

INTRODUCTION TO THE SYMPOSIUM ON COVID-19, GLOBAL MOBILITY AND INTERNATIONAL LAW

E. Tendayi Achiume*, Thomas Gammeltoft-Hansen** & Thomas Spijkerboer***

As a result of the COVID-19 pandemic, international mobility all but ground to a halt by the second quarter of 2020.¹ Airline traffic dropped more than 70 percent, and thousands of grounded airplanes filled up the runways. All over the world, travel restrictions and quarantine measures are still in place at the time of this writing, and cross-border mobility remains largely shut down for all but the most essential forms of travel. Although some countries partially relaxed travel restrictions over the summer,² there can be no question that the pandemic has fundamentally reconfigured global mobility and migration, even if only temporarily. Amidst these shifts, this symposium documents and reflects critically on the implications of the COVID-19 pandemic for mobility and migration across international borders, on pertinent governance structures, and on the field of global migration and mobility law more broadly. A key hypothesis motivating the symposium is that COVID-19 has both laid bare and exacerbated the discriminatory and flawed nature of current international rules related to migration and global mobility. Hence, we have invited our contributors not only to reflect on the implications of current developments, but also to imagine alternatives and to consider the possibility that COVID-19 might represent a kind of “Stunde Null,” an at least temporary reset, for the terms of global mobility and migration law.

In 2017, Jaya Ramji-Nogales and Peter Spiro convened a group of scholars in a prior *AJIL Unbound* symposium³ to discuss the idea of “global migration law”—a new field of inquiry devoted to the study of “transnational movement of people broadly defined” and encompassing law at all levels, including “international, regional, bilateral, transnational, national, subnational, state, and non-state.”⁴ This symposium builds on that work at a moment of possible inflection in global migration. Inspired by the so-called “mobility turn” in migration studies, this symposium also broadens the focus to human mobility at large.⁵ We begin by offering a few reflections of our own before providing a brief overview of the contributions to the symposium.

* Professor of Law, UCLA School of Law, United States; Research Associate, African Center of Migration and Society, University of Witwatersrand, South Africa.

** Professor WSR in Migration and Refugee Law, iCourts Centre of Excellence; Faculty law, University of Copenhagen, Denmark.

*** Professor of Migration Law, Vrije Universiteit Amsterdam, Netherlands; Raoul Wallenberg Visiting Professor of Human Rights and Humanitarian Law at Lund University, Sweden.

¹ Danny Santos, [How Airports Globally are Responding to Coronavirus](#), AISLELABS BLOG (Mar. 27, 2020) (last updated May 4, 2020).

² [Travelling in Europe: Which Countries Have Border Restrictions in Place](#), Euronews (Sept. 29, 2020); Raphael Minder, [Southern Europe Opens its Doors to Tourists. Not Many are Coming](#), N.Y. TIMES (July 19, 2020).

³ [Symposium on Framing Global Migration Law](#), 111 *AJIL UNBOUND* 1 (2017).

⁴ Jaya Ramji-Nogales & Peter Spiro, [Introduction to Symposium on Framing Global Migration Law](#), 111 *AJIL UNBOUND* 1, 1-2 (2017). Their three-part symposium is a valuable introduction to multiple perspectives on the global governance of migration.

⁵ See, e.g., JOHN URRY, [MOBILITIES](#) (2007); Mimi Sheller, [From Spatial Turn to Mobilities Turn](#), 65 *CURRENT SOCIO.* 623 (2017); Thomas Faist, [The Mobility Turn: A New Paradigm for the Social Sciences?](#), 36 *ETHNIC & RACIAL STUD.* 1637 (2013). In the field of law, see Thomas Spijkerboer, [The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control](#), 20 *EUR. J. MIGRATION & L.* 452 (2018).

The Global COVID-19 Pandemic and Shifts in the Patterns and Governance of International Mobility and Migration

Since March 2020, trends in the patterns, politics, and governance of migration have changed. Lengthy stand-offs between states, each refusing disembarkation, are no longer reserved for irregularly arriving migrant boats and can now involve cruise ships with thousands of passengers and crew members locked at sea. Seasonal and other forms of labor migration have declined, affecting the livelihood of millions around the world and calling into question the capacity of many nations to sustain functions as vital as food production and public health care without foreign labor. For refugees and other forcibly displaced persons, COVID-19 has greatly exacerbated existing vulnerabilities, including food insecurity and loss of livelihood, and it has further diminished mobility and refuge opportunities. For some refugees and migrants, the pandemic has escalated xenophobic tension and resulted in violent attacks and climates of heightened intolerance.

A few countries have taken concrete measures to address the specific threat that the pandemic poses to migrants and refugees, especially those living clandestinely or confined to often overcrowded and makeshift camps and detention centers.⁶ Portugal, for example, decided in March 2020 to treat both irregularly staying migrants and asylum-seekers with pending cases as “residents,” thereby securing their access to welfare benefits, rental contracts, and free health care on par with nationals.⁷ Likewise, Côte d’Ivoire, the Central African Republic, and Guinea have each permitted entry for refugees despite general, COVID-based border closures.⁸ These countries offer evidence that national crisis need not inevitably result in heightened precarity for non-nationals, and that draconian or neglectful responses are in fact policy choices that reveal normative commitments and associated priorities.

COVID-19 has also prompted new and unprecedented forms of international movement. 2020 has seen a historic process of global return migration. Whether voluntarily or as a result of lost income and opportunities, self-identified “expats,” low-income labor migrants, students, tourists, and others living abroad have repatriated in large numbers. States with the capacity to do so scrambled to help secure access for their nationals on whatever flight routes or trains were still operating. But some groups, such as African⁹ and South Asian¹⁰ migrant workers in the Persian Gulf, have found themselves stranded and exposed to the pandemic, with little aid from either host or home governments.¹¹

At least in the short term, then, COVID-19 has more profoundly impacted global mobility and migration than anything else in our lifetime. Many of the changes may well be temporary. Nonetheless, the pandemic also holds the potential to fundamentally challenge and upend current mobility structures and migration law. The risk of future pandemics like COVID-19 may well prompt states to make significant regulatory adjustments. To the extent that these adjustments follow the regulatory logic deployed so far, states will likely expand existing programs

⁶ A whistleblower in the United States, for example, recently brought to light gross misconduct and medical neglect in officials’ treatment of detained migrants during the pandemic and alleged forced sterilization of migrant women at this facility. Rachel Treisman, [Whistleblower Alleges “Medical Neglect,” Questionable Hysterectomies of ICE Detainees](#), NPR (Sept. 16, 2020).

⁷ [Order No. 3863-B / 2020](#), Diário da República 2nd Series No. 62, at 387 (Mar. 27, 2020); see also [Order No. 5793-A / 2020](#), Diário da República 2nd Series, 1st Supp. No. 102, at 294 (May 26, 2020) (supplementing the first order by implementing a simplified procedure for examining applications for the granting and renewal of residence permits).

⁸ [Impact of COVID-19 on the Protection of Displaced and Stateless Populations](#), UNHCR Protection Note 1, 7 (June 2020).

⁹ Ben Hubbard & Louise Donovan, [Laid Off and Locked Up: Virus Traps Domestic Workers in Arab States](#), N.Y. TIMES (July 6, 2020).

¹⁰ Sebastian Castelner, [Gulf Workers Out of Cash Under COVID-19 Lockdown](#), ASIA TIMES (Apr. 24, 2020).

¹¹ In an example of judicial intervention on behalf of migrant workers at risk of such neglect, the Nepali Supreme Court held that the Nepali government bore a legal obligation to repatriate migrant workers who did not have the means to return on their own. See *Advocate Shom Prasad Luitel et. al v. Office of Prime Minister and Council of Ministers et. al.*, Order of the Supreme Court of Nepal, Case No. 076-FN-0558/076-WO-0940 (June 15, 2020).

regulating travel permissions (such as the U.S. and EU systems for visa-free travel) as well as programs designed to contain populations in their states of nationality (including programs of externalized migration control and biometric registration throughout the world). If states do proceed in reforming mobility practices and governance in anticipation of future pandemics, new technologies are further likely to play a significant role in driving the process. As proposals for immunity passports as an innovation that would permit greater international mobility received swift backlash,¹² technology companies around the world have raced to develop contact tracing and other digital “fixes” that some states are already deploying to determine who travels, when they travel, and how they travel.

Moreover, even the temporary measures introduced by different governments this past half-year appear to challenge several core principles of global mobility and migration law. These are principles that many, though not all, have come to take for granted. For example, the idea that nationals can move freely within a state’s territory is widely accepted but has been effectively upended by regional, citywide, and neighborhood-specific lockdowns. Internationally, reciprocity—arguably one of the key norms in international migration law—has been significantly challenged as a result of differently developing infection rates and significantly differing national policy responses. Consequently, both regional free movements and bilateral mobility arrangements have come under pressure or been abandoned. Meanwhile, new requirements, including some that link entry permission (through the issuance of visas, or health-based rejection at the border) to negative COVID-19 tests, are being introduced for international travel. While passport power¹³ has always been unevenly distributed, such measures further stratify international mobility rights both between and within different nationalities. Not all individuals will be able to access or afford such tests, and not all countries are currently in a position to provide the required infrastructures for their population at large.

Last but not least, mobility and migration issues are likely to feature prominently as part of the broader legal aftermath of the pandemic. In the way that the *RMS Titanic* disaster in 1912 sparked a proliferation of transnational tort claims, COVID-19 may similarly prove a nodal point for litigative efforts and accountability mechanisms involving different national, regional, and international legal frameworks. Early examples of mobility-related claims include national inquiries and class action suits brought against several cruise ship companies by passengers and migrant crews alleging mismanagement and negligence.¹⁴ At this stage, the outcome of current and future efforts to challenge and hold governments and private actors responsible for violations of migrants’ mobility rights remains unclear. Past examples, such as 9/11, show us that global events like the present pandemic may be seized to reinforce those characteristics of global mobility and migration law that make it a prime site of global inequality. Yet, the pandemic may also provide an opportunity for fresh and innovative forms of contestation of such inequality, with international law playing an important role.

Other future implications of the pandemic are similarly unclear. Will the pandemic trigger litigation about the draconian border policies that have resulted in massive loss of life for decades, now that privileged world citizens also experience the consequences of some of those policies? Will the equally long-term slow-down of asylum processing in the global North or the abandonment of refugees and asylum-seekers in places like Dadaab in Kenya or the now incinerated Moria refugee camp in Greece be reconsidered? In other words, even if the

¹² The basic idea of immunity passports was to indemnify the travel of individuals who tested positive for COVID-19 antibodies, but this proposal came under swift criticism from public health officials and others both because antibodies had not scientifically been established to confer immunity, and because of the unreliability of existing antibody tests. Alexandra L. Phelan, *COVID-19 Immunity Passports and Vaccination Certificates: Scientific, Equitable, and Legal Challenges*, LANCET (May 4, 2020).

¹³ The term “passport power” signifies the ability of a national passport holder to obtain visa-free or visa-on-arrival access to other countries.

¹⁴ Thomas Gammeltoft-Hansen & Itamar Mann, *The Cruise Ship in International Law: COVID-19, Global Capitalism and Abandon* (iCourts Working Paper, Dec. 2020).

pandemic does not result in the remaking of international borders that many have argued is required for a more just international order, might it provide new avenues for “border justice” defined as “lawsuits and legal campaigns [that] make it more difficult for governments to use extreme violence in attempting to seal their borders[?]”¹⁵ Will the sudden visibility of the crucial role of migrant workers in vital economic sectors improve their protection? And will the public health crisis prompt a much-needed resurgence in economic and social rights arguments that are traditionally sidelined in discussions over migrant and refugee law? These are just some of the burning questions that the different contributions to this symposium address.

The Symposium Contributions

The first essay in the Symposium, by Guofu Liu of the Beijing Institute of Technology, focuses on the obligations of states of origin towards their nationals abroad and the foreign family members of nationals.¹⁶ This original perspective points out that those obligations include respect for the right to return, the right to family unity, and the right to an adequate standard of living and adequate health care of nationals abroad. Liu also points to the harmful impact of racialized markers (“the Chinese virus”) on Chinese nationals abroad. By adopting this perspective, Liu implicitly relativizes the host-state bias that characterizes much academic work on migration law produced in the global North.

Frédéric Mégret of McGill University calls attention to the traditional host-state bias in international migration law and the concomitant focus on issues concerning, for example, access and expulsion.¹⁷ As he explains, the pandemic highlights a different central issue—namely, the varying ability of states to summon and hold back their own nationals and the complicated extraterritorial issues related to their legal obligations in this regard. The COVID-19 crisis thus represents an important opportunity to more generally refocus our attention on states of nationality as an increasingly important part of what Mégret calls “the mobility equation.”

Writing from a Brazilian perspective, Florian Hoffmann and Isadora Gonçalves, both from Pontificia Universidade Católica do Rio de Janeiro, point out how migrants and refugees remain particularly vulnerable amid the momentous impact the pandemic has had on Brazil at large.¹⁸ They show how global events like COVID-19 may transform and upend already volatile legal regime complexes around borders. In the present case, the Brazilian government readily embraced global health law and WHO regulations to close their borders and renege on key international refugee and migration law commitments. Hoffmann and Gonçalves conceptualize as “pandemic law” the process through which previously extraneous legal logics suddenly encroach on border regimes.

The contribution of Tesseltje de Lange, Sandra Mantu, and Paul Minderhoud, all of Radboud University Nijmegen, focuses on migrant workers, whose exploitative labor conditions became apparent once more in the wake of the pandemic.¹⁹ De Lange, Mantu, and Minderhoud analyze how in the European Union, where workers from other member states formally enjoy privileged legal status, migration law contributes significantly to a starkly segmented labor market. The fact that migration law does so not merely through the creation of illegality, but also through its very categories of legality, invites further reflection.

¹⁵ Itamar Mann, *Border Justice in the Age of Pandemic*, JUST SECURITY (Aug. 21, 2020).

¹⁶ Guofu Liu, *COVID-19 and the Human Rights of Nationals Abroad*, 114 AJIL UNBOUND 317 (2020).

¹⁷ Frédéric Mégret, *Homeward Bound? Global Mobility and the Role of the State of Nationality During the Pandemic*, 114 AJIL UNBOUND 322 (2020).

¹⁸ Florian F. Hoffmann & Isadora d’Avila Lima Nery Gonçalves, *Border Regimes and Pandemic Law in the Time of COVID-19: A View from Brazil*, 114 AJIL UNBOUND 327 (2020).

¹⁹ Tesseltje de Lange et al., *Into the Unknown: COVID-19 and the Global Mobility of Migrant Workers*, 114 AJIL UNBOUND 332 (2020).

Abdoulaye Hamadou of the University of Tahoua focuses on another regional free movement zone: West Africa.²⁰ He shows that African governments have instrumentalized COVID-19 to legitimize uncoordinated border closures in profound contradiction of a widespread view in the region that mobility is normal both empirically and normatively. These restrictions have been adopted for ill-conceived political purposes, one of which is cooperating with European policies undermining the legal regime of free movement in West Africa.

John Reynolds of the National University of Ireland, Maynooth reflects on the impact of COVID-19 on Europe's border regime and broader migration policy.²¹ While from the outset the pandemic served to exacerbate human rights violations related to border violence and maritime pushback practices, it also highlights international law's longstanding reification of racialized border practices. In Reynolds' view, the powerful and confounding global agendas concerning public health, racism, and the environment represent a much-needed opportunity to challenge and address the historic injustices characterizing this field. These agendas present different alternative principles for organizing human mobility and may be a starting point for reconceptualizing migration as a form of political reparation.

In the final essay of this symposium, Ian Kysel and Chantal Thomas of Cornell University reflect on two key regional and global normative interventions that have taken place following the onset of the pandemic: the Inter-American Principles on the Human Rights of Migrants, Refugees, Stateless Persons and Victims of Trafficking, and the Principles of Protection for Migrants, Refugees, and Other Displaced Persons in the COVID-19 Pandemic.²² Kysel and Thomas argue for the role of soft-law initiatives in shifting post-pandemic migration regimes, and for the role of civil society mobilizations that might leverage this soft law to undercut exclusionary, sovereigntist regimes in favor of greater recognition of universal, organic interconnection.

The scholars in this symposium represent diverse geographical and theoretical perspectives on international law. Their contributions shed important light on how the COVID-19 pandemic is currently shaping or reconfiguring global mobility and migration, and their accompanying regulatory frameworks nationally, regionally, and trans-regionally. They posit possible long-term impacts of the pandemic, with some speaking directly to the question of whether such impacts are likely to reinforce or disrupt existing structures of inequality in regard to global mobility. Yet they also—and rightly, in our view—raise questions that it is far too soon to answer.

²⁰ Abdoulaye Hamadou, *Free Movement of Persons in West Africa Under the Strain of COVID-19*, 114 AJIL UNBOUND 337 (2020).

²¹ John Reynolds, *Fortress Europe, Global Migration & the Global Pandemic*, 114 AJIL UNBOUND 342 (2020).

²² Ian M. Kysel & Chantal Thomas, *The Contested Boundaries of Emerging International Migration Law in the Post-Pandemic*, 114 AJIL UNBOUND 349 (2020).