greece. In this regard, the Human Rights Watch detailed that “13 victims and witnesses who described incidents in which the Greek police, the Greek Coast Guard, and unidentified men in black or commando-like uniforms, who appeared to be working in close coordination with uniformed authorities, violated pushed migrants back to Turkey in March and April in 2020.”(Human Rights Watch, 2020).

The International Organization for Migration (IOM), expressed on 10 June 2020 concerns about “persistent reports of pushbacks and collective expulsions of migrants, in some cases violent, at the European Union (EU) border between Greece and Turkey”⁶⁰. In addition, the IOM called for a more humanitarian border management, as it should be prioritized a “protection-sensitive border management aligned with international law, which respects the human rights and fundamental freedoms of all migrants regardless of their migratory status including the right to seek asylum” (IOM, 2020). After that, on August 21, the United Nations High Commissioner

⁵⁹ The Evros River, which forms the natural border between Greece, Bulgaria and Turkey, and has been at the center of a longstanding dispute between the two countries over the movement of migrants. In recent years, there has been a significant influx of migrants and refugees entering Greece via Turkey. Many of these migrants attempt to cross the Evros River, which has led to tensions between Greece and Turkey (see Appendix 2).

⁶⁰ On 10 June 2020, launched a Press Release expressing strong concerns with regard to the pushbacks at the Greek-Turkish border, as “International media reports and footage showing the use of marine rescue equipment to expel migrants across the Eastern Aegean Sea”. IOM. IOM alarmed over Reports of Pushbacks from Greece at EU Border with Turkey. Available at: <https://greece.iom.int/news/iom-alarmed-over-reports-pushbacks-greece-eu-border-turkey>

for Refugees (UNHCR) expressed its concerns after having access to numerous trustworthy sources that reported “men, women and children may have been informally returned to Turkey immediately after reaching Greek soil or territorial waters in recent months”. The UNHCR encouraged Greece to examine into claims of multiple pushbacks by Greek officials at the nation’s maritime and land borders, potentially sending migrants and asylum seekers back to Turkey after they crossed Greek borders or territorial sea. (UNHCR, 2020b).

The "Border Violence Monitoring Network" (BVMN), a nongovernmental organization, has compiled a large database of testimonies of persons being forcibly returned from Greece to Turkey over the Evros river. The nongovernmental organization has documented the experiences of 692 individuals whose rights were violated at the external border of the European Union. In this report, special attention was given to Greece, as “several cases of pushbacks across the Aegean Sea where the Greek authorities continue to use worrying methods to force transit ships back in Turkish waters (...)”⁶¹.

Among the cases reported, a case of six asylum seekers that had legal documentation confirming their residency in Greece, were sent back to Turkey. This was the case reported on April 23, 2020, of a group of 24 people that were convinced and guided until the Turkish border and the respondent in matter was residing in Greece for over 3 years and was holder of a residency card, proof of their regular situation in Greece. The police officers had informed to the group of 24 people living in Thessaloniki – they would be taken to Athens; however, after a long trip, and some being submitted to acts of torture – such as beating and electric shock, the asylum seekers were taken to the Evros River by the authorities⁶². According with Article 3 (“Prohibition of torture”) of the European Convention on Human Rights, there is no obligation to grant a secure status, as it only states that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”⁶³.

⁶¹ Border Violence Monitoring Network. “Illegal Push-backs and Border Violence”. August 2020. Available at: <https://www.borderviolence.eu/wp-content/uploads/Working-Doc-August-Report-BVMN-2.pdf>

⁶² It was reported that around 30 Greek officers, wearing army uniform and face-masks, committed several acts of violence, such as “beating (with batons/hands/other), electric shock, water immersion, pouring water over one’s head, destruction of personal belongings, theft of personal belongings”. “They tell them, ‘We will let you fast with Erdogan’”. April 23, 2020. Available at: <https://www.borderviolence.eu/violence-reports/april-23-2020-0000-near-to-uzunkopru/>

⁶³ Article 3 (“Prohibition of Torture”) of the European Convention on Human Rights. Available at: https://www.echr.coe.int/documents/convention_eng.pdf.

On July 29, 2020, the UN General Assembly launched a report of the Working Group on Arbitrary Detention, after a visit to Greece – described the situation of the ongoing pushbacks at the border between Greece and Turkey. Within the document, the Evros region is referred and is reported that some people in the region “had been arrested, detained and summarily returned across the land border between Greece and Turkey without being given the opportunity to apply for international protection in Greece”. In addition, it states that “individuals had made previous attempts to cross the border but had been forcibly removed to Turkey”. (United Nations General Assembly, 2020).

3.7 EU-Turkey agreement on hold and its consequences

On 27 of February 2020, the President of Turkey – Tayyip Erdogan – announced the reopening of the border between Turkey and Greece, by breaching its promise to the EU to stop migrant movements into Greece (Reynolds, 2020). Unsatisfied with the European leaders⁶⁴, the Turkish President ordered the unilateral opening of the border stating that Turkey would no longer stop asylum seekers from leaving Turkey to try to go to the EU.

Stating “We Opened the Doors” the Turkish President has caused a huge refugee surge and instability on the Greek side, (The New York Times, 2020). This decision made by the Turkish President, Tayyip Erdogan, marked a turning point between the EU-Turkey relations, with an apparent effort to put pressure on Europe (Fenix Aid, 2021). At that time, 3.6 million Syrian refugees were residing in Turkey. From December 2019 on, countless more have migrated to the Turkish border with Syria, where the conflict was still happening (Reches, 2022). Thus, the President of Turkey claimed that it was unable to handle the rising number of asylum seekers.

Thousands of people traveled to the Greece-Turkey border after the Turkish statement. Greece dealt with an extreme event of mass migration of illegal migrants caused by the decision taken by the Turkish government. This structured massive violation of its national borders and state

64 Under the context of the Turkish invasion of the border Province of Idlib in Syria, the Turkish President took this decision, in order to pressure the European Union. Due to the large-scale displacement in Idlib, Turkey was predicting to face increasing international pressure to reopen its border with Syria and provide refuge to those fleeing from war. Fearing that, Erdogan stated “We can’t handle a new wave of migration”. Available at: <https://apnews.com/article/ap-top-news-syria-turkey-recep-tayyip-erdogan-greece-42a117912dd5a6a7ba407298a89563f3>

sovereignty initiated by the Turkish government- and it lasted the entire month of March until the radical outbreak of the COVID-19 crisis. This situation created a growing tension, between refugees and Greek authorities at the border. It was reported that “numerous organized groups of illegal migrants attempt to enter Greek national territory in a violent way attacking Greek policemen, border guards and military personnel”; and, as soon as the EU’S Frontex agency was mobilized, some conflicts between migrants and the Greek coastguards were reported.⁶⁵ Under this context, the European Commission President Ursula Von der Leyen stated that:

*“The Greek authorities are facing a very difficult task in containing the situation. And I want to thank to the Greek border guards and the coast guards, I want to thank the civilians, the police, the servicemen and the servicewomen, and I want to thank Frontex for their tireless effort. It is important to me to be here today with you and to tell you that Greek worries are our worries. **This border is not only a Greek border but it is also a European border.**”*

The re-opening of the Greek-Turkish border was in the origin of numerous pushbacks at the Greek territory; it was reported that countless individuals were forced to return to Turkey when arriving to Greece. On the Greek side, the Greek government implemented measures in order to reinforce its border control, relying on army and police. Towards this situation, the EU-Turkey “agreement” was on hold; and as a consequence, countless were stuck and without having to possibility to have access to assistance, in the Greek-Turkey border.

This context, reflected in numbers, has resulted in “over 52 000 attempts to enter illegally Greek territory” and “410 illegal migrants who violated the border were arrested and 50 of them have been sentenced to 4 years in prison and 10 000 euros fine for each illegal border crossing”⁶⁶. Due to COVID-19 outbreak in late March the attempts to enter Greece illegally were put on hold, and the majority of migrants decided to flee the border region. Nonetheless,

⁶⁵ Video report shows violence taken by Greek coastguards towards migrants. “Greek coastguards in altercation with migrant dinghy as Turkey opens border-video report. The Guardian. 2 March 2020. Available at: https://www.theguardian.com/world/video/2020/mar/02/greek-coastguards-altercation-migrant-dinghy-turkey-opens-border-video-report?CMP=gu_com.

⁶⁶ The 2020 Migration Crisis on the Greek-Turkish Border: Turkey’s Hybrid Warfare Against Greece and the EU”. Available at: https://d1wqtxts1xzle7.cloudfront.net/64063931/2020_The_2020_Migration_Crisis_on_the_Greek-Turkish_Border-libre.

the Turkish authorities continued to advocate for the maintenance of demographic engineering and the intelligent management of migration flows.

The suspension of the agreement between Turkey and the EU has contributed to an increased migration flow, and within the context of the COVID-19 Pandemic, an anti-migrant narrative has been built; these two factors have contributed to an increase in tighter border control in the EU. During the Pandemic, NGOs did not have as much control as they normally do due to the Pandemic movement restrictions, and under this context, more instances of abuse of human rights occurred. The EU's border control policies were shaped in a way that was much more restrictive and hostile to migrants' entry.

3.8 Migrants Lack of Access to Health Care

The Border closure had several negative impacts on migrants lives and have created difficulties to the access of basic needs and services. Lupieri states that within the COVID-19 crisis, displaced people and refugees were largely disregarded within global healthcare solutions. In this regard, the author states that “responding to the needs of refugees in camps and detention centers; providing adequate public health information; providing access to health care and mental health services; and including refugees as decision-makers within health responses”, were the biggest flaws in the inclusion of migrants in access to health care (Lupieri, 2021).

Under this context, it was difficult to migrants - who were stranded at the borders - to have access to food, water, and healthcare. This has completely violated the “prohibition of inhuman and degrading treatment”⁶⁷. Chetail argues that the entry restrictions based on public health grounds are incompatible with the premises established by the International Human Rights Law (Lang et al., 2020). Under the context of the COVID-19 Pandemic, often “national responses have frequently neglected to provide adequate public health information to refugees” (Lupieri, 2021).

⁶⁷ Article 3 of the European Convention on Human Rights (“Prohibition of torture”) - “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. The prohibition of inhuman and degrading treatment is the common ground used to attack such practices before the European Court of Human Rights Available at: https://www.echr.coe.int/documents/convention_eng.pdf

Within this context, one legal case in particular, it addresses the question of whether the authorities did enough to safeguard the applicants' health as HIV-positive people in the context of the COVID-19 health crisis. This case -Maratsis and Others v. Greece (no. 30335/20) and Vasilakis and Others v. Greece (no. 30379/20) advocates the applications communicated to the Greek Government on 25 February 2021, regarding primarily concerns the circumstances of incarceration for HIV-positive prisoners. In accordance with Article 3 of the European Convention on Human Rights (which forbids inhuman or degrading treatment), Article 5 (which guarantees a person's liberty and security), and Article 13 (which guarantees the right to an effective remedy), the Court informed the Greek Government of the applications and asked the parties questions.

On 5 May 2021, the legal case - Faia v. Italy (no. 17378/20) – brought before the EtCHR, represents an application communicated to the Italian Government. In this instance, it is asserted that the applicant's substantial impairment and medical condition make confinement in a correctional facility incompatible. The applicant also expresses dissatisfaction with the efforts taken by the authorities to shield him from the possibility of contracting COVID-19. In accordance with Article 3 of the Convention (which forbids inhuman or degrading treatment) and Article 35 of the Convention (which specifies the requirements for admissibility), the Court informed the Italian Government of the application and asked the parties questions.

Refugees living in refugee camps that were overcrowded camps were far from being able to follow “social distancing measures”. In this regard, several organizations have expressed concern about degrading circumstances at reception centers, such as those in Cyprus, Greece, Italy, or Malta, as well as in the unofficial camps in France, underlining that they find it hard to avoid the spread of the virus (European Union Agency for Fundamental Rights, 2020). In addition, “plans to move refugees from the overcrowded camps on the Greek islands were hampered by national lockdown measures and the unwillingness of other EU member states to take in more refugees, with the exception of a small number of accompanied minors”. (*EU Discusses Emergency Plan for Migrant Camps in Greece - InfoMigrants*, 2020)

In Greece, when positive cases were found, asylum seekers in the Athens metropolitan area or the Aegean islands were detained in the reception facilities. The congested living conditions in these centers did not stop the virus from spreading inside those populations, and there was also

a lack of access to healthcare (Leach & Scoones, 2020). On the Greek Island of Lesbos – the first confirmed cases of COVID-19 had a huge impact on the refugee’s life. The lack of sanitary conditions was already tough, and under this context it got even more difficult the access to medical care and refugees endures horrible sanitary problems and housing conditions. For instance, the refugees living in the Moria Camp in the Greek Island – were reported around 5000 refugees were not able to have access to water, toilets, showers, or electricity. It was also reported that a single tap water was shared from more than 1300 refugees living in the Moria Refugee Camp (Gilman et al., 2020).

In addition to this, the rise of xenophobia, racism, and huge growth of tensions between refugees and the locals – made it difficult for NGOs, doctors, and journalist to access the camps. It was reported several attacks in “a series of violent incidents targeting international aid workers, amid an increasingly hostile climate which has prompted several NGOS to withdraw”⁶⁸. The motivation behind these attacks remained as the number of. Migrants arriving at the island was continuously growing. (The Guardian, 2020a)

The challenge to provide medical care to the refugees was mainly due to the fact that the majority of medical associations were overwhelmed. On top of that, the fact that the Greek Minister of Labor and Social Affairs – Nikos Vrotsis prohibit the access of refugees and asylum seekers to the Greek social security number – the AMKA. The access to this number is essential to access services like Health care, Education and Labor. Following this decision, the Greek government stated that the decision would be re-evaluated, and new regulations would be announced; however, since this decision was made, nothing has changed (Keep Talking Greece, 2019). Thus, refugees are often denied having access to the national health care system, however, within the COVID-19 Pandemic context, with was clear that further exacerbated their fragile situation and “entrenched inequalities in host countries not only increase the exposure of refugees to health risks in a pandemic, but also magnify the challenges to accessing adequate healthcare services as compared to national populations” (Lupieri, 2021b).

⁶⁸“We left fearing for our lives’: doctors set upon by mob in Lesbos”. March 2020. Available at: <https://www.theguardian.com/world/2020/mar/04/we-left-fearing-for-our-lives-doctors-set-upon-by-mob-in-lesbos>

These practices highlight the complex and difficult trade-offs that governments face in balancing public health concerns with migration control. It is crucial that any measures taken during the pandemic would be grounded in human rights principles and would not discriminate against vulnerable populations.

Non-Refoulement violations – denied access to health care – under the context of the Pandemic

Under the pretext of COVID-19, several asylum seekers saw their requests denied, even when the health conditions from the home country were not assured. Under a clear violation of the Principle of Non Refoulement; under the scope of this Principle “no one shall be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. This principle applies to all migrants at all times, irrespective of migration status”⁶⁹

On 16 April 2021, the legal case -Vlami and Others v. Greece (no. 29655/20)⁷⁰ and four other applications (nos. 29689/20, 30240/20, 30418/20 and 30574/20) – advocate the applications communicated to the Greek Government. These cases relate to the petitioners' solitary confinement circumstances at Korydallos Prison (Greece). The applicants specifically criticize the absence of safeguards against the spread of the COVID-19 virus, under the context of the Pandemic.

On December 1st, 2021, the Court of the Hague cancelled a decision made by the Dutch State Secretary for Justice and Security's to repatriate an Iranian citizen that requested to stay in the Netherlands – since that due to his weak health situation was not protected when back to his country, Iran. This legal case highlights the lack of access to medical care of migrants during the Pandemic. The State Secretary considered that the applicant could be deported, even though he suffered from heart problems, and, in Iran, the sanitary situation was getting worse as the COVID-19 situation was falling apart, and the Iranian national would not have had access to

⁶⁹“The principle of non-refoulement under international human rights law”. Available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>

⁷⁰ European Court of Human Rights. Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%2201-128294%22%7D>

proper health treatment back to Iran. Thus, the Netherlands was failing under the compliance of international obligations; in fact, all States must ensure that foreign persons have the right to have access to health care⁷¹, as it advocated by the European Convention on Human Rights. According to Article 3 of the European Convention on Human Rights (“Prohibition of torture”) - “no one shall be subjected to torture or to inhuman or degrading treatment or punishment” (European Union, 1953).

The Article 3 of the Schengen Borders Code and the Article 3 of the Dublin Regulation, regulates international protection applications, and it is determined when the rules would be breached. Thus, the domestic Dutch Court annulled the decision of the Dutch State Secretary, as it was under the disrespected of the most fundamental human rights. According to the Court of Hague, the Dutch decision “was not sufficiently up-to-date and failed to take the COVID-situation in the country into account”. There was, indeed, a failure of the asylum system and, as well as the domestic judicial system of the Netherlands.

Detainees - under the context of the Pandemic

On 11th March 2021, a legal action was initiated by a Nigerian national, that among other objections, complained the fact that was placed in a detention facility that was established for quarantine purposes⁷². The fact the Nigerian citizen was kept in a place reserved for quarantine, has represented a threat to his health.

The Nigerian citizen was forced to comply with a period of almost seven weeks of quarantine and the complainant believed that there was no reason for that long period isolation and part of this period the applicant was limited to be in a container without natural light and ventilation. There was no indication that the applicant had required such a quarantine, especially after an extended period. Despite the fact that the applicant was isolated for his own safety as a result

⁷¹ The Netherlands: Court asks Secretary of State to update its healthcare information on Iran in light of COVID-19 | European Database of Asylum Law. Available at: [asylumlawdatabase.EU](https://www.asylumlawdatabase.eu)

⁷² ECtHR – Feilazoo v. Malta, Application no. 6865/19, 11 March 2021 (Chamber judgement). Available at: <https://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-feilazoo-v-malta-application-no-686519-11-march-2021>

of threats he had experienced, the brutality and length of the measure were disproportionate. It is additionally concerning that the Nigerian national was relocated to a different area of the facility; this relocation made him move to where asylum seekers newly arrived were placed in COVID-19 quarantine. This claim was not refuted by the Maltese Government, which alarmed the court. As a result, it was impossible to examine the action of putting him, for a period of several weeks, with people who would have been a risk to his health in the absence of any pertinent consideration to that effect.

Thus, emerges as a clear violation of the Article 3 (which forbids cruel or degrading treatment) of the European Convention on Human Rights⁷³ - which forbids cruel or degrading treatment-, as the applicant was in Inadequate confinement circumstances. The court highlighted the period of 75 days that the Nigerian citizen spent alone in a facility without proper conditions. These concerns that were reported previously with regard to the detention centers in the island of Malta. The Court also stated that this case has represented a violation of the Article 5(1)⁷⁴- as the detention lasted for fourteen months; and Article 34⁷⁵ - due to anomalies in how the applicant received legal assistance, as well as a lack of secrecy and assistance during his communications with the Court while he was in detention.

Detention is just permitted under certain circumstances and must be approved by law. In addition, the terms of detention must ensure the necessary guarantees under the European Convention on Human Rights, including the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment. Several EU Member States were criticized for the deplorable conditions in their immigration detention facilities, already before the COVID-19 Pandemic. However, the pandemic just brought to light some existing weakness. All in all, among other violations with regard to the European Convention on Human Rights – this case compiles the detention in inhuman conditions and the lack of basic sanitary conditions - under the context of the pandemic.

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⁷⁴ Article 5 (right to liberty and security) of the ECtHR: “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty (...). Available at: https://www.echr.coe.int/documents/convention_eng.pdf

⁷⁵ Article 34 (Individual applications) of the ECtHR: “The Court may receive applicants from any person, non-governmental organization or group of individuals claiming to be the victim of a violation (...)”. Available at: https://www.echr.coe.int/documents/convention_eng.pdf

3.9 COVID-19: overall consequences on the border management

COVID-19 has resulted in historically high levels of border closures and migration restrictions (representing around 91% of the world's population – living in nations that were imposing entry restrictions on visitors from other countries. (Wapenhandel, 2020). Just a few States have acted according to the premises stated by the UN Secretary-General, taking this opportunity to “reimagine human mobility for the benefit of all” (“COVID-19 and People on the Move J U N E 2 0 2 0,” 2020). The dilemma of border management control remained in a limbo between security freedom – as they are “places where hybridization is possible: they are zones that may be composed of mixed flows and may become places of exchange. Borders need to remain open while being kept ‘secure’”(Bigo, 2014).

Nevertheless, given that these exiles frequently lost their homes and the mere possibility of return to their own countries, this is certainly not a privilege they could afford – when trying to enter the EU illegally. Additionally, despite the fact that the EU Commission's statement on the application of “temporary travel restrictions” contained a few exceptions, such as those pertaining to “persons in need of international protection or for other humanitarian reasons”⁷⁶ ; however, this exception that was stated, was not implemented by the European Union Member States, in order to keep the corridors open (Heller, 2021).

The COVID-19 epidemic brought to light certain fundamental and unresolved issues with immigration control. As the time passed, the concerns about migrants as well as the possibilities of refused entry and asylum were also raised. Under the context of the Pandemic, it is crucial to find whether immigration officers held detainees due to risks represented by COVID-19 alongside and, as a consequence, whether asylum seekers have been rejected entry, as in violation of International Refugee Law.

The border closers were, for a lot of countries a synonym of denying individuals seeking asylum or refuge. Thus, the decision of closing borders has pretended refugees to find a safe country, when fleeing from persecution, war, and other forms of violence. With this restriction, many

⁷⁶ On the 16th of March the European Commission issued this communication, in order to act upon the first confirmed cases of COVID-19 with the EU MS. This statement establishes a set a of guidelines and restrictions on non-essential travel to the EU. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0115>

people were forced to stay in dangerous situations, and, under this context, we were often towards the violation of the right to seek asylum⁷⁷. According to a study developed by the European Parliamentary Research Service, in February 2020, the available data reveal that the existing mechanisms does not protect individuals in an effective way when health concerns arise⁷⁸. The report “The Implementation of the Dublin III Regulation in 2019 and during COVID-19” - by the Asylum Information Database - from August 2020, collected data from Germany, Sweden, and Switzerland shows that, there were several asylum seekers who were refused entry, since the COVID-19 pandemic started. The presented study revealed that, despite that, there was a “*decrease compared to transfers in pre-COVID-19 times, but it also indicates that both Member States continued to transfer people despite the health risks*”(ECRE, 2020).

The existing structures, alongside the new forms of cooperation, highlighted some questions regarding shared responsibility under EU Law. The Dublin Regulation determines when a State is responsible for examining an application for international protection. However, some shortcomings have been highlighted during this migration crisis, due to the Pandemic we were living in.

The border management control under the atypical context of the Pandemic, was the perfect scenario to secretly manage to send back thousands of migrants. In this sense, asylum processes in many countries were put on hold extremely delayed due to the pandemic, which often meant that people who have made it into the country were in precarious legal and financial situations for much longer than they would have been before (Reches, 2022).

Overall, border closures have separated families, who were in the process of reuniting or who were already separated by migration. This has resulted in emotional distress and has violated the right to family unity. There was also a restricting freedom of movement, as border closures have restricted the freedom of movement of people, including those who were in the process of moving to a new country for work or study, and those who were visiting family or friends. This

⁷⁷ The Right to Asylum was firstly enshrined on the Article 14 of the 1948 United Nations Universal Declaration of Human Rights. (available at:<https://www.un.org/en/about-us/universal-declaration-of-human-rights>); after that, was reinforced by the 1951 Convention Relating to the Status of Refugees, (available at: <https://www.unhcr.org/3b66c2aa10>), and the 1967 Protocol Relating to the Status of Refugees (available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-relating-status-refugees>).

⁷⁸The implementation of the Dublin III Regulation in 2019 and during COVID-19, August 2020. Available at: https://asylumineurope.org/wp-content/uploads/2020/11/aida_dublin_update_2019-2020.pdf

has violated the right to freedom of movement. Lastly, there was an increase of racial and ethnic discrimination, once within the border closing, some authorities were seen acting as discriminatory against certain racial and ethnic groups.

In general, it is important to note that the severity and extent of the human rights violation may vary from country to country and depend on the specific border closing policies and practices implemented. The EU border patrol agency Frontex has continued to fortify itself during the Pandemic, with goals to acquire or lease its own equipment. With the majority of the participating member states of the EU supporting the work of Frontex, the agency reported in early April that 100 officers from its new swift border intervention team had been deployed between Greece and Turkey as of the end of March (Nielsen, 2020).

Notably Frontex has been explicit in positioning itself as an organization capable of both limiting migration and the spread of COVID-19 (Triandafyllidou, 2022). On May 8, 2020, Frontex issued a Statement “The Europe Day - united against coronavirus with eyes on the future” with regard to the COVID-19 Pandemic and the impact on the border control management:

” The coronavirus pandemic has highlighted the need for solidarity across Europe and the crucial role of the EU in coordinating the European response. Such a response is essential when it comes to our borders. If we cannot control the external borders, we cannot control the spread of pandemics in Europe. Frontex plays a key role in ensuring effective protection of the external borders of the European Union not only against cross-border crime but also against health threats.”

(Frontex, 2020)

This kind of speech enhances the anti-immigrant narrative, exacerbating the idea that migrants are the ones who are responsible for the spread of the COVID-19 virus. Thus, to contain the spread of the virus, it is needed to proceed with strict border control and avoid migrants entering the EU borders.

Chapter 4: Overview of the EU Migration Crisis Approach

4.1 Overview EU Migration Law under the COVID-19 context

Pressures from the outside world, rivalry with developing nations, and the threats of international crises (health environmental, financial, economic, and political) – as we saw recently with the COVID-19 Pandemic - spreading can boost centripetal forces, promoting the integration of the European Union. However, there are also challenges, as the current competition can lead to the Member States leaving the European Union and diminishing it. The three main external pressures on the European Union at the moment are: competitiveness in the world economy; the increase in International Migration; and the demographic and environmental issues that have an impact on a number of common policies. In this scenario, the question that arises is: How can the EU respond to the rise in global migration and play a meaningful world in this globalized world? (da Conceição, 2016).

Since the outbreak of COVID-19, the actions that have been taken were *ad hoc*, instead of taking place a preventive approach. Since practices of migration control are a major cause of Human Rights abuses, it is urgent to create a reliable structure that is essential for crises. By analyzing the European Union (EU) approach to managing the “Migration Crisis” it is easy to conclude that the existing mechanisms are not sufficient to solve the problem. In particular, during the outbreak of COVID-19 we were continually reminded of how interrelated we are in a world dealing with a global health pandemic. The safety of one affects the safety of thousands. Henceforth, the COVID-19 global pandemic called for major international solidarity, more than ever before.

While the majority of the EU Member States have implemented COVID-19 extraordinary measures that intend to limit the exercise of fundamental rights, to contain the spread of the COVID-19 virus - some governments stood out for choosing a different path. For instance, Portugal determined that allowing immigrants and asylum seekers in the country to fully access the health care system. Portugal understood that this would be the best way to limit the spread of the COVID-19 virus (Marin, 2020).

4.2 The EU's migratory resilience plan - overly ambitious and unrealistic

Through the guidelines provided by the European Commission on the “COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum seekers and return procedures and on resettlement” document it is stated that asylum seekers and persons “who must be admitted to the territory of the Member State for other humanitarian reasons”, travel restrictions should not be applied. In addition, “any restrictions in the field of asylum, return and resettlement must be proportional, implemented in a non-discriminatory way and take into account the principle of non-refoulement and obligations under international law.”⁷⁹. Nonetheless, COVID-19 measures have had an impact on how the EU Member States fulfilled the EU law provision and did not reflect the premises stated by the European Commission (Marin, 2020).

Gareth Davies poses the hypothesis that, at the EU level, the pandemic has created a new chapter in EU law, as the “national fears are a more legitimate justification for restricting movement, or will the pandemic be treated as so exceptional that it has no precedential value?” (Davies, 2020). In this line, the Global Compact for Safe, Orderly and Regular Migration (GCM)⁸⁰ emerged in a context marked by the will of establish a “global cooperation” and somehow, to fill the gaps that the EU Migration procedures, has and were highlighted within the context of the Pandemic (Kysel & Thomas, 2020). This document reflects the intention of the International Society to create a set of points that gathers an attempt at a global answer, within global cooperation. Apart from the fact that this agreement resumes the demand of a global answer, the Global Compact for Safe, Orderly and Regular Migration is the first intergovernmental agreement to address international migration in a holistic and comprehensive way (IOM, n.d.).

Regardless of these two revolutionary aspects, this agreement confines to a (one more) not legally binding document and does not establish any new international responsibilities under

⁷⁹ Communication from the Commission. “COVID-19 Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement”. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0417\(07\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0417(07)&from=EN)

⁸⁰ This agreement, marked by the compromise of the UN General Assembly, to create a global debate on issues linked to migration and refugees. On September 19, 2016, States came together to set a non-binding agreement with the aim of achieving a common position and a global response to migration. ((IOM, n.d.)

the structure of new customary laws. In this line, the States' sovereignty appears as a priority – firstly, naturally, as a consequence of the reasons that were mentioned above, once that the establishment of these premises has implied the defense of the States' sovereignty; secondly, given that the agreement does, in fact, multiple mentions to this matter (“*The Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law*”⁸¹) (Spagnolo, 2019).

Migration flows: The lack of legislation in International Migration Law

Under International Migration Law there is no international agreement that allocates or organizes migratory flows. The new UN Network on Migration has sparked debate and provided helpful policy recommendations in the middle of the pandemic; however, it doesn't seem to have developed into a significant center for interstate cooperation on the response (Kysel & Thomas, 2020).

Of course, there is no universally accepted convention outlining all migrants' rights. That being said, it is unmistakable to claim that a patchwork of international institutions and norms has only partially protected the rights of migrants, including refugees. Particularly during times of crisis as, for example, the COVID-19 pandemic - these traits have frequently amplified the most extreme human effects. The central problem will always revolve around the absence of any legislation protecting or regulating migrants in general.

4.3 The EU Migration approach: duality of criteria

2022: A non - refugee crisis. The migration influxes are understood

On the 24th of February, the conflict in Ukraine began and with that, a chance for the EU to reconsider the dual standards for asylum seekers from the Ukraine and nations in North Africa and the Middle East. Less than a month after the conflict began, the Council of the European Union agreed with the European Commission proposal to activate the 2001 Temporary

⁸¹ (United Nations General Assembly, 2019)

Protection Directive⁸². This Directive from 20 July 2001, is an extraordinary measure that aim to supply instant temporary protection for those who are in risk. The aim of the Directive is to act upon a mass influx of displaced persons from non-EU countries, that are unable to return to the home country.

The guidelines under this Directive establish measures encoring a balance of efforts between Member States in accepting these individuals and enduring the repercussions of their actions. The duration of the temporary protection covered by the Directive is at least one year, with the possibility of an extension based on the state of affairs in Ukraine. In addition to the ability to request for international protection, there is also the right to Temporary Protection. A residency permit, access to the housing market and the job market, medical aid, and children’s access to education are all rights under the Temporary Protection Directive.⁸³ When analyzing this Directive, it is easy to understand that under the context of the COVID-19 crisis, the activation of this Directive could have made a difference in the EU Member States migration management if it had been applied.

The European Union countries' reaction and action upon the Ukrainian migration refugees was completely different, compared to similar contexts. We observed from suddenly, enormous waves of solidarity. For all of a sudden, the countries bordering Ukraine – Poland, Hungary, Slovakia and Romania – welcomed as many refugees as they could.

If we compared these actions brought from the EU to a similar situation, back to 2015-2016 with the so called “Migration crisis” we can certainly state that a lack of political will was (and maybe still is) evident at the European level. Indeed, the “Russian invasion of Ukraine serves as a clear reminder that having to flee war, violence, persecution, and human rights abuse, does not only happen to people from certain countries far away. Becoming a refugee is something that can happen to anyone during their lifetime. All refugees have the same rights to seek asylum and must have the same possibility to exercise and access their rights” (Fenix, 2022b).

⁸² The Council Directive 2001/55/EC of July 2001 on minimum standards for giving temporary protection on the event of a mass influx of displaced persons on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en)

⁸³ The measures under the Temporary Protection Directive also include access to employment, access to suitable accommodation or housing, access to social welfare or means of subsistence if necessary and access to medical care. Available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en

The European Union needs to be ready to act upon any sudden migration flow; It is urgent to create a basic set of legislations to act upon any sudden migration flow. These legislations must be both – binding and non-binding. This set of rules must guarantee that no country gets in a disadvantage situation compared to others. Under the context of the 2015 “Migration crisis” – Greece was overwhelmed with the number of refugees; and recently, Poland also got submerged with the huge number of refugees with a short period of time. As much supportive as the country would like to be, towards a situation like this it is easy to cause widespread discontent and racism. The European Union must and need to have a fast reaction towards a migration flow and need to have a quick and effective direct action to protect and help the most affected countries.

The response and actions of the EU Member States to the migrant refugees from Ukraine were very diverse. We observed sudden, enormous waves of solidarity. Poland, Hungary, Slovakia, and Romania, which border Ukraine, welcomed as many refugees as they could. Having that said, why were the European citizens so much more receptive to receiving immigrants from Ukraine than from Syria, for instance? The geographical proximity can play a fundamental role, as the way we understand these people’s situation. However, the cultural proximity and economic relations can have a bigger impact in the way we welcome refugees.

Chapter 5: Synthesis, Reflections, and Recommendations

5.1 Synthesis of the Findings and theoretical reflections

The outbreak of COVID-19 highlighted some unsolved and structural problems regarding migration control. Even though health care is supposed to be assured to asylum seekers in the case that the conditions are not insured, as has been shown in this essay, lack of clear definitions has made thousands of asylum seekers sent back to the countries of origin, without having access to medical care guaranteed. As it is easy to understand, migration represents a challenge for public policies in democratic States, in an increasingly globalized world. The existing structures have shown to be ineffective to avoid certain problems. During the COVID-19

Pandemic, the EU Member States have adopted Border control policies much more restrict and with that, based on an anti-immigration Narrative.

The Dublin Regulation does not effectively address asylum seekers' protection when the country of origin does not offer medical and health conditions in the case of health issues. There are some guidelines, but they are very vague. There is a lack of clarity with regard to the criteria that determine whether the country of origin of the asylum seeker has a health system capable of giving medical assistance when the asylum seeker proves to have some health issues. Probably thousands of immigrants were and are sent back to the countries of origin, without having medical assistance assured. Even though that it is right in front of our eyes, the EU cannot turn a blind eye to this problem.

The recent New Pact on migration and Asylum is an attempt to reinforce the legal migration structure. However, it has weak legal binding obligations; nevertheless, if approved – it will be binding. Thus, a few possible ways forward might be drawn. First, the EU, as well as other international organizations, should perform a campaign to combat many of the myths associated with refugees, and that far-right movements propagate the idea that the integration of refugees carries security risks. It is necessary to undo the prejudicial connotation associated to refugees. It is also necessary to clarify that refugee reception is a major advantage for the EU, as it can help reverse the EU's demographic aging. This would be a soft law instrument that could help change some mentalities.

Secondly, the EU should create a directive that would structure and clarify criteria that determine, in a case of health issue, whether the country of origin of the asylum seeker has conditions to be sent back home. The Member State would have a certain period to transpose it into national legislation and, to ensure that they fulfill clear and transparent rules. These changes are crucial for the defense of Human Rights. In the end, the idea of law remains as the product of the will of those who are in charge. It is up to the EU - an organization governed by the fulfillment and defense of Human Rights - to outline guidelines to increase the protection of innocent people, who are harmed daily and are victims of pre-condemnation owing to the place where they were born.

Among other things, any systematic reimagining of international migration law that is to be consistent with this ethical vision must abandon knee-jerk commitments to a vision of the absolute sovereign power of exclusion that have driven both law- and policy-making (and the violence and inequality which such exclusion works on migrants). It is fitting that a new UN mantra for the post-pandemic era is that “no one is safe unless everyone is safe.” (Kysel & Thomas, 2020)

We are increasingly suffering from brain anesthesia, due to the fact that we are constantly bombarded by images and information from the media of people fleeing their countries and risking their own lives, in the hope of reaching a territory that provides them with a dignified life. There are numerous and constant images of migrants trying to cross the Mediterranean in inhumane ways – which reflect the hopelessness of these people; but we cannot turn a “blind eye”⁸⁴ to these and normalize it.

Under the context of the Pandemic, Portugal first gave temporary regularized status to all immigrants with pending visa and asylum claims, thereby classifying them (albeit not all undocumented individuals) as citizens for the purposes of access to healthcare and social assistance. Italy did follow suit by partially legalizing certain undocumented employees, but this has unmistakably been the exception rather than the rule and does not address the initial border-related issue. But as with the demands made by migrant populations themselves, this regularization does show that there are alternatives to the status quo (Reynolds, 2020).

The COVID-19 Pandemic crisis has shown not only that the European Union and its Member States have not taken a consistent stance on immigration, but it has also proven that the impact of national sovereignty can be seen in the individual actions of Member States (Sommarribas & Nienaber, 2021). Within the EU, the pandemic policies have been executed in completely unequal ways, shielding some while putting others at greater danger. Both migrants already living in Europe and those attempting to immigrate to Europe undoubtedly experience this.

⁸⁴ This expression was referred to in the documentary “*Fire at Sea*” – metaphorically, the “blind eye” represents what we often have towards migrants in such a present reality. The documentary, from 2016, addresses the European Migration Crisis, from one of the frontlines of the European Crisis – the island of Lampedusa in Italy. “*Fire at Sea*”, 2016, <https://www.imdb.com/title/tt3652526/>

European securitization discourses and stories about overcrowding and cultural degradation have traditionally focused on migrants (Baldacchino, 2021).

5.2 Conclusion:

The purpose of this research aims to understand the impacts of the COVID-19 under the EU context. Under the context of the Pandemic, we have seen that the COVID-19 crisis has shaped the EU and its Member States' policies of migration control in a more restrictive border control and also with an increase of the violence towards migrants.

The measures taken to contain the spread of the COVID-19 virus were used to justify the decisions that were placing migrants in an (even more) vulnerable place. Measures taken by the EU Member States, such as the denying accepting refugees (for example, the Greek case) - are a complete violation of the rights defended by the EU and completely fail under the contemporary promises and shortcoming of EU migration and Asylum law. Increasing the legal sharing of responsibility through increased institutional capacity will be crucial for the future European asylum and border systems to be successful. The EU ought to demand the establishment of a common European Asylum Service with the authority to aid member states in the evaluation of asylum applications (Carrera, Gros, et al., 2015).

While the recently adopted EU proposals represent a step in the direction of creating a uniform European policy on migration, asylum, and borders, there are still a number of significant issues that require addressing. This is particularly important when it comes to: ensuring a more equitable distribution of legal obligations and institutional solidarity between the EU and the member states, as well as among the member states themselves; ii) ensuring that member states properly implement and enforce current EU laws and standards on the ground, as well as the rule of law principles in external border controls and defense/military-oriented responses (Carrera, Blockmans, et al., 2015).

Lastly, there was also, within the COVID-19 Crisis context, some positive lessons that we can learn from, this is the example of some the EU Member States that have improved the Migration policies, in order to everyone have access to health care facilities, such as Portugal and also with the recent case of the Russo-Ukrainian conflict. This is an example that within a crisis, cooperation and solidarity can and should always prevail.

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Annexe 1 – The Greek-Turkish border – Evros river



Source: What is really happening at the land border between Greece and Turkey? Cities of Refugee Search. Available at: <https://citiesofrefuge.eu/news/what-really-happening-land-border-between-greece-and-turkey>