

COVID-19-Nationalism and its toll on citizenship and mobility rights in the European Union

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There is still much that we do not know about COVID-19, but by now it has become very clear that, far from being ‘the great equalizer,’ the disease is disproportionately impacting the poor and the most vulnerable (including racial and ethnic minorities), fuelling nationalist and xenophobic sentiments,ⁱ and prompting a resurgence of borders and mobility restrictions all over the globe. The siege mentality that has been brewing under the threats of mass migration and terrorism is now at peak intensity, as States barricade themselves, adopt increasingly protectionist measures and compete against each other for medical supplies and personnel.ⁱⁱ

In Europe, the first national responses to the outbreak were unilateral and selfish, which should come as no surprise to anyone familiar with the European integration process, but is nevertheless disheartening. In early March, when Italy became the epicentre of the outbreak and the WHO acknowledged that we were facing a pandemic, Austria and other Schengen States rushed to reintroduce border controls at their land and air borders, in rapid succession.ⁱⁱⁱ Flights to and from Italy were blocked by several EU Member States.^{iv} EU citizens were denied admission in Italy, Hungary, Croatia and the Czech Republic, to name a few.^v The Hungarian government banned the entry of all non-Hungarian citizens, with minor exceptions, and suspended submission of asylum claims.^{vi} Cyprus even barred entry to its own nationals returning from hotspots abroad.^{vii} Boats of migrants intercepted in the Mediterranean were hastily returned to Libya.^{viii} The list could go on.

A benign reading of this rush to close borders is that national governments were merely seeking to fulfil their obligation to protect their populations,^{ix} although it is fair to say that many European governments (including those of Italy, Hungary, Greece and Poland) seized the opportunity presented by the virus scare to push their anti-immigration agendas

and regain border control.^x We also know that travel bans based on nationality and/or place of origin are mostly ‘security theatre’ to prevent widespread panic, since they are ultimately ineffective in blocking the spread of the virus.^{xi} The political appeal of such restrictive measures is, in any case, understandable in times of unprecedented turmoil and even the WHO refrains from criticising States which adopt them.^{xii} From a legal standpoint, moreover, the States’ decisions to close borders and restrict the access of foreigners to their territories during a global health crisis have ample grounds in international human rights standards and in EU law.

For starters, it is important to keep in mind that the States’ entitlement to control immigration, while challenged for many decades and from many quarters, is still generally recognised in the practice of the international system, as Joseph Carens would put it.^{xiii} The 1966 International Covenant on Civil and Political Rights famously does not recognise the right of aliens to enter or reside in the territory of a State party, even though the UN Human Rights Committee has held that there may be circumstances in which an alien may enjoy the protection of the Covenant in relation to entry into a territory, as will be the case for instance when considerations of non-discrimination arise.^{xiv} Only nationals are recognised a right of admission to their State of nationality, by Article 12(4) of the Covenant, and even here the wording of the provision (the use of the term ‘arbitrarily’) suggests that there may be instances in which nationals are lawfully barred at the border, a possibility that the Human Rights Committee considers unlikely but does not dismiss entirely.^{xv} Furthermore, under Article 12(3) of the Covenant, States are allowed to invoke reasons of public health to restrict the freedom of movement of those lawfully within the territory, subject to requirements of legality, necessity and proportionality.^{xvi}

Similarly, the European Convention on Human Rights and its Protocols do not recognise the right of aliens to enter or reside in the territory of a State party, and expressly allow restrictions to the freedom of movement of those lawfully within the territory of a State for the protection of health [Article 2 (3) of Protocol No. 4]. The ECHR framework goes further, however, in the protection of the right of admission enjoyed by State nationals, since it prescribes that no one shall be expelled from the territory of the State of which he is a national nor be deprived of the right to enter the territory of that State (Article 3 of Protocol No. 4). It is also more protective of foreigners, since it expressly prohibits collective expulsions (Article 4 of Protocol No. 4). Besides, the European Court of

Human Rights, in spite of its frequent reminders that States have the right to control entry, residence and expulsion of non-nationals,^{xvii} has come to set some limits on this right, by holding States responsible when their decisions to refuse entry or to expel foreigners are deemed to place foreigners at risk of being killed or subject to torture (in breach of Articles 2 and 3 of the Convention) or hinder the foreigners' right to private and/or family life (in breach of Article 8).^{xviii} The Court has also been critical of push-backs at sea, having held Italy responsible for breach of Article 3 of the Convention and Article 4 of Protocol No. 4, after the Italian coastguard summarily returned a group of about 200 migrants to Libya without giving them the opportunity to apply for asylum.^{xix} Presumably to prevent equally severe assessments of their current emergency measures, several EU Member States (Bulgaria, Estonia, Latvia and Romania) have derogated from the European Convention for the duration of the COVID-19 crisis, an ominous (albeit legal) move by all accounts.^{xx}

The most far reaching limitations on the right of States to control their borders are, of course, those set by EU law, since freedom of movement of persons (first workers, then EU citizens in general) has been at the core of the European integration project from the very start. Even here, however, States retain prerogatives to bar access to their territories on a number of grounds (including public health), which means that, for the most part,^{xxi} COVID-19-related border restrictions are likely to pass muster. The temporary reintroduction of border controls at internal borders is allowed by Articles 25 and ff. of the Schengen Borders Code, and the restriction of freedom of movement of EU citizens from other Member States is allowed by Articles 27 and ff. of Directive 2004/38/EC. Both the Code and the Directive phrase their provisions narrowly. The reintroduction of internal borders is a measure of last resort, for exceptional circumstances when there is a serious threat to public policy or internal security; it must be of short duration (although it can extend up to two years^{xxii}) and be limited to what is strictly necessary to respond to the serious threat; the assessment of the proportionality of the measure in relation to the threat must consider *inter alia* the likely impact of the measure on free movement of persons within the area. The restriction of the freedom of movement of Union citizens is only possible on grounds of public policy, public security or public health; for the restriction to be imposed on the first two grounds, the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and the restriction must comply with the principle of proportionality;

for the restriction to be imposed on public health grounds, it is necessary that the disease justifying it has epidemic potential as defined by the relevant instruments of the WHO or is an infectious disease or a contagious parasitic disease which is subject of protection provisions applying to nationals of the host Member State.^{xxiii} These exceptional scenarios are precisely what the EU Member States are facing right now, so it is no wonder that they have so unashamedly resorted to protectionist and exclusionary measures in response to the COVID-19 health crisis.

Given the considerable leeway enjoyed under present circumstances by the EU Member States in deciding who enters their territories, the European Commission's measures to curb the States' worst impulses and push for coordinated action at EU level are no small feat. It took some time and some catch-up with what the States were already doing on their own, but the Commission eventually put forward, on 16 March 2020, a communication recommending that the Schengen Member States and Associated States should adopt a coordinated decision to impose a temporary restriction on non-essential travel from third countries into the EU+ area, for an initial period of 30 days.^{xxiv} The Commission stressed that the temporary travel restriction must exempt nationals of all EU Member States and Schengen Associated States, and their family members, as well as third-country nationals who are long-term residents under the Long-Term Residence Directives and persons deriving their right to reside from other EU Directives or national law, or who hold long-term visas. The Commission did, however, limit the scope of the exemption, by adding that it only applies if the purpose of the border crossing is for the travellers to return to their homes. According to the guidelines issued by the Commission on that same day, this means that the Member States must always admit their own citizens and residents, and facilitate transit of other EU citizens and residents who are returning home.^{xxv} In the communication, the Commission also recommended that the travel restriction should not apply to other travellers with an essential function or need, including frontier workers and persons in need of international protection or for other humanitarian reasons. In the guidelines, the Commission added *inter alia* that (a) any decision to refuse entry at Schengen external borders needs to be proportionate (i.e. taken following consultation of the health authorities and considered by them as suitable and necessary to attain the public health objective) and non-discriminatory; (b) controls at internal borders should be applied in a proportionate manner and with due regard to the health of the individuals concerned (so that persons who are clearly sick are not refused

entry but instead have access to appropriate health care); and (c) EU citizens must enjoy the safeguards laid down in Directive 2004/38/EC, in particular the guarantee of non-discrimination vis-à-vis the nationals of the Member State of residence. Following the endorsement of the communication and the guidelines by the European Council, on 17 March 2020, the Member States are reported to have lifted or modified some of their earlier restrictions in line with the Commission's observations.^{xxvi}

On 30 March 2020, the Commission provided further guidance on how to implement the temporary travel restriction, adding advice on the repatriation of EU citizens stranded in third countries and on the effects of visa policy.^{xxvii} The Commission stressed that any decision on refusal of entry to third-country nationals needs to be proportionate, non-discriminatory, and implemented in a way that ensures full respect of the human dignity of the persons concerned, besides complying with the special provisions on the right to asylum and international protection or the issue of long-term visas, per Article 14(1) of the Schengen Borders Code. The Commission widened the scope of the exemption to the travel restriction, by clarifying that, besides UK nationals, also the nationals and residents of San Marino, Andorra, Monaco and Vatican/Holy See should be treated as nationals/residents of Member States and allowed entry for the purpose of returning home. The Commission conceded that Member States could require non-nationals entering their territory to undergo self-isolation or similar measures, but only on condition that they impose the same requirements on their own nationals. The Commission reiterated the recommendation that the temporary restriction should not apply to persons in need of international protection, adding that the principle of non-refoulement must be respected. Taking a cue from promising practices already adopted by some Member States (Luxembourg, on 17 March,^{xxviii} Portugal, on 27 March^{xxix}), the Commission recommended that the stay of visa holders unable to leave the territory due to travel restrictions should be extended (if necessary, by issuing them with a long-stay visa or a temporary residence permit), and that Member States should waive administrative sanctions or penalties on third-country nationals in those circumstances. Regarding the repatriation of EU citizens, the Commission recommended that Member States should facilitate onward transit (by any means of transportation available) of EU citizens and their family members who are returned to the EU from third-countries. The joint action of the Commission and the Member States in securing assistance and consular repatriation operations to EU citizens stranded in third-countries allowed thousands to return home^{xxx}

and demonstrated how a key entitlement of EU citizenship – that of consular protection by any EU Member State outside of the EU (Article 46 of the Charter of Fundamental Rights) – can be put into effect at crucial junctures. An arguable silver lining in this whole nightmarish process.

In the end, when domestic courts, the ECtHR and the ECJ are finally called upon to assess the lawfulness of Member States' emergency border measures, it will all come down to questions of legality, necessity, proportionality and respect for the principle of non-discrimination, as is usually the case with restrictions to fundamental rights. Strict views of necessity and proportionality will likely prove difficult to sustain, however, given the unprecedented scale and severity of the health crisis, and the ongoing scientific uncertainty as to the most effective ways to handle it.^{xxxix} There are, in any case, a few clear red lines provided by international human rights standards and EU law which some EU Member States have no doubt crossed and for which they should be held accountable, including discrimination on the basis of nationality, suspension of asylum applications, push-backs at sea in breach of the principle of non-refoulement, and refusal to admit their own nationals into the territory.

ⁱ There have been multiple reports in the media about verbal and physical attacks linked to COVID-19, first directed against Chinese nationals and people perceived as of Asian origin, then extended to African migrants, asylum seekers, Roma communities, and foreigners in general. For an overview of racist and xenophobic incidents reported in the EU Member States in the first months of 2020, see FRA, *Bulletin # 1 Coronavirus Pandemic in the EU: Fundamental Rights Implications*, April 2020, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-1_en.pdf [13.04.2020].

ⁱⁱ See *The New York Times* editorial by Peter Goodman *et al.* entitled 'A new front for nationalism: The global battle against a virus,' published on 10 April 2020, available at <https://www.nytimes.com/2020/04/10/business/coronavirus-vaccine-nationalism.html> [11.04.2020].

ⁱⁱⁱ Information available at https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en [13.04.2020].

^{iv} Information available at https://ec.europa.eu/transport/coronavirus-response_en [05.04.2020].

^v Information available at <https://www.schengenvisainfo.com/news/schengen-area-in-the-brink-of-suspension-what-could-be-the-consequences/> [14.04.2020].

^{vi} See Hungary's Country Report for FRA's comparative study on the Coronavirus COVID-19 outbreak in the EU and its fundamental rights implications, March 2020, pp. 3 and 7-8, available at https://fra.europa.eu/sites/default/files/fra_uploads/hungary-report-covid-19-april-2020_en.pdf [11.04.2020].

^{vii} See Cyprus' Country Report for FRA's comparative study on the Coronavirus COVID-19 outbreak in the EU, pp. 5-6, available at https://fra.europa.eu/sites/default/files/fra_uploads/cyprus-report-covid-19-april-2020_en.pdf [14.04.2020].

^{viii} See Sandro Mezzadra & Maurice Stierl, 'What happens to freedom of movement during a pandemic?,' *openDemocracy*, 24 March 2020, available at <https://www.opendemocracy.net/en/can-europe-make-it/what-happens-freedom-movement-during-pandemic/> [13.04.2020].

^{ix} That seems to be the reading of FRA’s Director Michael O’Flaherty in his Forward to *Bulletin # 1 Coronavirus Pandemic in the EU: Fundamental Rights Implications, cit.*, p. 5.

^x See e.g. Stefania D’Ignoti, ‘How coronavirus hits migrants and asylum seekers in Italy,’ *The New Humanitarian*, 16 March 2020, available at <https://www.thenewhumanitarian.org/news/2020/03/16/italy-coronavirus-migrants-asylum-seekers> [13.04.2020]; Alena Kudzko, ‘Return to borderless Europe after COVID-19 will be difficult but not impossible,’ *EURACTIVE*, 31 March 2020, available at <https://www.euractiv.com/section/future-eu/opinion/return-to-borderless-europe-after-covid-19-will-be-difficult-but-not-impossible/> [13.04.2020].

^{xi} See Yasmeen Serhan & Timothy McLaughlin, ‘The other problematic outbreak,’ *The Atlantic*, 13 March 2020, available at <https://www.theatlantic.com/international/archive/2020/03/coronavirus-covid19-xenophobia-racism/607816/> [13.04.2020].

^{xii} *Idem, ibidem.*

^{xiii} See Joseph H. Carens, ‘Who should get in? The ethics of immigration admissions,’ *Ethics & International Affairs*, vol. 17, no. 1, April 2003, p. 1.

^{xiv} ‘General Comment no. 15: The position of aliens under the Covenant,’ 1986, § 5, available at <https://www.refworld.org/pdfid/45139acfc.pdf> [14.04.2020].

^{xv} ‘General Comment no. 27: Freedom of movement (article 12),’ 1999, § 21.

^{xvi} ‘General Comment no. 27...,’ *cit.*, §§ 13-15.

^{xvii} See e.g. *Moustaquim v. Belgium*, no. 12313/86, § 43, 18 February 1991.

^{xviii} See e.g. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, 12 October 2006; *Sharifi and Others v. Italy and Greece*, no. 16643/09, 21 October 2014; *M.A. and Others v. Lithuania*, no. 59793/17, 11 December 2018.

^{xix} See *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012.

^{xx} See *Bulletin # 1 Coronavirus Pandemic in the EU: Fundamental Rights Implications, cit.*, p. 13. See also Bulgaria’s Country Report for FRA’s comparative study on the Coronavirus COVID-19 outbreak in the EU, p. 9, available at https://fra.europa.eu/sites/default/files/fra_uploads/bulgaria-report-covid-19-april-2020_en.pdf [14.04.2020].

^{xxi} The biggest caveat here is the principle of non-refoulement, which must be complied with per Article 78(1) of the Treaty on the Functioning of the EU and Article 19(2) of the Charter of Fundamental Rights.

^{xxii} Some last even longer, in clear breach of the Schengen Borders Code, as noted by Alena Kudzko, referring to the introduction of internal borders by Germany, Austria, Denmark, Sweden, France and Norway, following the 2015 migration crisis. See Alena Kudzko, ‘Return to borderless Europe after COVID-19 will be difficult but not impossible,’ *cit.*

^{xxiii} A similar definition of ‘threat to public health’ is provided in the Schengen Borders Code [Article 2(21)], which allows/requires States to bar entry at external borders to third-country nationals who are considered to be a threat to public health [Article 6(1)(e)].

^{xxiv} ‘Communication from the Commission to the European Parliament, the European Council and the Council COVID-19: Temporary Restriction on Non-Essential Travel to the EU,’ COM(2020) 115 final, 16.3.2020.

^{xxv} ‘COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services,’ C(2020) 1753 final, 16.3.2020.

^{xxvi} See Dionyssi G. Dimitrakopoulos and Georgette Lalis, ‘The European Union’s reaction to the COVID-19 reaction: A preliminary assessment,’ available at <https://blogs.lse.ac.uk/europpblog/2020/03/27/the-european-unions-reaction-to-the-covid-19-pandemic-a-preliminary-assessment/> [15.04.2020].

^{xxvii} ‘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,’ C(2020) 2050 final, 30.3.2020.

^{xxviii} Article 13 of the Règlement grand-ducal du 18 mars 2020 portant introduction d’une série de mesures dans le cadre de la lutte contre le Covid-19, available at <http://www.legilux.lu/eli/etat/leg/rgd/2020/03/18/a165/jo> [15.04.2020].

^{xxix} Despacho no. 3863-B/2020, of 27 March 2020, available at <https://dre.pt/home/-/dre/130835082/details/maximized> [15.04.2020].

^{xxx} Detailed information on repatriation operations by country is available at https://eeas.europa.eu/headquarters/headquarters-homepage/76203/good-stories-consular-support-eu-citizens-stranded-abroad_en [15.04.2020].

^{xxxi} For a similar take, see Frédéric Bouhon *et al.*, ‘States’ reactions to COVID-19 pandemic: An overview of the Belgian case,’ *International Journal of Constitutional Law Blog*, 14 April 2020, available at <http://www.iconnectblog.com/2020/04/states-reactions-to-covid-19-pandemic-an-overview-of-the-belgian-case> [15.04.2020].