

Gloria Zuccarelli

**Illegal Immigration and  
Refugeehood at the Time of  
Covid-19: Rethinking Amnesties  
and Closed Borders**

I. INTRODUCTION

On June 24, 2020, the European Commission gave a notice stating that “The Covid-19 pandemic has impacted procedures to apply for and obtain residence and work permits, as government offices have reduced their services or closed during this time [...] and economic uncertainty related to the pandemic may have an impact on demand for work permits”.<sup>1</sup> The same source recognized the existence of an increase in discriminatory and violent acts against immigrants and people of foreign ethnic backgrounds. Moreover, the condition of invisibility that characterizes illegal immigration<sup>2</sup> makes difficult to track the disease among this group (Pelizza *et al.* 2020).

This paper is meant to address the subject of illegal immigration and refugeehood in Europe during the Covid-19 pandemic,<sup>3</sup> a topic that has been largely put in the background of public discourse. It does so by discussing and defending two theses. The first is that Member States, at least during the Covid-19 pandemic,<sup>4</sup> ought to regularize illegal immigrants, by the tools of amnesties and sanatoria.

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<sup>1</sup> Retrievable at <https://ec.europa.eu/migrant-integration/news/Covid-19s-impact-on-migrant-communities>.

<sup>2</sup> Meaning that states do not know their exact numbers, nor where they are or live.

<sup>3</sup> Covid-19, or Coronavirus Disease, or SARS-CoV-2 is an infectious disease caused by a newly discovered coronavirus that causes respiratory and other symptoms. At the time the paper is written, there is no specific treatment (WHO 2020a) and vaccines are being tested (WHO 2020a).

<sup>4</sup> In the *EU context*, a regularizing state procedure by which illegally staying third-country nationals are awarded a legal status.

This holds true for all of the irregular immigrants that would already be in Europe when this decision would be made. I also argue that the same Member States, due to the pandemic, are justified and even morally required to exclude would-be immigrants, and even to suspend new asylum applications for potential would-be refugees illegally entering EU Member States.<sup>5</sup>

There are four premises behind this non-ideal and public interest-focused approach: the first is that, during emergencies, states can take urgent and coercive decisions (Dyzenhaus 2017), even if the citizens are not fully represented by them. The second is that the Covid-19 pandemic constitutes an emergency that allows states to take coercive actions even with reduced democratic representation. During the first European outbreak, the pandemic has had the most severe impact in Spain, Italy, Germany and France.<sup>6</sup> Nonetheless, this paper will not address just these four countries, for the simple reason that it is not predictable where the next outbreaks will be and how the spread of the disease will evolve in the next months. At the time this paper is written, the second outbreak is also hitting Austria, Belgium, and other European countries. Therefore, the third premise is that I suggest we look at the European Union as the ultimate coercive supranational authority rather than leaving choice and responsibility to single Member States. The fourth premise gives an explanation to the decision to consider illegal immigrants and asylum seekers as only partly part of the same arguments.

The first thesis proceeds by way of two arguments that appeal to morality and to the public interest constraint (Duff 2018) that states need to meet. The morality argument recognizes the right of the irregular immigrants and asylum seekers as an extreme vulnerable group to be protected on two levels. First, to be protected from the epidemic, which represents a condition that exacerbates their vulnerability (IOM 2020; Sanchez, Achilli 2020), and second, by the exploitation that may follow from such a period of severe crisis. The public interest-based argument supports the idea according to which regularizing all the immigrants through amnesties (Epstein, Weiss 2001) is necessary to benefit

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<sup>5</sup> In the course of the paper, I will refer to them as *potential/alleged* asylum seekers or *potential/alleged* refugees. This formula indicates those people who enter the EU territory illegally and, only after arriving in that territory, ask for international protection.

<sup>6</sup> As of 28<sup>th</sup> June 2020, data available at <https://www.ecdc.europa.eu/en/cases-2019-n-cov-eueea>.

and protect the whole European community, by facilitating the tracking of the contagion, in order to contain it. Indeed, the EU Member States and the European Union should have the ultimate duty of promoting social protection.<sup>7</sup> The reason why EU Member States ought to use long term solutions, such as amnesties and sanatoria, as a tool for dealing with irregular migrants and not, for example, temporary regulations, is that this emergency is likely to last over time, and we cannot know exactly how much time. This uncertainty element makes amnesties the best tool available for states to face this issue, because it represents a long-term solution that in this case is preferable to a short-term one, like temporary work permits. This consideration has moral and practical implications. On the one hand, countries would not be exploiting migrants only for a limited period of time and then reject them when the pandemic concludes. On the other hand, illegal migrants would not choose to go public by making themselves trackable if they knew that this would make them vulnerable to repatriations and/or detention in future.

The second thesis supports the idea that these countries have the right to exclude would-be immigrants and refugees (Fine 2013; Wellman, Cole 2011), but they are also required to close their borders to those who enter European territories illegally until the emergency has been contained. The argument is, once again, twofold. Firstly, the fact that these states are justified in excluding would-be immigrants is an argument that appeals to the right of a state to close its borders. In this case, it applies also to potential refugees and asylum seekers because of the emergency situation that Europe is living through (Miller 2016). This does not apply to refugees and asylum seekers legally border-crossing. In the second place, the paper will proceed by supporting the thesis according to which EU Member States have the duty to close their borders, again by appealing to the public interest constraints and special obligations that a democratic state needs to meet. For there is the risk of new sites of contagion and creating new ‘invisible’ illegal migrants.

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<sup>7</sup> As stated by the European Commission in the *European Pillar of Social Rights*, retrievable at [https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles\\_en](https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en).

## 2. PREMISES

I shall make explicit four premises.

(A) Unlike the Lockean position (Locke 1988), this paper does not argue that in a state of emergency the sovereignty comes before the law and, therefore, cannot be constrained by the law. Quite the opposite. During emergencies, I argue that states can take urgent and coercive decisions, even if the citizens are not fully represented by those actions. This means both that states are *allowed* by international law to use emergency powers (OHCHR 2020a) and sometimes even by constitution (Binder *et al.* 2020), and that the same states are *justified* in doing so (Armitage 2002; Dyzenhaus 2017; Rossiter 2017). After the declaration of an emergency, a state creates a new normative order in which governments “May act in ways that in ordinary times would be illegal”, and may also “Claim legal authority to operate outside of the law, if one understands law to mean the rule of law as it applies in ordinary situations” (Dyzenhaus 2017, 804). This cannot mean the suspension of all human rights. The coercive power needs to be proportionate to the threat faced and “Emergency powers should be used with the parameters provided by international law” (OHCHR 2020b).

(B) The Covid-19 pandemic constitutes an emergency that allows states to take coercive actions even with reduced democratic representation. On the one hand, *de facto*, Member States’ governments have already adopted emergency measures that also include migration policies (Binder *et al.* 2020) and, therefore, nothing prevents the implementation of new and more substantive measures.<sup>8</sup> On the other hand, the reason why the Covid-19 pandemic can be considered an issue that justifies emergency measures should be obvious if we analyze the severe consequences it has been having on the population and on the states. A high mortality rate especially in older populations<sup>9</sup> and a severe impact on states’ health care

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<sup>8</sup> Just few examples: Italy has declared the state of emergency on January 31<sup>st</sup>, 2020 (Binder *et al.* 2020); France declared on March 18<sup>th</sup>, 2020 the state of health emergency (Momtaz 2020); Spain declared the state of emergency on March 14<sup>th</sup>, 2020 (Colson 2020).

<sup>9</sup> According to the John Hopkin University’s Coronavirus Resource Center, the mortality rate in Italy is around 13,9%, in Spain 8,3%, in France 12% and in Germany

services – to the point of potential collapse – are just two examples of this (Bloche, Wikler 2020; Horowitz 2020; WHO 2020b).

(C) In this paper I suggest that the single EU Member States – only until the state of emergency related to the Covid-19 pandemic is concluded – should not be allowed to take autonomous decisions in regard of migration policies. For the European Union should be considered as the ultimate coercive authority. Naturally, the design of the EU and of the European Parliament does not permit to take direct decisions on behalf of single sovereign countries. Therefore, this paper does not go so far as to refer to the EU as a supranational entity with identical power of sovereign countries, and *over* sovereign countries. Nonetheless, it would be able to intervene coercively by the means of sanctions or incentives to pursue the policies of amnesties and closed borders that this paper is arguing for. Moreover, I prefer to focus on the EU as a kind of coherent political unit rather than single Member States, because I consider the urgent need of a common plan to face both the Covid-19 pandemic and irregular migration. There are at least two alternatives to this approach. The first is to consider the European Union a supranational entity that takes the power over its sovereign countries. The second is to leave all the decisions to Member States. Both these alternatives, I argue, are to be discarded, in terms of efficiency and fairness. In terms of fairness, to leave each Member State free to choose for its own nation in terms of immigration policies leads to national egoisms even in emergency-free times. Now, during this emergency, this option would leave countries of arrival alone in managing the situation. Moreover, focusing on single Member States would create difficulties for the argument, namely the Dublin agreements and other kinds of state obligations towards the EU. On the other hand, a focus on the European Union as a supranational entity with identical power of sovereign countries, and even *over* sovereign countries, would be problematic to implement because the EU is not equipped for such a series of actions at the moment. It is more equipped to put in place a policy of heavy sanctions and incentives to pursue a common plan in terms of immigration policies.

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4,1%. Data retrievable at <https://coronavirus.jhu.edu/data/mortality> (last update: 17<sup>th</sup> August 2020).

In conclusion, it is the EU that should have the final say, declare a binding state of emergency and make the program that I am going to defend in the forthcoming pages an obligation for single Member States.

(D) The fourth premise regards the juxtaposition of the group of irregular migrants<sup>10</sup> and of the group of asylum seekers.<sup>11</sup> It may seem that this paper treats them as a single group, but it does not. There are important practical and normative differences between the group of asylum seekers and the one of irregular migrants. However, I decided to put them together in the forthcoming arguments because in some cases the two groups have overlapping experiences. Moreover, the boundaries between these two groups often fade over time. For further information on the ways that the experiences of these two groups overlap, please refer to the next paragraph. Here I would like to focus here on what I mean by saying that the boundaries between the irregular migrants and asylum seekers groups sometimes fade over time. Recalling the definition given in the footnote, an irregular migrant is one person that transits or arrives in a foreign country by irregular or illegal means without carrying valid documents. As the European Parliament recognizes, asylum seekers' entry "Into EU territory is usually irregular, due to a lack of necessary documentation and/or the use of unauthorized border-crossing points".<sup>12</sup> Furthermore, once a state rejects their asylum application and appealing is not an option anymore, asylum seekers receive the expulsion letter. If the asylum seeker does not leave the country when given notice, then that individual turns into an illegal migrant. This considered, and being aware of the existing oscillation between them, the paper will not treat asylum seekers and illegal migrants as a single group.

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<sup>10</sup> I use the terms 'illegal', 'irregular' and 'undocumented' synonymously when referring to migration. For an illegal migration is "The movement of a person to a new place of residence or transit using irregular or illegal means, without valid documents or carrying false documents" (European Commission, 'Irregular migration', *Migration and Home Affairs – Glossary*, available at: [https://ec.europa.eu/home-affairs/e-library/glossary/irregular-migration\\_en](https://ec.europa.eu/home-affairs/e-library/glossary/irregular-migration_en)).

<sup>11</sup> An asylum seeker is "A non-EU national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken" (European Commission, 'Asylum seeker', *Migration and Home Affairs – Glossary*, available at: [https://ec.europa.eu/home-affairs/e-library/glossary/asylum-seeker\\_en](https://ec.europa.eu/home-affairs/e-library/glossary/asylum-seeker_en)).

<sup>12</sup> See <https://www.europarl.europa.eu/thinktank/infographics/migration/public/?page=intro>.

### 3. TWO ARGUMENTS IN FAVOR OF LONG-TERM AMNESTIES

The thesis defended here refers to immigrants illegally staying in a European country at the time of Covid-19, and asylum seekers either waiting for an answer to their application or appealing to a negative answer. For irregular migrants, this paragraph defends the idea that there are two arguments in favor of long-term amnesties. The same two arguments are used for defending the idea that asylum procedures should not be suspended for those applicants who are in the European territory. If the application succeeds, the asylum seeker becomes a refugee. If the applicant is rejected even on appeal, then he becomes an irregular migrant, who falls within the policy of sanatoria. This means that also all detention centers designed and implemented for illegal immigrants ought to be closed, and people who are detained ought to be released and regularized. I argue that EU Member States have the duty to regularize those immigrants not just for a limited period of time, but rather on a long-term horizon. The only policy that can guarantee a sufficient long-term solution for this issue is the tool of legalizations, amnesties, and long-term regularization programs.

The terms regularization program, regularization drive, amnesty and legalization are used similarly. They all refer to a process by which a country allows aliens in an irregular situation to obtain legal status in the country. Typical practices include the granting of a regularization (also known as legalization or amnesty) to aliens who have resided in the country in an irregular situation for a given length of time, fulfill certain requirements (such as employment and no criminal record) and are not otherwise found inadmissible. (Sunderhaus 2007)

Only the first part of this definition is considered valid here. Although in normal circumstances<sup>13</sup> it makes sense to put some limits on the people who are allowed to be legalized and regularized, namely no criminal record or employment, I find that these requirements are no longer admissible now, at the time of Covid-19. There are two main arguments in defense of this thesis, both answering to the question: Why states ought to regularize, in a long-term horizon, all illegal migrants? The first argument relies on morality

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<sup>13</sup> By ‘normal circumstances’ I mean times where there are no states of emergency and, in particular for the purposes of this paper, when there is no Covid-19 pandemic going on.

and on the natural duties that we owe to persons simply *qua* persons (Jeske 2019). The second is a public interest-based argument.<sup>14</sup> I will discuss both in that order.

First, what does it mean to make an argument based on morality and acting morally? Moral reasoning is a kind of practical reasoning. And it is a type of reasoning<sup>15</sup> that is directed towards deciding what to do and that, specifically, “Involves forming judgments about what one ought, morally, to do” (Richardson 2018). So, the question becomes: What are the policies EU Member States ought, morally, to implement with regard to irregular migrants and asylum seekers?

Before answering, I shall give an idea of the conditions under which asylum-seekers and irregular migrants are confined in EU during the pandemic. That is, what it means to be an irregular immigrant hiding from authorities and living in the streets. Or waiting in detention centers to be returned to the country of origin. Or an asylum seeker still waiting for an answer to the international protection application process. Or even appealing to a negative response. As the Platform for International Cooperation on Undocumented Migrants (PICUM)<sup>16</sup> recognizes, “Being undocumented in Europe today means being among those most exposed to Covid-19, and among the least protected” (PICUM 2020a, 1), and “For undocumented people, one of the most marginalized communities in Europe, the pandemic and the lockdown measures have exacerbated pre-existing conditions of social exclusion and deprivation” (PICUM 2020b). An example of the way

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<sup>14</sup>This paper takes those two arguments as separate, primarily because I want to put the focus on the fact that the idea of regularizing immigrants is not only matter of justice toward them, it is also of interest of anyone who is part of the European community. Even though there are cases in which what is morally required and what a (democratic) state ought to do in order to satisfy the common good, or the public interest of its own citizens do overlap, there are also other cases where the public interest takes precedence over pure morality (an issue that will be revived in the forthcoming paragraph).

<sup>15</sup> Reasoning is defined as “Active or explicit thinking, in which the reasoner, responsibly guided by her assessments of her reasons and of any applicable requirements of rationality, attempts to reach a well-supported answer to a well-defined question” (Richardson 2018).

<sup>16</sup> PICUM is an NGO that aims at promoting human rights of irregular migrants in Europe. This is its website: <https://www.google.com/search?q=picum&coq=picum&aqs=chrome.0.69i59j69i57j69i59j69i60l2.1159j0j7&sourceid=chrome&ie=UTF-8>.



that pre-existing conditions are exacerbated by the pandemic is given by FRA (The European Union Agency for Fundamental Rights). In its report, the agency (FRA 2020) noted that European detention centers in Cyprus, Italy, Greece, and Malta, as well as in informal camps in France are currently in deplorable conditions: they are overcrowded, a factor that makes the prevention of the infection impossible. The bulletin also warns, a lack of accurate information about Covid-19 and relative measures contribute to this situation across all Europe. Moreover, “In Italy, detainees started a hunger strike to protest against the risk of the virus spreading in the center [...] In Belgium, some centers started releasing detainees” leaving them with no assistance and nowhere to go (*ibidem*, 9). The Council of Europe (2020) also recognizes the need for an alternative to detention centers, which should be closed. Besides, the number of asylum applications during spring 2020, when the pandemic was at its highest level, decreased by 90% compared to the pre-Covid level. On the one hand, this is due to the significant decrease of illegal border crossing, but, on the other hand, the reason relies also on the suspension of most of the procedures (EASO 2020).<sup>17</sup> In these regards, as UNHCR (2020) effectively states, “Where new asylum claims are not registered, people’s stay is not regulated, and they have no access to basic assistance and health services”.<sup>18</sup>

There is also another side to the story, that should be considered an important feature of illegal immigration in the EU. For illegal immigrants often work in our houses, in our farmlands picking up fruits, vegetables as well as working the land, and take care of our children along with the elderly (PICUM 2020a; 2020b). Let me begin with care workers. If they are illegally staying in the European territory, they do not work under contract. Therefore, during the Covid-19 outbreak and especially during this late winter and spring’s lockdowns they were left at home, because they were not allowed to leave their homes to go to work in private houses, since, without a legal contract, they could not demonstrate the necessity of their movements, therefore risking heavy fines. Secondly, another particularly vulnerable group of workers is constituted by irreg-

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<sup>17</sup> The acronym stands for European Asylum Support Office.

<sup>18</sup> See: <https://www.unhcr.org/news/press/2020/4/5ea68bde4/coronavirus-unhcr-of-fers-practical-recommendations-support-european-countries.html>.

ular immigrants working in farmlands. For agriculture is among the economic sectors in Europe that depends most heavily on the exploitation of undeclared labor, especially for seasonal activities of irregular migrants (European Commission 2017). On June 1<sup>st</sup>, Italy initiated amnesties for irregular migrants in order to facilitate care work and work in farmlands, since there was the fear of a lack of labor force in these two fields. In particular, it was feared that Italian agriculture would suffer severe damage without enough workers to distribute vegetables and fruits (Borrillo 2020; Giuffrida 2020; Jattoni Dall'Asén 2020; Tomasello 2020). Even though this measure can be considered a positive example of good intentions, in fact it was a failure: in a country where immigrants in an irregular position are estimated to amount at 600,000, only 80,000 have applied, 88 per cent of whom are care workers (Coluzzi 2020). Thus, farm laborers are the largely absent from this measure. This measure was a failure caused by the decision of leaving the responsibility of application for regulations to employers, the same employers that were exploiting them (*ibidem*).

It now shall appear clear that these two groups, irregular migrants and asylum seekers, are very vulnerable to lack of information, prevention, and therefore to infection, adequate treatment and exploitation (Cham 2020; Jauhiainen 2020; Nanthini 2020). I argue now it is a moral duty to protect the vulnerable ones, because vulnerability gives rise to moral obligations (Mackenzie *et al.* 2014). I embrace here the line of thought of Goodin (1985), who argued that vulnerability is itself a primary source of moral obligations, and I disregard the idea of vulnerability as a “Signal that alerts us to obligations arising from other moral claims, such as those of harm or need” (Mackenzie *et al.* 2014). I find, indeed, that it does not suit the argument defended in this paper. For it is not important that every irregular migrant and asylum seeker actually suffer from harm and are in desperate need. In order to be subjects of moral obligations it is sufficient that they are particularly *vulnerable* to harm and need, and that they will probably suffer from it. It is their vulnerability that gives rise to the Communitarian responsibility of protection, not the actual amount of harm and need, which, by the way, is difficult to measure.<sup>19</sup> Thus, Mem-

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<sup>19</sup> A difficulty would be where to track the line between the ‘acceptable’ amount of harm and, instead, the amount of harm that makes states’ obligations arise.

ber States have the duty to protect the vulnerable “As a matter of protecting those people whose vital interests – food, clothing, adequate shelters, self-respect and civil liberties – are vulnerable to our choices and actions” (Goodin 1985). Irregular migrants and asylum seekers fall perfectly well into this characterization. Vulnerability is a relational concept. It implies that some agents (a person, a state, a metaphorical notion as a particular action) can cause or prevent this harm. Therefore, it means that the duty to protect the vulnerable, in this case irregular migrants and asylum seekers, arises when the harm to be protected from is avoidable because it depends on the choices of some other agents. This is particularly true when it comes to health emergencies, which more than anything else have uncovered and reminded us of the overall human vulnerability to threat and harm. Although it is true that nobody, nor any rule or policy is capable of making sure that EU residents do not get infected by the SARS-Cov-2 virus, the consequences of neglect in protecting the irregular migrants and asylum seekers are avoidable. Vulnerability arising from overcrowded detention centers as well as refugee camps is avoidable by releasing irregular migrants from detention centers and by opening more refugee camps.

In case of a third outbreak and new lockdowns across European countries in early 2021,<sup>20</sup> which would lead to new restrictions in movements, it is also avoidable to reduce irregular care workers to extreme poverty, by providing them the possibility to work under contract and to prove the necessity of their movements, in case for example they assist elderly people. The elimination of the irregular work force would also reduce the exploitation of farm laborers, which has been exacerbated by the emergency (Coluzzi 2020). As Goodin (1985) stated, vulnerability is an agent and object specific notion: in this paper, the objects of vulnerability are asylum seekers and irregular migrants, and the agents, who can choose to perpetrate or act on it, are the EU Member States. Besides, to argue that Member States have the duty to act on irregular migrants and asylum seekers’ vulnerability – which is grounded

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<sup>20</sup> At the time this paper was written, EU Member States are living through the second wave of contagion and many of them are experiencing new lockdowns and restrictions of movement (Amaro 2020). This said, many virologists and politicians predict a third wave of contagion and new restrictions of movement between February and March 2021. See: [https://www.ansa.it/sito/notizie/topnews/2020/11/19/bertolaso-tra-febbraio-e-marzo-terza-ondata-Covid\\_5e3df345-5141-4aea-a9d7-54303be3c7e7.html](https://www.ansa.it/sito/notizie/topnews/2020/11/19/bertolaso-tra-febbraio-e-marzo-terza-ondata-Covid_5e3df345-5141-4aea-a9d7-54303be3c7e7.html).

from their vulnerability itself – means to state that Member States can be *responsible* for their choices and their actions. It may appear trivial to remind the reader that protecting asylum seekers and refugees is a primary responsibility of the states that signed the 1951 Geneva Convention, but people whom have had their asylum applications rejected are under the responsibility of protection of their basic human rights of the state they are residing in,. Besides, if it is true that “The duty to protect the vulnerable falls on anyone who is in a position to assist but most especially on those to whom a person is most vulnerable” (Mackenzie *et al.* 2014, 13),<sup>21</sup> it is a duty of EU Member States to protect irregular migrants and asylum seekers, because they are extremely dependent on them and vulnerable to their actions as well as choices.

The second argument in defense of massive use of amnesties for irregular immigrants and asylum seekers relies on the public interest constraint that a democratic state needs to address. As recognized by Douglass (1980), the notion of public interest emerged from the concept of ‘common good’ as an innovation of liberalism. Even though the two concepts are commonly considered as overlapping, the scholar wants to draw a distinction between them. The common good has historically been considered as the ultimate goal of a state. However, this concept not only has a political meaning, narrowly speaking, but also consists in promoting human well-being, and the government is a mean to obtain that. Moreover, Douglass says that the *common* is used to indicate a community rather than a collection of individual goods. The public interest notion, on the other hand, carried individualist connotations. Brian Barry (1965) defined the public interest as the interests shared by all members of society in their roles as citizens. Therefore, here, I use the two terms interchangeably, since they are both political ideas at their core and because, for the case I am considering in this paper, the public interest of states *is* the common good. In other words, what is in the interest of each EU Member State, as democratic states in relation to one another and with their citizens, coincides with the common good they should be willing to pursue. In this sense, members of the EU have a special obligation to care about what is in the interest of one another in virtue of the fact that they stand in a certain relationship (Waheed 2018).

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<sup>21</sup> See also: Goodin 1985 and Fineman 2010.

Therefore, the original question becomes: What kind of migration policy would better serve the public interest of EU Member States' residents? During the Covid-19 pandemic the public interest of EU Member States should be – among others – (a) to protect their citizens from the infection and from threats to social order, (b) to face economic difficulties and (c) to promote welfare. Migration policies can affect, for better or worse, all these three elements. Therefore, I argue, long-term amnesties and policies of regulation can affect them positively. I will survey how right here.

- (a) Covid-19 causes sever health consequences to the population and, therefore, states need to put up every possible measure to contain the infection. I quote here the effective statement by the NGO Amnesty International (2020a): “Overcrowded camps and detention centers will become new epicenters unless urgent action is taken”. It appears clear that if refugee camps and detention centers turn into Covid-19 clusters every citizen and the whole European community would be affected. I do not concentrate too much on this aspect, since it appears trivial the danger that comes from not being able to properly manage these shelters. Therefore, a policy of amnesties to all irregular immigrants would mean the possibility of releasing the administratively detained irregular migrants from detention centers – since these would be closed. Moreover, this would also mean the end of the issue of overcrowded camps, where asylum seekers are currently waiting for a response for their application or their appeal.<sup>22</sup> In order to serve this purpose, detention centers could be converted into new refugee camps: the more structures there are, the less they will be overcrowded. Moreover, migrants illegally present in European territory would have no reason to hide from the authorities anymore, which would facilitate the overall tracking of the infection. In Italy, it is estimated that in 2017 illegal migrants present in the territory amounted between 500,000 and 700,000 (Montrella 2019) and, in 2019, at 562,000.<sup>23</sup> During a health emergency more than ever, invisible

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<sup>22</sup> Obviously, there is also the need of other measures for ensuring that these people have somewhere to go and to live, a specific program of work etc. however, this goes further the purposes of this paper and it will not be addressed.

<sup>23</sup> <https://www.ismu.org/comunicato-stampa-xxv-rapporto-ismu/>.

- illegal migrants that are nearly impossible to track and the fear that this can bring to the established population can seriously endanger the delicate equilibrium of social order, especially if combined with a delicate topic like migration. Moreover, prostitutes working on the streets or at home, whether ciswomen or transgender, are for a large part constituted by migrants illegally present in the European territory and often also trafficked (Crowhurst 2012; Massari 2009; Robinson 2006). Giving them the possibility to stay legally in European countries would make it easier for them to have access to health care services and swabs. This would also provide additional protection to the nearby citizens and residents.
- (b) There is a need to face the severe economic crisis caused by lockdowns, social distancing and restriction of movements. Legalizing irregular immigrants will for sure not save Europe from the economic crisis, but it can meliorate some issues related to seasonal working necessities. According to the European Commissioner for Jobs and Social Rights Nicolas Schmit, “Each year, hundreds of thousands of seasonal workers help to underpin hugely important sectors of the EU’s economy, such as food and agriculture” (European Commission 2020).<sup>24</sup> This spring and summer, as already noted, Italian agriculture was in peril. Indeed, Italy was at risk of throwing away huge amounts of fruits and vegetables without being able to distribute them, due to the fact that there would have been nobody to pick them up, which would have worsened the effects of the shutdowns (Giuffrida 2020; Jattoni Dall’Asén 2020; Tomasello 2020). That is why the country thought it would have been useful to give massive amnesties to irregular migrants, even with the limits already highlighted. With good management of this tool there would be more low-cost regular labor. For it means that the agricultural necessities would be met and illegal employment, which is damaging for the welfare system, would be more efficiently faced.
- (c) Care work constitutes an invisible, yet essential welfare, that in Italy consists 70% of foreigners, mostly from Ukraine, Philippines, Moldova and Peru. It is estimated that there are over one million caregivers irregularly working in Italy this year (Ambrosini 2020).

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<sup>24</sup> See the press release: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1342](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1342).

Many caregivers working in Europe are undocumented migrants or migrants working illegally, “Because employment within private households can easily be concealed, migrants in an irregular situation are often found among home-based workers” (King-Dejardin 2019, p. 7). The problem is that during the lockdowns experienced in spring and fall across Europe, this work could not be concealed as easily as before. Under restrictions in freedom of movement and the prohibition to leave their houses, those migrants in irregular situations lost their jobs, and families in the need for caregivers for children or the elderly were deprived of essential help. During the second wave and the subsequent second series of lockdowns of this autumn, as it was feared, the problem recurred. The same would likely happen during the predicted third wave. We can face this issue by permitting care workers to show a regular contract that demonstrates that their movements are necessary. Evidently, those irregular immigrants who would not have a regular income even after the sanatoria policy is in place, would be entitled to financial support for which targeted economic measures would be needed.

In conclusion, there are two main arguments in favor of amnesties. The reason why I suggest maintaining a distinction between long term solutions for irregular migrants and the recognition of the status of refugees for asylum seekers – rather than amnesties for both groups – relies on the peculiarity of asylum claims. In particular, I recognize the centrality of the principle of non-refoulement – stated under the 1951 Geneva Convention<sup>25</sup> – that forbids states to return refugees to their home countries where they would be at risk of persecution, a type of protection that is not ensured by amnesties. The need for long term solutions is grounded in the acknowledgment that we do not know how long this health emergency will last, even though we do know that it is likely it will last over time.<sup>26</sup>

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<sup>25</sup> “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion” (UNHCR 1951, Article 33(1)).

<sup>26</sup> See <https://news.un.org/en/story/2020/08/1069392>.

#### 4. THE RIGHT AND DUTY TO EXCLUDE: WHAT IS OWNED TO CITIZENS?

The second thesis that this paper defends regards would-be immigrants and asylum seekers. Again, this argument is twofold: on the one hand, in times of emergency EU Member States *have the right* to close their borders and to suspend asylum applications to those who illegally enter the EU territory; on the other hand, they *ought* to do so. By the phrase *until the emergency is over*, I mean until the state of emergency is declared to be over. That is, until there is a speech act<sup>27</sup> that declare the end of the Covid-19 emergency.

The first part of the argument, that Member States have the right to close their borders, is a largely addressed field and, therefore, I will spend less time on it. It is certainly not new to argue that a sovereign state has the right to exclude would-be immigrants (Miller 2005; Miller 2008; Miller 2016; Fine, Sangiovanni 2014). It is a given that most of the normative literature on closed borders refers to economic migrants, or at least excludes the category of forced migrants and refugees (Fine 2013; Fine, Sangiovanni 2014), since it is largely recognized that states have more stringent obligations toward refugees and asylum seekers than toward economic migrants (Miller 2016). However, only a few scholars have extended this right to them even when it comes to state of emergency situations (Ekins 2019; Wellman, Cole 2011). Instead, other authors give hints for a closed border argument applied to would-be asylum seekers during emergencies. For example, in his recent work *Strangers in our Midst*, David Miller (2016), in defending the closed borders arguments, still maintained that it is harder, if not impossible, to justify the exclusion of refugees. Nonetheless, he stressed out how the obligation to rescue or carry out rescues for a state is not illimited and unconditional. Accordingly, “The duty that is imposed aims to safeguard the urgent interests of the victim without placing an unacceptable burden on the rescuer” (*ibidem*, p. 78). The point is precisely that. I now argue that Member States have the right and duty to not let them arrive in EU territory. In the case of

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<sup>27</sup> As a very simplistic definition, a speech act is an action that is performed with the words, by the tool of speech itself (Austin 1975; Green 2007; Searle 1969). In this case, the EU by saying “The Covid-19-related state of emergency is over” is not only describing that there is no longer a health emergency going on, but it is also ceasing all the extraordinary measures that are in place.



the current Covid-19 pandemic, indeed, Miller's rescuer – EU Member States – would be carrying an unacceptable burden: the risk of an infection that becomes out of control. The point is not so much how many of the new arrivals are Covid-19 positive. That is to say that it is not necessary to the argument that the would-be immigrants and asylum seekers are an actual and demonstrated source of infection. It is sufficient that they significantly contribute to an overall confusion that would elevate the risk of an out-of-control contagion even further. Therefore, this risk does not rely so much on the numbers of Covid-19 positives among new arrivals, but rather on the risk of not being able to manage their reception or even the practical impossibility of managing their reception by following Covid-19 prevention guidelines. Indeed, at the height of the emergency, EU Member States cannot afford to create new invisibles, nor to have overcrowded camps or detention centers, for the reasons already explained above. As the European Parliament (2020) stressed, "The arrival of illegal immigrants with Covid-19 in Italy, Spain and Greece poses a risk to people's health and is causing social tensions"<sup>28</sup>. Would not it be enough if Member States opened new refugee camps? I would say that in times of emergency like the ones we are facing now, this idea that all Member States would be able and capable of setting in motion such policies is not realistic, due to economic and organizational limitations.

Following Fine and Sangiovanni (2014), who exclude refugees from their analysis, a state can justify the right to prevent would-be immigrants to enter its territory on the basis of four major grounds: the *freedom of association* argument, the *Kantian* argument, the *liberal nationalist* argument and the *special obligations* argument. Briefly, the first argument settles that states have a right of self-determination, right that includes the liberty to choose whom to associate with and, therefore, to exclude outsiders. The second argument assumes that "States have rights to control and regulate the territory over which they have jurisdiction, and then goes on to claim that this set of rights must also include the right to exclude" (*ibidem*, 200). The third argument values the special and distinctive connection that co-nationals have one another as well as their associated territory, and, therefore, they have the right to preserve their culture and their society. Moreover, the fellow

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<sup>28</sup> See: [https://www.europarl.europa.eu/doceo/document/E-9-2020-004190\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-004190_EN.html).

nationals have special obligations toward each other in virtue of being part of a certain community. The fourth and last argument “Claims that immigration can be restricted if it harms the domestic worse off” (*ibidem*, 205).

Thus, although arguing for the right and the duty of a state to reject would-be immigrants may seem trivial, the same cannot be said for potential asylum seekers and refugees. It is counterintuitive because there are special obligations toward them, precisely because of their condition of vulnerability, need and persecution. However, EU Member States have special obligations *also* to their citizens and, in general, to the people living within the European territory. It may seem that this argument is in contrast with the one based on a common-sense morality of the previous paragraph. I do not think so. While it is true that it may seem that morality suggests the EU to accept the most asylum seekers and potential refugees it can, given the dangers they face during the journey to Europe and in their home countries, there are two ways to tackle the problem. The first is to admit that even though there would be a moral obligation for EU Member States to admit would-be asylum seekers, admitting massive numbers of new arrivals would endanger European citizens, and that is unacceptable because of the special obligations EU Member States have toward their own. The balance tips in favor of internal special obligations. The second way to justify this kind of policy is to say that closing the borders to would-be asylum seekers illegally border-crossing at the heart of the Covid-19 emergency constitutes itself a moral obligation. I argue that if I adopt the argument according to common-sense morality used in the previous paragraph, this second way is not viable. For moral reasoning in a broad sense would tell us to protect the most vulnerable ones, and among this group there certainly are people risking death in the Mediterranean or while crossing land borders. A way to escape this issue may be to argue that only the people that are physically in the European territory are under EU Member States’ responsibility, and this group does not include people trying to (often illegally) cross European borders. Accordingly, it is only residents who are vulnerable to the EU Member States’ choices and actions, and it is only toward them that protection is due.

However, I find this line of reasoning fallacious. For all the 27 Member States have signed and rectified the 1951 Geneva Convention on refugees. It means that they do have responsibility toward whomever attempts to enter their borders, besides putting their lives at risk. As simple as that. More-

over, it is hard to justify the lack of responsibility toward potential refugees, at least for those who arrive from the Libyan coast. The European Union has indeed a clear responsibility toward the people escaping from infamous and inhuman Libyan detention centers, where people are starved, repeatedly raped and tortured (Amnesty International 2020b; Human Rights Watch 2020; Medecins sans Frontieres 2019). This is because at least one Member State – Italy – has been making and renovating agreements with the Libyan Coast Guard to hold migrants and to not make them leave toward the European coasts (Amnesty International 2020b; Human Rights Watch 2020).

The remaining option is the one according to which, during the Covid-19 state of emergency, when opting for trying to protect whomever is under their responsibility and EU residents,<sup>29</sup> EU Member States ought to put their residents first. This is because states have some specific and special obligations toward their residents, that are particularly relevant in times of emergency. As highlighted by Derek Parfit (1981):

Most of us believe that there are certain people to whom we have special obligations. These are the people to whom we stand in certain relations – such as our children, parents, pupils, patients, members of our own trade union, or those whom we represent. We believe we ought to help these people in certain ways. We should try to protect them from certain kinds of harm, and should try to give them certain kinds of benefit. Common-sense morality largely consists in such obligations. Carrying out these obligations has priority over helping strangers (Parfit 1981, 556).

Especially in times of emergency, EU Member States ought to comply to these obligations, protecting those whom they have a *special relation* with, before ‘helping strangers’, or to whom they still are in a relation. Recalling Fine & Sangiovanni’s interpretation of the special obligation argument, the current immigration policy “Would in fact make the domestic worse off even worse off than they otherwise would have been absent that policy” (206). It is clear how uncontrolled immigration during Covid-19 pandemic would harm the EU domestics, for the reasons I gave previously: it would create new invisibles, it would make it even more difficult to track the contagion and it would

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<sup>29</sup> The ‘resident’ category includes either citizens, those whom the amnesty policy applied and migrants that were already in a regular position before the advent of Covid-19 emergency.

create social tension.<sup>30</sup> The point is precisely that, given the peculiarity of the emergency, immigration during Covid-19 would not only harm the domestic worse-off, but everyone. This is because this is a health-related emergency, something everyone is exposed to. This associative duty is grounded on a contractarian and reversed Lockean kind of appeal to the notion of tacit consent in the political context (1988), in the sense that the European Union is obliged to comply with what is in the best interest of its residents. Hence, if it is true that an open immigration policy would damage European residents and that in time of emergencies the special obligations argument takes over pure morality, then it should appear clear that the EU Member States have the duty to close its external borders until the Covid-19 emergency is over.

I shall now make one important clarification. The arguments advanced in this paragraph apply only to economic immigrants and alleged would-be asylum seekers illegally border-crossing into European territory, and only them. My argumentation does not apply to asylum seekers *legally* border-crossing, by the means, for instance, of humanitarian corridors.<sup>31</sup> In this way, entrances are fixed quota and, therefore, more effectively manageable. It is, therefore, easier to imagine that controlled entrances do not contribute to that state of confusion that would contribute to making the state lose control over new arrivals.

## 5. CONCLUSIONS

This paper addressed the topic of immigration and refugeehood at the time of Covid-19. It did that by considering first the illegal immigrants and asylum seekers who are already present in the European territory and, second,

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<sup>30</sup> Taking Italy as an example again, few episodes demonstrate that, despite the attempts of minimalization from the government, there are risks connected to the mishandling of the reception procedures. Check: [https://www.ilmessaggero.it/italia/coronavirus\\_migranti\\_scappati\\_hotel\\_palermo\\_tunisini-5380771.html](https://www.ilmessaggero.it/italia/coronavirus_migranti_scappati_hotel_palermo_tunisini-5380771.html) and [https://bari.repubblica.it/cronaca/2020/08/07/news/matera\\_20\\_migranti\\_positivi\\_al\\_Covid\\_nel\\_centro\\_di\\_accoglienza\\_di\\_ferrandina\\_altri\\_14\\_sono\\_scappati-263986558/](https://bari.repubblica.it/cronaca/2020/08/07/news/matera_20_migranti_positivi_al_Covid_nel_centro_di_accoglienza_di_ferrandina_altri_14_sono_scappati-263986558/).

<sup>31</sup> Humanitarian corridors are an Italian reception program for asylum seekers and refugees. The list of possible beneficiaries of humanitarian corridors is screened by the Ministry of the Interior after receiving a first list of the cases most in need of protection. See: [https://www.esteri.it/mae/en/politica\\_estera/temi\\_globali/diritti\\_umani/i-corridoi-umanitari.html](https://www.esteri.it/mae/en/politica_estera/temi_globali/diritti_umani/i-corridoi-umanitari.html).

by imagining a European policy of closed borders. Regarding the first issue – how to face the problem of people waiting for an answer to their asylum claims or already appealing to their answer and people irregularly present in the European territory – I advanced two arguments in favor of a policy of amnesties, that I argued to be necessary either from a common sense morality point of view and from a public interest-based argument. Both of these two arguments were consistent with the proposed solution. Afterwards, the paper addressed the problem of would-be immigrants and asylum seekers illegally border-crossing. For I argued that, given the nature of the emergency Member States are facing, the massive and uncontrolled arrival of new potential asylum seekers and immigrants would put an excessive burden on European residents. Therefore, the special obligations that the EU and the EU Member States have towards their residents overcome the common-sense morality that would suggest protecting all vulnerable people with whom there is some kind of relation and toward whom they have some level of responsibility. This is because the EU is in a special relation – an economic, social and coercive kinds of relation – that it does not have with ‘strangers’ such as foreigners attempting to enter its borders. Given that illegal border-crossing would put its residents in danger, the EU ought to close its external borders until the emergency is declared over.

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