

## The impact of COVID-19 related measures on human rights of migrants and refugees in the EU

Briefing paper

26 June 2020

Since January 2020, the Coronavirus pandemic has been spreading in Europe. As a result, all EU Member States have taken measures with the stated intention of containing the spread of the virus. These included restrictions on public gatherings, requirements to stay at home except for limited essential activities, and orders to close businesses and cultural and educational institutions. The most severe of these restrictions were in place between March and May 2020, which is the period covered by this paper.

In this period, some EU Member States closed their borders; stopped the registration and lodging of asylum applications; or freedom of movement in and out of reception centers was restricted. Many of these measures affected, often disproportionately, the rights of migrants and refugees.

This briefing paper considers some of these measures, their impact on the human rights of migrants and refugees, and their compliance with international human rights law. It touches in particular upon the following issues: (1) The impact of the closure of the EU external borders and suspension of new and on-going asylum applications; (2) Closure of internal borders and impact of COVID-19 measures on Dublin transfers and the right to family life; (3) Impact of COVID-19 measures on residence permits, right to work and access to health care; (4) Reception and living conditions and (5) Immigration detention.

### Application of international human rights obligations in times of crisis

During times of crisis such as the COVID 19 pandemic, states' obligations under international human rights law continue to apply except to the extent that relevant treaty obligations have been formally derogated from, through notification to the relevant international authorities.<sup>1</sup> Under international treaties binding on EU Member States, including the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), States may take emergency measures to derogate from certain of their international human rights law obligations in times of crisis, only to the extent strictly necessary to protect the life of the nation.<sup>2</sup> Even where derogation is permitted however, the necessity to derogate must be continually re-assessed to ensure that derogating measures remain necessary and proportionate and so that they apply for the shortest time possible<sup>3</sup> and certain rights may never be derogated from.<sup>4</sup> Although a small number of EU Member States have formally derogated from their obligations pursuant to a declared state of emergency in response to Covid-19, most have chosen not to do so.<sup>5</sup> In the absence of derogation, states retain obligations to uphold all internationally

<sup>1</sup> For example, under the International Covenant on Civil and Political Rights (ICCPR), art 4; European Convention on Human Rights (ECHR), art 15, UN Guidance is provided in the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights of (1984). CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: <https://www.refworld.org/docid/453883fd1f.html> States must communicate the derogation, the measures undertaken and the extent to which they derogate from their obligations under the relevant human rights treaty to the treaty's depository, i.e. the UN Secretary General for the ICCPR and the Council of Europe's Secretary General for the ECHR. See Article 4.3 ICCPR, article 15.3 ECHR.

<sup>2</sup> International Covenant on Civil and Political Rights (ICCPR), art 4; European Convention on Human Rights (ECHR), art 15, See further Siracusa Principles op. cit.

<sup>3</sup> See A/HRC/37/52 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenges of states of emergency in the context of countering terrorism.

<sup>4</sup> See, articles 4.2 ICCPR, 15.2 ECHR

<sup>5</sup> Latvia, Estonia and Romania derogated from the ECHR, see <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations> and also from the ICCPR, see <https://ijrcenter.org/2020/04/29/ohchr-human-rights-committee-address-derogations-during-covid-19/>

protected human rights of those within the jurisdiction of the state, irrespective of immigration status.

## 1. The impact of the closure of the EU external borders and suspension of new and on-going asylum applications

### The situation in the EU

Following the outbreak of the COVID-19 pandemic, the majority of EU Member States introduced restrictions for third-country nationals crossing the EU's external border.<sup>6</sup> In some cases, EU Member States banned entry to asylum applicants (*Greece, Hungary*),<sup>7</sup> pushed back boats with asylum seekers on board (Cyprus,<sup>8</sup> Greece<sup>9</sup>) or declared their ports "unsafe" (*Italy and Malta*) which meant closing the borders even for the disembarkation of people rescued at sea.<sup>10</sup> Other Member States<sup>11</sup> closed their arrival centers, ultimately restricting access to seeking asylum (inability to lodge asylum applications). The state of emergency due to COVID-19 declared in *Hungary*, led to the suspension of the right to apply for asylum.<sup>12</sup> In *Spain*, the processing of asylum applications has been suspended since the state of emergency entered into force on 15 March.<sup>13</sup> *Belgium* closed the arrival centre for asylum seekers in Brussels to contain the spread of COVID-19, hence new applicants were not able submit an application for international protection and thus be assigned reception places.<sup>14</sup> The asylum authority (Fedasil) re-opened the arrival centre on 3 April for priority cases received via an online registration and appointment system.<sup>15</sup>

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<sup>6</sup> For definitions of internal and external EU borders see Art 2 Schengen Border Code for definitions: 1. "internal borders" means: (a) The common land borders, including river and lake borders, of the Member States; (b) The airports of the Member States for internal flights; (c) Sea, river and lake ports of the Member States for regular internal ferry connections; 2. "external borders" means the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports provided that they are not internal borders.

<sup>7</sup> On 20 March 2020, the Cypriot coastguards pushed back a boat with approximately 175 Syrians seeking asylum on board, including 30 women and 69 children, the first recorded incident of its kind. (Cyprus, LGC News (2020), 175 Syrian Refugees Rescued as Boat Sinks, 20 March 2020). Hungary suspended admission of asylum seekers to the transit zones located at the Serbian border due to public health risks related to COVID-19 (Hungary, Cabinet Office of the Prime Minister (2020), Coronavirus – Hungary to suspend admission of illegal migrants to transit zone indefinitely, 3 March 2020). Greece had temporarily suspended access to asylum for March 2020, as migrants and refugees gathered in large numbers at the land border with Turkey. (Greece, Official Gazette, 2 March 2020). Greece allows only persons of Greek and/or EU citizenship or persons legally working permanently in Greece to enter the Greek territory until further notice.

<sup>8</sup> See Cyprus, [https://fra.europa.eu/sites/default/files/fra\\_uploads/cyprus-report-covid-19-april-2020\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/cyprus-report-covid-19-april-2020_en.pdf), p.10

<sup>9</sup> See <https://news.un.org/en/story/2020/03/1059992>

<sup>10</sup> On 8 April Italy declared its ports unsafe and said it will not authorise migrant boats to disembark in case of emergency, see: <https://www.theguardian.com/world/2020/apr/08/italy-declares-own-ports-unsafe-to-stop-migrants-disembarking>, On 11 April, Malta declared it is no longer a safe port for migrants: [https://www.maltatoday.com.mt/news/national/101610/malta-cabinet-declares-island-is-no-longer-safe-port-for-asylum-seekers#.XpYD\\_qszbaQ](https://www.maltatoday.com.mt/news/national/101610/malta-cabinet-declares-island-is-no-longer-safe-port-for-asylum-seekers#.XpYD_qszbaQ)

<sup>11</sup> For instance in Belgium, as of 17 March 2020, the arrival centre for asylum seekers was temporarily closed and, therefore, new arrivals were not able to request protection or be assigned reception places. See FRA, Coronavirus Pandemic in the EU – Fundamental Rights Implications (Bulletin 1) - Belgium, April 2020, p.7, available at [https://fra.europa.eu/sites/default/files/fra\\_uploads/belgium-report-COVID-19-april-2020\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/belgium-report-COVID-19-april-2020_en.pdf). All interviews for status determination of asylum seekers were cancelled temporarily and have only restarted on 8 April, The Brussels Times (2020) *Coronavirus: Belgium restarts services for asylum seekers*, <https://www.brusselstimes.com/all-news/belgium-all-news/105343/coronavirus-belgium-restarts-services-for-asylum-seekers/>

<sup>12</sup> JRS Europe and ECRE informed that entries into transit zones were suspended as of the start of March. This effectively means suspension of access to asylum. See ECRE, "Information Sheet: COVID-19 Measures related to asylum and migration across Europe," 8 April 2020, available at: <https://www.ecre.org/wp-content/uploads/2020/04/COVID-INFO-8-APRIL-.pdf>

<sup>13</sup> El País (2020) *Se desploman las solicitudes de asilo y las entradas irregulares*. <https://elpais.com/espana/2020-03-26/se-desploman-las-solicitudes-de-asilo-y-las-entradas-irregulares.html>

<sup>14</sup> A measure criticised by Belgian's French- and German-speaking bars.

<sup>15</sup> See FRA, *Coronavirus pandemic in the EU - Fundamental Rights Implications - Bulletin 2*, 28 May 2020, p.32, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-may\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-may_en.pdf)

A more human-rights compliant approach has been taken by countries such as *Germany*<sup>16</sup> and *Sweden*,<sup>17</sup> which allow access to filing of new asylum applications and also for entry to the country in order to seek asylum.<sup>18</sup> The status of people who were in the process of applying for international protection was automatically extended in *Luxembourg*.<sup>19</sup> In *Portugal*, it was decided that “persons who applied for international protection are considered to be regularly in the country and thereby qualified for health care and public services.”<sup>20</sup> In *Greece* a new, temporary health number was given to all asylum seekers to ensure free public healthcare to asylum-seekers who arrived in Greece since July when the new government halted the granting of social security numbers.<sup>21</sup>

### Analysis of international and EU law

The right to seek and enjoy asylum is guaranteed under international human rights, refugee and EU law.<sup>22</sup> Indeed, Article 18 of the EU Charter of Fundamental Rights guarantees the right to asylum.<sup>23</sup> The principle of *non-refoulement* prohibits States from transferring - in any manner whatsoever - anyone to a country or a territory where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion or where they would otherwise face a real risk of serious harm. As such, it is one of the strongest limitations under international law on the right of States to control entry into their territory and to expel aliens as an expression of their sovereignty.<sup>24</sup> The UN Human Rights Committee has established that the protection against *refoulement* extends to a real risk of violations of the right to life or the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.<sup>25</sup> The European Court of Human Rights has held that *non-refoulement* protects “the fundamental values of democratic societies”,<sup>26</sup> among which it has included the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the right to life,<sup>27</sup> and fundamental aspects of the rights to a fair trial<sup>28</sup> and to liberty.<sup>29</sup>

To promote a uniform approach to border controls, both at internal and external borders, imposed as a result of COVID-19, on 16 March 2020, the European Commission recommended a temporary restriction – initially for 30 days – of non-essential travel to the EU to prevent the further spread of

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<sup>16</sup> A need for international protection constituted an exception to border closure in Germany, see: [https://fra.europa.eu/sites/default/files/fra\\_uploads/germany-report-covid-19-april-2020\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/germany-report-covid-19-april-2020_en.pdf) p.10

<sup>17</sup> In Sweden non-essential travel was banned to and from Sweden, while a number of exceptions remain, including for people travelling for the purpose of seeking international protection. See: Sweden, Ministry of Justice (Justitiedepartementet) (2020) Temporary ban against travels to Sweden due to COVID-19 (Ett tillfälligt förbud mot resor till Sverige med anledning av COVID-19), press release, 17 March 2020

<sup>18</sup> In Germany, the entry in the country is depending on proof of the applicant proving quarantine for at least 14 days, or testing negative for COVID-19.

<sup>19</sup> Luxembourg, Grand-ducal decree of 18 March 2020 introducing a series of measures to combat the COVID-19 (Règlement grand-ducal du 18 mars 2020 portant introduction d'une série de mesures dans le cadre de la lutte contre le COVID-19).

<sup>20</sup> The measures as presented are temporary and do not result in automatic asylum or regularisation. ECRE (2020) *Portugal: COVID 19 Measure - Services Ensured for People with Pending Applications for Asylum or Regularisation*. Available at <https://www.ecre.org/portugal-covid-19-measure-services-ensured-for-people-with-pending-applications-for-asylum-or-regularisation/>

<sup>21</sup> See ECRE, “Information Sheet: COVID-19 Measures related to asylum and migration across Europe,” 8 April 2020

<sup>22</sup> “The right to seek and to enjoy in other countries asylum from persecution” in article 14(1) of the Universal Declaration of Human Rights, the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees, Article 18 EU Charter on Fundamental rights (right to asylum).

<sup>23</sup> “The right to asylum shall be guaranteed with 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.”

<sup>24</sup> Article 33 Geneva Convention, Article 3 ECHR, Article 3 Convention Against Torture (CAT). See: ICJ, *Practitioners Guide No.6 on Migration and International Human Rights Law*, 2014, available at <https://www.icj.org/updated-practitioners-guide-on-migration-and-international-human-rights-law/>. In the EU Charter on Fundamental Rights it is protected under Article 19. Under Articles 3 and 4 of the Schengen Borders Code, border control authorities must respect the rights of refugees and international protection obligations.

<sup>25</sup> Human Rights Committee (CCPR), *General Comment No. 31 [80] – The nature of general legal obligations imposed on States Parties to the Covenant*, UN doc. CCPR/C/21/Rev.1/Add.13, para. 12.

<sup>26</sup> *Saadi v. Italy*, ECtHR(GC)Application No. 37201/06, Judgment of 28 February 2008, para. 127; *Chahal v. the United Kingdom*, ECtHR, Application No. 70/1995/576/662, Judgment 11 November 1996, para. 79.

<sup>27</sup> *Bader and Kanbor v. Sweden*, ECtHR, Application No. 13284/04, Judgment of 8 November 2005, para. 48.

<sup>28</sup> See, *Othman (Abu Qatada) v. the United Kingdom*, ECtHR, Application No. 8139/09, Judgment of 17 January 2012.

<sup>29</sup> See, for example, *Z and T v. United Kingdom*, ECtHR, Application No. 27034/05, Admissibility Decision, 28 February 2006, The Law

COVID-19.<sup>30</sup> EU guidelines on Covid 19 specified that, “(...) Member States have the possibility to refuse entry to non-resident third country nationals where they present relevant symptoms or have been particularly exposed to risk of infection and are considered to be a threat to public health.” It also suggested “alternative measures to a refusal of entry such as isolation or quarantine.” And it specifically stated that, “any decision on refusal of entry needs to be proportionate and non-discriminatory. A measure is considered proportionate on condition that it has been taken following consultation of the health authorities and that it has been considered by them as suitable and necessary to attain the public health objective.”<sup>31</sup>

The Commission has further specified that: “Measures taken by Member States to contain and limit the further spread of COVID-19 should be based on risk assessments and scientific advice, and must remain proportionate. Any restrictions in the field of asylum, return and resettlement must be proportional, implemented in a nondiscriminatory way and take into account the principle of non-refoulement and obligations under international law.”<sup>32</sup> The Commission recommended that, where necessary, it should be possible to lodge applications by means of a form either by postal mail or preferably online.<sup>33</sup> Linked to access to the asylum procedure, the Commission advised prolonging the time limit for lodging an asylum application to 10 working days.<sup>34</sup> It also said that the period for concluding the examination of applications can be extended for another nine months beyond the ordinary period of six months as foreseen by the Asylum Procedures Directive in similar situations.<sup>35</sup>

The United Nations High Commissioner for Refugees (UNHCR) stated that “In order to give effect to their international legal obligations, including the right to seek asylum and the principle of non-refoulement, States have a duty vis-à-vis persons who have arrived at their borders, to make independent inquiries as to the persons’ need for international protection and to ensure they are not at risk of *refoulement*. If such a risk exists, the State is precluded from denying entry or forcibly removing the individual concerned.”<sup>36</sup>

The European Commission has also clarified that “[a]s regards asylum procedures, considering that a situation such as the one resulting from the COVID-19 pandemic has not been foreseen in Directive 2013/32/EU (hereafter “the Asylum Procedures Directive”), the application of derogatory rules such as those set in the Directive in case of a large number of simultaneous applications may be considered.”<sup>37</sup> The Commission stressed that “in any event, any further delays in the registration of applications should

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<sup>30</sup> European Commission (2020), Communication from the Commission COVID-19 Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy 2020/C 102 I/02, C/2020/2050, OJ C 102I, 30 March 2020, p. 1., see [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200330\\_c-2020-2050-report\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200330_c-2020-2050-report_en.pdf)

<sup>31</sup> European Commission, COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, 2020/C 86 I/01, OJ C 86I, 16 March 2020, p. 4, part 4.

<sup>32</sup> On 16 April 2020 the European Commission issued a practical guidance to Member states, advising on issues related to asylum, return and resettlement. COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement, 16 April 2020, p.1, <https://www.refworld.org/docid/5e99707d4.html>

<sup>33</sup> European Commission, 16 April 2020, *op.cit.*, P. 6

<sup>34</sup> European Commission, 16 April 2020, *op.cit.*, p. 5

<sup>35</sup> “Article 31(3) point (b) of the Asylum Procedures Directive allows Member States to extend the six months period for concluding the examination of applications by a period not exceeding a further nine months where a large number of third country nationals or stateless persons simultaneously apply for international protection making it very difficult in practice to conclude the examination within this time-limit. It should be possible for Member States to apply this temporary derogatory rule where it is very difficult in practice for them to respect the six-month time limit for the examination of applications as a result of the COVID-19 situation, which could have a similar impact, in the light of the overall purpose of the legislation and the interests at stake, to a difficulty resulting from a large number of simultaneous applications considering that the specific circumstances resulting from a pandemic situation have not been foreseen by the co-legislator.” European Commission, 16 April 2020, *op.cit.*, p.8

<sup>36</sup> UNHCR, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, 16 March 2020, available at: <https://www.refworld.org/docid/5e7132834.html>

<sup>37</sup> Article 6(5) of the Asylum Procedures Directive allows Member States to extend the time limit for the registration of applications to ten working days where simultaneous applications by a large number of third-country nationals or stateless persons make it very difficult in practice to respect these time limits. In the light of the overall purpose of the Directive and the interests at stake, it should be possible for Member States to apply this exception to the rule for a limited period of time where it is very difficult in practice for national authorities to respect the three-day or six-day time limit for the registration as a result of the COVID-19 situation, notwithstanding the fact that the Directive does not envisage the specific difficulties resulting from a pandemic situation. See: European Commission, 16 April 2020, *op.cit.*

not affect the rights of the applicants pursuant to the Reception Conditions Directive which apply as from the making of an application.”<sup>38</sup>

The EU guidelines on these specific issues highlight in line with international human rights obligations, that EU Member states measures taken during the Covid-19 pandemic cannot affect the rights of the applicants, whether it comes to their right to seek asylum and the prohibition of *non-refoulement*.

States are responsible for ensuring protection from *refoulement* to all persons who are within their jurisdiction, including at national frontiers. “The obligation under Article 33(1) of the 1951 Convention not to send a refugee or asylum-seeker to a country where he or she may be at risk of persecution is not subject to territorial restrictions; it applies wherever the State in question exercises jurisdiction.” “UNHCR is of the view that the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be at risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.”<sup>39</sup>

In order to give effect to their international legal obligations to protect the right to seek asylum and the principle of *non-refoulement*, States have a duty vis-à-vis persons who have arrived at their borders, to make independent inquiries as to the persons’ need for international protection and to ensure they are not at risk of *refoulement*. If such a risk exists, the State is precluded from denying entry or forcibly removing the individual concerned.<sup>40</sup> At the outset, persons seeking international protection must have access to relevant information in a language they understand and the ability to make formal asylum claims with the competent authority.<sup>41</sup> Obligations to uphold the right to seek asylum and the principle of *non-refoulement* apply irrespective of health or other emergencies, such as the COVID-19 pandemic. Under international human rights law, the European Convention on Human Rights and the EU Charter, among others, the *refoulement* prohibition can never be subject to derogation. There is no pandemic exemption to the right to asylum or the protection against *refoulement*.

An additional issue is the fact that some countries<sup>42</sup> decided on the closure of borders for non-nationals “until further notice.” The necessity and proportionality of such emergency measures restricting human rights is dependent on continuous review to ascertain if they remain necessary in light of developing circumstances, including through time-limitation to ensure that they do not become permanent.

**Recommendations:**

**There should be an exemption to border closures to allow claims for international protection. Restrictions at borders imposed in the interests of public health must not result in denying an effective opportunity to seek asylum or in *refoulement*, in violation of states’ obligations under international and EU law.**

**In order to ensure that restrictions on rights involved in border closures respect such international law obligations, measures other than blanket closure of the borders, such as health checks at the borders and/or possible quarantine of newly arrived persons for 2 weeks as suggested by the European Commission guidelines, should have been considered first in response to COVID-19.**

**Emergency measures that restrict human rights, such as exceptional closure of borders, should be time-bound and have a final date or have a date established on which these measures will be reassessed.**

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<sup>38</sup> See, European Commission, 16 April 2020, *op.cit.*, p. 5

<sup>39</sup> Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, para. 9 and 24.

<sup>40</sup> UNHCR, Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response, <https://reliefweb.int/report/world/key-legal-considerations-access-territory-persons-need-international-protection-context>

<sup>41</sup> *ibid.*

<sup>42</sup> For instance Greece or Hungary.

## 2. Closure of internal borders and impact of COVID-19 measures on Dublin transfers<sup>43</sup> and the right to family life

### 2.1 Impact on Dublin transfers for family reunification of asylum seekers

#### The situation in the EU

Citing the exceptional circumstances created by COVID-19, EU Member States temporarily reintroduced controls at the internal borders from March 2020.<sup>44</sup> The closure of internal EU borders had an impact on transfer procedures for applicants for international protection within the EU under the Dublin Regulation, with significant consequences for family reunification. For instance in *the Netherlands* all incoming and outgoing Dublin transfers were suspended, up to and including 6 April 2020.<sup>45</sup> The administrative process regarding the Dublin procedure continued after that as far as possible. *Germany* introduced a temporary suspension of transfers under the Dublin Regulation to and from all EU Member States due to the Coronavirus.<sup>46</sup> The temporary suspension did not lead to the expiry of the six months' time limit for the transfer. The regular six months' time limit, after which the responsibility of the asylum procedure would pass to *Germany*, was only kept on hold.

#### Analysis of international and EU law

Article 28 of the Schengen Borders Code (Regulation (EU) 2016/399) allows the closure of internal borders under strict conditions and for a limited period.<sup>47</sup> Such reintroduction must be limited in time and notified to the European Commission.<sup>48</sup> However in the context of COVID-19, closure of borders should be considered in light of the World Health Organisation (WHO), which has advised against the application of travel restrictions between countries experiencing COVID-19 outbreaks.<sup>49</sup> It stated that travel bans will not be effective and that "travel measures that significantly interfere with international traffic may only be justified at the beginning of an outbreak, as they may allow countries to gain time, even if only a few days, to rapidly implement effective preparedness measures. Such restrictions must be based on a careful risk assessment, be proportionate to the public health risk, be short in duration, and be reconsidered regularly as the situation evolves."<sup>50</sup>

The European Commission in its Communication encouraged all Member States to resume transfers as soon as practically possible in view of the evolving circumstances.<sup>51</sup> The European Commission stated in its guidance that, "where a transfer to the responsible Member State is not carried out within the applicable time limit, responsibility shifts to the Member State that requested the transfer pursuant to Article 29(2) of the Dublin Regulation. No provision of the Regulation allows for departure from this

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<sup>43</sup> The EU Dublin Regulation (Regulation No. 604/2013) determines which EU Member State is responsible for the examination of an application for asylum, submitted by persons seeking international protection under the Geneva Convention and the EU Qualification Directive, within the EU.

<sup>44</sup> See FRA – Bulletin 1, p.9, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-coronavirus-pandemic-eu-bulletin\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin_en.pdf).

For instance France was carrying out targeted border controls with all neighboring countries, while border crossings with Germany have been limited (See: FRA, p.2, [https://fra.europa.eu/sites/default/files/fra\\_uploads/france-report-covid-19-april-2020\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/france-report-covid-19-april-2020_en.pdf)). Poland reintroduced controls at borders between Poland and its EU neighbouring states (See: FRA, Poland, p.7, [https://fra.europa.eu/sites/default/files/fra\\_uploads/poland-report-covid-19-april-2020\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/poland-report-covid-19-april-2020_en.pdf)). Czechia, Denmark, also closed its borders, See ECRE, p.3, <https://www.ecre.org/wp-content/uploads/2020/05/COVID-INFO-5-May-.pdf>.

Spain announced on 16 March 2020 the closure of its land borders to contain the spread of the coronavirus, thus suspending the Schengen Agreement (See FRA, Spain, p.3, [https://fra.europa.eu/sites/default/files/fra\\_uploads/spain-report-covid-19-april-2020\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/spain-report-covid-19-april-2020_en.pdf))

<sup>45</sup> AIDA, *Country Report: The Netherlands (2019 Update)*, available at [https://www.asylumineurope.org/sites/default/files/report-download/aida\\_nl\\_2019update.pdf](https://www.asylumineurope.org/sites/default/files/report-download/aida_nl_2019update.pdf)

<sup>46</sup> ECRE (2020) *Germany: Temporary Suspension of Dublin Returns Due to COVID 19*, <https://www.ecre.org/germany-temporary-suspension-of-dublin-returns-due-to-COVID-10/>

<sup>47</sup> European Commission (2020), Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq. of the Schengen Borders Code.

<sup>48</sup> European Commission (2020), Only 11 Schengen Members Have Notified EU for Reintroduction of Internal Border Checks, press statement, 21 March 2020.

<sup>49</sup> Updated WHO recommendations for international traffic in relation to COVID-19 outbreak, 29 February 2020, <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak>

<sup>50</sup> *ibid.*

<sup>51</sup> See, European Commission, 16 April 2020, *op.cit.*, p. 7

rule in a situation such as the one resulting from the COVID-19 pandemic.”<sup>52</sup> However, “[a]s regards unaccompanied minors, the procedure for family reunification with a family member, sibling or a relative could continue after the expiry of the transfer time limits set out in Article 29 where it is in the best interests of the child and where the duration of the procedure for placing the minor led to a failure to observe this time limit, as provided for in Article 12(2) of the Dublin Implementing Regulation.”<sup>53</sup> Further, the Commission has set out unaccompanied minors and family unity cases as priorities for Member States: “In a situation where Member States’ administrations are adjusting work practices which may affect the capacity to deal with all the Dublin cases in time, Member States should give priority to processing of cases concerning unaccompanied minors, other vulnerable persons, or family unity.”<sup>54</sup>

The EU guidance was issued in line with the principle of legal certainty and the need to decide on asylum applications without undue delay. The recommendation is compliant with the right to family unity in international human rights law, ensuring that the procedures for family reunification are prioritized, and it takes the best interest of the child into consideration. However, all transfers for the reunification of the family should be carried out as soon as possible and without unnecessary delay.

All individuals, including migrants and refugees, have the right to respect for family life under international and EU law, and any restrictions on this right must be justified as prescribed by law, and necessary and proportionate to a legitimate aim, such as the protection of public health or the rights of others.<sup>55</sup>

#### **Recommendations:**

**For Dublin transfers, the EU guidance stated that the country, which sent the request to take charge of the case will remain responsible for the asylum application, if the transfer was not possible during the time limit. However, family reunification cases should not have been suspended due to Coronavirus related restrictions on travel, and should be enacted at the earliest possibility.**

**As the closure of borders should not apply to impede people from seeking international protection, neither should it apply to prevent family reunification. Where necessary, measures such as quarantine after arrival should be put in place, rather than restricting family reunification.**

**Where children are involved or the reason for the Dublin transfer is family reunification, these transfers should be prioritized.**

## **2.2 Impact on the right to family life and the right family reunification for migrants**

### **The situation in the EU**

The closure of internal borders has also had a disproportionately detrimental impact on the right to family life and the right to family reunification for migrants under the Family Reunification Directive.<sup>56</sup> The Directive aims at determining the conditions for the exercise of the right to family reunification by third country nationals lawfully residing in the EU.

Due to the Coronavirus related restrictions, family separation took in many cases longer than it would under normal circumstances as family reunifications got delayed.<sup>57</sup> Administrative procedures, such as visa processes for family reunification were suspended and migrants were unable to be reunited with their families. Family reunification procedures were for instance suspended by *Slovenia*.<sup>58</sup> In some

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<sup>52</sup> See, European Commission, 16 April 2020, *op.cit.*, p.8

<sup>53</sup> *ibid.*

<sup>54</sup> See, European Commission, 16 April 2020, *op.cit.*, p.5

<sup>55</sup> Article 8 ECHR, Article 17 and 23 ICCPR, Article 10 International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 44 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Article 9, 10 and 22 Convention on the Rights of the Child (CRC).

<sup>56</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

<sup>57</sup> For instance in Romania, family reunification procedures were suspended. See, ECRE, p. 15, <https://www.ecre.org/wp-content/uploads/2020/05/COVID-INFO-5-May-.pdf>

<sup>58</sup> As reported by ECRE, Information Sheet: COVID-19 Measures related to asylum and migration across Europe,” 8 April 2020, p.1.

cases where Member States have forbidden foreigners from entering the country with a few exceptions, family reunification cases were missing from the list of exceptions (*Romania*).<sup>59</sup>

### **International and EU law analysis**

All individuals, including migrants and refugees, have the right to respect for family life under international and EU law.<sup>60</sup> The best interests of the child should be taken fully into consideration in decisions regarding family unity.<sup>61</sup> The rules of family reunification must be applied in a non-discriminatory way.<sup>62</sup>

The right to family reunification by third country nationals residing lawfully in the territory of the Member States in the EU is governed by the Family Reunification Directive of 2003. The CJEU has clarified that the Directive requires Member States, in specific cases, to authorise family reunification of certain members of the sponsor's family, without the application of a margin of appreciation (CJEU, C-540/03). The CJEU further clarified that the provisions of the Directive on Family Reunification require that States ensure that family reunification is the general rule.<sup>63</sup>

Family reunification cases should be prioritised and arrangements and exceptions made for safe transfer, so that the impact on individual's right to family life is not disproportionate.

### **Recommendations:**

**Any restrictions on the right to family life of migrants, asylum seekers or refugees must be shown to be necessary and proportionate to the legitimate aim of curbing the spread of COVID-19. While non-essential travel is prohibited by some EU Member States as a measure to contain COVID-19, travel for reunification of a family may amount to essential travel. Therefore exceptions for this purpose should be permitted in Member States' responses to the pandemic, in cases where the denial of family reunification would amount to an unnecessary or disproportionate interference with family life.**

**When children who are undergoing a family reunification procedure under the Family Reunification Directive reach the age of 18, they may as a consequence lose some of their rights to family reunification under the Directive or national laws. So that such children should not be prevented from reuniting with their families due to delays resulting from the Covid-19 pandemic, when administrations are back in service, the person's claim should be considered as if it was submitted before the age of 18 if at that time the administration was not available due to specific COVID-19 related measures.**

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<sup>59</sup> See for instance Romania (FRA – Bulletin 2, op.cit., p.7, [https://fra.europa.eu/sites/default/files/fra\\_uploads/ro\\_report\\_on\\_coronavirus\\_pandemic\\_may\\_2020.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/ro_report_on_coronavirus_pandemic_may_2020.pdf))

<sup>60</sup> Article 17 and 23 ICCPR, Article 10 ICESCR, Article 44 CMW, Article 9, 10 and 22 CRC, Article 8 ECHR

<sup>61</sup> CRC & CMW, Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, 16 November, para 29. See also *El Ghatet v. Switzerland*, ECtHR, Application No. 56971/10, Judgment 8 November 2016.

<sup>62</sup> In *Biao v. Denmark*, Denmark breached article 8 and 14 of the Convention by establishing different family reunification rules for persons with Danish citizenship below and over the age of 28. In practice this rule impacted only citizens of non-Danish origin, which amounted to indirect discrimination on the basis of ethnicity and the State failed to provide any reasonable justification for this difference of treatment. *Biao v. Denmark*, ECtHR, Application No.38590/10, Judgment 24 May 2016.

<sup>63</sup> C-578/08, Chakroun, CJEU, 4 March 2010, para 43.



### **3. Impact of COVID-19 measures on residence permits, right to work and access to health care and public services**

#### **3.1 Expiration of residence permits**

##### **The situation in the EU**

When migrants lose their residence status or are no longer in an international protection procedure, they will also often lose access to health care and public services, which will have a serious negative impact on the spreading of the virus. In extreme cases, where irregular status leads to a situation of destitution, they will have even less capacity to comply with social distancing or otherwise protect themselves from infection.

Some Member States have adopted measures to address these risks. In *Luxembourg*, the government has foreseen an automatic extension of temporary stay for people already staying in Luxembourg with travel documents that were expiring during the movement restrictions.<sup>64</sup> In *Portugal*, it was decided that “persons who applied for regularisation are considered to be regularly in the country and thereby qualified for health care and public services.”<sup>65</sup> *Ireland* announced that all immigration permits due to expire between 20 March and 20 May 2020 will be automatically renewed under the same conditions for a period of two months.<sup>66</sup> *France* extended all residence permits by three months starting on 16 March 2020, thereby guaranteeing access to work, social rights and social security for those who might otherwise be vulnerable due to expirations of their permits during the pandemic. *Slovakia* has extended residency permits for non-citizens as an exceptional crisis measure.<sup>67</sup>

##### **International and EU law analysis**

Such measures are an effective means of complying with Article 12, paragraph 2.c of the International Covenant on Economic, Social and Cultural Rights (ICESCR), under which “[t]he steps to be taken by the States Parties to the present Covenant to achieve the full realization of” everyone’s right to health “shall include those necessary for” “the prevention, treatment and control of epidemic, endemic, occupational and other diseases”.

The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation”.<sup>68</sup>

##### **Recommendations:**

**Granting access to healthcare, welfare benefits, bank accounts, employment and rental contracts to all migrants including refugees and asylum seekers on an equal basis with nationals is an effective way to comply with international legal obligations to respect economic and social rights. These measures can also maximize the access of everyone to the best conditions to contain the spread of the virus.**

**Where residence permits are about to expire in the period when COVID-19 measures are in place and certain services are suspended or reduced and are not able to ensure that residence permits are prolonged, states should automatically extend such permits, to avoid discrimination in access to healthcare and other essential services.**

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<sup>64</sup> Luxembourg, Grand-ducal decree of 18 March 2020 introducing a series of measures to combat the COVID-19 (Règlement grand-ducal du 18 mars 2020 portant introduction d’une série de mesures dans le cadre de la lutte contre le COVID-19).

<sup>65</sup> The measures as presented are temporary and do not result in automatic asylum or regularisation.

<https://www.ecre.org/portugal-covid-19-measure-services-ensured-for-people-with-pending-applications-for-asylum-or-regularisation/>

<sup>66</sup> UN Network on Migration, COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?, p.9, [https://migrationnetwork.un.org/sites/default/files/docs/un\\_network\\_on\\_migration\\_wg\\_atd\\_policy\\_brief\\_covid-19\\_and\\_immigration\\_detention\\_0.pdf](https://migrationnetwork.un.org/sites/default/files/docs/un_network_on_migration_wg_atd_policy_brief_covid-19_and_immigration_detention_0.pdf)

<sup>67</sup> *ibid* p.10

<sup>68</sup> CESCR, General Comment No. 20, para. 30. See also, Article 42, Limburg Principles. Certain kinds of discrimination between citizens and non-citizens are also covered by Article 26 ICCPR.

### 3.2 Impact on migrant workers and the right to work

#### The situation in the EU

The measures taken by EU Members States to require the closure of businesses, with the stated intention of responding to the pandemic had consequences for employment, where those most affected were often people in lower-paid jobs.<sup>69</sup> For instance in *Greece*, people in mainland camps where COVID-19 cases have occurred were locked in, and were unable to go to work (those employed were mainly working in the informal economy).<sup>70</sup> In *Hungary*, people granted international protection were losing their jobs, as low-skilled positions have been disappearing due to the confinement.<sup>71</sup>

There have also been some positive developments in some European States where asylum seekers have been granted the right to work, albeit with the caveat that it only applied to occupations where Members States experience shortages, such as in the medical sector. A French department close to Paris experiencing severe labour shortage in agriculture has allowed asylum seekers to work in the agricultural sector. Around 50 persons agreed to work and volunteer planting and harvesting fields.<sup>72</sup>

In *France*, refugees who graduated outside Europe and worked as physicians or pharmacists before reaching Europe have been granted the right to work as doctors and to be recruited by the French public health system, although under the previous circumstances their certificates would not have been recognized. Similar provisions could be open for other sectors experiencing labour shortages.<sup>73</sup> The Czech government has modified work permits to allow those who hold a single work permit visa to change their contract and employer without risking loss of their status and deportation.<sup>74</sup>

#### International and EU law analysis

Restrictions on work pose particular challenges to those especially vulnerable to reductions in income and to losing their jobs, such as migrant workers.<sup>75</sup> Migrant workers who lose their employment will often also lose their residence status as this is almost always dependent on their employment. This may also have detrimental consequences for their and their family members' exercise and enjoyment of other economic and social rights, including access to social security, healthcare and housing, and, as a result, to an adequate standard of living, protected under the International Covenant on Economic, Social and Cultural Rights, and the European Social Charter.<sup>76</sup> Migrants who lose their job may also as a result lose access to health care and other services.

States may legitimately regulate or restrict the right to work of non-citizens or particular categories of non-citizens — those with particular types of work or residence permits, or asylum seekers. The Committee on the Elimination of Racial Discrimination has acknowledged that "State Parties may refuse to offer jobs to non-citizens without a work permit."<sup>77</sup> However, different applications of the right to work of non-citizens and citizens, as well as differences between different categories of non-nationals, must be objectively justifiable and non-discriminatory on other grounds, such as race or ethnicity.

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<sup>69</sup> Data generated in various countries show that migrants and their families represent a high percentage of people who lost their jobs, receive decreased income, or stopped receiving income at all, following the implementation by States of measures to counter the spread of COVID-19. Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants, UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and UN Special Rapporteur on the human rights of migrants, 26 May 2020, p.2, see: <https://www.ohchr.org/Documents/Issues/Migration/CMWSPMJointGuidanceNoteCOVID-19Migrants.pdf>

<sup>70</sup> See ECRE, p 12, <https://www.ecre.org/wp-content/uploads/2020/05/COVID-INFO-5-May-.pdf>

<sup>71</sup> *ibid*

<sup>72</sup> See more: ECRE, p.5, <https://www.ecre.org/wp-content/uploads/2020/04/COVID-INFO-8-APRIL-.pdf>

<sup>73</sup> Usually, asylum seekers cannot access employment before 6 months in the procedure. See more: ECRE <https://www.ecre.org/wp-content/uploads/2020/04/COVID-INFO-8-APRIL-.pdf>

<sup>74</sup> See ECRE, p. 11, <https://www.ecre.org/wp-content/uploads/2020/05/COVID-INFO-5-May-.pdf>

<sup>75</sup> Migrant workers as defined by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990.

<sup>76</sup> Articles 7, 9, 10, 11 and 12 ICESCR, Articles 3, 4, 11, 12, 13, 30 and 31 European Social Charter.

<sup>77</sup> Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 30, para. 35. In ICJ Practitioners Guide No 6, p. 279.

Loss of employment and residence status may also affect migrant workers' and their families' right to social security, which is protected under Article 9 ICESCR. In its General Comment No. 19, the UN Committee on Economic, Social and Cultural Rights (CESCR) clarified that "[t]he right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (...) unaffordable access to health care or insufficient family support."<sup>78</sup> The Committee further noted that "Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. (...) All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care."<sup>79</sup> It further clarified that "[r]efugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards."<sup>80</sup>

**Recommendations:**

**Measures allowing asylum seekers to work while still in the asylum procedure and making the procedures of recognition of education and training received outside of the EU faster and easier for refugees and asylum seekers are positive steps towards protecting their economic and social rights.**

**States should ensure that migrants who have lost their employment and/or residence status as a result of COVID-19 have access to a social security scheme that provides a minimum essential level of benefits that will enable them to obtain essential health care, shelter and housing, water and sanitation, food, and education.<sup>81</sup> In accordance with international law obligations to protect the right to health, there should be safe and unrestricted access to free healthcare, irrespective of employment, for everyone.<sup>82</sup> Under international human rights law, states have a duty to respect the right to health by ensuring that all persons, including migrants and refugees, have equal access to preventive, curative and palliative health services, regardless of employment, or of their legal status and documentation.<sup>83</sup>**

**There should be a safety net for all people losing their jobs as a result of the COVID-19 measures, including migrant workers and their families, regardless of their immigration status. Such safety net should comprise access to social protection and renewal of permits of migrant workers regardless of whether or not they are employed and access to adequate standard of living.**

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<sup>78</sup> CESCR, [General Comment No. 19](#), The right to social security (art. 9), UN Doc. E/C.12/GC/19, para. 2.

<sup>79</sup> CESCR, [General Comment No. 19](#), para. 37

<sup>80</sup> CESCR, [General Comment No. 19](#), para. 38

<sup>81</sup> CESCR, [General Comment No. 19](#), para. 59.a.

<sup>82</sup> See CESCR, General comment No. 14 (2000) on the right to the highest attainable standard of health, para. 43.

<sup>83</sup> CESCR, General comment No. 14 (2000) on the right to the highest attainable standard of health, para 34.

## 4. Reception and living conditions

### The situation in the EU

A majority of reception centers for asylum seekers are not well suited or equipped to allow for special measures in order to contain COVID-19. In many cases the centres are overcrowded, and it may be very difficult for asylum seekers, and especially the most vulnerable, to access kitchens and bathrooms safely due to these being shared with other residents. There is also a risk of deteriorating conditions in these facilities.

For instance in *Greece*, as of March 22, the population of the hotspots<sup>84</sup> on Lesbos, Chios, Samos, Kos, and Leros was almost 31,400 over capacity, with 37,427 people in facilities with a total capacity of just 6,095. Medecins Sans Frontieres reported on the need to evacuate refugee camps on the Greek islands as unhygienic conditions and overcrowding were posing a real threat to public health.<sup>85</sup> People in such camps have to queue to access toilets or to get food, have no access to health care and suffer from insecure conditions, all in all having serious negative impact on people's mental health.

In other countries, asylum seekers and refugees are housed in centres where people, including children and families, share common spaces (such as a kitchen or bathroom) with a high number of unrelated adults. Migrant support organisations in *Ireland* have expressed concern about the conditions in reception facilities, warning that an outbreak would be devastating, due to the inability of those living there to self-isolate or maintain social distance.<sup>86</sup> The concern has materialized in an outbreak of the coronavirus in one of the centres in early May.<sup>87</sup> Several Member States have introduced measures in reception facilities to contain the spread of COVID-19, including social distancing/quarantine measures<sup>88</sup> and the temporary banning or restriction of visitors.<sup>89</sup> This often meant that providers of social services or legal aid were unable to visit facilities. Notably, direct NGO assistance in the few camps open in *Hungary* was suspended due to COVID-19 risks.<sup>90</sup> In some countries residents of asylum and reception centres were provided information on COVID-19,<sup>91</sup> while others were lagging behind.<sup>92</sup>

In *Germany*, the Bavarian Refugee Council appealed for an immediate dissolution of mass accommodation in refugee centres because of the risk of infection, proposing that refugees be housed in apartments or hotels.<sup>93</sup>

In countries where the registering and lodging of asylum applications was temporarily suspended (*Belgium, France, Greece or Hungary*<sup>94</sup>), asylum seekers unable to register risked being left destitute in the streets. Also, some reception centers were closed which led immediately to more people in

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<sup>84</sup> Γενική Γραμματεία Ενημέρωσης και Επικοινωνίας (2020) Αποτύπωση της εθνικής εικόνας κατάστασης για το προσφυγικό/μεταναστευτικό ζήτημα την 22/3/2020. <https://infocrisis.gov.gr/8275/apotyposi-tis-ethnikis-ikonas-katastasis-gia-to-prosfygiko-metanasteytikio-zitima-tin-22-3-2020/>

<sup>85</sup> Greece, Medecins sans Frontieres (2020) *Evacuation of squalid Greek camps more urgent than ever over COVID-19 fears*, available at <https://msfaccess.org/node/56296>

<sup>86</sup> Pollak S. (2020), 'Coronavirus: Outbreaks in direct provision centres could be "devastating"', *The Irish Times*, 10 March 2020, available at: [www.irishtimes.com/news/social-affairs/coronavirus-outbreaks-in-direct-provisioncentres-could-be-devastating-1.4199164](http://www.irishtimes.com/news/social-affairs/coronavirus-outbreaks-in-direct-provisioncentres-could-be-devastating-1.4199164)

<sup>87</sup> Irish Times, Asylum seekers appeal for safe housing after Covid-19 outbreak at Co Kerry centre, 6 May 2020, available at: <https://www.irishtimes.com/news/social-affairs/asylum-seekers-appeal-for-safe-housing-after-covid-19-outbreak-at-co-kerry-centre-1.4246829>

<sup>88</sup> For example in Austria, Croatia, Cyprus, Germany, Greece, Latvia and Romania. See FRA – Bulletin 1, p. 29

<sup>89</sup> For example in Belgium, Bulgaria, Croatia, Cyprus, Czechia, Ireland, Latvia and Romania. See FRA – Bulletin 1, p. 29

<sup>90</sup> See ECRE, "Information Sheet: COVID-19 Measures related to asylum and migration across Europe," 8 April 2020

<sup>91</sup> For example in Portugal, the Refugee Council held information sessions, issued recommendations in several languages, put up posters with guidelines and handed out kits with alcoholbased gel and disinfectants. UNHCR Malta produced guidance in several languages and established a Facebook group. See: FRA, p. 29

<sup>92</sup> Organisations in some Member States, however, urged authorities to do more: for instance, the association Women in Exile & Friends in Germany points to the lack of information about COVID-19 in languages spoken by asylum seekers.

<sup>93</sup> Bavarian Refugee Council (Bayerischer Flüchtlingsrat) (2020) *Gesundheitsversorgung sicherstellen! Lager auflösen! Menschen und ihre Rechte schützen!*, 20 March 2020, available at [www.fluechtlingsrat-bayern.de/beitrag/items/gesundheitsversorgung-sicherstellen-lager-aufloesen-menschen-und-ihre-rechte-schuetzen.html](http://www.fluechtlingsrat-bayern.de/beitrag/items/gesundheitsversorgung-sicherstellen-lager-aufloesen-menschen-und-ihre-rechte-schuetzen.html)

<sup>94</sup> See <https://www.ecre.org/wp-content/uploads/2020/05/COVID-INFO-5-May-.pdf>

precarious situations, who were forced to live in the streets.<sup>95</sup> Housing shortages for refugees, a pre-existing problem in *Italy*, have become more severe as a result of the COVID-19 restrictions. Homelessness was increasing with very poor living conditions being reported in shelters accessible to the homeless. A few people were hosted by family members and Italian friends, but in very difficult conditions.<sup>96</sup> In *Greece*, people including homeless asylum seekers were being fined for being out in the streets.<sup>97</sup>

Several international bodies and organisations have called on *Greece* to move people and especially vulnerable individuals from the difficult conditions they find themselves in even before the COVID-19 crisis, and these became even more urgent during the pandemic.<sup>98</sup>

In *Belgium*, multiple cities have increased their capacity to shelter homeless people, including migrants, also creating separate, isolated spaces for people with COVID-19. People have been hosted in hotels and campsites.<sup>99</sup> In *France*, reception centres were instructed not to remove asylum seekers already accommodated there, including rejected asylum seekers and beneficiaries of international protection.<sup>100</sup> In addition, in an interim measure handed down on 30 March, the European Court of Human Rights ordered France to provide shelter, clothes and food to an unaccompanied minor.<sup>101</sup>

Members of ethnic minorities, including migrants and refugees living in the community, may have been at increased risk of infection due to their disadvantaged living conditions. In *Sweden*, at least five of the first 15 COVID-19 related deaths in the Stockholm area were people of Somali descent who lived in the same overcrowded and socio-economically deprived area.<sup>102</sup>

### International and EU law analysis

The right to the 'highest attainable standard of physical and mental health'<sup>103</sup> in international human rights law is a right of everyone, irrespective of citizenship or immigration status and wherever they may reside, to healthcare systems, facilities, goods and services that are available, accessible, acceptable and of sufficient quality.<sup>104</sup> Migrants and refugees, especially newly arrived migrants and asylum seekers, are especially at risk due to lack of ties to host country health systems. Those already facing extreme hardship, including shortage of food, water and healthcare (which is for instance the

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<sup>95</sup> Belgium closed its application centre for asylum seekers in the Klein Kasteeltje, in Brussels, to prevent large groups of people from coming into close contact, and possibly infecting each other. This decision received a lot of criticism: The Brussels Times (2020) *Coronavirus: Belgium begins shutting down services for asylum seekers* <https://www.brusselstimes.com/belgium/100794/coronavirus-belgium-begins-turning-away-asylum-seekers-brussels-refugees-belgium/>

<sup>96</sup> See ECRE, "Information Sheet: COVID-19 Measures related to asylum and migration across Europe," 8 April 2020

<sup>97</sup> See ECRE, p.12, <https://www.ecre.org/wp-content/uploads/2020/05/COVID-INFO-5-May-.pdf>

<sup>98</sup> See for instance: UNHCR, Greece must act to end dangerous overcrowding in island reception centres, EU support crucial, 1 October 2019, <https://www.unhcr.org/news/briefing/2019/10/5d930c194/greece-must-act-end-dangerous-overcrowding-island-receptioncentres-eu.html>, or O Council of Europe, Commissioner for Human Rights, Greece must urgently transfer asylum seekers from the Aegean islands and improve living conditions in reception facilities, 31 October 2019 <https://www.coe.int/en/web/commissioner/-/greece-musturgently-transfer-asylum-seekers-from-the-aegean-islands-and-improve-living-conditions-in-reception-facilities>

<sup>99</sup> UN Network on Migration, COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?, p.16, [https://migrationnetwork.un.org/sites/default/files/docs/un\\_network\\_on\\_migration\\_wg\\_atd\\_policy\\_brief\\_covid-19\\_and\\_immigration\\_detention\\_0.pdf](https://migrationnetwork.un.org/sites/default/files/docs/un_network_on_migration_wg_atd_policy_brief_covid-19_and_immigration_detention_0.pdf)

<sup>100</sup> See ECRE, "Information Sheet: COVID-19 Measures related to asylum and migration across Europe," 8 April 2020

<sup>101</sup> See Interim measures for France, ECtHR, Request No. 15457/20, 31 March 2020,

[https://www.infomie.net/IMG/pdf/mesure\\_provisoire\\_cedh\\_covid19\\_page1.pdf](https://www.infomie.net/IMG/pdf/mesure_provisoire_cedh_covid19_page1.pdf)

<sup>102</sup> Sweden, Swedish Television (Sveriges Television) (2020), Läkareförening larmar: Flera svensksomalier bland coronadödsfall i Stockholmsområdet, 23 March 2020.

<sup>103</sup> <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>

<sup>104</sup> See CESCR, General comment No. 14 (2000) on the right to the highest attainable standard of health (Art. 12), UN Doc. E/C.12/2000/4, 11 August 2000. For more information on the need of states to use the maximum of their resources see also: OpinioJuris (2020) *COVID-19 Symposium: COVID-19 Responses and State Obligations Concerning the Right to Health (Part 2)*. <https://opiniojuris.org/2020/04/01/COVID-19-symposium-COVID-19-responses-and-state-obligations-concerning-the-right-to-health-part-2/>

case of asylum seekers in reception centers in Greece<sup>105</sup>) are at grave risk of violation of their right to health under COVID-19.<sup>106</sup>

In accordance with EU Member States' international and EU law obligations to protect everyone's right to health, they need to ensure that people in reception centers are protected from the spread of the virus, that they have conditions allowing for social distancing and hand washing and other necessary measures to minimize the impact and potential spread of the virus. In the situation of overcrowded camps and unsanitary conditions, any measures necessary for the protection of the right to health, such as social distancing or regular hand washing are not possible. This is not a situation compliant with the Member States' obligations under international law to ensure everyone's right to health.

Aspects of the right to adequate housing and shelter are protected under a number of international human rights treaties, including by Article 11 ICESCR, Article 5(e)(iii) CERD, Article 43 CMW, Article 28 CRPD and by the UN CRC Articles 3, 24 and 27. The UN Committee on Economic, Social and Cultural Rights (CESCR) has affirmed that Article 11 ICESCR encompasses the right to adequate housing and the right to live somewhere in security, peace and dignity. States are obliged to respect, protect and fulfill these rights.<sup>107</sup> The CESCR has also previously highlighted that compliance with ICESCR Article 11 entails that: "Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups (...) should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups."<sup>108</sup>

In relation to migrants, asylum-seekers and refugees living in or facing destitution, a number of cases have been dealt with by international courts and tribunals under the right to life in light of the principle of human dignity. In *M.S.S. v. Belgium and Greece*, the ECtHR assessed, among other things, whether article 3 ECHR permitted the Belgian authorities to return asylum-seekers to Greece even though they were aware of the inhumane conditions in Greek migration shelters, and it found obligations of States to prevent destitution (including homelessness) under article 3.<sup>109</sup>

Article 31.2 of the European Social Charter places a positive obligation on States to introduce emergency measures to reduce homelessness, such as the provision of immediate shelter, which must comprise of enough places<sup>110</sup> and must provide conditions compatible with human dignity,<sup>111</sup> and measures to help persons without a shelter to overcome their difficulties and prevent them from

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<sup>105</sup> See *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, European Committee for Social Rights of the Council of Europe, Complaint No.173/2018, 21 December 2018; and Decision on Admissibility and on immediate measures in the case on 23 May 2019: <https://hudoc.esc.coe.int/fre/?i=cc-173-2018-dadmissandimed-en>.

<sup>106</sup> Article 12.2.c ICESCR, obliges States to fulfill the full realization of the right to health to include steps necessary for "the prevention, treatment and control of epidemic, endemic, occupational and other diseases".

<sup>107</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant), UN Doc. 1990, E/1991/23, 14 December 1990, Available at: <http://www.refworld.org/docid/4538838e10.html>

<sup>108</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The right to adequate housing (Art. 11(1) of the Covenant)*, UN Doc. E/1992/23, 13 December 1991, para. 8(e).

<sup>109</sup> The ECtHR in its judgement said that "the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs." See *M.S.S. v. Belgium and Greece*, ECtHR, application no. 30696/09, Judgment 21 January 2011, para. 263. See more, *F.H. v. Greece*, ECtHR, Application No. 78456/11, Judgment of 31 July 2014; *Al.K. v. Greece*, ECtHR, Application No. 63542/11, Judgment of 11 March 2015; *S.D. v. Greece*, ECtHR, Application No. 53541/07, Judgment of 11 June 2009; *Amadou v. Greece*, ECtHR, Application No 37991/11, Judgment of 4 February 2016 and *S.G. v. Greece*, Application No 46558/12, Judgment of 18 May 2017.

<sup>110</sup> Article 31(2) European Social Charter; *European Committee on Social Rights (ECSR), European Federation of National Organisations Working with the Homeless (FEANTSA) v. France*, Complaint No 39/2006, 5 December 2007, para. 107

<sup>111</sup> ECSR, *FEANTSA v. France*, paras. 108-109

returning to a situation of homelessness.<sup>112</sup> To ensure respect of dignity of persons sheltered, shelters must meet health, safety and hygiene standards.<sup>113</sup>

The EU Charter states in its Article 1: “Human dignity is inviolable. It must be respected and protected.” Article 34.3 further states that the EU “recognises and respects the right to social and housing assistance” (...) in order to combat social exclusion and poverty. In respect of reception conditions under the 2003/9 Reception Conditions Directive,<sup>114</sup> the CJEU has held that material conditions, including housing, food and clothing must be provided from the moment an asylum seeker applies for asylum<sup>115</sup> and that regardless of what form the material conditions may take, they must be sufficient to ensure asylum applicants’ dignity, both in terms of their living standards and their health, that such conditions ensure their subsistence and that the family unit is guaranteed.<sup>116</sup> State authorities implementing these conditions must comply with the above standards, as a very minimum, and no derogation from these standards is permitted even where the reception network is saturated.<sup>117</sup>

Article 19 of the EU Reception Conditions Directive requires that applicants receive the necessary health care, which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders. The European Commission established, that “Member States should take the necessary measures to ensure that such health care include, where necessary, treatment for COVID-19.”<sup>118</sup>

EU Member States clearly have obligations not only towards their nationals, but all people on their territory, to ensure they have access to adequate housing, without discrimination on grounds of status, nationality or ethnic origin. The right to housing is closely connected to the right to life and is crucial for the respect of every person’s human dignity. In light of COVID-19 there is a particular onus on States to ensure equal access to housing that is adequate to avoid the virus from spreading.

#### **Recommendations:**

**All migrants, refugees and asylum seekers must have access to an adequate place to stay, so that they can self-isolate if needed, and that they can comply with the measures of social distancing, and regular hand-washing. The safety of people who are particularly vulnerable to COVID-19 (older or with existing pre-conditions) must be made a priority, including by taking them to safety from unsanitary reception centers.**

**In cases of overcrowding of reception centres or where proper sanitation and social distancing are not possible, in order to comply with the right to health and to adequate living conditions, steps should be taken to evacuate the facility – providing for the transfer of residents within the Member State concerned or to other EU countries<sup>119</sup> and move the refugees to full-structured shelters. At minimum, possibilities for social distancing, regular hand washing and access to adequate information, support and health care must be made possible in the facility. Nobody, migrants included, should be subject to fines for being homeless.**

<sup>112</sup> Governmental Committee of the European Social Charter, *Report – Conclusions 2003 Italy*, T-SG(2003)28, 23 January 2004, available at <https://rm.coe.int/168070cacc>

<sup>113</sup> European Committee of Social Rights, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, Decision on the merits 20 October 2009, para. 62

<sup>114</sup> Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0033&from=EN>

<sup>115</sup> *Cimade and GISTI v. Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration* Reference CJEU, C179/11, Judgment of 27 September 2012, [ECLI:EU:C:2012:594], para. 39.

<sup>116</sup> *Federaal agentschap voor de opvang van asielzoekers v. Saciri and Others*, CJEU, C79/13, Judgment of 27 February 2014, [ECLI:EU:C:2014:103], para. 45. The CJEU will soon provide its judgment on a preliminary reference from the Labour Court of Brussels on the conditions which are to be provided to asylum applicants where material conditions are reduced or withdrawn under Article 20 RCD and whether a withdrawal of material conditions (either definitively or temporary) can ever be permissible for children, especially those who are unaccompanied, *Haqbin v. Belgium*, CJEU, C-233/18.

<sup>117</sup> CJEU, *Saciri and Others*, paras. 49-50.

<sup>118</sup> <https://ec.europa.eu/info/sites/info/files/guidance-implementation-eu-provisions-asylum-retur-procedures-resettlement.pdf>, P 10

<sup>119</sup> The first groups of unaccompanied children were relocated from overcrowded Greek camps to Luxembourg and Germany. See European Commission (2020) *Migration: First unaccompanied children relocated from Greece to Luxembourg*. [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_668](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_668); VOA (2020) *Greece Relocates 50 Migrant Minors to Germany Amid Coronavirus*. <https://www.voanews.com/europe/greece-relocates-50-migrant-minors-germany-amid-coronavirus>





## 5. Immigration detention

### 5.1 Restrictions of freedom of movement: Impact on the right to liberty

#### The situation in the EU

A number of countries have imposed restrictions on the movement of persons residing in reception centers for asylum seekers. In *Greece*, the Ritsona camp has been sealed off after 20 persons from the camp tested positive for the COVID-19 virus in the week of 1 April.<sup>120</sup> On 5 April, the Malakasa camp was put on lockdown after one man tested positive in the camp.<sup>121</sup> In addition, preventive measures included effective lockdowns of the island camps and in Moria, where only 100 people an hour were permitted to leave.<sup>122</sup> Any remaining NGOs had to submit a list of staff, who will be working in the camp. Also immediate detention upon arrival and not granting access to the asylum procedure were among further “preventive” measures taken by *Greece*.<sup>123</sup> Neither children nor other vulnerable groups were exempted from these measures. A refugee centre in *Austria* with 162 residents was put under quarantine, banning residents from leaving.<sup>124</sup>

More appropriate measures included self-isolating of people suspected of being infected and those at greater risk either in the camps, or outside of the camps.

#### International and EU law analysis

Deprivation of liberty involves more severe restriction of movement than mere interference with liberty of movement.<sup>125</sup> Under international human rights law, a deprivation of liberty is not defined solely with reference to the classification imposed by national law, but rather takes into account the reality of the restrictions imposed on the individual concerned. For example, persons accommodated at a facility classified domestically as a “reception”, “holding” or “accommodation” centre and ostensibly not imposing “detention”, may, depending on the nature of the restrictions on their freedom of movement, and their cumulative impact, be considered under international human rights law to be deprived of their liberty. In assessing whether restrictions on liberty amount to deprivation of liberty under international human rights law, relevant factors will include the type of restrictions imposed; their duration; their effects on the individuals; and the manner of implementation of the measure (*Amuur v. France*, para. 42).<sup>126</sup>

Under both EU law and international law, deprivation of liberty can only be imposed as a measure of last resort following an individual assessment of each case, if other less coercive alternative measures cannot be applied effectively. All forms of detention must have a clear legal basis in national law and procedures and must not be arbitrary, unnecessary or disproportionate. Under the ECHR, a deprivation of liberty must be: justified for a specific purpose defined in Article 5.1, be ordered in accordance with a procedure prescribed by law, and not be arbitrary. Under both EU and international law, deprivation of liberty must comply with other human rights guarantees, such as: the conditions of detention respecting human dignity or never putting the health of individuals at risk.

<sup>120</sup> See <https://www.aljazeera.com/news/2020/04/woman-greece-refugee-test-positive-coronavirus-200401111738369.html>, <https://www.iom.int/news/iom-raises-concern-over-increasing-COVID-19-cases-recorded-greece-mainland-refugee-and-migrant>

<sup>121</sup> See <https://www.euractiv.com/section/justice-home-affairs/news/greece-quarantines-second-migrant-camp-after-COVID-19-case-confirmed/>

<sup>122</sup> See HRW (2020) *Greece: Nearly 2,000 New Arrivals Detained in Overcrowded, Mainland Camps*. <https://www.hrw.org/news/2020/03/31/greece-nearly-2000-new-arrivals-detained-overcrowded-mainland-camps>

<sup>123</sup> *ibid.*

<sup>124</sup> FRA Report, *op cit.*, p.29; Austria, ORF (2020), Quarantäne für Asylheim mit 162 Bewohnern, 18 March 2020. <https://salzburg.orf.at/stories/3039810/>.

<sup>125</sup> Restriction of movement under article 12 as opposed to deprivation of liberty in article 9 ICCPR. Human Rights Committee, General Comment 35, para 18; *González del Río v. Peru*, HRC, Communication No. 263/1987, Views of 28 October 1992, UN Doc. CCPR/C/46/D/263/1987, para. 5.1; *Karker v. France*, HRC, Communication No. 833/1998, Views of 26 October 2006, UN Doc. CCPR/C/70/D/833/1998, para. 8.5.

<sup>126</sup> *Amuur v. France*, ECtHR, Application No. 19776/92, Judgment of 25 June 1996, para. 48.

Under article 9 of the ICCPR, as well as in international refugee law in regards to asylum seekers, the State must show that the detention was reasonable, necessary and proportionate in the circumstances of the individual case, in order to establish that detention is not arbitrary. As specified by the Human Rights Committee,<sup>127</sup> detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.<sup>128</sup> Asylum seekers who enter a State party's territory irregularly may be detained, if necessary, for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt.<sup>129</sup> To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding.<sup>130</sup> The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.<sup>131</sup>

In relation to detention for the purposes of immigration control, the ECHR permits detention only in two specific situations: to prevent unauthorized entry to the country and pending deportation or extradition (article 5.1.(f)).

As a last resort, detention may also be lawful for public health reasons. For example, under Art. 5.1.(e) of the ECHR deprivation of liberty is permitted for the purpose of "the lawful detention of persons for the prevention of the spread of infectious diseases" The European Court of Human Rights established that "(...) the essential criteria when assessing the "lawfulness" of the detention of a person "for the prevention of the spreading of infectious diseases" are whether the spreading of the infectious disease is dangerous to public health or safety, and whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest. When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist."<sup>132</sup>

In countries where restrictions on freedom of movement measures were not applied to the general population, and only non-citizens were detained for public health reasons but not the rest of the population (with the stated aim of preventing the spread of the disease), deprivation of liberty of migrants, asylum seekers or refugees for this alleged purpose, if not based on health concerns specific to their situation, would be likely to amount to unjustified discrimination in the application of Article 5.1.e and therefore to arbitrary detention in violation of article 5.

Forced lockdowns of whole reception centers effectively turn open reception centres into closed centres, in which asylum seekers are deprived of their liberty. Any such measures should comply with international standards. Additionally, they should take into account the consequences of the right to health, given that imposing detention on people in the reception centres can exacerbate their health situation. Prisoners and those in detention face a real risk of infection and lack of access to appropriate

<sup>127</sup> UN Human Rights Committee, General Comment No. 35 Article 9 (Liberty and security of person), CCPR/C/GC/35, 2014

<sup>128</sup> A. v. Australia, UN Human Rights Committee, Communication No. 560/1993, views of 3 April 1997, UN Doc.

CCPR/C/59/D/560/1993, paras. 9.3–9.4; Jalloh v. Netherlands, UN Human Rights Committee, Communication No. 794/1998, views of 26 March 2002, UN Doc. CCPR/C/74/D/794/1998, para. 8.2. ; Nystrom v. Australia, UN Human Rights Committee, Communication No. 1557/2007, views of 28 July 2011, UN Doc. CCPR/C/102/D/1557/2007, paras. 7.2–7.3.

<sup>129</sup> Bakhtiyari v. Australia, UN Human Rights Committee, Communication No. 1069/2002, views of 29 October 2003, UN Doc. CCPR/C/79/D/1069/2002, paras. 9.2–9.3.

<sup>130</sup> Tarlue v. Canada, UN Human Rights Committee, Communication No.1551/2007, views of 27 March 2009 ,UN Doc. CCPR/C/95/D/1551/2007 paras. 3.3 and 7.6; Ahani v. Canada, UN Human Rights Committee, Communication No. 1051/2002, views of 29 March 2004, UN Doc. CCPR/C/80/D/1051/2002, para. 10.2.

<sup>131</sup> Baban v. Australia, UN Human Rights Committee, Communication No. 1014/2001, views of 6 August 2003, UN Doc. CCPR/C/78/D/1014/2001; Bakhtiyari v. Australia, paras. 9.2–9.3; see UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), guideline 4.3 and annex A (describing alternatives to detention).

<sup>132</sup> Enhorn v Sweden, ECtHR, Application. No. 56529/00, Judgment 25 January 2005, para. 44.

healthcare measures as a result of their detention.<sup>133</sup> A general deprivation of liberty of all people in a reception centre, for a reason of one or several cases of the virus being detected in the centre, does not fulfil any legal basis under article 5 ECHR nor can it be deemed necessary, reasonable or proportionate and would be arbitrary.

The UN Special Rapporteur on the human rights of migrants and the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families have recommended to states to “Implement mechanisms to review the use of immigration detention with a view to reducing their populations to the lowest possible level, and immediately release families with children and unaccompanied or separated children from immigration detention facilities to non-custodial and community based alternatives with full access to rights and services, including health care.”<sup>134</sup> The United Nations Network on Migration called on States (...) to: (1.) Stop new detentions of migrants for migration - or health-related reasons and introduce a moratorium on the use of immigration detention. (2.) Scale up and urgently implement non-custodial, community-based alternatives to immigration detention in accordance with international law. (3.) Release all migrants detained into non-custodial, community-based alternatives, following proper safeguards. (4.) Improve conditions in places of immigration detention while alternatives are being scaled up and implemented.<sup>135</sup>

In the time of the COVID-19 epidemic, immigration detention other than for a very short period of time, for instance identification purposes is contrary to UN recommendations and should not be carried out.

**Recommendations:**

**Migrants must not be detained under the pretext of prevention of Covid-19. Unless detention is strictly necessary and for a very short period of time, people should be immediately released from immigration detention and provided with adequate alternative housing (care arrangements in cases of children) and means of subsistence.**

## 6.2 Detention pending removal

### **The situation in the EU**

The suspension of removal operations has left a significant number of migrants in an irregular situation and subject to removal orders detained in pre-removal facilities.<sup>136</sup> In addition, in many countries, NGOs that provide often essential services to migrants in detention, were not allowed to enter the detention centers.<sup>137</sup>

In *Spain*, detainees unreturnable due to the movement restrictions put in place related to the COVID-19 emergency, were released.<sup>138</sup> Also in *Italy*, the National Guarantor for the Rights of Persons

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<sup>133</sup> The Guardian (2020) *Detainees in US immigration jails living in fear as coronavirus spreads*, <https://www.theguardian.com/us-news/2020/mar/29/detainees-coronavirus-us-immigration-ice> in Rights and Security International: COVID 19: Toolkit for civil society partners, p.22, <http://www.rwuk.org/wp-content/uploads/2020/04/TOOLKIT-ULTIMATE.pdf>

<sup>134</sup> Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants, UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and UN Special Rapporteur on the human rights of migrants, 26 May 2020, p.2, see: <https://www.ohchr.org/Documents/Issues/Migration/CMWSPMJointGuidanceNoteCOVID-19Migrants.pdf>

<sup>135</sup> UN Network on Migration, COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do? [https://migrationnetwork.un.org/sites/default/files/docs/un\\_network\\_on\\_migration\\_wg\\_atd\\_policy\\_brief\\_covid-19\\_and\\_immigration\\_detention\\_0.pdf](https://migrationnetwork.un.org/sites/default/files/docs/un_network_on_migration_wg_atd_policy_brief_covid-19_and_immigration_detention_0.pdf)

<sup>136</sup> FRA report, p. 9

<sup>137</sup> For instance in Belgium: NGO members of the Transit Group network are unable to visit detainees in immigration detention centres. The Jesuit Refugee Service reported that they can only provide assistance by phone and that detainees expressed concern about the uncertainty of their situation.

<sup>138</sup> <https://www.ecre.org/spain-to-release-unreturnable-detainees-ngos-urges-uk-to-do-the-same/>

Detained or Deprived of Liberty asked to assess the need for early release.<sup>139</sup> Releases have also been reported in several member states, including *Belgium* and *the Netherlands*.<sup>140</sup>

### **International and EU law analysis**

The Council of Europe Commissioner for Human Rights called on all Council of Europe member states to review the situation of rejected asylum seekers and irregular migrants in immigration detention, and to release them to the maximum extent possible.<sup>141</sup> The Commissioner also called for immediate release of children and said that “[t]he authorities of member states should also refrain from issuing new detention orders to persons who are unlikely to be removed in the near future.” She added that “Member states should also ensure that those released from detention are given appropriate access to accommodation and basic services, including health care. This is necessary to safeguard their dignity and also to protect public health in member states.”<sup>142</sup>

On 31 March, four UN organisations called for the release of refugees and migrants held in formal and informal places of detention.<sup>143</sup> On 26 March 2020, the Council of Europe called on Member States to release rejected asylum seekers and irregular migrants in immigration detention who could not be returned to their countries of origin due to the suspension of return procedures in the context of the COVID-19 outbreak.<sup>144</sup>

Under both EU and international law, pre-removal detention is only justified, where there is a realistic prospect of removal within a reasonable time.<sup>145</sup> When there are no such realistic prospects, including due to border closures or travel restrictions imposed in response to COVID-19, there is no legal basis for detention. At the same time, measures to ensure that migrants are housed in appropriate accommodation should accompany their release from detention.

In making arrangements for the accommodation of migrants pending removal, all EU Member States must comply with international law obligations on the right to the highest attainable standard of health. All migrants, including refugees and asylum seekers, must have access to a place to stay, that allows them to comply with the measures of social distancing, and regular hand-washing and to self-isolate if needed.

### **Recommendations:**

**Those detained in view of removal where removal cannot take place, must be released and have access to adequate housing.**

**Migrants who cannot return to the country to which they were to be removed, should be granted a temporary residence permit.**

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<sup>139</sup> See FRA, Italy, National Guarantor for the Rights of Persons Detained or Deprived of Liberty (2020), Statement, 12 March 2020. See also: Council of Europe, Commissioner for Human Rights (2020), Commissioner calls for release of immigration detainees while COVID-19 crisis continues, 26 March 2020.

<sup>140</sup> Council of Europe, Commissioner for Human Rights (2020) *Commissioner calls for release of immigration detainees while COVID-19 crisis continues*. <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-release-of-immigration-detainees-while-covid-19-crisis-continues>. See also: EU Member States & Norway: responses to COVID-19 in the migration and asylum area, Jan-March 2020, p.18: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00\\_eu\\_30\\_emn\\_bulletin\\_annex\\_covid\\_19.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_30_emn_bulletin_annex_covid_19.pdf)

<sup>141</sup> CoE, Commissioner calls for release of immigration detainees while Covid-19 crisis continues.

<sup>142</sup> *ibid*

<sup>143</sup> UNHCR (2020) *The rights and health of refugees, migrants and stateless must be protected in COVID-19 response – Joint press release from OHCHR, IOM, UNHCHR and WHO*. <https://www.unhcr.org/news/press/2020/3/5e836f164/rights-health-refugees-migrants-stateless-must-protected-covid-19-response.html>, 31 March 2020.

<sup>144</sup> Council of Europe, Commissioner for Human Rights (2020) *Commissioner calls for release of immigration detainees while COVID-19 crisis continues*. <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-release-of-immigration-detainees-while-covid-19-crisis-continues>, 26 March 2020. In FRA report, *op.cit.*

<sup>145</sup> European Parliament and Council of the European Union (2008), Return Directive, Article 15 (4); *Kadzoev (Huchbarov)*, C-357/09, CJEU 30 November 2009, ECLI:EU:C:2009:691, paras. 65-66; *Al Husin v. Bosnia and Herzegovina (No. 2)*, ECtHR, Application No. 10112/16, Judgment 25 June 2019. See also *Mikolenko v. Estonia*, ECtHR, Application No. 10664/05, Judgment 8 October 2009.

