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Implementing the UN Global Compacts for
Refugees and Migrants in Times of Pandemic:
A View from the EU Member States.



This project has received funding from the European Union's
Horizon 2020 research and innovation program under grant
agreement No 870761.





PROTECT DELIVERABLE No. D2.8, Part 2.

Published by the PROTECT Consortium.

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PROTECT CONSORTIUM

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To cite this publication:

Elspeth Guild, Kathryn Allinson and Nicolette Busuttil (2022). Implementing the UN Global Compacts for Refugees and Migrants in Times of Pandemic: A View from the EU Member States. PROTECT Deliverable no. 2.8, Part 2. Bergen: PROTECT Consortium.

DOI: [10.5281/zenodo.7064780](https://doi.org/10.5281/zenodo.7064780)

Implementing the UN Global Compacts for Refugees and Migrants in Times of Pandemic: A View from the EU Member States

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Abstract

This paper explores the impact of the COVID-19 pandemic on refugees' and migrants' access to human rights protection in the European Union, in light of its Member States' commitments in the UN Global Compacts on Refugees and Migrants (Compacts). It holds that those in precarious and vulnerable positions vis-à-vis the State were among the first to experience a loss of access to rights in the face of the pandemic. Through analysis of the commitments made in the Global Compacts and their relationship to existing legal frameworks, as expressed in the Common European Asylum System (CEAS) and European Human Rights treaties, we assess implementation and policy in response to COVID-19. We contend that both the CEAS and the Compacts balance the human rights protections of refugees and migrants against the observance of state sovereign control over borders. A focus on three areas of contention in EU law and policy: access to migration procedures, use of immigration detention, and access to healthcare, demonstrates that there was a fragmented response to the pandemic based upon differing accounts of this balance. The paper concludes that, in line with the Global Compacts' call for respect for the human rights of refugees and migrants, States are obliged by their Global Compact commitments to extend basic healthcare and social service provisions to all migrants and refugees as well as to release those detained under immigration powers. This would go a long way to preserve *their* basic rights in the face of COVID-19 and ensure EU policy is in line with the commitments made within the Global Compacts.

Keywords

COVID-19; refugees; migrants; UN Global Compacts on Refugees and Migrants (Compacts); Common European Asylum System (CEAS); Human Rights; Access to migration procedures; Immigration detention; access to healthcare; EU policy.

* This article is part of PROTECT The Right to International Protection: A Pendulum between Globalization and Nativization? (www.protect-project.eu), a research and innovation project which is funded by the European Union's Horizon 2020 Framework Programme and coordinated by the University of Bergen (Grant Agreement No 870761). The authors would like to thank Dr Madeline Garlick, UNHCR, Mr Alexander Sorel, EASO, and Ms Catherine Woollard, ECRE, for their presentations at the PROTECT Expert Forum on 13-14 November 2020 which provided us with much inspiration for this article. All errors or omissions are our exclusive responsibility.

1. Introduction

There has been much discussion of rights restrictions in response to the COVID-19 pandemic: movement, education, healthcare and the list goes on. This paper highlights the effect of COVID-19 measures on those whose access to rights is precarious. During the pandemic, some European Union Member States (EUMSs) differentiated among groups of persons based on their immigration status to limit their obligations towards certain 'categories' of individuals found on their territory. This rights limitation is in stark contrast to the commitments EUMSs (and the EU) made by voting for two Compacts that are founded on existing refugee and human rights obligations.¹¹¹ We propose that there is a balance in the two Global Compacts (Compacts) and the Common European Asylum System (CEAS) between human rights protections for refugees and migrants and the observance of state sovereign control over borders. Yet, the discriminatory practices of some EUMSs in response to COVID-19 undermines this balance.

The Compacts were affirmed by the United Nations General Assembly (UNGA) in December 2018 following two years of inter-governmental negotiations.¹¹² Our study considers the relationship between *both* the Global Compact on Refugees (GCR) and the Marrakesh Compact (MC) with the CEAS for two reasons. Firstly, the CEAS provides the rules for recognition of refugees, the determination of applications for international protection, and the treatment of these persons while their applications are under consideration.¹¹³ There is an artificiality in dividing people into refugees and migrants when all refugees are also migrants, and migrants are often future asylum-seekers and unrecognised refugees.¹¹⁴ Secondly, the Compacts converge and provide for complementary treatment of all third-country nationals (TCNs). The Refugee Convention sets out the rights of refugees as reaffirmed in the GCR,

¹¹¹ Global Compact on Refugees, UN doc A/73/12 (Part II) (2 August 2018) (hereinafter GCR) paragraphs. 5, 9, 56, and 85; Global Compact for Safe, Orderly and Regular Migration, UN doc A/RES/73/195 (19 December 2018) (hereinafter MC) paragraphs. 2, 11, 12, and 15(f) MC.

¹¹² UNGA, 'The New York Declaration for Refugees and Migrants', UN Doc. A/RES/71/1, 19.09.2016 (hereinafter NY Declaration).

¹¹³ The CEAS comprises Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.06.2013 (hereinafter Asylum Procedures Directive or APD); Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) L 180/96 (hereinafter the Reception Conditions Directive or RCD) establishes the applicable entitlements in terms of access to social rights for all persons who have a pending application for international protection (including refugees); Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29.06.2013 (hereinafter Dublin III Regulation); and Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L337 (hereinafter Qualification Directive or QD). It includes Regulation 603/2013 (the Eurodac Regulation) which is not considered further.

¹¹⁴ Under the UN Convention Relating to the Status of Refugees, a person is a refugee from the time they fulfil the elements of the refugee definition contained therein, with this recognised by a state when it grants asylum to the refugee. This position is affirmed under EU law. CJEU, A & S, Case C-550/16, 12.04.2018, ECLI:EU:C:2018:248, paragraph 54. INTERNATIONAL ORGANISATION FOR MIGRATION (hereinafter IOM), *Glossary on Migration*, IOM, Geneva 2019, pp. 132-133, defines a migrant as 'a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons'. Since a refugee has to be 'outside his or her country of origin' to meet the refugee definition under Article 1A(2) Refugee Convention, they must be a migrant as well as a refugee.

including refugees who not yet been recognised.¹¹⁵ Comparably, migrants have no widely ratified equivalent convention,¹¹⁶ so their rights arise from general international human rights conventions where such rights apply to everyone and, on this basis, are included in the MC.¹¹⁷ However, the Achilles heel of refugee status is national procedures which may, or may not, result in recognition of refugee status, the allocation of a subsidiary status, or, in the EU context, recognition as a person entitled to international protection.¹¹⁸ Consequently, many people who are classified under national law as 'not refugees' but receive some protection, or are treated as irregular migrants, might well, should their claim be considered in another country, be recognised as refugees.¹¹⁹ To fully explore the alignment of the CEAS with the commitments to refugees in the Compacts, we must consider refugees, asylum seekers, and migrants as three administrative categories that substantially overlap.

Our research analyses the implementation of the Compacts in EUMSs throughout the Covid-19 pandemic. During drafting there was extensive debate concerning the legal status of a 'Compact' but the final versions confirm that they are non-legally binding at the international level.¹²⁰ However, they are still internationally negotiated agreements, signed and committed to by States that are founded on existing international human rights law¹²¹. Through the adoption of the Compacts, States have acknowledged that existing international human rights obligations apply to migrants as well as refugees and committed to implement the Compacts in line with these¹²². In examining the implementation of the Compacts, we are looking to whether States have upheld the commitment they made when signing them, and in particular, in respect of their existing human rights obligations under international law as applicable to refugees and migrants.

This article begins by presenting the analytical framework from which our discussion will build. Section 2 positions the Compacts within the existing human rights framework and the CEAS. It examines the tensions between the legal and political commitments to respect

¹¹⁵ See GCR, *supra* note 1, paragraph 5 which presents the instrument as 'grounded in the international refugee protection regime, centred on the cardinal principle of *non-refoulement*, and at the core of which is the 1951 Convention and its 1967 Protocol'; MC, *supra* note 1, paragraph 4 outlines how '[o]nly refugees are entitled to the specific international protection defined by international refugee law.'

¹¹⁶ The UN Migrant Workers Convention still has only 56 parties and 12 additional signatories at the time of writing. See further at <https://indicators.ohchr.org/>.

¹¹⁷ See paragraph 15(f) MC, *supra* note 1, see also E. GUILD, T. BASARAN (eds) 'Analysis on the Final Draft for the UN Global Compact on Safe, Orderly and Regular Migration' *RLI Research Series, 2019*, available at https://rli.sas.ac.uk/sites/default/files/files/Global%20Compact%20for%20Migration_RLI%20blog%20series.pdf last accessed 09.04.2021

¹¹⁸ Qualification Directive, *supra* note 3, Articles 15(b) and (c).

¹¹⁹ See UNHCR, 'Statistical Yearbooks: Eurostat', available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Table6_-_First_instance_decisions_by_citizenship_and_outcome,_selected_Member_States,_3rd_quarter_2020.png, last accessed 09.04.2021.

¹²⁰ Paragraph 7 MC, *supra* note 1; Paragraph 4 GCR, *supra* note 1; See GUILD E and GRANT S, *Migration Governance in the UN: What is the Compact and What does it mean?* (Queen Mary University of London, School of Law Legal Studies Research Paper No. 252/2017); GAMMELTOFT-HANSEN T, GUILD E, MORENO-LAX V, PANIZZON M and ROELE I, *What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Compact for Safe, Orderly and Regular Migration* (Raoul Wallenberg Institute of Human Rights and Humanitarian Law, October 11, 2017)

¹²¹ See paragraph 15 MC, *supra* note 1: Guiding Principle – Human Rights 'The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle; paragraph 5 GCR, *supra* note 1: 'the global compact is guided by relevant international human rights instruments.'

¹²² See paragraphs 40-47 MC, *supra* note 1; paragraphs 101-106 GCR, *supra* note 1.

human rights and the rule of law with the preservation of EU borders and asylum procedures. It proposes that both the CEAS and the Compacts are constructed to reconcile these competing obligations. However, the COVID-19 pandemic has cast the implementation of human rights into stark relief in the European context. Sections 3 to 5 analyse this tension through three examples of EUMSs practice in response to the pandemic: access to asylum procedures, continued use of immigration detention, and access to healthcare. This discussion demonstrates how, despite the commitments in the Compacts, EUMS' delivery of their CEAS obligations is often discriminatory and invariably fragmented.

Our conclusions bring together the analysis to propose that the balancing of sovereign border control and respect of human rights is evident in both the Compacts and the CEAS. In practice, even prior to COVID-19, States frequently limited access to human rights for TCNs and justified this as a permissible exercise of their sovereign right to control who enters their territory. COVID-19 shattered any illusions that these policies were non-discriminatory. Thus, the balancing between sovereignty and human rights, which the Compacts and CEAS purport to do, is too often confounded in practice. This tension has merely been rendered more visible during the COVID-19 pandemic.

2. The UN Compacts, Human Rights and State Sovereignty

This section compares the extent to which the Compacts' and CEAS' structural frameworks are embedded in human rights protection, with a focus on those elements that maintain the preservation of state sovereign control over borders. This will set the backdrop against which COVID-19 pandemic-related measures came to exacerbate tensions evident in the Compacts and the CEAS between commitments to the human rights of refugees, asylum seekers, and migrants and States' focus on fighting the pandemic through border and asylum/immigration procedures.

2.1. The Compacts' Human Rights Framework

The Compacts add value to the existing EU framework on refugees, asylum seekers and migrants. They articulate their rights in considerable detail and populate, in concrete terms, the substantive scope and content of pre-existing obligations.¹²³ In their role as State-negotiated agreements, they express States' concerns and commitments.¹²⁴ They are a manifestation of state sovereignty, and as non-legally binding instruments can facilitate the implementation of pre-existing obligations into (national and) EU legal orders.¹²⁵ As will be explored, the gap between EUMSs human rights commitments vis-à-vis refugees and asylum seekers and their implementation emanates from an absence of political will and limited European institutional mandates and capacity to translate binding obligations into the enjoyment of rights in practice.

From the international and European perspectives, the Compacts' commitment to end discrimination,¹²⁶ together with the MC-expressed duty to avoid discrimination based on

¹²³ See paragraph 2 MC, *supra* note 1; See E. GUILD, T. BASARAN, and K. ALLINSON, 'From Zero to Hero? An Analysis of the Human Rights Protections with the Global Compact for Safe, Orderly and Regular Migration (GCM)', (2019) 57 *International Migration*, p. 43; V. TURK, 'The Promise and Potential of the Global Compact on Refugees', (2019) 30 *International Journal of Refugee Law*, p. 575; See also E. GUILD AND T. BASARAN, *supra* note 7.

¹²⁴ See J. MCADAM, 'The Global Compacts on Refugees and Migration: A New Era for International Protection', (2019) 30 *International Journal of Refugee Law*, p. 571.

¹²⁵ E. GUILD, R. WEILAND, 'The UN Global Compact for Safe, Orderly and Regular Migration: What does it mean in International Law?', *Global Community: Yearbook of International Law and Jurisprudence* (2020) vol. 10 (1)

¹²⁶ In paragraph 9 GCR, *supra* note 1, all States are called on 'to end exploitation and abuse, as well as discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, or other status...'; paragraph 84 GCR calls for

migratory status, fit well with pre-existing international and regional obligations.¹²⁷ While the UN Convention on the Elimination of all forms of Racial Discrimination (CERD) sets the international standards as regards the prohibition of discrimination, Articles 1(1) and (2) limit its application as regards the treatment of citizens and non-citizens. Within Europe, the Council of Europe's European Convention on Human Rights (ECHR) allows for discrimination between migrants and citizens, albeit within specified and limited circumstances.¹²⁸ EU primary law similarly prohibits discrimination on a number of protected grounds, including race, ethnic or social origin and differential treatment is tightly circumscribed.¹²⁹ Discrimination on the basis of (EU) nationality is prohibited, even if the differential treatment of TCNs is permitted, unless tainted by one of the protected grounds.¹³⁰ The Compacts reiterate these commitments, providing clear guidelines on how refugees and migrants should be treated and place human rights at their core, ensuring that refugees and migrants are entitled to the same human rights protections as everyone else.¹³¹

2.2. EU Law's Reconciliation of Border Control with Respect for Fundamental Rights: The Expression of State Sovereignty

EU law reflects international law's acceptance that state sovereignty entails the corresponding power and responsibility to determine the entry, stay, and expulsion of non-citizens.¹³² A sophisticated legal and policy framework dedicated to migration control distinguishes between EU citizens and TCNs and addresses its various dimensions,¹³³ including through measures that regulate TCNs' entry, stay and removal.¹³⁴ Like international law, EU law accepts that immigration control can only

programmes and projects to 'be designed in ways that combat all forms of discrimination and promote peaceful coexistence between refugee and host communities'. Paragraph 15(f) MC, *supra* note 1, noted that it 'is based on [IHRL] and upholds the principles of non-regression and non-discrimination'; Objective 17 seeks to 'Eliminate all forms of discrimination'.

¹²⁷ Paragraph 4 MC, *supra* note 1 recalls the universality of human rights means '[r]efugees and migrants are entitled to the same universal human rights and fundamental freedoms', with paragraph 11 outlining 'an overarching obligation to respect, protect and fulfil the human rights of all migrants, regardless of their migration status'.

¹²⁸ Article 14 ECHR outlines the prohibition of discrimination for 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status..', however, Article 5(1)(f) permits 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition...'; Article (1) of Protocol 7 outlines the procedural safeguards relating to expulsion of aliens and Article 16 ECHR permits Contracting States placing restrictions on political activity of aliens.

¹²⁹ EU Charter of Fundamental Rights of the European Union (hereinafter 'the Charter' or CFREU). Article 21 CFREU prohibits any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. Article 51(1) CFREU sets out the limitations of Charter rights. See also Article 19 TFEU.

¹³⁰ Articles 18 and 19 TFEU; See, for example, CJEU, *Servet Kamberaj v Istituto per l'Edilizia Sociale della Provincia Autonoma di Bolzano (IPES) and others*, Case C-571/10, 24.04.2012, ECLI:EU:C:2012:233.

¹³¹ See McADAM, *supra* note 14; see also paragraph 5 GCR, *supra* note 1, 'The global compact is guided by relevant [IHRL] instruments,' and paragraph 9 commits all States to 'to promote, respect, protect and fulfil human rights and fundamental freedoms for all...'

¹³² J. A. R. NAFZIGER, 'The General Admission of Aliens under International Law', (1983) 77(4) *American Journal of International Law*, p. 804.

¹³³ See generally, S. PEERS, V. MORENO-LAX, M. GARLICK and E. GUILD (eds), *EU Immigration and Asylum Law (Text and Commentary)*, Brill | Nijhoff, Leiden 2015.

¹³⁴ For e.g., Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77; Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ L243, as amended by multiple instruments, most recently,

be exercised in line with fundamental rights obligations, which are embedded at the apex of the EU legal order. The Charter of Fundamental Rights (CFREU) enumerates the rights which bind EUMS when they act within the scope of EU law, including their treatment of migrants and refugees.¹³⁵ In the field of asylum, this consists of the Common European Asylum System (CEAS), which flows from the Treaty of the Functioning of the European Union (TFEU)'s obligation for the EU to create a common asylum policy in full compliance with the 1951 Refugee Convention, the obligation of *non-refoulement*,¹³⁶ and 'other relevant treaties', like the ECHR.¹³⁷ Respect for fundamental rights, which include international human rights law (IHRL) obligations,¹³⁸ frame the CEAS which establishes common standards in relation to eligibility for international protection and the content of such protection,¹³⁹ the reception conditions for applicants for international protection,¹⁴⁰ the allocation of responsibility among the EUMS for examining their applications,¹⁴¹ and the procedures to be followed in their determination.¹⁴² Its implementation is subordinated to fundamental rights considerations, particularly *non-refoulement*, since CEAS provisions 'must be interpreted and applied in a manner consistent with the fundamental rights guaranteed by the Charter [...]'.¹⁴³

Accordingly, the EU legal framework - itself an expression of EUMS' sovereignty - reconciles the existence of border control with the obligation to uphold migrants' and refugees' fundamental rights. The emphasis on fundamental rights protection in the exercise of border control commits the EU and its EUMSs and reflects the commitments States made in adopting both Compacts.

2.3. The Compacts and State Sovereignty

The Compacts recognise the importance of state sovereignty in respect of border controls yet emphasise that borders are a shared responsibility among states. They further acknowledge that States' claim to sovereignty is constrained by the application of their human rights obligations. Paragraph 33 GCR echoes how '[w]hile recognising the primary responsibility and sovereignty of States, a multistakeholder and partnership approach will be pursued, in line with relevant

Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), OJ L188; Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343.

¹³⁵ Article 51 CFREU, CJEU, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 26.02.2013, ECLI:EU:C:2013:105, paragraph 19.

¹³⁶ In international refugee law and IHRL, *non-refoulement* outlines the prohibition on returning a person to a state where they have a well-founded fear of persecution on the grounds set out in the Refugee Convention or where there is a real risk that he or she will be subject to torture contrary to the UN Convention against Torture, enforced disappearance under the UN Convention against Enforced Disappearances, or cruel, inhuman or degrading treatment, as under the ECHR. See generally, K. WOUTERS, *International Legal Standards for the Protection from Refoulement*, Intersentia, Mortsel 2009.

¹³⁷ Article 78 TFEU.

¹³⁸ See Article 6 TEU. See generally V. MORENO-LAX, in *Accessing Asylum in Europe*, Oxford University Press 2017, p.

¹³⁹ Qualification Directive, *supra* note 8.

¹⁴⁰ RCD, *supra* note 3.

¹⁴¹ Dublin III Regulation, *supra* note 3.

¹⁴² Asylum Procedures Directive, *supra* note 3.

¹⁴³ For example, Recitals 9 and 20 RCD; CJEU, *C.K. and others*, Case C-578/16, 16.02.2017, ECLI:EU:C:2017:127, paragraph 59; CJEU, *N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Joined Cases C-411/10 and C-493/10, 21.12.2011, paragraphs 77, 99.

legal frameworks and in close coordination with national institutions...'.¹⁴⁴ The GCR's provisions are contingent upon the primary responsibility and sovereignty of each State (as are all protection of human rights and rule of law). The GCR's focus on responsibility and burden-sharing reflects the voluntary nature of the commitments undertaken which respect each State's sovereignty.¹⁴⁵ Similarly, the MC places national sovereignty as a guiding principle that: 'reaffirms the sovereign right of States to determine their national migration policy.'¹⁴⁶ This position, and the provisions on state cooperation, places the protections and the commitments to non-discrimination secondary to each State's sovereign ability to define its own national laws. There are tensions at play between upholding the rights of refugees and migrants and the sovereignty of States who want control over border and migration policies.

The CEAS and both Compacts maintain the balance between the preservation of state sovereign control over borders and the human rights of refugees and migrants, yet the protection of migrants' and refugees' fundamental rights remains beholden to EUMSs' penchant to prioritise border control over their fundamental rights commitments. The CEAS's implementation gap preceded COVID-19 and the Compacts' adoption and while the CEAS purports to implement *common* standards, its disparate implementation by EUMSs challenges its designation as a harmonised system.¹⁴⁷ Thus, the tension between the two facets of sovereignty is not due to an absence of law; indeed, the Compacts equip EUMSs with a blueprint for a sovereignty-preserving, rights-conforming implementation of their pre-existing obligations, including in times of crisis. Yet, as will become apparent, EUMSs' fragmented response to COVID-19 indicates their reliance on their state sovereignty, as expressed through border control, to justify exceptional measures in response to a crisis. Nowhere is this more evident than in March 2020 when several EUMS reacted to COVID-19's arrival in Europe through border closures, territorial limitations on movement, including enhanced detention, and the closure of processing centres for asylum seekers and migrants. While the CEAS *is* sufficiently flexible to be implemented consistently with the two Compacts and human rights obligations – as was the case in some EUMS (most notably Portugal)¹⁴⁸ - others relied on discretionary provisions or simply disregarded aspects of the CEAS in their treatment of asylum seekers, refugees and undocumented migrants who may need international protection

¹⁴⁴ Emphasis added.

¹⁴⁵ See for example, Section 3 of the GCR, *supra* note 1, on '3. Key tools for effecting burden- and responsibility-sharing; Paragraph 4 further highlights the voluntary nature of State's commitments thereunder and continued respect for national policies '...voluntary contributions to achieve collective outcomes and progress towards its objectives... These contributions will be determined by each State and relevant stakeholder, taking into account their national realities, capacities and levels of development, and respecting national policies and priorities...'.

¹⁴⁶ Paragraph 15(c) MC, *supra* note 1, a sentiment that is echoed under Objective 11 in relation to border management that respects national sovereignty, see paragraph 27.

¹⁴⁷ The need for reform is accepted across the board. See, EUROPEAN COMMISSION, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final 23.9.2020. On the CEAS, see generally V. CHETAİL, 'A Common European Asylum System: Bric-à-brac or System?', in V. CHETAİL, P. DE BRUYCKER and F. MAINI, *Reforming the Common European Asylum System. The New European Refugee Law*, Brill | Nijhoff, Leiden/Boston 2016, pp. 3 – 38; M. DEN HEIJER, J. RIJPMAN and T. SPIJKERBOER, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System', (2016) 53 *Common Market Law Review*, p. 4.

¹⁴⁸ Some EUMS have been exemplary in ensuring that refugees, asylum seekers and migrants have not suffered discrimination as a result of pandemic related measures. In particular, from the commencement of the pandemic in Europe, Portugal implemented measures to ensure all persons were entitled to equal treatment with nationals as regards health care, socio-economic rights and civil rights other than those protected for citizens. See IOM, Portugal's Contribution to the IOM Regional Review, 19.10.2020, available at https://migrationnetwork.un.org/sites/default/files/docs/oim-portugal-contribution_global_compact_migration-nv_400-2020.pdf, accessed 21.03.2021 p5.

and departed from the commitments they made when embracing the two Compacts. This highlights the extent to which voluntary state cooperation, which preserves state sovereignty, is instrumentalised in the European context despite legal frameworks that seek to place refugee and asylum seeker protection at their centre.

3. Accessing Asylum Procedures in the EU During the COVID-19 Pandemic

Among the foundations of both Compacts is states' commitment to the rule of law and due process through which they undertake to ensure access to justice in all aspects of refugee protection and migration governance.¹⁴⁹ The Compacts specify that state, public and private institutions and entities are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated, and consistent with all relevant international law.¹⁵⁰ For our purposes here, the reference to international law is primarily international and regional human rights commitments.

In respect of asylum procedures, this commitment is reiterated in the GCR where states undertake to ensure the establishment of mechanisms for identification, screening, and referral of those with specific needs to appropriate and accessible processes and procedure.¹⁵¹ This commitment to fair and efficient procedures is extended to a particular sensitive category of procedures: simplified or accelerated procedures for cases likely to be manifestly founded or unfounded.¹⁵² This classification is important for the intersection of the GCR and the MC as an insufficiently rigorous application of these procedures can result in people who should be recognised as refugees being rejected or otherwise categorised.

In the MC, this foundation is developed through a commitment to strengthen certainty and predictability in migration procedures for appropriate screening, assessment, and referral.¹⁵³ This is to be achieved, as stated in the MC, by developing and strengthening effective and human rights-based mechanisms for an adequate and timely screening and individual assessment of all migrants.¹⁵⁴ The five measures which are set out to achieve this objective in the MC are also relevant to the correct implementation of the GCR in light of the intersection of the two Compacts and the multiple legal identities of refugees. The measures are to: increase transparency and accessibility of migration procedures; develop and conduct regional specialised human rights and trauma-informed training for officials; establish gender responsive and child sensitive assessments at borders and places of first arrival through standardised operating procedures; ensure that migrant children are promptly identified and swiftly referred to child protection authorities; and ensure that relevant information on rights and obligations under national laws and procedures is appropriately, promptly, and effectively communicated and accessible.¹⁵⁵

Among those most affected by the changing administrative frameworks of EUMS in the face of the COVID-19 pandemic were those seeking international protection. The rule of law foundation of border-crossing and the entitlement of those in need of international protection to a fair and effective procedure are central elements of EU law. In this section, we look at the problems which have occurred in this field under the following subheadings: access to the territory to seek international protection, access to registration procedures, access to reception conditions, and access to the substantive procedure for applicants for international protection. As will become apparent, not only did the EUMS fall short of their Compact commitments as

¹⁴⁹ See GCR, *supra* note 1, paragraph 9; MC, *supra* note 1, paragraph 15(d).

¹⁵⁰ GCR, *supra* note 1, paragraph 9; MC, *supra* note 1, paragraph 7.

¹⁵¹ GCR, *supra* note 1, paragraph 60.

¹⁵² GCR, *supra* note 1, paragraph 61.

¹⁵³ MC, *supra* note 1, objective 12.

¹⁵⁴ MC, *supra* note 1, paragraph 28.

¹⁵⁵ MC, *supra* note 1, paragraph 28(a-e)

regards the treatment of refugees and migrants during the pandemic but they also failed to live up to their commitments to the rule of law and their international human rights obligations reaffirmed so recently in 2018 in the Compacts.

3.1. Access to the Territory

Through the Schengen Borders Code, EU law provides for a common set of rules for the admission of TCNs at the external borders of (most) EUMS.¹⁵⁶ Article 3 of the Code states that it is without prejudice to the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*.¹⁵⁷ This obligation means that where someone arrives at an EU border and claims international protection, the state is required to consider that application, and to allow the person to remain until an assessment of their case is completed and a decision taken.

One of the first impacts of COVID-19's arrival in the EU in February 2020 was the abandonment of coordination through the EU institutions to protect EU law in light of the new circumstances, which was particularly evident in national decisions to close external borders with third countries. It was not until 30 March 2020 that the European Commission (EC), issued guidance to the EUMSs on how to apply their restrictions on access to territory in light of the pandemic.¹⁵⁸ Provision was made in those guidelines calling on EUMSs to permit admission to those carrying out essential travel who were described by profession, personal situation, and economic activity. Those seeking international protection were not included.¹⁵⁹ Rather in the last indent of a section headed "Other [TCNs] who can be authorised to enter the EU despite the closure of the EU external borders" the Commission suggests that EUMSs should allow access to the territory to 'persons in need of international protection or for other humanitarian reasons respecting the principle of *non-refoulement*'¹⁶⁰. It is rather unedifying that the EC should consider people fleeing persecution and torture as undertaking non-essential travel.

An immediate result of the closure of EU external borders was the exclusion of people in need of international protection from access to the territory. This was recognised by the EU institution, the European Asylum Support Office (EASO), which has been issuing regular updates on national practices.¹⁶¹ It noted a 31% decrease in asylum applications between 2019 and 2020 which it attributed to COVID-19-related emergency travel restrictions (and obstacles).¹⁶² This appears to confirm that EUMSs failed to take the necessary measures to ensure that those fleeing persecution and torture had access to the EU territory. Travel restrictions covered a wide range of measures, including limitations on flights from certain destinations (which started with China) to the closure of ports for the duration of the national public health emergency. These measures particularly affected people seeking international

¹⁵⁶ Schengen Borders Code, *supra* note 24. Those EUMS outside the common Schengen area are Bulgaria, Croatia, Cyprus, Ireland, and Romania. No further mention will be made to these states in particular hereafter.

¹⁵⁷ See *supra* note 26.

¹⁵⁸ EUROPEAN COMMISSION, Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy, COM(2020) 2050 30.03.2020.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ EASO, 'COVID-19 emergency measures in asylum and reception systems – Issue 2', 07.12.2020, available at: https://www.easo.europa.eu/sites/default/files/publications/COVID-19%20emergency%20measures%20in%20asylum%20and%20reception%20systems-December-2020_new.pdf, last accessed 02.03.2021.

¹⁶² *Ibid.*

protection. This was the case in Italy.¹⁶³ According to Human Rights Watch (HRW), the day before the adoption of the Italian decree, the German Government advised their NGOs engaged in saving lives in the Mediterranean that neither Italy nor Malta would permit them to disembark the people they saved at their ports and so the NGOs should cease this activity.¹⁶⁴ Challenges to the EU obligation of *non-refoulement* through practices to prevent people, including those who are likely to be seeking international protection, from arriving at EU points of entry intensified under the cover of COVID-19 measures.¹⁶⁵

3.2. Access to Registration Procedures

Once a refugee has arrived at an EU border or entered the territory, it is necessary for them to apply for asylum. Accordingly, the Asylum Procedures Directive defines an asylum application as an ‘application for international protection... ‘application’ means a request made by a [TCN] or a stateless person for protection from a [EUMS], who can be understood to seek refugee status or subsidiary protection status...’.¹⁶⁶ When a refugee makes an asylum application it is obligatory for state authorities to ensure that the individual is registered as an asylum seeker and provided with a document establishing their status. From the commencement of the COVID-19 pandemic in Europe, many EUMS suspended their registration procedures for asylum seekers.¹⁶⁷ This ranged from complete suspension as in Belgium, Greece, or Poland, to almost complete suspension with some exceptions (in particular for the most vulnerable) in France and elsewhere.¹⁶⁸ These suspensions were often accompanied by closure of application centres, changes of hours at short notice or without notice, cancellation of appointments and failure to issue documents.¹⁶⁹ If a refugee is unable to register their asylum application in an EUMS, their status remains ambiguous. If they have arrived irregularly in the EU, they remain an irregularly present migrant in the EU, subject to the EU and EUMS’ coercive measures against such migrants in an irregular situation (including, severe limitations on access to housing, health care, food and other essential assistance, prohibition of working and vulnerability to summary expulsion).¹⁷⁰

¹⁶³ ITALIAN DECREE, 07.04.2020, available at:

[https://www.avvenire.it/c/attualita/Documents/M_INFRA.GABINETTO.REG_DECRETI\(R\).0000150.07-04-2020%20\(3\).pdf](https://www.avvenire.it/c/attualita/Documents/M_INFRA.GABINETTO.REG_DECRETI(R).0000150.07-04-2020%20(3).pdf), last accessed 03.03.2021.

¹⁶⁴ HRW, ‘EU/Italy: Port Closures Cut Migrant and Refugee Lifeline’, 09.04.2020 available at:

www.hrw.org/news/2020/04/09/eu/italy-port-closures-cut-migrant-and-refugee-lifeline, last accessed 09.04.2021.

¹⁶⁵ UNHCR, ‘UNHCR warns asylum under attack at Europe’s borders, urges end to pushbacks and violence against refugees’, 28.01.2021, available at <https://www.unhcr.org/news/press/2021/1/601121344/unhcr-warns-asylum-under-attack-europes-borders-urges-end-pushbacks-violence.html>, last accessed 03.03.2021; M. STEVIS-GRIDNEFF, EU Border Agency Accused of Covering Up Migrant Pushback in Greece, New York Times, 26.11.2020, available at <https://www.nytimes.com/2020/11/26/world/europe/frontex-migrants-pushback-greece.html>, last accessed 03.03.2021.

¹⁶⁶ APD, *supra* note 3, Article 2.

¹⁶⁷ EASO, ‘Special Report: Asylum Trends and COVID-19’, 11.06.2020, available at

<https://www.easo.europa.eu/sites/default/files/easo-special-report-asylum-COVID-june-2020.pdf>, last accessed 03.03.2021.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ EU AGENCY FOR FUNDAMENTAL RIGHTS (FRA), ‘Fundamental Rights of Migrants in an Irregular Situation in the European Union’, 2011, available at <https://fra.europa.eu/en/publication/2012/fundamental-rights-migrants-irregular-situation-european-union>, last accessed 11.04.2021. See generally, FRA, ‘Asylum, Migration and Borders’, available at <https://fra.europa.eu/en/themes/asylum-migration-and-borders>, last accessed 11.04.2021.

3.3. Access to Reception Conditions

The Reception Conditions Directive requires all EUMSs to provide reception conditions for asylum seekers registered on their territory.¹⁷¹ This includes refugees who make their application at the borders, in the territorial waters, or in the transit zones of an EUMS. EUMS are required to ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.¹⁷² It is access to reception conditions which enables destitute asylum seekers to be housed, fed, and cared for while their asylum claim is under consideration. Registration is central to ensuring that asylum seekers are not reduced to conditions which are inhuman and degrading treatment, which is condemned by the European Court of Human Rights (ECtHR) as vulnerability created by EUMS' own inaction.¹⁷³ Yet on the basis of COVID-19 related measures, it is this access to registration which was diminished or extinguished in many EUMSs.

3.4. Access to a Substantive Procedure

The Asylum Procedures Directive sets out the requirements of an asylum procedure in the EU which includes a personal interview so that the applicant can explain the reasons for their flight and need for international protection.¹⁷⁴ So long as state authorities are still processing asylum applications, the asylum seeker *only* has access to reception conditions. Once the asylum seeker is recognised as a refugee or beneficiary of international protection, they can start a new life in the EUMS: work, take up education and enjoy equal treatment with nationals in a series of fields.¹⁷⁵

COVID-19 measures in several EUMS have resulted in the suspension or cancelling of personal interviews with asylum seekers.¹⁷⁶ Further, not all EUMSs have made accommodation for COVID-19 restrictions as regards the application of time limits for applying for asylum and lodging full applications.¹⁷⁷ This has resulted in asylum seekers being unable to comply with the conditions of their status. In addition, some EUMSs have failed to put in place systems whereby asylum seekers can renew the validity of their registration documents in order to lawfully remain.¹⁷⁸ Many asylum seekers have become vulnerable to expulsion decisions as a result of the failure of state authorities to process their asylum applications in a timely manner.¹⁷⁹

As set out in detail above, many EUMSs have failed to comply with EU law regarding the treatment of refugees and asylum seekers in the implementation of their COVID-19 measures. This is contrary to the Compacts undertaking to respect rule of law. In the MC, states committed themselves to ensuring certainty and predictability in migration procedures.¹⁸⁰ As a result of COVID-19 measures many EUMS have fallen short of this obligation. They have failed to take into account their duties towards migrants, refugees and asylum seekers to ensure certainty and predictability in the processing of their applications. Access to the territory,

¹⁷¹ RCD, *supra* note 3, Article 3(1).

¹⁷² *Ibid*, Article 17.

¹⁷³ ECtHR, *M.S.S. v. Belgium and Greece*, no. 30696/09 [GC], 21.01.11, paragraph 263.

¹⁷⁴ Asylum Procedures Directive, *supra* note 3.

¹⁷⁵ Qualification Directive, *supra* note 8.

¹⁷⁶ EASO, Special Report, *supra* note 51.

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid*.

¹⁷⁹ See for example, in Germany where the courts required authorities to reconsider over 5,500 applications: S. SANDERSON, German courts repeal more than 5,600 Afghan asylum rejections, 07.12.2020, available at <https://www.infomigrants.net/en/post/28966/german-courts-repeal-more-than-5-600-afghan-asylum-rejections>, last accessed 03.03.2021.

¹⁸⁰ MC, *supra* note 1, paragraph 28.

procedures, reception conditions and substantive determination of their applications has been made fragile by COVID-19 measures, and in some cases frustrated entirely. Times of pandemic place increased pressures on public administrations to deliver services to everyone on their territory. But these increased demands cannot justify the failure to comply with internationally accepted and EU binding obligations to migrants, refugees and asylum seekers.

4. Continued Use of Immigration Detention During a Pandemic

Immigration detention is only lawful when it has a lawful objective – expulsion or whilst procedures are being undertaken.¹⁸¹ As the COVID-19 pandemic tightened its grip on states, many refugees, asylum seekers, and migrants continued to be detained in reception and detention centres, without any prospect of release. The tensions evident in the continued use of detention during a pandemic will be examined from two perspectives. The first is the arbitrary nature of the detention. Secondly, the breach of human rights caused by the poor conditions within detention centres.

4.1. Immigration Detention as a First Resort?

The ECHR protects all people from arbitrary detention and protects their freedom of movement.¹⁸² However, the CEAS permits detention in specific circumstances, including for purposes of identification, to determine admission, to enforce transfer as well as enforcing returns of migrants.¹⁸³ This leaves broad discretion to authorities to regularly detain asylum-seekers during the whole asylum determination procedure.¹⁸⁴ However, immigration detention must be in line with Article 5(1)(f) ECHR such that it can only be utilised to prevent TCNs unauthorised entry into the country or during deportation proceedings.¹⁸⁵ This preserves the sovereign control over borders whilst providing clear protections from arbitrariness for TCNs.

Despite the framework prohibiting arbitrary and prolonged detention, as well as guidance that detention should only be used in immigration situations as a last resort, State practice demonstrates that it has been frequently utilised as a matter of course, even prior to the COVID-19 pandemic. The UN Working Group on Immigration Detention reported in 2016 that immigration detention was utilised routinely and systematically in Malta,¹⁸⁶ and in 2015 found that Germany made wide use of its prison system to hold foreigners in administrative detention

¹⁸¹ See ECHR, *supra* note 16, Article 5(1)(f).

¹⁸² Article 5 ECHR states “1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law”; Article 2 of Protocol 4 to the ECHR provides ‘Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence’.

¹⁸³ RCD, *supra* note 3, Article 8(3); Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348, Article 15 (hereinafter Returns Directive); See for further discussion I. MAJCHER, ‘Creeping Crimmigration in CEAS Reform: Detention of Asylum-Seekers and Restrictions on Their Movement under EU Law’ [2020] *Refugee Survey Quarterly*, s 2.

¹⁸⁴ See M. BOSWORTH & S. TURNBULL, ‘Immigration Detention, Punishment, and the Criminalization of Migration’, in S. PICKERING AND J. HAM (eds.), *The Routledge Handbook on Crime and International Migration*, Routledge, New York 2015, pp.91–106

¹⁸⁵ Article 5(1)(f) ECHR; Article 6(4) Returns Directive, *supra* note 73, holds that detention ceases to be justified where there is no longer a reasonable prospect of removal. See also, CJEU, *K. v. Staatssecretaris van Veiligheid En Justitie*, Case C-18/16, 14.09.2017, ECLI:EU:C:2017:680, paragraphs 36 and 39, where the CJEU discusses compatibility with Article 5 ECHR.

¹⁸⁶ UN WORKING GROUP ON ARBITRARY DETENTION (WGAD), ‘Report of the Working Group on Arbitrary Detention on its follow-up mission to Malta’, UN Doc. A/HRC/33/50/Add.1, 23.06.2016, p.2.

despite CJEU cases holding this was incompatible with the Returns Directive.¹⁸⁷ In *Khlaifia v Italy*, the ECtHR Grand Chamber found a violation of Articles 5 and 4 ECHR for the use of early detention centres in Lampedusa.¹⁸⁸ Furthermore, conditions within immigration detention centres have been frequently called into question before courts and by human rights organisations.¹⁸⁹ Despite commitments to human rights within the CEAS's framework, in practice, immigration detention has been used as a first, rather than the last, resort.

However, very recently EUMSs reaffirmed their political commitment to ensuring freedom of movement for refugees, asylum seekers, and migrants. These human rights protections are evident in the GCR which commits states to using detention only where community-based alternatives are not possible.¹⁹⁰ Further, the MC specifically provides that detention must be used only as a last resort after all alternatives have been found to be unsuitable.¹⁹¹ When EUMS' signed the Compacts, they committed to uphold these protections and work towards their realisation. Despite this, with the spread of COVID-19 and EUMSs efforts to curb the pandemic, measures taken in relation to immigration detention demonstrated that refugees, asylum seekers and migrants were the first to suffer a degradation of human rights protection justified as exercise of sovereign power.

4.2. Arbitrary Detention

The GCR makes clear that all alternatives to detention must be sought and the MC commits to ensuring any immigration detention is 'non-arbitrary, is based on law, necessity, proportionality and individual assessments, is carried out by authorised officials and is for the shortest possible period of time.'¹⁹² The tension between the CEAS powers to detain individuals who are awaiting asylum procedures or expulsion,¹⁹³ and the commitments under the Compacts were put into stark contrast during the pandemic because, with asylum processing at a standstill and returns to countries of origin on hold, the detention of these individuals became arbitrary.

Firstly, failed asylum-seekers and migrants who were in detention awaiting expulsion were no longer being held in accordance with IHRL as the purpose of the detention – to achieve expulsion was no longer possible because of border closures. In Greece, Human Rights Watch reported that the government implemented a policy of detaining asylum seekers arriving at its borders whilst simultaneously suspending the procedures and removals.¹⁹⁴ Similar policies were reported in Italy and France.¹⁹⁵ The detention of asylum seekers and migrants where there

¹⁸⁷ WGAD, 'Report of the Working Group on Arbitrary Detention on its follow-up mission to Germany', UN Doc. A/HRC/30/36/Add.1, 10.07.2015, p.7; see also CJEU, *Bero and Bouzalmate*, Joined Cases C-473/13 and C-514/13, 17.07.2014, ECLI:EU:C:2014:2095.

¹⁸⁸ ECtHR, *Khlaifia and Others v. Italy*, no 16483/12, 15.12.2016, paragraph 106.

¹⁸⁹ *Ibid.*, paragraphs 158-211.

¹⁹⁰ Paragraph 60 GCR, *supra* note 1.

¹⁹¹ Paragraph 29 MC, *supra* note 1, see E.GUILD AND T. BASARAN, *supra* note 7, Objective 13.

¹⁹² Paragraph 60 GCR; Objective 13, paragraph 29 MC, *supra* note 1.

¹⁹³ Article 8(3) RCD; See also Article 28(2) Dublin Regulation, where EUMS states may detain the person concerned pending transfer to the responsible EUMS if there is a "significant" risk of absconding.

¹⁹⁴ HRW, 'Curb Immigration Detention Amid Pandemic', Report, March 2020, available at: <https://www.hrw.org/news/2020/03/27/europe-curb-immigration-detention-amid-pandemic>, last accessed 04.04.2021.

¹⁹⁵ ASGI, 'COVID-19, l'impatto sui diritti delle cittadine e cittadini stranieri e le misure di tutela necessarie', March 2020, available at: <https://www.asgi.it/asilo-e-protezione-internazionale/COVID-stranieri-proposte/>, last accessed 05.09.2021; LE MONDE, 'Coronavirus: "Let's safeguard fundamental rights during the health crisis"', March 2020, available at https://www.lemonde.fr/idees/article/2020/03/20/coronavirus-sauvegardons-les-droits-fondamentaux-pendant-la-crise-sanitaire_6033892_3232.html, last accessed 06/09/2021

is no possibility of pursuing expulsion is no longer justified by a legitimate objective.¹⁹⁶ While processes are suspended for effectuating removals, detention becomes increasingly arbitrary.

In March 2020, the Council of Europe's Commissioner for Human Rights called for the release of all immigration detainees because detention can only be lawful 'as long as it is feasible that return can indeed take place... This prospect is clearly not in sight in many cases at the moment...'.¹⁹⁷ As a result, some EUMS recognised that, under COVID-19, detention risked becoming arbitrary. In Spain, following an official declaration, all people in detention centres were released and no new detentions orders were permitted.¹⁹⁸ In Belgium many detainees were released in practice, albeit on a case-by-case basis.¹⁹⁹ In some EUMS, moves were made to avoid continued immigration detention being rendered arbitrary by COVID-19 measures.

Secondly, reception centres which had been open, closed their doors in response to the pandemic, preventing asylum seekers from leaving at all. Liberty of movement is a human right that has been severely curtailed since the outbreak of the COVID-19 pandemic. Under Article 7 of the RCD, states may restrict asylum applicants' freedom of movement to an assigned area or an actual residence of the applicant. However, rather than this simply being a matter of interference with the right of freedom of movement, the policies taken towards asylum seekers in reception centres, became tantamount to detention.²⁰⁰ Without a clear end in sight as asylum procedures were often suspended, this also became arbitrary detention.²⁰¹

Numerous cases were brought before national courts to challenge the measures taken to curb the spread of COVID-19 as a breach of human rights. The Romanian Supreme Court held the isolation and quarantine measures violated Article 5 ECHR.²⁰² This case held that for ongoing measures to be legal, the State must declare a state of emergency under Article 15 ECHR limiting the application of human rights.²⁰³ In relation to the specific situation of the ongoing and arbitrary detention of individuals, two cases in France held that the risk generated

¹⁹⁶ See UNGA, 'Report of the Working Group on Arbitrary Detention – United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court', UN Doc. A/HRC/30/37, 06.07.2015, paragraph 45; UNGA, 'Report of the Working Group on Arbitrary Detention', UN Doc. A/HRC/10/21, 16.02.2009, paragraph. 75.

¹⁹⁷ CoE, 'Commissioner calls for release of immigration detainees while COVID-19 crisis continues,' March 2020, available at: <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-release-of-immigration-detainees-while-COVID-19-crisis-continues>, last accessed 09.04.2021.

¹⁹⁸ JRS-Europe, COVID-19 and Immigration detention: Lessons Not Learned, Report, February 2021, p.5, available at <https://jrseurope.org/wp-content/uploads/sites/19/2021/02/Report-Covid-19-and-immigration-detention.pdf>, last accessed 09.04.2021.

¹⁹⁹ See BELGIAN FEDERAL CENTRE FOR MIGRATION, 'Visites de Myria dans les centres fermés de Merksplas, Bruges et Vottem entre le 10 avril et le 14 mai 2020 dans le cadre de la pandémie de COVID-19', Report, July 2020, p.6, available at: https://www.myria.be/files/Rapport_visites_aux_centres_fermes_-_COVID-19.pdf, last accessed 09.04.2021.

²⁰⁰ BORDER CRIMINOLOGIES, 'Confine to Protect: Greek Hotspots and the Hygienic-Sanitary Borders of COVID-19', Report, September 2020, available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/09/confine-protect>, last access 09.04.2021.

²⁰¹ See for further discussion of the lack of procedural safeguards for people in immigration detention in the UK: BiD, 'Immigration bail hearings during the COVID-19 Pandemic', December 2020, available at: https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1263/201214_v6_Immigration_bail_monitoring.pdf, last accessed 09.04.2021.

²⁰² Decision of the Romanian Constitutional Court no. 458 of 25.06.2020 published in the Official Gazette, part I, no. 581 of 02.07.2020; see L. STEFAN, 'Rule of Law in Tough Times—A Case Study on the Romanian Sanctioning Policy During the COVID-19 Pandemic', (2020) *Transylvanian Review of Administrative Sciences* pp.121-148.

²⁰³ R. DUMINICA, 'Some Reflections about the Activation of Article 15 of the European Convention on Human Rights by Romania in the Context of the COVID-19 Pandemic', (2020) 13 *JL & Admin Sci* p.78

by the extension of the administrative detention was disproportionate to the prospect of return, since most countries had closed their borders.²⁰⁴ Further, a report by BID in 2020 on applications for bail of immigration detainees demonstrates the dubious claims by States that immigration detention remained necessary during COVID-19 due to the 'risk of harm' the detainees represented.²⁰⁵ Immigration detention during the COVID-19 pandemic was rendered arbitrary because there was no prospect of asylum procedures being completed or of return.

4.3. Immigration Detention Conditions

The GCR outlines the importance to access to healthcare for refugees and asylum seekers and reaffirms the commitments in the New York Declaration to provide access to healthcare and adequate conditions upon arrival.²⁰⁶ Additional obligations accrue towards those in immigration detention, who are wholly dependent on the EUMS for fulfilment of their right.²⁰⁷ The MC commits to 'safeguard[ing] physical and mental integrity, and that, at a minimum, access to food, basic health care...as well as adequate accommodation is granted, in accordance with [IHRL]...' for those in detention.²⁰⁸ These commitments are not discordant with the CEAS which commits to adequate reception conditions for all refugees and asylum seekers.²⁰⁹ However, often access to these basic human rights are undermined during detention and this was made particularly clear during the pandemic.

Several cases went before the ECtHR to challenge the conditions people were placed in during detention because of COVID-19. In *Feilazoo v. Malta*, the applicant was detained in a part of the detention facility that was reserved for COVID-19 quarantine breaching Article 3 ECHR.²¹⁰ In France, the domestic Court held that an Egyptian national with a serious health condition, held in an administrative detention centre in a room with three other persons without masks available or social distancing possible, must be immediately released.²¹¹ A German case similarly found that where compliance with the distancing rules in an asylum seeker accommodation centre was not possible, they should be able to seek alternative accommodation.²¹² Further, legal proceedings in the UK were brought against the government challenging the use of detention during a pandemic as it presents ideal incubation conditions for the spread of COVID-19.²¹³ It became clear that the detention that individuals were being forced into due to their migratory status was not only arbitrary, but also threatened their wider access to rights to health and life.²¹⁴ While many interior ministries seemed unable or unwilling

²⁰⁴ France – Lille Judicial Tribunal, n° 20/00633, 17.03.2020; France - Judiciary Tribunal of Perpignan, No RG20/00356, 18.03.2020.

²⁰⁵ BID, 'COVID-19 Detention Research', Report, 2020, available at https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1203/BID_COVID-19_Detention_research_report.pdf, last accessed 06.04.2021.

²⁰⁶ GCR, *supra* note 1, paragraph 72-73; NY Declaration, *supra* note 1, paragraph 5(c).

²⁰⁷ See, Article 11 RCD, *supra* note 3; Article 16 Returns Directive, *supra* note 73.

²⁰⁸ MC, *supra* note 1, paragraph 29(f)

²⁰⁹ RCD, *supra* note 3, Article 3(1).

²¹⁰ ECtHR, *Feilazoo v Malta*, no 6865/19, 11.03.2021, paragraphs 73, 92.

²¹¹ France Tribunal Administratif de Montpellier, *X v. Le Prefet des Pyrenees Orientales*, N 2020-213, 19.03.20.

²¹² Germany Administrative Court Leipzig (VG), *Decision 3 L 204/20.A*, 22.04.20.

²¹³ DETENTION ACTION, 'High Court Orders Government to Respond Urgently To COVID-19 Immigration Detention Legal Challenge'. March 2020, available at: <https://detentionaction.org.uk/2020/03/20/high-court-orders-government-to-respond-urgently-to-COVID-19-immigration-detention-legal-challenge/>, last accessed 09.04.2021.

²¹⁴ See 'Human Mobility and Human Rights in the COVID-19 Pandemic: Principles of Protection for Migrants, Refugees, and Other Displaced Persons', (2020) 32(3) *International Journal of Refugee Law*, Pp. 549–558; See JRS-Europe, *supra* note 76, p.11.

to implement their Compact obligations as set out in the CEAS during COVID-19, their courts took a much more robust approach ordering them to do so.

What happened in many countries with the slippage from open reception facilities to detention because of COVID-19 is inconsistent with human rights and states' commitments in the Compacts. The CEAS provisions relating to detention are intended to protect the State's ability to enforce and maintain control over borders. During the pandemic this has been pursued at the expense of human rights provisions, resulting in detention becoming arbitrary and threatening human rights to health, life and free movement.

5. Access to Essential Healthcare During the COVID-19 Pandemic

COVID-19 highlighted the extent to which access to good quality healthcare is a precursor to the enjoyment of all other fundamental rights.²¹⁵ It strengthened the case for universal health coverage, which refers to the effective possibility for individuals and communities to receive the health services they require, includes 'access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines', and which States had committed to achieve through Agenda 2030.²¹⁶ COVID-19 illustrated how the application of an individualistic lens to health collapses in the face of a highly transmissible disease, which does not distinguish by migration status, since a response which safeguards public health needs to consider the health of all its members, including migrants, refugees, and host communities.²¹⁷

This section assesses EUMS' practices towards migrants' and refugees' access to appropriate healthcare in the COVID-19 response against their commitments under the two Compacts, which reaffirm pre-existing IHRL and EU law obligations. It shows how effective enjoyment of the right to health during the pandemic was prejudiced by pre-existing barriers which limited access, particularly to appropriate healthcare. As will become apparent, some EUMS realigned their frameworks with pre-existing fundamental rights obligations, to extend basic healthcare to those hitherto excluded in practice and drew on the skills of migrants and refugees to strengthen their COVID-19 response. Yet, the effectiveness of these measures was prejudiced by the longstanding limitations placed on migrants' and refugees' practical access to healthcare.

5.1. A Right to Access Healthcare of Good Quality

Both Compacts frame the right to health of migrants and refugees alongside that of the host community and commit to providing *both* migrant and refugee populations with appropriate healthcare. States need to 'promote the physical and mental health of migrants and communities overall',²¹⁸ and 'expand and enhance the quality of national health systems [within host countries] to facilitate access by refugees and host communities'.²¹⁹ States' commitments are grounded in the fulfilment of pre-existing IHRL obligations which prescribe the equal entitlement of migrants and refugees to the enjoyment of the highest attainable standard of

²¹⁵ See, for example, the UN Committee on Economic, Social and Cultural Rights (hereinafter ICESCR-Committee), General Comment no 14 on the right to the highest attainable standard of physical and mental health ICESCR-Committee, UN Doc. E/C.12/2000/4 (2001) (hereinafter GC 14), paragraph 1.

²¹⁶ UNGA, 'Transforming Our World: The 2030 Agenda for Sustainable Development', UN Doc. A/RES/70/1, 25.09.2015, Target 3.8.

²¹⁷ WHO, 'ApartTogether Survey: Preliminary Overview of Refugees and Migrants Self-reported Impact of COVID-19', 18.12.2020, available at <https://www.who.int/publications/i/item/9789240017924>, last accessed 09.04.2021, p.VI.

²¹⁸ MC, *supra* note 1, paragraph 31(e).

²¹⁹ GCR, *supra* note 1, paragraph 72.

physical and mental health, which includes access to healthcare that is acceptable and of good quality, and is to be realised without distinction on the basis of migration status.²²⁰ Accordingly, States commit that 'all migrants, regardless of their basic status, can exercise their human rights through safe access to basic services', and acknowledge the relationship between non-discrimination and service provision.²²¹ The GCR contemplates State cooperation and input by relevant stakeholders, such as the World Health Organisation (WHO), to 'facilitate access by refugees and host communities' to national health systems'.²²² Like the UN core IHRL treaties which articulate a right to health adapted to specific categories, such as women, children, migrant workers, and persons with disabilities,²²³ both Compacts commit States to tailor healthcare provision to migrants' and refugees' specific experience and their intersecting identities, including an age and gender dimension.²²⁴

Under EU law, the Charter asserts that everyone has 'the right of access to preventive health care and the right to benefit from medical treatment'.²²⁵ The CEAS concretises migrants' and refugees' right to access healthcare within EUMS. Although these prescribe varying entitlements at different stages of their (legal) journey, they all outline a minimum entitlement to emergency and primary healthcare, which includes treatment for COVID-19.²²⁶ Like the Compacts' acknowledgment that specific groups require additional support, the CEAS includes a heightened obligation to secure healthcare for those designated as vulnerable populations, including children, persons with serious healthcare needs, survivors of torture, and persons with disabilities.²²⁷

5.2. Access to Healthcare During COVID-19

Notwithstanding the comprehensive legal framework, in March 2020, it was amply clear that, compared to EUMS citizens, migrants and refugees were at a disadvantage in their enjoyment of the right to health,²²⁸ with 'many ... at heightened risk [of COVID-19 infection]'.²²⁹ While healthcare needs are 'a complex combination of biological and socioeconomic factors developed over [migrants' and refugees'] lives', migration is also a social determinant of health

²²⁰ Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides 'States Parties *must* take steps to prevent, treat and control epidemic [...] diseases whilst taking the necessary steps to create conditions that would assure medical service and attention to all in the event of sickness.' While the right to health is broader than the right to healthcare, for healthcare to be IHRL-compliant, it must meet the principles of availability, accessibility, acceptability, and quality (AAAQ). See ICESCR-Committee, *supra* note 105, paragraph 12.

²²¹ MC, *supra* note 1, paragraph 31. See also Objectives 1, 2, 6, 7, and 13.

²²² GCR, *supra* note 1, paragraph 72.

²²³ For an overview, P. PACE, 'Migration and the Right to Health: A Review of International Law', IOM, 2009, available at https://publications.iom.int/system/files/pdf/iml_19.pdf, last accessed 11.04.21.

²²⁴ See, NY Declaration, *supra* note 1, paragraph 30. For example, for women and girls and children, see GCR, *supra* note 1, paragraphs 75-76. The MC, *supra* note 1, paragraph 31 recognises that 'nationals and regular migrants may be entitled to more comprehensive service provision'.

²²⁵ Article 35 CFREU. This is subject to national rules given the limited EU competence in the area, even if these cannot obviate the provision of meaningful content.

²²⁶ See RCD, *supra* note 3, Article 19(1); QD, *supra* note 9, Articles 31 and 32; Returns Directive, *supra* note 73, Article 14. See also, CJEU, *Centre public d'action social d'Ottignies-Louvain-La-Neuve v Moussa Abdida*, Case C-562/13, 18.12.14, ECLI:EU:C:2014:2453.

²²⁷ For example, Articles 19(2) and 21 RCD, *supra* note 3; Article 30 QD, *supra* note 9, Article 14 Returns Directive, *supra* note 73.

²²⁸ H. H. P. KLUGE ET AL, 'Refugee and Migrant Health in the COVID-19 Response', (2020) 395 *The Lancet*, p.1237.

²²⁹ OHCHR, IOM, UNHCR and WHO, The Rights and Health of Refugees, Migrants and Stateless must be protected in COVID-19 response, Joint Press Release, 31.03.2020, available at <https://www.unhcr.org/uk/news/press/2020/3/5e836f164/rights-health-refugees-migrants-stateless-must-protected-covid-19-response.html>, last accessed 09.04.2021.

which affects individual health status.²³⁰ Discrimination, inequalities, and exclusion from health and welfare services constitute negative health influences yet are the lived experience of a significant number of migrants and refugees across EUMSs.²³¹ Through the Compacts, in an attempt to address these barriers to effective access, States committed to incorporate migrants' health needs 'into national and local health-care policies and plans, such as by strengthening capacities for service provision, facilitating affordable and non-discriminatory access, reducing communication barriers and training health-care providers on culturally sensitive service delivery'.²³²

Against this framework, the EC's March 2020 Guidance reminded EUMS that, notwithstanding the challenges posed by the pandemic, 'emergency and essential treatment of illness, including for COVID-19 must be ensured'.²³³ EUMS' responses varied significantly, not least according to the migrant's legal status which attracts different levels of entitlement, although an emphasis was retained on access to emergency COVID-19 care. The European Migration Network (EMN) and Organisation for Economic Co-operation and Development (OECD) report that in several EUMS, irregularly present migrants were entitled to access COVID-19-related emergency healthcare across a spectrum which included free healthcare, subsidised healthcare, or healthcare against payment.²³⁴ Most EUMS continued to provide emergency healthcare and essential treatment to all migrants, including those facing removal.²³⁵ In some cases, authorities relaxed administrative rules to encourage irregularly staying migrants to get tested, and provided COVID-related emergency healthcare for free.²³⁶ Yet, as PICUM reports highlight, the trend to extend emergency healthcare to all migrants, including irregularly staying ones is best contextualised against restrictive pre-COVID-19 policies; in Luxembourg, the 'provision of free COVID-related emergency [care] is more striking', given the previous 'extremely limited access to all forms of care, even emergency care'.²³⁷ Despite the welcome extension of EUMS' healthcare services to all migrants and refugees, it bears noting that the provision of emergency medical care, as is treatment for COVID-19, is a long-standing obligation under the CEAS for *all* migrants.

Among the EUMS, Portugal recognised early on that ensuring access to healthcare for all 'is consistent with a rights-based approach and is also logical from a public health

²³⁰ I. ABUBAKER ET AL, 'The UCL-Lancet Commission on Migration and Health: The Health of a World on the Move' (2018) 392 *The Lancet*, p. 2634.

²³¹ Ibid; S. P. JUÁREZ ET AL, 'Effects of Non-health-targeted Policies on Migrant health: A Systematic Review and Meta-analysis', (2019) 7 *Lancet Global Health*, p.435.

²³² MC, *supra* note 1, paragraph 31(e). See WHO, 'Global Action Plan 2019-2023, Promoting the Health of Refugees and Migrants', Doc. A72/25 Rev.1, 2.05.2019, paragraphs 12 and 26, which seeks 'to assert health as an essential component of refugee assistance and good migration governance' in view of the large number of migrants and refugees who lack access to health care services and the need for international cooperation.

²³³ EC (2020), COVID-19 Guidance, *supra* note 48.

²³⁴ The EMN/OECD, 'EU and OECD Member States Responses to Managing Residence Permits and Migrant Unemployment During the COVID-19 Pandemic', July 2020, p.8, available at https://ec.europa.eu/home-affairs/sites/default/files/oo_eu_inform1_residence_permits_and_unemployment_en_updated_final.pdf, last accessed 09.04.21 refers to Belgium, Estonia, Greece, Finland, Lithuania, Luxembourg, Spain, Poland and Slovakia as extending free healthcare. See further PICUM, 'Non-exhaustive overview of European government measures impacting undocumented migrants taken in the context of COVID-19', March-August 2020, p.12, available at <https://picum.org/wp-content/uploads/2020/10/Non-exhaustive-overview-of-European-government-measures-impacting-undocumented-migrants-taken-in-the-context-of-COVID-19.pdf>, last accessed 09.04.2021.

²³⁵ EMN, 'Impact of COVID-19 Pandemic on Voluntary and Forced Return Procedures and Policy Responses', EMN-OECD Inform, 2021, p.7, available at https://ec.europa.eu/home-affairs/sites/default/files/00_eu_inform5_return_en.pdf, last accessed 11.04.21.

²³⁶ Ibid.

²³⁷ PICUM, Non-exhaustive Overview, *supra* note 124, p.12.

perspective ... [since] restricting access to health care not only puts individuals at risk but also threatens the health and safety of members of their community'.²³⁸ The initiative to extend state support, including healthcare, to all refugees, applicants for international protection, and those awaiting decisions on residence applications prioritised the health of citizens and non-citizens alike and recognised the symbiotic relationship between the two.²³⁹ Similarly, the inclusion of migrants and refugees, regardless of migration status, in several EUMSs' national vaccination strategies reflect their obligations to respect, promote, and fulfil the right to health of all those within their jurisdiction and aligns with both Compacts' commitments to non-discrimination on the basis of migration status in access to basic services, even if their concrete implementation remains to be seen.²⁴⁰

Healthcare provision during COVID-19 is contextualised against pre-existing inequalities which prejudiced migrants' and refugees' access to healthcare, placing them at heightened risk of infection and, as members of the community, with a concomitant impact on public health. The pandemic affected the continuity of healthcare services, including routine testing and treatment of other illnesses, which disproportionately affected migrants.²⁴¹ The European Centre for Disease Prevention and Control (ECDC)'s Guidance outlines how, in the absence of evidence of higher rates of transmission amongst migrants and refugees, 'environmental factors such as overcrowding in reception and detention centres may increase their exposure to the disease', with pre-existing restricted access to social security systems, to the labour market, and the absence of appropriate accommodation 'exacerbat[ing] the vulnerabilities of migrants and refugees living in reception and detention centres.'²⁴² The EC acknowledges this heightened risk and includes those in refugee camps among the groups to be prioritised for vaccine delivery.²⁴³

Yet, entitlement does not equate to effective access. Research highlights migrants feared accessing available healthcare services due to the potential impact on their rights of residence or exposure to removal action.²⁴⁴ While the MC stops short of establishing a 'firewall' between service providers and immigration enforcement,²⁴⁵ States commit not to compromise migrants'

²³⁸ A. MOORE AND P. KORTSARIS, 'Adaptable Asylum Systems in Portugal in the Context of COVID-19', (November 2020) *Forced Migration Review*, p.51.

²³⁹ See IOM, Portugal's Contribution to the IOM Regional Review, *supra* note 38.

²⁴⁰ For e.g., PICUM noted Belgium, Finland, France, and the Netherlands made vaccination available to all, including undocumented migrants, although it is not always clear how authorities will reach out to these populations. In contrast, Poland explicitly limits vaccine entitlement to those with a residence permit. See, PICUM, 'The COVID-19 Vaccines and Undocumented Migrants: What Are European Countries Doing?', 11.02.21, available at <https://picum.org/covid-19-vaccines-undocumented-migrants-europe/>, last accessed 11.04.2021.

²⁴¹ T. BURTON, 'Tackling TB amidst a Global Crisis' (UNDP), available at <<https://www.undp.org/content/undp/en/home/blog/2021/tackling-tb-amidst-a-global-crisis.html>> accessed 6 April 2021.

²⁴² ECDC, 'Guidance on Infection Prevention and Control of Coronavirus Disease (COVID-19) in Migrant and Refugee Reception and Detention Centres in the EU/EEA and the United Kingdom', 15.06.2020, available at <https://www.ecdc.europa.eu/sites/default/files/documents/COVID-19-guidance-refugee-asylum-seekers-migrants-EU.pdf>, last accessed 11.04.2021. See also JRS-Europe, 'From Bad to Worse: COVID-19 Aggravates Existing Gaps in the Reception of Asylum Seekers', 2021, available at <https://jrseurope.org/en/resource/from-bad-to-worse/>, last accessed 09.04.2021.

²⁴³ EC, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Preparedness for COVID-19 vaccination strategies and vaccine deployment, COM(2020) 680 final, 15.10.2020.

²⁴⁴ In the WHO, ApartTogether report, *supra* note 122, migrants and refugees shared that their residence status had a significant bearing on their willingness to seek medical care, even when having COVID-symptoms, p.27.

²⁴⁵ See E.GUILD AND T. BASARAN, *supra* note 8, objective 15.

'safe access to basic services or unlawfully infringing upon the human rights to privacy, liberty and security of the person at places of basic service delivery.'²⁴⁶ Irish authorities recognised the importance of firewall protection in encouraging migrants and refugees with COVID-19 symptoms to come forward and confirmed that healthcare providers would not share these migrants' data with immigration officers.²⁴⁷

5.3 Refugees and Migrants as Contributors

Simultaneously, some EUMSs harnessed the potential contribution of migrants and refugees to national healthcare systems. This aligns with the GCR's presentation thereof as contributors to host communities,²⁴⁸ and foresees that States and relevant stakeholders contribute to the capacity development of national health systems, including through opportunities for 'refugees and members of host communities who are or could be engaged as health care workers'.²⁴⁹ While pre-COVID-19, TCNs formed a sizeable group of workers within several EUMS' health systems, migrants and refugees faced barriers such as administrative hurdles related to the recognition of qualifications.²⁵⁰ Throughout the pandemic, German medical authorities endorsed initiatives which encouraged migrant and refugee healthcare professionals to join the COVID-response.²⁵¹ The Spanish government fast-tracked the migration status applications of foreign-born doctors and nurses to allow their participation in the healthcare system.²⁵² French authorities allowed the recruitment of refugees who had previously qualified as healthcare workers in their countries of nationality but who lacked the documentation usually required for registration purposes.²⁵³ These examples highlight EUMS' incorporation of migrants and refugees within the national COVID-19 effort, as crucial actors in the implementation of the right to health for the entire community.

6. Conclusion

The COVID-19 pandemic shed light on the continued practice of some EUMS to differentiate access to human rights based upon migration status, despite, firstly, their commitments in the Compacts and, secondly, the exigencies of the global COVID-19 pandemic. In outlining a framework for the treatment of refugees and migrants, the balancing of human rights protections on the one hand and preservation of state sovereign control over borders on the

²⁴⁶ MC, *supra* note 1, paragraph 30.

²⁴⁷ Parliamentary Debate (Ireland) on the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020: Committee and Remaining Stages, 20.03.2020, available at <https://data.oireachtas.ie/ie/oireachtas/debateRecord/seanad/2020-03-20/debate/mul@/main.pdf>, p.390.

²⁴⁸ GCR, *supra* note 1, paragraph 13 speaks of a programme of action which 'is underpinned by a strong partnership and participatory approach, involving refugees and host communities'.

²⁴⁹ GCR, *supra* note 1, paragraph 73.

²⁵⁰ UNHCR, 'Council of Europe and UNHCR Support Member States in Bringing Refugee Health Workers Into the COVID-19 Response', 14.04.2020, available at <https://www.unhcr.org/uk/news/press/2020/4/5e957e9611/council-europe-unhcr-support-member-states-bringing-refugee-health-workers.html>, last accessed 11.04.21.

²⁵¹ K. CONNELLY, 'Germany calls on migrant medics to help tackle coronavirus', The Guardian, 14.04.2020, available at <https://www.theguardian.com/world/2020/apr/14/germany-calls-on-migrant-medics-to-help-tackle-coronavirus>, last accessed 09.04.2021.

²⁵² LA MONCLOA, 'El Gobierno impulsa la contratación de cerca de 200 profesionales extranjeros en situación regular del sector sanitario ante la crisis del COVID-19', 27.03.2020, available at <https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/sanidad14/Paginas/2020/270320-contratacion.aspx>, last accessed 09.04.2021.

²⁵³ Ministère de l'Intérieur, 'Citizen Mobilization: Refugees with Diplomas from Outside the EU can Contribute to the Public Health Service', 14.04.2020, available at <https://accueil-integration-refugies.fr/2020/04/14/les-refugies-peuvent-contribuer-au-service-public-de-sante/> last accessed 09.04.2021.

other is evident in both the CEAS and the Compacts. When put under pressure, this balancing of obligations rarely survives implementation, with States resorting to their sovereign powers to justify preventing access to human rights. This policy of discrimination was rendered visible in the EU's treatment of refugees and migrants in the response to COVID-19 which exposed existing fault lines between sovereign border control and respect for human rights in refugee and migrant protection. An examination of the migrant's journey into the EU from arrival (or prevention) to detention and to healthcare belies the difference in treatment between those seeking access to EU territory, whom EUMS shut out, as opposed to those already within the territory, whom EUMS were compelled to treat as one of their own, not least because of the nature of a virus which does not discriminate by migration status.

The treatment of migrants and refugees in the EU during the pandemic varied significantly and, in the absence of a coordinated EU response, largely depended on individual EUMSs. COVID-19 exposed the extent to which EUMS' practice was inconsistent with their existing CEAS obligations and highlighted the existing gap between EU law and its implementation. In some respects, it mirrored pre-existing trends and approaches which, irrespective of COVID-19, already sought to minimise TCNs' access to the territory for the purpose of seeking international protection, as reflected in the closure of borders at pandemic's outset, which EUMSs instrumentalised to negate migrants' and refugees' right to seek asylum. It is evident in those EUMSs' reluctance to treat migrants and refugees as one of their own, by continuing to detain them and expanding the use of immigration detention by reference to COVID-19. In others, it signalled a (cautious) shift away from restrictive laws and policies which limit migrants' effective access to socio-economic rights, with some EUMSs relaxing earlier restrictive measures concerning migrants' access to healthcare and actively encouraging their access thereto, albeit for the purposes of COVID-19 testing and treatment. Nonetheless, structural inadequacies which continued to fail to adapt services to the specific needs of migrant populations were exacerbated during the pandemic, with a concomitant risk to the health of migrants and host communities.

Moreover, unlike most other human rights obligations which admit of limitation, the prohibition of *refoulement* and the right to seek asylum are absolute obligations under both international and EU law. In addition to affirming States' pre-existing human rights obligations, including *non-refoulement*, the Compacts illustrate how in times of crisis – such as the COVID-19 situation – States committed to seek collaborative ways of working to address migratory movements, in full compliance with human rights obligations. The instrumentalization of COVID- to justify the closure of ports to possible new arrivals by reference to the potential strain on their healthcare systems belies the collaborative approach under the GCR, through which States can call upon UNHCR and other relevant stakeholders for support in times of crisis and provides a template which eases pressures on EUMS and benefits both refugees and the wider community. The fragmentation of EUMS' approaches towards migrants and refugees within their pandemic response reneges on their commitments - asserted in 2018 as a contemporary State-led, migrant-specific articulation of rights – to address crises collectively. These fragmented responses belied the existence of a *Common* European Asylum System, despite the Compacts articulating a blueprint ready for deployment in crisis settings.