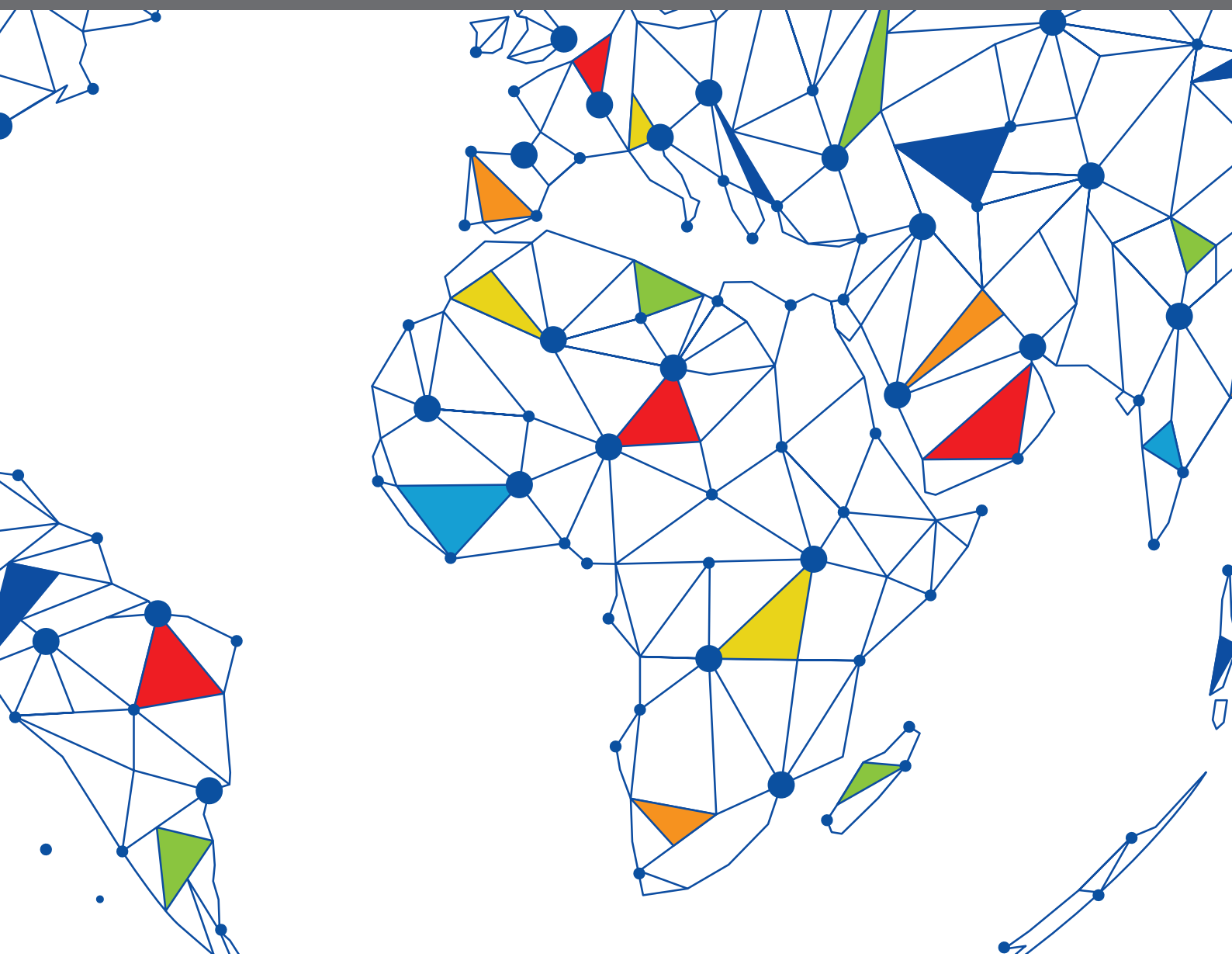
MIGRATION IN THE TIME OF COVID-19: COMPARATIVE LAW AND POLICY RESPONSES

EDITED BY: Jaya Ramji-Nogales and Iris Goldner Lang
PUBLISHED IN: Frontiers in Human Dynamics and Frontiers in Political Science



frontiers Research Topics

frontiers

ISSN 1664-8714
ISBN 978-2-88971-096-6
DOI 10.3389/978-2-88971-096-6

About Frontiers

Frontiers is more than just an open-access publisher of scholarly articles: it is a pioneering approach to the world of academia, radically improving the way scholarly research is managed. The grand vision of Frontiers is a world where all people have an equal opportunity to seek, share and generate knowledge. Frontiers provides immediate and permanent online open access to all its publications, but this alone is not enough to realize our grand goals.

Frontiers Journal Series

The Frontiers Journal Series is a multi-tier and interdisciplinary set of open-access, online journals, promising a paradigm shift from the current review, selection and dissemination processes in academic publishing. All Frontiers journals are driven by researchers for researchers; therefore, they constitute a service to the scholarly community. At the same time, the Frontiers Journal Series operates on a revolutionary invention, the tiered publishing system, initially addressing specific communities of scholars, and gradually climbing up to broader public understanding, thus serving the interests of the lay society, too.

Dedication to Quality

Each Frontiers article is a landmark of the highest quality, thanks to genuinely collaborative interactions between authors and review editors, who include some of the world's best academicians. Research must be certified by peers before entering a stream of knowledge that may eventually reach the public - and shape society; therefore, Frontiers only applies the most rigorous and unbiased reviews.
Frontiers revolutionizes research publishing by freely delivering the most outstanding research, evaluated with no bias from both the academic and social point of view. By applying the most advanced information technologies, Frontiers is catapulting scholarly publishing into a new generation.

What are Frontiers Research Topics?

Frontiers Research Topics are very popular trademarks of the Frontiers Journals Series: they are collections of at least ten articles, all centered on a particular subject. With their unique mix of varied contributions from Original Research to Review Articles, Frontiers Research Topics unify the most influential researchers, the latest key findings and historical advances in a hot research area! Find out more on how to host your own Frontiers Research Topic or contribute to one as an author by contacting the Frontiers Editorial Office: frontiersin.org/about/contact

MIGRATION IN THE TIME OF COVID-19: COMPARATIVE LAW AND POLICY RESPONSES

Topic Editors:
Jaya Ramji-Nogales, Temple University, United States
Iris Goldner Lang, University of Zagreb, Croatia

Citation: Ramji-Nogales, J., Goldner Lang, I., eds. (2021). Migration in the Time of COVID-19: Comparative Law and Policy Responses. Lausanne: Frontiers Media SA. doi: 10.3389/978-2-88971-096-6

Table of Contents

frontiers in Human Dynamics

EDITORIAL
published: 21 June 2021
doi: 10.3389/fhumd.2021.720484

Editorial: Migration in the Time of COVID-19: Comparative Law and Policy Responses

Jaya Ramji-Nogales[1]* *and Iris Goldner Lang*[2]

[1]Temple University, Beasley School of Law, Philadelphia, PA, United States, [2]University of Zagreb, Faculty of Law, Zagreb, Croatia

Keywords: asylum, refugee, international law, EU law, COVID-19, migration, pandemic, comparative law

Editorial on the Research Topic

Migration in the Time of COVID-19: Comparative Law and Policy Responses

The Covid-19 pandemic landed in a world grappling with increasing numbers of humans on the move, in response to whom destination states have instituted strict and often harsh border control policies. The pandemic, which has given rise to legitimate public health concerns about the movement of people even domestically, has also been leveraged as a pretext to renege on international legal obligations towards migrants in ways that are not justified by public health guidance. Often located in positions of precarity, migrants test the strength of destination states' humanitarian commitments and the binding nature of international migration law. The pandemic also demonstrated the fragility of EU free movement rules, raising issues of power, solidarity and trust in the system. EU Member States' reintroduction of intra-Schengen border controls, the imposition of travel restrictions, including entry and exit bans, and the closure of external borders towards third countries challenged both the functioning of the EU's internal market and basic values underpinning the Union. This collection offers a comparative study of law and policy around human mobility in the face of the pandemic. Several papers in this collection examine the impact of the pandemic on EU free movement law. Others assess destination states' responses to COVID-19 from the perspective of migration law and policy, and consider how they build upon prior exclusionary regimes, offering suggestions for reform of domestic laws in the wake of the pandemic.

Through the lens of the Covid-19 pandemic, Sirleaf analyzes the intersection of race, migration, and global health. She explains how the pandemic revives colonial imaginaries through the racialization of disease, relying on border closures reminiscent of colonial quarantine regulations used to protect the imperial metropole. Prof. Sirleaf draws a chronological connection between the emergence of the global health regime, the creation of the nation state, and the erection of racial borders. Even under the leadership of the World Health Organization, Prof. Sirleaf explains that global health law and policy are characterized by formal equality but racialization in practice.

Chetail assesses the legality of border closures from the perspective of international human rights law. He argues that blanket entry bans on the ground of public health are illegal under international human rights law, as they cannot be reconciled with the most basic rights of migrants and refugees, including the principle of non-refoulement and access to asylum procedures, the prohibition of collective expulsion, the best interests of the child, and the principle of non-discrimination. Professor Chetail points out that public health and migrants' rights are not mutually exclusive. Quite the opposite, they can reinforce each other within a comprehensive human rights-based approach to health and migration policies, as exemplified by the prohibition on arbitrary detention, which is both a human rights law duty and a necessity measure to avoid contagion in overcrowded detention centers.

OPEN ACCESS

Edited and reviewed by:
Jane Freedman,
Université Paris 8, France

Correspondence:
Jaya Ramji-Nogales
jayarn@temple.edu

Specialty section:
This article was submitted to Refugees and Conflict, a section of the journal Frontiers in Human Dynamics

Received: *04 June 2021*
Accepted: *07 June 2021*
Published: *21 June 2021*

Citation:
Ramji-Nogales J and Goldner Lang I (2021) Editorial: Migration in the Time of COVID-19: Comparative Law and Policy Responses. Front. Hum. Dyn 3:720484. doi: 10.3389/fhumd.2021.720484

Focusing on the case of Canada, Macklin discusses the construction of the idea of "essential" movement, exploring its production, revision, and representation. She sets out three types of essential movement: economic, legal, and political. The first category fits within a restrictionist trend, extending entry rights to foreign workers, seasonal agricultural workers, and some international students, but not to refugees or asylum seekers generally. The last category provides the possibility of contestation, demonstrated through the broadening of the definition of family members in Canada.

Also in Canada, Rehaag et al. draw an insightful historical connection to the Canadian government's prior use of crises to shape immigration law. The authors remind us that Canadian officials leveraged fears of terrorism in the wake of the September 11, 2001 attacks to secure the Safe Third Country Agreement with the United States, through which most asylum seekers arriving at land ports of entry along Canada's southern border are returned to the United States to seek asylum there. Similarly, they demonstrate how the Liberal Party used the Covid-19 pandemic to prevent irregular crossings that posed political risks. Both crises enabled Canadian officials to espouse progressive values while keeping out asylum seekers.

Moving to South America, Acosta and Brumat describe the "right to migrate" frame that has characterized the region's approach to migration in the 21st Century. In particular, they examine the MERCOSUR agreement, through which nearly all South American countries enable free movement, including the right to enter, reside, and work. While some emergency powers were invoked in the face of the Covid-19 pandemic, the MERCOSUR free movement arrangement is still in effect. As is the case elsewhere, migration in South America is characterized by multilevel contestation and accommodation, with legalization as a response to undocumented migration alongside securitization trends.

Freier and Espinoza focus on policy and political responses to the Covid-19 pandemic in Chile and Peru, asking how political discourse shapes the process of inclusion of migrants during the pandemic. The authors describe an increase in immigration and subsequent backlash in the form of legislative projects to exclude migrants that exacerbate socioeconomic vulnerabilities. Through case studies of Venezuelans in Chile and Peru, they discuss the militarization of external and internal borders, the depiction of migrants as disease vectors, and the links drawn between immigration, job loss, and crime.

Turning to the United States, Gilman describes the use of the Covid-19 pandemic as a justification to close the border by hardening existing impediments to asylum, reviving failed proposals, and implementing harsh new policies that are hard to reverse. She explains the rise of territorial exclusion policies that culminated in the Centers for Disease Control orders closing the borders, the extension and expansion of those policies, and the Trump administration's use of them to expel thousands of unaccompanied children. Prof. Gilman makes the case that these pandemic border closure policies are arbitrary in that they are both over- and under-inclusive, allowing tourists to enter by plane while keeping out asylum seekers at the land borders in violation of international law.

Marouf examines the spread of Covid-19 through crowded and unhygienic US immigration detention facilities. She describes fragmented detention policies that include delayed testing, transfers, failures to track medically vulnerable detainees, and obstacles in communicating with lawyers.

Box and Wadhia discuss community lawyering responses to Trump's immigration policies, describing how their prior approaches prepared their immigration clinic for the Covid-19 pandemic. They describe a three-part strategy that includes community outreach and education, policy products for institutional clients, and legal support in individual cases. Working from the starting point that "no document should be viewed as too simple or too basic for a legislative lawyer," the authors discuss how their clinic supported the community in the face of visa suspensions, border closures, and immigration processing stops and delays.

Kritzman-Amir discusses the Israeli government's response to the pandemic. She describes the government's use of uncodified and therefore volatile immigration policy to welcome Jewish immigrants while treating others as labor market contributors rather than human beings. Prof. Kritzman-Amir discusses not only entry restrictions for migrant workers but also strict monitoring of these workers in disregard of their rights to privacy, freedom of movement and autonomy. She places the Covid-19 pandemic in the context of the constitutional crisis in Israel, and the interim government's excessive reliance on emergency regulation. In this situation, she lauds the High Court's decision to protect asylum seekers while wondering whether these positive developments will be lasting.

Turning to the EU, Davies questions whether the pandemic has introduced a new phase in EU law in which national fears have become a more legitimate justification for restricting movement, or whether the pandemic will be treated as so exceptional as to be beyond law, and thus not a precedent. He explains that, when imposing border restrictions during the pandemic, EU Member States' governments followed not only scientific advice, but also public opinion, contrary to what EU law generally allows. Professor Davies points out that this approach could be seen as a defeat for EU law as traditionally conceived and as a triumph of local preferences for symbolic security and closure over scientific standards and law. Alternatively, it can be argued that the EU Court of Justice's emphasis on exclusively objective justifications for measures is unrealistic and excessively strict.

Guild points out that in the first phase of the pandemic EU Member States did not do much to coordinate their actions aimed at the protection of public health. Member States' border control reflex took priority over the EU cooperation on public health, leading to inconsistency in the field. Professor Guild concludes that this incoherence reveals the differences in opinion among EU public health ministries and indicates a failure by Member States to mainstream cooperation as an EU duty. The new proposal to establish a European Health Union may be considered bold by EU constitutionalists but it may be the best way forward to protect public health.

De Bruycker warns that the public health exception in EU migration law could in the future become increasingly important with the appearance of new viruses. He explains that the EU system of multi-level governance, which made it impossible for the European Commission to organize the necessary inter-state

cooperation, was responsible for the Member States' failure to coordinate their actions. Professor De Bruycker lays out the main lessons that can be drawn from the pandemic, among them the need to revise the Schengen Borders Code by adding public health as one of the reasons to permit the introduction of internal border controls.

de Lange examines COVID-19 migration policy measures for international students and graduate job searchers, finding huge disparities and insecurities regarding their migration status. Professor de Lange identifies three main patterns of response to COVID-19: one of continuing welcome and facilitation of international students to remain, seen in the cases of Canada and France; a blocking attitude, seen in the US; and an ambiguous policy seen in Australia and the Netherlands. Based on these findings, she concludes that the COVID-19 crisis has shown that in some countries of destination, international students and graduates, although high-skilled, and 'home-trained', are not treated as belonging to the country of destination, but as high-skilled guest workers, disposed of in times of crisis.

Mantu asserts that the EU's internal market priority during the pandemic was to safeguard its economy by enforcing mobility rights, without ensuring protection of workers' rights. She explains this statement by discussing the case of Romania, which at the same time discouraged return of its diaspora–by relying on border closures and quarantine/isolation–and encouraged emigration, without safeguarding the rights of migrant workers and protecting public health.

Roksandić et al. explore the ways the pandemic influenced migration policy and practices in Croatia, by examining the treatment of migrants on the Western Balkans Route. The authors examine to what degree COVID-19 impacted migrants' access to services, in particular healthcare, and whether facilities for migrants and asylum seekers in Croatia have appropriate healthcare standards. They conclude that Croatian authorities seem to be aware that only an inclusive public health and socio-economic response will help suppress the virus, but do not appear to understand that an effective response to COVID-19 and the protection of human rights of people on the move are not mutually exclusive. They highlight the need for an independent monitoring mechanism that would investigate allegations of pushbacks.

Jakobson and Kalev demonstrate that the COVID-19 crisis can induce a permanent labor migration policy change by discussing the case of Estonia. The authors explain that the pandemic enabled anti-immigrant parties to take charge of the Estonian immigration policy and to move Estonia towards a more restrictive labor migration agenda. However, the crisis did not affect all sectors alike. Sectors in which migrant labor is standard in Eastern Europe, such as construction, industry or farming, were not negatively affected.

The papers in this collection, offering a broad range of case studies, present some common themes around migration law and policy responses to the COVID-19 pandemic. We see the pandemic used as a pretext or justification for responses that would not otherwise be viewed as legitimate. Underlying some of these actions are racism towards and/or scapegoating of migrants. While asylum seekers are often excluded, labor migrants are permitted to enter, but their rights are left behind, creating a disposable work force (and in some cases, we see even disposable students). There are numerous examples of widespread failures of planning, coordination, and cooperation within and across states in response to the pandemic, which also reveals the shortcomings in our legal systems and triggers legal changes that are still unfolding. From this perspective, the pandemic can be viewed as an opportunity to adjust our legal and policy frameworks for the better and make them more resilient to future public health and fundamental rights challenges. The case studies provide examples of contestation and accommodation, and the hope that mechanisms can be designed that will produce migration law and policies that are aligned with both human rights and public health.

AUTHOR CONTRIBUTIONS

All authors listed have made a substantial, direct, and intellectual contribution to the work and approved it for publication.

Conflict of Interest: The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

frontiers in Human Dynamics

CONCEPTUAL ANALYSIS
published: 15 December 2020
doi: 10.3389/fhumd.2020.599157

Entry Denied: COVID-19, Race, Migration, and Global Health

*Matiangai Sirleaf**

University of Maryland School of Law, Baltimore, MD, United States

This essay uses the novel coronavirus pandemic as an entry point to explore the intersections between race, migration, and global health. The pandemic is simultaneously reviving stereotypical colonial imaginations about disease directionality, but also challenging racialized hierarchies of diseases. This essay illuminates how the racialization of diseases is reflected in historic and ongoing United States' migration law and policy as well as the global health law regime. By demonstrating the close relationship between often separately treated areas, the essay clarifies underlying currents in global health and migration law and policy that stem from fears of the racialized other. Rendering these intersections visible creates avenues for rethinking and reshaping both theory and praxis toward anti-subordination efforts.

Keywords: global health, international law, critical race theory, migration law, COVID-19, immigration law, public health law, third world approaches to international law

OPEN ACCESS

Edited by:
Jaya Ramji-Nogales,
Temple University, United States

Reviewed by:
Angela Banks,
Arizona State University, United States
Ruqaijah Yearbyr,
Saint Louis University, United States

***Correspondence:**
Matiangai Sirleaf
msirleaf@law.umaryland.edu

Specialty section:
This article was submitted to Refugees and Conflict, a section of the journal Frontiers in Human Dynamics

Received: *26 August 2020*
Accepted: *11 November 2020*
Published: *15 December 2020*

Citation:
Sirleaf M (2020) Entry Denied: COVID-19, Race, Migration, and Global Health. Front. Hum. Dyn. 2:599157. doi: 10.3389/fhumd.2020.599157

INTRODUCTION

The coronavirus disease (COVID-19)[1] has resurfaced outdated but persistent settler-colonial conventions that have mapped illness and disease on to racialized peoples and certain geographic regions. The President of the United States has sought to revitalize "Yellow Peril[2]" with his xenophobic and racist references to the coronavirus disease that play on anxieties of the "alien" and their illnesses[3]. The President's incessant racist and inaccurate references to COVID-19 as the "Wuhan Virus," "Kung Flu," and "Chinse Virus[4]," harken to a long history of othering and denigrating Black, Indigenous and other people of color as infection-prone, afflicted with exotic sicknesses and generally unhealthy. For instance, when the bubonic plague hit San Francisco at the beginning of the twentieth century, Chinatown was forcibly quarantined[5]. Chinese residents, considered unclean by the authorities, could not go to work, and went hungry, as it was difficult to find food[6].

[1]For further discussion see, for example, *Coronavirus (COVID-19)*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/index.html (last visited August 7, 2020).

[2]In 1895, this term was defined as the belief in the danger to Western civilization held to arise from expansion of the power and influence of eastern Asian peoples. *See Yellow Peril*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/yellow%20peril (last visited August 14, 2020).

[3]*See, e.g.*, E. Tendayi Achiume, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, *States Should Take Action Against COVID-19-related Expressions of Xenophobia, Says UN Expert*, U.N. Human Rights Off. High Comm'r (Mar. 23, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25739&LangID=E.

[4]David Nakamura, *With 'Kung Flu,' Trump Sparks Backlash over Racist Language — and a Rallying Cry for Supporters*, Wash. Post (June 24, 2020), https://www.washingtonpost.com/politics/with-kung-flu-trump-sparks-backlash-over-racist-language--and-a-rallying-cry-for-supporters/2020/06/24/485d151e-b620-11ea-aca5-ebb63d27e1ff_story.html.

[5]Charles McClain, *Of Medicine, Race, and American Law: The Bubonic Plague Outbreak of 1900*, 13 Law & Soc. Inquiry 447, 452 (1988).

[6]For further discussion, see generally Nayan Shah, Contagious Divides: Epidemics and Race in San Francisco's Chinatown (2001).

The association of people of color with various maladies—or what I have referred to as the "racialization of diseases" in other work–attaches racial meaning to ailments based on the racial groups that tend to be socially associated with a given illness[7]. The practice of racializing diseases is socially constructed as disease carrying microorganisms do not differentiate amongst their victims based on race, nationality, ethnicity, or other categories. While these microorganisms do not discriminate, societal actors do individually and systemically via direct and indirect action, which is exhibited by racialized health disparities and inequities[8]. The racialization of diseases is manifested in myriad areas of law and policy, especially the areas of migration and global health. In this essay, I clarify how the racialization of diseases is reflected in historic and ongoing United States' migration law and policy as well as the global health law regime.

RACIALIZATION OF DISEASES AND U.S. MIGRATION LAW AND POLICY

The othering of Black, Indigenous, and other people of color as diseased in the United States has a long history. Black people in the United States were considered a "notoriously syphilis-soaked race" while when White people contracted diseases like polio, it was due to their complex and delicate bodies, which made them more susceptible[9]. This racialization of diseases is similarly reflected in United States migration law and policy. For example, Chinese migrants were subject to invasive and often humiliating medical inspections due to the presumption that they were disease ridden, which Europeans arriving through Ellis Island were not subjected to[10]. Further, the Chinese Exclusion Act, an immigration law passed in 1882 in the United States[11], prevented Chinese laborers from immigrating in part based on racialized biases and prejudices that Chinese people were somehow more prone to have and transmit cholera and smallpox[12]. A century afterwards, the government of the United States established a detention center in Guantanamo Bay, Cuba from 1991 to 1993 and held 310 Haitians with HIV/AIDS notwithstanding their refugee and asylum rights[13]. Although every detainee had a credible basis for claiming political persecution, they were nonetheless uniformly prohibited from entering the United States to seek asylum[14].

The intersections between racialization, migration, and disease have continued to the present day. Most recently, the United States Department of Homeland Security and the Executive Office for Immigration Review put forward a rule proposal for public comment in July of 2020[15]. The rule if adopted, would enable officials to rely on "emergency public health concerns based on communicable disease due to potential international threats from the spread of pandemics when making a determination as to whether" there are reasonable grounds for considering an individual as a "'danger to the security of the United States' and, thus, ineligible to be granted asylum or the protection of withholding of removal in the United States[16]". As aptly observed by Jaya Ramji-Nogales, the securitization of public health concerns can easily be "manipulated to exclude asylum seekers on grounds that are not explicitly racial but map conveniently onto racial categories[17]". Notably, at the time of publication, the United States sits at the top of the COVID-19 pandemic statistics with the national death toll well above 269,000 and with over thirteen million cases[18]. The incongruency of the United States leading the world in the number of cases globally of COVID-19 as well as with the number of deaths per country due to the disease[19], yet seeking to place blame on racialized others and barring them from entry to the country was apparently not relevant to the administration.

The almost reflexive turn for some to treat migrants as "dangerous others[20]" and harbingers of disease has materialized with the COVID-19 pandemic in the United States. A paradigmatic example of this occurred when Florida governor Ron DeSantis blamed largely Latinx migrant workers for the state's rise in COVID-19 cases in a press conference in June of 2020[21]. The governor racialized COVID-19 and scapegoated migrant workers, which obfuscated that fields had long since been cleared for harvest with many workers returning to

[7] *See* Matiangai Sirleaf, *Racial Valuation of Diseases*, 68 UCLA L. Rev. (forthcoming 2020) (manuscript on file with author).

[8] *Id.* The public health literature has also recognized such racial inequality as a social determinant of health. *See, e.g.,* Asad L. Asad and Matthew Clair, *Racialized Legal Status as a Social Determinant of Health*, 199 Soc. Sci. & Med. 19 (2018) (discussing how racialized legal status is a social position with fundamental health effects); Heide Castañeda et al., *Immigration as a Social Determinant of Health*, 36 Ann. Rev. Pub. Health 375 (2015) (applying "a broad social determinants lens to understand[ing]immigrants' experiences and how related policies impact health"); Mary A. Gerend and Manacy Pai, *Social Determinants of Black-White Disparities in Breast Cancer Mortality: A Review*, 17 Cancer Epidemiology, Biomarkers & Prevention 2913 (2008) (using the social determinants of health disparities model to review disparities in mortality from breast cancer between White and Black women).

[9] James H. Jones, Bad Blood: The Tuskegee Syphilis Experiment 29 (1993) [hereinafter Jones, Bad Blood].

[10] Shah, *supra* note 6, at 198.

[11] An Act to Execute Certain Treaty Stipulations Relating to the Chinese, May 6, 1882, Enrolled Acts and Resolutions of Congress, 1789-1996; General Records of the United States Government; Record Group 11; National Archives, https://www.ourdocuments.gov/doc.php?flash=false&doc=47 (last visited August 17, 2020).

[12] Salonee Bhaman et al., *Histories: Public Health & Xenophobic Racism*, *in* Asian Am. Feminist Antibodies 5 (March 2020).

[13] *See* Michael J. Ratner, *How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation*, 11 Harv. Hum. Rts. J. 187 (1998).

[14] *See* Harold Koh. *The "Haiti Paradigm" in United States Human Rights Policy*, 103 Yale L.J. 2397 (1994).

[15] Security Bars and Processing, 85 Fed. Reg. 41,201 (proposed July 9, 2020) (to be codified at 8 C.F.R. pt. 208).

[16] *Id.* at 41,201 (if adopted this rule would amend the Immigration and Nationality Act sections 208 and 241 and other regulations to allow for removal on the proposed grounds).

[17] Jaya Ramji-Nogales. *Dispatches from a Racialized Border: The Invisible Threat*, Just Sec. (July 27, 2020), https://www.justsecurity.org/71678/dispatches-from-a-racialized-border-the-invisible-threat/.

[18] *See COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE)*, John Hopkins University & Medicine Coronavirus Resource Center, https://coronavirus.jhu.edu/map.html (last visited December 1, 2020).

[19] *Id.*

[20] Gideon Lasco, *Medical Populism and the COVID-19 Pandemic*, 15 Global Pub. Health 1417, 1419 (2020).

[21] Daniel Chang and Ben Conarck, *DeSantis Attributes COVID Surge to Farmworkers. Aid Groups Say Testing Help Came Late*, Miami Herald (June 19, 2020), https://www.miamiherald.com/news/coronavirus/article243614522.html.

their communities. Further, his racist and xenophobic remarks attempted to deflect attention away from the governor's decision to keep busy spring break beaches open, his initial resistance to issuing a lock-down order[22], and other governmental and societal failures to limit transmission of COVID-19. In fact, this harkens back to longstanding colonial and racial logics that defined the emergence of the global health regime.

WHITE HEALTH AS GLOBAL HEALTH

The early efforts at global health cooperation by European powers were premised on containing racialized threats of disease contagion from colonized peoples. For example, the adoption of the 1897 Sanitary Convention followed an outbreak of the plague in India[23], and some Europeans feared that their Muslim subjects in colonial territories might become infected by Indian pilgrims and bring the plague back with them[24]. Consequently, the International Sanitary Convention of 1897 prioritized the plague as a disease warranting international attention[25]. Imperial powers increasingly focused on creating an international system of quarantine regulations to protect the colonial metropole[26]. This resulted in the enactment of 13 international treaties adopting health control measures in the first half of the twentieth century[27].

The health and well-being of European peoples was of particular concern following World War I, given the influenza pandemic, which claimed an estimated 50–100 million persons between 1918 and 1919[28]. Public health officials at that time deemed it impractical to impose international quarantine measures to address the influenza pandemic[29]. Accordingly, influenza was not included in the list of internationally notifiable diseases under the Sanitary Convention of 1926[30]. Instead, the 1926 Convention modified the 1912 Convention and required international notification for the first confirmed cases of cholera, plague, yellow fever, as well as small pox and typhus[31]. At the time, there were millions of cases of typhus in Poland and the Soviet Union following WWI[32].

Western powers already deemed yellow fever, the plague, and cholera as significant by then, as the very first International Sanitary Conference was convened to address the danger that these diseases posed to Europe[33]. Of the three, cholera sparked the most fear because it had reached Russia from India[34]. The entirety of the 1892 Sanitary Convention accordingly only pertains to cholera and the sanitary control of westbound shipping to European countries based on fears that the Suez Canal might be a conduit for the importation of cholera from India to Europe[35]. The Euro-centric focus of the early global health treaties is also exhibited in the 1903 Convention[36]. White Europeans initially regarded the control of yellow fever as a minor concern limited to the Americas[37]. Thus, of the 1903s Convention's 184 articles, only one relates to yellow fever, while the rest of the provisions concern the plague and cholera[38].

The above analysis indicates that the expansion of the list of diseases that deserved international recognition under global health law coincided with the salience given to responding to these diseases in Western capitals. It was not as if diseases prioritized by the Sanitary Conventions were the only diseases afflicting populations globally. Yet, it was not until the 1944 modification of the International Sanitary Convention that the global health regime began requiring state parties to send epidemiological information for diseases not prioritized by White majoritarian interests in Western capitals[39]. An assessment of the emergence of the global health regime that simplifies things down to a matter of Western states pursuing their national interests obscures underlying issues as the early global health treaties did not take place in a vacuum. European colonial powers formulated the nascent global health regime to perfect the colonial project.

RACIALIZED BORDERS AND THE CREATION OF THE NATION-STATE

The global health regime's emergence was coterminous with the creation of the nation-state and the erection of "racial

[22] *See, e.g.*, State of Florida, Office of the Governor, Exec. Order No. 20-91, Essential Services and Activities During COVID-19 Emergency (April 1, 2020). https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-91-compressed.pdf.

[23] *See* Norman Howard-Jones, World Health Org. [WHO]. *The Scientific Background of the International Sanitary Conferences 1851-1938*, 1 HIST. INT'L PUB. HEALTH 1, 78 (1975) [hereinafter Howard-Jones, WHO].

[24] *Id.*

[25] *See* International Sanitary Convention of 1897 (March 19, 1897). *See also* Howard-Jones, WHO, *supra* note 23, at 78–80 (1975); Wallace S. Jones, *Italy. International Sanitary Conference*, 12 PUB. HEALTH REPS. 452 (1897).

[26] *See* Howard-Jones, WHO, *supra* note 23, at 11 (discussing how Western powers wanted to determine how restrictive quarantine regulations needed to be to continue the expansion of imperial trade without exposing their populations on the mainland to health risks from colonial territories).

[27] *See generally* WHO, Proceedings of the Special Committee and of the Fourth World Health Assembly on WHO Regulations No. 2, 1 (1952) (discussing the background to the International Sanitary Conferences and any resulting treaties from 1851 to 1938).

[28] *See* Howard-Jones, WHO, *supra* note 23, at 93. *See also* David Morens and Anthony Fauci. *The 1918 Influenza Pandemic: Insights for the 21st Century*, 195 J. INFECTIOUS DISEASES 1018 (2007) (noting that the 1918–1919 H1N1 influenza pandemic was one of the deadliest events in recorded human history).

[29] *See* P.G. Stock. *The International Sanitary Convention of 1944*, 38 PROCEEDINGS ROYAL SOC'Y MED. 309, 311 (noting that the Convention did not include a proposal to include influenza among the diseases covered).

[30] *See generally* International Sanitary Convention of 1926 arts. 1 and 8 (June 21, 1926). For further discussion see Howard-Jones, WHO, *supra* note 23, at 97.

[31] International Sanitary Convention of 1926, *supra* note 30, arts. 1 and 8.

[32] Howard-Jones, WHO, *supra* note 23, at 93.

[33] For further discussion see generally, Valeska Huber. *The Unification of the Globe by Disease? The International Sanitary Conferences on Cholera, 1851–1894*, 49 HIST. J. 453–76 (2006).

[34] Howard-Jones, WHO, *supra* note 23, at 9.

[35] *See* International Sanitary Convention of 1892 art. 4 (Jan. 9, 1892) (noting measures to prevent cholera). *See also* Howard-Jones, WHO, *supra* note 24, at 65.

[36] *See* International Sanitary Convention of 1903 (December 3, 1903). *See also* Howard-Jones, WHO, *supra* note 23, at 85.

[37] Howard-Jones, WHO, *supra* note 23, at 85.

[38] *See* International Sanitary Convention of 1903, *supra* note 36, at art. 182 (noting that interested countries are recommended to modify their sanitary regulations to bring them in line with current scientific findings on the mode of transmission of yellow fever, especially the role of mosquitoes as vehicles of germs of the disease).

[39] *Cf.* International Sanitary Convention of 1944, art. 5A *with* art. 5B (December 15, 1944) (modifying the International Sanitary Convention of 21 June 1926).

borders[40]" in many places. The foundation of the nation-state itself was influenced by the racialization process, which involves "the extension of racial meaning to a previously racially unclassified relationship, social practice or group[41]". As Europeans encountered different societies and peoples, they created race as a biological or natural occurrence and came up with a racial categorization system for the human species[42]. Racialized social systems constructed by White Europeans allocated different economic, political, social, and other rewards to groups along racial lines internally and external to the nation-state[43].

The racialized construction of the nation-state was legitimated by scientific racism[44], which then reified categories such as "Indians" and "Negroes." Scientific racism was used to justify, propose, and project scientific findings and theories, which facilitated and reinforced the enactment of racist social policies[45]. Scientific racism was intertwined with the "civilizing mission" of European imperial expansion and helped to facilitate the subjugation of Black, Indigenous, and other people of color. Racialized social systems then created vested interests in keeping or transforming the society's racial structure[46] nationally and transnationally. Viewed in this way, the formation of nation-states in many ways was the result of drawing borders internally and externally of "we" vs. "them," "insider" vs. "outsider," and "foreigner" vs. "alien" at all levels of racialized societies.

CREATION OF THE WORLD HEALTH ORGANIZATION

Many of these nation-states would later draft and adopt the constitution of the World Health Organization (WHO) in 1946[47]. This new organization was to be committed to the principle that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic, or social condition[48]". The WHO was also founded on the premise that the health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and states[49]. These foundational principles indicate that the privileging of White, colonial, European, and/or Western interests would presumably be less central, yet this has not proven to be the case in practice.

The basic premise of the global health regime remains the same, with an international system of state surveillance and notification for certain infectious diseases[50]. The relevant treaty obligations stem from the International Health Regulations of 2005, which aims to "prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade[51]." Under the regulations, the WHO can make wide-ranging temporary or standing recommendations concerning travel including: placing suspected "persons under public health observation;" implementing "quarantine or other health measures for suspect[ed] persons;" refusing "entry of suspect[ed] and affect[ed] persons;" refusing "entry of unaffected persons to affected areas;" and implementing "exit screening and/or restrictions on persons from affected areas;" amongst others[52].

Significantly, member states gave the WHO the power to declare a Public Health Emergency of International Concern (PHEIC), "an extraordinary event, which is determined... (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response[53]." The Regulations empower the Director General of the WHO's Secretariat, in conjunction with a committee of mostly medical experts, to declare a PHEIC[54]. The Regulations also require the Director General to consider the views of state parties, the advice of a committee, and scientific principles as well as other factors when issuing, modifying, or terminating temporary and standing recommendations[55]. None of the enumerated criteria to guide decision-making includes consideration of race or the race of the populations impacted by a given disease.

RACIALIZATION OF DISEASES AND GLOBAL HEALTH LAW AND POLICY

Instead, the racialization of diseases in global health law and practice is accomplished subtly and indirectly. Indeed, while the regulations set out the framework for recommendations and emergency decision-making, they do not determine *when* an emergency should be declared nor when recommendations should be put forward[56]. The broad discretion regarding when a given disease constitutes an international emergency and what recommendations to put forward allows for decision-making

[40] For further discussion of this concept, see E. Tendayi Achiume, Racial Borders (manuscript on file with author).

[41] Michael Omi and Howard Winant, Racial Formation in the United States: From the 1960s to the 1990s, 64 (2d ed. 1994).

[42] *See e.g.*, Matthew Clair and Jeffrey S. Denis, *Sociology of Racism*, 19 Int'l Encyclopedia Soc. & Behav. Sci. 857 (2015).

[43] Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 Am. Soc. Rev. 465, 474 (1997).

[44] Scientific racism refers to the scientific and biomedical endeavor to support and explain variance between human groups as innate and involving a qualitative racial hierarchy. *See generally* Elazar Barkan, The Retreat of Scientific Racism: Changing Concepts of Race in Britain and the United States between the World Wars (1992); Saul Dubow, Scientific Racism in Modern South Africa (1995).

[45] *See* Rutledge M. Dennis. *Social Darwinism, Scientific Racism, and the Metaphysics of Race*, 64 J. Negro Educ. 243 (1995).

[46] *See* Bonilla-Silva, *supra* note 43, at 471.

[47] *See* WHO Constitution art. 82, July 22, 1946, 14 U.N.T.S. 185 (entered into force April 7, 1948) [hereinafter WHO Constitution].

[48] *Id.* pmbl.

[49] *Id.*

[50] *See generally* WHO, International Health Regulations, arts. 5-6 (2d ed. 2005) [hereinafter IHRs of 2005].

[51] *Id.* art. 2.

[52] *Id.* art. 18(1).

[53] *Id.* art. 1 (defining a "public health emergency of international concern").

[54] *Id.* arts. 12–17, 48–49.

[55] *Id.* art. 17.

[56] *Id.* art. 12 and 49.

informed either explicitly or implicitly by the racialization of diseases. This was on vivid display during the 2014–2015 Ebola outbreak in West Africa. The Ebola epidemic resuscitated historical images of Black African bodies as uncontainable and disease-ridden. The WHO seized on the fact that someone with Ebola traveled on an international flight as an opportunity to revise its initial slow and flat-footed stance toward the disease[57]. Yet, the circumstance that triggered the WHO's declaration of a public health emergency of international concern–someone[58] from Liberia who was infected with Ebola traveling to Nigeria—can hardly be viewed as the seminal event in the disease's trajectory that the organization purported it was[59].

The epidemic was already international in nature and a PHEIC might have been declared earlier, if White health were more implicated. Certainly, Ebola had already traveled across borders in West Africa to upend things in three countries[60]. The possibility of the disease spreading via air travel was always present[61]. Confirmation of transmission via air travel, transformed Ebola from a "local" disease in "Africa," to one that potentially touched and concerned countries in the Global North. Thus, the comparatively trivial number of cases that occurred in Europe (three) and the United States (four)[62] turned Ebola into a crisis calling for international action. Consequently, the 2014–2015 Ebola epidemic in West Africa was converted from an unfortunate situation in a "backward" region to a significant public health emergency of international concern.

The WHO's recommendations to address the 2014–2015 epidemic allowed for limited travel restrictions for all confirmed or suspected cases of Ebola[63]. Significantly, the WHO specifically advised against general bans on international travel[64]. The organization explained that a general travel ban would likely "cause economic hardship, and could consequently increase the uncontrolled migration of people from affected countries, raising the risk of international spread of Ebola[65]". In the first study aimed at assessing state compliance with the WHO's recommendations, of the 187 (95.4%) of the 196 states parties included in the study, "23.0% had imposed a ban on the entry of foreigners traveling from countries with widespread transmission of Ebola[66]". The results also indicated that "58 (31.0%) of the States Parties... had exceeded or disregarded the 2005 IHR's international travel recommendations[67]". Further, the study revealed that "entry of foreigners who had departed from a country with widespread transmission of Ebola was prohibited in 43 (23.0%) and another 15 (8.0%) of the States Parties had applied exclusions or substantial restrictions to such travelers[68]".

Under the Regulations, state parties are permitted to implement health measures in response to a PHEIC that "achieve[s] the same or greater level of health protection than WHO recommendations" as long as those "measures shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection[69]". While additional health measures are allowed under the Regulations that significantly interfere with international travel, states that decide to adopt these measures are required to "provide to WHO the public health rationale and relevant scientific information for it[70]". Further, the Regulations clarify that "significant interference generally means refusal of entry or departure of international travelers... or their delay, for more than 24 h[71]". State parties that apply additional measures that significantly interfere, are within 3 months to undertake a review "taking into account the advice of WHO[72]". However, at one point during the Ebola epidemic in 2014–2015, Australia restricted the entry of "everyone who was not an Australian citizen or an Australian permanent resident[73]". The consequences of the lack of a robust monitoring mechanism for assessing when countries deviate from the WHO's recommendations allows significant room for countries to implement policies not based on any public health rationale[74]. Furthermore, the WHO's inability to impose sanctions on state parties in the event of non-compliance with its recommendations[75] also means that potentially protective provisions that require state parties to implement and apply health measures "in a transparent and non-discriminatory manner," lacks much enforceability[76]. The WHO has remarked that perhaps "the best incentives for compliance are 'peer pressure' and public knowledge" since "[s]tates do not want to

[57] *See* J. Benton Heath, *Global Emergency Power in the Age of Ebola*, 57 HARV. INT'L L.J. 1, 29 (2016).

[58] *See* WHO, Ebola Outbreak in West Africa Declared a Public Health Emergency of International Concern, WHO Regional Office for Europe (2014), http://www.euro.who.int/en/health-topics/emergencies/ebola-outbreak-2014.

[59] *See generally Factors that Contributed to Undetected Spread of the Ebola Virus and Impeded Rapid Containment*, WHO (January, 2015). http://www.who.int/csr/disease/ebola/one-year-report/factors/en/.

[60] Heath, *supra* note 57, at 30.

[61] *Id.*

[62] *See 2014-2016 Ebola Outbreak in West Africa*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html.

[63] Press Release, WHO, Statement on the 1st meeting of the IHR Emergency Committee on the 2014 Ebola Outbreak in West Africa (August 8, 2014), http://www.who.int/mediacentre/news/statements/2014/ebola-20140808/en/.

[64] WHO, Statement on the 3rd meeting of the IHR Emergency Committee regarding the 2014 Ebola Outbreak in West Africa (2014), http://www.who.int/mediacentre/news/statements/2014/ebola-3rd-ihr-meeting/en/.

[65] *Id.*

[66] Wendy Rhymer and Rick Speare, *Countries' Response to WHO's Travel Recommendations Curing the 2013–2016 Ebola Outbreak*, 95 BULL. WORLD HEALTH ORG. 10–17 (2017), https://www.who.int/bulletin/volumes/95/1/16-171579/en/.

[67] *Id.*

[68] *Id.*

[69] IHRs of 2005, *supra* note 50, art. 43(1)(a)(b).

[70] *Id.* art. 43(3). *See also id.* art. 43(5).

[71] *Id.* art. 43(3).

[72] *Id.* art. 43(6).

[73] *See* Rhymer and Rick Speare, *supra* note 66.

[74] *See id.*

[75] *See generally* IHRs of 2005, *supra* note 50 (the Regulations do not include any enforcement mechanism per se for state parties that fail to comply with its provisions).

[76] *Id.* art. 42.

be isolated[77]". Yet, more often than not it is the WHO that is the one isolated from state action.

Moreover, the Regulations' failure to engage with race obscures the role of racism and subordination in global health. Indeed, despite the long history of racializing diseases[78], the IHRs of 2005 do not specifically refer to historic or ongoing racial discrimination in public health or medicine[79]. The IHRs of 2005 rendering of race invisible is especially glaring in the provision requiring that all travelers are treated with "respect for their dignity, human rights, and fundamental freedoms," when implementing health measures. This provision explicitly calls for recognition of the "gender, sociocultural, ethnic, or religious concerns" of travelers, but does not mention race[80].

The backgrounding of race under the current regime provides state parties with significant latitude to make choices influenced by the implicit or explicit racialization of diseases. For example, the weaknesses in the Regulations allow for decision-making informed by the racialization of diseases when countries formulate their emergency responses to disease outbreaks. The WHO declared COVID-19 a public health emergency of international concern on January 30, 2020[81]. The WHO consistently "advise[s] against the application of travel or trade restrictions to countries experiencing COVID-19 outbreaks[82]". Yet, by February 27, 2020, 38 countries reported taking additional health measures to the WHO "that significantly interfere with international traffic in relation to travel to and from China or other countries, ranging from denial of entry of passengers, visa restrictions, or quarantine for returning travelers[83]".

COVID-19 is the most recent instantiation of the racializing of diseases. For instance, a newspaper in France recently carried the headline "Yellow Alert" on its front page[84]. Additionally, the government of the United States' response to COVID-19 is emblematic of decision-making informed by the racialization of diseases. The administration initially primarily relied on general travel bans in its response to the spread of the novel coronavirus, by first banning foreign nationals who had traveled to China in the last 14 days from reentering[85]. This was counter to WHO's recommendations which advised that "restricting the movement of people and goods during public health emergencies is ineffective in most situations and may divert resources from other interventions. Furthermore, restrictions may interrupt needed aid and technical support, may disrupt businesses, and may have negative social and economic effects on the affected countries[86]". Moreover, the WHO advised that,

> Travel measures that significantly interfere with international traffic may only be justified at the beginning of an outbreak, as they may allow countries to gain time, even if only a few days, to rapidly implement effective preparedness measures. Such restrictions must be based on a careful risk assessment, be proportionate to the public health risk, be short in duration, and be reconsidered regularly as the situation evolves[87].

Yet, the United States did not take sufficient advantage of any potential window of opportunity. Instead, as I have argued elsewhere, "delays in developing a reliable test, plus a limited and faulty domestic supply, as well as restrictions on testing based on travel history, meant that the virus was likely spreading locally undetected for a while[88]".

The racial and colonial logics influencing COVID-19 law and policymaking by the Trump administration was evident in innumerable ways. First, the President's problematic understanding of the disease as racialized and "foreign," constrained the space initially for consideration of community transmission within the United States. This led to an over reliance on general travel bans as a magical solution to stop the spread of a highly infectious novel disease. In addition, imperial rationales were evident in the administration's decision to initially exclude certain countries from the application of general travel bans. Thus, the administration initially exempted the United Kingdom[89] from the expanded travel ban that it imposed on the European Schengen area[90]. The Proclamation from the White House which later added the United Kingdom

[77] WHO, Frequently Asked Questions About the International Health Regulations (2005), https://www.who.int/ihr/about/FAQ2009.pdf?ua=1 (last visited August 16, 2020).

[78] *See generally* Sirleaf, *Racial Valuation of Diseases*, *supra* note 7.

[79] *See generally* IHRs of 2005, *supra* note 50.

[80] *Id.* art. 32.

[81] WHO, Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV) (January 30, 2020), https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

[82] WHO, Updated WHO Recommendations for International Traffic in Relation to COVID-19 Outbreak, (February 29, 2020), https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak [hereinafter WHO, COVID-19 Travel Advice].

[83] *Id.*

[84] Motoko Rich, *As Coronavirus Spreads, So Does Anti-Chinese Sentiment*, N.Y. Times (January 30, 2020), https://www.nytimes.com/2020/01/30/world/asia/coronavirus-chinese-racism.html [citing *Coronavirus Chinois: Alerte Juane*, Courrier Picard 24 (January 26, 2020)].

[85] *See* The White House, Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus (January 31, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/.

[86] WHO, COVID-19 Travel Advice, *supra* note 82.

[87] *Id.*

[88] Matiangai Sirleaf, *COVID-19 and the Racialization of Diseases (Part II)*, Opinio Juris (April 7, 2020), http://opiniojuris.org/2020/04/07/covid-19-symposium-covid-19-and-the-racialization-of-diseases-part-ii/.

[89] *See* White House, Proclamation—Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus (March 11, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-2019-novel-coronavirus/ (note the United Kingdom does not appear on the order).

[90] *See* White House, Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus (March 14, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-coronavirus-2/.

to the ban, notes that the "CDC has determined that the United Kingdom is experiencing widespread, ongoing person-to-person transmission of SARS-CoV-2[91]". Yet, this information was readily available to the administration and circumstances in the United Kingdom had not changed materially between the proclamation released on March 11, which excluded the United Kingdom and the one released on March 14, 2020, which included it[92].

Moreover, the lackadaisical approach to implementing screening measures at airports and the attendant lack of a coherent plan to accommodate the rush to the airports from United States nationals situated abroad who frantically attempted to return home from the newly banned countries all indicate a lack of consideration of the public health risks involved when adopting the additional measures. Cumulatively, the above travel bans, and their haphazard implementation do not support a conclusion that they were primarily aimed at diminishing the risks of spreading COVID-19. Instead, the administration's policies indicate how the racializing of diseases led to public health law and policy decisions that seemingly assumed that the disease is engaged in racialized border control efforts; checking documents and nationalities to determine who to infect next[93].

CONCLUSION

The objective of this essay is to render race visible in migration and global public health law and policy. This essay serves as a powerful reminder of how the history of diseases and responses to diseases is linked to colonial and ongoing politics of racial exclusion. The argument developed thus far may be perceived as overly relying on race in ways that downplay other factors. Given the impossibility of severing race from other influences in the world, this essay does not engage in a futile attempt to disprove the relevance of other variables compared to race. There are of course other factors contributing to the migration and global health law policies analyzed in this essay.

For instance, the total number of cases for a disease also influences the imposition of travel bans and other restrictions. Accordingly, over 30 countries have placed broad travel bans on travelers from the United States[94]. Thus, an administration notorious for increasing the racialization of borders in the United States from the "Muslim Ban[95]" to the recent expansion of the travel ban to include Burma (Myanmar), Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania[96], now has to contend with what it perceives as "shit-hole countries[97]" in the Global South imposing travel bans on its residents. The administration must also face the ignominy of its perceived peers in the Global North placing travel bans on Americans, including all 27 countries in the European Union[98]. Additionally, both Canada and Mexico prohibited non-essential travelers from the United States to cross their borders[99]. And, a poll in July of 2020, found that 80% of Canadian respondents wanted the border to stay closed until at least the end of 2020[100].

The COVID-19 pandemic and the responses to halt its spread have fundamentally altered the world as we know it. Yet, as this essay shows the more things change, the more they stay the same. Although, the COVID-19 pandemic has revived stereotypical colonial imaginations, it also simultaneously challenges racialized hierarchies of diseases. This duality creates an opening to rethink and reshape the relationship between race, migration and global health and opens new possibilities for anti-subordination efforts.

AUTHOR'S NOTE

This essay illuminates how the racialization of diseases is reflected in historic and ongoing United States' migration law and policy as well as the global health law regime. By demonstrating the close relationship between often separately treated areas, the essay clarifies underlying currents in global health and migration law and policy that stem from fears of the racialized other. Rendering these intersections visible creates avenues for rethinking and reshaping both theory and praxis toward anti-subordination efforts.

AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

Conflict of Interest: The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

[91] *Id.*

[92] *Cf. supra* note 89 with 90.

[93] Sirleaf, *supra* note 88.

[94] Alexandra Sternlicht, *These 33 Countries Have Banned U.S. Travelers*, FORBES (July 20, 2020), https://www.forbes.com/sites/alexandrasternlicht/2020/07/20/these-33-countries-have-banned-us-travelers/#4cdf3fe47ea9.

[95] White House, Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States (March 6, 2017), https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/.

[96] White House, Proclamation on Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry (January 31, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-improving-enhanced-vetting-capabilities-processes-detecting-attempted-entry/.

[97] *See* Julie Hirschfeld Davis et al., *Trump Alarms Lawmakers With Disparaging Words for Haiti and Africa*, N. Y. TIMES (January 11, 2018) https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html.

[98] Sternlicht, *supra* note 94.

[99] *Id.*

[100] Robin Levinson-King, *Americans, Go Home: Tension at Canada-US Border*, BBC NEWS (August 13, 2020), https://www.bbc.com/news/world-us-canada-53742684.

frontiers in Political Science

ORIGINAL RESEARCH
published: 03 December 2020
doi: 10.3389/fpos.2020.606307

Crisis Without Borders: What Does International Law Say About Border Closure in the Context of Covid-19?

*Vincent Chetail**

Department of International Law, Global Migration Centre, Graduate Institute of International and Development Studies, Geneva, Switzerland

This paper is assessing the legality of border closures decided by a vast number of countries with the view of limiting the spread of Covid-19. Although this issue has raised diverging interpretations in relation to International Health Regulations and regional free movement agreements, international human rights law provides a clear-cut answer: the rule of law stops neither at the border nor in times of emergency. Against this normative framework, border control can and must be carried out with the twofold purpose of protecting public health and individual rights, whereas border closure is unable to do so because it is by essence a collective and automatic denial of admission without any other form of process. This paper argues that blanket entry bans on the ground of public health are illegal under international human rights law. They cannot be reconciled with the most basic rights of migrants and refugees, including the principle of *non-refoulement* and access to asylum procedures, the prohibition of collective expulsion, the best interests of the child and the principle of non-discrimination. The paper concludes on the ways to better integrate at the borders public health and human rights imperatives in due respect with the rule of law. In both law and practice, public health and migrant's rights are not mutually exclusive. They can reinforce each other within a comprehensive human rights based approach to health and migration policies.

Keywords: COVID-19, migration, border closure, entry ban, human rights, refugee, migrant

OPEN ACCESS

Edited by:
Iris Goldner Lang,
University of Zagreb, Croatia

Reviewed by:
Luc Leboeuf,
Max Planck Institute for Social Anthropology, Germany
Lyra Jakuleviciene,
Mykolas Romeris University, Lithuania

***Correspondence:**
Vincent Chetail
vincent.chetail@graduateinstitute.ch

Specialty section:
This article was submitted to Comparative Governance, a section of the journal Frontiers in Political Science

Received: *14 September 2020*
Accepted: *06 November 2020*
Published: *03 December 2020*

Citation:
Chetail V (2020) Crisis Without Borders: What Does International Law Say About Border Closure in the Context of Covid-19? Front. Polit. Sci. 2:606307. doi: 10.3389/fpos.2020.606307

INTRODUCTION

Borders have always played a symbolic and political function in times of crisis. As a powerful expression of state's sovereignty, immigration control provides a typical avenue for governments to reassure their citizens and bolster a national sense of belonging, while providing an ideal scapegoat for their own failure or negligence. The Covid-19 pandemic is no exception.

Unsurprisingly, governments have swiftly imposed travel limitations with the view of mitigating the spread of contagion from abroad. As of 21st August 2020, a total of 219 countries or territories have issued 85,034 travel restrictions of various types (IOM, 2020b). Many states have taken the most radical one by closing their borders unilaterally.[1] Whether entry bans are exclusively grounded in health considerations or follow other purposes remains an open question. Banning entry of nationals from specific countries has been heavily influenced by broader considerations, be they diplomatic, economic or political. In some instances, it has even been decided as a countermeasure against denials of admission of their own nationals (see e.g., Reuters, 2020). Covid-19 also offers a formidable pretext for populists to experiment their nationalist agenda of border closure, as exemplified by Trump's gesticulation in the US.

To be clear, in the current context of the pandemic, states have the right and indeed the duty to protect public health and carry out migration control accordingly. Yet border control does not mean border closure. The former regulates and monitors admission to the territory through immigration processing, identity check and, if needed, health assessment, whereas the latter is a categorical ban of entry against any non-nationals or those coming from specific countries. Although the distinction between controlling and closing borders is frequently blurred in political discourse, it has key implications at both the policy and normative levels.

From a policy angle, border closure is counterproductive and even dangerous in addressing the pandemic for two main reasons. First, it encourages irregular migration without any health assessment and follow-up (Guadagno, 2020; Sanchez and Achilli, 2020; UN Network on Migration, 2020b). Second, it deprives the states of a much-needed human resource as a large percentage of migrants work in sectors considered essential to address the pandemic (health; agriculture; delivery services; cleaning; care for children, persons with disabilities, or older persons) (Gelatt, 2020; ILO, 2020).

The distinction between "travel bans" and "travel restrictions" has been at the heart of the recommendations adopted by the World Health Organization to address the current pandemic. The UN agency observes that, on the one hand, "travel bans [. . .] are usually not effective in preventing the importation of cases but may have a significant economic and social impact" (World Health Organization, 2020). On the other hand, instead of blanket bans, travel restrictions "may only be justified at the beginning of an outbreak, as they may allow countries to gain time, even if only a few days, to rapidly implement effective preparedness measures. Such restrictions must be based on a careful risk assessment, be proportionate to the public health risk, be short in duration, and be reconsidered regularly as the situation evolves" (World Health Organization, 2020).

From a normative angle, the legality of border closure has raised legal debates and diverging interpretations in relation to its compatibility with International Health Regulations (Burci, 2020; Foster, 2020; Habibi et al., 2020) and regional free movement agreements, such as in the European Union (Carrera and Luk, 2020; Hruschka, 2020; Thym, 2020). By contrast, international human rights law provides a clear-cut answer: the rule of law does not stop at the border or in times of pandemic. It provides an authoritative and flexible legal framework to protect public health without undermining the most fundamental rights.

Following this stance, border controls can and must be carried out with the twofold purpose of protecting public health and individual rights. However, border closures are unable to do so because banning entry to any foreigners or those of a particular nationality is, by definition, a collective and automatic denial of admission without any other form of process. This paper argues and demonstrates that closing borders on the ground of public health is illegal under international law. It violates the most basic rights of migrants (section Border Closure and Human Rights of Migrants) as well as the rights of refugees to access protection and asylum procedures (section Border Closure and Access to Refugee Protection).

BORDER CLOSURE AND HUMAN RIGHTS OF MIGRANTS

Although states enjoy a broad margin of discretion in controlling their borders, access to a territory does not operate in a legal vacuum. The movement of persons across borders is governed by a rather rich and complex network of international legal norms, whether grounded on universal and regional conventions or enshrined in customary international law (for an overview see Plender, 2015; Chetail, 2019). Most of these norms and instruments may be subjected to lawful restrictions and/or derogations to address the current pandemic, whereas others are absolute and do apply in any circumstances, including in times of health emergency.[2]

This last category of absolute guarantee concerns a few albeit fundamental principles of international law that prevail over any other considerations. They include, most notably, the principle of *non-refoulement*, when there is a real risk of torture, inhuman or degrading treatment, the prohibition of collective expulsion, the best interests of the child and the principle of non-discrimination. Their continuing applicability in the context of Covid-19 has been reaffirmed by many stakeholders, including the United Nations High Commissioner for Refugees (UNHCR, 2020a), the International Organization for Migration (IOM) (IOM and UNHCR, 2020), the Office of the High Commissioner for Human Rights (OHCHR, 2020a), and UNICEF (2020), to quote a few.

[1] According to IOM data, entry restrictions represented the highest share of total restrictions but, since the beginning of August 2020, they have been following a decreasing trend. As of 24th August 2020, they still represent 40% of total restrictions, whereas medical measures are the most common restriction with 48%. In parallel to existing travel restrictions, 177 countries, territories or areas have issued 715 exceptions enabling mobility despite blanket travel restrictions (see IOM and UNHCR, 2020). Notwithstanding these exceptions, UNHCR further noticed that border restrictions "are impacting heavily on asylum-seekers and refugees, preventing many across the world from seeking asylum and safety" and a significant number of states "are making no exception for people seeking asylum" (IOM and UNHCR, 2020).

[2] For further discussion about absolute rights, lawful restrictions and derogations in the context of migrant's rights and Covid-19 (see Chetail, 2020).

As detailed in my book *International Migration Law* (Chetail, 2019), these core rights at the borders have four key characteristics in common. First, they are legally binding for all states under customary international law and reinforced by a broad range of widely ratified conventions. Second, they apply to any migrants regardless of their documentation status and nationality. Third, they are applicable both within the territory—including at the border—and outside the territory when migrants are under the effective control of a state. Fourth, they are absolute and cannot suffer from any exception or derogation under any circumstances, including in times of emergency.

Against this normative background, border closure is inherently in contradiction with the most elementary rights of persons on the move. No public health consideration can justify a denial of access to a territory without proper safeguards to guarantee the best interests of the child and to protect against *refoulement*, collective expulsion and discrimination. Whether it applies to all foreigners or targets those of a particular nationality, border closure is by essence an automatic and collective entry ban and cannot be reconciled with these core individual rights of migrants.

As confirmed by an extensive case law, the general prohibition of collective expulsion requires that any rejection at the frontier, interception or removal be taken on the basis of a reasonable and objective examination of the particular case of each migrant.[3] Because of its collective nature, border closure is *ipso facto* incompatible with such an individual assessment. Similarly, because the best interests of the child shall be a primary consideration in all situations, including at the border, this basic duty of international law cannot be fulfilled without assessing the individual situation of migrant children (see e.g., Committee on the Rights of the Child Committee on the Protection of the Rights of All Migrant Workers Members of Their Families, 2017; Guttentag, 2020; UNICEF, 2020).

The same conclusion comes from the prohibition of *refoulement*. Due respect for this absolute principle entails an individual and rigorous scrutiny of the risk of torture, inhuman or degrading treatment, before taking any decision of non-admission or forcible removal.[4] The principle of *non-refoulement* further retains a particular relevance in the context of Covid-19. Returning someone to his or her own country, where the health care system is broken or not available, may in some exceptional circumstances amount to an inhuman or degrading treatment. This has been notably acknowledged in the jurisprudence on medical cases of the UN Committee against torture and the European Court of Human Rights.[5]

BORDER CLOSURE AND ACCESS TO REFUGEE PROTECTION

Denying access to territory and asylum procedure also goes in blatant contradiction with the Geneva Convention relating to the Status of Refugees of 1951 and its Additional Protocol of 1967. Although the Geneva Convention pays tribute to public order and national security of state parties, none of its provisions allows banning access to refugee protection in the context of Covid-19.

The derogation clause contained in its Article 9 provides an archetypal instance of this balancing act between state sovereignty and refugee rights. It grants states parties the right to adopt temporary measures in times of emergency, without undermining access to refugee protection. According to Article 9, provisional measures may be taken provided that two cumulative conditions are met: they are necessary to face "grave and exceptional circumstances" and they must "be essential to the national security." Whilst the current pandemic is without any doubt a grave and exceptional situation on its own, whether it endangers the national security of a state is more debatable and context specific.[6]

Even by assuming that this would be the case, Article 9 does not allow suspending asylum procedures. On the contrary, the wording of this provision makes it clear that access to protection remains plainly binding even in such exceptional circumstances, for provisional measures do apply "pending a determination by the Contracting State that that person is in fact a refugee." Thus, while allowing states to adapt their response to Covid-19, temporary measures cannot bar access to asylum procedure. This would in turn violate the prohibition of *refoulement* under Article 33(1). This cardinal principle of refugee law prohibits rejection at the border and return "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The only legal ground for suspending access to protection may be found in the exceptions to the prohibition of *refoulement* under Article 33(2). In stark contrast with its human rights law counterpart, the principle of *non-refoulement* under the Geneva Convention is not absolute. In particular, its benefit cannot be claimed by a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is."[7] Although states retain a substantial margin of appreciation in assessing a danger to their own security, this does not give them a *carte blanche*. As with any exceptions to a principle (especially when fundamental rights are at stake), "it is clear that Article 33(2) exception must be interpreted restrictively."[8]

[3]See for instance: IACtHR, *Nadege Dorzema et al. v. Dominican Republic,* Series C No 251 (2012), para 172; ECtHR, *ECtHR, Hirsi Jamaa, and Others v. Italy,* Application no. 27765/09 (2012), para 184; ECtHR, Khlaifia, and Others v Italy, Application no 16483/12 (2016), para 238. See also in the context of Covid-19 (IOM and UNHCR, 2020; OHCHR, 2020a).

[4]See among many other similar restatements: *ECtHR, Jabari v Turkey, Application no 40035/98* (2000), para 50; *ECtHR, Gebremedhin v France, Application no 25389/05* (2007), para 66. See also in the context of Covid-19 (IOM and UNHCR, 2020; OHCHR, 2020a).

[5]See in particular Committee against Torture, *GRB v Sweden* (1998) Communication No 93/1997 UN Doc CAT/C/20/D/83/1997, para 6.7; ECtHR, D v The United Kingdom, Application no. 30240/96 (1997), para 54; and *ECtHR, Paposhvili v Belgium, Application no 41738/10* (2016), paras 181–193.

[6]See below the discussion on national security and Covid-19 in the context of Article 33(2) of the Refugee Convention.

[7]The second exception does not apply to Covid-19 as it focuses on the protection of the host society against criminality, when a refugee "having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

[8]*Court of Appeal of New Zealand, Attorney General v. Zaoui (2004) Dec. No. CA20/04*, para. 136.

When transposed to the Covid-19 context, the threshold of this exception remains particularly high. The very notion of national security is broader, but also more demanding, than the one of public health. It requires a threat to an essential interest of the state, its territory, institutions or population. National security has long been understood in other contexts than the one of health emergency. As Atle Grahl-Madsen underlined, "the meaning of this term is rather clear. [...] Generally speaking, the notion of 'national security' or 'the security of the country' is invoked against acts of a rather serious nature endangering directly or indirectly the constitution (Government), the territorial integrity, the independence or the external peace of the country concerned" (Grahl-Madsen, 1997; see also in this sense Chetail, 2001; Hathaway, 2005; Wouters, 2009).

Obviously, the risk of contagion within the community of a host country may, in some circumstances, endanger the security of a whole state. Yet the causal link between the two must be established and substantiated. In other words, there is no automaticity between the risk of contagion and the danger to national security. As confirmed by a longstanding jurisprudence on Article 33(2), "the threat [to national security] must be 'serious,' in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible."[9]

Furthermore and more importantly, the very wording of Article 33(2) as interpreted in good faith does not allow blanket border closure and collective denial in access to asylum procedures. As noted by domestic courts, "[t]he wording of the provision ... requires the person him or herself to constitute a danger to national security."[10] Thus, because article 33(2) refers to an individual refugee, it cannot justify the general suspension of refugee status procedure for all asylum-seekers.

Likewise, it is hardly tenable in both law and practice that one single person is able to threaten the security of a whole country because he or she is affected by Covid-19. In any event, as mentioned above in section Border Closure and Human Rights of Migrants, any asylum seekers invoking a risk of torture, inhuman or degrading treatment are protected by the absolute principle of *non-refoulement* under international human rights law. In such cases, the exceptions of the Refugee Convention are literally neutralized.

As a result of this normative framework, UNHCR has concluded alongside IOM and OHCHR that "denial of access to territory without safeguards to protect against *refoulement* cannot be justified on the grounds of any health risk [...]. States have a duty vis-à-vis persons who have arrived at their borders, to make independent inquiries as to the persons' need for international protection and to ensure they are not at risk of *refoulement*. If such a risk exists, the State is precluded from denying entry or forcibly removing the individual concerned" (see also Castellanos-Jankiewicz, 2020; Gilbert, 2020; IOM and UNHCR, 2020; Nicolosi, 2020; Ogg, 2020; OHCHR, 2020a; UNHCR, 2020a).

As exemplified above, denying access to refugee protection through border closure is a violation of Articles 9 and 33 of the Geneva Convention. When this measure is targeting asylum seekers from a particular country, this also violates the principle of non-discrimination under Article 3 of the Geneva Convention and many other similar provisions of human rights conventions (including articles 2 and 26 of the International Covenant on Civil and Political Rights).

CONCLUSION

Although the challenges of the current pandemic are huge and manifold, Covid-19 cannot be an excuse to close borders at the expense of the most basic rights of migrants and refugees. International human rights law draws a clear-cut dividing line between what states can do and what they must do to protect public health at their borders. While states enjoy a broad margin of appreciation in their response to Covid-19, a minimum standard of absolute guarantees does apply in any circumstances, including in times of pandemic.

Blanket entry bans on the ground of public health are irreconcilable with the core rights at borders, because they exclude any forms of individual processing to ensure due respect for the principle of *non-refoulement* and access to asylum procedures, the prohibition of collective expulsion, the best interests of the child and the principle of non-discrimination.

By contrast, migration control can and must be adapted to integrate health and protection imperatives in due respect with the rule of law. The core rights at the border strengthen and underpin public health for they allow states to carry out, within their own immigration and asylum processing, health screening or testing at borders and, where required, quarantine. Following this stance, UNHCR (2020b) and IOM (2020a) have detailed a comprehensive set of practical recommendations addressed to states and their immigration and asylum authorities, with the view of protecting both public health and migrant rights at the borders.

Because Covid-19 is likely to become the new normal for some time, further systematic integration of health and protection calls for a comprehensive and ambitious human rights based approach to both health and migration policies. Accordingly, in some circumstances, mitigating the contagion of Covid-19 may justify lawful limitations to human rights, provided that they are necessary, proportionate, non-discriminatory and in accordance with law. This concerns primarily the right to freedom of movement within the territory of a state through community-based or home quarantine and other related temporary restrictions on movement.

In most instances, however, the same objective of public health cannot be achieved without fully implementing human rights. The prohibition of arbitrary detention offers a persuasive case.

[9]Supreme Court of Canada, *Suresh v. Canada (Minister of Citizenship and Immigration) (2002) 1 SCR 3.* para. 90. See also: *Attorney General v. Zaoui* (2004), Dec. No. CA20/04, paras. 133 and 140; *NSH v. Secretary of State for the Home Department* (1988) Imm AR 410.

[10]Court of Appeal of New Zealand, *Attorney General v. Zaoui (2004) Dec. No. CA20/04.*, para. 148.

Providing non-custodial alternatives to immigration detention is not only a duty of states under human rights law,[11] it is also required to avoid contagion in overcrowded detention centers (OHCHR, 2020b; UN Network on Migration, 2020a; Working Group on Arbitrary Detention, 2020). The same observation should be raised with regard to the right to health. While access to primary health care for all migrants and refugees is a minimum core obligation under the International Covenant on Economic, Social and Cultural Rights (UN Committee on Economic, 2017; for further discussion see Chetail, 2019), it is in fact more needed than ever to avoid the spread of contagion (OHCHR, 2020a; UN Committee on Economic, 2020; UN Committee on the Protection of the Rights of All Migrant Workers Members of Their Families UN Special Rapporteur on the Human Rights of Migrants, 2020; UN Network on Migration, 2020c).

[11] See among many other restatements: Global Compact for Safe. Orderly and Regular Migration. A/RES/73/195. (2018), objective 13; Human Rights Committee, *C v Australia* (2002) Communication No 900/1999 UN Doc CCPR/C/76/d/900/1999., para 8.2 (UNHCR, 2012).

When assessed from the angle of the state's duties under human rights law, public health and migrant's rights are thus not exclusive but mutually reinforcing. They are bound to work in tandem within a continuum of protection. Both in pith and substance, taking seriously public health means more, than less, protection of migrants for the benefits of all.

DATA AVAILABILITY STATEMENT

The original contributions presented in the study are included in the article, further inquiries can be directed to the corresponding author.

AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

REFERENCES

Burci, G. L. (2020). *The Outbreak of COVID-19 Coronavirus: Are the International Health Regulations Fit for Purpose?* EJIL: Talk! Available online at: https://www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/ (accessed August 30, 2020).

Carrera, S., and Luk, N. C. (2020). *Love Thy Neighbour? Coronavirus Politics and Their Impact on EU Freedoms and Rule of Law in the Schengen Area*. CEPS Paper No. 2020-04. Available online at: http://aei.pitt.edu/102710/1/LSE2020%2D04_Love%2Dthy%2Dneighbour.pdf (accessed August 30, 2020).

Castellanos-Jankiewicz, L. (2020). *COVID-19 Symposium: US Border Closure Breaches International Refugee Law*. Opinio Juris. Available online at: http://opiniojuris.org/2020/04/03/covid-19-symposium-us-border-closure-breaches-international-refugee-law/ (Accessed August 30, 2020).

Chetail, V. (2001). "Le principe de non refoulement et le statut de réfugié en droit international," in *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après: bilan et perspectives*, eds Chetail and Flauss (Brussels: Bruylant), 3–61.

Chetail, V. (2019). *International Migration Law*. Oxford: Oxford University Press.

Chetail, V. (2020). Covid-19 and human rights of migrants: more protection for the benefit of all. *IOM Policy Brief*. p. 1–11. Available online at: https://publications.iom.int/system/files/pdf/covid19-human-rights.pdf (accessed August 30, 2020).

Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (2017). *Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return*. UN Doc CMW/C/GC/4-CRC/C/GC/23.

Foster, C. (2020). *Justified Border Closures Do Not Violate the International Health Regulations 2005*. EJIL: Talk!. Available online at: https://www.ejiltalk.org/justified-border-closures-do-not-violate-the-international-health-regulations-2005/ (accessed August 30, 2020).

Gelatt, J. (2020). *Immigrant Workers: Vital to the U.S. COVID-19 Response, Disproportionately Vulnerable*. Migration Policy Institute (MPI). Available online at: https://www.migrationpolicy.org/research/immigrant-workers-us-covid-19-response (accessed August 30, 2020).

Gilbert, G. (2020). "Forced displacement in a time of a global pandemic," in *Covid-19, Law and Human Rights: Essex Dialogues*, eds C. Ferstman and A. Fagan (Colchester: University of Essex), 167–175.

Grahl-Madsen, A. (1997). *Commentary on the Refugee Convention, 1951*. Geneva: UNHCR.

Guadagno, L. (2020). *Migrants and the COVID-19 Pandemic: An Initial Analysis*. IOM, Migration Research Series No. 60. Available online at: https://publications.iom.int/system/files/pdf/mrs-60.pdf (accessed August 30, 2020).

Guttentag, L. (2020). *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors*. Just Security. Available online at: https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/ (accessed August 30, 2020).

Habibi, R., Burci, G. L., de Campos, T. C., Chirwa, D., Cinà, M., Dagron, S., et al. (2020). Do not violate the international health regulations during the COVID-19 outbreak. *Lancet* 395, 664–666. doi: 10.1016/S0140-6736(20)30373-1

Hathaway, J. (2005). *The Rights of Refugees Under International Law*. Cambridge: Cambridge University Press.

Hruschka, C. (2020). *The Pandemic Kills Also the European Solidarity*. EU Immigration and Asylum Law and Policy. Available online at: http://eumigrationlawblog.eu/the-pandemic-kills-also-the-european-solidarity/ (accessed August 30, 2020).

ILO (2020). *Policy Brief: Protecting Migrant Workers During the COVID-19 Pandemic: Recommendations for Policy-Makers and Constituents*. Available online at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_743268.pdf (accessed August 30, 2020).

IOM (2020a). *IOM Global Strategic Preparedness and Response Plan: Coronavirus Disease 2019: February–December 2020*. Available online at: https://www.iom.int/sites/default/files/defaul/iom_covid19_appeal_15.04.2020.pdf (accessed August 30, 2020).

IOM (2020b). *Global Mobility Restriction Overview*. Available online at: https://migration.iom.int/reports/covid-19-travel-restrictions-output-%E2%80%94-24-august-2020?close=true&covid-page=1 (accessed August 30, 2020).

IOM and UNHCR (2020). *COVID-19: Access Challenges and the Implications of Border Restrictions*. Available online at: https://reliefweb.int/report/world/covid-19-access-challenges-and-implications-border-restrictions (accessed August 30, 2020).

Nicolosi, S. (2020). *Non-Refoulement During a Health Emergency*. EJIL: Talk! Available online at: https://www.ejiltalk.org/non-refoulement-during-a-health-emergency (accessed August 30, 2020).

Ogg, K. (2020). *Covid-19 Travel Restrictions: A Vilation of Non-Refoulement Obligations?* Available online at: https://law.anu.edu.au/research/essay/covid-19-and-international-law/covid-19-travel-restrictions-violation-non-refoulement-obligations (accessed August 30, 2020).

OHCHR (2020a). *COVID-19 and the Human Rights of Migrants: Guidance*. Available online at: https://www.ohchr.org/Documents/Issues/Migration/OHCHRGuidance_COVID19_Migrants.pdf (accessed August 30, 2020).

OHCHR (2020b). *US: Migrants "Held for Processing" Should Be Released From COVID-19 High-Risk Detention Centres*. Geneva. Available online at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25827&LangID=E (accessed August 30, 2020).

Plender, R. (Ed.). (2015). *Issues in International Migration Law*. Leiden: Brill Nijhoff.

Reuters (2020). *South Korea Vows "Reciprocal" Countermeasures to Japan's Coronavirus Travel Limits*. Available online at: https://www.reuters.com/article/us-health-coronavirus-southkorea-japan/south-korea-vows-reciprocal-countermeasures-to-japans-coronavirus-travel-limits-idUSKBN20T0F1 (accessed August 30, 2020).

Sanchez, G., and Achilli, L. (2020). *Stranded: The Impacts of COVID-19 on Irregular Migration and Migrant Smuggling*. Florence: Migration Policy Centre, Robert Schuman Centre for Advanced Studies and European University Institute, Policy Brief Issue 2020/20.

Thym, D. (2020). *Travel Bans in Europe: A Legal Appraisal (Part I) and (Part II)*. EU Immigration and Asylum Law and Policy. Available online at: http://eumigrationlawblog.eu/travel-bans-in-europe-a-legal-appraisal-part-i/; http://eumigrationlawblog.eu/travel-bans-in-europe-a-legal-appraisal-part-ii/ (accessed August 30, 2020).

UN Committee on Economic, Social and Cultural Rights (2017). *The Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights*. UN doc E/C.12/2017/1.

UN Committee on Economic, Social and Cultural Rights (2020). *Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights*. UN Doc E/C. 12/2020/1.

UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Special Rapporteur on the Human Rights of Migrants (2020). *Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants*. Available online at: https://www.ohchr.org/Documents/Issues/Migration/CMWSPMJointGuidanceNoteCOVID-19Migrants.pdf (accessed August 30, 2020).

UN Network on Migration (2020a). *COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?* Available online at: https://migrationnetwork.un.org/sites/default/files/docs/un_network_on_migration_wg_atd_policy_brief_covid-19_and_immigration_detention_0.pdf (accessed May 21, 2020).

UN Network on Migration (2020b). *UN Network on Migration Official Statement on the SG's Policy Guidance: The COVID-19 Pandemic Is an Opportunity to Reimagine Human Mobility*. Available online at: https://migrationnetwork.un.org/un-network-migration-official-statement-sgs-policy-guidance-covid-19-pandemic-opportunity-reimagine (accessed August 30, 2020).

UN Network on Migration (2020c). *Working Group on Access to Services. Enhancing Access to Services for Migrants in the Context of COVID-19 Preparedness, Prevention, and Response and Beyond*. Available online at: https://migrationnetwork.un.org/sites/default/files/docs/final_network_wg_policy_brief_covid-19_and_access_to_services_1.pdf (accessed August 30, 2020).

UNHCR (2012). *Detention Guidelines*.

UNHCR (2020b). *Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic*. Available online at: https://www.unhcr.org/cy/wp-content/uploads/sites/41/2020/04/Practical-Recommendations-and-Good-Practice-to-Address-Protection-Concerns-in-the-COVID-19-Context-April-2020.pdf (accessed August 30, 2020).

UNHCR. (2020a). *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response*. Available online at: https://www.refworld.org/docid/5e7132834.html (accessed August 30, 2020).

UNICEF (2020). *Refoulement, Detention, Push-Backs and Deportations of Children in the Context of the COVID-19 Pandemic: Key Messages*. Available online at: https://migrationnetwork.un.org/sites/default/files/docs/kms_refoulement_detention_and_deportations_of_children_in_the_context_of_covid-19.pdf (accessed August 30, 2020).

Working Group on Arbitrary Detention (2020). *Deliberation No. 11 on Prevention of Arbitrary Deprivation of Liberty in the Context of Public Health Emergencies*. Available online at: https://www.ohchr.org/Documents/Issues/Detention/DeliberationNo11.pdf (accessed August 30, 2020).

World Health Organization (2020). *Updated WHO Recommendations for International Traffic in Relation to COVID-19 Outbreak*. Available online at: https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak/ (accessed August 30, 2020).

Wouters, K. (2009). *International Legal Standards for the Protection From Refoulement*. Antwerp; Oxford; Portland, OR: Intersentia.

Conflict of Interest: The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

frontiers in Human Dynamics

CONCEPTUAL ANALYSIS
published: 23 December 2020
doi: 10.3389/fhumd.2020.609694

(In)Essential Bordering: Canada, COVID, and Mobility

*Audrey Macklin**

Centre for Criminology & Sociolegal Studies and Faculty of Law, University of Toronto, Toronto, ON, Canada

The global migration of COVID-19 not only disrupted transborder movement. In many (if not most) states, statis, and closure became the default norm at and within borders. This, in turn, generated exceptions organized around an idea of "essential" entry. The category of "essential" was produced, revised, and represented through the interaction of pandemic-driven exigencies and nationally specific configurations of the legal, political, and economic forces in play. To understand how the admission into Canada of certain people was accepted as legally, economically and/or politically essential, one must take account of Canada's character as a settler society, its economic integration with the United States, and its growing dependence on migrant workers and international students to subsidize food production and higher education for nationals.

Keywords: COVID-19, Canada, borders, mobility, migrant workers, refugees, international students, citizens

OPEN ACCESS

Edited by:
Jaya Ramji-Nogales,
Temple University, United States

Reviewed by:
Frédéric Mégret,
McGill University, Canada
Rebecca Hamlin,
University of Massachusetts Amherst, United States

***Correspondence:**
Audrey Macklin
audrey.macklin@utoronto.ca

Specialty section:
This article was submitted to Migration and Society, a section of the journal Frontiers in Human Dynamics

Received: *24 September 2020*
Accepted: *01 December 2020*
Published: *23 December 2020*

Citation:
Macklin A (2020) (In)Essential Bordering: Canada, COVID, and Mobility. Front. Hum. Dyn. 2:609694. doi: 10.3389/fhumd.2020.609694

INTRODUCTION

The cross-border movement of a virus threw into chaos the cross-border movement of everything and everyone else. The unprecedented conjuncture of border closure and domestic immobilization has disrupted conventional patterns of movement and mobility into and within Canada. The hierarchy of admissibility according to legal status and national origin has been jumbled. Consider that in summer 2020, cars on Canadian streets bearing US license plates were viewed with suspicion and hostility, prompting calls to Canada Border Services Agency (CBSA) to report the illicit presence of Americans.

This paper uses Canada as a case study to explore two features of COVID's impact on bordering. The first inquires into the relationship between the control of movement across borders and movement within borders. COVID makes this salient because of the drastic and unfamiliar restraints imposed on individual movement at the local and inter-provincial level. In *Spheres of Justice,* Walzer (1982) famously provided a normative defense of closed national borders by, *inter alia*, predicting that if national borders were open, sub-state and local communities would reactively erect barriers to entry in order to preserve the sense of communal membership. This world of a "thousand petty fortresses" was contrasted to a national territory characterized by unimpeded mobility. In other words, the maintenance of free movement within the state is underwritten by the presumption of closure of national borders. COVID-induced regulation both tracks and disrupts this model.

The second feature of Canada's pandemic migration regulation is the reconfiguration of the conventional priorities and preferences for non-citizen entry. Like other affluent countries, Canadian migration law facilitatex travel and migration by nationals from other states of the global north (and Australia/NZ), in contrast to nationals from the global south. Ideas about the desirable traveler and migrant are infused with ideas about class, race, religion, ability etc.

This passport privilege has been temporarily displaced by a different hierarchy based less on "desirability" than immediate necessity. In Canada and elsewhere, pandemic rules have been organized around ideas about whose entry, which labor, and which interests are "essential." I offer a typology of "essential" that braids together economic, legal, and political elements. While this article is not comparative, I suspect that particular choices about who and what is "essential" might vary between states, and that these variations might link to different conceptions of migration, the nation, and national belonging. Canada is a settler-society. It is built literally and discursively on a commitment to immigration that, in the first instance, displaced Indigenous people and consolidated colonial political power. It provided the demographic, economic, and social foundation upon which the state was assembled and continues to grow. Other states have a different migration history and trajectory, but all face similar challenges around COVID. It may be premature to theorize the impact of COVID on bordering while events are still unfolding, but one can begin the task of tilling the ground.

THE UNEXCEPTIONAL BORDER

A conventional metaphor for the border depicts it as a filter or screen that slows and halts the entry of some, while permitting and expediting the entry of others. In ordinary times, this image is juxtaposed against the situation within state territory, where movement is unimpeded and virtually unregulated. COVID has eroded this distinction between governance of movement at the border and inside the country. I do not anticipate that the changes wrought by COVID will become permanent, but what has changed irrevocably is the assumption of irrevocability.

As COVID traveled the world passport-free, a predictable reaction of states was to target for exclusion travelers from alleged source countries—first China, then Iran and Italy. We know this exclusion narrative well, replete with metaphors of foreign viruses infecting the body politic, and the deplorable enthusiasm with which some political leaders fomented and exploited it. The racist and stigmatizing effects of labeling COVID19 the "Chinese" or "Wuhan" virus" are made no less pernicious by their predictability.

Critics of these border closures rightly observed that they would likely fail to halt the spread of the virus, partly because these closures inevitably happen after the virus has already found its way in—the inverse problem of shutting the barn door after the horse has bolted. By around mid-March, it became evident that the virus was everywhere and could not be stopped, only slowed. At that moment, borders slammed shut more tightly and more pervasively than many of us had ever seen in our lifetimes. But this quantitative intensification of border control masked a shift in its qualitative character that was produced by a transformation in the governance of movement more generally.

Discriminating against "dangerous" foreigners from certain states—China, Italy, Iran—belongs to the banal work of racist border control in the Global North. It has a long and ignoble pedigree. Identifying foreigners as vectors of disease and degeneration in both physical and moral terms is a familiar trope. One need not reach far back to recall, for example, the "homosexual Haitian drug user" as the villain in the HIV/AIDs origin story. "Xenophobia: COVID Edition" seems to this observer like a variation on a familiar theme[1]. But this endeavor of excluding the foreign menace was superseded by the project of halting movement as such, of which cross-border movement was only one type. Once it was apparent that stopping the virus was not viable and the goal shifted to slowing its spread (pending a vaccine), any and all movement became undesirable. In this context, borders mark critical jurisdictional breaks. Canada does not govern the territory of other states, and the actions and inactions of those other states in managing the pandemic become a source of risk embodied in individual foreign travelers. But it was not the conduct or character of border-crossers themselves that was at issue.

At the same time, the pandemic precipitated unprecedented restraints on movement within the territory of the Canadian state, and this applied to citizens and non-citizens alike. From the individual body, to the household, to municipalities, to provinces and, finally, to the state, the universal object of governance became the arrest of human movement. Each person was a potential vector and victim of disease, and controlling mobility preoccupied every jurisdiction at every scale of governance. With policing techniques ranging from appeals to solidarity to threats of criminal sanction, people were told to stay home, to stay away from one another, to stay put. In ordinary times, the default position for state borders is closure, subject to exception; within the state, the default is free movement, subject to exception. In Canada, s. 6 of the Canadian Charter of Rights and Freedoms not only protects the right of citizens to enter, but the free movement of citizens and permanent residents throughout Canada. Yet, under COVID, it was all stasis, all the time, everywhere, for everyone. Movement was policed by state actors, by neighbors, via cell phone technology and otherwise; inessential movement was subject to opprobrium, or worse. Borders between provinces that hitherto only functioned to mark the transition between sub-state jurisdictions were activated to impede inter-provincial or inter-regional movement. A Newfoundland law barring interprovincial travel withstood constitutional challenge, though it is under appeal (Taylor, 2020).

Within this regime of immobilization within the state, where citizenship is less relevant, border control appears less distinctive, and more like one node in a matrix of mechanisms aimed at halting the circulation of people. The technology of border control is purpose-designed to maximize coercion and minimize accountability, and one should not trivialize its specificity and violence. Having said that, it is worth noting how *border control* under COVID was interpolated into an infrastructure of *mobility control* that was not primarily about migration. It was primarily about slowing the spread of the virus, the same objective shared by a suite of domestic measures, including quarantine, lockdown, social distancing rules, internal travel restrictions, mobile app

[1]For example, Canada adopted explicitly racist entry policies against Chinese migrants from 1885 to 1946, and covertly (and more effective) racist policies against Japanese and South Asian migrants from the early twentieth to mid-twentieth century. *See generally,* Aiken (2007).

contact tracing, and so on. In this sense, the border's function in arresting movement was no longer unique. That is new. (That some employers would use their power to restrict the mobility of migrant workers even more harshly is not new).

Thanks to COVID, a vision of Walzer's world of a thousand petty fortresses came into view, with provinces erecting barriers to non-residents, including former residents. People in rural areas grumbled loudly about city dwellers "escaping" to their cottages or chalets and bringing COVID with them. Fragile northern communities (especially Indigenous) tried to protect themselves by denying access to people from outside the region. But Walzer imagined this as a reaction to [more] open borders. That is not the explanation for the sub-national restraint of movement under COVID. There is no trade-off between closure at one scale and openness at another. Here, state sovereignty is not manifested by preventing entry, but by controlling, confining, and surveilling movement, of which cross-border movement is only the exemplar. We cannot know now, and perhaps will not know for a long time, the durability, shape, and the trajectory of states' newly revived and amplified will and capacity to regulate movement that begins not with crossing a border between two states, but with crossing a threshold between abode and outdoors. In my view, the measures adopted since COVID undermine the very idea of mobility as free movement, and tilt toward a vision of mobility as permitted movement.

ESSENTIAL CONNECTIONS

Essential Movement

Even in a pandemic, borders cannot be hermetically sealed. While the pandemic obviously restricted entry, it also reconfigured the basis for admission in revealing ways. Unlike many other states, the Canadian government did not respond to the pandemic by declaring a national emergency and invoking the powers contained in the *Emergencies Act*. Under Canada's federal system, international border control falls under federal jurisdiction, and Emergency Orders issued and renewed monthly by Cabinet under the authority of s. 58 of the *Quarantine Act* regulated cross-border movement, overriding or otherwise altering existing provisions of the *Immigration and Refugee Protection Act*.

The term "essential" became the stamp on the notional permit that validates movement. Technically, the Emergency Orders do not positively authorize "essential" border crossing. Instead, they prohibit entry for "optional" or "discretionary" purposes. The residue that remains is travel for an "essential purpose."

Who or what is essential, and why? For present purposes, I will detach the label "essential" from "services," "work" or "worker" and instead consider more broadly the reasons that give shape and content to the category "essential," which in turn signifies an exception to the default of stasis and exclusion. I propose that entry might usefully be classified as *legally* essential, *politically* essential, or *economically* essential. The legal dimension captures constitutional, international, or legislative provisions that constrain the power of the state to exclude. While it is true that most laws create exceptions for emergencies of various sorts, the existence of an initial legal obligation can still exert significant force over policy choices.

Entry is economically essential to a state in respect of those workers who transport otherwise unavailable goods or who provide vital and otherwise unavailable forms of labor, such as health care, sanitation, public transportation, and food production and distribution. However, as the Canadian case shows, workers are not the only non-citizens considered essential to the Canadian economy.

The category of politically essential entry necessarily overlaps with the other two, and is necessarily contested and contingent. Claims that entry is legally or economically essential will be leveraged by interested parties (employers, institutions etc.) to persuade politicians to create an exception to the default of closure and exclusion. But the political impetus may also be generated from successful public appeals to moral, social, or pragmatic considerations.

These proposed categories of essential entry are neither mutually exclusive, nor static. They simply provide a rough schema for organizing and comparing the diverse responses of various states to the challenges of COVID and trans-border movement.

US and Everywhere Else

Canada's only land border is with the United States. The Canada-US border is not only a barrier, but also a suture stitching together two political units into a deeply interdependent economic, social, and political relationship (Salter, 2012). Early on, it became obvious that the neither the US federal government, nor most state governments, would or could act quickly to contain the spread of COVID. Inevitably, the *per capita* infection and fatality rates in the US would (and did) soar relative to Canada. Restricting the flow of entrants from the United States was both vital from a public health perspective and potentially devastating to the Canadian economy. This tension between sovereign self-interest and unequal economic power plays out across a range the full range of Canada-US relations, and the pandemic provides another site for observing its effect on migration and border management.

Each month since March 2020, Cabinet has renewed not one, but two Emergency Orders under the *Quarantine Act* that govern cross-border movement. One is for foreign nationals entering Canada from the United States. The other is for foreign nationals entering from all other countries. The salient difference between the two Orders is the default starting point. Foreign nationals from the United States are prohibited unless their entry is not for an optional or discretionary purpose. Foreign nationals from elsewhere are prohibited unless they come within a list of designated exceptions, *and* if their entry is not for an optional or discretionary purpose. A non-exhaustive list of examples of discretionary or optional travel includes "tourism, recreation, and entertainment." Until October 2020, internationals students arriving directly from the United States were admissible if they possessed student permits issued anytime; international students arriving from anywhere else had to possess student permits issued before 18 March 2020. As discussed below, the government amended these rules in mid-October 2020.

The reason for the preferential treatment of the United States is straightforward: The United States is the only country with

whom Canada shares a land border. North American economic integration makes the cross-border traffic of goods (including food and health equipment) from the United States vital to Canadians. US truckers become essential workers to Canada, and the Emergency Order enables them to traverse the border as visitors (they are also exempt from the quarantine requirement). Indeed, the same quarantine exemption applies to hundreds of Canadian nurses living in the Windsor, Ontario area who cross the border daily to work in Detroit hospitals and return home to Windsor.

Travel to Canada for tourism and business travel are prohibited as optional and discretionary, although special permits are granted for overland transit through Canada from continental United States and Alaska, and vice versa. Well-publicized stories of Americans who assured CBSA that they were transiting through Canada, but who were actually vacationing in Canada, stoked a certain degree of suspicion and animosity directed at drivers of cars with US license plates. While mocking Americans is something of a national pastime in Canada, there was something undeniably novel about casting the white, affluent, middle-aged American tourist in the role of foreign scofflaw and vector of contagion. Even more troubling, however, were revelations that senior Canadian officials authorized entry of several US business executives to Canada during the pandemic with no requirement to quarantine (Gatehouse, 2020).

CITIZENS AND PERMANENT RESIDENTS

As states moved to close borders in response to the pandemic in early 2020, Canadian citizens outside Canada remained free to re-enter, subject to a 14-day quarantine period. Indeed, the Prime Minister of Canada repeatedly urged Canadians abroad to return to Canada as soon as possible. Since the right of citizens to enter Canada is constitutionally protected under section 6 of the Canadian Charter of Rights and Freedoms, as well as international law, one might understand access by citizens to Canadian territory as *legally essential*. But it bears noting that citizens who exhibit any symptoms of COVID illness can be refused boarding by airline carriers, rendering them *de facto* excluded. Here, bio-status trumps citizenship-status when citizens travel by air, which they must do to reach Canada from anywhere but the United States.

Why did the Prime Minister exhort Canadians to return? One might read this as a romantic appeal to the Canadian diaspora: in times of crisis, one can and should return to the protective embrace of the homeland (Mégret, 2020). Of course, patriotism can be mobilized toward a variety of ends. The Chinese government blocked Canadian-Chinese dual citizens from leaving China (often with Canadian family members) and traveling to Canada. At the same time, the Chinese government actively discouraged thousands of Chinese international students attending Canadian from returning to China, ostensibly to minimize any risk of reintroducing COVID into China. It seems that Chinese citizens in China behave patriotically by remaining in China, while those abroad express their patriotism by not returning home to China.

In general, the call to "come home" tracked the predictable eruption of xenophobia directed at actual or perceived "foreigners" (Purohit and Mukherjee, 2020; Stevens, 2020). The familiar story is that the non-citizen and the racialized other (in this case, people with Asian features) always teeter at the edge of outsider status, and an outsider is always vulnerable when bad things happen and people look for someone to blame. Around the world, anti-Asian racism, and scapegoating of migrants and foreigners escalated.

From a purely pragmatic perspective, the Canadian Prime Minister's appeal to citizens abroad also anticipated the imminent global shutdown of international travel. The government wished to avoid the prospect of thousands of Canadian citizens stranded abroad and calling on the Canadian government to repatriate them. And even though the Canadian government insistently (though quietly) declares that consular assistance in the form of repatriation is dispensed as a matter of discretion, not entitlement, Canadians continue to expect it. The political cost of refusing to repatriate Canadians would be enormous, so better to do so before the logistical and financial cost escalated even further.

Permanent residents of Canada do not enjoy a constitutional right to (re)enter Canada, but they do enjoy a statutory right under s. 19(2) of the *Immigration and Refugee Protection Act* to enter Canada. Permanent residents must physically reside in Canada for at least 6 months a year to maintain their status. A purely statutory right can be abridged more easily than a constitutional right, but in any case, the orders issued under the *Quarantine Act* preserved permanent residents' ability to enter Canada on the same terms as citizens. This was true of most countries in the Global North, who recognized that exclusion of permanent residents would have been politically untenable. The Canadian government also included many permanent residents in repatriation flights (Government of Canada, 2020f).

Unsurprisingly, the government continues to discourage Canadians from non-essential travel outside Canada (Government of Canada, 2020f). In the early days of the pandemic, many Canadians (with the support of some provincial premiers) disregarded the advice of public health officials not to travel south for spring break vacations, and it appears that this accelerated the spread of COVID in Canada. Thousands of retired Canadians spend the winter in Florida, Arizona, and California. In October 2020, Prime Minister Trudeau cautioned against traveling to the US but added,

"If someone chooses to travel, we're not going to keep them imprisoned in Canada. There is freedom of movement in this country. [But] they have to recognize that they're putting themselves at risk". They're putting loved ones at risk (Muggeridge, 2020).

In light of the various restraints on mobility within Canada, Prime Minister Trudeau's invocation of freedom of movement is striking, if not ironic.

FOREIGN NATIONALS IN CANADA

Workers

Canadian immigration law defines foreign nationals as non-citizens who are not permanent residents. When the pandemic

struck, some foreign nationals who had resided in Canada for extended periods on renewable work permits happened to be temporarily abroad. Their legal entitlement to enter is even more conditional and precarious under immigration law than permanent residents, but the government ultimately permitted them to return. To understand why, it is worth noting that over the past 15 years, Canadian immigration policy has reduced the proportion of "high" skill economic immigrants admitted directly as permanent residents in favor of two-step immigration schemes that require migrants to undergo a period of temporary status before qualifying for permanent residence. Thousands of foreign nationals live and work in Canada more or less continuously for years (often with families) on a succession of temporary work permits. Many temporary work permit holders are indistinguishable from those admitted as permanent residents in the economic class. But legally, the line between temporary and permanent resident status means that temporary residents' continuous, long-term physical presence in Canada is inconsequential. During COVID, however, prior presence sufficed for purposes of admission (Government of Canada, 2020c).

International Students

All major Canadian universities are publicly funded, but governments cover a decreasing proportion of actual costs. Historically, the education of international students was framed as a form of quasi-international development assistance, in which students from the Global South would acquire a university education in Canada that they would carry back and apply in their countries of origin. By the turn of the twenty-first century, this neo-colonial model of international students as aid recipients evolved into a neo-liberal model of international students as revenue stream. Programs that enable some international students to obtain post-graduation work permits incentivize international students to choose Canada as a destination in the hopes of finding a pathway to permanent immigration. Today, Canadian universities depend heavily on tuition fees charged to international students; international student tuition across Canadian universities average 4.5 times the fees charged to domestic students (Statistics Canada, 2020). Even as the pandemic pushed post-secondary institutions to facilitate online course instruction for the vast majority of programs, universities were anxious to maintain international student enrolment. They worried that international students would balk at paying exorbitant tuition fees without the benefit of actually living in Canada. Thus, universities lobbied the federal government to ensure that international students who were willing to leave their home countries could still travel and live in Canada—even if they studied online after arrival.

Universities found themselves in a quandary: The physical presence of international students is *economically essential* to Canadian post-secondary institutions. But universities' own efforts to manage the pandemic by going online refuted the claim that physical presence is essential to fulfillment of universities' pedagogical mission. The economic imperative to enable international students to enter Canada thus collided with the bar on entry for "discretionary" or "optional" purposes. Although the federal government allowed online courses to "count" for purposes of activating a study permit, this did not resolve the problem of entry.

Universities only partially succeeded in enabling international students to enter in time for the launch of the academic term in September 2020. As with holders of temporary work permits, government policy drew on past residence as a criterion for designating entry as essential. Returning international students able to prove that they had already lived in Canada could enter. This did not address the situation of first-year international students, unless their university furnished a supporting letter from the university attesting that "the program requires in-person attendance … once the [university] is able to resume classroom operations." The university was also required to "indicate a target start date for courses that require the student to be in Canada" (Government of Canada, 2020e). International students arriving directly from the United States could hold student permits issued anytime; international students arriving from anywhere else could only hold student permits issued before 18 March 2020. But even with a study permit in hand, actual admission remained subject to CBSA officers' exercise of discretion at the port of entry. This meant that students could not confidently predict whether they would be admitted until they actually traveled to Canada.

In mid-October 2020, the federal government announced a new program to enable international students to study in Canada. Henceforth, provincial governments would certify individual Canadian universities with an approved "COVID readiness plan" as Designated Learning Institutions (DLI). International students possessing study permits for DLIs could enter, and would follow the quarantine protocol arranged by the university (Government of Canada, 2020h). This model was the product of assiduous negotiations with government by Canadian post-secondary institutions. Although it arrived too late for the start of the academic year, it enables universities to continue offering the "in-Canada" experience to international students for whom online study from the country of origin was not worth the price of tuition.

FAMILY MEMBERS

Over 20% of Canada's population was born abroad. Immigration is written into Canada's nation-building narrative as a settler society; historically, family-based migration was considered integral to social and demographic. Untold numbers of Canadian citizens, as well as permanent and foreign nationals in Canada, have close kin who are foreign nationals. Even though non-citizens have no currency in the political marketplace, they are virtually represented by the millions naturalized citizens and descendants of immigrants. The admission of foreign national family members of people who reside in Canada emerged as a contentious issue early in the pandemic. Foreign national family members had no legal or economic argument in favor of admission, but the government eventually relented. The admission of foreign national family members of those who had made Canada home became *politically essential*, even if not legally required.

Emergency orders under the *Quarantine Act* prohibit entry for optional or discretionary purposes, and specifically list tourism, recreation, and entertainment as examples. This leaves considerable interpretative latitude in the hands of CBSA officials standing at the border. The government's initial position on non-optional/non-discretionary exceptions to border restrictions was that "[t]here are no exemptions to border restrictions for compassionate reasons, such as visiting a critically ill loved one or attending a funeral" (Government of Canada, 2020f, p. 5). Early on, however, the government declared an exemption for immediate family members (intimate partners and dependent children) of citizens and permanent residents. These foreign nationals could be admitted as visitors if it was "for an essential purpose."

Over the course of several months, media accounts abounded of foreign national spouses denied entry to attend the birth of their child, adult children unable to visit or care for their ailing, elderly parents, and long-term long-distance couples refused permission to see one another (Bureau, 2020a,b). Other states wrestled with the same issue (Dutch News, 2020). In each of the Canadian cases, CBSA officers determined that the foreign national did not qualify as an immediate family member and/or that the purpose of travel was inessential. In some cases, CBSA officers threatened to issue a 1-year ban if the foreign national did not surrender their attempt to enter Canada (Harris, 2020).

Ad-hoc advocacy sprung up across Canada to press for a wider definition of immediate family, and for recognition of family reunification as intrinsically essential. The "Faces for Advocacy" group set up a social media presence under the slogan "Family Reunification, Not Open Borders," and engaged in a media campaign, and government lobbying (Faces of Advocacy, 2020). In a subsequent order under the *Quarantine Act*, "immediate family" was broadened to include parents and step-parents and adult children of citizens and permanent residents (Government of Canada, 2020b). The government also removed the requirement for foreign national family members to establish the essential purpose of their travel, thereby reducing border officials' negative discretion; in effect, family reunification as such was deemed essential for those who fell within the definition of family, who were reuniting in Canada with a citizen or permanent resident, and who would be staying beyond the mandatory 14-day quarantine period (Government of Canada, 2020a,d). Immediate family members of temporary residents were required to obtain an advance authorization letter from Immigration, Refugees and Citizenship Canada, which they would present at the port of entry. CBSA border officials retain residual discretion to reject them at the port of entry, even with the letter. An indirect indication of how CBSA border officials had been wielding their discretion is provided by a policy guideline clarifying that non-discretionary or non-optional travel could indeed include a "foreign national coming for the birth of their own child to another foreign national with temporary resident status" (Government of Canada, 2020a).

While the Canadian government recognized admission of some family members as *politically essential* from the outset, successful advocacy reconfigured family reunification as intrinsically essential, such that family members did not have to demonstrate why reunification was essential. It also expanded the ambit of who counted as "family" in the pandemic. Importantly, media attention appeared to play an important role, and many profiles of separated family members featured people who were not habitually the subject of restrictive and arbitrary border enforcement, or politically active on migration issues. Indeed, the slogan "Family Reunification, Not Open Borders," underscores the conservatism of the campaign.

SEASONAL AGRICULTURAL WORKERS

Canada operates a Seasonal Agricultural Worker Program (SAWP) via bilateral agreements between the governments of Canada as destination state, and Mexico and Jamaica as sending states. Through this program, the government subsidizes the agricultural employers' labor costs by furnishing migrant workers who work in greenhouses, orchards and other industrial agriculture operations for wages and working conditions that Canadians will not accept. Privatized variations on this model supply Canadian agricultural businesses with temporary migrant workers from Guatemala, Philippines, Indonesia and elsewhere. Most return year after year on work permits that tie them to particular employers for a stipulated duration of up to 10 months. The workers can never transition to permanent residence, and must perform the annual ritual of returning "home" for some period of time in order to affirm their legal designation as temporary.

The work requires long hours of hard physical labor and is poorly paid. Respect for occupational health, safety and employment standards by employers is uneven, and exploitative practices by unscrupulous employers are endemic and well-documented. The demand for the labor may or may not be temporary, but the visa is restricted in duration in order to keep the workers temporary. Because of their precarious immigration status (accompanied by the ubiquitous threat of deportation), they experience wage-theft, over-work, unhealthy and dangerous working conditions, overcrowded and inadequate shelter, poor sanitation, and restricted access to food, health care, and liberty (Migrant Workers Alliance for Change, 2020).

In the initial iteration of the pandemic travel restrictions, temporary workers who did not reside in Canada were barred from entry. This excluded seasonal agricultural workers because, as noted above, the requirement to return home annually meant that each entry would be based on a new temporary work permit precisely so they could not claim to reside in Canada. Their exclusion under COVID rekindled a familiar discussion about migrant labor. Although frequently denigrated as "unskilled" and thus undeserving of permanent residence, employers now emphasized the skill, experience, and efficiency of seasonal agricultural workers. They reiterated the refrain that Canadians—even in the face of unprecedented unemployment rates—could not and would not do the arduous work. And so, in order to sustain the food supply in Canada, the entry of seasonal agricultural workers was facilitated as an exception because their admission was *economically essential* to Canada.

But upgrading the work to essential did not make the workers essential. Rather, it exposed the extent to which migrant agricultural labor is essential *because* the workers themselves are dispensable. This is not a paradox: slave labor is essential to a slave economy but, and because, enslaved people have no intrinsic worth in that economy.

Migrant workers were screened for COVID before departure, and employers pledged to honor the 14-day quarantine period, ensure housing and working conditions that respected social distancing requirements, and to otherwise respect and protect workers' health. The Jamaican government, recognizing the remittances by seasonal agricultural workers as economically essential, a report that the Jamaican government was requiring Canada-bound workers to sign a waiver of any liability for contracting COVID while employed in Canada (Mojtehedzadeh, 2020). The dependence of sending states on remittances, their competitive relationship with other sending states, and their weakness relative to destination states, often result in tepid protection and advocacy by sending states for overseas workers.

Consistent with pre-COVID patterns of employer misconduct, many Canadian employers did not respect the quarantine period, coerced employees into working immediately alongside local workers (who did not live on site and circulated freely), did not provide them with adequate housing, personal protective equipment or means of social distancing and, in some cases, physically confined them to the property. Non-compliant workers were threatened with repatriation. Government inspectors—who refrained from entering workplaces because of the risk—conducted virtual inspections in which they relied on employer reports.

COVID outbreaks on farms and greenhouse operations erupted almost immediately. In surrounding communities and commercial establishments, migrant workers were stigmatized and even refused service (Hennebry et al., 2020). For the first 6 months of the pandemic, the agricultural industry (including meat packing plants) and privately-operated long-term care facilities were responsible for the overwhelming majority of positive cases and deaths in Canada. In each sphere, the common denominator is a work force that is disproportionately racialized and low-paid, and populated by migrants who lack secure migration status. A key finding of a study of the differential impact of COVID on non-citizen and racialized people in Ontario (Canada's largest province) found that, as of June 2020, "Although immigrants, refugees and other newcomers make up just over 25% of the Ontario population, they accounted for 43.5% of all COVID-19 cases" (Guttmann et al., 2020). The study did not include seasonal agricultural workers, which would have significantly increased the proportion of non-citizen COVID cases.

Civil society organizations focused on migrant and refugee rights continue document conditions facing precarious migrants and refugees during the pandemic, using mainstream and social media, as well as public protest, to advance long-standing demands to issue migrant workers (across a range of occupations) access to permanent resident status (Migrant Workers Alliance for Change, 2020). In one well-publicized case, a migrant farm worker was fired for allegedly speaking to media after he tested positive and a roommate died from COVID-19. The agri-business employed hundreds of workers under Canada's seasonable agricultural program. The employer failed to provide safe, clean and well-supplied accommodation for workers. By June 2020, over 190 workers tested positive. With support from a migrant rights organization, he was able to resist the employer's attempt to summarily deport him. He filed a complaint against the employer for engaging in reprisal against the worker. In early November, the Ontario Labor Relations Board ruled in favor of the worker, awarding him lost wages and damages (Gabriel-Flores, 2020).

Migrant worker organizations have drawn attention to the essential services these workers provide to a Canadian economy in crisis. They face a heightened risk of infection, illness and death because of the nature of the work they perform, compounded by employer disregard for their health and safety. With the exception described below regarding some asylum seekers, the government has deflected the issue and, instead, provided tens of millions of dollars to employers to encourage them to undertake the protective measures they had already pledged and failed to provide.

ASYLUM SEEKERS AND REFUGEES

At the bottom of all hierarchies of legal migration are refugees and asylum seekers. The admission of people in need of refugee protection is not politically or economically essential to Canada. Refugee resettlement is not legally required, and Canada halted resettlement in March 2020. It resumed slowly in late August, but it is clear that Canada will not meet its resettlement targets for 2020 at the current pace.

Canada's obligations toward asylum seekers qualify their admission as legally essential under a proper interpretation of Canada's obligations under the *UN Refugee Convention* (United Nations High Commissioner for Refugees, 2020), but it is undeniable that Canada (like most other states) seeks to evade those obligations. In a separate contribution, Rehaag et al. have described how Canada leveraged the pandemic to advance its goal of preventing asylum seekers from reaching Canada and claiming refugee protection. In a depressing and distinctive display of Canadian-ness, the government has classified the entry of NHL hockey teams (and their entourages) as essential, but not the entry of asylum seekers (Mohammed, 2020; Rehaag, 2020).

In July 2020, the Federal Court of Canada ruled that the Canada-US Safe Third Country Agreement (STCA) violates the Canadian Charter of Rights and Freedoms, based on the treatment to which asylum seekers are subject when returned to the United States under the STCA (Canadian Council for Refugees, 2020). The government is appealing the decision, has obtained a court order to retain the STCA in place pending the outcome of an appeal scheduled for early 2021, and the border remains closed to refugee claimants who do not fall within STCA exceptions. Those who are apprehended while crossing irregularly are pushed back to the United States.

Against this generally dismal landscape for refugees, one surprising development stands out. When the pandemic

measures began, refugee and migration advocates launched a campaign to urge the federal government to provide access to permanent residence for front-line "essential workers" with precarious immigration status, including seasonal agricultural workers, other migrant workers, and refugee claimants. The Black Lives Matter uprising amplified the racialized character of the migrant worker population, and the impact of the pandemic on expressions of racism and xenophobia. Activists' calls to action were backed by evidence about the treatment of seasonal agricultural workers and temporary workers in meat packing plants. Front line workers in long-term care facilities also received considerable attention, especially in Quebec. Many among them were Haitian and African refugee claimants who had entered Canada irregularly from the United States post-2016 (because the aforementioned STCA precluded them from entering through regular means) at a Quebec location known as Roxham Road. They had long been vilified as "illegal" immigrants in various quarters, including the Quebec provincial government, which had promoted various anti-Muslim and anti-immigrant policies since its election. But here they were, risking their health by providing services in nursing care, security, janitorial work, and food preparation.

In mid-August 2020, the federal government announced that refugee claimants working in the health sector in direct contact with patients would be granted direct access to permanent resident status (Government of Canada, 2020g) The federal immigration minister praised these refugee claimants for demonstrating "a uniquely Canadian quality in that they were looking out for others" (Kestler-D'Amours, 2020). There was, of course, a certain irony to rewarding refugee claimants for their enactment of "Canadian-ness," which they performed by doing work that Canadians would not do. But more significant was the exclusion of other services that were also deemed essential, which also exposed workers to heightened risk of infection, but which did not involve direct contact with the sick or elderly. Inside health care facilities, these included security, cleaning, and food preparation. Workers in other sectors, especially in agriculture, also faced heightened risks that were not inherent to the work (unlike health care), but largely attributable to employer failure to ensure safe working and living conditions. Additionally, precarious migrant workers who were not refugee claimants remain ineligible. A journalist estimated that the proposed measure would probably benefit no more than a thousand people. It emerged soon after the program announcement that while the federal government and other provinces were open to a wider scope of eligibility, at least for refugee claimants in the health sector, the Quebec government strongly opposed it (Gruda, 2020).

This exceptional initiative for refugee claimants appeals to the logic of deservingness and "earned" citizenship: non-citizens may be put on a path to citizenship as a reward for extraordinary sacrifice to the nation. A similar premise underwrote US President Obama's DACA program, whereby prosecution for irregular presence was extended to people without legal status who served in the US military or attended post-secondary education. The Canadian program's limitation to direct provision of health care, and the ineligibility of precarious workers who are not refugee claimants, both invite deeper reflection about the particular confluence of events and discourses that produced it. This unprecedented offer of permanent resident status for refugee claimants is both welcomed for those it includes, and contested as arbitrarily restrictive for those it excludes. In December 2020, four months after the initial announcement, the government opened the application process. The scope of the program remains confined to a subset of eligible refugee claimants who arrived before 18 March 2020 and who work in direct provision of health care (Pilon-Larose, 2020).

CONCLUSION

The global migration of COVID-19 not only disrupted transborder movement. In many (perhaps most) states, stasis and closure became the default norm at and within borders. It is too early to predict or theorize the future of mobility as free (vs. permitted) movement in an era of surveillance, internal borders, and lock-downs.

With respect to transborder movement, pandemic restrictions have in turn, generated exceptions organized around a conception of "essential" that was produced, revised, and represented through the interaction of pandemic-driven exigencies and nationally specific articulations of the legal, political, and economic constraints in play. It would be imprudent to suggest that these have permanently altered conventional migration and citizenship hierarchies. Yet, the pandemic has temporarily inverted conventional hierarchies of who (or whose labor) is essential enough to expose the *status quo ante* to greater critical scrutiny.

To understand how the admission of certain people to Canada was accepted as legally, economically and/or politically essential, one must take account of Canada's character as a "country of immigration," and its contribution to expanding grounds for admission of family members. Canada's economic integration with the United States explains its preferential treatment of entry from that country (despite the hazards posed by US governance of the pandemic). The exposure of Canada's dependence on migrant workers to subsidize food production and to deliver critical services counters the settler-society tendency to promote permanent immigration and settlement. It has also dampened anti-immigrant sentiment, as Canadians recognize the vital contribution of those admitted on a temporary basis.

If one describes Canadian policy on COVID admissions as a circle of inclusion, the government has drawn the circle around citizens, permanent residents, and foreign nationals who can demonstrate prior physical presence of some duration in Canada. In other words, the circle is drawn around functional rather than formal residence. Normally, formal temporary status prevails over functional residence under immigration law. One can reside in Canada continuously for years and yet remain permanently "temporary" because one holds only a temporary visa. Under COVID, the ethical significance of the fact that a student or worker actually lives in Canada—even if their status is "temporary"—has been validated in a way that it normally is not. The work performed by temporary foreign workers, so often

deprecated as "unskilled" or misrepresented as "seasonal," has been newly valorized during COVID. The acknowledgment that the definition of family (essentially parents and children) used for ordinary immigration purposes was too narrow to address the urgent need for family members to connect with those residing in Canada during COVID was also noteworthy. Refugees, however, were left behind.

Each autumn, the Minister of Immigration, Refugees and Citizenship announces projected levels of immigration for the next year. On 30 October 2020, the federal government announced its plan to increase admissions over the next 3 years to compensate for the shortfall caused by the pandemic and facilitate economic recovery and future growth (Government of Canada, 2020i). The messaging is positive about immigration at a moment when many states have doubled down on xenophobia and exclusion, and that is remarkable in itself. The critical question is whether the insights gained through COVID, which carry with them profound potential for transforming migration policy, will survive the pandemic.

Each state has its own set of factors that combine to determine whose entry and what kind of labor is legally, economically and politically essential during the COVID-19 pandemic. But beyond these pragmatic considerations lie conceptions of the nation and identity, and broader social attitudes toward immigration that surely matter. These may best be revealed and appreciated through comparative analysis. By offering Canada as a case study, I hope to open the possibility for comparison between states.

AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

FUNDING

This work was supported by part of a COVID19 Research Topic. This article was fully waived. The author thanks the Pierre Elliott Trudeau Foundation and the Canadian Institute for Advanced Research for generously supporting the author's research.

ACKNOWLEDGMENTS

The author thanks the reviewers and Catherine Dauvergne for excellent and constructive comments, and Jona Zyfi for superb research assistance.

REFERENCES

Aiken, S. (2007). "From Slavery to Expulsion: Racism, Canadian Immigration Law and the Unfulfilled Promise of Modern Constitutionalism," in *Interrogating Race and Racism,* ed Vijay Agnew (Toronto, ON: University of Toronto Press), 55–111.

Bureau, B. (2020a). Turned away at border, pregnant couple stranded in New York's coronavirus zone. 7 May 2020. *CBC News Online*. Available online at: https://www.cbc.ca/news/canada/ottawa/turned-away-at-border-pregnant-couple-1.5538669 (accessed September 15, 2020).

Bureau, B. (2020b). Internal documents show CBSA scenarios to decide who gets across the border — and who doesn't. 2 June 2020. *CBC News Online*. Available online at: https://www.cbc.ca/news/canada/ottawa/cbsa-document-outlines-scenarios-who-crosses-border-1.5594684 (accessed September 15, 2020).

Canadian Council for Refugees (2020). *Canada, 2020 FC 770*. Available online at: https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/482757/index.do?q=safe$+$third$+$country (accessed September 15, 2020).

Dutch News (2020, July 17). Dutch government backs down over 'sweetheart visas' for long-distance couples. *Dutch News*. Available online at: https://www.dutchnews.nl/news/2020/07/dutch-government-backs-down-over-sweetheart-visas-for-long-distance-couples/ (accessed August 21, 2020).

Faces of Advocacy (2020). *Facebook*. Available online at: https://www.facebook.com/facesofadvocacy (accessed 15 November 2020).

Gabriel-Flores (2020). *Gabriel-Flores v. Scotlynn Sweetpac Growers Inc. Ontario Labour Relations Board* Case No. 0987-20-UR.

Gatehouse, J. (2020). UPS executive granted special ministerial exemption from Canada's COVID-19 quarantine. *CBC News Online*. Available online at: https://www.cbc.ca/news/canada/ups-executive-quarantine-exemption-1.5780753 (accessed December 12, 2020)

Government of Canada (2020a). *Non-Optional and Non-Discretionary Travel: COVID-19 Program Delivery*. Available online at: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/service-delivery/coronavirus/travel-restrictions/non-optional-non-discretionary.html#ex (accessed August 21, 2020).

Government of Canada (2020b). *Travel Restriction Measures: COVID-19 Program Delivery*. Available online at: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/service-delivery/coronavirus/travel-restrictions.html#immediate-family-members (accessed August 21, 2020).

Government of Canada (2020c). *Coronavirus Disease (COVID-19): Who Can Travel to Canada-Citizens, Permanent Residents, Foreign Nationals and Refugees*. Available online at: https://www.canada.ca/en/immigration-refugees-citizenship/services/coronavirus-covid19/travel-restrictions-exemptions.html (accessed August 21, 2020).

Government of Canada (2020d). *Orders in Council PC 2020-0565: Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)*. Available online at: https://orders-in-council.canada.ca/attachment.php?attach=39536&lang=en (accessed August 21, 2020).

Government of Canada (2020e). *Corona Virus Disease (COVID-19): International Students*. Available online at: https://www.canada.ca/en/immigration-refugees-citizenship/services/coronavirus-covid19/students.html#travel (accessed August 21, 2020).

Government of Canada (2020f). *Coronavirus Disease (COVID-19): Travel Restrictions, Exemptions and Advice*. Available online at: https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/latest-travel-health-advice.html (accessed August 21, 2020).

Government of Canada (2020g). *Pathway to Permanent Residency Recognizes Exceptional Service of Asylum Claimants on Front Lines of COVID-19 Pandemic*. Available online at: https://www.canada.ca/en/immigration-refugees-citizenship/news/2020/08/pathway-to-permanent-residency-recognizes-exceptional-service-of-asylum-claimants-on-front-lines-of-covid-19-pandemic.html (accessed September 15, 2020).

Government of Canada (2020h). *Study Permit: Covid-19 Program Delivery*. Available online at: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/service-delivery/coronavirus/temporary-residence/study-permit.html#sec1.3 (accessed November 15, 2020).

Government of Canada (2020i). *Government of Canada Announces Plan to Support Economic Recovery Through Immigration*. Available online at: https://www.canada.ca/en/immigration-refugees-citizenship/news/2020/10/

government-of-canada-announces-plan-to-support-economic-recovery-through-immigration.html (accessed November 15, 2020).

Gruda, A. (2020). *Demandeurs d'asile: Remercier à Reculons. La Presse*. 18 August 2020. Available online at: https://www.lapresse.ca/debats/editoriaux/2020-08-18/demandeurs-d-asile-remercier-a- reculons.php (accessed September 15, 2020).

Guttmann, A., Gandhi, S., Wanigaratne, S., Lu, H., Ferreira-Legere, L. E., Paul, J., et al. (2020). *COVID-19 in Immigrants, Refugees and Other Newcomers in Ontario: Characteristics of Those Tested and Those Confirmed Positive, as of June 13, 2020*. ICES: Toronto, ON.

Harris, S. (2020). 'Canadian-American couple reunited after compiling 250-page binder proving common-law status.' *CBC News*. 17 July 2020. Available online at: https://www.cbc.ca/news/business/cbsa-canada-u-s-border-restrictions-common-law-couple-1.5651128 (accessed November 16, 2020).

Hennebry, J. L., Caxaj, C. S., McLaughlin, J., and Mayell, S. (2020). Coronavirus: Canada stigmatizes, jeopardizes essential migrant workers. *The Conversation*. Available online at: https://theconversation.com/amp/coronavirus-canada-stigmatizes-jeopardizes-essential-migrant-workers-138879 (accessed August 21, 2020).

Kestler-D'Amours, J. (2020). "Why not us?": Asylum seekers on COVID-19 front lines demand permanent residency in Canada. *Toronto Star*. 15 August 2020. Available online at: https://www.thestar.com/news/canada/2020/08/15/why-not-us-asylum-seekers-on-covid-19-front-lines-demand-permanent-residency.html (accessed September 15, 2020).

Mégret, F. (2020, March 30). COVID-19 Symposium: Returning "Home"–Nationalist International Law in the Time of the Coronavirus. *OpinioJuris*. Available online at: http://opiniojuris.org/2020/03/30/covid-19-symposium-returning-home-nationalist-international-law-in-the-time-of-the-coronavirus/ (accessed August 21, 2020).

Migrant Workers Alliance for Change (2020). *Unheeded Warnings: COVID-19 & Migrant Workers in Canada*. Available online at: https://migrantworkersalliance.org/wp-content/uploads/2020/06/Unheeded-Warnings-COVID19-and-Migrant-Workers.pdf (accessed November 15, 2020).

Mohammed, J. (2020). If Canada can welcome the NHL, it can welcome refugees. *Toronto Star*. 4 August 2020. Available online at: https://www.thestar.com/opinion/contributors/2020/08/04/if-canada-can-welcome-the-nhl-it-can-welcome-refugees.html (accessed 10 September 2020).

Mojtehedzadeh, S. (2020, April 13). Migrant farm workers from Jamaica are being forced to sign COVID- 19 waivers. *Toronto Star*. Available online at: https://www.thestar.com/business/2020/04/13/migrant-farm-workers-fear-exposure-to-covid-19.html (accessed August 21, 2020).

Muggeridge, P. (2020, October 15). Trudeau urges snowbirds not to fly south this winter. *Zoomer*. Available online at: https://www.everythingzoomer.com/travel/2020/10/15/trudeau-urges-snowbirds-not-to-fly-south/ (accessed November 15, 2020).

Pilon-Larose, H. (2020, November 10). Québec ouvre la porte à élargir son programme. *La Presse*. Available online at: https://www.lapresse.ca/actualites/2020-11-10/regularisation-du-statut-des-anges-gardiens/quebec-ouvre-la-porte-a-elargir-son-programme.php (accessed November 12, 2020).

Purohit, K., and Mukherjee, T. (2020, March 24). Foreign tourists face hostility in India amid coronavirus panic. *Aljazeera*. Available online at: https://www.aljazeera.com/news/2020/03/foreign-tourists-face-hostility-india-coronavirus-panic-200324083648362.html (accessed August 21, 2020).

Rehaag, S. (2020). 'Whose Travel is Essential During COVID-19: Hockey Players or Asylum Seekers?' *The Conversation*. 17 June 2020. Available online at: https://theconversation.com/whose-travel-is-essential-during-coronavirus-hockey-players-or-asylum-seekers-140239 (accessed September 10, 2020).

Salter, M. (2012). Theory of the / : the suture and critical border studies. *Geopolitics* 17, 734–755. doi: 10.1080/14650045.2012.660580

Statistics Canada (2020). *Canadian and International Tuition Fees by Level of Study*. Available online at: https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3710004501 (accessed August 21, 2020).

Stevens, M. (2020, March 29). How Asian-American leaders are grappling with xenophobia amid coronavirus. *The New York Times*. Available online at: https://www.nytimes.com/2020/03/29/us/politics/coronavirus-asian-americans.html?searchResultPosition=1 (accessed August 21, 2020).

Taylor (2020). *Taylor v. Newfoundland and Labrador*, 2020 NSLC 125.

United Nations High Commissioner for Refugees (2020). *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response*. Available online at: https://www.refworld.org/docid/5e7132834.html (accessed March 16, 2020).

Walzer, M. (1982). *Spheres of Justice*. Boston, MA: Basic Books.

Conflict of Interest: The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

frontiers in Human Dynamics

CONCEPTUAL ANALYSIS
published: 14 October 2020
doi: 10.3389/fhumd.2020.588961

Never Letting a Good Crisis Go to Waste: Canadian Interdiction of Asylum Seekers

Sean Rehaag[1*†], *Janet Song*[2†] *and Alexander Toope*[2†]

[1] *Centre for Refugee Studies & Osgoode Hall Law School, York University, Toronto, ON, Canada,* [2] *Osgoode Hall Law School, York University, Toronto, ON, Canada*

This article examines two moments of crisis at Canada's border with the United States: the aftermath of September 11th, 2001 ("9/11") and the COVID-19 pandemic. The Canadian government leveraged both crises to offshore responsibilities for asylum seekers onto the United States. In the first case, Canada took advantage of U.S. preoccupations with border security shortly after 9/11 to persuade the United States to sign the *Canada-U.S. Safe Third Country Agreement ("STCA")*—an agreement that allows Canada to direct back asylum seekers who present themselves at land ports of entry on the Canada-U.S. border. In the second case, Canada used heightened anxieties about international travel during the COVID-19 pandemic to persuade the United States to block irregular border crossings that asylum seekers were increasingly using to circumvent the *STCA*. After reviewing Canada's successful use of these moments of crisis to persuade the United States to take on additional responsibilities for asylum seekers for whom Canada would have otherwise been responsible, the article discusses a recent Canadian Federal Court decision that may make all this political maneuvering moot. This decision found that Canada cannot send asylum seekers back to the United States without violating constitutional rights to life, liberty, and security of the person. Given past practice, however, we can expect the Canadian government to continue to pursue avenues to persuade the United States to take on additional responsibility for asylum seekers—and moments of crisis will be important drivers for those efforts.

Keywords: COVID-19, 9/11, refugees, asylum seekers, Canada, safe third country

OPEN ACCESS

Edited by:
Jaya Ramji-Nogales,
Temple University, United States

Reviewed by:
Rachel Settlage,
Wayne State University, United States
Catherine Holtmann,
University of New Brunswick
Fredericton, Canada

***Correspondence:**
Sean Rehaag
srehaag@osgoode.yorku.ca

†These authors have contributed equally to this work

Specialty section:
This article was submitted to Refugees and Conflict, a section of the journal Frontiers in Human Dynamics

Received: *30 July 2020*
Accepted: *04 September 2020*
Published: *14 October 2020*

Citation:
Rehaag S, Song J and Toope A (2020) Never Letting a Good Crisis Go to Waste: Canadian Interdiction of Asylum Seekers. Front. Hum. Dyn. 2:588961. doi: 10.3389/fhumd.2020.588961

INTRODUCTION

This article examines two moments of crisis at Canada's land border with the United States: the aftermath of 9/11 and the COVID-19 pandemic. The Canadian government leveraged both crises to offshore responsibilities for asylum seekers onto the United States.

The primary legal instrument we will be examining with respect to both these crises is the *Canada-U.S. Safe Third Country Agreement ("STCA").* Under the terms of the *STCA*, subject to limited exceptions, asylum seekers attempting to enter Canada from the United States via an official land border port of entry are denied access to Canada's refugee determination system and returned to the United States (Government of Canada, 2002). The agreement works both ways—asylum seekers who attempt to enter the United States from Canada at a land border crossing can also be turned back to Canada (Government of Canada, 2002). The rationale behind this agreement is that

asylum seekers are expected to claim refugee protection in the first safe country they arrive in—currently, the United States is the only country designated as a safe third country under Canada's *Immigration and Refugee Protection Act* (S.C., 2001, c. 27; Government of Canada, 2002). There is an important limitation to the *STCA*: it does not apply to asylum seekers who enter Canada "irregularly" by circumventing *official* ports of entry along the land border. As such, asylum seekers who cross into Canada irregularly cannot be returned to the United States and are thus eligible to claim asylum in Canada (Government of Canada, 2002; Smith, 2019).

The first crisis explored in this article—the terrorist attacks on the World Trade Center in New York City on 9/11—was a catalyst for the Canadian government to secure the implementation of the *STCA*. The United States had long refused to enter into such an agreement despite pressure from Canada, knowing that it would significantly increase the number of asylum seekers for whom the United States, rather than Canada, was responsible. Eventually, the *STCA*'s ratification was a quid pro quo: the United States accepted additional responsibility for asylum seekers in return for Canada's implementation of enhanced security measures and greater collaboration along the U.S.-Canada border, at a time when such measures were U.S. priorities (US Department of State, 2002; Meyers, 2003; Macklin, 2005, p. 417). In addition, the Bush administration saw political advantages to announcing the successful negotiation of the *STCA*, which offered an occasion to contrast purportedly strong U.S. border security measures with perceived vulnerabilities in Canadian border control practices (Macklin, 2003, p. 16–17; House of Representatives, 2002).

The second crisis analyzed in this paper—the current COVID-19 global pandemic—was channeled by the Canadian government to persuade the United States to block irregular border crossings that asylum seekers were increasingly using to circumvent the *STCA*. These irregular border crossings had begun to pose political risks to Canada's governing Liberal party: the sudden influx of irregular crossings following the 2016 U.S. presidential election garnered strong criticism from opposing political parties and certain members of the Canadian public (Vigil and Abidi, 2018, p. 55; Harris, 2019; Jansa et al., 2019). Once again, a crisis presented an opportunity: when Canada negotiated border closures with the United States during the COVID-19 pandemic, the Trump administration was persuaded to allow Canada to direct back to the United States asylum seekers caught crossing the border irregularly, functioning as a de facto expansion of the *STCA* (Government of Canada, 2020a; Russell, 2020). While this was ostensibly justified on public health grounds, from the Canadian government's perspective the policy had little to do with protecting public health. Rather, it aimed to address critiques raised by political opponents about the Liberal party failing to stem the flow of asylum seekers crossing the land border irregularly to avoid the *STCA* (Hwang, 2017; Canadian Council for Refugees, 2020b).

In both cases, Canada successfully harnessed moments of crisis to convince the United States to take on greater obligations toward asylum seekers. It is ironic that what the Trump administration has attempted to achieve through overt anti-immigrant rhetoric and policies (i.e., "build a wall" against asylum seekers), Canada achieved on its southern border through less inflammatory but more calculating means. It is troubling that Canada has managed to maintain an international reputation for progressive immigration and refugee policies, while quietly leveraging crises to establish interdiction agreements with the United States that prevent asylum seekers from accessing refugee protection in Canada.

A recent Canadian Federal Court of Canada decision, however, may make all this political maneuvering moot (Federal Court of Canada, 2020). This decision found that Canada cannot send asylum seekers back to the United States without violating constitutional rights to life, liberty, and security of the person. Thus, the primary rationale for supporting the *STCA*—namely, that the United States is a safe country for asylum seekers—has now been invalidated by a Canadian court. This makes the Canadian government's underlying motivations behind the agreement appear plain: to offload responsibility for asylum seekers to the United States irrespective of whether the United States is safe for asylum seekers. The Canadian government has continued to pursue that agenda by appealing the Federal Court decision, and by continuing to implement the *STCA* and its de facto extension, pending the outcome of that appeal. Moreover, regardless of the outcome of the appeal, we can expect the Canadian government to continue pressuring the United States to take on additional responsibility for asylum seekers—and moments of crisis will be important drivers in those efforts.

I: POST-9/11 U.S. SECURITY CONCERNS AND THE *STCA*

For several years before the *STCA* was officially signed, Canada had been pressing for an interdiction agreement with the United States to manage the flow of asylum seekers (Macklin, 2005, p. 372–373). The United States consistently refused to enter into such an agreement, as it would prevent thousands of asylum seekers from leaving the United States for Canada each year, thus significantly increasing the number of asylum seekers for whom the United States is responsible. Consider that from 1995 to 2001, 60 to 70 percent of asylum seekers entering Canada came through the United States first (394). Indeed, in 2001 alone, 13,000 asylum seekers arrived in Canada from the United States, while only 200 traveled in the other direction (394–395).

Prior to 9/11, Canada made little progress in its efforts to persuade the United States to close off this route for asylum seekers. However, "the 9/11 attack gave [. . .] that area a new impetus" (Adelman, 2002, p. 27; Moore, 2007, p. 262; Settlage, 2012, p. 150). On October 29, 2001, George W. Bush directed U.S. personnel "to begin harmonizing customs and immigration policies with those of Canada as well as Mexico" (Adelman, 2002, p. 21). This led to negotiations between Canada and the United States that culminated in the *U.S.-Canada Smart Border Action Plan ("Action Plan")*, which sets out a 30-point plan for collaboration, including coordination on refugee processing and

the enactment of counter-terrorism legislation (US Department of State, 2002).

President Bush and Prime Minister Jean Chrétien met at the Ambassador Bridge in Detroit, Michigan in September 2002 to provide a status report on the *Action Plan*, a discussion that included the *STCA* and other collaborative security measures between the United States and Canada (Meyers, 2003, p. 4). For the United States, the *STCA* was a quid pro quo that secured Canada's agreement to the *Action Plan* (Macklin, 2005, p. 417; Meyers, 2003). For Canada, the *Action Plan* represented an opportunity to leverage U.S. security concerns related to border security after 9/11 and the perceived security vulnerabilities of Canada's immigration regime, to convince the United States to sign the *STCA* (Macklin, 2003, p. 16–17).

As the *Action Plan* was being negotiated, the rhetoric surrounding security tended to overshadow Canada's attempt to offload responsibility for asylum seekers to the United States. For example, consider Congressional testimony by Kelly Ryan, then Deputy Assistant Secretary of State in the Bureau of Population, Refugees, and Migration at the U.S. Department of State. Ryan praised Canada's eagerness to collaborate with the United States on enhancing security measures, declaring that "the United States and Canada share a common determination to combat terrorism" and a "willingness to develop mutual approaches to our common security." The examples cited by Ryan for Canada's "tangible security improvements" included, among others, advanced information sharing on international air passengers, "integrated border enforcement teams" of enforcement personnel, and sharing fingerprints and other criminal record information (House of Representatives, 2002).

With overarching national security preoccupations in the United States post-9/11, criticisms of Canada's supposed lack of border security were common. Ryan's testimony is but one example of the emphasis placed on Canada's perceived lack of border security in the fight against terrorism. Such rhetoric directly tied terrorism to regulating the flow of asylum seekers, showcasing that "the glue binding asylum seeker and terrorist adheres just enough that invoking the former suffices to bring the latter to mind" (Macklin, 2005, p. 410). Consider, for example, the critiques of Canada for insecure borders and for insufficient measures to prevent organized crime and terrorism, in the Congressional testimony of Mark Krikorian, the Executive Director of the Center for Immigration Studies (House of Representatives, 2002):

> *the United States has an important security interest in Canada's applying the safe third country proposal and incorporating it into its own asylum system. According to the Canadian equivalent of our asylum, more than 50 terrorist groups have established themselves in Canada, partly because of a laxity of that country's asylum system.* [. . .] [I]*deally, all applicants for asylum should be detained until their cases are decided. So, sure, I would rather have a potential terrorist [locked] up in New Jersey than working in Manitoba.*

This "laxity" referenced by Krikorian is based on the argument that it is easier to become a refugee in Canada in comparison to the United States, and that Canada provides more access to public health care, legal aid, and other social assistance to asylum seekers, thus further incentivizing individuals to claim asylum (Macklin, 2005, p. 412). One would assume that Canada would unequivocally reject critiques of its supposedly "lax" approach to border control, especially considering that none of those responsible for the 9/11 attacks entered the United States from Canada (or were asylum seekers generally). However, instead of actively combatting misinformation, Canada leaned into the link between asylum seekers and terrorists, as doing so helped secure an agreement they had been pursuing for years. As Macklin (2003) explains, it was politically valuable for the United States to place scrutiny on a perceived lack of security measures employed by their neighbor to the North:

> *Even if US policy makers know that the Canadian refugee system plays a minimal role in the presence of terrorists on US soil, it may be worth the cost of adjudicating several thousand additional asylum claims to reinforce the perception that the Canadian refugee system is dangerously lax, and that the United States can and will do a better job* (18).

Whether real or imagined, these negative perceptions of Canada's border control regime in the aftermath of 9/11, and Canada's tacit encouragement of these perceptions, appear to have played a role in finally persuading the US to agree to the *STCA*.

II: COVID-19, THE *STCA* AND CLOSING UNOFFICIAL PORTS OF ENTRY

Long before COVID-19, the Canadian government faced considerable pressure from political opponents to expand the *STCA* to cover irregular border crossings (Jansa et al., 2019, p. 38; Panetta, 2019). This was largely due to the belief that asylum seekers crossing irregularly are "illegal" and "jumping the queue" (Vigil and Abidi, 2018, p. 55; Harris, 2019). Despite this being false—international law recognizes the right to seek asylum and prohibits the imposition of penalties on asylum seekers who travel irregularly—these anti-migrant sentiments spread in Canadian political discourse and became a cornerstone of Conservative election campaigns (Jansa et al., 2019, p. 38; Canadian Council for Refugees, 2020a).

Opposition to asylum seekers who cross the border irregularly increased following U.S. President Donald Trump's 2016 election win. In line with the anti-migrant and xenophobic rhetoric touted during his campaign, Trump signed several executive orders targeting migrants, including stripping certain groups of Temporary Protected Status, and imposing a "Muslim Travel Ban" (Jansa et al., 2019, p. 38). The results of anti-migrant rhetoric and policies were felt along Canada's border: in December 2016, 1 month after the November 2016 U.S. election, 305 asylum seekers entered Quebec from the United States irregularly; this was a 1,400% increase from December 2015 (Proctor, 2017, p. 2). The number of asylum seekers crossing irregularly into Canada continued to increase in the following years, with nearly 50,000 irregular border crossings recorded between 2017 and 2019 (Smith, 2019). It is important to note

that the vast majority of these crossings were not clandestine, but rather were made at highly monitored "unofficial" ports of entry, such as Roxham Road at the New York-Quebec border, where the Canadian government has built border infrastructure to process irregular border crossers seeking asylum (Smith, 2019).

Critics suggested that this sudden influx in migration at unofficial ports of entry was proof that Trudeau's Liberal government had "lost control of the border" and were being soft on "illegal" migration, despite the legal and generally orderly nature of the crossings (Panetta, 2019; Smith, 2019). Given these mounting criticisms, the Liberal government had an interest in expanding the *STCA* to unofficial ports of entry. They also had an interest in doing so quietly to avoid undermining efforts to present a progressive and pro-migrant image, including through Trudeau's highly publicized tweet stating: "To those fleeing persecution, terror & war, Canadians will welcome you, regardless of your faith. Diversity is our strength #WelcomeToCanada" (Austen, 2017; Trudeau, 2017). Canada, however, had little leverage in renegotiating the *STCA* with the United States, given the Trump administration's reluctance to take on additional responsibility for asylum seekers (Smith, 2019). Unsurprisingly, there was initially very little movement on this front.

This changed quickly during the COVID-19 pandemic, which presented an opportunity for the Canadian government to secure an agreement that serves as a de facto expansion of the *STCA*, justified ostensibly on public health grounds. The Canadian government's initial plan at the onset of the pandemic was that asylum seekers who crossed the border irregularly would be screened, sheltered, and isolated for 14 days (Government of Canada, 2020b; The Canadian Press, 2020). However, on March 20, 2020, Prime Minister Justin Trudeau reversed course, announcing that asylum seekers crossing into Canada irregularly would be denied entry and returned to the United States (Russell, 2020). This was implemented under Canadian law through a series of Orders in Council (see e.g., Government of Canada, 2020a), which are instruments available to the executive branch of the Canadian government that are enforceable without action by the legislature—in this case authorized by the *Quarantine Act* (S.C., 2005, c. 20). Trudeau stated that these emergency measures would be lifted once it is safe to do so (The Canadian Press, 2020).

There is reason to be skeptical that this action was taken solely to protect public health during the COVID-19 pandemic. There are other measures that would effectively protect public health without requiring the closure of the border to asylum seekers. As the Canadian government initially proposed (The Canadian Press, 2020), there could have been immediate health checks at unofficial ports of entry and mandatory quarantines. Such a strategy would be in line with the requirements imposed on other travelers entering Canada, including those with less "essential" reasons to travel to Canada (Rehaag, 2020). Yet, despite little evidence that asylum seekers are any more likely than other travelers to carry COVID-19 or to violate self-isolation measures, they were uniquely targeted (Hwang, 2017; Canadian Council for Refugees, 2020b; Government of Canada, 2020a,b,c).

There is also reason to believe that closing off this route into Canada may actually increase, rather than decrease, public health risks in Canada. The experience with the *STCA* has taught us that when the law was used to block paths into Canada at official ports of entry, asylum seekers pursued other routes into the country, including by crossing the border irregularly at unofficial ports of entry like Roxham Road (Settlage, 2012, p. 171). Given that asylum seekers attempting to avoid the *STCA* by crossing the border irregularly will, during the COVID-19 pandemic, be returned to the United States if they are caught crossing, they have a strong incentive to make clandestine crossings into Canada. That means crossing at remote and risky sites, perhaps with the assistance of smugglers, and without health screenings or quarantines. In other words: the Canadian government has taken safe, well-monitored routes into Canada at places like Roxham Road, and replaced them with unsafe, unmonitored routes that may exacerbate public health risks during the pandemic.

While the public health rationale for closing off unofficial ports of entry like Roxham Road seems decidedly weak, the same cannot be said about the political justification. The Trudeau government achieved a policy outcome that it had been pursuing for years, and in so doing made a political headache go away: the route that tens of thousands of asylum seekers have used to enter Canada since Trump was elected has been blocked, at least temporarily, and the Liberal government's Conservative opponents have been silenced.

CONCLUSION

The Canadian government's proclivity to channel American perceptions of the Canadian border as a threat to U.S. national security—whether due to terrorism or pandemics—to convince the United States to take on greater obligations toward asylum seekers, is a lesson in diplomacy. It is worthy of note that Canada achieved this under two Republican administrations that both championed strict border enforcement and restricting "illegal" immigration. Canada has not employed the blatant anti-immigrant rhetoric exemplified in the United States under the Trump administration but has nonetheless "built a wall" against asylum seekers through the *STCA*, and more recently during the COVID-19 pandemic. Although the Canadian government espouses progressive values, in practice, closed-door diplomacy with respect to the interdiction of asylum seekers has undercut these values and Canada's international obligations.

Recently, the unconstitutionality of these tactics has been recognized by the Federal Court of Canada, which in July 2020 issued a landmark decision invalidating the *STCA* (Federal Court of Canada, 2020). In this decision, Justice McDonald found that the United States is not safe for asylum seekers, and that "…the risk of detention in the United States for the sake of 'administrative' compliance with the provisions of the *STCA* cannot be justified" (138). Based on evidence describing inhumane conditions of detention, the use of detention as a penalty against asylum seekers, and increased risks of deportation to face persecution for detained asylum seekers in the United States, the Federal Court found that directing

back asylum seekers to the United States under the *STCA* violates constitutional rights to life, liberty, and security of the person (138–140).

The Federal Court suspended the effect of this decision for 6 months, to provide the Canadian government with an opportunity to appeal or to otherwise respond (163).

On August 21, 2020, Canadian Public Safety Minister Bill Blair confirmed that the government filed an appeal of the decision, citing legal and factual errors as a rationale for the appeal (Tunney, 2020). This is perhaps not surprising. A previous challenge to the constitutionality of the *STCA* when the agreement was first implemented was successful in the Federal Court, on the basis that, even then, the United States was not safe for asylum seekers (Federal Court of Canada, 2007). However, the Canadian government successfully appealed that decision on technical grounds, including that the parties to the litigation lacked standing before the courts since none of the parties had been directly turned away under the *STCA* (Federal Court of Appeal, 2008). The more recent constitutional case does not suffer from the same technical challenges, partly because litigants were selected who were directly impacted by the *STCA* and who thus clearly have standing. That means that any appeal will need to address the substantive question of whether the United States is safe for asylum seekers—in other words, whether asylum seekers returned to the United States under the *STCA* encounter circumstances where their rights to life, liberty, and security of the person, as protected by section 7 of the *Canadian Charter of Rights and Freedoms*, are respected. Given that these circumstances include deeply problematic conditions of detention in the United States, as set out in the Federal Court's factual findings, we think it will be difficult for the Federal Court of Appeal to overturn this decision. We therefore echo calls made by others for the Canadian government to cease its appeal in this matter, and to immediately suspend any removals under the *STCA* (Canadian Council for Refugees, 2020a).

Despite these calls, given past practice, it is reasonable to expect that the government will fully exhaust all appeals. While the appeal slowly makes its way through the Court system, the *STCA,* and the de facto extension of the agreement to unofficial ports of entry will remain in effect. This means that these "emergency" measures are likely to be in place for the duration of the pandemic and potentially the current U.S. administration, notwithstanding the constitutional problems identified by the Federal Court.

Regardless of the outcome of the appeal, it seems likely that Canada's efforts to convince the United States to take on additional responsibilities for and act as a wall against asylum seekers is not at an end. We can also anticipate that Canada will attempt to leverage future crises in these efforts.

AUTHOR CONTRIBUTIONS

All authors listed have made a substantial, direct and intellectual contribution to the work, and approved it for publication.

FUNDING

This research was supported in part by funding from the Social Sciences and Humanities Research Council, Osgoode Hall Law School and York University.

ACKNOWLEDGMENTS

The authors are grateful for feedback provided by Elise Mercier, Centre for Refugee Studies Research Lawyer.

REFERENCES

Adelman, H. (2002). Canadian borders and immigration post 9/11. *Int. Migrat. Rev.* 36, 15–28. doi: 10.1111/j.1747-7379.2002.tb00066.x

Austen, I. (2017, January 28). In Canada, Justin Trudeau Says Refugees Are Welcome. *The New York Times.* Available online at: https://www.nytimes.com/2017/01/28/world/canada/justin-trudeau-trump-refugee-ban.html (accessed July 11, 2020).

Canadian Council for Refugees (2020a). *Media Release: Organizations Welcome Court Ruling on Safe Third Country*. Available online at: https://ccrweb.ca/en/ruling-safe-third-country (accessed September 2, 2020).

Canadian Council for Refugees, Amnesty International Canada, Canadian Association of Refugee Lawyers, and BC Civil Liberties Association (2020b, April 2). Media release: call for border to be reopened to refugees. *Canadian Council for Refugees.* Available online at: https://ccrweb.ca/en/media/call-border-be-reopened-refugees-02-04-2020 (accessed July 11, 2020).

Federal Court of Appeal (2008). *Canadian Council for Refugees v Canada*, 2008 FCA 229.

Federal Court of Canada (2007). *Canadian Council for Refugees v R*, 2007 FC 1262.

Federal Court of Canada (2020). *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770.

Government of Canada (2002). *Agreement between the Government of Canada and the Government of the United States of America for the Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*. Available online at: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html (accessed July 11, 2020).

Government of Canada (2020a). Order in Council PC 2020-0442: *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)*. Available online at: https://orders-in-council.canada.ca/attachment.php?attach=39383&lang=en (accessed July 11, 2020).

Government of Canada (2020b). Order in Council PC 2020-0175: *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Mandatory Isolation)*. Available online at: https://orders-in-council.canada.ca/attachment.php?attach=38989&lang=en (accessed July 11, 2020).

Government of Canada (2020c). Order in Council PC 2020-0184: *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from any Country other than the United States)*. Available online at: https://orders-in-council.canada.ca/attachment.php?attach=38990&lang=en (accessed July 11, 2020).

Harris, K. (2019, December 12). Don't blame Trump: New study explores Canada's surge in asylum-seekers. *CBC News*. Available online at: https://www.cbc.ca/news/politics/trump-immigration-trudeau-asylum-seekers-roxham-road-1.5393071 (accessed July 11, 2020).

House of Representatives (2002). "United States and Canada safe third country agreement: hearing before the subcommittee on immigration, border security,

and claims of the committee on the judiciary," in *107th Congress, Second Session* (Washington, DC).

Hwang, J. (2017). *Public Health Response and Health Status of Asylum Seekers: A Review of the International Literature and Implications for the Canadian Context*. National Collaborating Centre for Infectious Disease, 352. Available online at: https://nccid.ca/publications/public-health-response-health-status-asylum-seekers-review-international-literature-implications-canadian-context/ (accessed September 28, 2020).

Jansa, M., Klassen, A., Meinen, D., and Steinwand, C. (2019). *Canada as a Frontline State? Populist Discourse, New Population Movements and the Canada-US Border Relationship*. Balsillie School of International Affairs, 37–42. Available online at: https://www.balsillieschool.ca/wp-content/uploads/2019/02/Graduate-Fellows-Anthology-2019.pdf#page=43 (accessed September 28, 2020).

Macklin, A. (2003). *The Value(s) of the Canada-Us Safe Third Country Agreement*. Caledon Institute of Social Policy, 1–23. Available online at: https://ssrn.com/abstract=557005 (accessed September 28, 2020).

Macklin, A. (2005). Disappearing refugees: reflections on the Canada-Us safe third country agreement. *Columbia Hum. Rights Law Rev.* 36, 365–426. Available online at: https://ssrn.com/abstract=871226

Meyers, D. M. (2003). Does 'Smarter' lead to safer? An assessment of the border accords with Canada and Mexico. *Migrat. Policy Inst. Insight* 41, 1–16. doi: 10.1111/1468-2435.00251

Moore, A. (2007). Unsafe in America: a review of the U.S.-Canada safe third country agreement. *Santa Clara Law Rev.* 47, 201–284. Available online at: https://digitalcommons.law.scu.edu/lawreview/vol47/iss2/1

Panetta, A. (2019, September 16). Canada decides: Trudeau faces charge he's undermined support for immigration. *Politico*. Available online at: https://www.politico.com/story/2019/09/16/canada-decides-trudeau-faces-charge-hes-undermined-support-for-immigration-1666087 (accessed July 11, 2020).

Proctor, B. (2017). *Fleeing to Canada on Foot: Reviewing the Canada-U.S. Safe Third Country Agreement*. Wilson Center – Canada Institute. Available online at: https://www.wilsoncenter.org/sites/default/files/media/documents/article/fleeing_to_canada_on_foot_stca_final_04-04-2017.pdf (accessed July 11, 2020).

Rehaag, S. (2020, June 17). Whose travel is 'essential' during coronavirus: Hockey players or asylum-seekers? *The Conversation (Canada)*. Available online at: https://theconversation.com/whose-travel-is-essential-during-coronavirus-hockey-players-or-asylum-seekers-140239 (accessed July 11, 2020).

Russell, A. (2020, March 20). Coronavirus: Trudeau says irregular migrants will be turned away at Canada-US border. *Global News*. Available online at: https://globalnews.ca/news/6707593/coronavirus-trudeau-says-irregular-migrants-will-be-turned-away-at-canada-us-border/ (accessed July 11, 2020).

S.C. (2001). *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

S.C. (2005). *Quarantine Act*, *Statutes of Canada* 2005, c.20.

Settlage, R. G. (2012). Indirect refoulement: challenging Canada's participation in the Canada-United States safe third country agreement. *Wisconsin Int. Law J.* 30, 142–188. Available online at: https://heinonline.org/HOL/P?h=hein.journals/wisint30&i=148&a=eW9ya3UuY2E

Smith, C. D. (2019). *Changing US Policy and Safe-Third Country 'Loophole' Drive Irregular Migration to Canada*. Migration Policy Institute. Available online at: https://www.migrationpolicy.org/article/us-policy-safe-third-country-loophole-drive-irregular-migration-canada (accessed September 28, 2020).

The Canadian Press (2020, March 17). COVID-19: Isolation required for Roxham Rd asylum seekers, Blair says. *CTV News*. Available online at: https://montreal.ctvnews.ca/COVID-19-isolation-required-for-roxham-rd-asylum-seekers-blair-says-1.4857034 (accessed July 11, 2020).

Trudeau, J. (2017, January 28). Twitter Post, 3:20 PM. Available online at: https://twitter.com/JustinTrudeau/status/825438460265762816 (accessed July 11, 2020).

Tunney, C. (2020, August 21). Liberals appealing ruling striking down Canada-U.S. asylum agreement. *CBC News*. Available online at: https://www.cbc.ca/news/politics/safe-third-country-agreement-liberals-appeal-1.5695386 (accessed August 28, 2020).

US Department of State (2002). *U.S.-Canada Smart Border/30 Point Action Plan Update*. Available online at: https://2001-2009.state.gov/p/wha/rls/fs/18128.htm (accessed July 11, 2020).

Vigil, Y. N., and Abidi, C. B. (2018). 'We' the refugees: reflections on refugee labels and identities. *Refuge* 34, 52–60. doi: 10.7202/1055576ar

Conflict of Interest: The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

frontiers in Human Dynamics

ORIGINAL RESEARCH
published: 20 November 2020
doi: 10.3389/fhumd.2020.592196

Political and Legal Responses to Human Mobility in South America in the Context of the Covid-19 Crisis. More Fuel for the Fire?

Diego Acosta and Leiza Brumat*

[1] School of Law, University of Bristol and Migration Policy Centre, Bristol, United Kingdom, [2] Migration Policy Centre, European University Institute (EUI), Fiesole, Italy

During the XXI century, South America has been the epicenter of vibrant discussions on human mobility. A new vocabulary emerged with legal principles such as the non-criminalization of irregular migration or the right to migrate as a fundamental right taking central stage. The combination of the arrival of COVID-19 together with the important emigration of Venezuelans in the region, as well as economic and political crisis are putting into question some of these advances and present a complex scenario of migration governance in the region for the years to come.

Keywords: South America, MERCOSUR residence agreement, venezuelan emigration, COVID – 19, irregular migration

OPEN ACCESS

Edited by:
Jaya Ramji-Nogales, Temple University, United States

Reviewed by:
Liliana Lyra Jubilut, Universidade Católica de Santos, Brazil
Cristián Doña-Reveco, University of Nebraska Omaha, United States

****Correspondence:***
Diego Acosta
d.acosta@bristol.ac.uk

Specialty section:
This article was submitted to Migration and Society, a section of the journal Frontiers in Human Dynamics

Received: *06 August 2020*
Accepted: *28 October 2020*
Published: *20 November 2020*

Citation:
Acosta D and Brumat L (2020) Political and Legal Responses to Human Mobility in South America in the Context of the Covid-19 Crisis. More Fuel for the Fire? Front. Hum. Dyn. 2:592196. doi: 10.3389/fhumd.2020.592196

INTRODUCTION

In the XXI century, South America adopted distinctive policies and vocabulary in the area of migration. This approach emphasized migrants' rights, the non-criminalization of migration and the "right to migrate" in fora such as the South American Conference on Migration. However, the arrival of Covid-19 coincided with a very delicate moment in which most of the region was already experiencing an economic, political and social crisis and where the emigration of circa five million Venezuelans, mostly to other countries in South America, had dramatically altered the migration picture in the region.

The objective of this article is to explain how the political and legal responses to the Covid-19 crisis in South America in the first semester of 2020 have affected human mobility. We position these political and legal responses within a wider context of a multidimensional crisis, and we propose possible future political and legal developments. The sources for this article are national and regional legislation, statistics for migration and mobility, and specialized literature. This also builds from the authors' previous work on South American migration governance (Acosta and Freier, 2015; Brumat and Acosta, 2019; Brumat, 2020a; Acosta, 2018).

This article is divided into three parts. In the first one, we describe the general context in the region before Covid-19 arrived: we address the policies and legislation that were developed in the early XXI century, as well as the political, social and economic crisis that ensued since 2015. We particularly focus on the Venezuelan emigration as a destabilizing factor. The second part addresses the political and legal responses to the Covid-19 crisis as well as their legal and political consequences and effects on mobility. Taking all these factors into account, the third part proposes three possible scenarios for the future.

SOUTH AMERICA BEFORE COVID-19

During the XXI century, South America has been the epicenter of vibrant discussions on human mobility[1]. A new vocabulary emerged with legal principles such as the non-criminalization of irregular migration or the right to migrate as a fundamental right taking central stage in fora such as the South American Conference on Migration—a regional consultative process involving all countries in the region and adopting yearly non-legally binding declarations (Acosta, 2018). These animated debates were facilitated by the fact that most countries in the region had large numbers of emigrants, particularly in the United States and Spain, coupled with center-left governments that presented the protection of the rights of their nationals abroad as a central aspect of their international agenda (Acosta and Freier, 2018). Whilst South America had been the second largest recipient of newcomers, after the USA, during the great European migrations taking place between the 1870s and 1930, non-national populations at home were statistically insignificant in comparative global terms at the dawn of the new century [2].

This new vocabulary also found its way into laws. The MERCOSUR Residence Agreement revolutionized mobility in South America. Implemented in 2009, the Agreement provides that any national of a MERCOSUR or Associate Member State may reside and work, as well as access other rights, for a period of 2 years in a host State. After 2 years, the temporary residence permit may be transformed into a permanent one if the person proves legitimate means of living for himself or herself and any family members. All countries in South America (i.e., not just MERCOSUR countries) have ratified the agreement and apply it with the exception of Venezuela, Surinam and Guyana [3]. By 2016, 2.7 million residence permits had been granted under the agreement in the countries implementing it (IOM, 2018). In the first years of the XXI century, migration became an issue that reinforced South American regionalism (Margheritis, 2013).

By the time COVID-19 hit South America in 2020, this general and sketchy picture had been subject to various political, economic and mobility pressures since at least 2015. These pressures aroused from what seemed to be an improvement of the social and economic situation in the first decade and a half of the XXI century. During that period, South America experienced sustained economic growth, facilitated by increasing international prices of commodities, its main exports (ECLAC, 2009, 2013). This growth allowed for a reduction in income inequality and extreme poverty as well as the inclusion of vast sectors of the society into the formal workforce. Between 2002–2017, the middle income population in Latin America increased by 65%, while poverty was reduced by 40% (ECLAC, 2019b, p. 29). Economic expansion and social policies enhanced the popularity of the so-called "pink tide" governments. By 2015 though, increased commodity price volatility led to an economic slowdown particularly affecting its three largest powerhouses: Brazil, Argentina and Venezuela (ECLAC, 2016, 2019a).

With the economy worsening in 2015, it became clear that the social policies of the early 2000s had not been sufficient to reverse the inequalities characterizing the region. Partly as a consequence of this, center-right and right-wing politicians returned to power. This included Macri in Argentina (2015), Temer in Brazil (2016, following the impeachment of Dilma Rousseff) or Piñera in Chile (2018) and heralded a shift in the economic and social policies in the region. The "turn to the right" was completed with the arrival to Brazil's presidency in January 2019 of Jair Bolsonaro, a far-right politician and a vociferous opponent of migrants' rights. Chile rejected the adoption of the Global Compact on Migration while Brazil withdrew from it right after Bolsonaro took office.

Venezuela deserves further attention. Since 2014, the country is undergoing a profound social, political and economic crisis with rampant inflation (IMF, 2020), severe food and health insecurity (FAO, 2019) and increased criminality having the second highest murder rate in the world (WB, 2020). This extreme situation has sparked mass protests since 2018 and prompted the largest forced displacement in Latin American history with 4.5 million Venezuelans emigrating between 2015 and early 2020 (UNHCR IOM, 2020). This was unprecedented since Venezuela had never been an origin country but rather a destination one.

Most of the 5.2 million Venezuelans residing abroad in early 2020 did so in other South American states—notably Colombia, Peru, Chile, Ecuador, Brazil and Argentina, in that order. Legal and political responses to the arrival of Venezuelans have been mostly adopted at the national level, and regional cooperation on the issue has been scarce, with the exception of the Quito Process—an *ad hoc* meeting of governments in the region adopting non-binding declarations about Venezuelan emigration (Acosta et al., 2019; Brumat, 2020b). These responses can be categorized into five groups with some countries falling into more than one of them. Firstly, Argentina, Brazil, Ecuador, and Uruguay have extended regional free movement provisions to incorporate Venezuelans thus offering them a right of residence. Particularly in the Ecuadorian case, the requirements to access a temporary permit were difficult to meet and left many in an irregular situation. Thus, a second response has been to launch regularization processes in Bolivia, Chile, Ecuador, and more recently in October 2020 in Peru. A third legal tool, mostly used by Brazil—and to a much lesser extent by Bolivia and Paraguay—has been to recognize Venezuelans as refugees under the extended definition enshrined in the Cartagena declaration (Acosta and Sartoretto, 2020). Fourthly, Chile, Colombia, Paraguay, and Peru introduced special temporary residence permits, with Colombia offering a new round of such permits in October 2020. Finally, and particularly as the situation aggravated, Chile, Ecuador and Peru decided to introduce visa requirements for Venezuelans, a step that had been first taken outside

[1]South America in this paper refers to ten countries: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, and Venezuela. Due to their different historical and colonial past, and to their lower participation in regional integration processes, Guyana and Surinam are no incorporated in this analysis.

[2]By 2015, the 10 countries in the region had 5.6 million non-nationals representing 1.3% of the total population. By contrast, they had more than 10.8 million emigrants, amounting to 2.6% of the total population (Acosta, 2018, p. 14).

[3]Chile has not ratified it with a national law. It applies it to nationals of Argentina, Bolivia, Brazil, Paraguay, and Uruguay through an administrative regulation "Oficio Circular 26456" of 2009. See IOM (2018).

South America by Panama already in 2017 (Acosta et al., 2019).

The Venezuelan crisis has also affected regional integration. Following tensions between Argentina and Brazil, on the one hand, and the Venezuelan government, on the other, the country was suspended in 2017 in its membership of the Common Market of the South (MERCOSUR) (Briceño-Ruiz, 2018). South American regionalism was further weakened when all countries—with the exception of Guyana, Surinam, and Venezuela—left or suspended their membership in the Union of South American Nations (UNASUR). UNASUR was then replaced by PROSUR [4], a mere coordination and dialogue forum at presidential level embodying the right-wing governments' preferences for more fragile and less ambitious forms of cooperation (Sanahuja, 2019). The Pacific Alliance, another regional organization including Mexico, Colombia, Peru, and Chile has never truly advanced on migration issues with the exception of establishing a visa-free area among its Members.

By the end of 2019, South America was undergoing several deep crises: an economic recession, a multidimensional crisis in Venezuela with consequences for the whole region, and massive protests confronting widespread social inequalities in places like Bolivia, Chile, Colombia or Ecuador (Faúndes, 2019; Billion and Ventura, 2020). It is within this context that COVID-19 made its appearance in the region further affecting mobility, the economy and the distribution of resources. At the time of writing in July 2020, South America had been severely hit by the pandemic with Brazil having the second highest number of confirmed cases in the world after the US, and Chile, Ecuador and Peru also confronting major outbreaks (Horton, 2020).

COVID-19 AND HUMAN MOBILITY IN SOUTH AMERICA

Covid-19 has arrived at a time when there was already a major multilevel crisis of governance in South America. Its relationship with mobility is clear at all levels. At the subnational level, some cities in countries like Brazil or Peru that experienced a large inflow of Venezuelans in a short period of time started feeling pressure for the provision of public services including health services. This has led in some instances to social tensions and episodes of xenophobic violence (Koechlin and Eguren, 2018; Freier and Parent, 2019b). At the national level, various governments already had low levels of public approval, which limits their legitimacy to act in emergencies [5]. Added to this, economic difficulties have made it harder to access international credit and, therefore, fewer possibilities of strengthening their health systems. Consequently, strict quarantines and lockdowns have emerged as the main option to prevent national health systems from collapsing. At the regional level, the weakening of UNASUR, which was the only organization that had developed relatively successful regional policies and cooperation in the area of health (Riggirozzi, 2020), means that that there is no common institutional framework with policy expertise to adopt shared responses to the health crisis.

In principle, national responses have been constrained by international law. The American Convention on Human Rights is the most important instrument at regional level overseeing the protection of fundamental rights and freedoms (American Convention on Human Rights, 1969). The duo Inter-American Commission and Inter-American Court of Human Rights are responsible for supervising its compliance. Whilst state parties might suspend some of its guarantees in times of emergency, they need to inform, in accordance with article 27 of the American Convention, the Secretary General of the Organization of American States. Emergency powers have a long tradition in South America and have been unacceptably abused since the XIX century (Negretto and Aguilar Rivera, 1999). This is the result of several factors such as the prominent powers of Executives and that others have debated (Gargarella, 2013). During the last three decades though, emergency powers had only been sparely used during. With the arrival of COVID-19, all South American countries – with the exception of Brazil, Guyana and Uruguay—have availed themselves of a possibility that, even if affecting the entire population, might have a larger impact on vulnerable groups (OAS, 2020).

Undocumented migrants have been particularly distressed by COVID-19. In countries such as Colombia, Ecuador and Peru, the number of migrants in an irregular situation has skyrocketed with the arrival of Venezuelans. For example in Peru, the mechanisms for obtaining residence were suspended in 2018 and the introduction of visa requirements the year after led to an increase in the number of irregular entries (Freier and Parent, 2019a). In Colombia, despite the adoption of new regularization mechanisms in early 2020, 56% of the estimated 1.8 million Venezuelan nationals were undocumented by April 2020 (Migración Colombia, 2020). As recognized by the Inter-American Court, undocumented migrants are often in situations of great vulnerability, particularly when their employment is precarious and takes place in the informal economy (Inter-American Court of Human Rights, 2003). Some countries have put in place some measures to avoid protracted situations of irregularity. Ecuador extended the period to apply for a residence permit under the regularization that had been launched in 2019 (Presidencia de la República del Ecuador, 2020). The respect for the best interests of the child also led Ecuador to establish another regularization procedure for parents of Ecuadorian nationals who had entered into the country irregularly (República del Ecuador, 2020). Similarly in Colombia, the principle of the best interest of the child played an instrumental role in the introduction of an exception to the normal rules for obtaining nationality. Despite the absence of absolute ius soli in Colombia, the new rules allowed children of Venezuelan citizens to become Colombian nationals upon birth in the territory (Castro, 2020).

Unlike in the European Union or in the USA, detention and expulsion are not major issues in South America (Acosta, 2018). However, the increase in the xenophobic discourse is worrisome. In Chile, for example, immigration debates have centered on the

[4]Forum for the Progress and Development of South America.

[5]For instance, after the massive protests in Chile, the approval rating of Sebastián Piñera was below 10% [see Mella Polanco (2020)]. The management of the COVID-19 pandemic by Bolsonaro is also weakening him and his approval ratings are around 30% [see Belmonte Martín (2020)].

adoption of a new law to modify Chile's out-dated Pinochet-era immigration law from 1975. Its current President, Sebastian Piñera, had presented his vision for Chile's migration policy as one that allows to "tidying up the house we share" and which "combats irregular migration" (Prensa Presidencia, 2018). A draft bill had remained under debate in Congress since 2018. However, on 29 April 2020 the government requested the discussion of the bill through an accelerated procedure despite, or rather precisely because, it was expected that the COVID context would benefit the adoption of a harsher final text. Also within the COVID context, the Chilean government attempted to implement what was labeled as a humanitarian return plan. Migrants who were in a vulnerable situation in Chile and who availed themselves of such plan would agree to a 9 years prohibition of entry. The Supreme Court ruled that this was contrary to the right reside, enter, and leave any country freely as established in Article 19 of its Constitution and, one could add, Article 22 of the American Convention on Human Rights (Corte Suprema de Chile, 2020).

Any measures adopted under emergency powers need to be justified, proportional and temporary. One of the most important restrictions in some countries—notably Argentina, Bolivia, Ecuador, and Paraguay—relates to the right to return to one's own country, something that has been limited for both nationals and permanent residents [6]. Border closures have also limited the right to apply for asylum in various countries such as Brazil (Brazil, Portaria 2, 20 March, 2020).

The responses to the COVID-19 crisis are intensifying a trend that has been taking place since the mid-2010s: the power increase of "securitist" actors (Brumat et al., 2018), particularly the military. In order to enforce quarantines and border closures, many countries have militarized their borders and even cities, particularly during curfews, thus militarizing immobility (Verdes-Montenegro, 2020).

Government responses to COVID-19 are also creating some paradoxical consequences, such as new types of mobility. As the economic situation worsens, many people are deciding to return to their home countries or cities. The most extreme case of this are Venezuelans. The UNHCR estimates that more than 50,000 people have returned to Venezuela since February 2020, despite the need to take a risky trip back home (UNHCR, 2020). Once in Venezuela, they have to quarantine in unhealthy conditions and they face government persecution (Bolívar, 2020). There are also new types of internal mobility. As many people can no longer afford to stay in cities, many are moving back to rural areas, for example in Peru (Chávez Yacila and Turkewitz, 2020). These trips are usually done in buses or by foot, in ways that do not ensure physical distance, which paradoxically increases the risk of contagion of COVID-19.

PROSPECTS FOR THE FUTURE

South America finds itself at a crossroads with important consequences for mobility and the rights of migrants. The fact that most migrants in the region happen to be South American nationals does facilitate policy and legal responses. However, a clearer distinction has started to emerge in some countries between Venezuelans, on the one hand, and other South Americans, on the other.

It is important to understand that South Americans on the move often find themselves in transitional legal statuses. For example, a South American might be an asylum seeker, later obtain a residence permit as a regional citizen only to then find himself in an irregular situation (Acosta 2018, Chapter. 7). Interestingly, despite the fact that most nationality laws can be characterized as moderately open to naturalization in comparative perspective—including the general acceptance of dual citizenship everywhere except in Paraguay—the number of those naturalizing remains very low (Acosta, 2020). In the present circumstances, these transitions affect most dramatically Venezuelans who represent the largest number of those moving in the region, and will remain so for the foreseeable future.

We envisage three likely developments. First, the MERCOSUR Residence Agreement will continue to facilitate mobility and access to rights in the region. The Residence Agreement is one of the main successes and longer-term policies in the history of South American regional integration (Mondelli, 2017) because it has proved to have institutional "lock-in" effects (Simmons, 2009; Börzel, 2016). Even in countries such as Ecuador or Peru, where the political discourse on migration has been securitized, its continuity is not in question. We can thus argue that COVID-19 has not as of today affected the most important regional free movement norm.

Second, recent legalizations in Bolivia, Chile, Ecuador or Peru confirm the preference by South American states in favor of regularization as a tool to manage undocumented migration, in cases where the MERCOSUR Residence Agreement is not enough (e.g., because the migrants who are undocumented are not covered under the agreement). The non-criminalization of irregular migrants will continue to be an important element guiding state action with detention and expulsion playing a marginal role when compare to the EU or the USA. This is part of a distinctive regional position in the migration agenda that South American countries have developed in the last 12 years and they strongly sustain in international forums, including in the negotiations leading to the adoption of the Global Compact on Migration (Brumat and Acosta, 2019).

Third, the economic and political consequences of the COVID-19 crisis may emphasize existing securitization trends in the region (Brumat et al., 2018). As the economic situation becomes more precarious and millions of people fall below the poverty line (ECLAC FAO, 2020), the situation of Venezuelans, one of the most vulnerable groups of migrants, could get worse. In Peru for instance, a new draft bill, which arrival to Congress is pending, proposes their expulsion once their temporary permits expired (Blouin et al., 2020). The economic consequences of COVID-19 are presented as the rationale behind such choice (Proyecto de Ley 5359, 25 May, 2020). Whilst its adoption is doubtful, it is significant in how it represents a shift from the migration bills that had been adopted and debated in the region in the XXI century. Chile, Colombia and Ecuador are also debating amendments of their legal frameworks. These

[6]The measures suspending various guarantees adopted by all states can be found at (OEA, 2020).

amendments, if approved, would contradict and even regress many of the human-rights-oriented policies adopted in the early XXI century. However, we have to bear in mind that the coexistence of "securitist" and "human rights-oriented" policy approaches to migration characterizes regional governance in South America (Acosta, 2018; Brumat, 2020a; Brumat et al., 2018). The prevalence of one of the two approaches depends on the political orientation of the governments that are in office and the power position of various actors at domestic level. This organic juxtaposition between restrictive and open attitudes toward non-nationals represents a historical trend in South America, which finds its roots in the early stages of the construction of the new nations since the beginning of the XIX century (Acosta, 2018).

Mobility has been at the center of the government responses to the COVID-19 crisis in South America. These responses have been adopted with increasingly limited resources due to the economic, social and political constraints that the region was already experiencing before the pandemic arrived. This, together with the rise of governmental and non-governmental actors whose interests are more aligned with security issues, is enforcing changes toward restrictive migration policies and new types of both, mobility and immobility. But at the same time, these policy responses coexist with longer-term regional policies "locking-in" certain rights for migrants, such as the MERCOSUR Residence Agreement. In all the countries, the governance of migration is not any longer a purely state affair. Numerous actors have emerged including academics, civil society, and domestic courts. This makes the future governance of mobility in South America richer and more complex and a site of multilevel contestation and accommodation.

DATA AVAILABILITY STATEMENT

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author/s.

AUTHOR CONTRIBUTIONS

All authors listed have made a substantial, direct and intellectual contribution to the work, and approved it for publication.

REFERENCES

Acosta, D. (2018). *The National versus the Foreigner in South America. 200 Years of Migration and Citizenship Law*. Cambridge: Cambridge University Press.

Acosta, D. (2020). *Unblocking Access to Citizenship in the Global South: Should the Process be Decentralised? Globalcit.* Available online at: https://globalcit.eu/unblocking-access-to-citizenship-in-the-global-south-should-the-process-be-decentralised/ (accessed July 24, 2020).

Acosta, D., Blouin, C., and Freier, L. F. (2019). *La Emigración Venezolana: Respuestas Latinoamericanas*. Madrid: Fundación Carolina.

Acosta, D., and Freier F. (2018). "Regional Governance of Migration in South America," in *Handbook of Migration and Globalisation*, ed A. Triandafyllidou (Cheltenham, PA: Edward Elgar), 69–85.

Acosta, D., and Freier, F. (2015). Turning the immigration policy paradox up-side down? Populist liberalism and discursive gaps in South America. *Int. Migr. Rev.* 49, 659–697. doi: 10.1111/imre.12146

Acosta, D., and Sartoretto, L. M. (2020). *Migrantes o Refugiados?* Madrid: La Declaración de Cartagena y los Venezolanos en Brasil. Análisis Carolina.

American Convention on Human Rights (1969).

Belmonte Martín, I. (2020). Coronavirus: la singularidad del Brasil de Bolsonaro. *Conversation*. Available online at: http://theconversation.com/coronavirus-la-singularidad-del-brasil-de-bolsonaro-137574 (accessed July 20, 2020).

Billion, D., and Ventura, C. (2020). Por qué protesta tanta gente a la vez? *Nueva Sociedad* 286, 37–52.

Blouin, C., Ramos, G., and Benites, A. (2020). *Agenda Migratoria en el Congreso? Propuestas Antimigratorias y Partidos Políticos Débiles.* IDEHPUCP. Available online at: https://idehpucp.pucp.edu.pe/notas-informativas/agenda-migratoria-en-el-congreso/ (accessed July 21, 2020).

Bolívar, L. (2020). *Volver a Venezuela es Volver a Ser Víctima.* La Silla Llena. Available online at: https://lasillavacia.com/silla-llena/red-de-venezuela/volver-venezuela-volver-ser-victima-72343 (accessed July 21, 2020).

Börzel, T. A. (2016). "Theorizing regionalism: cooperation, integration and governance," in *The Oxford Handbook of Comparative Regionalism*, eds. T. A. Börzel and T. Risse (Oxford: Oxford University Press), 41–63.

Briceño-Ruiz, J. (2018). Times of change in latin American regionalism. *Contexto Int.* 40, 573–594. doi: 10.1590/s0102-8529.2018400300008

Brumat, L. (2020a). "Four Generations of Regional Policies for the (Free) Movement of Persons in South America (1977–2016)," in *Regional Integration and Migration Governance in the Global South United Nations University Series on Regionalism,* eds. G. Rayp, I. Ruyssen, and K. Marchand (Cham: Springer International Publishing), 153–176.

Brumat, L. (2020b). "The residence agreement of mercosur as an alternative form of protection: the challenges of a milestone in regional migration governance," in *Latin America and Refugee Protection: Regimes, Logics and Challenges*, eds. L. L. Jubilut, G. Mezzanotti, and M. Vera Espinoza (Oxford: Berghahn Books).

Brumat, L., and Acosta, D. (2019). "Three generations of free movement of regional migrants in mercosur. Any influence from the EU?," in *The Dynamics of Regional Migration Governance,* eds A. Geddes, M. Vera Espinoza, L. Hadj Abdou, and L. Brumat (Cheltenham: Edward Elgar), 54–72.

Brumat, L., Acosta, D., and Vera Espinoza, M. (2018). "Gobernanza Migratoria en América del Sur: 'Hacia una nueva oleada restrictiva?," in *Anuario de Política Internacional & Política Exterior 2017-2018* (Tradinco: Universidad de la República- Ediciones Cruz del Sur), 205–210.

Castro, A. (2020). Three *Important Lessons From the Recent Decision of the Colombian Constitutional Court.* Globalcit. Available online at: https://globalcit.eu/three-important-lessons-from-the-recent-decision-of-the-colombian-constitutional-court/ (accessed July 21, 2020).

Chávez Yacila, R., and Turkewitz, J. (2020). *En Perú el Virus Provoca Que Miles de Personas Regresen al Campo.* The New York Times. Available online at: https://www.nytimes.com/es/2020/04/30/espanol/america-latina/peru-virus-migracion-caminantes.html (accessed July 20, 2020).

Corte Suprema de Chile (2020). *The Supreme Court Ruling in Chile is N° Amparo-1402-2020.*

ECLAC (2009). *Estudio Economico de America Latina y el Caribe 2008-2009: Politicas Para la Generacion de Empleo de Calidad*. Santiago de Chile: CEPAL. Available online at: https://repositorio.cepal.org/bitstream/handle/11362/1068/1/S0900483_es.pdf

ECLAC (2013). *Estudio Económico de América Latina y el Caribe.* Santiago de Chile: ECLAC Available at: https://repositorio.cepal.org/bitstream/handle/11362/1085/1/S2013574_es.pdf

ECLAC (2016). *Estudio Económico de América Latina y el Caribe 2016: La Agenda 2030 para el Desarrollo Sostenible y los Desafíos del Financiamiento para el Desarrollo*. Santiago: UNiLibrary.

ECLAC (2019a). *Estudio Económico de América Latina y el Caribe 2019: El Nuevo Contexto Financiero Mundial: Efectos y Mecanismos De Transmisión en la Región*. Santiago de Chile: UNiLibrary.

ECLAC (2019b). *Panorama Social de América Latina 2019*. Santiago de Chile: Comisión Económica para América Latina y el Caribe. Available online at: https://repositorio.cepal.org/bitstream/handle/11362/44969/5/S1901133_es.pdf

ECLAC and FAO (2020). *FAO y CEPAL: Millones De Personas Pueden Caer en la Pobreza Extrema y el Hambre en 2020 en América Latina y el Caribe Debido al Impacto De la Pandemia*. Available online at: https://www.cepal.org/es/comunicados/fao-cepal-millones-personas-pueden-caer-la-pobreza-extrema-hambre-2020-america-latina (accessed July 28, 2020).

FAO, OPS, WFP, and UNICEF (2019). *Panorama de la Seguridad Alimentaria y Nutricional en América Latina y el Caribe 2019*. Santiago de Chile: Food & Agriculture Org. Available online at: http://www.fao.org/3/ca6979es/ca6979es.pdf

Faúndes, J. M. M. (2019). Chile despertó: El modelo chileno, la matriz de desigualdad y la protesta de 2019. Crítica y resistencias. *Rev. Conflict. Soc. Latinoam*. 54–69.

Freier, L. F., and Parent, N. (2019a). *A Turning Tide? Venezuelan Displacement and Migration Governance in Peru*. MPC Blog. Available online at: https://blogs.eui.eu/migrationpolicycentre/turning-tide-venezuelan-displacement-migration-governance-peru/ (accessed July 21, 2020).

Freier, L. F., and Parent, N. (2019b). The Regional Response to the Venezuelan Exodus. *Curr. Hist.* 118, 56–61. doi: 10.1525/curh.2019.118.805.56

Gargarella, R. (2013). *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution*. Oxford: Oxford University Press.

Horton, J. (2020). *Latin America's Coronavirus Crisis in Numbers*. BBC News. Available online at: https://www.bbc.com/news/world-latin-america-52711458 (accessed July 28, 2020).

IMF (2020). *World Economic Outlook (April 2020) - Inflation Rate, Average Consumer Prices*. Available online at: https://www.imf.org/external/datamapper/PCPIPCH@WEO (accessed May 29, 2020).

Inter-American Court of Human Rights (2003). "Advisory Opinion OC-18/03," in *Juridical Condition and Rights of Undocumented Migrants*. United Mexican States. Available online at: /cases,IACRTHR,4f59d1352.html (accessed July 21, 2020).

IOM (2018). *Evaluación del Acuerdo de Residencia del MERCOSUR y su Incidencia en el Acceso a Derechos de los Migrantes*. Buenos Aires.

Koechlin, J., and Eguren, J (eds). (2018). *El Éxodo Venezolano: Entre el Exilio y la Emigración*. Lima: Universidad Antonio Ruiz de Montoya- Konrad Adenauer Stiftung-OIM-OBIMID

Margheritis, A. (2013). Piecemeal regional integration in the post-neoliberal era: Negotiating migration policies within Mercosur. *Rev. Int. Politi. Econ.* 20, 541–575. doi: 10.1080/09692290.2012.678762

Mella Polanco, M. (2020). *Piñera y el Desgaste del Sistema – CIPER Chile. CIPER Académico*. Available at: https://ciperchile.cl/2020/02/24/pinera-y-el-desgaste-del-sistema/ (accessed July 20, 2020).

Migración Colombia (2020). *Más de 1 Millón 825 mil Venezolanos Estarían Radicados en Colombia*. Migración Colombia. Available at: https://www.migracioncolombia.gov.co/noticias/mas-de-1-millon-825-mil-venezolanos-estarian-radicados-en-colombia (accessed July 21, 2020).

Mondelli, M. (2017). "Scaling up citizenship. The case of the Statute of MERCOSUR Citizenship," in *Handbook of South American Governance*, eds. P. Riggirozzi and C. Wylde (London: Routledge), 426–441.

Negretto, G. L., and Aguilar Rivera, J. A. (1999). Liberalism and emergency powers in latin america: reflections on carl scmitt and the theory of constitutional dictatorship. *Cardozo L. Rev.* 21, 1797–1824.

OAS (2020). *The IACHR Urges States to Protect the Human Rights of Migrants, Refugees and Displaced Persons in the Face of the COVID-19 Pandemic*. Available online at: http://www.oas.org/en/iachr/media_center/PReleases/2020/077.asp (accessed July 21, 2020).

OEA (2020). *Suspensión de Garantías Recientes en Materia de Tratados Multilaterales*. Available online at: http://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_suspencion_garantias.asp (accessed July 21, 2020).

Prensa Presidencia (2018). *Presidente Piñera Anuncia Reforma Migratoria*. Prensa Presidencia. Available online at: http://prensa.presidencia.cl/discurso.aspx?id=73020 (accessed July 21, 2020).

Presidencia de la República del Ecuador (2020). *Decreto Ejecutivo No. 1020. Prorrogar el Plazo de Amnistía Migratoria y del Proceso de Regularización por Motivos Humanitarios*. Available online at: https://zonacontable.net/index.php?mod=doc&id=8802&tit=DECRETO%20EJECUTIVO%20No.%201020.%20PRORROGAR%20EL%20PLAZO%20DE%20AMNIST%C3%8DA%20MIGRATORIA%20Y%20DEL%20PROCESO%20DE%20REGULARIZACI%C3%93N%20POR%20MOTIVOS%20HUMANITARIOS (accessed July 21, 2020).

República del Ecuador (2020). *Acuerdo Ministerial No. 0000006*. República del Ecuador. Available online at: http://www.bustamante.com.ec/covid/Recopilatorio-COVID-19-EC.pdf

Riggirozzi, P. (2020). Coronavirus y el desafío para la gobernanza regional en América Latina. *Análisis Carolina* 12. doi: 10.33960/AC_12.2020

Sanahuja, J. A. (2019). "La crisis de la integración y el regionalismo en América Latina: giro liberal-conservador y contestación normativa," in *Ascenso Del Nacionalismo y el Autoritarismo en el Sistema Internacional Anuario 2018-2019*, ed. M. Mesa (Madrid: CEIPAZ), 107–126.

Simmons, B. A. (2009). *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge: Cambridge University Press.

UNHCR (2020). *ACNUR al Lado de Venezolanos Forzados Por la Pandemia a Retornar a su País*. UNHCR. Available online at: https://www.acnur.org/noticias/historia/2020/6/5eeb02154/acnur-al-lado-de-venezolanos-forzados-por-la-pandemia-a-retornar-a-su-pais.html (accessed July 20, 2020).

UNHCR and IOM (2020). *Situation Response for Venezuelans. Coordination Platform for Refugees and Migrants From Venezuela*. Available online at: https://data2.unhcr.org/en/situations/platform (accessed July 20, 2020).

Verdes-Montenegro, F. J. (2020). *Excepcionalidad y COVID-19: Un test Democrático Para América Latina. Análisis Carolina*. Madrid.

WB (2020). *Intentional Homicides (per 100,000 People) Data*. Available online at: https://data.worldbank.org/indicator/vc.ihr.psrc.p5 (accessed May 29, 2020).

Conflict of Interest: The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

frontiers in Human Dynamics

ORIGINAL RESEARCH
published: 10 March 2021
doi: 10.3389/fhumd.2021.606871

COVID-19 and Immigrants' Increased Exclusion: The Politics of Immigrant Integration in Chile and Peru

Luisa Feline Freier[1]* *and Marcia Vera Espinoza*[2]*

[1]Departamento de Ciencias Sociales y Políticas, University of the Pacific, Lima, Peru, [2]School of Geography, Queen Mary University of London, London, United Kingdom

The COVID-19 pandemic has put into sharp relief the need for socio-economic integration of migrants, regardless of their migratory condition. In South America, more than five million Venezuelan citizens have been forced to migrate across the region in the past five years. Alongside other intra-regional migrants and refugees, many find themselves in precarious legal and socio-economic conditions, as the surge in numbers has led to xenophobic backlashes in some of the main receiving countries, including Chile and Peru. In this paper, we explore in how far the COVID-19 crisis has offered stakeholders an opportunity to politically reframe migration and facilitate immigrant integration or, rather, further propelled xenophobic sentiments and the socio-economic and legal exclusion of immigrants.

Keywords: COVID-19, South America, venezuelan displacement, immigrant integration, immigrant exclusion, xenophobia

OPEN ACCESS

Edited by:
Jaya Ramji-Nogales, Temple University, Philadelphia, PA, United States

Reviewed by:
Melissa Martins Casagrande, Universidade Positivo, Brazil
Cristián Doña-Reveco, University of Nebraska Omaha, United States
Victoria Finn, Diego Portales University, Chile; Leiden University Leiden, Netherlands, in collaboration with reviewer CD-R

***Correspondence:**
Luisa Feline Freier
lf.freierd@up.edu.pe
Marcia Vera Espinoza
m.vera-espinoza@qmul.ac.uk

Specialty section:
This article was submitted to Migration and Society, a section of the journal Frontiers in Human Dynamics

Received: *05 December 2020*
Accepted: *28 January 2021*
Published: *10 March 2021*

Citation:
Freier LF and Vera Espinoza M (2021) COVID-19 and Immigrants' Increased Exclusion: The Politics of Immigrant Integration in Chile and Peru. Front. Hum. Dyn 3:606871. doi: 10.3389/fhumd.2021.606871

INTRODUCTION

While the COVID-19 pandemic has shed light on the need for social integration of migrants and refugees, it has also revealed the lack of sustainable inclusion and integration policies across different countries of destination. In South America, the above-mentioned is evidenced by the exacerbated vulnerabilities of migrant and refugee populations, as a result of the COVID-19 crisis, and their general lack of inclusion in social policies and emergency responses to the pandemic across the region (Bengochea et al., 2020; Vera Espinoza et al., Forthcoming). In this paper we explore the policy *and* political responses in Chile and Peru, interrogating whether migrants and refugees were included in COVID-19 responses, but also whether the sanitary crisis has facilitated immigrant integration or further propelled their exclusion more broadly.

Neighboring Chile and Peru are relevant cases as these two South American countries have seen a sharp increase in intraregional migration in recent years and are among the main destinations for Venezuelan migrants and refugees (R4V, 2020)[1]. While Chile turned into a destination of intra-regional migration in the 2000s (Doña-Reveco and Levinson, 2012), and hosts migrants from a variety of different origins, Peru has only recently transitioned from an emigration to a transit and destination country of predominantly Venezuelan immigrants (Berganza and Freier, 2021). Similarities and differences between the two countries allow for a comparative analysis that is

[1]It has been argued that Venezuelans ought to be recognized as refugees according to the incorporation of the Cartagena definition of refugee in domestic refugee laws across the region (Berganza et al. 2020; Freier et al. 2020). However, recognition rates remain low. We thus refer to Venezuelan "migrants" in this paper, while recognizing the largely forced character of their displacement and the obligation of Latin American states, including Chile and Peru, to recognize them as refugees.

pivotal for the understanding of immigrant inclusion in these specific cases, and at the same time also invite us to reflect about the region more broadly.

The COVID-19 crisis hit South America in the middle of the massive displacement of more than five million Venezuelans citizens, 80% of who have settled in the region (R4V, 2020). Although less visible, there are other migrant groups whose vulnerability has also increased during the pandemic (Vera Espinoza et al., 2020). In this context, the actors involved in immigration governance continue to make sense of immigration–trying to understand what is happening and what to do next—not only in relation to the increased numbers of immigrants, public opinion, and political considerations (Geddes et al., 2019), but also in view of how to deal with migrants and refugees in the context of the COVID-19 sanitary crisis. Thus, immigration policy responses to the pandemic need to be understood in the context of policies and political discourses both prior and during the pandemic.

We argue that both Chile and Peru's emergency responses to the pandemic have jeopardized any timid efforts of immigrant integration, as migrants are framed as another "crisis" within the crisis or even as responsible for the sanitary crisis (Vera Espinoza et al., Forthcoming; Mazza, 2020). While migrants have been key actors in mitigating the impacts of the health and economic crisis during the pandemic (as essential workers in health-related areas, as well as in the entire food supply chain), COVID-19 has exacerbated their precarious conditions (Bengochea et al., 2020; Luzes et al., 2020; Zapata and Prieto Rosas, 2020). It is important to note that the integration barriers that migrants face are not determined by COVID-19 alone, but by the significant gaps in social and labor conditions between native and migrant populations, as well as by the lack of effective policy responses.

In this paper, we contribute our understanding of law and policy responses to COVID-19 in two South American countries, while reflecting on immigration policies and politics of integration in the region more broadly. More specifically, we explore political narratives and policy reactions both before and during the pandemic, and how they were embedded in media discourses and changing public opinion. We address the question whether COVID-19 has led the Chilean and Peruvian governments to take any concrete measures targeting migrants and refugees, as part of their emergency response, and in how far the sanitary crisis has led to discursive changes in political discussions that are likely to influence immigration policies beyond the pandemic.

For the purpose of this study, we adopt a narrow understanding of integration, which focuses on the incorporation of migrants and refugees in the formal labor market and their access to social services, such as education, healthcare, and social protection programs. Traditionally, "integration" has been understood as the incorporation of legal immigrants or naturalized citizens in their host societies, whereas the term "inclusion" is broader and conveys that the migrant experiences a sense of security, stability and predictability with a view to the future, irrespective of her legal status (Cook, 2013). Indeed, undocumented immigrants can also be bureaucratically incorporated through schools and social services (Marrow, 2009) and socially and economically included as workers, consumers and neighbors (Cook, 2013). In this paper we refer to integration and inclusion, as they both convey intertwined structural and social processes that are at play in the context discussed here. While interdisciplinary bodies of literature have largely recognized that integration is a multidimensional process across diverse structural and social dimensions (Gidley, 2014), less attention has been paid to the role of political discourses in shaping these processes of inclusion and associated policies in the context of the pandemic.

Our analysis is based on a review of selected government declarations, decrees, and media reports in relation to the COVID-19 sanitary crisis up until September 2020, and informed by the preliminary analysis of 20 interviews with key actors (central and local governments, NGOs, migrant organizations and international organizations) that we conducted in Chile and Peru between June and August 2020[2]. In the case of Chile, we focus on two of the largest migrant groups: Venezuelans and Haitians, that respectively represent 30.5% and 12.5% of the total foreign population (INE-DEM, 2020). In the case of Peru, we focus on policies targeting, and narratives surrounding, Venezuelan immigration, given that they made up 84.4% of all foreigners in Peru by the end of 2019 (Andina, 2019). For each country, we briefly present the context of the rising number of migrants, and how these had affected processes of sense-making among policy makers and consequent immigration policies pre-COVID-19. We then turn to analyze the changes in narratives and broader immigration policies during the pandemic, in order to reflect upon their impact on migrant and refugee integration.

CHILE

Rising Immigration and Political Salience

The increase of intraregional migration in South America has been particularly significant in Chile (Stefoni and y. Brito, 2019). The country's migrant population increased from 1.3% in 2002, to 4.4% in 2017 (CEPAL, 2019), to almost constituting 8% of the total population by the end of 2019, when the foreign-born population residing in Chile was almost 1.5 million people (INE-DEM, 2020). The main migrant groups in Chile come from Venezuela (30.5% of the total immigrant population), Peru (15.8%), Haiti (12.5%), Colombia (10.8%), and Bolivia (8.0%) (INE-DEM, 2020). The 2017 Census shows that most migrants live in the Metropolitan Region of Santiago (65.3%), as well as in the northern regions of Antofagasta (8.4%), Tarapacá (5.9%), and the region of Valparaíso (5.4%) (INE, 2018).

Overall, the majority of immigrants in Chile come from other Latin American countries and the Caribbean, mainly as a result of humanitarian or political and economic crisis (Jubilut et al.,

[2]The research for this paper has been conducted in the context of a larger study by the research group CAMINAR (Comparative Analysis in International Migration and Displacement in the Americas) (Bengochea et al. 2020; Vera Espinoza et al., 2020; Zapata and Prieto Rosas 2020).

2021); facilitated by sub-regional mobility regimes (MERCOSUR) (Brumat, 2020); or as a result of the increasing border and migration restrictions imposed by the global north (Stefoni and y. Brito, 2019). Alongside the growing numbers of immigrants, there has been a well-documented politicization of migration in Chile (Acosta et al., 2018; Thayer, 2019), with increased presence in the political agenda and the media.

Public perception surrounding immigration has also grown more polarized and complex in the last few years. In 2018, a survey by Ipsos recorded that 53% of Chileans agreed that migration was "beneficial" to the country, while 43% viewed it as "harmful" (Ipsos 2018). Another survey conducted by the Universidad Andrés Bello and the Ministry of Interior in June 2020 - amid the COVID-19 pandemic-, showed that 57% of Chileans thought that the amount of migrants living in the country should decrease, and that 70% agreed that visas should not be given to migrants who entered the country through irregular channels (UNAB-DEM, 2020). An analysis of the Centro de Estudios Públicos (CEP) national surveys of 2003 and 2017 further shows that throughout this period one in three Chileans thought that immigrants contributed to the economy (González et al., 2019). At the same time, however, the perception that immigrants increased crime grew by 6% since 2003, reaching 41% in 2017. Overall, and despite the increased presence in media and political discourses, "immigration" remained of low concern to Chileans in comparison with other issues. When asked to identify three key issues the government should solve in the CEP public opinion survey in December 2019, only 1% chose migration, compared to pensions (64%), health (46%) and education (38%). The latter concerns were reflected in the demands raised during the national social protests that took place in Chile in late 2019.

Pre-COVID Narratives and Policies

In April 2018, and only one month after starting his second administration, Chilean President Sebastián Piñera announced a "migration reform" that included some modifications to the migration bill sent to Congress during his first government in 2013, as well as a series of executive measures that aimed to "clean up the house" (Acosta et al., 2018). This statement referred to dealing with the perceived "chaos," brought on by the increased numbers of migrants, by combating irregular immigration through the creation of six new visas, as well as announcing a process of regularization[3] (Finn and Umpierrez de Reguero, 2020; Thayer, 2019). Chile's current immigration law dates back to 1975 (Decree-Law No. 1094) and was decreed under the military dictatorship of Augusto Pinochet. Piñera's migration bill (Boletín No 8.970-06) was approved by the Deputies of Chamber in January 2019 (Interior 2019), and then by the Senate at the beginning of December 2020 (Gobierno de Chile, 2020).

Piñera's "migration reform" installed migration as one of the priorities of his administration and positioned the topic in the media. Alongside the modifications to the bill, Piñera issued two executive decrees to change visa procedures for Venezuelan and Haitian migrants (Acosta et al., 2018). These executive decrees created the Visa of Democratic Responsibility for Venezuelans, which can be issued in any Chilean consulate abroad but is subject to specific requirements such as a passport (or ID national card) and proof of non-criminal record, and a consular tourist visa for Haitians. As in other countries, such as Ecuador and Peru, these visas represent *de facto* barriers to legal entry for the targeted nationalities (Freier and Luzes, 2021). At the same time, the government reinforced the practice of mass deportations, as a key feature of a communication campaign that criminalizes migration, reproducing ideas about "good" and "bad" migrants (Stefoni and y. Brito, 2019; Brumat and Vera Espinoza, Forthcoming).

The increased salience of immigration in governmental discourses continued alongside two major events in Chile: the social protests of 2019 and the subsequent constitutional process that started with the plebiscite in 2020. While the public, as shown above, was more concerned about the social demands, an exclusionary rhetoric about immigrants persisted. Such as the wrongful accusation that linked the social protests to "Cuban and Venezuelan migrants" that aimed to destabilize the country (La Tercera, 2019). Despite these challenges, migrant-led groups have sought to take an active participation in these social processes (Red de Migrantes por el Apruebo, 2020).

Narratives and Policies in the Context of COVID-19

Chile reported its first confirmed COVID-19 case on March 3, 2020 (IMF, 2020). On March 18, 2020, the Chilean government declared a state of emergency (Decree No 104), and closed its borders for a period of 90 days, except in the case of Chileans and foreign residents in Chile (Decree No 102, March 16, 2020). As in many other South American countries, the army was sent to reinforce the borders (Bengochea et al., 2020). In addition, a nationwide curfew (10pm–11pm to 5am) has been in place since March 22 (Exempt Resolution No 202). Alongside these measures, the government's emergency plan included territorial quarantines in specific municipalities and cities, declared through exempt resolutions, as well as sanitary cordons[4]. These measures have translated into increased police control, closure of commerce, and changes to the transport system, all of which have impacted migrants' livelihoods and mobility (Bengochea et al. 2020).

The government also announced a series of social protection measures in order to deal with the economic impacts of the pandemic. At the end of March, the government enacted the "Bono COVID-19" (Law No 21225), by which the government provided a bonus of $50,000 Chilean pesos (USD$60) that sought to reach 60% of the most vulnerable members of Chilean society. On May 14, the government enacted Law No 21230 "Emergency

[3]According to the government, this process was going to allow the regularisation of more than 300,000 immigrants in a period of 3 months. By the end of the process, 155,000 immigrants participated in the process (Navarrete and Vedoya, 2019).

[4]The entire action plan of the government and updated measures can be reviewed at the https://www.gob.cl/coronavirus/plandeaccion/

Family Income," aimed at helping families working in the informal sector, whose income was most severely affected by the sanitary crisis. To receive this benefit, one must be included in the Social Registry of Homes (*Registro Social de Hogares*) and have a valid Chilean ID (*Cédula de Identidad*). This means that irregular migrants, or those with expired IDs, cannot access these benefits, including immigrants who have initiated their regularization process, but who have not yet received their IDs (Ambiado et al., 2020; Vera Espinoza et al., Forthcoming).

In the context of COVID-19, the Chilean government has also seen the increasing digitalization of visa and documentation procedures. This digitalization process did not emerge exclusively due to the pandemic, but it was certainly accelerated by it. Already in January 2020, the Department of Immigration and Foreign Nationals (DEM by its acronym in Spanish) had announced that certain procedures, such as applications for permanent residence, travel certificates, and payment of fines could be done online, in order to improve waiting times (Sub Interior 2020). However, some of our interviewees[5], as well as comments from migrants on DEM's social networks, have reported increased waiting times and delays in responses, as well as failures in the online platform. The government also granted an extension to the validity of identity cards for a period of 1 year (Ministerio de Justicia y Derechos Humanos (MJDDHH), 2020), and extended the period to switch employers for immigrants on work visas[6] from 30 to 180 days (Carreño, 2020).

According to the government, as emphasized in our interviews[7], all the measures taken in relation to the pandemic are "transversal" to the entire population. However, this "whole society" rhetoric, in relation to the government's pandemic response, does not necessarily translate into the implementation of benefits for migrant and refugee populations[8], particularly those with expired documentation and in an irregular situation (Ambiado et al., 2020). For example, the digitalization has not included asylum applications, and most of them are on standby as governmental offices are closed, leaving asylum seekers in limbo. Two Court decisions (one in Iquique[9] and one in Puerto Montt[10]) have pushed the government to accept the asylum applications of two families by email, without yet resulting in concrete policy changes to the asylum procedures.

Despite the "transversality" claimed by the government, there has not been a coordinated action. While the Ministry of Foreign Affairs has been actively dealing with the return of some migrant groups, the DEM at the Ministry of Interior has been handling visa procedures and the extensions granted to specific documentation or processes. Other ministries are leading general social, labor, and epidemiological responses, some of which do not target immigrant populations.

Besides the emergency measures taken by the government, the municipalities have played a key role in addressing the concerns of migrants. They have also helped cover the essential material needs of migrants who wanted to return to their countries of origin, or to another country in the region, but who were unable to do so as result of border closures and sanitary measures within these countries, as it was—and still is—the case of Peruvian, Bolivian, Colombian, and Venezuelan migrants (Vera Espinoza et al., 2020). International organizations, local NGOs, and migrant-led organizations have also had a crucial role, mainly in providing food parcels, shelter, some cash transfers, and translating key information to different languages (Vera Espinoza et al., Forthcoming).

As reported by the local media, and supported by our interviewees[11], exclusion also emerges from unclear information, as well as from a growing climate of racism and xenophobia, which is present in both the government and part of the media. Indeed, the government and some media outlets associated the rising numbers of COVID-19 cases to irregular migration since April (Vera Espinoza et al., 2020). Although official records indicate that the virus entered Chile via a Chilean traveler returning from Singapore in early March (BBC Mundo, 2020), Piñera said in a televised statement on April 10, 2020, that the borders needed to be strengthened to "prevent "illegal" immigration from bringing the infection with the virus into our country" (Prensa Presidencia, 2020). Similar comments were made by the Minister of Health. Around the same time, some media outlets started to use images that associated COVID-19 and the migrant population, especially black migrants, such as the cover page of the newspaper *La Segunda* on April 7th, which featured a Haitian woman holding a baby in her arms with the headline "Infections stabilize." Migrant organizations, NGOs, and academics have issued rejection letters and statements against these expressions, which are "indicative of discrimination against the international migrant population" (El Mostrador 2020).

It is relevant to note that xenophobia against migrants in Chile was already well documented before the pandemic (Tijoux and Ambiado, 2019; Bonhomme, 2021) and that misleading accusations against migrants as vectors of disease, such as HIV and Tuberculosis, are not new in the country (see discussion in Cabieses et al., 2019). During the pandemic, there has been

[5]Interview with migrant-led organization's representative, June 18, 2020; interview with staff of NGO in Arica, July 7, 2020.

[6]This process can only be done online if the person resides in the Metropolitan Region, for all the other regions migrants need to book an appointment and go to the relevant office in person https://www.extranjeria.gob.cl/trabajar-en-chile/visa-sujeta-a-contrato/cambio-de-empleador-de-visa-sujeta-a-contrato

[7]Interview with official from the Chilean government, July 6, 2020.

[8]As documented by Finn and Umpierrez de Reguero (2020), the Chilean government has already used "inclusive language for exclusive policies" in relation to some of the measures taken as part of the migration reform announced in 2018.

[9]Information available at https://www.indh.cl/ante-solicitud-indh-y-por-covid-19-corte-de-iquique-ordena-tramitacion-de-solicitud-de-refugio-via-correo-electronico/

[10]https://www.soychile.cl/Puerto-Montt/Sociedad/2020/07/23/665529/Ordenan-a-la-Gobernacion-de-Llanquihue-acoger-a-tramite-solicitud-de-refugio-de-cinco-ciudadanos-extranjeros.aspx

[11]Interviews with migrant-led organization's representative, June 18, 2020; interview with staff of NGO in Santiago, July 13, 2020; and interview NGO member in Arica, July 20, 2020.

recorded cases of racism, such as the one experienced by a group of Haitians living in an overcrowded accommodation in Quilicura, Santiago, who tested positive for coronavirus. The local authorities moved them to a sanitary residency, amid the neighbors' violence and media exposure (Emol, 2020). The increase in xenophobia has not only targeted Haitian and Venezuelan migrants; the country has also seen an increase in racism against the Asian communities living in Chile (Chan et al., 2020).

It can be argued that political and media discourse and some exclusionary actions have led to a hostile environment for immigrants. Another example is the so-called "humanitarian" return plan through which the government allowed Colombian migrants, who were in a vulnerable socio-economic situation in Chile, to fly from Santiago to Bogotá (MINREL, 2020), previous signature of a declaration by which they would have to agree to a 9 years prohibition of entry. This return plan is similar to the one initiated by the government in 2018 to repatriate Haitian migrants (Ministerio de Interior, 2018). The Supreme Court ruled the non-return clause contrary to the person's freedom of movement established in Article 19 No 7 of the Chilean Constitution (Corte Suprema de Chile, 2020).

By the end of April 2020, Piñera's administration put "urgency" to the discussion of the Migration and Foreigners Bill (Boletín No 8.970-06) in the Senate (Senate session 18/368), a resource through which the president can modify the legislative agenda by accelerating the discussion of the bill (Constitution of Chile, 1980, Art. 71). Both inside and outside Chile, civil society and academics issued warnings about several aspects of the bill[12] (CELS, 2020), as well as the risks of discussing such an important law in the middle of the sanitary crisis and without substantial participation of civil society organizations (Diario UChile, 2020). The government justified the "urgency" of discussing the bill with the baseless estimate that around 500,000 migrants would arrive in the country after the pandemic (Schüller Gamboa, 2020). The bill was approved by the Senate in December 2020.

The emphasis on immigration by both the government and some media outlets in the middle of the sanitary crisis, evidences the strategic use and the politicization of immigration in Chile. The government's focus on the "urgent" discussion and approval of the Migration and Foreigners Bill in Congress, as well as the emphasis on the potential risk of transmission that immigrants could represent, can be understood as yet another attempt to shift media and public attention from the mishandling of the COVID-19 crisis to the "other"—the migrant–crisis (see Ramírez, 2020a). This framing of immigration reinforces political narratives that already existed before the pandemic. However, the challenges imposed to migrants' inclusion are not only discursive. The rhetoric runs alongside the explicit exclusion of migrants from some mitigation measures–due to irregular residency or expired documentation—(Vera Espinoza et al., Forthcoming), as well as exacerbated vulnerabilities produced by the sanitary and economic crisis (Bengochea et al., 2020; Zapata and Prieto Rosas, 2020).

[12]One example is the article 16 of the bill that restricts access to certain social benefits to immigrants with less than two years of legal residency in the country.

PERU

Rising Immigration and Xenophobia

Venezuelans are by far the largest and most politicized immigrant group in Peru, partly due to the rapid increase in numbers. In 2008, there were less than 3,000 foreigners with temporary or permanent residence, a number that rose to 54,000 in 2016. Since then, Peru has become home to more than 860,000 Venezuelan migrants according to United Nations data (R4V, 2020). By the end of 2019, Venezuelan immigrants made up 84.4% of all foreigners in Peru (Andina, 2019). Arequipa (with 3% of the total Venezuelan population in Peru), Cusco (0.7%), Lima (83.8%), Tacna (0.4%), and La Libertad (3.9%) are the regions in which the majority of Venezuelans reside (Gestión, 2019). Other national origins of foreigners living in Peru include Colombia (3.6%), Spain (1.3%), the United States (1.0%), Ecuador (1.0%), Argentina (1.0%), Chile (0.9%), Brazil (0.9%), and China (0.8%) (Andina, 2019).

In addition to the steep increase in numbers, the socio-demographic characteristics of Venezuelans arriving in Peru have changed over time, with a tendency toward lower socio-economic status and educational skills. More recent Venezuelan migrants arriving in Peru are poorer, less educated, and more vulnerable than their predecessors (Freier et al., 2019). Both factors - rising numbers and the change in social profile-led to a surge in xenophobic public opinion in Peru (Aron Said and Castillo Jara, 2020; Freier, 2020; Freier and Pérez, 2021). Perceptions of economic competition and migrants, as an additional burden for already precarious public services, led to an increasing percentage of the national population to oppose immigration (World Bank, 2019). Already by the end of 2018, 72% of respondents in the capital Lima agreed with the statement that "the arrival of too many Venezuelans will harm the Peruvian economy," and 73% agreed that "Venezuelan are taking away jobs from many Peruvians" (Instituto de Opinión Pública (IOP) and Instituto de Democracia y Derechos Humanos PUCP (IDEHPUCP), 2020). By the end of 2019, these percentages had risen to 77 and 76% respectively.

Between 2018 and 2019, a perceived link between immigration and crime added to the economic argument and worsened the public perception of Venezuelans, which generated pressure on the government to implement non-inclusive reception policies. While by the end of 2018, 55% of respondents agreed with the statement that "many Venezuelans are responsible for criminal activities in Peru," this percentage increased to 81% by the end of 2019 (ibid.). This process was further fueled by stigmatizing reporting in the media and political discourses that criminalized Venezuelans, and specifically Venezuelan nationality (Freier and Pérez, 2021).

Pre-COVID Narratives and Policies

Peru reformed its outdated immigration law of 1991, which had a strong security focus, twice, through Legislative Decree 1,236 in 2015, and Legislative Decree 1,350 in 2017. Both reforms sought to simplify immigration legislation, protect the fundamental

rights of national and foreign citizens, and strengthen national security. The 2017 law, which was the first to receive a regularizing decree, gave greater authority to the National Superintendence of Migration (Ministry of the Interior), simplified migratory statuses, facilitated the entry and stay of highly qualified foreigners, and strengthened the protection of vulnerable populations (Aron and Freier, 2020).

The Peruvian response to Venezuelan immigration has gone through two phases: openness under former president Pedro Pablo Kuczynski (July 2016–March 2018), and restrictiveness under incumbent president Martín Vizcarra (March 2018 - November 2020). Initially, Peru made significant advances in providing Venezuelans the necessary documentation to work. Although Peru did not apply the Southern Common Market (Mercosur) Residence Agreement or the Cartagena refugee definition (Acosta et al., 2019), it was the first country in the region to create a special residence permit for Venezuelan migrants: the Temporary Residence Permit (PTP), which was launched in early 2017, renewed four times[13], and allowed Venezuelans to reside and work in Peru legally for one year.

However, the PTP program ended in December 2018 (applications could only be made by migrants who had entered by October of the same year). Roughly half a million Venezuelans received PTP status, and by mid 2020, about 200,000 had been able to change to another temporary "special" residence status for a year (Freier and Brauckmeyer, 2020). In parallel, the Peruvian government introduced the requirement of a so-called "humanitarian" access visa in mid 2019, which had to be issued in Venezuela with a valid passport and certified clean criminal record—requirements that have long been prohibitive for most Venezuelans (Freier and Luzes, 2021). Entering, residing, and working regularly in Peru has since become much more difficult, if not impossible, for most Venezuelans, and the humanitarian visa presents an entry barrier to regular integration in practice.

This change in policy can be explained by an interplay between three factors: the change in number and social profiles of Venezuelan migrants, with a tendency toward lower social, economic, and educational statuses; and the rise in xenophobic attitudes among the Peruvian population, discussed above, as well as the internal political crisis, due to conflict between the executive and legislative branches of government (Aron Said and Castillo Jara, 2020). The stand-off between executive and legislative, which led to the resignation of President Kucynski in March 2018 and culminated in the ousting of President Vizcarra and social unrest in November 2020, accentuated the latter's policy focus on domestic affairs and led to an approach to immigration that focused more on public opinion and less on foreign policy considerations.

Narratives and Policies in the Context of COVID-19

In the context of COVID-19, on March 16, Peru declared a state of emergency via Supreme Decree No 044-2020-PCM[14], closing international borders and imposing compulsory social isolation. This measure was extended four times and lasted until June 30 (since then additional lockdowns were issued in regions with high infection rates). Borders remain closed and national and international transport suspended through Supreme Decrees N° 044- 2020-PCM, 051-2020-PCM, 064-2020-PCM, 080-2020-PCM and 094-2020-PCM. In addition, different curfews have been in place across the country. Exceptions to the above-mentioned include the repatriation of Peruvians and return flights for foreigners organized in coordination with consulates and embassies. During the state of emergency, the armed forces actively participated in the vigilance of land and sea border crossings, both official and unofficial. For instance, in April, military vehicles were mobilized to the 22 clandestine crossings identified on the border with Ecuador. This was done in coordination with the Ecuadorian authorities and with "the exclusive aim of controlling the clandestine passages of illegal migrants" (Gestión, 2020).

In the case of foreigners who were already residing in Peru, some facilities were given to avoid sanctions due to irregularity during the state of emergency. Fines and administrative sanctions related to overstay were suspended (Resolución de Superintendencia N° 100-2020 and 104-2020). The use of provisional certificates was authorized for foreigners who had their *Carné de Extranjería* or PTP approved, but could not receive it due to compulsory social isolation (Resolución de Superintendencia No 121-2020). Additionally, and as we have seen in Chile, the virtual platform of the National Superintendence of Migration was strengthened. It is currently possible to carry out, and pay for, procedures for visa applications, change of migratory status, extension of residence permits, inscription for the issuance of the *Carné de Extranjería*, among other procedures, online.

Government measures to provide social and economic support for Peruvian families in vulnerable conditions, such as direct cash transfers (*Bono Yo Me Quedo En Casa, Bono Independiente, Bono Rural, Bono Familiar Universal*), did not include immigrants and refugees, since the national ID was required to access these. Legislative Decree 1,466 of April 21, 2020 authorized temporary affiliation to the public Integral Health Insurance (SIS) for all people who show symptoms or are diagnosed with COVID-19. However, this only applied for Peruvians and foreigners with *Carné de Extranjería*, which is not accessible for the majority of Venezuelan migrants due to the elevated procedural costs. Thus, the state did not consider the vulnerable situation in which many immigrants, and especially Venezuelan foreigners, found themselves, nor its public health implications. Rather, the government sought to transfer the

[13]PTP 1: Supreme Decree N° 002-2017-IN (January 3, 2017); PTP 2: Supreme Decree N° 023-2017-IN (July 29, 2017); PTP 3: Supreme Decree N° 001-2018-IN (January 23, 2018) and PTP 4: Supreme Decree N°007-2018IN (August 19, 2018).

[14]https://busquedas.elperuano.pe/normaslegales/decreto-supremo-que-declara-estado-de-emergencia-nacional-po-decreto-supremo-n-044-2020-pcm-1864948-2/

responsibility for assisting the most vulnerable migrants to international organizations, but without any coherent strategy or monitoring (Berganza et al., 2020).

Similar to the Chilean case, and in line with their institutional and ideological orientation, the Ministry of Foreign Affairs focused on issues related to the rights of Peruvians abroad and the strengthening of the work of Peruvian consulates, but did not assume its powers as the governing entity of the National Migration Policy, nor did it actively seek international funds for the inclusion of the migrant population in social emergency policies. On the other hand, the National Superintendence of Migration focused primarily on immigration control, supporting a questionable legislative project, as discussed below.

Some efforts were made to include migrant healthcare professionals in the fight against the pandemic. In April 2020, Emergency Decree No. 037-2020-PCM allowed the hiring of additional Peruvian and foreign health professionals to work in the fight against the pandemic in a special service called SERVICER. Hired professionals worked under a temporary contract and were granted life insurance paid by the state. However, according to the Peruvian Ombudsman's office[15], bureaucratic barriers complicated the effective inclusion of these professionals, such as the non-recognition of their documents to open the bank accounts that they needed to receive their salaries. More recently, in August 2020, the Emergency Decree No. 090-2020 expanded the possibilities of hiring foreign healthcare workers by temporarily suspending the requirements of degree revalidation and inscription in the medical professional association. Both of these more inclusive policies, were limited to the state of emergency generated by the pandemic. It is still pending to see whether they will be continued in the post-COVID context.

More broadly, the COVID-19 pandemic led to a sharp decline in the link between Venezuelan immigration and crime made in the Peruvian media. At the same time, Peruvian civil society saw the pandemic as an opportunity to point out the need for migrant regularization. For example, the report of the *Grupo Temático De Ciencias Sociales*, commissioned by the Peruvian minister of health, included a chapter dedicated exclusively to the situation of Venezuelan immigrants in the country (Freier and Brauckmeyer, 2020). Despite these efforts, and the decline of political urgency of Venezuelan immigration, the Peruvian Congress presented various discriminatory laws during the quarantine period.

Five bills presented in the Peruvian Congress between 2019 and 2020 (PL 05625/2020 and PL 05349/2020 proposed by *Acción Popular*, PL 04830/2019 proposed by *Fuerza Popular*, PL 4844/2019 proposed by *Contigo*, and PL 4958/2020 proposed by *Unión por el Perú*) evidence the presence of xenophobic attitudes in some political parties. Guided by the perceived link between migration (particularly, irregular migration) and an increase in crime, PL 05625/2020 and PL 04844/2019 coincided in proposing special and fast mechanisms for the expulsion of migrants. For instance, PL 04844/2019 proposed the disproportionate sanction of expulsion for common crimes. Similarly, PL 05349/2020 proposed to invalidate the permits already granted to Venezuelan citizens (PTPs). Had this bill entered into force, it would have opened the door for the collective expulsion of Venezuelan migrants[16].

In the context of the pandemic, PL 04958/2020 further proposed to repatriate vulnerable foreigners to their countries of origin, in an attempt to elude responsibility for the inclusion of migrants in the state's emergency response[17]. Finally, in relation to refugees, PL 04830/2019 proposed to change, in a politicized manner, the composition of the two commissions in charge of deciding and reviewing asylum cases. The proposed new composition would have directly included the ministers of Foreign Affairs, Interior, and Justice, instead of the vice ministers or representatives, leading to the further politicization of the refugee determination process in Peru. Although it is unlikely that these bills will be passed, the fact that they were formally presented before the relevant state commissions shows that there was a serious attempt by the parliamentary groups to transform xenophobic misconceptions into enforceable law.

DISCUSSION: COVID-19 AND IMMIGRANTS' INCREASED EXCLUSION

At the time of editing this article, COVID-19 policy measures are ongoing. Chile's land borders closure has been renewed until January 2021 (Decree No 656, December 22, 2020). In both Chile and Peru, partial lock-downs continue. At the same time, Peru's Superintendence of Migration announced a regularization program in October 2020, establishing "special, exceptional and temporary" measures for the regularization of foreigners, of any nationality, through the issuance of a Temporary Permanence Permit Card (Carné de Permiso Temporal de Permanencia, CPP)[18]. This new visa will be valid for one year and requires applicants to pay the overstay fines owed within a year after the approval of their application[19].

The review of the immigration discourses and policies in Chile and Peru, both before and during the COVID-19 pandemic, offers relevant insights in relation to three key aspects: 1. The lack of inclusion and sustainable integration policies for immigrants prior and during the pandemic; 2. The political immigration narratives that emerged in the context of the sanitary crisis, which offer insights on how actors in migration governance systems make sense of migration under the current scenario; and 3. The ways in which COVID-19 may be reframing migration governance in these two countries, and in the region, by reinforcing a securitized approach to migration that may

[15]Interview with official from the Peruvian Ombudsman's office, July 6, 2020.

[16]PL 05349/2020 was archived by the Congress' Commission on Foreign Affairs on 16th December 2020.

[17]PL 04958/2020 was archived by Congress' Commission on Foreign Affairs on 16th December 2020.

[18]Supreme Decree 010-2020-IN of October 22.

[19]At the time of editing in January 2021, the CPP is not yet being issued as the Administrative Procedures (TUPA) have not yet been published.

translate into the increased socio-economic and legal exclusion of migrant and refugee populations.

First, although many analysts have highlighted the initial relatively open and generous policy response by South American countries to Venezuelan displacement and increased intra-regional mobility (Acosta et al., 2019; Selee and Bolter, 2020), the majority of countries in the region, including Peru and Chile, passed *ad hoc* policies through presidential decrees, instead of applying existing and, overall, very progressive legislation (Acosta et al., 2019). In the context of Latin American presidentialism, this always bore the risk of leading to unstable policies that could change rapidly, depending on changing political inclinations and public opinion (Aron Said and Castillo Jara, 2020; Ramírez, 2020b). Indeed, even before the COVID-19 crisis, immigrants in both Chile and Peru were increasingly excluded in socio-economic terms. This can be explained by bureaucratic barriers to having their precarious legal status recognized both by state institutions and the private sector (e.g., banks and employers), and by the fact that immigrants increasingly found themselves in irregular status due to barriers to legal entry and stay.

Second, even before the onset of the COVID-19 pandemic, political narratives responded to the steep increase in the numbers of immigrants, and led to xenophobic backlashes, restrictive policy reactions, and related barriers to socio-economic inclusion of immigrants in both countries. Although there were some efforts to reframe the need for migrant regularization in the context of the pandemic, mainly spearheaded by civil society and migrant led-organizations, both in Chile and Peru, immigrants—particularly those without IDs or with irregular migration status - were excluded, in practice, from most of the social emergency policies during the pandemic, mirroring similar developments across the region (Vera Espinoza et al., Forthcoming). As mentioned above, in the case of Chile, immigrants have been directly associated with the spread of the virus.

Third, and perhaps most worrisomely, the pandemic has led to, or accelerated, legislative projects that envision the increased legal exclusion of immigrants in both countries, which will be detrimental for any efforts to counter their socio-economic exclusion and increasing vulnerability beyond the immediate context of the COVID-19 crisis. Here, the cases of Chile and Peru reflect a regional pattern of increased socio-economic and legal exclusion of immigrants and refugees, reflected by deep-rooted vulnerabilities, hostile political narratives, and the emergence of restrictive policies (ibid.)

Overall, as in other world regions, in South America, the reframing of immigration will be essential. The multiple exclusions described in this paper have been challenged by migrant-led groups and civil society organizations. They demonstrate the need to move beyond the politics of immigration policies to the discussion of sustainable integration policies and broader practices of immigrant inclusion, understanding the need for facilitating–instead of restricting–regular migration to enable integration from a public health perspective, and to enable true socio-economic migrant inclusion, moving from a focus on national security toward human security (Ceriani Cernadas, 2020; Freier, 2020). The effects of COVID-19 on migrant and refugee populations make this task more timely, but also more difficult than ever.

DATA AVAILABILITY STATEMENT

The data presented in this article are not readily available because of confidentiality obligations toward the interviewees that participated in the study. Data discussed in this paper is also part of a larger study, which other outputs are still under development. Requests to access the datasets should be directed to Research Group CAMINAR, contacto@caminaramericas.org.

ETHICS STATEMENT

The study was reviewed and approved by the Queen Mary Ethics of Research Committee on May 19, 2020 (ref: QMERC2020/27). The participants provided their informed consent to participate in this study.

AUTHOR CONTRIBUTIONS

MVE wrote the section on Chile, and LF wrote the section on Peru. MVE led the introduction and LF the conclusion. Both authors contributed equally to the paper.

ACKNOWLEDGMENTS

Original data used in this paper is part of an ongoing multi-sited, regional and interdisciplinary project by the Research Group "Comparative Analysis on International Migration and Displacement in the Americas" (CAMINAR) www.caminaramericas.org. The authors thank Soledad Castillo Jara and Andrea Kvietok for their excellent research assistance, particularly with the section on Peru.

REFERENCES

Acosta, D., Blouin, C., and Feline Freier, L. (2019). *La emigración venezolana: respuestas latinoamericanas*. Madrid, Spain: Documento de Trabajo, no 3 (2a época) Fundación Carolina.

Acosta, D., Vera Espinoza, M., and Brumat, L. (2018). The new Chilean government and its shifting attitudes on migration governance. MPC Blog. Available at: https://blogs.eui.eu/migrationpolicycentre/new-chilean-government-shifting-attitudes-migration-governance/ (Accessed May 3).

Ambiado, C., Orrego, C., and Lages, R. (2020). Migración en tiempos de excepción: ¿con o sin papeles de identidad? Chile, CL: El Mostrador. Available at: https://www.elmostrador.cl/destacado/2020/04/09/migracion-en-tiempos-de-excepcion-con-o-sin-papeles-de-identidad/ (Accessed April 9, 2020).

Andina (2019). ¿Cuántos extranjeros residen en el Perú y dónde trabajan? Portland, OR: Andina. Available at: https://andina.pe/agencia/noticia-%C2%

BFcuantos-extranjeros-residen-el-peru-y-donde-trabajan-778866.aspx. (Accessed December 22, 2019).

Aron, V., and Freier, L. F. (2020). "La legislación migratoria en Perú: entre la promoción de los derechos humanos y la seguridad nacional," in *Políticas y reformas migratorias en América Latina*. Editor N. Caicedo Camacho (Lima, Peru: Fondo Editorial de la Universidad del Pacífico), 207–230.

Aron Said, V., and Castillo Jara, S. C. (2020). Reacting to change within change: adaptive leadership and the Peruvian response to Venezuelan immigration. *Int. Migration* doi:10.1111/imig.12761

BBC Mundo (2020). Coronavirus: identifican primer caso de covid-19 en Chile. London, United Kingdom: BBC News Mundo. Available at: https://www.bbc.com/mundo/noticias-america-latina-51729957. (Accessed March 3, 2020).

Bengochea, J., Cabezas, G., Gandini, L., Herrera, G., Luzes, M., Montiel, C., et al. (2020). "COVID-19 y población migrante y refugiada. Análisis de las respuestas político-institucionales en ciudades receptoras de seis países de América Latina," in *Inmigrando: comprender Ciudades en Transición*. Editors F. Vera, V. Adler, and F. Toro (Buenos Aires, AR: BID), Vol. 3, 749–782.

Berganza, I., Blouin, C., and Feline Freier, L. (2020). El elemento situacional de violación masiva de derechos humanos de la definición ampliada de Cartagena: hacia una aplicación en el caso venezolano. *Revista Chilena de Derecho* 47 (2), 385–410. doi:10.4067/S0718-34372020000200385

Berganza, I., and Freier, L. F. (2021). "Política Migratoria y de Refugio: hacia una Política de Integración para un País de Acogida," in *Proyecto Bicentenario: contribuciones al Perú en Camino a su Desarrollo*. (Lima, Peru: Universidad del Pacífico).

Bonhomme, M. (2021). Racismo en barrios multiculturales en Chile: pre-cariedad habitacional y convivencia en contexto migratorio. *Bitácora Urbano Territorial* 31 (I), 167–181. doi:10.15446/bitacora.v31n1.88180

Brumat, L. (2020). "Four generations of regional policies for the (free) movement of persons in South America (1977-2016)," in *In regional integration and migration in the global South*. Editors K. Marchand, G. Rayp, and R. Ilse (New York, NY: Springer-United Nations University).

Brumat, L., and Vera Espinoza, M. (Forthcoming). Migration policy change in Argentina, Brazil and Chile: the Re-emergence of the 'securitist' actors.

Cabieses, B., Libuy, M., and Dabanch, J. (2019). *Hacia una compresión integral de la relación entre migración internacional y enfermedades infecciosas. De la creencia a la evidencia para la acción sanitaria en Chile*. Santiago, CL: Colegio Medico de Chile.

Carreño, C. (2020). Covid 19: cuando las políticas públicas discriminan por ser inmigrante. Santiago, CL: Diario Constitucional.cl. Available at: https://www.diarioconstitucional.cl/articulos/covid-19-cuando-las-politicas-publicas-discriminan-por-ser-inmigrante/ (Accessed September 20, 2020).

CELS (2020). Preocupación Internacional por el Proyecto de Ley de Migración y Extranjería, en Chile. Carta Abierta. Available at: https://www.cels.org.ar/web/2020/08/chile-preocupacion-internacional-por-el-proyecto-de-ley-de-migraciones/. (Accessed August 18, 2020).

CEPAL (2019). Observatorio Demográfico América Latina y el Caribe 2018. (LC/PUB.2018/25-P), Santiago.

Ceriani Cernadas, P. (2020). Migratory regularization as an essential condition for the comprehensive protection of the rights of children in the context of human mobility. Technical Note, UNICEF Latin America and Caribbean Regional Office. Available at: https://www.unicef.org/lac/en/reports/migratory-regularization-essential-condition-comprehensive-for-children-protection. (Accessed May, 2020).

Chan, C., and Montt Strabucchi, M. (2020). Many-faced orientalism: racism and xenophobia in a time of the novel coronavirus in Chile. *Asian Ethn.* 22, 374. doi:10.1080/14631369.2020.1795618

Cook, M. L. (2013). "Is incorporation of unauthorized immigrants possible? Inclusion and contingency for nonstatus migrants and legal immigrants," in *Outsiders No more?: models of immigrant political integration*. Editors J. Hochschild, J. Chattopadhyay, C. Gay, and M. J. Correa (Oxford Scholarship Online). doi:10.1093/acprof:oso/9780199311316.003.0003

Corte Suprema de Chile (2020). The Supreme Court ruling in Chile is N°Amparo-1402-2020.

Doña-Reveco, C., and Levinson, A. (2012). *Chile: a growing destination country in search of a coherent approach to migration*. Washington, DC: Migration Information Source.

Emol (2020). SJM acusa discriminación a extranjeros de cité donde hubo brote de covid-19: "El problema no son ellos, sino el racismo". Emol. Available at: https://www.emol.com/noticias/Nacional/2020/04/22/983935/SMJ-discriminacion-cite-Quilicura-coronavirus.html. (Accessed April 22, 2020).

Finn, V., and Umpierrez de Reguero, S. (2020). Inclusive Language for exclusive policies: restrictive migration governance in Chile, 2018. *Latin Am. Policy* 11 (1), 42–61. doi:10.1111/lamp.12176

Freier, L. F., Berganza, I., and Blouin, C. (2020). *The Cartagena refugee definition and Venezuelan displacement in Latin America*. International Migration.

Freier, L. F., and Brauckmeyer, G. (2020). "Migrantes venezolanos y COVID-19: impacto de la cuarentena y propuestas para la apertura," in *Por una nueva convivencia. La sociedad peruana en tiempos de COVID-19: escenarios, propuestas de política y acción pública*. Editors M. Burga, F. Portocarrero, and A. Panfichi. (Lima: Fondo Editorial PUCP)

Freier, L. F. (2020). Covid-19 and the transformation of migration and mobility globally – COVID-19 and rethinking the need for legal pathways to mobility: taking human security seriously. Available at: https://publications.iom.int/books/covid-19-and-transformation-migration-and-mobility-globally-covid-19-and-rethinking-need-legal (Accessed September 5, 2020).

Freier, L. F., Luzes, M., and Bolívar, L. (2019). Propuesta de Política Pública N° 2: los impactos adversos de las visas humanitarias. Paris, France: CIUP. Available at: https://ciup.up.edu.pe/media/1583/ciup-ppp-no2.pdf (Accessed June 8, 2020).

Freier, L. F., and Luzes, M. (2021). "How humanitarian are humanitarian visas? An analysis of theory and practice in South America," in *Latin America and Refugee Protection: regimes, logics and challenges*. Editors L. Jubilut, G. Mezzanotti, and M. Vera Espinoza (New York, NY: Berghahn).

Freier, L. F., and Pérez, L. (2021). Criminalisation of south-south migration: the experience of Venezuelan forced migrants in Peru. *Eur. J. Criminal Policy Res.* doi:10.1007/s10610-020-09475-y

A. Geddes, M. Vera Espinoza, L. Hadj-Abdou, and L. Brumat (Editors) (2019). *The Dynamics of regional migration governance* (Cheltenham, England: Edward Elgar Publishing).

Gestión (2020). Coronavirus: refuerzan vigilancia en 22 puntos clandestinos identificados en la frontera con Ecuador. Available at: https://gestion.pe/peru/coronavirus-en-peru-refuerzan-vigilancia-en-22-puntos-clandestinos-identificados-en-la-frontera-con-ecuador-nnpp-noticia/. (Accessed April 4, 2020).

Gestión (2019). ¿Dónde se ubican los ciudadanos venezolanos en el Perú por domicilio y trabajo? Available at: https://gestion.pe/economia/empresas/ubican-ciudadanos-venezolanos-peru-domicilio-270124-noticia/. (Accessed June 13, 2019).

Gidley, B. (2014). "Integration," in *Migration: the COMPAS anthology*. Editors B. Anderson and M. Keith (Oxford, England: COMPAS).

Gobierno de Chile (2020). Congreso aprobó la Ley de Migración y Extranjería y quedó en condiciones de ser promulgada. Gob.cl. Available at: https://www.gob.cl/noticias/congreso-aprobo-la-ley-de-migracion-y-extranjeria-y-quedo-en-condiciones-de-ser-promulgada/. (Accessed December 3, 2020).

González, R., Muñoz, E., and Mackenna, B. (2019). *"Como quieren en Chile al amigo cuando es forastero: actitudes de los chilenos hacia la inmigración" in Isabel Aninat and Rodrigo Vergara (des), Inmigración en Chile. Una mirada multidimensional*. CEP: Santiago de ChileFCE, 321–346.

INE (2018). Resultados Censo 2017. Chile: Instituto Nacional de Estadísticas. Santiago, Abril de 2018.

IMF (2020). Policy responses to COVID-19. International monetary fund. Available at: https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19#C (Accessed September 2, 2020).

INE-DEM (2020). *Estimación de Personas Extranjeras Residentes en Chile al 31 de Diciembre 2019*. Santiago, Chile: Informe Técnico, Instituto Nacional de Estadísticas y Departamento de Extranjería y Migración.

Instituto de Opinión Pública (IOP) and Instituto de Democracia y Derechos Humanos PUCP (IDEHPUCP) (2020). Cambios en las actitudes hacia los inmigrantes venezolanos en Lima-Callao 2018-2019. Available at: http://repositorio.pucp.edu.pe/index/bitstream/handle/123456789/169459/IOP_1119_01_R2.pdf?sequence=1&isAllowed=y (Accessed June 6, 2020).

La Tercera (2019). Aclaración sobre artículo publicado por La Tercera: un error del que nos hacemos cargo. La Tercera. Available at: https://www.latercera.com/

nacional/noticia/aclaracion-articulo-publicado-la-tercera-error-del-nos-hacemos-cargo/881975/. (Accessed October 28, 2019).

L. L. Jubilut, M. Vera Espinoza, and G. Mezzanotti (Editors) (2021). *Latin America and Refugee Protection: regimes, logics and challenges* (New York, NY: Berghahn Books).

Luzes, M., Freier, L. F., and Castillo Jara, S. (2020). Propuesta de Política Pública N° 10: La necesaria regulación migratoria durante la crisis sanitaria. CIUP. Available at: https://ciup.up.edu.pe/ppp/la-necesaria-regulacion-migratoria-durante-crisis-sanitaria/ (Accessed October 10, 2020).

Mazza, J. (2020). Venezuelan migrants under COVID-19: managing South America's pandemic amid a migration crisis. Latin American Program Working Paper. Washington: Wilson Center.

Ministerio de Interior (2018). Comienza inscripción de migrantes en el Plan de Retorno Humanitario al país de origen. Noticias Interior.gob.cl. Available at: https://www.interior.gob.cl/noticias/2018/10/17/comienza-inscripcion-de-migrantes-en-el-plan-de-retorno-humanitario-al-pais-de-origen/. (Accessed October 17, 2018).

Ministerio de Justicia y Derechos Humanos (MJDDHH) (2020). Diario Oficial de la República de ChileMinisterio del Interior y Seguridad Pública. Normas Generales CVE 1747658. Available at: https://www.diariooficial.interior.gob.cl/publicaciones/2020/04/01/42621/01/1747658.pdf. (Accessed November 15, 2020).

MINREL (2020). Cancillería dispondrá un vuelo humanitario para repatriar a colombianos varados en Chile. Noticias Ministerio de Relaciones Exteriores. Available at: https://minrel.gob.cl/minrel/noticias-anteriores/cancilleria-dispondra-un-vuelo-humanitario-para-repatriar-a-colombianos (Accessed June 3, 2020).

Marrow, H. B. (2009). Immigrant bureaucratic incorporation: the dual role of professional missions and government policies. *Am. Sociological Rev.* 74 (5), 756–776. doi:10.1177/000312240907400504

Navarrete, M. J., and Vedoya, S. (2019). Ordenar la casa": análisis del primer año de la política migratoria del gobierno. La Tercera. Available at: www.latercera.com/nacional/noticia/ordenar-la-casa-analisis-del-primer-ano-la-politica-migratoria-del-gobierno/604018/. (Accessed April 6, 2019).

Prensa Presidencia (2020). Presidente inicia visita a las regiones de Biobío y Ñuble para supervisar operaciones de apoyo de las Fuerzas Armadas por coronavirus. Prensa Presidencia. Available at: https://prensa.presidencia.cl/discurso.aspx?id=149807. (Accessed April 10, 2020).

R4V (2020). Coordination platform for refugees and migrants from Venezuela. Available at: https://r4v.info/es/situations/platform (Accessed November 9, 2020).

Ramírez, C. (2020a). Discursos anti-inmigración y su posición privilegiada en los medios: una amenaza a la convivencia. CIPER Chile. Available at: https://ciperchile.cl/2020/05/20/discursos-anti-inmigracion-y-su-posicion-privilegiada-en-los-medios-una-amenaza-a-la-convivencia/. (Accessed May 5, 2020).

Ramírez, J. (2020b). De la ciudadanía suramericana al humanitarismo: el giro en la política y diplomacia migratoria ecuatoriana. *Ref* 21. doi:10.21670/ref.2019061

Red de Migrantes por el Apruebo (2020). *La participación migrante debe continuar en el proceso constituyente*. Santiago, CL: Declaration.

Selee, A., and Bolter, J. (2020). An uneven welcome: Latin American and caribbean responses to Venezuelan and Nicaraguan migration. Washington, DC: Migration Policy Institute. Available at: https://www.migrationpolicy.org/research/latam-caribbean-responses-venezuelan-nicaraguan-migration (Accessed July 25, 2020).

Stefoni, C.., and y. Brito, S. (2019). "Chile: un destino más en el mapa migratorio intrarregional," in *Migración en Chile. Evidencias y mitos de una nueva realidad.* Editors. N. R. Pedemonte and V. José Tomás. Santiago, CL: LOM ediciones, 23–48.

Schüller Gamboa, P. (2020). Gobierno llama al Senado a rechazar indicaciones de la oposición a ley de migración. La Nación. Available at: http://www.lanacion.cl/gobierno-llama-al-senado-a-rechazar-indicaciones-de-la-oposicion-a-ley-de-migracion/. (Accessed August 11, 2020).

Thayer, L. E. (2019). "Causas y consecuencias de La irregularidad migratoria," in *Migración in Chile. Evidencias y Mitos de una nueva realidad.* Editors N. Rojas Pedemonte and J. Tomás Vicuña (Santiago, CL: LOM Ediciones), 297–334.

M. E. Tijoux and y. C. Ambiado (Editors) (2019). *Racismo y Migración Contemporánea en Chile. Informe alternativo para el Comité para la Eliminación de la Discriminación Racial (CERD). Cátedra de Racismos y Migraciones Contemporáneas* (Universidad de Chile y Movimiento Acción Migrante.). Available at: https://www.uchile.cl/noticias/159487/catedra-de-racismos-y-migraciones-entrega-informe-a-la-onu. (Accessed October 31, 2019).

UNAB-DEM (2020). Sondeo de percepción sobre migración en Chile. Síntesis de resultados. Centro de Políticas Públicas Universidad Andres Bello. Available at https://www.extranjeria.gob.cl/media/2020/06/20200615-Resultados-Encuesta-Migracio%CC%81n-en-Chile-UNAB-DEM.pdf (Accessed August 4, 2020).

Vera Espinoza, M., Prieto, V., Zapata, G., Gandini, L., Herrera, G., Reguera, A., et al. (Forthcoming). Migrants and refugees in Latin America during COVID-19: an inclusion/exclusion spectrum of social protection.

Vera Espinoza, M., Zapata, G. P., and Gandini, L. (2020). Mobility in immobility: Latin American migrants trapped amid COVID-19. United Kingdom: OpenDemocracy. Available at: https://www.opendemocracy.net/en/democraciaabierta/mobility-immobility-latin-american-migrants-trapped-amid-covid-19/. (Accessed May 26).

World Bank (2019). *Una oportunidad para todos. Los migrantes y refugiados venezolanos y el desarrollo del Perú*. Washington, DC: World Bank.

Zapata, G. P., and Prieto Rosas, V. (2020). Structural and contingent inequalities: the impact of COVID -19 on migrant and refugee populations in South America. *Bull. Lat. Am. Res.* 39 (S1), 16–22. doi:10.1111/blar.13181

Conflict of Interest: The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

The reviewer MC declared a shared committee with one of the authors MVE at time of review.

frontiers in Human Dynamics

PERSPECTIVE
published: 21 December 2020
doi: 10.3389/fhumd.2020.595814

Barricading the Border: COVID-19 and the Exclusion of Asylum Seekers at the U.S. Southern Border

*Denise Gilman**

University of Texas School of Law, Austin, TX, United States

What years of deterrence efforts and restrictions on asylum did not achieve to block the U.S. southern border to asylum seekers, the Trump Administration has now accomplished using the COVID-19 pandemic as justification. New measures exclude asylum seekers from U.S. territory, thereby effectively obliterating the U.S. asylum program, which had promised refugee protection in the form of asylum to eligible migrants who reach the United States. In some cases, the policies adopted during the COVID-19 pandemic harden impediments to asylum already in place or implement restrictions that had been proposed but could only now be adopted. In others, the policies could never have been imagined before the pandemic. Overall, the force of these measures in dismantling the asylum system cannot be overemphasized. Once adopted, using an emergency rationale based on the pandemic, these policies are likely to become extremely difficult to reverse. This is particularly true where the restrictions exclude asylum seekers from the physical space of the United States. This article will thus explore two modes of physical exclusion taking place at the U.S. southern border during the COVID-19 pandemic: (1) indefinitely trapping in Mexico those asylum seekers who are subject to the so-called Migrant Protection Protocols; and (2) immediate expulsions of asylum seekers arriving at the southern border pursuant to purported public health guidance issued by the U.S. Centers for Disease Control and Prevention.

Keywords: asylum, border, migration, COVID-19, refugee, migrant protection protocol, expulsions

OPEN ACCESS

Edited by:
Jaya Ramji-Nogales,
Temple University, United States

Reviewed by:
Susan Gzesh,
University of Chicago, United States
Susan Martin,
Georgetown University, United States

***Correspondence:**
Denise Gilman
dgilman@law.utexas.edu

Specialty section:
This article was submitted to Refugees and Conflict, a section of the journal Frontiers in Human Dynamics

Received: *17 August 2020*
Accepted: *20 October 2020*
Published: *21 December 2020*

Citation:
Gilman D (2020) Barricading the Border: COVID-19 and the Exclusion of Asylum Seekers at the U.S. Southern Border. Front. Hum. Dyn. 2:595814. doi: 10.3389/fhumd.2020.595814

INTRODUCTION

What years of deterrence efforts and restrictions on asylum did not achieve to block the U.S. southern border to asylum seekers, the Trump Administration has now accomplished using the COVID-19 pandemic as justification. New measures exclude asylum seekers from U.S. territory, thereby effectively obliterating the U.S. asylum program and its promise of refugee protection for eligible migrants who reach the United States.[1]

In some cases, policies adopted during the COVID-19 pandemic harden impediments to accessing asylum that were already in place or implement restrictions that had been previously proposed but could only now be adopted. In others, the policies could never have been imagined before the pandemic. Overall, the force of these measures in dismantling the asylum system cannot be overemphasized. Once adopted, using an emergency rationale based on the pandemic, these policies are likely to become extremely difficult to reverse.

[1] *See* 8 U.S.C. 1158(a)(1); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *U.S. Citizenship and Immigration Services, Refugees and Asylum*, Available online at: https://www.uscis.gov/humanitarian/refugees-and-asylum (accessed November 4, 2020).

Restrictions that exclude asylum seekers from the territory of the United States are especially likely to become permanent fixtures of the system. This article will thus explore two modes of territorial exclusion taking place at the U.S. southern border during the COVID-19 pandemic: (1) indefinitely trapping in Mexico those asylum seekers who are subject to the so-called Migrant Protection Protocols; and (2) immediate expulsions of asylum seekers arriving at the southern border pursuant to purported public health guidance issued by the U.S. Centers for Disease Control and Prevention (CDC). The article also asks how the territorial exclusion of asylum seekers ever occurred and examines the underlying exclusionary logic of the U.S. asylum system. It emphasizes the importance not only of dismantling the border blockade but also of forging a new path forward toward protection rather than exclusion.

BEFORE COVID-19—ESCALATING EXCLUSION EFFORTS

For years, the United States has sought to deter, or flatly prevent, migrants from accessing the asylum system available to those who reach U.S. territory. The United States has deployed a broad range of "remote control" measures to keep asylum seekers at bay, far removed from the physical border of the United States, with limited success (Fitzgerald, 2019). These measures include, for example, visa and passenger carrier controls abroad but also encouragement of other countries to deport migrants back to their home countries long before they reach the United States (Fitzgerald, 2019). While these efforts may have occasionally slowed the flow of asylum seekers toward the United States, significant numbers still reach the U.S. southern border.[2]

Similarly, the United States has attempted to deter arrivals by making the U.S. asylum system harsher, with little impact on the numbers of asylum seekers reaching the border, although with significant negative impact on asylum seekers themselves. These efforts have escalated under the Trump Administration and included even the separation of young children from their parents.[3] They have also included expanded prolonged detention of asylum seekers, including entire families,[4] even during the COVID-19 epidemic (Eagly and Shafer, 2020). Additional policies include the so-called "transit ban," which bars asylum eligibility for those who transited through Mexico or any other party to the UN Refugee Convention without applying for asylum and receiving a negative decision.[5] The ban has now been declared unlawful and its application halted, but only after resulting in the denial of numerous viable asylum claims.[6] The actions intended to deter and thus exclude asylum seekers also encompass new restrictive interpretations of substantive asylum law, which make it difficult if not impossible for many asylum seekers to achieve protection. The Attorney General's decision in *Matter of A-B*[7] is one such interpretation, which largely precludes claims based on domestic violence and gang violence.

These deterrence efforts have had no meaningful impact on the arrivals of new asylum seekers at the southern border. Empirical research finds that migrants are driven by violence in the home region and are not deterred by knowledge of heightened U.S. enforcement efforts.[8] Data regarding arrival of asylum-seeking families further establishes the point. Thus, for example, since the inception of widescale family detention in 2014 and even in the wake of the 2018 family separation policies that sought to deter Central American asylum seeking families, the numbers of families arriving at the southern border *increased*, albeit with some fluctuations.[9]

Given these failures in limiting arrivals of asylum seekers at the southern U.S. border through remote control and deterrence measures, the United States took a different tack. The United States has turned to measures implemented at the border to block asylum seekers from accessing U.S. territory and the U.S. asylum system.

These territorial exclusion measures became increasingly aggressive after the inauguration of President Trump, even before the outbreak of COVID-19. Initially, the Trump Administration expanded and institutionalized a practice

[2] *See, e.g.,* U.S. Border Patrol Monthly Apprehensions, Available online at: https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Monthly%20Apprehensions%20%28FY%202000%20-%20FY%202019%29_1.pdf (accessed December 6, 2020).

[3] *See, e.g.,* GAO, *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border* (Oct. 2018), Available online at: https://www.gao.gov/assets/700/694963.pdf; IACHR, *IACHR Grants Precautionary Measure to Protect Separated Migrant Children in the United States* (Sept. 2018), Available online at: https://www.oas.org/en/iachr/media_center/PReleases/2018/186.asp; New York Times, *'We Need to Take Away Children,' No Matter How Young, Justice Dept. Officials Said* (Oct. 6, 2020), Available online at: https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html?smid=em-share-v1 (accessed December 6, 2020).

[4] *See, e.g.,* U.S. Immigration and Customs Enforcement, ICE Detention Data, Available online at: https://www.ice.gov/detention-management; Migration Policy Institute, *Trump Administration's New Indefinite Family Detention Policy: Deterrence Not Guaranteed* (Sept. 26, 2018), Available online at: https://www.migrationpolicy.org/article/trump-administration-new-indefinite-family-detention-policy; BBC, US Ruling to Expand Indefinite Detention for Some Asylum Seekers (April 17, 2019), Available online at: https://www.bbc.com/news/world-us-canada-47952648; *R.I.L.-R. v. Johnson*, 80 F.Supp. 3d 164 (D.D.C. 2015) (establishing that family detention was unlawfully used as deterrence).

[5] U.S. Department of Homeland Security, *DHS and DOJ Issue Third-Country Asylum Rule* (2019), Available online at: https://www.dhs.gov/news/2019/07/15/dhs-and-doj-issue-third-country-asylum-rule (accessed November 4, 2020).

[6] Al Otro Lado v. Wolf, 952 F.3d 999 (9th Cir. 2020); *Human Rights First, Asylum Denied, Families Divided: Trump Administration's Illegal Third-Country Transit Ban*, Available online at: https://www.humanrightsfirst.org/resource/asylum-denied-families-divided-trump-administration-s-illegal-third-country-transit-ban (accessed November 4, 2020).

[7] 27 I&N Dec. 316 (A.G. 2018); Nat'*l Immigrant Justice Center, Matter of A-B- and Matter of L-E-A-: Information and Resources* (2020), Available online at: https://immigrantjustice.org/for-attorneys/legal-resources/topic/matter-b-and-matter-l-e-information-and-resources (accessed November 4, 2020).

[8] *See* Jon Hiskey, et al., *Leaving the Devil You Know: Crime Victimization, US Deterrence Policy, and the Emigration Decision in Central America*, 53 Latin American Research Review 429–447 (2018), Available online at: http://doi.org/10.25222/larr.147; Congressional Research Service, Asylum and Credible Fear Issues in U.S. Immigration Policy (June 29, 2011) ("conditions in... source countries... were likely the driving force behind asylum seekers"), Available online at: https://fas.org/sgp/crs/homesec/R41753.pdf (accessed December 6, 2020).

[9] U.S. Border Patrol Monthly Apprehensions, Available online at: https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Monthly%20Apprehensions%20%28FY%202000%20-%20FY%202019%29_1.pdf; CBP, Claims of Fear, Available online at: https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear (accessed December 6, 2020).

whereby asylum seekers arriving at official ports of entry on the U.S. southern border were turned away with an assertion that the U.S. was "full" and could not process more asylum seekers[10]. Under this practice, sometimes known as "metering," asylum seekers were required to place their names on waitlists in order to cross into the United States and to be processed into asylum proceedings in the United States.

Then, beginning in January 2019, the Trump Administration implemented the Migrant Protection Protocols ("MPP"), a program pursuant to which individuals placed in U.S. asylum proceedings at the southern border were physically returned to Mexico to await asylum proceedings in U.S. immigration courts.[11] This program will be further described below, as it has led to hardened exclusion at the border during COVID-19.

Later in 2019, the Trump Administration entered agreements with El Salvador, Guatemala and Honduras to send asylum seekers arriving at the U.S. southern border to those three Central American countries to seek asylum there rather than in the United States.[12] The agreements envisioned sending asylum seekers from the U.S. southern border to the Central American countries, all three of which have high levels of violence and underdeveloped asylum systems, without requiring any connection between the asylum seekers and the country that would be processing their claims.[13] Almost one thousand asylum seekers were transferred from the U.S. southern border to Guatemala under the agreement with that country.[14] Such transfers would likely have become even more commonplace to all three countries if it were not for the outbreak of COVID-19 and the refusals of countries to accept their non-nationals[15].

COVID-19—BLOCKING THE BORDER

This is the backdrop of escalating border blockage that was in place when the COVID-19 pandemic hit. The Trump Administration then hardened territorial exclusion measures to erect a barricade at the border for asylum seekers. This barricade upended the U.S. asylum system, which provides for the possibility of asylum for any migrant "who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival" and meets the refugee definition."[16] While arrival at the U.S. border and entry into the country were still physically possible,[17] prompt ejection from the territory of the United States became the rule. It thus became effectively impossible to be "present" on U.S. territory and to enter the U.S. asylum system.

The best measure of new asylum seekers processed in the United States—referrals for credible fear screening interviews—demonstrates the dramatic nature of the exclusion. Referrals dropped from over 5000 in July 2019 to fewer than 350 in July 2020.[18] From February 2020 to April 2020, the number dropped from over 2,000 to under 450.[19]

The territorial exclusion measures at the southern border operate in conjunction with other policies predating the pandemic described above, not all of which involve a border blockade but which nonetheless make it exceedingly difficult to secure asylum protection in the United States. And the Trump administration has continued to expand policies that leave asylum seekers largely beyond the reach of the law during the time of COVID-19, even when they do make their way onto U.S. territory. Most recently, for example, the Trump administration has relied on the COVID-19 outbreak to propose a new rule that certain asylum seekers, who have symptoms of a communicable disease or who simply have originated in or transited through a region with an outbreak of communicable disease, are ineligible for refugee protection on national security grounds.[20] If adopted as a final rule, this novel interpretation of the national security bar to asylum would prevent many legitimate refugees from obtaining asylum based merely on their country of origin or transit.

Yet, it is crucial to distinguish between those actions that serve to limit access to protection under the legal framework for asylum and those actions that territorially exclude asylum seekers arriving at the southern border before or in place of adjudication

[10] Leutert, S. (2020). *Metering Update*, Available online at: https://www.strausscenter.org/campi-publications/ (accessed November 4, 2020).

[11] DHS, *Migrant Protection Protocols* (2019), Available online at: https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols (accessed November 4, 2020).

[12] *See* 84 Fed. Reg. 63994; Americas Society/Council of the Americas, *Explainer: U.S. Immigration Deals with Northern Triangle Countries and Mexico* (2019), Available online at: https://www.as-coa.org/articles/explainer-us-immigration-deals-northern-triangle-countries-and-mexico (accessed December 6, 2020).

[13] *See U.T. v. Barr*, Complaint, 1:20-cv-00116 (D.D.C. Jan. 15, 2020), Available online at: https://www.aclu.org/legal-document/complaint-ut-v-barr (accessed December 6, 2020).

[14] Human Rights Watch and Refugees International, *Deportation With a Layover* 6 (2020), Available online at: https://www.refugeesinternational.org/reports/2020/5/8/deportation-with-a-layover-failure-of-protection-under-the-us-guatemala-asylum-cooperative-agreement (accessed December 6, 2020).

[15] L.A. Times, *Guatemala Turns Tables, Blocking U.S. Deportations Because of Coronavirus* (March17, 2020), Available online at: https://www.latimes.com/politics/story/2020-03-17/guatemala-close-borders-to-americans-trumps-deportation-flights (accessed December 6, 2020).

[16] 8 U.S.C. 1158(a)(1); U.S. Citizenship and Immigration Services, *Refugees and Asylum*, Available online at: https://www.uscis.gov/humanitarian/refugees-and-asylum (accessed December 6, 2020).

[17] The blockade is not a physical one in the sense of a wall. As such, most asylum seekers blocked at the border do spend a period of hours, days or even weeks on U.S. territory at the border while they are processed back out of U.S. territory. However, the situation under current policies is unique in that they are not even detained under U.S. detention laws but instead are subject to processing for immediate departure with almost no access to proceedings of any kind to challenge their removal from the territory.

[18] USCIS, *Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions by Outcome Type: July 1, 2019 to July 15, 2020*, Available online at: https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions (accessed November 4, 2020).

[19] USCIS, *Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions by Outcome Type*, Available online at: https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions (accessed December 6, 2020).

[20] 85 Fed. Reg. 41201; Bipartisan Policy Center, *Proposed DHS and DOJ Rule Seeks to Further Restrict Asylum Access Beyond the COVID-19 Pandemic* (2020), Available online at: https://bipartisanpolicy.org/blog/proposed-dhs-and-doj-rule-seeks-to-further-restrict-asylum-access-beyond-the-covid-19-pandemic/ (accessed December 6, 2020).

of their asylum claims. The transit ban or the proposed new contagion bar to asylum might at first glance appear to effectuate territorial exclusion, but they are actually limits on eligibility for refugee protection as a substantive law matter. The distinction is between policies that make it exceedingly difficult to win asylum and *remain* in the United States and policies that prevent an asylum seeker from *accessing* U.S. territory and the asylum process in the first place in order to plead for protection from within this country. The distinction is critical, because the territorial exclusion policies have had a uniquely sweeping impact denying asylum seekers any opportunity for protection in the United States. In addition, as discussed below, it will likely be significantly more challenging to end policies of territorial exclusion. Further discussion follows, then, of the two main territorial barricades in place during the time of COVID-19—the Migrant Protection Protocols and expulsions under order of the Centers for Disease Control and Prevention.[21]

Migrant Protection Protocols—Trapping Asylum Seekers in Danger in Mexico

Beginning in early 2019, the Migrant Protection Protocols ("MPP"), otherwise known as the "Remain in Mexico" program, trapped asylum seekers physically in Mexico while their asylum claims moved forward slowly in border immigration courts inside the United States.[22] Since the COVID-19 pandemic, the exclusion from the United States executed through MPP has become indefinite if not permanent as all hearings in MPP cases have been suspended.

Under the MPP program, asylum seekers who arrive in or enter the United States from Mexico may be sent back to Mexico for the duration of their U.S. immigration proceedings. The program was initially rolled out in San Diego, California, followed by implementation in El Paso, Texas and then the south Texas border.[23] The program originally applied only to migrants from Spanish-speaking countries, although it was eventually extended to include nationals of Brazil.[24] On its face, the program targeted families with children, particularly from Central America. In explaining the program, officials stated:

> Historically, illegal aliens to the U.S. were predominantly single adult males from Mexico now over 60% are family units and unaccompanied children and 60% are non-Mexican. In FY17, CBP apprehended 94,285 family units from Honduras, Guatemala, and El Salvador (Northern Triangle) at the Southern border[25].

Implementing MPP required the U.S. government to seek the involvement of the Mexican government, because Mexico is the country to which the asylum seekers are sent while they await their U.S. asylum proceedings. The United States threatened tariffs and damage to bilateral relations to force Mexico to join in implementing MPP.[26] Mexico acquiesced to U.S. demands and participated in the program by accepting asylum seekers back into Mexico after exclusion from U.S. territory. While Mexico thus is complicit in U.S. actions denying access to U.S. territory and the asylum process, the United States also is responsible for coercing Mexico to take on this role.

The MPP program is based on a provision in U.S. immigration law, which allows certain migrants arriving by land "from a foreign country contiguous to the United States" to be returned to that territory pending immigration proceedings.[27] There are strong legal arguments under U.S. law suggesting that the provision may *not* be used against asylum seekers, and it had never before been used to return asylum seekers to Mexico until the MPP rollout in 2019.[28]

Nonetheless, as of March, 2020, the U.S. had sent nearly 65,000 migrants back to Mexico to await their U.S. asylum proceedings under the MPP program.[29] Those asylum seekers subject to the program suffered an effective denial of access to the United States and the possibility of asylum protection even before the pandemic, and their situation has become even more dire since the outbreak of COVID-19.

Many in MPP have suffered extreme violence in Mexico. As of May 2020, there were more than 1,000 documented cases of murder, rape and other assaults impacting asylum seekers in Mexico under MPP.[30] Asylum seekers also face grave health threats. Medical professionals have documented the reality that migrants trapped in northern Mexico are "subject to a gamut of communicable and non-communicable diseases" and inadequate health services are available to them.[31] Many asylum seekers in

[21] The safe third country agreements with Central American countries would also constitute territorial exclusion measures, but they are not functioning during the pandemic. Metering practices also fall within this category and continue to be used to some degree even during the pandemic, but their place in the blockade at the border is relatively minor.

[22] DHS, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration* (2018), Available online at: https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration-hereinafter-Nielsen~Announcement (accessed November 4, 2020).

[23] *See* Human Rights First, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process* 21–22 (2019), Available online at: https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf (accessed November 4, 2020).

[24] DHS, *DHS Expands MPP To Brazilian Nationals* (2020), Available online at: https://www.dhs.gov/news/2020/01/29/dhs-expands-mpp-brazilian-nationals (accessed November 4, 2020).

[25] DHS, Migrant Protection Protocols (Jan. 24, 2019), Available online at: https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols (accessed December 6, 2020).

[26] White House, *Statement from the President Regarding Emergency Measures to Address the Border Crisis* (May 30, 2019), Available online at: www.whitehouse.gov/briefings-statements/statement-president-regarding-emergency-measures-address-border-crisis/; Donald Trump (@realDonaldTrump) TWITTER (Jun 7,2019, 5:31PM), Available online at: https://twitter.com/realDonaldTrump/status/1137155056044826626 (accessed December 6, 2020).

[27] 8 U.S.C. 1225 (b)(2)(C).

[28] *See Innovation Law Lab v. McAleenan*, 924 F.3d 503, 506 (9th Cir. 2019) (per curiam) (stays of the order invalidating MPP resulted in the ongoing operation of MPP pending a decision on the merits as to its legality).

[29] *See* TRAC Immigration, *Details on MPP (Remain in Mexico) Deportation Proceedings* (2020), Available online at: https://trac.syr.edu/phptools/immigration/mpp/ (accessed November 4, 2020).

[30] Human Rights First, *Delivered to Danger*, *supra note 21*.

[31] Harvard Global Health Initiative and Boston College School of Social Work. *A Population in Peril: A Health Crisis Among Asylum Seekers on the Northern Border of Mexico* (2020), Available online at: https://globalhealth.harvard.edu/wp-content/uploads/2020/07/A_Population_in_Peril.pdf (accessed November 4, 2020).

Mexico live in camps and shelters lacking in infrastructure, which have become tinderboxes for outbreaks of COVID-19.[32]

The risk of violence or other harm leads some asylum seekers to give up their claims, placing them in grave danger upon return to their home countries.[33] Furthermore, Mexican authorities have coerced asylum seekers to board buses taking them south without any means of returning to the border for hearings, which also leads to abandonment of asylum claims and return to potential persecution in home countries.

Asylum seekers forced to wait in Mexico for their hearings in the U.S. border immigration courts faced denials of basic due process even before the pandemic shut down the courts. Unsurprisingly, success rates in MPP were miniscule—only about 1% of individuals receiving a final decision were granted asylum or related protection as of March 2020.[34]

Asylum seekers in MPP were required to present at the U.S. border on multiple occasions and often at 4:30 am, to attend their hearings. They were not permitted to travel to the court on their own or with counsel but instead were escorted by immigration officials and were confined strictly within the court complex.[35] In Laredo and Brownsville, Texas, the courts hearing MPP cases are temporary facilities within the border port of entry where hearings were conducted by video with immigration judges sitting elsewhere.

Because the asylum seekers in MPP were forced to live in Mexico between hearings, most faced extreme difficulties in securing counsel or communicating with the few attorneys who agreed to take MPP cases. It was almost impossible for asylum seekers to prepare and present an asylum case in this context. Layered on top of these limitations, asylum seekers in MPP also had to overcome the other restrictions on asylum imposed in recent years, including the caselaw limiting domestic violence and gang claims. Because the probability of achieving protection through asylum in MPP proceedings is so low, after being returned to Mexico, most asylum seekers in MPP were never allowed to enter the United States, other than for day-long escorted visits to attend hearings at the border.

Those MPP realities of exclusion are now overshadowed by the indefinite and possibly permanent physical exclusion of asylum seekers in MPP because of the suspension of hearings. Since the outbreak of COVID-19, all hearings in MPP cases have been suspended, and no date has been set for their resumption. The MPP hearings were initially suspended for definite time periods through June 19, 2020, in a series of announcements issued on March 23, April 1, and May 10, 2020.[36] Then, in an announcement on July 17, 2020, the suspension of hearings was extended indefinitely.[37] The latest announcement provides for a resumption of hearings only when the dangers of the COVID-19 pandemic have been determined by the U.S. government to have diminished.

Meanwhile, the U.S. government continues to place asylum seekers into MPP and return them to Mexico knowing full well that their proceedings in the border immigration courts will not move forward. Their placement in the program is simply expulsion to Mexico with a misleading claim that asylum proceedings will take place in the United States.[38]

As a result of the suspension of hearings, as of the fall of 2020, asylum seekers have already been blocked from accessing the United States for well over six months. They will likely be barred for at least months or years into the future. During this time of suspended hearings, asylum seekers are no longer presenting at the border at all so that they have no contact with the U.S. asylum system and no possibility for adjudication of their claims. Thus, even those who would qualify for asylum under current restrictive policies have no opportunity in the foreseeable future to gain asylum and then to enter the United States.[39] They are blockaded at the entry point to the United States.

With the suspended hearings and no foreseeable possibility of entering the United States, many asylum seekers will abandon their efforts to seek protection. It is not an exaggeration to say that many others will likely succumb to fatal illness or murder.[40] For many asylum seekers, then, physical exclusion from the United States will become permanent without any opportunity for a determination on the asylum claim.

CDC Entry Ban—Immediate Expulsions of Asylum Seekers at the Border

Most recently, as MPP exclusions continued to play out, the Trump Administration invoked the COVID-19 pandemic to halt all entry into U.S. territory by asylum seekers through orders

[32] Newsweek, *Asylum Seekers Trapped at Border Camp Face Coronavirus, Cartels and Storms but Still no Help from US* (July 27, 2020), Available online at: https://www.newsweek.com/asylum-seekers-trapped-border-camp-face-coronavirus-cartels-stormsbut-still-no-help-u-s-1520702; Doctors without Borders, *U.S. Must Include Asylum Seekers in COVID-19 Response Rather than Shut Border* (March 27, 2020), Available online at: https://www.msf.org/us-must-include-asylum-seekers-covid-19-response; The New York Times Opinion, *The Impending Mass Grave Across the Border from Texas* (April 12, 2020) (describing the lack of proper hygiene conditions and the lack of medical attention for those awaiting MPP proceedings in the crowded refugee encampment in Matamoros, Mexico), Available online at: https://www.nytimes.com/2020/04/12/opinion/matamoros-migrants-coronavirus.html (accessed December 6, 2020).

[33] Request for Precautionary Measures to the Inter-American Commission on Human Rights (June 17, 2020), Available online at: https://law.utexas.edu/wp-content/uploads/sites/11/2020/02/2020-IC-Request-for-PM-MPP.pdf (describing case of Honduran family that had been kidnapped in Mexico, then separated by US border officials and returned to Mexico, where the decision was made to abandon the U.S. asylum claim and return to Honduras).

[34] TRAC, *Details on MPP (Remain in México) Deportation Proceedings* (March 2020) (the percentage of persons receiving "relief" as compared to the percentage receiving orders of deportation).

[35] CBP, *MPP Guiding Principles* (2019), Available online at: https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf (accessed November 4, 2020).

[36] Joint DHS/EOIR Statement on the Rescheduling of MPP Hearings (May 10, 2020), Available online at: https://www.dhs.gov/news/2020/05/10/joint-dhseoir-statement-rescheduling-mpp-hearings (accessed December 6, 2020).

[37] DOJ, *Department of Justice and Department of Homeland Security Announce Plan to Restart MPP Hearings* (2020), Available online at: https://www.justice.gov/opa/pr/department-justice-and-department-homeland-security-announce-plan-restart-mpp-hearings (accessed November 4, 2020).

[38] CBP, *Migrant Protection Protocols*, Available online at: https://www.cbp.gov/newsroom/stats/migrant-protection-protocols (showing more than two hundred new enrollments in MPP in June 2020) (accessed November 4, 2020).

[39] Migrant Protection Protocols, *supra note 10* (those found by the immigration courts to have meritorious claims will be allowed to enter the United States).

[40] *See* Human Rights First, *Delivered to Danger, supra note 21.*

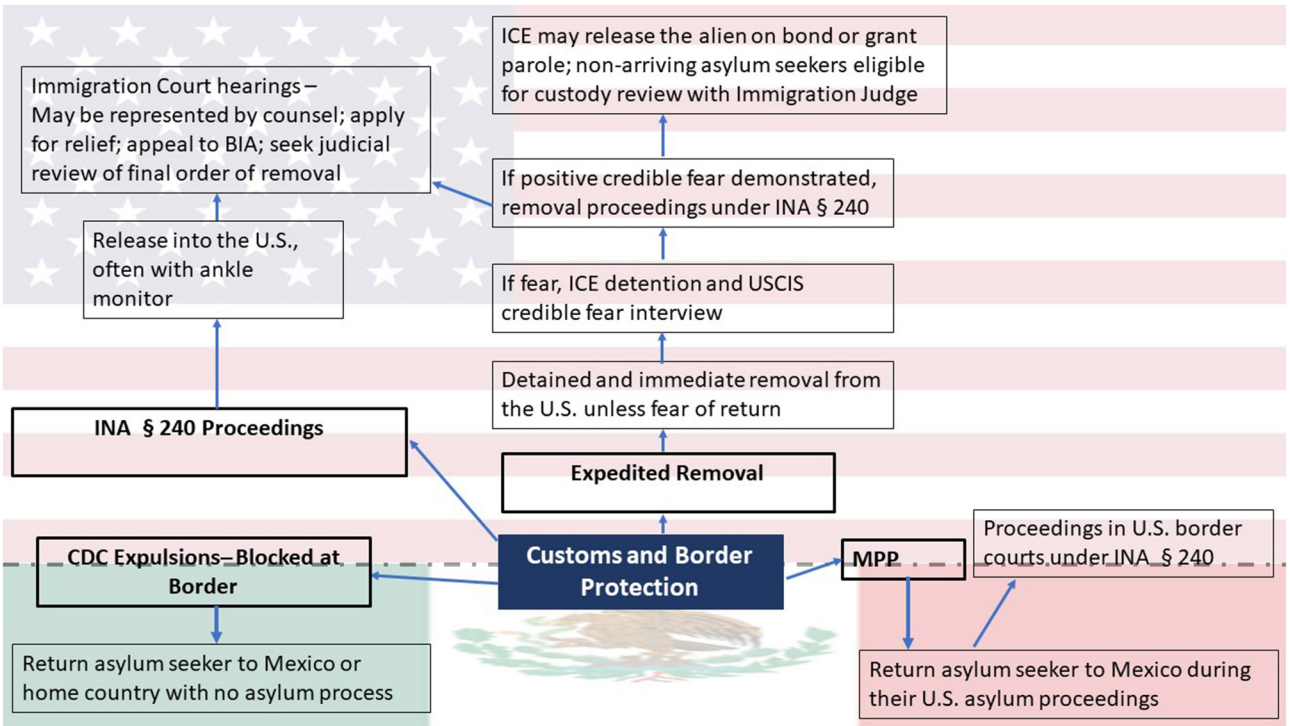


FIGURE 1 | Potential U.S. Processing Decisions at the U.S./Mexico Border.

of the Centers for Disease Control and Prevention.[41] The CDC orders provide for the immediate expulsion of asylum seekers arriving at U.S. land borders without permitting access to the asylum process or any other immigration process.[42]

The CDC first issued a temporary order in March 2020 prohibiting entry into the United States of non-citizens arriving at a U.S. land border with exceptions. In May 2020, the CDC made indefinite the prohibition on entry for certain non-citizens, extending the ban until COVID-19 "cease[s] to be a serious danger to the public health."[43] The indefinite ban includes individuals arriving to land or coastal borders.

The CDC expulsions supersede the normal processes applicable to asylum seekers. Normal procedures for adult asylum seekers and families would require: (1) placement in removal proceedings within the United States where the asylum claim would be heard; (2) placement in expedited removal proceedings within the United States with the possibility of entering full removal proceedings where the asylum claim would be heard; or (3) placement in MPP with removal to Mexico but with the initiation of U.S. removal proceedings.[44] For unaccompanied children, applicable procedures would generally prevent their immediate expulsion and instead require placement in asylum proceedings.[45] CDC expulsions follow none of these procedures. The CDC orders thus block asylum seekers from access to U.S. territory in a way that also completely avoids the asylum proceeding that would otherwise be provided, See **Figure 1**.

Migrants expelled under the CDC orders have been returned either to the country from which they arrived, mainly Mexico, or to their countries of origin. As with the MPP program, Mexico has allowed implementation of the orders by accepting migrants back on to Mexican territory and otherwise offering full support for border measures adopted by the United States during the pandemic.[46] Under pressure from the United States, other countries are also accepting their nationals back after expulsion at the U.S. southern border[47].

[41] 85 Fed. Reg. 17060; Associated Press, *Pence Ordered Borders Closed after CDC Experts Refused* (2020), Available online at: https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae (accessed December 6, 2020).

[42] DHS, *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus* (2020), Available online at: https://www.dhs.gov/news/2020/03/23/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus (accessed November 4, 2020).

[43] 85 Fed. Reg. 31503 (May 26, 2020).

[44] 8 U.S.C. 1158, 1225.

[45] 8 U.S.C. 1232.

[46] CBS News, *U.S. to Rapidly Turn Away Migrants, including those Seeking Asylum, Over Coronavirus* (March 21, 2020), Available online at: https://www.cbsnews.com/news/us-to-turn-way-migrants-including-those-seeking-asylum-without-delay-over-coronavirus/; *see also* Joint Statement on US-Mexico Joint Initiative to Combat the COVID-19 Pandemic, Available online at: https://www.dhs.gov/news/2020/03/20/joint-statement-us-mexico-joint-initiative-combat-covid-19-pandemic (accessed December 6, 2020).

[47] LA Times, *Central America Fears Trump Could Deport the Coronavirus* (March 29, 2020), Available online at https://www.latimes.com/politics/story/2020-03-29/trump-deportations-guatemala-coronavirus (accessed December 6, 2020).

The expulsions have blocked more than 200,000 migrants at the U.S. southern border, many of whom likely intended to seek asylum.[48] Among those expelled at the border are more than 8,000 unaccompanied children.[49] These children are processed briefly, often in settings such as hotels that are not appropriate for the care of children, and then returned to Mexico or to their country of origin without any consideration of their protection needs.[50]

The CDC orders purport to be motivated by public health concerns but are instead specifically designed to exclude asylum seekers from the United States. The orders did not originate with the CDC but rather with the Trump administration leadership, which has been focused on exclusion of asylum seekers as described above.[51]

Meanwhile, other countries, including 20 countries in Europe, adopted travel restrictions at international borders and other precautions to address the COVID-19 crisis but specifically excepted asylum seekers from border closures or entry bans.[52] The United States took the opposite approach, demonstrating the focus on asylum exclusion.

A particular focus on excluding asylum seekers is evident in the language of the CDC orders that justify immediate expulsions on the grounds that those affected would otherwise be "held for significant periods of time in [border] facilities" for processing[53]. Those who are held for longer periods are those who must be referred into further proceedings under the asylum rules. Migrants who are simply turned away at the border as inadmissible, without making an asylum claim, do not require any more processing under existing rules than is required to process them for expulsion under the CDC orders. The original CDC order also specifically mentioned "asylum camps and shelters" in Mexico and the risk of contagion there as part of the justification for blocking entrants from Mexico.[54]

The CDC orders are also both under and overinclusive in ways that make clear that the focus is on achieving territorial exclusion of asylum seekers at the border at all costs, without regard to public health considerations. The CDC expulsions have never included U.S. citizens, Lawful Permanent Residents, visa holders or airport arrivals, and separate guidance has allowed for continued entry into the U.S. for commerce and education purposes.[55] So the directive only impacts individuals arriving at the border who do not have existing immigration status and would require extensive processing in border facilities. The group covered under these criteria is almost entirely the category of asylum seekers.

The ban is thus underinclusive if the concern is really directed at the entry of individuals who might be infected with COVID-19 and who might spread the disease within the United States since there is no indication that asylum seekers or others without status would be more likely to be contagious than those exempted from the CDC orders. On the other hand, the ban is overinclusive. It incorrectly assumes categorically that those arriving at the border would be likely to be contagious and could not be handled by means other than exclusion, on the theory that they would not have the possibility of quarantining effectively within the United States. The orders require no individualized inquiry into the realities of the situation in individual cases and no testing or other screenings to determine which asylum seekers are infected or present a risk. In the cases of unaccompanied children, as a practical matter, the ban only applies to those children who test negatively for corona virus, since the countries of origin will not accept returned children who test positive.[56] It thus covers and excludes those who present the least serious health risk.

The expulsions thus impact a broad category of migrants—asylum seekers—in a manner that ensnares many who do not present the problem purportedly to be addressed. The mismatch between justification and impacted migrants lays bare the ban's anti-asylum foundation.

There is also little, if any, evidence that the CDC expulsions function effectively to protect public health. International guidelines discourage travel restrictions on the grounds that "restricting the movement of people and goods during public health emergencies is ineffective in most situations and may divert resources from other interventions."[57] The CDC's own scientists questioned the public health basis for the ban.[58] Independent medical experts also questioned the wisdom of the ban and offered measures that could be taken without banning asylum seekers, which would offer more tailored protection against the introduction of additional contagion risk into the country.[59] The failure to adopt these alternatives further

[48] CBP, Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions, Available online at: https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (accessed December 6, 2020).

[49] CBS News, *U.S. Policy of Expelling Migrant Children without an Asylum Interview Challenged in Class-Action Lawsuit* (2020), Available online at: https://www.cbsnews.com/news/lawsuit-seeks-to-halt-u-s-policy-of-expelling-migrant-children-without-an-asylum-interview/ (accessed November 4, 2020).

[50] ABC News, *AP Exclusive: Migrant Kids Held in US Hotels, Then Expelled* (2020), Available online at: https://abcnews.go.com/Business/wireStory/ap-exclusive-migrant-kids-held-us-hotels-expelled-71918837 (accessed November 4, 2020).

[51] Associated Press, *Pence Ordered Borders Closed after CDC Experts Refused, supra note 38*.

[52] *See* UNHCR, *Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic 2* (2020), Available online at: https://www.unhcr.org/cy/wp-content/uploads/sites/41/2020/04/Practical-Recommendations-and-Good-Practice-to-Address-Protection-Concerns-in-the-COVID-19-Context-April-2020.pdf (accessed December 6, 2020).

[53] 85 Fed. Reg. 31503, 31507 (May 26, 2020).

[54] 85 Fed. Reg. 17060, 17064.

[55] 85 Fed. Reg. 06253 (March 24, 2020).

[56] ProPublica, *ICE is Making Sure Migrant Kids Don't Have COVID-19—Then Expelling Them to "Prevent the Spread" of COVID-19* (2020), Available online at: https://www.propublica.org/article/ice-is-making-sure-migrant-kids-dont-have-covid-19-then-expelling-them-to-prevent-the-spread-of-covid-19 (accessed November 4, 2020).

[57] World Health Organization, *Updated WHO Recommendations for International Traffic in Relation to COVID-19 Outbreak* (Feb. 29, 2020), Available online at: https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak; *see also* International Health Regulations, art. 2 (2005) (providing standards for governments to follow in order to "avoid unnecessary interference with international traffic and trade" while addressing international spread of disease).

[58] Associated Press, *Pence Ordered Borders Closed after CDC Experts Refused, supra note 38*.

[59] Letter to CDC Director Signed by Medical Experts (May 18, 2020), Available online at: https://www.publichealth.columbia.edu/public-health-now/news/

highlights the extent to which the ban is intended to exclude asylum seekers.

In addition, the CDC expulsions do not even ensure rapid processing, although the purported purpose is to ensure that migrants do not remain in the custody of U.S. border officials for extended periods in order to avoid contagion. There would be more effective ways to ensure prompt processing out of border facilities, including immediate release to families within the United States.

Instead, the CDC expulsions turn away hundreds of thousands of asylum seekers at the border, including young children on their own, and send them to danger in Mexico or their home countries. This exclusion of asylum seekers is not a side effect of a valid public health measure; it is the intended result.

THE NEED TO AVOID A PERMANENT BORDER BLOCKADE

While these measures of territorial exclusion at the border have been put in place in reliance on the dangers posed by a pandemic, the real danger is that the border blockade will become permanent. The success of the exclusion measures in closing the border and placing asylum seekers just out of reach of U.S. territory makes it challenging to rebuild a meaningful pathway to asylum at the southern U.S. border.

The impacted asylum seekers reached U.S. territory and so should have enjoyed the legal rights that accompany such arrival,[60] but the barricade at the border pushed them back just enough to make full enforcement of those rights a challenge. Several U.S. courts have issued decisions finding the MPP and CDC exclusion measures to be in likely violation of law.[61] Nonetheless, they have allowed for implementation of MPP returns to Mexico and the CDC expulsions while the legality questions are litigated.[62] The courts appear to struggle with the unique issues raised by migrants at the border, right at the edge of the United States.[63] The court decisions suggest a restrained approach in assessing border policies, but rather than allowing for restraint, they have allowed the Trump Administration to reshape the law dramatically to block asylum seekers at the border. Now that the exclusionary programs have been allowed to take effect, invalidation would require a remedy for the hundreds of thousands of migrants who have already been turned away at the border. The courts may thus be less likely than ever to end the exclusionary policies.

Similarly, at the international level, international refugee and human rights bodies have insisted that migrants arriving at an international border, like the U.S. southern border, have the right to access asylum and *non-refoulement* protections (the right not to be returned to a country where they will face persecution or torture), even in the context of the pandemic. While not concretely addressing the measures adopted by the United States, UNHCR has stated that the right to asylum and non-refoulement applies, "including at national frontiers."[64] The refugee agency went on to assert that States are prohibited from "denying entry or forcibly removing" protection seekers. Other United Nations bodies have also insisted that "States must ensure the continuity of asylum at the borders" during the pandemic.[65] The Inter-American Commission on Human Rights has specifically expressed concern about the impact on the right to seek asylum caused by the actions of the United States in implementing both MPP and the CDC expulsions.[66]

Yet, international bodies have not taken active measures to pressure the United States to rescind the border blockade against asylum seekers. The Inter-American Commission on Human Rights, which is the only body that can accept individual complaints against the United States, recently declined to grant a request for precautionary measures seeking to end the MPP program.[67] Like U.S. courts, the international bodies may be reticent to act, because the law on migrants' rights at the border is not as fully developed or as protective as in other realms.[68] The unique circumstances involving potential human rights violations by multiple States at once may also be contributing to inaction by international bodies. Regardless of the reasons, the United States has proceeded with its border blockade without any meaningful resistance from the international community.

Just as legal challenges under international and domestic law have so far fallen short in halting the border blockade, change will be difficult as a policy matter as well. The border exclusions function to place asylum seekers outside of the sights

public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers (accessed December 6, 2020).

[60] *See* 8 U.S.C. 1158(a)(1); U.N. Convention relating to the Status of Refugees, 189 U.N.T.S. 150 [hereinafter Refugee Convention], as extended by the Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. Entered into force for the United States, Nov. 1, 1968, through accession to the Refugee Protocol; Refugee Act of 1980, Public Law 96-212 (adopted March 17, 1980); UNHCR, Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response (March 16, 2020), Available online at: https://www.refworld.org/docid/5e7132834.html (accessed December 6, 2020).

[61] *See, e.g.,* CBS News, *Federal Judge Skeptical of Trump Order Used to Expel Migrants at Border* (June 25, 2020), Available online at: https://www.cbsnews.com/news/federal-judge-trump-order-migrant-expulsions-policy-aclu/; *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020).

[62] *See, e.g., Innovation Law Lab v. Wolf*, 140 S.Ct. 1564 (2020); NPR, *U.S. Supreme Court Allows 'Remain In Mexico' Program To Continue* (March 11, 2020), Available online at: https://www.npr.org/2020/03/11/814582798/u-s-supreme-court-allows-remain-in-mexico-program-to-continue (accessed December 6, 2020).

[63] *See also Department of Homeland Security v. Thuraissigiam,* 140 S.Ct. 1959 (2020).

[64] UNHCR, Key Legal Considerations, supra note 55, at 1.

[65] Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants by the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and the UN Special Rapporteur on the Human Rights of Migrants (26 May 2020), Available online at: https://www.ohchr.org/Documents/HRBodies/TB/COVID19/External_TB_statements_COVID19.pdf (accessed December 6, 2020).

[66] IACHR, *IACHR Concerned About Restrictions of the Rights of Migrants and Refugees in the United States During COVID-19 Pandemic* (2020), Available online at: https://www.oas.org/en/iachr/media_center/PReleases/2020/179.asp (accessed November 4, 2020).

[67] *See* Communication from IACHR (on file with the author).

[68] *See, e.g., Ilias and Ahmed v. Hungary*, E.Ct.H.R. (2019) (permitting deprivation of liberty at the border but requiring adequate processes to ensure access to asylum protection before returning an asylum seeker to a third country for processing).

of policymakers and the public. It will require intensive efforts to have any Administration view the *absence* of asylum seekers entering the U.S. system at the southern border as a serious concern that must be addressed. Without clear instruction and accountability at the top, it is unlikely that U.S. officials will reopen the border to asylum seekers. U.S. border agencies are notoriously resistant to changes in general, particularly those that might require more humane treatment of asylum seekers.[69] They are unlikely to readily abandon the MPP and CDC expulsions programs that are now fully functioning to turn away hundreds of thousands of asylum seekers quickly and easily.

However, urgent intervention is exactly what is needed to avoid the conversion of the territorial exclusion policies into a permanent fixture. The longer the MPP and CDC Orders continue to function to block the border, the more unmovable the blockade will become. With each day, more asylum seekers are pushed out of reach of the asylum process and out of easy range of the mechanisms that could reopen the border for them to seek protection. As the problem grows, the solutions become more difficult, creating a real intractability problem. Invalidation of the programs is required as soon as possible to restore access to asylum and the rule of law at the U.S. southern border.

To achieve this result, further inquiry will also be required to understand how the United States arrived at this juncture in the first place. There can be no doubt that the restrictionist tendencies of the Trump Administration combined with the pandemic allowed the blockade in the immediate sense.

However, it seems likely that the security and border control logic of the U.S. asylum system created the opportunity for such a shift toward full territorial exclusion to occur. Based on a logic of threat control, the U.S. asylum system has long prioritized excluding asylum seekers as dangerous or perfidious rather than on processing and deciding claims for protection. Removal thus becomes the presumptive approach of the system and a grant of asylum protection the rare exception.

The language utilized by the Trump Administration in implementing border exclusion policies makes clear that these actions find a foundation in a system that focuses on concerns about fraud and security rather than effective or efficient adjudication. For example, in announcing MPP, the program was described as a tool to be utilized against asylum seekers in order to address "false claims to stay in the U.S."[70] The CDC expulsions also treat asylum seekers as a threat by claiming that they prejudice public health.

The exclusionary approach of the U.S. asylum system has a long history that extends even further back than the remote control and deterrence efforts that led up to the border blockade established under the Trump administration and solidified with COVID-19. In fact, recent measures of territorial exclusion find their closest parallel in pivotal historic moments when the U.S. blocked the entry of asylum seekers pleading for protection. The most shameful historic precursor to the current blockade is the 1939 refusal of the United States to allow the disembarkment on U.S. territory of Jewish refugees arriving near the Florida coast on the *St. Louis* German ship.[71] The *St. Louis* carried 937 passengers, almost all Jews fleeing the rise of Adolf Hitler in Germany. After the passengers were refused any opportunity to enter and seek protection in the United States, the ship returned to Europe. In the end, 254 St. Louis passengers were killed in the Holocaust. The exclusion of individuals fleeing Europe during World War II was based in part on claims by U.S. leadership that the refugees presented a national security threat including by spying for Germany.[72]

In the wake of World War II, the United States purported to commit itself to protecting those fleeing persecution so that another *St. Louis* would not occur (Goodman, 2016). The United States ratified the international refugee treaty and eventually adopted domestic legislation to create an asylum program.[73] Yet, before the ink was even dry on U.S. asylum law, the United States began to turn away Cuban and Haitian asylum seekers fleeing autocratic regimes and approaching our shores to seek protection.[74] Territorial exclusion prevented most from having their asylum claims heard. This is the historical backdrop of the U.S. asylum system.

The emphasis on threat control and exclusion is also "baked in" to the U.S. system in many ways. For example, the expedited removal process in U.S. law treats all border arrivals as immediately deportable unless they claim a fear of return to their home countries and then allows access to asylum only for those who pass a screening interview.[75] Similarly, those who pass this screening must still make their claim to asylum in adversarial removal proceedings before the non-specialized immigration courts rather than before a refuge determination corps.[76] All those who seek asylum after an encounter with immigration authorities and are not subjected to expedited removal, whether they turn themselves in at the border to seek asylum or are apprehended within the United States, must present their claim in these adversarial immigration court proceedings.[77] To be clear, the asylum claim is made

[69] *See, e.g.,* National Council 118 – Immigration and Customs Enforcement, Vote of No Confidence in Director John Morton (June 25, 2010), Available online at: http://iceunion.org/download/259-259-vote-no-confidence.pdf (union vote of no confidence in ICE leadership where officers asked to make prosecutorial discretion decisions and improve detention conditions).

[70] *Migrant Protection Protocols*, Available online at: https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols (accessed December 6, 2020).

[71] *See* United States Holocaust Museum, *Holocaust Encyclopedia: Voyage of the St. Louis,* Available online at: https://encyclopedia.ushmm.org/content/en/article/voyage-of-the-st-louis (accessed December 6, 2020).

[72] *See* Smithsonian Magazine, *The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing That They Were Nazi Spies* (2015), Available online at: https://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/?no-ist (accessed November 4, 2020).

[73] U.N. Refugee Convention.

[74] Edward M. Kennedy, *Refugee Act of 1980*, 15 International Migration Review 141 (1981).

[75] 8 U.S.C. 1225; American Immigration Council, *A Primer on Expedited Removal* (2019), Available online at: https://www.americanimmigrationcouncil.org/research/primer-expedited-removal (accessed November 4, 2020).

[76] 8 U.S.C. 1229; 8 C.F.R. 208.30(f); American Bar Association, Reforming the Immigration System 2:3-2:33. (2019), Available online at: https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf (accessed November 4, 2020).

[77] 8 U.S.C. 1229.

within "removal" proceedings where asylum is offered as a defense to removal rather than as a freestanding claim for protection.[78]

This underpinning framework of suspicion must be considered to address more fully the policies adopted to blockade the border during the COVID-19 pandemic. Some theorize that the existence of *generous* asylum policies in place for those who reach a national territory inspire restrictions that seek to prevent asylum seekers from ever reaching that territory.[79] The "remote control" or exclusionary policies are seen to put up a shell that protects a soft center. They function as a way of ensuring that a nation may appear to grant asylum rights broadly but only offer those rights in practice to a scarce few. In the United States, the opposite may be true. The stinginess and restrictiveness of the U.S. asylum process at its core may be seen to have emanated outward to the border and beyond. The limits and restrictions on recognition of asylum which were formulated within the United States have injected an ethos of exclusion and suspicion into the asylum process. In turn, the exclusionary approach that begins within the United States allows for increasingly aggressive measures at the border and beyond. The buildup of restrictions on asylum within the United States, constructed on a foundation of exclusion and threat control, may be seen to have created the base for the blockade at the border. The very nature of the underlying system must therefore be addressed to ensure that the blockade at the border does not become permanent.

[78] An "affirmative" asylum process outside of Immigration Court removal proceedings does exist in the United States but it is only applicable to those who arrive in the United States and apply affirmatively before any apprehension or other encounter with immigration enforcement authorities.

[79] Fitzgerald, *supra*, at 6-14, 252-54.

CONCLUSION

Actions taken by the Trump Administration invoking the COVID-19 pandemic effectuate a level of exclusion of asylum seekers at the border that would have been hard to imagine even recently. The barricade at the border did not appear out of thin air, however, but is instead an extreme version of a U.S. asylum system that has been focused on security and has treated exclusion as the norm and asylum protection as the rare exception. As one commentator noted: "We codify the nation's fears into law, yet we delegitimize the fears of our neighbors, the fears of refugees and asylum seekers—many of whom are fleeing actual, immediate, duck-for-cover, jackboots-kicking-at-your-door, the-roof-is-collapsing fear (Washington, 2020)."

Perhaps the need to address the border blockade will allow for a rethinking of the U.S. asylum system. A deeper look would make clear that the security and fraud focus is a poor match with the realities at the border. In the realization, it may be possible to break down the barricade and build a system that prioritizes the need to process and evaluate asylum claims rather than exclude. Such a system would almost certainly be more efficient and more humane.

AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

ACKNOWLEDGMENTS

Part of a COVID-19 Research Topic. This article is fully waived.

REFERENCES

Eagly, I., and Shafer, S. (2020). *The Continued Detention of Migrants in U.S. Detention Centers During the COVID Pandemic*. Available online at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/07/continued (accessed November 4, 2020).

Fitzgerald, D. S. (2019). *Refugee Beyond Reach*. New York, NY: Oxford University Press. 58–159.

Goodman, C. (2016). *Between Foreign Policy, Politics, and the Law: The United States Refugee Crises of 1980*. Available online at: https://www.humanityinaction.org/knowledge_detail/between-foreign-policy-politics-and-the-law-the-united-states-refugee-crises-of-1980/ (accessed November 4, 2020).

Washington, J. (2020). *The Long, Winding, and Painful Story of Asylum*. The Nation. Available online at: https://www.thenation.com/article/society/asylum-history-united-states/ (accessed November 4, 2020).

Conflict of Interest: The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

frontiers in Human Dynamics

HYPOTHESIS AND THEORY
published: 08 April 2021
doi: 10.3389/fhumd.2020.599222

The Impact of COVID-19 on Immigration Detention

*Fatma E. Marouf**

School of Law, Texas A and M University, Fort Worth, TX, United States

COVID-19 has spread quickly through immigration detention facilities in the United States. As of December 2, 2020, there have been over 7,500 confirmed COVID-19 cases among detained noncitizens. This Article examines why COVID-19 spread rapidly in immigration detention facilities, how it has transformed detention and deportation proceedings, and what can be done to improve the situation for detained noncitizens. Part I identifies key factors that contributed to the rapid spread of COVID-19 in immigration detention. While these factors are not an exhaustive list, they highlight important weaknesses in the immigration detention system. Part II then examines how the pandemic changed the size of the population in detention, the length of detention, and the nature of removal proceedings. In Part III, the Article offers recommendations for mitigating the impact of COVID-19 on detained noncitizens. These recommendations include using more alternatives to detention, curtailing transfers between detention facilities, establishing a better tracking system for medically vulnerable detainees, prioritizing bond hearings and habeas petitions, and including immigration detainees among the groups to be offered COVID-19 vaccine in the initial phase of the vaccination program. The lessons learned from the spread of COVID-19 in immigration detention will hopefully lead to a better response to any future pandemics. In discussing these issues, the Article draws on national data from January 2019 through November 2020 published by Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), two agencies within DHS. The main datasets used are detention statistics published by ICE for FY 2019 (Oct. 2018-Sep. 2019), FY 2020 (Oct. 2019-Sep. 2020), and the first two months of FY 2021 (Oct. 2020-Nov. 2020). These datasets include detention statistics about individuals arrested by ICE in the interior of the country, as well as by CBP at or near the border. Additionally, the Article draws on separate data published by CBP regarding the total number of apprehensions at the border based on its immigration authority under Title 8 of the United States Code, as well as the number of expulsions at the border based on its public health authority under Title 42 of the United States Code.

Keywords: immigration, migration, detention, removal, deportation, incarceration, asylum, COVID-19

OPEN ACCESS

Edited by:
Jaya Ramji-Nogales,
Temple University, United States

Reviewed by:
César García Hernández,
University of Denver, United States
Emily Ryo,
University of Southern California, United States

***Correspondence:**
Fatma E. Marouf
fatma.marouf@law.tamu.edu

Specialty section:
This article was submitted to Refugees and Conflict, a section of the journal Frontiers in Human Dynamics

Received: *26 August 2020*
Accepted: *16 December 2020*
Published: *08 April 2021*

Citation:
Marouf FE (2021) The Impact of COVID-19 on Immigration Detention. Front. Hum. Dyn 2:599222. doi: 10.3389/fhumd.2020.599222

INTRODUCTION

COVID-19 has spread quickly through immigration detention facilities in the United States. As of December 2, 2020, there have been over 7,500 confirmed COVID-19 cases among detained noncitizens (Immigration and Customs Enforcement, 2020a). The purpose of immigration detention is supposed to be to secure attendance at immigration court hearings and ensure the

safety of the community. In reality, however, widespread detention is used as a way to deter asylum seekers and other migrants from coming to the United States (Ryo, 2019a). Although the United States immigration detention system is considered civil, it is embedded in the criminal justice system and virtually indistinguishable from criminal punishment (Stumpf, 2006; García Hernández, 2014; Ryo, 2019b). Like prisoners, immigration detainees live in crowded conditions, often with poor hygiene and inadequate ventilation, making them especially vulnerable to contagious diseases (Meyer et al., 2020).

The high rate of turnover in the detained population contributes to the risk of infection (Solis et al., 2020). In FY 2020, the average daily population in United States immigration detention was 34,427, but the total number of people booked into immigration detention was 177,391 (Immigration and Customs Enforcement, 2020b). Frequent transfers of noncitizens between detention facilities further compounds the risk of transmission (Human Rights Watch, 2011; Ryo and Peacock, 2018). In fact, in August 2019, when the Centers for disease Control ("CDC") addressed outbreaks of the mumps in fifteen immigration detention centers across seven states, the agency specifically noted concerns about "new introductions [of mumps cases] into detention facilities through detainees who are transferred or exposed before being taken into custody" (Leung et al., 2019).

Making matters worse, the immigration detention system is plagued by "substandard and dangerous medical practices," including "overreliance on unqualified medical staff, delays in emergency care, and requests for care unreasonably delayed" (Human Rights Watch, 2017). Problems with medical care in immigration detention have been documented for decades, and the months leading up to the COVID-19 pandemic were no exception. In June 2019, the Department of Homeland Security (DHS) Office of the Inspector General found "egregious violations" of ICE's own detention standards, including poor hygiene and inadequate medical care (Department of Homeland Security, Office of the Inspector General, 2019). Congress opened an investigation into the medical care in immigration detention facilities in December 2019, just a month before the first confirmed coronavirus cases in the United States (Aleaziz, 2019).

These conditions alone have made it difficult for DHS to protect the health of noncitizens in custody. But DHS's slow response after the World Health Organization (WHO) announced a global pandemic in March 2020 exacerbated the situation. This Article examines why COVID-19 spread rapidly in immigration detention facilities, how it has transformed detention and deportation proceedings, and what can be done to improve the situation for detained noncitizens.

In discussing these issues, the Article draws on national data from January 2019 through November 2020 published by Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), two agencies within DHS. The main datasets used are detention statistics published by ICE for FY 2019 (Oct. 2018-Sep. 2019), FY 2020 (Oct. 2019-Sep. 2020), and the first two months of FY 2021 (Oct. 2020-Nov. 2020). These datasets include detention statistics about individuals arrested by ICE in the interior of the country, as well as by CBP at or near the border. Additionally, the Article draws on completely separate data published by CBP regarding the total number of apprehensions at the border based on its immigration authority under Title 8 of the United States Code, as well as the total number of expulsions at the border based on its public health authority under Title 42 of the United States Code. Some, but not all, of the individuals apprehended by CBP are transferred to ICE custody and detained. For example, unaccompanied minors apprehended by CBP are never transferred to ICE custody. Instead, they are transferred to the custody of the Office of Refugee Resettlement within the U.S. Department of Health and Human Services, which operates shelters that are not considered detention.

Part I identifies key factors that contributed to the rapid spread of COVID-19 in immigration detention. While these factors are not an exhaustive list, they highlight important weaknesses in the immigration detention system. Part II then examines how the pandemic changed the size of the population in detention, the length of detention, and the nature of removal proceedings. In Part III, the Article offers recommendations for mitigating the impact of COVID-19 on detained noncitizens. These recommendations include using more alternatives to detention, curtailing transfers between detention facilities, establishing a better tracking system for medically vulnerable detainees, prioritizing bond hearings and habeas petitions, and including immigration detainees among the groups to be offered COVID-19 vaccine in the initial phase of the vaccination program. The lessons learned from the spread of COVID-19 in immigration detention will hopefully lead to a better response to any future pandemics.

Factors Contributing to the Spread of COVID-19 in Immigration Detention

Several factors have contributed to the rapid spread of COVID-19 in immigration detention. First, ICE delayed testing detained noncitizens for COVID-19. Second, ICE delayed issuing COVID-19 guidance to all immigration detention facilities and made important infection prevention and control measures discretionary rather than mandatory. In particular, too much discretion has been permitted regarding quarantine methods and transfers of detainees between facilities. Third, ICE lacked a system for tracking medically vulnerable detainees at risk for serious illness from COVID-19. Each of these factors is discussed below.

Delayed Testing

There were significant delays in testing detained noncitizens for COVID-19 that allowed infections to spread rapidly at the beginning of the pandemic. While ICE has not shared information about when it began testing for COVID-19, it began reporting data on COVID-19 testing on its website on April 28, 2020, well into the pandemic. On that day, it reported that only 705 detainees had been tested, of whom 425 were confirmed positive. By the end of May 2020, only 2781 detainees had been tested, of whom 1406 were positive. The extremely high positive rate of 50.5% in the month of May underscored the need

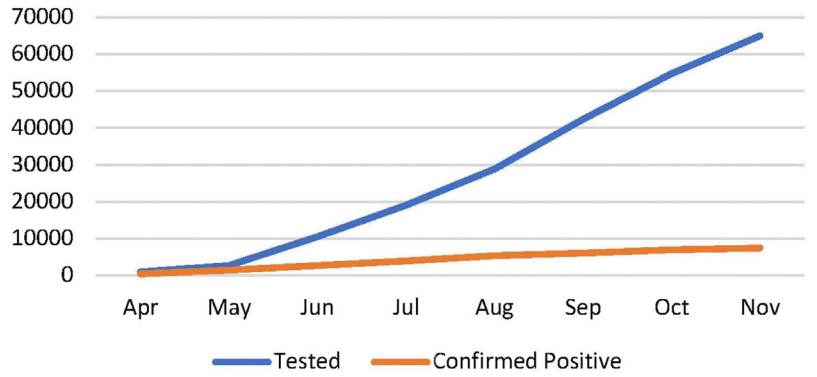


FIGURE 1 | COVID-19 Testing of Immigration Detainees, April-November 2020. Source: COVID-19 ICE Detainee Statistics, available at "https://www.ice.gov/coronavirus" and archived versions of that webpage.

for more widespread testing. Over the next several months, ICE began testing around 10,000 detainees each month. By December 2, 2020, ICE had tested 67,660 detainees, of whom 7,567 (11.2%) were confirmed positive. **Figure 1** shows how COVID-19 testing of detainees progressed between April and November 2000.

Delayed and Discretionary Guidance From ICE

Another major factor contributing to the spread of COVID-19 in detention was delayed and discretionary guidance from ICE. ICE did not issue COVID-19 Pandemic Response Requirements ("PRR") that apply to all immigration detention facilities until April 10, 2020, one month into the pandemic (Immigration and Customs Enforcement, 2020f). Before April 10, 2020, ICE issued various memoranda that provided only piecemeal instructions and did not apply to all detention facilities.

The ICE Health Service Corps (IHSC) first issued guidance on March 6, 2020, informing health care staff of the CDC's recommendations for testing but leaving it up to staff to use their own discretion in deciding whether someone should be tested (Immigration and Customs Enforcement Health Service Corps, 2020). The IHSC guidance did not stress the importance of social distancing or face masks. A few weeks later, on March 27, 2020, ICE issued a memorandum that set forth an "action plan" with certain measures designed to reduce exposure to COVID-19, such as screening staff and detainees, suspending social visitation, and offering non-contact legal visits (Immigration and Customs Enforcement, 2020c). However, this action plan applied only to "ICE-dedicated facilities," meaning facilities that hold exclusively immigration detainees. With respect to the 172 "non-dedicated facilities," which hold federal or state criminal detainees as well as civil immigration detainees, ICE deferred to local, state, and federal public health authorities.

Shortly thereafter, on April 4, 2020, ICE issued updated guidance titled "Detained Docked Review," asking Field Office Directors to "please" review the custody of individuals who have a "significant discretionary factor weighing in favor of release" (Immigration and Customs Enforcement, 2020d). This language did not require compliance. The guidance also stressed that noncitizens who pose a potential danger to persons or property should not be released as a matter of discretion, giving Field Office Directors wide latitude to deem someone a potential danger and keep them detained.

ICE finally set forth certain mandatory requirements for all facilities holding immigration detainees on April 10, 2020, when it issued the first version of the PRR (Immigration and Customs Enforcement, 2020f). Among other things, the PRR directed all facilities to require staff and detainees to wear cloth face coverings when PPE is limited and to provide unlimited supplies of liquid soap for handwashing. However, the PRR, like prior guidance, was replete with discretionary language.

For example, the PRR stated that "efforts should be made" to reduce the population to approximately 75% of capacity, instead of requiring ICE to reduce the detained population. With respect to social distancing, the PRR simply noted that "strict social distancing may not be possible" and suggested that certain measures be adopted "to the extent practicable" (Immigration and Customs Enforcement, 2020f). Regarding new entrants to a facility, ICE advised making "considerable effort" to quarantine them for 14 days before they enter the general population (Immigration and Customs Enforcement, 2020f). For symptomatic detainees, the PRR stated that "ideally" they should not be isolated with other individuals (Immigration and Customs Enforcement, 2020f). This discretionary language enabled detention centers to avoid adopting crucial measures for preventing the spread of COVID-19.

The PRR has been revised multiple times during the course of the pandemic, generally in response to updated guidance from CDC or federal court orders requiring ICE to make certain changes. At the time of this writing, the most recent version of the PRR is the fifth version that was published on October 27, 2020. Two especially important areas where discretionary measure remain a concern involve quarantining cohorts of detainees and transfers between facilities.

Quarantining Practices

"Cohorting" refers to isolating a group of potentially exposed individuals together. According to the CDC, every possible effort should be made to *individually* quarantine potentially exposed

people. The CDC explains that "cohorting individuals with suspected COVID-19 is not recommended due to the *high risk of transmission* from infected to uninfected individuals" (Centers for Disease Control and Prevention, 2020). Thus, "cohorting should only be practiced if there are no other available options." ICE, however, has relied *primarily* on cohorting potentially exposed individuals (Schriro, 2020). Entire dorms, which may include 50 or more people, are typically placed in isolation as a cohort when there is suspected exposure. The PRR simply instructs detention facility operators to "review" the CDC's preferred methods of isolation and allows decisions to be made "depending on the space available in a particular facility." Additionally, the CDC recommends that when it is not possible to place individuals who are quarantined in single cells, each person in the cohort should be assigned at least 6 feet of personal space in all directions (Centers for Disease Control and Prevention, 2020). Such social distancing simply is not possible in a detention facility.

Transfers Between Detention Facilities

The CDC recommends against transferring detained individuals between facilities unless absolutely necessary. Yet, throughout the pandemic, ICE has continued to transfer detained noncitizens all over the nation. Such transfers have led to known outbreaks of COVID-19 in numerous states, including Texas, Ohio, Florida, Mississippi, and Louisiana (Seville and Rappleye, 2020). For instance, on April 11, 2020, ICE transferred around 70 people from facilities in Philadelphia and New Jersey with known outbreaks of COVID-19 to the Prairieland Detention Center in Alvarado, Texas, resulting in an outbreak there (Solis, 2020). Furthermore, at least 200 people were transferred to the Bluebonnet Detention Center in Texas between mid-March 2020 and the end of May 2020 (Seville and Rappleye, 2020). By early April 2020, there was an outbreak in Bluebonnet that grew to 300 confirmed cases (Immigration and Customs Enforcement, 2020b).

In a particularly egregious incident, ICE flew detainees to Virginia simply to transport its own agents to Washington DC to help suppress Black Lives Matter protests (Olivo and Miroff, 2020). That transfer resulted in an outbreak of 300 COVID-19 cases in the Farmville Detention Center, resulting in one death. While the fifth version of the PRR attempts to limit transfers, the number of exceptions still makes it ineffective, as discussed further in Part III below.

NO SYSTEM FOR TRACKING MEDICALLY VULNERABLE INDIVIDUALS IN DETENTION

A third factor that contributed to the spread of COVID-19, recognized by the April 20, 2020, court order in *Fraihat v. United States. Immigration and Customs Enforcement*, is that no system existed for identifying and tracking medically vulnerable detainees (Fraihat, 2020). ICE uses a tool called a Risk Classification Assessment (RCA) that generates recommendations about detention or release for individuals who are not subject to mandatory detention. The RCA includes a "checklist" for "special vulnerabilities," but this checklist provides only minimal information. It includes only four categories that can be marked: "serious physical illness," "elderly," "disabled," and "pregnant." These limited categories failed to provide enough information to identify individuals at high risk of severe illness due to COVID-19. The absence of a centralized tracking mechanism for high risk individuals resulted in insufficient medical and preventive monitoring.

Impact of COVID-19 on Immigration Detention and Detained Proceedings

The spread of COVID-19 in immigration detention has had an enormous impact on detention. Both the number of people in detention and the average length of detention have changed as a result of the pandemic. Additionally, detained removal proceedings have been adversely impacted, especially access to counsel.

Reduction in Detained Population

Since the pandemic began, the average daily detained population has been reduced by more than half. In February 2020, before the WHO declared a pandemic, the average daily detained population was 39,314 (Immigration and Customs Enforcement, 2020b). By November 2020, it was down to 16,894 (Immigration and Customs Enforcement, 2020e). The total drop in detention can be attributed to both fewer arrests by ICE, which operates in the interior of the country, and fewer arrests by CBP, which operates at the nation's borders. However, the drop in detention due to fewer arrests by CBP has been much more pronounced, as shown in **Figure 2** (Immigration and Customs Enforcement, 2020b; Immigration and Customs Enforcement, 2020e).

In March 2020, ICE announced that it would make only "mission critical" arrests necessary to "maintain public safety and national security" (Kullgren, 2020; Sacchetti and Hernández, 2020). The average daily detained population attributed to arrests by ICE dropped from 18,981 in February 2020 to 11,534 by November 2020 (Immigration and Customs Enforcement, 2020e). By comparison, the average daily detained population attributed to arrests by CBP fell from 20,332 in February 2020 to just 5,451 by November 2020 (Immigration and Customs Enforcement, 2020b; Immigration and Customs Enforcement, 2020e).

The more dramatic drop in detention by CBP is related to CBP's use of Title 42 of the United States Code, a public health law, to expel migrants, including asylum seekers, at the southwest border on public health grounds, rather than allowing them to apply for asylum in the United States. On March 21, 2020, President Trump determined that it was necessary to prevent undocumented migrants from entering the United States in the interest of public health and prohibited their entry under Title 42. That month, CBP expelled 7,075 migrants at the southwest border (U.S. Customs and Border Protection, 2020a). The number of expulsions has continued to increase exponentially

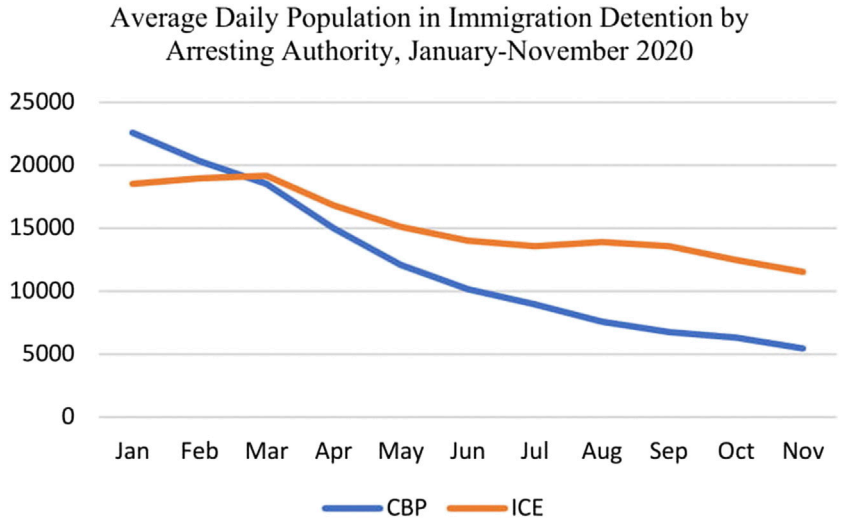


FIGURE 2 | Average daily population in immigration detention by arresting authority, January-November 2020. Source: Ice detention data, FY20 YTD; ice detention data, FY 21 YTD.

each month, exceeding 59,000 at the southwest border by October 2020 (U.S. Customs and Border Protection, 2020b).

As expulsions under Title 42 have increased, the number of individuals apprehended by CBP under Title 8 has plummeted (**Figure 3**). Title 8 pertains to immigration proceedings and protects the right to apply for asylum. The drop in credible fear interviews conducted by asylum officers for individuals apprehended at or near the border further confirms that asylum seekers are among those being expelled at the border. Credible fear interviews provide a threshold screening for asylum, and those who pass the interview are allowed to apply for asylum in immigration court. The number of credible fear cases received by USCIS dropped from 4,631 in February 2020 to 709 in October 2020 (U.S. Citizenship and Immigration Services, 2020).

A small percentage of the reduction in the detained population can also be attributed to the release of children detained in "family residential centers" (FRCs), which are detention centers that hold children together with their parents. Based on a nationwide restraining order issued by a federal judge in *Flores v. Barr* in March 2020, ICE was required to release children detained in FRCs (Flores, 2020). The average daily detained population in FRCs dropped from 1,591 in March 2020 to 766 in April 2020 and continued to decline in the following months (Immigration and Customs Enforcement, 2020b). By November 2020, the average daily detained population in FRCs was 235 (Immigration and Customs Enforcement, 2020e). The parents of the children, however, were not ordered released, and therefore had to decide whether to be separated from their children or remain together with their children in detention (Alvarez and Sands, 2020).

Prolonged Detention

While the size of the detained population has decreased during the pandemic, the length of detention has increased. In March 2020, the average length of stay in immigration detention was 51 days (Immigration and Customs Enforcement, 2020b). By November 2020, that number had increased to 88 days (Immigration and Customs Enforcement, 2020e). For individuals arrested by CBP, generally asylum seekers who asked for asylum at a port of entry or who were apprehended near the border after entering unlawfully, the average length in detention increased from 54 days in March to 137 days in November (Immigration and Customs Enforcement, 2020b; Immigration and Customs Enforcement, 2020e). This could be due to delays in conducting credible fears interviews or in delays conducting immigration court hearings to review credible fear denials.

Additionally, the increase in the average length of detention may be due to court closures or delayed bond hearings. There may also be more requests for continuances related to the pandemic. Noncitizens may need more time to find an attorney, and attorneys may need more time to prepare cases when they cannot meet with clients in person. In cases where the noncitizen already has final order of removal, detention may be prolonged by border closures, lack of commercial flights, and fewer charter flights to effectuate a deportation or voluntary departure.

IMPACT ON REMOVAL PROCEEDINGS

The pandemic has also had a significant impact on removal proceedings. Non-detained hearings in immigration court have been indefinitely postponed. Cases subject to the Migrant Protection Protocols ("MPP") have also been indefinitely postponed, even though those cases are categorized as detained under 8 U.S.C. § 1,225(b) (2). Asylum seekers placed in MPP are forced to remain in Mexico during their removal proceedings and must present themselves at designated ports of entry to be transported by ICE to their court hearings (Immigration and Customs Enforcement, 2019a). Consequently, they are effectively trapped in dangerous areas and squalid camps along the border. Even though they are not in

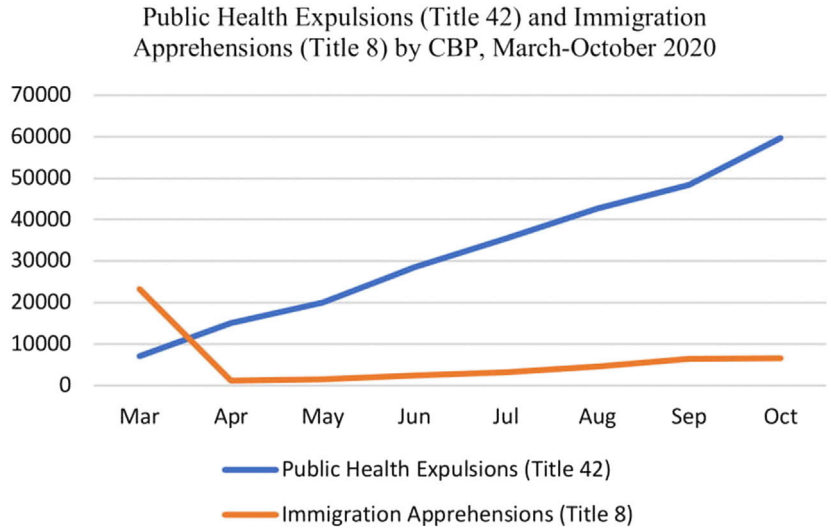


FIGURE 3 | Public health expulsions and immigration apprehensions by CBP, March to October 2020. Sources: CBP, nationwide enforcement encounters: Title 8.

a detention center, the regulation at 8 C.F.R. § 235.3(d) states that they are "considered detained," and immigration courts normally place MPP cases on the detained docket. Nevertheless, MPP cases remain suspended during the pandemic, prolonging and exacerbating the risk of harm these asylum seekers face while forced to remain in Mexico.

With the exception of MPP cases, immigration courts have proceeded with the detained docket during the pandemic. In order to reduce the need for personal appearances, immigration courts have liberally allowed telephonic appearances by counsel for master hearings, which are brief, status hearings. However, in-person appearances remain the norm for merits hearings, which are similar to trials. As a result, immigration judges, court personnel, attorneys on both sides, and detained immigrants face a risk of being infected by COVID-19 in court. This risk is real, as evidenced by numerous court closures due to COVID-19 exposure. But postponing detained cases due to the pandemic would further prolong detention and potentially raise due process concerns.

In moving forward with detained cases, both detained individuals and representatives have faced numerous challenges. For detained individuals, it is harder to find a representative and to communicate with an existing representative. Representatives have also dealt with confusing and changing directives about how to communicate with clients during the course of the pandemic. At the very beginning of the pandemic, guidance on ICE's website instructed legal representatives to bring their own PPE to detention centers to have contact visits. That guidance was later changed to say that representatives are required to undergo "the same screening required for staff," without specifying what that screening involves. As COVID-19 spread, it became increasingly dangerous for representatives to visit in person even if they brought their own PPE. Attorneys were forced to balance their professional responsibility of zealous representation with serious threats to their personal health. Ultimately, most representatives began to rely exclusively on phone calls to continue representing detained clients.

However, legal calls have also been challenging. Many detention centers do not have an adequate number of phones dedicated to legal calls. Detained individuals may therefore be forced to call their counsel from non-legal phone lines, which deprive them of private and confidential communications. While some detention centers make video conference calls available to detainees, those also can be monitored. Additionally, in some detention centers, individuals who are quarantined have been cut off completely from access to the legal phones, leaving them no choice but to make calls on monitored lines. Making matters worse, there are often tight time limits on calls and detainees may not be able to pay for them.

For counsel, being limited to telephonic communications with a client can greatly impede the representation. It is difficult to establish trust and properly prepare a client to testify telephonically. Assessing the client's demeanor and reviewing evidence are also nearly impossible over the phone. From a detained individual's perspective, it is much harder to engage with the legal process when interactions occur remotely rather than in-person, which can lead to giving up the case instead of fighting to remain in the country (Eagly, 2015). Detained individuals also lose the ability to confer with counsel before, during, and after a hearing, further limiting access to counsel. Consequently, protecting access to counsel, which is crucial to fundamental due process, remains one of the most challenges issues during the pandemic.

Addressing COVID-19 Related Problems in Detention

In light of the problems discussed above, urgent reforms are needed. This section makes several recommendations to improve

the plight of detained noncitizens. First and foremost, release is the best way to protect both public health and legal rights. There are various ways that ICE can release noncitizens to minimize any concerns about flight risk. Second, transfers between facilities should be stopped, or at least sharply curtailed and better regulated. Third, ICE should create a long-term system for tracking medically vulnerable detainees. Fourth, courts should prioritize bond hearings and habeas petitions challenging detention. Finally, detained noncitizens should be prioritized for COVID-19 vaccination.

Release From Detention

Releasing noncitizens from detention is the best way to address the risk of transmission in detention, concerns with medical care in detention, and the impact of detention on removal proceedings (Meyer et al., 2020; Solis et al., 2020). A poll by the University of Colorado Immigration Clinic found that a majority of the population supports releasing noncitizens from detention during the pandemic (Chapin, 2020). Releasing noncitizens not only lowers the risk of infection by reducing the detained population, but it also addresses some of the problems that ICE is currently addressing through dangerous transfers. For example, instead of transferring noncitizens for medical evaluation or clinical care, they could be released for medical care in the community; and instead of transferring noncitizens to "prevent overcrowding," that issue can be resolved by releasing more people from detention.

One positive change during the past year is that ICE has increased its use of "parole" under 8 C.F.R. § 212(d) (5) as a way to release someone from detention for humanitarian reasons. In FY 2019, 17,798 noncitizens were released on parole out of a total of 263,263 noncitizens released from detention (6.8%), while in FY 2020, 11,140 noncitizens were released on parole out of 60,625 released from detention (18.4%) (Immigration and Customs Enforcement, 2019b; Immigration and Customs Enforcement, 2020b). But the parole authority could be used much more liberally to reduce the detained population. In particular, noncitizens who have lawfully asked for asylum at a port of entry are generally detained as "arriving aliens," but ICE can decide to release them through parole. Releasing all asylum seekers would uphold the right to seek asylum while also protecting public health.

ICE could also release more noncitizens on their own recognizance, under an order of supervision, or on bond. In FY 2020, a much smaller percent of noncitizens were released from detention on their own recognizance compared to FY 2019 (23% compared to 67%), while a higher percentage of noncitizens were released under an order of supervision in FY 2020 compared to FY 2019 (10.6% compared to 5.2%). One might expect ICE to be more willing to set bonds during the pandemic, but the percent of people released from detention based on a bond set by ICE did not change in FY 2020 compared to FY 2019 (7.6% compared to 7.5%). More frequent use of these alternatives would help keep detention as a last resort.

The total number of people enrolled in ICE's electronic monitoring programs also did not increase much in FY 2020 compared to FY 2019 (85,857 compared 83,186) (Immigration and Customs Enforcement, 2019b; Immigration and Customs Enforcement, 2020b). Electronic monitoring programs involve either an ankle bracelet with GPS monitoring, telephonic check-ins with voice recognition software, or a smartphone app called SMARTLink that uses a photo check-in. If flight risk is the main issue, then bond and electronic monitoring are both preferable alternatives to detention that address that concern.

Community-based alternatives to detention that rely on case management are an even better option (Marouf, 2017). These community-based alternatives were being piloted during the Obama Administration. The basic idea is to provide a case manager's support with legal, medical, and other needs in order to help noncitizens effectively navigate their removal proceedings and comply with court orders. Reducing detention long-term is not only the most humane option, but it will also save enormous costs while protecting public health. As Solis et al. have concluded, simply "implementing CDC recommendations to mitigate COVID-19 transmission in carceral settings has been insufficient to lessen outbreak progression" (Solis et al., 2020).

Stopping Transfers Between Facilities

Abolishing detention is ideal, but at a minimum transfers should be sharply curtailed and better regulated. Although the fifth version of the PRR attempts to limit transfers, the exceptions swallow the general rule (Immigration and Customs Enforcement, 2020g). The PRR states that transfers "are discontinued unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, release or removal, or to prevent overcrowding" (Immigration and Customs Enforcement, 2020g). Because "security concerns" are not defined, this particular exception could be invoked for unspecified reasons. Additionally, the PRR allows "transfers for any other reason," as long as there is "justification and pre-approval from the local [ICE] Field Office Director" (Immigration and Customs Enforcement, 2020g). The PRR does not explain what qualifies as a justification. This loophole gives broad discretion to ICE Field Office Directors to approve transfers. Consequently, transfers are continuing on a large scale, both within states and between states.

Stopping these transfers, or at least substantially reducing them by reigning in the exceptions, is crucial for curbing the spread of COVID-19. Transfers for "clinical care" and "medical isolation/quarantine" are especially disturbing because the individuals being transferred may already be infected. If a facility cannot provide the medical evaluation or clinical care needed, the appropriate response during a pandemic would be to take the individual to an outside medical provider or release the individual, rather than transferring the individual to another detention facility. Release is also a much better solution than transfers to prevent overcrowding. Allowing transfers to "prevent overcrowding" effectively permits pre-pandemic practices to continue, since ICE has typically made decisions about transfers based on bed space (Ryo and Peacock, 2018).

Apart from the public health reasons for stopping transfers, they should be stopped because of their harmful impact on removal proceedings. As Emily Ryo and Ian Peacock have explained, transfers can "hinder access to legal representation,

sever family ties and community support, and separate detainees from the evidence needed in their court proceedings" (Ryo and Peacock, 2018). Human Rights Watch reports that transfers are often made to facilities in Louisiana, Mississippi, and Texas, "states that collectively have the worst ratio of transferred immigrant detainees to immigration attorneys in the country (510–1) (Human Rights Watch, 2011). Given how the pandemic has already hindered access to representatives, family, and community support, adding transfers to this mix makes representation nearly untenable. Transfers also impede detainees' ability to challenge their detention through bond hearings and habeas petitions, which is especially problematic during the pandemic (Human Rights Watch, 2011).

Even if transfers cannot be completely stopped, more checks should be imposed on the decisions of ICE officers to transfer detainees. Transfers of state and federal prisoners are currently much better regulated than the transfer of immigration detainees. If ever there was a time to address the need for better regulation of transfers, it is now, during a pandemic.

Creating a System for Tracking Medically Vulnerable Detainees Long Term

ICE eventually created a tracking mechanism in response to a preliminary injunction issued by a federal court in a case called *Fraihat*. The fifth version of the PRR explains that two categories of detained individuals must be tracked based on the *Fraihat* class action (Immigration and Customs Enforcement, 2020g). One category is for detained individuals who are pregnant or aged 55 and older. This category is called "Subclass One" and assigned the alert code "RF1." The second category is for detained individuals with certain medical conditions, who are called "Subclass Two" and assigned the alert code "RF2."

This new tracking system promotes compliance with the court's orders in *Fraihat*, but it is specific to the subclasses defined in that litigation. ICE could simply terminate the tracking system if the court no longer required it. A tracking method that is independent of the litigation and captures different types of medical vulnerabilities would be useful to maintain not only for the present pandemic, but long term. It would be useful for any future pandemics as well as to improve medical treatment in detention by providing a way for ICE to assess the medical conditions and needs of the detained population.

Prioritizing Bond Hearings and Habeas Petitions

Courts also have an important role to play in helping medically vulnerable noncitizens in detention. Immigration Judges should prioritize bond hearings in order to facilitate release from detention. During bond hearings, judges should ensure that the burden of proof is placed on the government to show a need for detention based on flight risk or danger. David Hausman has argued that because detention itself poses a danger to the community, immigration courts actually should not even consider flight risk (Hausman, 2020). Immigration judges should further ensure that they are setting individualized bonds based on ability to pay, instead of blanket bonds, and that they fairly consider all relevant factors. Emily Ryo's empirical research indicates that bond proceedings often are not fair, as the recency and number of convictions are not predictive of danger determinations, Central Americans are more likely to be deemed dangerous, and pro se individuals fare worse than those with representation even after controlling for criminal history (Ryo, 2019c). For detainees who cannot afford a bond, immigration judges should seriously consider other alternatives to detention. Considering the pandemic a "changed circumstance" that justifies a new bond hearing if bond was previously denied would also help protect public health.

Similarly, federal district courts should prioritize habeas petition by noncitizens seeking release from detention. It is all too common for federal judges to handle habeas petitions without any urgency, even during the pandemic. Instead of giving the government sixty days to respond to a habeas petition and then waiting thirty more days for a reply, courts should set expedited briefing schedules. Once the briefing is completed, courts should promptly schedule a hearing or render a decision. For many detained noncitizens, a habeas petition challenging prolonged detention or the conditions of detention may be the only hope for release.

Prioritizing Detained Noncitizens for COVID-19 Vaccination

Finally, while noncitizens remain detained, they should be prioritized for vaccination as a highly vulnerable group. The Advisory Committee on Immunization Practices (ACIP), a federal advisory committee that develops recommendations on the use of vaccines, has recommended, as interim guidance, that health care personnel and residents of long-term care facilities be offered COVID-19 vaccine in the initial phase of the vaccination program (Dooling et al., 2020). However, the ethical principles that guide decisionmaking about vaccination if supply is limited support prioritizing detained noncitizens as well. These ethical principles include: 1) maximizing benefits and minimizing harms; 2) mitigating health inequities; 3) promoting justice; and 4) promoting transparency.

Vaccinating detained noncitizens helps maximize benefits in several ways. It reduces the risk of large outbreaks in detention facilities; reduces the risk of spreading the disease to surrounding communities as well as to other cities and states through transfers; and reduces the risk of spreading the disease to other countries through deportations. At the same time, vaccinating detainees helps minimize harms, not only to the detainees themselves, but to the population. In fact, Jamie Solis et al. have identified outbreaks in jails, prisons, and immigration detention centers as responsible for the third wave of structural vulnerability related to COVID-19 that began in April 2020 (Solis et al., 2020). As WHO has explained, the transmission of COVID-19 in detention centers amplifies the overall effect of the pandemic (World Health Organization Regional Office for Europe, 2020). According to the WHO, "efforts to control COVID-19 in the community are *likely to fail* if strong infection prevention and control (IPC) measures, adequate testing, treatment and care are not carried out in prisons and other places of detention" (World Health Organization Regional Office for Europe, 2020).

Additionally, vaccinating detained noncitizens would help mitigate health inequities in the burden of COVID-19 disease. Factors such as income, access to health care, and race/ethnicity, which contribute to health disparities, are traditionally considered in applying this ethical principle. Most detained noncitizens are black or brown, have little or no income, limited access to health care, and no ability to socially distance in detention. Blacks and Hispanics also have a high prevalence of underlying medical conditions that place them at high risk of progressing to severe COVID-19 and dying (Solis et al., 2020). Prioritizing the vaccination of detained noncitizens would ensure that they are not further disadvantaged.

Third, the principle of promoting justice requires upholding the dignity of all persons and removing barriers to vaccination among marginalized groups. Detained noncitizens have already been stripped of their dignity in numerous ways and are often invisible to society, hidden in detention centers in remote areas. Certain subgroups of detained noncitizens are even less visible and more marginalized because they speak neither English nor Spanish and face medical neglect due to language barriers (Ryo, 2019b). The principle of promoting justice requires intentionally ensuring that all detained noncitizens "have equal opportunity to be vaccinated, both within the groups recommended for initial vaccination, and as vaccine becomes more widely available" (McClung et al., 2020). Establishing a fair and consistent implementation process is also an important aspect of this principle. The government should therefore not only prioritize the vaccination of detained noncitizens, but also have a concrete plan in place for how the vaccine will be distributed to this vulnerable group.

Finally, the principle of transparency supports prioritizing the vaccination of detained noncitizens because ICE's treatment of this group is notoriously non-transparent. Privately operated detention centers, which hold the vast majority of detained noncitizens (Cullen, 2018), are especially lacking in transparency and accountability (Ryo and Peacock, 2018). For those in detention, the experience of incarceration itself further reduces trust in government (Weaver and Lerman, 2010; Muller and Schrage, 2014). At a minimum, in order to promote transparency, the government's plan for distributing a vaccinate to detained noncitizens should be made publicly available. ICE should also provide accurate and detailed data on administration of the vaccine on its website.

CONCLUSION

The COVID-19 pandemic has impacted all aspects of immigration detention in the United States, from the conditions and length of detention, to the size of the detained population, to how detained removal proceedings are conducted. Using detention only as a last resort and relying more on alternatives would mitigate both the health risks of COVID-19 and its impact on the legal rights of detained individuals. Stopping transfers between detention facilities, establishing a system to track medically vulnerable detainees long-term, prioritizing bond hearings and habeas petitions by noncitizens seeking release, and prioritizing detained noncitizens for vaccinations are all ways to mitigate these harms.

DATA AVAILABILITY STATEMENT

Publicly available datasets were analyzed in this study. This data can be found here: https://www.ice.gov/detention-management.

AUTHOR CONTRIBUTIONS

FM is the sole author of this piece.

REFERENCES

Aleaziz, H. (2019). *Congress has launched an investigation into the medical care of immigrant detainees*, New York, NY: BuzzFeed News, https://www.buzzfeednews.com/article/hamedaleaziz/congress-investigation-immigrant-detainees-medical-care (Accessed December 5, 2020).

Alvarez, P., and Sands, G. (2020). *Judges rejects plea to release immigrant families in detention due to COVID-19*, Atlanta, GA: CNN, https://www.cnn.com/2020/07/22/politics/immigration-detention-coronavirus/index.html (Accessed December 5, 2020). doi:10.3386/w26981

Centers for Disease Control and Prevention (2020). *Interim guidance on management of coronavirus disease 2019 (COVID-19) in correctional and detention facilities*, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (accessed Dec. 5, 2020)

Chapin, V. (2020). *Policies and polling on the coronavirus and America's immigrant detention crisis, the justice collaborative*, https://filesforprogress.org/memos/coronavirus-detention-centers.pdf (Accessed December 5, 2020). doi:10.1093/oso/9780190081195.001.0001

Cullen, T. T. (2018). *ICE released its most comprehensive immigration data yet. It's Alarming*, Chicago, IL: National Immigrant Justice Center, https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet (Accessed December 5, 2020).

Department of Homeland Security, Office of the Inspector General (2019). *Concerns About ICE Detainee Treat. Care Four Detention Facil.*, https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf (Accessed December 5, 2020).

Dooling, K., McClung, N., Chamberland, M., Marin, M., Wallace, M., Bell, B., et al. (2020). The advisory committee on immunization practices' interim recommendation for allocating initial supplies of COVID-19 vaccine—United States, 2020. *MMWR Morb Mortal Wkly Rep.* 69, 1857–1859. doi:10.15585/mmwr.mm6949e1

Eagly, I. (2015). Remote adjudication in immigration, *Northwestern L. Rev.* 109, 933.

Flores, V. B. (2020). *Case CV 85-4544-DMG (AGRx), order re plaintiffs' ex parte application for restraining order and order to show cause re preliminary injunction*, https://www.courthousenews.com/wp-content/uploads/2020/04/Flores-CovidTRO03282020.pdf (Accessed December 5, 2020).

Fraihat, V. (2020). *U.S. Immigration and Customs enforcement, case 5-19-cv-01546-JGB-SHK (C.D. Cal. Apr. 20, 2020), Order Granting Plaintiff's Motion for Preliminary Injunction*, https://www.splcenter.org/sites/default/files/fraihat_pi_grant.pdf (Accessed December 5, 2020).

García Hernández, C. C. (2014). Immigration detention as punishment, *UCLA. L. Rev.* 61, 1346–1414. doi:10.5565/rev/dag.115

Hausman, D.. (2020). When immigration detention endangers the community, Pennsylvania, PA: Harvard Law Review Blog, https://blog.harvardlawreview.org/when-immigration-detention-endangers-the-community/ (Accessed December 7, 2020).

Human Rights Watch (2011). *A costly move*, https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united (Accessed December 7, 2020).

Human Rights Watch (2017). *Systemic indifference: dangerous & substandard medical care in United States immigration detention*, https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention (Accessed December 7, 2020).

Immigration and Customs Enforcement (2019a). *Memorandum from nathalie R. Asher Field Off. Directors, "Migrant Prot. Protoc. Guidance," February 12, 2019*, https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-Implementation-Memo.pdf (Accessed December 7, 2020).

Immigration and Customs Enforcement (2019b). *FY19 detention statistics*, https://www.ice.gov/detention-management (Accessed December 7, 2020).

Immigration and Customs Enforcement (2020a). *ICE guidance on COVID-19, ICE detainee statistics*, https://www.ice.gov/coronavirus (Accessed December 7, 2020).

Immigration and Customs Enforcement (2020b). *FY20 detention statistics*, https://www.ice.gov/doclib/detention/FY20-detentionstats.xlsx (Accessed December 7, 2020).

Immigration and Customs Enforcement (2020c). *Memorandum to detention warden and superintendents, coronavirus disease 2019 (COVID-19), action plan, revision 1, March 27, 2020*, https://www.aila.org/infonet/ice-memo-covid19-ice-dedicated-facilities (Accessed December 7, 2020).

Immigration and Customs Enforcement (2020d). *Updated guidance: COVID-19 detained docket review—effective immediately, April 4, 2020*, https://www.ice.gov/doclib/coronavirus/attk.pdf (Accessed December 7, 2020).

Immigration and Customs Enforcement (2020e). *FY21 detention statistics (tab titled "detention FY21 YTD")*, https://www.ice.gov/doclib/detention/FY21-detentionstats.xlsx (Accessed December 7, 2020).

Immigration and Customs Enforcement (2020f). *Enforcement and removal operations. COVID-19 pandemic response requirements, version 1.0 (updated on April 10, 2020)*,https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities-v1.pdf (Accessed December 7, 2020).

Immigration and Customs Enforcement (2020g). *Enforcement and removal operations. COVID-19 pandemic response requirements (version 5.0, Oct. 27, 2020)*, https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf (Accessed December 7, 2020).

Immigration and Customs Enforcement Health Service Corps (2020). *Interim reference sheet on 2019-novel coronavirus (COVID-19), version 6.0, March 6, 2020*, https://www.aila.org/infonet/ice-interim-reference-sheet-coronavirus (Accessed December 7, 2020).

Kullgren, I. (2020). ICE to scale back arrests during coronavirus pandemic, politico, mar. 18 https://www.politico.com/news/2020/03/18/ice-to-scale-back-arrests-during-coronavirus-pandemic-136800 (Accessed December 7, 2020).

Leung, J., Elson, D., Sanders, K., Marin, M., Leos, G., Cloud, B., et al. (2019). Notes from the Field: mumps in detention facilities that house detained migrants - United States, september 2018-august 2019. *MMWR Morb. Mortal. Wkly. Rep.* 68:749–750. doi:10.15585/mmwr.mm6834a4

Marouf, F. E. (2017). Alternatives to immigration detention, *Cardozo L. Rev.* 38, 101. doi:10.2139/ssrn.3048480

McClung, N., Chamberland, M., Kinlaw, K., Matthew, D. B., Wallace, M., Bell, B., et al. (2020). The advisory Committee on immunization practices' ethical Principles for allocating initial Supplies of COVID-19 vaccine—United States, 2020. *MMWR Morb Mortal Wkly Rep.* 69, 1782–1786. doi:10.15585/mmwr.mm6947e3

Meyer, J. P., Franco-Paredes, C., Parmar, P., Yasin, F., and Gartland, M. (2020). COVID-19 and the coming epidemic in US immigration detention centres. *Lancet Infect. Dis.* 20, 646–648. doi:10.1016/S1473-3099(20)30295-4

Muller, C., and Schrage, D. (2014). Mass imprisonment and trust in the law. *Annals Am. Acad. Polit. Soc. Sci.* 651, 139–158. doi:10.1177/0002716213502928

Olivo, A., and Miroff, N. (2020). *ICE flew detainees to Virginia so the planes could transport agents to D.C. protests. A huge coronavirus outbreak followed, Wash. Post., Sep 11, 2020*, https://www.washingtonpost.com/coronavirus/ice-air-farmville-protests-covid/2020/09/11/f70ebe1e-e861-11ea-bc79-834454439a44_story.html (Accessed December 7, 2020).

Ryo, E. (2019a). Detention as deterrence. *Stanford L. Rev. Online* 71, 237.

Ryo, E. (2019b). Understanding immigration detention: causes, conditions, and consequences. *Annu. Rev. L. Soc. Sci.* 15, 97–115. doi:10.1146/annurev-lawsocsci-101518-042743

Ryo, E. (2019c). Predicting danger in immigration courts. *L. Soc. Inq.* 44, 227–256. doi:10.1017/lsi.2018.20

Ryo, E., and Peacock, I. (2018). A national Study of immigration Detention in the United States, *S. Cal. L. Rev.* 92 (1), 39.

Sacchetti, M., and Hernández, A. R.. (2020). *ICE to stop most immigration enforcement inside U.S., will focus on criminals during coronavirus outbreak*, Washington, DC: Washington Post.

Schriro, D. (2020). *Declaration of dr. Dora schriro in support of petitioners' emergency petition for a writ of habeas corpus and motion for a temporary restraining order and/or preliminary injunction, dembele v. Prim, Case 1:20-cv-02401 (N.D. Ill. Apr. 17, 2020)*, https://www.aclu-il.org/sites/default/files/field_documents/declaration_of_schriro.pdf (Accessed December 7, 2020).

Seville, L. R., and Rappleye, H. (2020). *ICE keeps transferring detainees around the country, leading to COVID-19 outbreaks, NBC news, may 31, 2020*, https://www.nbcnews.com/politics/immigration/ice-keeps-transferring-detainees-around-country-leading-covid-19-outbreaks-n1212856 (Accessed December 7, 2020).

Solis, D.. (2020). *Virus began spreading in Texas detention center as positive immigrants were quickly transferred in from northeast, dallas morning news, apr 27, 2020*, https://www.dallasnews.com/news/public-health/2020/04/27/virus-began-spreading-in-texas-detention-center-as-positive-immigrants-were-quickly-transferred-in-from-northeast/ (Accessed December 7, 2020).

Solis, J., Franco-Paredes, C., Henao-Martínez, A. F., Krsak, M., and Zimmer, S. M. (2020). Structural vulnerability in the U.S. Revealed in three waves of COVID-19. *Am. J. Trop. Med. Hygv.103* 103, 25. doi:10.4269/ajtmh.20-0391

Stumpf, J. (2006). The crimmigration crisis: immigrants, crime, and sovereign power, *American U. L. Rev.* 56, 367–419.

U.S. Citizenship and Immigration Services (2020). *Congressional semi-monthly report 10-01-19 to 10-31-20*, https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions (Accessed December 7, 2020).

U.S. Customs and Border Protection (2020a). *FY 2020 nationwide enforcement Encounters: Title 8 enforcement actions and Title 42 expulsions*, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020 (Accessed December 7, 2020).

U.S. Customs and Border Protection (2020b). *U.S. Border patrol monthly enforcement Encounters 2021: Title 42 expulsions and Title 8 apprehensions*, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (Accessed December 7, 2020).

Weaver, V. M., and Lerman, A. E. (2010). Political consequences of the carceral state. *Am. Polit. Sci. Rev.* 104, 817–833. doi:10.1017/s0003055410000456

World Health Organization Regional Office for Europe (2020). *Preparedness, prevention, and control of COVID-19 in prisons and other places of detention, interim guidance, March 15, 2020*, https://apps.who.int/iris/bitstream/handle/10665/336525/WHO-EURO-2020-1405-41155-55954-eng.pdf?sequence=1&isAllowed=y (Accessed December 7, 2020).

Conflict of Interest: The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

Enforcement Actions and Title 42 Expulsions (FY 2020 and FY 2021).

frontiers in Human Dynamics

PERSPECTIVE
published: 17 November 2020
doi: 10.3389/fhumd.2020.592980

COVID-19 and Immigration: Reflections From the Penn State Law Center for Immigrants' Rights Clinic

Kaitlyn Box and Shoba Sivaprasad Wadhia*

Penn State Law, Pennsylvania State University, University Park, PA, United States

Since the 2016 Presidential Election, the Center for Immigrants' Rights Clinic (CIRC) at Penn State Law in University Park has been at the forefront of responding to rapidly changing immigration policies that include the "travel ban," efforts to end a policy called "DACA," policies to curb asylum at the southern border, and efforts to more easily exclude international students and scholars. Some of the tools CIRC has used to respond to these changes include easy to understand "fact sheets," in person and virtual "town halls," and legal support for individuals fighting deportation or seeking refuge. This essay will use CIRC as a case study to demonstrate how one set of student advocates used the same tools developed over 3 years of responding to ever-evolving immigration policies to respond to changes surrounding COVID-19. Specifically, we describe CIRC's responses to changes at international borders, stalemates in immigration detention, expansions to asylum restrictions, and the status of DACA at the Supreme Court. This article explains how the same responses that have long been used to address the current administration's immigration changes can also be used to respond to immigration policy changes resulting from the COVID-19 pandemic. This essay discusses how CIRC responded to each significant immigration policy change arising out of COVID-19, as well as explains how CIRC moved from an in-person to remote platform in spring 2020 alongside many law clinics across the country, shares reflections from those students, and offers lessons that can be drawn for legal education moving forward.

Keywords: immigration, COVID-19, clinical education, immigrants' rights, community lawyering

OPEN ACCESS

Edited by:
Jaya Ramji-Nogales, Temple University, United States

Reviewed by:
Lindsay Harris, University of the District of Columbia, United States
Peter Margulies, Roger Williams University, United States

****Correspondence:***
Kaitlyn Box
kub381@psu.edu

Specialty section:
This article was submitted to Refugees and Conflict, a section of the journal Frontiers in Human Dynamics

Received: *08 August 2020*
Accepted: *12 October 2020*
Published: *17 November 2020*

Citation:
Box K and Wadhia SS (2020) COVID-19 and Immigration: Reflections From the Penn State Law Center for Immigrants' Rights Clinic. Front. Hum. Dyn. 2:592980. doi: 10.3389/fhumd.2020.592980

COVID-19 AND IMMIGRATION

The COVID-19 pandemic has had a tremendous impact on immigration policy in the United States. The Immigration and Nationality Act, enacted in 1952, serves as the basis for U.S. immigration law but most of the changes made in the wake of COVID-19 have been through policies by federal agencies. A number of agencies are involved in the administration of the immigration laws. The Department of State (DOS) is primarily charged with issuing visas to individuals who wish to visit the United States temporarily or reside permanently in the United States. The Department of Homeland Security (DHS), which encompasses sub-agencies like U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement, is involved in immigration enforcement and overseeing lawful immigration into the United States. The Department of Justice (DOJ) contains the Executive Office for

Immigration Review (EOIR), a sub-agency that conducts removal proceedings in immigration court and hears appeals for individuals charged with violating the immigration law.

Beyond agencies, policy changes have also been made by the President through proclamations. Beginning in February 2020, President Donald J. Trump issued a number of proclamations that restrict the entry of individuals who had recently been present in countries impacted by COVID-19 into the United States[1]. Taken together, these proclamations banned entry by any national who had been in China, Iran, the Schengen Area, the United Kingdom and Ireland, or Brazil within 14 days preceding their entry into the United States[2]. This means that an international student attending a U.S. college or university who goes on a trip to Iceland will be barred from returning to the United States because of the proclamation. The proclamations included exemptions for U.S. citizens and permanent residents (green card holders), as well as their spouses and minor children[3].

As the pandemic worsened, the Department of State (DOS) on March 20, 2020 suspended all routine visa services at all embassies and consulates, which included canceling visa interviews[4]. This is significant because it means that individuals are in the final stages of their immigration process before receiving a visa are unable to move forward because of the suspension. DOS has indicated that embassies and consulates would continue to provide emergency services[5]. An example of an individual in need of emergency services might be a doctor who needs to travel immediately to assist in the treatment of COVID-19 patients[6]. H-2 visas, which allow employers in the United States to temporarily employ foreign workers in sectors such as agriculture on a seasonal, one-time, or intermittent basis continued to be as practicable[7]. The exemption for H-2 visas was granted in recognition of "the importance of the H-2 program to the economy and food security of the United States"[8].

The same day that the DOJ suspended visa services, the U.S. government reached two agreements, signed with Mexico and Canada, that suspended non-essential travel across the U.S. borders with these two countries for an initial period of 30 days[9]. The travel suspension has since been extended three times, and are currently in place until July 21, 2020[10]. CBP and DHS issued two rules implementing these agreements[11]. The CBP and DHS rules prohibited "non-essential" travel between Mexico or Canada and the United States, such as travel for tourism purposes, but exempted U.S. citizens and green card holders, as well as individuals traveling for essential purposes like healthcare and cross-border trade, from the restrictions[12].

Policy changes at the border have had a profound impact on asylum seekers. The Centers for Disease Control and Prevention (CDC) and the U.S. Department of Health and Human Services (HHS) issued a regulation and notice on March 20, 2020 that suspend the "introduction" into the United States of individuals who arrive at or between ports of entry without valid travel documents or permission[13]. Individuals who are subject to the rules will be expeditiously removed, or deported, to their home countries[14]. These regulations are inconsistent with a section of the immigration statute that allows any person to apply for asylum regardless of their status or the way that they entered the United States (Erfani, 2020). Between March 20 and September 9, 2020, over 159,000 people have been removed back to their home countries from the U.S. border[15].

On April 22, 2020, the Trump administration issued a Presidential Proclamation suspending the entry into the United States of individuals into the United States with the stated objective of preserving jobs for American workers in the face of the COVID-19 pandemic[16]. The Proclamation applies to individuals who were outside the United States on the effective date without a valid immigrant visa or other travel document[17]. The suspension does not apply to green card holders, spouses and children under age 21 of U.S. citizens, and healthcare professionals seeking to enter the United States on an immigrant visa to help combat COVID-19[18]. This proclamation is sweeping

[1] Proclamation No. 9984, 85 Fed. Reg. 6,709 (Jan. 31, 2020); Proclamation No. 9992, 85 Fed. Reg. 12,855 (Feb. 29, 2020); Proclamation No. 9993 (Mar. 11, 2020); Proclamation No. 9996, 85 Fed. Reg. 15,341 (Mar. 14, 2020); *see also* Presidential Proclamation on Novel Coronavirus, U.S. Dep't. St., Bureau of Consular Aff., https://travel.state.gov/content/travel/en/traveladvisories/ea/Presidential-Proclamation-Coronavirus.html.

[2] *Id.*

[3] *Id.*

[4] *Suspension of Routine Visa Services*, U.S. Dep't. St., Bureau of Consular Aff. (Mar. 20, 2020), https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html; *see also* Loweree et al. (2020).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Joint Statement on US-Canada Joint Initiative: Temporary Restriction of Travelers Crossing the US-Canada Land Border for Non-Essential Purposes*, Dep't. Homeland Security (Mar. 20, 2020), https://www.dhs.gov/news/2020/03/20/joint-statement-us-canada-joint-initiative-temporary-restriction-travelers-crossing; *Joint Statement on US-Mexico Joint Initiative to Combat the COVID-19 Pandemic*, Dep't. Homeland Security (Mar. 20, 2020), https://www.dhs.gov/news/2020/03/20/joint-statement-us-mexico-joint-initiative-combat-covid-19-pandemic; *see also* Loweree et al. (2020).

[10] *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus*, Dep't. Homeland Security (June 16, 2020), https://www.dhs.gov/news/2020/06/16/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus.

[11] Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 16,547; Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada, 85 Fed. Reg. 16,548.

[12] *Id.*

[13] The rules do not apply to U.S. citizens, lawful permanent residents, or individuals who have valid travel documents. *See* Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 42 C.F.R. Part 71; Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060.

[14] *Id.*

[15] *Impact of COVID-19 on the Immigration System*, ABA (Sept. 25, 2020), https://www.americanbar.org/groups/public_interest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system/.

[16] Proclamation No. 10052, 85 Fed. Reg. 38, 263 (Apr. 22, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-immigrants-present-risk-u-s-labor-market-economic-recovery-following-covid-19-outbreak/.

[17] *Id.*

[18] *Id.*

because it affects the vast majority of family and employment based immigration to the United States as well as admission through the diversity lottery program (Miroff and Young, 2020). On June 22, the White House extended the April proclamation through December 31, 2020 and added several temporary visa categories to the exclusionary order, including H1-B category for highly skilled workers[19].

Immigration processing within the United States has also been impacted by COVID-19. On April 24, 2020, USCIS suspended all in-person services like asylum interviews and naturalization ceremonies, until at least June 4, 2020[20]. Many biometrics, or fingerprinting, appointments were also canceled. USCIS indicated that it would rescheduled canceled interviews and use previously submitted fingerprints to process certain renewal applications[21]. However, the policy changes still caused delays for many immigrants seeking to become U.S. citizens (Loweree et al., 2020). Changes to the H-2A and H-2B visa processes also created complications for critical food-chain workers seeking to remain in the United States during the pandemic[22]. USCIS resisted pleas to grant automatic extensions, or otherwise act to prevent individuals from losing their valid immigration status as a result of the pandemic[23]. The agency resumed some in-person functions on June 4, 2020, subject to increased sanitation and social distances measures[24].

Immigration enforcement and detention in the United States also looked different in the face of COVID-19. Immigration and Customs Enforcement indicated that it would limit enforcement action against individuals during the pandemic, with the exception of those who pose a public safety risk or are subject to mandatory detention on criminal grounds[25]. ICE has also stated that it will not carry out immigration enforcement at hospitals or medical facilities, absent extraordinary circumstances[26]. However, ICE has continued to detain immigrants throughout the pandemic, posing serious health risks to detainees and ICE employees alike (Wadhia, 2020). At least four detainees and three ICE officers have died after contracting COVID-19 in ICE detention facilities as of August 2020, though the agency only counts deaths that take place in ICE custody (Cho, 2020; Glaun, 2020). Some ICE facilities have been the subject of allegations of egregious mistreatment of detained individuals, including the Farmville, Virginia facility, where nearly 90 percent of the detainees tested positive for COVID-19 and were reportedly treated only with Tylenol (Schwenk, 2020). Numerous individuals have been released from ICE custody as a result of legal efforts[27], but the situation is still dire for those who remain in detention (Cho, 2020; Wadhia, 2020).

CENTER FOR IMMIGRANTS' RIGHTS CLINIC RESPONSE TO COVID-19-RELATED POLICY CHANGES

The Center for Immigrants' Rights Clinic (CIRC) is an in-house clinic at Penn State Law in University Park whose mission is to advance immigrants' rights. Founded in 2008, students at CIRC work on three types of immigration work: (1) community outreach and education; (2) policy products for institutional clients; and (3) legal support in individual cases. Although the COVID-19 pandemic has brought a number of immigration policy shifts, the Trump administration has long been marked by numerous and ever-changing immigration law and policy changes. CIRC has been at the forefront of these developments for the past several years, and has developed a number of response tools, including fact sheets and frequently asked questions sheets (FAQs), town halls, and legal support for individuals fighting deportation or seeking refuge. Although these tools were developed to respond to rapidly-changing immigration law and policy more generally, CIRC adapted them for use in responding to COVID-19-related policy changes. The tools that have long been used by CIRC to respond to the Trump administration's immigration policies can also be useful in the face of COVID-19, and some of CIRC's key instruments can serve as a model.

The first tool that CIRC developed to respond to immigration law and policy changes is brief, easy-to-understand fact sheet and FAQ sheets that describe the key points of a new immigration law or policy, and address common questions or concerns. CIRC aims to produce these documents within 24 h after an immigration policy is announced, to ensure that the fact sheets are timely and combat the misinformation and fear that often surrounds new immigration policies. Students analyze the new policy document as soon as in becomes available, and learn by synthesizing the information and communicating it to the reader in a simplified way. In the past several years, CIRC has produced fact sheets and FAQs that address the various iterations of the travel ban, the rescission of the Deferred Action for Childhood Arrivals program (DACA), and family separation at the border, among other topics. More recently, CIRC partnered with the Office of the Presidents' Alliance on Immigration and Higher Education to produce fact sheets in response to a proposed rule that if implemented could change the landscape for international students in significant ways.

During the COVID-19 pandemic, CIRC put these same fact sheets to work in responding to COVID-19-related immigration

[19] *Id.*

[20] *USCIS Response to COVID-19*, U.S. Citizenship & Immigration Servs. (June 9, 2020), https://www.uscis.gov/about-us/uscis-response-covid-19.

[21] *Id.*

[22] *Id.*; *see also COVID-19 FAQ for Immigrants in Pennsylvania*, Center for Immigrants' Rights Clinic (May 22, 2020), https://pennstatelaw.psu.edu/sites/default/files/pictures/Clinics/Immigrants-Rights/COVID%20Immigration%20FAQ%20FINAL%20May%2022.pdf.

[23] *Id.*

[24] *USCIS Response to COVID-19*, U.S. Citizenship & Immigration Servs. (June 9, 2020), https://www.uscis.gov/about-us/uscis-response-covid-19.

[25] *ICE Guidance on COVID-19*, U.S. Customs & Immigration Enforcement (Apr. 7, 2020), https://www.ice.gov/coronavirus.

[26] *Id.*

[27] The ACLU has filed over 50 lawsuits to compel ICE to release individuals in detention, and the American Immigration Council (Council), together with the American Immigration Lawyers Association (AILA), filed a complaint with DHS arguing that ICE had failed to adequately protect detainees during the pandemic. *See* Cho (2020); *Complaint Details ICE's Failure to Protect Those in Its Custody Amid the COVID-19 Pandemic*, Am. Immigration L. Assn. (May 7, 2020), https://www.aila.org/advo-media/press-releases/2020/complaint-details-ices-failure-to-protect-those.

policy changes. CIRC produced fact sheets detailing each of the presidential proclamations suspending the entry of certain individuals into the United States, the CBP and DHS rules suspending tourist travel between Mexico and Canada and the United States, the CDC and HHS regulation and notice suspending the entry of individuals without valid travel documents, and the presidential proclamation suspending the entry of certain individuals to preserve jobs for American workers. CIRC also partnered with the Office of Global Programs at Penn State to produce facts sheets and "Question and Answer" documents to respond to policy changes announced by DHS in the name of COVID-19 as it relates to international students. One now rescinded policy would have forced international students remaining in the United States to leave the country or face deportation if their course of study in Fall 2020 was fully remote. These fact sheets served as an important informational resource for the community, given the ambiguous language of some of the policies and confusion surrounding their application to certain categories of individuals.

CIRC also conducts "town halls," or informational discussion forums to talk through new immigration laws or policies that have an impact on the community. Students prepare a short presentation that describes the new policy in easy-to-understand language, as anticipate common questions or concerns and prepare response, and curate additional resources. The townhalls are advertised in a variety of ways—on electronic mailing lists, CIRC's social media pages, and print and digital flyers. Although many attendees are part of the university community, town halls are typically open to interested members of the general public, as well. Participants are invited to share questions, and come away from the discussion with the tools to better understand a new policy and advocate for their own rights or those of immigrants in the community. Previous town halls have addressed topics ranging from DACA and the travel ban to immigration enforcement.

During the COVID-19 pandemic, CIRC's town halls moved online, but their purpose and utility remained much the same. CIRC organized one town hall, entitled COVID-19, & Our Community, through Zoom in April 2020. Students presented key updates on immigration topics including Immigration Services, immigration enforcement and detention, immigration courts, borders, U.S. consulates and embassies, public benefits and food security, and the CARES Act. Zoom's chat function was used to take questions from participants and moderate the question-and-answer portion of the event. While a live format offers the best opportunity to connect with participants at a town hall event, online town halls, like the event that CIRC hosted, serve the same goal of disseminating critical updates to the community and providing important resources, with the benefit of offering as many community members as possible an opportunity to listen in. Holding the town halls on a remote platform broadens their reach—interested participants from outside the State College area can now listen in, as can those who might have been prevented from attending a live event due to time constraints or other obligations.

The final tool that CIRC has used to respond to immigration policy changes in the pro bono representation of individuals clients who are challenging removal or seeking protection by the Department of Homeland Security and in the courts. CIRC has assisted with asylum, withholding of removal, and Special Immigrant Juvenile Status (SIJS) cases. Students assist in a variety of ways, including conducting legal research and analysis, drafting briefs, motions, and other legal documents, and interviewing clients.

While the methods CIRC used for meeting with clients changed during the COVID-19 pandemic, the need representation of clients challenging removal or seeking asylum in the United States did not. During the pandemic, CIRC had the opportunity to work with two new individuals. Students conducted initial interviews with the clients by phone or Zoom to learn more about their stories and immigration histories. CIRC students assisted in the preparation of legal documents that will help these individuals in their cases and gained valuable experience in building trust with a client despite the lack of in-person interaction.

COMMUNITY LAWYERING AND LEGAL EDUCATION

The work that CIRC does is an example of community lawyering, community legal education, and legislative lawyering, and can serve as an example for not only other law school clinics, but lawyers and organizations, as well. What follows is a brief survey of community lawyering and legislative lawyering literature. The roles CIRC students played have been named in the literature as a form of community lawyering (Tokarz et al., 2008). As described by one set of scholars "First, community lawyering involves formal or informal collaborations with client communities and community groups to identify and address client community issues. It assumes a community perspective in the consideration of legal problems"[28]. CIRC has partnered with a number of formal community groups like the borough of State College and the State College Area of School District. It has also worked informally with concerned local residents. These relationships have allowed CIRC to respond to specific needs of the community. In the wake of COVID-19 many of those needs centered on concerns about the immigration consequences of accessing local services like free or reduced lunches or a health clinic. Often, specific needs from the community are in response to fact sheets produced by CIRC or generated during or after a community forum.

The work by CIRC in the wake of COVID-19 is also a form of community legal education (Eagly, 1998; Johnson and Perez, 1998; Barry et al., 2012). As described by Ingrid Eagly, "Community education is a lawyering model grounded in theories of progressive practice that view client empowerment as one of the goals of social change" (Eagly, 1998). She presents community education as an "antipoverty strategy"[29]. Importantly, the community education provided by CIRC targets a broader group of people. For example, the CIRC town hall on COVID-19 and immigration drew affected community members like international students, faculty, retired teachers, and local residents. Defining "community" is important before an

[28] *Id.* at 363.
[29] *Id.* at 484.

education project is launched because it can shape the goal and the limits of any forum. Another benefit of community education is described by Barry et al. (2012) as follows: "incorporating community legal education into a clinical program with intentionality reinforces the principles that an important part of the lawyer's professional work involves teaching people about the law and the legal system."

Finally, the community-based work by CIRC is also a form of legislative lawyering. Coined by Chai Feldblum, "legislative lawyering" refers to the practice of law in a political, advocacy context. Feldblum identifies the following skills of a legislative lawyer "These stages are: assess the problem/issue; research the problem/issue; propose solutions and approaches; draft materials; and engage in oral presentations and negotiations." (Feldblum, 2003). The fact sheets and summaries produced by CIRC are often short and simple and yet, they are often the most challenging to write and the most sought after. Says Feldblum: "But no document should be viewed as too simple or too basic for a legislative lawyer. A legislative lawyer must have the capacity and the temperament to write both sophisticated legal documents and simple grassroots alerts-and to consider both as part of her job"[30]. She also underscores the importance of oral communication: "When a legislative lawyer is engaged in an explanatory communication, he must be able to convey the relevant information clearly and concisely. Time is the most precious commodity in the legislative arena; attention spans of listeners are often short. As in writing, a legislative lawyer must know a great deal of information, but must be able to convey only what the listener absolutely needs to know about the issue at that point"[31]. The delivery methods by CIRC on COVID-19 and immigration have often required clear and short communication. In the clinical setting, all three of these models—community lawyers, community education, and legislative lawyering often involve an institutional client such as a non-profit or school district[32].

CONCLUSION

COVID-19 has transformed immigration law and policy but the tools used by CIRC and in law clinics to address legal gaps or address unmet needs have been longstanding. This essay provides a summary of the key immigration changes made as a result of COVID-19, highlights the work of the Center for Immigrants' Rights Clinic, and revisits the multidimensional roles of law school clinics and lawyers.

AUTHOR CONTRIBUTIONS

SW served as the supervising author, reviewing drafts, proposing edits, conducting and overseeing research, and providing information on community lawyering. All authors contributed to the article and approved the submitted version.

[30] *Id.* at 812.

[31] *Id.* at 813.

[32] For an examination of the pedagogy for clinics representing institutional clients, *see generally*, Srikantiah and Martinez (2014).

REFERENCES

Barry, M. M., Camp, A. R., Johnson, M. E., and Klein, C. F. (2012). Teaching social justice lawyering: systematically including community legal education in law school clinics. *Clin. Rev.* 18:401. Available online at: https://scholarworks.law.ubalt.edu/all_fac/332/

Cho, E. (2020). *ICE's Lack of Transparency About COVID-19 in Detention Will Cost Lives*. Available online at: https://www.aclu.org/news/immigrants-rights/ices-lack-of-transparency-about-covid-19-in-detention-will-cost-lives/ (accessed September 30, 2020).

Eagly, I. (1998). Community education: creating a new vision of legal services practice. *Clin. Rev.* 4:433.

Erfani, A. (2020). *The Latest Brick in The Wall: How The Trump Administration Unlawfully 'Expels' Asylum Seekers & Unaccompanied Children in The Name of Public Health*. Available online at: https://immigrantjustice.org/staff/blog/latest-brick-wall-how-trump-administration-unlawfully-expels-asylum-seekers (accessed September 30, 2020).

Feldblum, C. R. (2003). The art of legislative lawyering and the six circles theory of advocacy. *McGeorge Rev.* 34:785. Available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2154992

Glaun, D. (2020). *How ICE Data Undercounts COVID-19 Victims*. Available online at: https://www.pbs.org/wgbh/frontline/article/how-ice-data-undercounts-covid-19-victims/ (accessed September 30, 2020).

Johnson, K. R., and Perez, A. (1998). Clinical legal education and the U.C. *davis immigration law clinic: putting theory into practice and practice into theory. SMUL Rev.* 51:1423.

Loweree, J., Reichlin-Melnick, A., and Ewing, W. A. (2020). *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System*. Available online at: https://www.americanimmigrationcouncil.org/sites/default/files/research/the_impact_of_covid-19_on_noncitizens_and_across_the_us_immigration_system.pdf (accessed September 30, 2020).

Miroff, N., and Young, T. (2020). *Trump, Citing pandemic, Orders Limits on Foreign Workers, Extends Immigration Restrictions Through December*. Available online at: https://www.washingtonpost.com/immigration/trump-immigration-workers-coronavirus/2020/06/22/3b969e88-b489-11ea-9b0f-c797548c1154_story.html (accessed September 30, 2020).

Schwenk, K. (2020). *The ICE Facility Where Almost Every Detainee Has Coronavirus*. Available online at: https://prospect.org/justice/farmville-ice-facility-almost-every-detainee-has-coronavirus/#: ~ :text=Almost%2090%20percent%20of%20detaineesFarmville%20detainees%20have%20been%20hospitalized (accessed September 30, 2020).

Srikantiah, J., and Martinez, J. (2014). Applying negotiations pedagogy to clinical teaching: tools for institutional client representation in law school clinics. *Clicical L. Rev.* 21:283. Available online at: http://www.law.nyu.edu/sites/default/files/upload_documents/Srikantiah%20%26%20Martinez%20-%20Negot%20Pedagogy%20in%20Clin%20Teaching.pdf

Tokarz, K., Cook, N. L., Brooks, S., and Blom, B. B. (2008). C*onversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*. Available online at: https://openscholarship.wustl.edu/law_journal_law_policy/vol28/iss1/11 (accessed September 30, 2020).

Wadhia, S. (2020). *Immigration in the Time of COVID-19*. Available online at: https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1239&context=books (accessed September 30, 2020).

Conflict of Interest: The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

frontiers in Political Science

ORIGINAL RESEARCH
published: 28 April 2021
doi: 10.3389/fpos.2020.592150

Flattening the Curve, Constitutional Crisis and Immigrants' Rights Protections: The Case of Israel

Tally Kritzman-Amir[1,2,3]*

[1] Department of Sociology, Harvard University, Cambridge, MA, United States, [2] Tally Amir, Cambridge, MA, United States, [3] Boston University School of Law, Boston, MA, United States

Despite being a small and relatively secluded country, managing the COVID-19 pandemic has so far been quite a challenge for Israel. This contribution seeks to explain how Israel had managed migration and the pandemic amidst a constitutional crisis between February and July 2020.

Keywords: Israel, Immigration and migration, refugees and asylum, migration for employment, family reunification, law and policy, Palestinians, Coronavirus

CLOSING BORDERS

The first Coronavirus patient was diagnosed in Israel in late February 2020, after having arrived from Italy[1]. This happened days after Israel started prohibiting entry of tourists from countries with high infection rates[2] and imposed quarantine requirements on Israeli nationals arriving from those countries. Yet despite this measure, in our globalized world, the pandemic penetrated Israel, proving the no matter how self-contained and closed-off states attempt to be, they inevitably maintain a significant degree of interdependence and interconnectedness, and are not able to avoid significant outside influences.

By March 2020, entry restrictions became broader, allowing only entry of nationals and residents[3] This impacted, for example, the ability to bring in new migrant workers, despite the fact that the Israeli economy is very much dependent on the availability of migrant workers in construction, agriculture, and the care sectors[4]. This also restricted the ability of spouses and children of Israeli citizens who are not nationals themselves to come to Israel in order to be with their family members[5], and impacting their ability to meaningfully enjoy their right to family life[6].

OPEN ACCESS

Edited by:
Jaya Ramji-Nogales, Temple University, United States

Reviewed by:
Michael Kagan, University of Nevada, United States
Itamar Mann, University of Haifa, Israel

***Correspondence:**
Tally Kritzman-Amir
tamir@bu.edu;
tamir@fas.harvard.edu

Specialty section:
This article was submitted to Refugees and Conflict, a section of the journal Frontiers in Political Science

Received: *06 August 2020*
Accepted: *21 October 2020*
Published: *28 April 2021*

Citation:
Kritzman-Amir T (2021) Flattening the Curve, Constitutional Crisis and Immigrants' Rights Protections: The Case of Israel. Front. Polit. Sci. 2:592150. doi: 10.3389/fpos.2020.592150

[1] Hilay, S., and Alon, A. *First Coronovirus Patient in Israel, Arrived from Italy Four Days Ago*, YNET (Feb. 27, 2020), https://www.ynet.co.il/articles/0,7340,L-5685621,00.html. Two persons who contracted the virus but were asymptomatic arrived to Israel before.

[2] Alon, A., and Blumental, I. *Israel Will Prevent Entrance of Foreigners Who Stayed in Thailand, Singapore, Macao and Hong Kong*, CALCALIST (Feb. 17, 2020), https://www.calcalist.co.il/local/articles/0,7340,L-3794333,00.html. Some tourists who were diagnosed with the Coronavirus visited Israel and infected locals who interacted with them. Blumental et al. *South Koreans Who Contracted Coronavirus Visited Israel*, YNET (Feb. 22, 2020), https://www.ynet.co.il/articles/0,7340,L-5682186,00.html; Ashkenazi, E. *The Bus Driver Who Contracted Coronavirus and Was in Severe State Has Recovered: "Toughest Month in My Life"*, WALLA! NEWS (Mar. 30, 2020), https://news.walla.co.il/item/3349605.

[3] Raz-Chaimovich, M. *Israel Closed Skies*, Globes (Mar. 8, 2020), https://en.globes.co.il/en/article-israels-closed-skies-1001321063.

[4] *See generally*, DRORI, I. FOREIGN WORKERS IN ISRAEL (2009).

[5] Stavrou, D. *This Is Discrimination – I Feel Like a Second-Class Citizen Because I Didn't Marry a Jew*, HAARETZ (July 6, 2020), https://www.haaretz.com/israel-news/.premium.MAGAZINE-in-israel-whoever-isn-t-jewish-doesn-t-get-anything-1.8970934.

[6] G.A. Res. 217(III) A, Universal Declaration of Human Rights, art. 16(3) (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 23(1), Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 10(1), Dec. 16, 1966, 993 U.N.T.S. 3.

Procedures allowing a limited possibility for non-nationals who are family members of Israeli citizens to enter the country for only published in late July, following massive pressure from the Israeli civil society and press[7].

CONSTITUTIONAL CRISIS, LEADERSHIP CRISIS

The pandemic outbreak occurred when Israel was also dealing with an unprecedented constitutional crisis[8]. Over the course of 1 year, Israel went through three cycles of elections due to the inability to form a majority government after the two first cycles. The third elections were held after the first Coronavirus patients were diagnosed in Israel, and just a few days before the economy shut down. The crisis of the pandemic deemed so severe to some of the elected officials as to justify breaking multiple election promises and forming a unity government[9]. In the process of shutting down the economy, different parties were holding discussions on possibilities of forming a government, a process that has proven to be challenging in the last few decades in Israel's parliamentary democracy system[10].

Initially, much of the COVID-19 emergency was thus handled by an interim government, the moral authority of which was met with massive public resistance[11]. The interim government was viewed with suspicion due to both the lack of ability to form a stable new government and the fact that even after the new unity government was formed, several of its ministers were facing criminal charges or undergoing criminal investigations, including the Prime Minister Benjamin Netanyahu himself. In addition, the interim government had a somewhat compromised authority to take some of the steps deemed necessary to manage the pandemic[12].

The constitutional crisis in Israel though was not limited to the executive and legislative branches. This process also occurred as the pressure was mounting on the Israeli judicial system. The right-wing political leadership in Israel delegitimized the Israeli courts on an ongoing basis, looking to pass an override clause to restrict its ability to conduct judicial review of primary legislation. This issue of judicial autonomy and the override clause was one of the issues in the negotiations between the parties which eventually formed the government[13]. It is worth mentioning that much of the legitimacy crisis of the Israeli court system had to do with its display of judicial activism in decisions on asylum policy, namely a series of decisions strike down legislation on immigration detention[14].

The exposed nerves of the relationships between the different branches of government were once again hit, leading to the eventual intervention of the Israeli High Court of Justice in various issues relating to the relationship between the legislature and the government having to do with the coalition formation process[15].

Finally, in the midst of this conundrum, Israel announced intentions to annex parts of the West Bank[16], an act that attracted significant international criticism[17]. While this intention has yet to materialize when this paper was written, this act, which would be a violation of international law, would, in all likelihood, impose another set of constitutional crises in Israel, as well as security issues and international pressures.

EMERGENCY LEGAL FRAMEWORK

It was in this constitutional atmosphere, Israel was forced to cope with the emerging Coronavirus crisis. The above-mentioned entry and immigration restrictions were, a small part of the picture: Between mid-March and early July Israel applied a mixed

[7]The Population and Immigration Authority, Entry to Israel Policy in the Coronavirus Period (March 19, 2020, update from July 28, 2020) https://www.gov.il/he/departments/news/border_closing_coronavirus_14062020. The policy allowed for some married couples and their children to re-enter Israel "after examination and in exceptional circumstances". However, it seems that the policy was not implemented immediately. Gur David, U. *The Skies are Closed and That's It, The State Continues to Deny Thousands of Israelis the Possibility of Reunification with Their Partners and Children,* HAMAKOM (July 23, 2020) https://www.hamakom.co.il/post-uriel-no-flights/.

[8]Bar Siman Tov, I. *Covid-19 Meets Politics: the Novel Coronavirus as a Novel Challenge for Legislatures*, 8 THE THEORY AND PRACTICE OF LEGISLATION 11-48 (2020); Ben Sales, *Israel Is Going Through a Constitutional Crisis*, JEWISH TELEGRAPHIC AGENCY (Mar. 24, 2020), https://www.jta.org/2020/03/24/israel/israel-is-going-through-a-constitutional-crisis.

[9]See, e.g., Hostovsky Brandeis, T. Israel's Perfect Storm: Fighting Coronavirus in the Midst of a Constitutional Crisis, VERFASSUNGBLOG (April 7, 2020) https://verfassungsblog.de/israels-perfect-storm-fighting-coronavirus-in-the-midst-of-a-constitutional-crisis/; Mordechay, N., and Roznai, Y. Constitutional Crisis in Israel: Coronavirus, Interbranch Conflict, and Dynamic Judicial Review, VERFASSUNGBLOG (April 8, 2020) https://verfassungsblog.de/constitutional-crisis-in-israel-coronavirus-interbranch-conflict-and-dynamic-judicial-review/; Sales, B. Israel is Going Through a Constitutional Crisis, FORWARD.COM (March 25, 2020), https://forward.com/fast-forward/442315/israel-is-going-through-a-constitutional-crisis/.

[10]Schneider, T. *Gantz: "We Will Establish a Coronavirus Cabinet Which Unfortunately Will Have to Function for a Long Period of Time. The Forum Will Include All Relevant Ministers"*, GLOBES (Apr. 21, 2020), https://www.globes.co.il/news/article.aspx?did=1001326095.

[11]Sharvit Baruch, P., and Beeri, O. *The Coronavirus Crisis in Israel: When an Epidemic Meets a Political Crisis*, INSS INSIGHT No. 1291 (Apr. 2, 2020), https://www.inss.org.il/publication/coronavirus-and-law-1/?offset=57&posts=1349&type=399; Landau, N. *It Is Indeed an Emergency Hour: We Should Not Allow Breach in Our Basic Principals in the Asupices of Coronavirus*, HAARETZ (Mar. 15, 2020), https://www.haaretz.co.il/health/corona/.premium-1.8675399.

[12]Altstein, G. *The Coronavirus Drama Is Too Big for a One Man Show*, CALCALIST (Mar. 16, 2020), https://www.calcalist.co.il/local/articles/0,7340,L-3801341,00.html.

[13]Shemesh, M. *Netanyahu Demands: NotwithStanding Clause to Secure His Service and Prevent Supreme Court Intervention*, KAN (Apr. 12, 2020), https://www.kan.org.il/item/?itemid=69534.

[14]Weill, R., and Kritzman-Amir, T. *Between Institutional Survival and Human Rights Protection: Adjudicating Landmark Cases of African Undocumented Migrants in Israel in a Comparative and International Context*, 41 U. PENN. J. INT'L L. 43 (2019).

[15]Wootliff, R. and TOI Staff. *High Court Orders Vote for New Knesset Speaker to go Ahead Thursday*, TIMES OF ISRAEL (Mar. 26, 2020), https://www.timesofisrael.com/high-court-orders-vote-for-new-knesset-speaker-to-go-ahead-thursday/.

[16]Al Jazeera and News Agencies. *Netanyahu Discusses Annexation Plan with Gantz: Report*, AL JAZEERA (June 18, 2020), https://www.aljazeera.com/news/2020/06/netanyahu-discusses-annexation-plan-gantz-report-200618083806812.html.

[17]Tidey, A. *More Than 1,000 European MPs Call for Israel Annexation to Be Halted and Warn of 'Consequences'*, EURONEWS (June 24, 2020), https://www.euronews.com/2020/06/24/more-than-1-000-european-mps-call-for-israel-annexation-to-be-halted-and-warn-of-consequen.

approach of acute emergency measures enforcing closures[18], restricting economic activity[19], an extremely strict approach to physical distancing[20], alongside with minimal economic assistance to persons whose financial stability was compromised due to the resulting changes in the labor market[21].

Initially, the reliance on emergency regulations was almost inevitable since Israel did not have a functioning parliament or parliamentary committees in March, and its health laws were ill-fitted to introduce the restrictions necessary to deal with the public health situation at hand[22]. However, this behavior pattern institutionalized, and resulted in a wide-scale long-term emergency regulatory crisis. As research by Nir Kosti demonstrates, in the first 3 months of the attempts to address the Coronavirus pandemic, the Israeli Government quickly passed 38 emergency regulations, and amended them 64 times[23]. This unusually high number of emergency regulations was dramatically high and unprecedented even for a country like Israel. Israel has been in a constant state of general emergency since 5 days after declaring its independence 1948, and has since normalized the use of emergency regulations, but never were so many of them enacted in such a short period of time[24]. Those regulations were passed in a quick, secretive manner, without much public or parliamentary debate, and without outlining any clear considerations or explaining the scientific basis for the imposed restrictions. The emergency regulations covered restrictions on freedom of movement, on the labor market, and on the operation of the court system; introduction of physical distancing requirements; tracing of persons tested positive with the virus; and management of the economic crisis. The emergency regulation seemed trivial, and were treated by the Israeli Prime Minister Netanyahu as a necessary measure to overcome the "bureaucracy" of passing legislation in the Israeli Parliament[25].

Nevertheless, this massive use of emergency regulations did not go unnoticed. The Attorney General of the State of Israel criticized the massive use of the emergency regulations, calling to rely on primary legislation to the extent possible[26]. Some members of the Israeli public demonstrated against the use of the regulations[27]. Finally, several Israeli human rights organizations petitioned against some of those regulations, and some of those petitions were successful in the Israeli High Court of Justice[28].

NEVERTHELESS, IMMIGRATION

Inevitably, despite the pandemic, the vast emergency measures and the above-mentioned constitutional crisis, the issue of immigration could not be sidelined in Israel, even in a time like this.

Just like in non-pandemic days, the characteristics of Israel's immigration policy are a big part of the character of the state. It is easy to understand the Israeli immigration and asylum regime if we imagine a spectrum. On one end of the spectrum there are immigrants who are included in the Israeli society and the welfare state and receive access to status. On the other end are those migrants who are excluded from Israel, and thus are not able to acquire status or access to the Israeli welfare state. I will provide a short overview of the meaningful categories of migrants in the Israeli immigration regime and explain how the challenges of the pandemic have met each of the particular categories.

Jewish Migrants or Olim and Family Members of Israeli Citizens

On the inclusive end of the spectrum are Jewish migrants and their relatives who migrate under the Law of Return[29]. The most fundamental component of Israel's immigration laws, the general premise of which is that "Every Jew has the right to come to this country as an *oleh* [an ascender, Jewish new comer–t.k.a]"[30]. This notion corresponds to the nature of Israel as a Jewish and democratic state, as proclaimed in its

[18] Kaplan Sommer, A. *Explained: Shutdown, Curfew in Israel's Toughest Coronavirus Restrictions to Date*, HAARETZ (Apr. 7, 2020), https://www.haaretz.com/israel-news/new-coronavirus-guidelines-edging-israel-closer-to-total-lockdown-1.8683889; *but see* Ruth Eglash and Steve Hendrix, *Israeli Lawmakers Move Quickly on New Government After Court Endorses Netanyahu's Coalition*, WASHINGTON POST (May 7, 2020), https://www.washingtonpost.com/world/middle_east/israel-high-court-allows-netanyahu-to-form-a-government-despite-indictment/2020/05/07/82dd0dde-901e-11ea-9322-a29e75effc93_story.html.

[19] Schneider, T., and Ashkenazi, S, *The Next Step on the Agenda: Wide Lockout of the Market*, GLOBES (Mar. 13, 2020), https://www.globes.co.il/news/article.aspx?did=1001321717.

[20] Global Legal Monitor. *Israel: COVID-19 Social Distancing Requirements Tightened*, LIBRARY OF CONGRESS (Apr. 1, 2020), https://www.loc.gov/law/foreign-news/article/israel-covid-19-social-distancing-requirements-tightened/.

[21] Surkes, S. *Israel's Coronavirus Aid Package Only Half That of Similar Developed Nations*, TIMES OF ISRAEL (May 7, 2020), https://www.timesofisrael.com/israels-coronavirus-aid-package-only-half-that-of-similar-developed-nations/.

[22] Kosti, N. *Emergency Regulations: Contemporary and Historic Look*, ICON-S-IL-BLOG (July 7, 2020), https://israeliconstitutionalism.wordpress.com/2020/07/07/%d7%aa%d7%a7%d7%a0%d7%95%d7%aa-%d7%a9%d7%a2%d7%aa-%d7%97%d7%99%d7%a8%d7%95%d7%9d-%d7%9e%d7%91%d7%98-%d7%a2%d7%9b%d7%a9%d7%95%d7%95%d7%99-%d7%95%d7%94%d7%99%d7%a1%d7%98%d7%95%d7%a8%d7%99-%d7%a0/?fbclid=IwAR2bd3ulM-3OucJzx1bFwf9AR_AYfg7q2XFa39Na8IPnkN0tm-uYkaU6RFg.

[23] *Id.*

[24] *Id.*; Margalit, L. *Emergency Powers and Parliamentary Monitoring in the Coronavirus Crisis: Comparative Survey*, ISRAEL DEMOCRACY INSTITUTE (May 7, 2020), https://www.idi.org.il/articles/31524?fbclid=IwAR2xdN3X_rBvEzSspcS4wmkxKaqRicQxlr7A_tK8tWIVp8EV0WLYRCVtaHM.

[25] *PM Netanyahu's Statement to the Media*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (July 2, 2020), https://mfa.gov.il/MFA/PressRoom/2020/Pages/PM-Netanyahu-s-statement-to-the-media-2-July-2020.aspx.

[26] Gorali, M. *Mandelblit to Netanyahu: Promote Legislation to Coping with Coronavirus Instead of Emergency Regulations*, CALCALIST (Apr. 6, 2020), https://www.calcalist.co.il/local/articles/0,7340,L-3806478,00.html.

[27] Toi Staff. *Hundreds protest against Netanyahu, contentious emergency virus bill in Tel Aviv*, THE TIMES OF ISRAEL (June 5, 2020), https://www.timesofisrael.com/hundreds-protest-against-netanyahu-contentious-emergency-virus-bill-in-tel-aviv/.

[28] *Annul Emergency Regulations Allowing Tracking Upon Citizens*, ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL (Apr. 6, 2020), https://www.acri.org.il/post/__387; *After Adalah's Petition to the Supreme Court: Netanyahu Repeals Emergency Regulations That Allowed Employers to Dismiss Pregnant Women During Coronavirus Period*, ADALAH (Apr. 17, 2020), https://www.adalah.org/he/content/view/9988.

[29] Law of Return, 5710-1950, SH No. 51 p. 159.

[30] *Id.* art. 1.

declaration of independence[31] and in Israel's basic laws[32], which translates into an effort to maintain a Jewish majority[33]. Under the corresponding naturalization norms, the Nationality Law, citizenship is granted automatically to those who immigrate to Israel under the Law of Return. Non-returnees have a limited ability to acquire citizenship[34].

After the pandemic outbreak, Israeli authorities announced an increase in the applications for *oleh* status, though it is unclear how significant this increase is. Numbers ranged from a two percent increase in *Aliya* to up to a fifty percent increase[35]. Some have argued that the Coronavirus outbreak is an opportunity to induce *aliya* – Jewish migration or return – to Israel, given the economic crisis in many countries, which also hit some of the Jewish communities[36]. At the same time, others provided data supporting the conclusion that *aliya* to Israel will actually decrease[37]. This hope of potential *aliya* was celebrated by many in Israel. Israel, in fact, encouraged the arrival of some Jewish non-citizens, with the hope of serving them as the Jewish home. In July, the Israeli government approved the massive arrival of thousands of Ultraorthodox students under relaxed quarantine rules[38]. This created a situation which some might perceive as an anomaly, in which persons who are outsiders to the national community (but insiders to the ethnic-religious community) are allowed to enter the country even at a high cost for public health, while the entry of insiders to the national community (such as non-citizen nuclear family members of nationals, who are ethnic-religious outsiders by virtue of being non-Jewish) is restricted[39]. Attempts to challenge this inconsistent and discriminatory policy in Court failed, as the Court deferred to the government on this matter, finding that individuals may petition regarding their individual cases rather than challenge the policy in its entirety[40].

Migrant Workers

Under the Israeli immigration regime, non-Jews do not hold a right to immigrate to Israel, and their entry to the state is restricted through the Entry to Israel Law[41]. Non-Jewish persons would typically not be able to naturalize in Israel.

Further down from the inclusive end of the spectrum we would find the category of non-Jewish migrant workers. Since the early 1990s Israel has invited migrant workers to enter its territories for employment in agriculture, construction, industry and care sectors for a limited period of time[42]. The migrant workers comprise a significant part of the Israeli labor market and employers became dependent on their available labor[43]. Nevertheless, they are not fully included in the Israeli society and welfare state, are largely isolated and are eligible for only a few of the socio-economic rights and benefits that Israeli nationals enjoy access to[44]. Generally speaking, migrant workers are only rarely perceived in the fully capacity of their humanity, but rather are perceived in terms of their labor force and their utility to their employers.

An overtly simplified perception of the best interest of the employer was the underlying logic of all the policy measures that addressed the rights of migrant workers. Most measures addressed the concerns of the employers in the care sector, where the intimate connection and the pre-existing health conditions of the employers are cause for concern. Despite the mostly-closed border policy, attempts to freeze entry of labor migration were not completely successful, and eventually the Population and Immigration Authority allowed for migrant workers who left Israel for vacation to return to Israel, subject to quarantine requirements[45]. Later on, newly recruited migrant workers were also allowed to enter Israel to work in the care sector[46], and

[31] Declaration of the Establishment of the State of Israel, 1 L.S.I. 3 (1948).

[32] See, e.g., Basic Law: Human Dignity and Liberty, § 1, SH No. 1391 p. 150 (according to which "[t]he purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.").

[33] On the connection between being an Israeli state and maintaining a Jewish majority in Israel, see the Interim Report of the Advisory Committee on Israel's Immigration Policy 3-6 (Feb. 7, 2006) [in Hebrew] (copy on file with author). This committee was appointed by the former minister of interior and headed by Prof. Amnon Rubinstein.

[34] Nationality Law, 5712-1952, SH No. 95 p. 146.

[35] Jean, C. *20% Increase in Demand for Aliyah Following the Coronavirus Crisis*, Jerusalem Post (May 21, 2020), https://www.jpost.com/diaspora/20-percent-increase-in-demand-for-aliyah-following-the-coronavirus-crisis-628759; *20% Increase in Demand for Aliyah Following the Coronavirus Crisis, Record Number of Olim Landed This Morning in Israel*, Ministry of Aliyah and Integration (May 25, 2020), https://www.gov.il/he/departments/news/aliyah_1952020; Yalon, Y. *Olim Flight from the U.S. Landed in Israel*, Israel Hayom (June 9, 2020), https://www.israelhayom.co.il/article/769323; Knesset News, *Estimations of 50,000 Olim This Year, Almost Twice, and the Ministries Budgets Were Not Enlarged*, Knesset (June 16, 2020), https://main.knesset.gov.il/News/PressReleases/Pages/press16062020I.aspx.

[36] Feiglin, M. *Coronavirus Is an Opportunity to Complete the Return to Zion in a Big Aliyah Wave*, Haaretz Blogs (Apr. 27, 2020), https://www.haaretz.co.il/blogs/radical/BLOG-1.8799555.

[37] Experts Writing. *Will the Coronavirus Spread Create Waves of Aliyah and Return to Israel*, Bizportal (July 7, 2020), https://www.bizportal.co.il/bizpoint-sponsored/news/article/781990; Waxman, A. *Of the Coronavirus Victims: The Aliyah to Israel Decreased by 42%*, The Marker (July 12, 2020), https://www.themarker.com/news/macro/1.8988205.

[38] Amit, H. *Thousands of Yeshiva Students to Be Let Into Israel, Under Relaxed Quarantine Rules*, Haaretz (July 26, 2020) https://www.ha-makom.co.il/post-uriel-no-flights/.

[39] The entry of family members of citizens was limited to exceptional cases. See: The Entry to Israel Policy during the Period of the Coronavirus (June 14, 2020), available at: https://www.gov.il/he/departments/news/border_closing_coronavirus_14062020. This restriction was placed despite the fact that this impacts the right to family life of the Israeli citizens.

[40] HCJ 5692/20 Helit Kovetski vs. The Minister of Interior (September 9, 2020), available at: https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts%5C20%5C820%5C056%5Ce06&fileName=20056820.E06&type=2&fbclid=IwAR2xIulxFLYQPMidhSpW67EGVFs8tNgiCV71a1JZZwls4CuFaICLjZBU5X4 [in Hebrew]. HCJ 5628/20 Plia Katner vs. The Ministry of Interior (September 14, 2020) (on file with author) [in Hebrew].

[41] Entry into Israel Law, 5712-1952, SH No. 111 p. 354.

[42] Bartram, D. *Foreign Workers in Israel: History and Theory*, 32 Int'l Migration Rev. 303 (1998).

[43] Natanzon, R., et al. Immigrant Workers and Non-Israelis in the Israeli Labor Market (2017), http://www.macro.org.il/images/upload/items/16423344100905.pdf.

[44] Kritzman-Amir, T. "*Otherness" as the Underlying Principle in Israel's Asylum Regime*, 42 Isr. L. Rev. 306 (2010).

[45] Letter by Inbal Mashash, Foreign Workers Administration Director, *Framework for the Entry of Foreign Workers in the Care Sector Who Are Presently Staying in Vacation Outside Israel* (May 20, 2020) [on file with author].

[46] The Population and Immigration Authority, Announcement of the Expansion of the Plan to Allow Entry of Migrant Workers in the

migrant workers in the agriculture sector were also allowed to return to Israel from their vacation[47].

Various restrictions were temporarily imposed on the ability of migrant workers in the care sector who work in nursing homes[48]. One such restriction was a general prohibition on care workers to leave the nursing home premises, except in unusual circumstances[49]. Additionally, migrant workers were subjected to daily monitoring of their health situation, and required to wear PPA at all times[50]. All considerations of the workers' right to privacy, freedom of movement, and autonomy[51] were sidelined or utterly disregarded by both risk-averse employers and officials. As physical distancing requirements were eased, and due to intense pressures of migrants' rights NGOs, eventually migrant workers were allowed to leave their workplaces to enjoy some time off. However, they were still barred from staying in shared apartments, in which most of them had stayed in before the pandemic outbreak[52]. This restriction effectively meant that migrant workers were not able to stay outside of their employer's house for more than a few hours at a time, since most were not able to afford renting out their own place. In the tense and stressful situation of coping with a global crisis of massive scale and a demanding job, this restriction was another dimension of difficulty to an already physically and emotionally tasking situation.

Asylum Seekers

Further down the immigration policy spectrum are asylum seekers. Israel is currently hosting more than thirty thousand asylum seekers, mostly from Eritrea and Sudan[53], referred to by the government as "infiltrators." Despite being a party to the Convention and the Protocol since their entry into force, Israel has yet to incorporate its international law obligations to refugees into its domestic law, and has only started conducting Refugee Status Determination (RSD) on its own in 2009[54]. Most of the asylum seekers have arrived in Israel since the middle of the first decade of the twenty-first century through its southern, continental border with Egypt in an undocumented manner[55]. Since 2010, many of them were subjected to a difficult journey *en route* to Israel, which for many included a period of time during which they were held captive by their smugglers, tortured, raped, and enslaved to extort money from their families[56]. In 2013, this border became virtually impossible to cross with the erection of a border fence[57].

Asylum seekers enjoy a fragile status in Israel, and most are protected from deportation under temporary collective arrangements[58]. Generally speaking, Israel has been applying various means of exclusion on the asylum seeking population, including strict border policies[59]; extended periods of immigration detention for those who enter in an undocumented manner[60]; denial of social and economic rights, as well as political participation[61]; continuous attempts resettlement (voluntarily and forcibly) to third countries[62]; geographical limitations, restricting their ability to work or reside in certain urban areas[63]; heavy taxation[64]; issuance of work permit which do not grant asylum seekers the right to vote, but include an implicit commitment to refrain from enforcing the prohibition to employ them on the employers[65]; extremely low recognition rates (0.1%)[66]; and imposition of bureaucratic hurdles and

Care Sector (July 13, 2020) https://www.gov.il/he/departments/policies/extending_plan_to_allow_entering_of_caregivers.

[47]The Population and Immigration Authority, Announcement on the Conditions for Application for Allowing the Return of Migrant Workers in the Agriculture Sector Who Left for Vacation in Their Country with Intervisa (July 23, 2020) https://www.gov.il/BlobFolder/policy/return_application_for_foreign_workers_with_intervisa/he/%D7%9B%D7%A0%D7%99%D7%A1%D7%AA%20%D7%A2%D7%95%D7%91%D7%93%D7%99%20%20%D7%90%D7%99%D7%A0%D7%98%D7%A8%D7%95%D7%99%D7%96%D7%94%20%D7%97%D7%A7%D7%9C%D7%90%D7%95%D7%AA.pdf.

[48]Gamzu, R. Magen for Our Fathers and Mothers 133, art. 11.1.3 (Apr. 20, 2020) https://govextra.gov.il/media/17274/elderly-care-covid19.pdf.

[49]*Id.* at 133, art. 11.1.3.1.

[50]*Id.* at 133, art. 11.1.3.2-5.

[51]Migrant workers are granted the right to privacy, freedom of movement and autonomy under Israeli constitutional law. *See* Basic Law: Human Dignity and Liberty, SH No. 1391 p. 150. Also, since Israel is a party to the International Covenant on Civil and Political Rights, they are also eligible to those rights under international law. International Covenant on Civil and Political Rights, *supra* note 7, art. 12, 1.

[52]*Notice for Foreign Workers Who Live in the House of the Patient*, Ministry of Health (May 8, 2020), https://www.gov.il/he/departments/news/080520_01.

[53]Population and Immigration Authority, Foreigners in Israel Data, Edition 1/2020 (Apr. 2020), https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/%D7%A0%D7%AA%D7%95%D7%A0%D7%99%20%D7%96%D7%A8%D7%99%D7%9D%20%D7%91%D7%99%D7%A9%D7%A8%D7%90%D7%9C%20%D7%A8%D7%91%D7%A2%D7%95%D7%9F%201%202020.pdf. The state's authorities and the Court use the term 'infiltrators' to describe the asylum seeking population, but, in our view, a more accurate term would be "asylum seekers," since the latter term focuses more on the purpose of these people's arrival in Israel rather than on the way they reached the country.

[54]Before that was only partially involved in a hybrid RSD process administered by the United Nations High Commissioner for Refugees (UNHCR). Harel, S. *The Asylum Apparatus of Israel: The Process of Transferring the Responsibility for Handling Asylum Applications from the United Nations High Commissioner for Refugees to the State of Israel*, *in* Where Levinski Meets Asmara: Social and Legal Aspects of Israel's Asylum Policy 43 (Kritzman-Amir, T., ed., 2015) (in Hebrew).

[55]*Id.*

[56]Human Rights Watch, "I Wanted to Lie Down and Die": Trafficking and Torture of Eritreans in Sudan and Egypt (Feb. 11, 2014), https://www.hrw.org/report/2014/02/11/i-wanted-lie-down-and-die/trafficking-and-torture-eritreans-sudan-and-egypt.

[57]Population and Immigration Authority, *supra* note 48.

[58]Kritzman-Amir, T. *Introduction*, *in* Where Levinski Meets Asmara: Social and Legal Aspects of Israel's Asylum Policy, *supra* note 49, at 9, 23-25.

[59]On the border policy see Kritzman-Amir, T., and Spijkerboer, T., *On the Morality and Legality of Borders*, 26 Harv. J. Hum. Rts. 1 (2013).

[60]Berman, Y. *Detention of Refugees and Asylum Seekers in Israel*, *in*Where Levinski Meets Asmara: Social and Legal Aspects of Israel's Asylum Policy, *supra* note 49, at 147.

[61]Kritzman-Amir, *supra* note 53, at 23, 33.

[62]https://reliefweb.int/report/israel/israel-forced-and-unlawful-israels-deportation-eritrean-and-sudanese-asylum-seekers.

[63]Kritzman-Amir, *supra* note 53, at 34.

[64]Reuters, *New Tax in Israel Leaves African Migrants Feeling Unwanted and Unwelcome*, Jerusalem Post (July 3, 2017), https://www.jpost.com/Israel-News/New-tax-in-Israel-leaves-African-migrants-feeling-unwanted-and-unwelcome-498648.

[65]Public Advocacy, *Employment*, Assaf, http://assaf.org.il/en/node/139 (last visited July 21, 2020).

[66]Kritzman-Amir, *supra* note 53, at 26.

constantly changing policies[67]. These exclusion mechanisms are deliberate with the goal of deterring asylum seekers from reaching Israel in first place, and deterring those who do reach Israel from staying[68]. As a result, the majority of the asylum seekers are in a liminal situation in which they are physically present but legally absent and, in the foreseeable future, they have no chance of obtaining a stable civil status that will allow them to plan their future, build their lives, or settle down. The Israeli asylum regime has been the subject of critique by the UNHCR, Court, academia, and administrative bodies, among others[69].

This liminal situation had direct economic implications on the asylum seeking communities even before the pandemic. Not only were asylum seekers struggling to find non-precarious employment due to their status, but they were also facing a financial struggle, mostly due to the so-called "deposit law"[70]. The law required asylum-seekers to "deposit" one-fifth of their salaries each month with the state and made these salaries available only upon their departure from the country. In addition, under the "deposit law" employers were required to transfer additional 16 percent of the salaries to the deposit – instead of paying an equivalent amount on the benefits they were eligible to receive from their employers according to Israeli employment laws. This imposition on the already-low salaries of asylum seekers has already jeopardized their stability[71]. The constitutionality of this law was challenged by a coalition of human rights organizations in a petition to the Israeli High Court of Justice shortly after the law entered into force in May 2018[72].

But due to massive furloughs and business closures among asylum seekers, poverty approached a scope that could no longer be alleviated by community mutual aid mechanisms[73]. Many of them worked in the restaurant industry, which suffered a significant blow when physical distancing requirements were put in place[74]. They were not eligible to many of the welfare benefits which are extended to nationals. Their severance payments were not made available, since, as per the "deposit law," employers transfer severance pay of asylum seekers into the "deposit," even in this situation during which it was clear that leaving Israel is not a viable option in the foreseeable future[75]. Many asylum seekers were struggling to find adequate housing to quarantine in, as many of them lived in overcrowded, poorly ventilated shared spaces[76]. Having lost their employment, they have also lost their health insurance, and were not eligible for services of the national health care system, which, despite its claim to be universal, was limiting services only to citizens and residents[77].

This crisis in the asylum seeking communities did not go unnoticed. The Israeli government considered in April 2020 relaxing measures of economic pressure to push asylum seekers out of Israel in order to address the emergency situation, but was hesitant to legislate the amended regulations necessary to relieve the pressure off the asylum seeking population, for fear of political dissatisfaction of its base[78]. The main concern was that this measure will be perceived as a normalization or acceptance of the presence of asylum seekers in Israel, in contrast to the wide and intensive efforts to exclude them[79].

As in the past, the Israeli High Court of Justice, became once again an important institution in which migrants' rights NGOs challenge governmental policies. The Court, on the one hand, was well-experienced in judicial review in emergency situations, and, on the other hand, gained reputation (and suffered loss of legitimacy in the Israeli public) for repeatedly nullifying aspects of the immigration policies when those defied constitutional human rights obligations[80]. It is in this particular legal-political climate that the High Court of Justice issued its decision to strike down parts of the "deposit law" as unconstitutionally violating the right to property of asylum seekers in a disproportionate

[67] Paz, Y. *Ordered Disorder: African Asylum Seekers in Israel and Discursive Challenges to an Emerging Refugee Regime* (New Issues in Refugee Research, Research Paper No. 205, 2011), http://www.unhcr.org/research/working/4d7a26ba9/ordered-disorder-african-asylum-seekers-israel-discursive-challenges-emerging.html.

[68] Yaron-Mesegene, H. *Divide and Conquer Through Order and Disorder: The Politics of Asylum in Israel – Bureaucracy and Public Discourse*", *in* Where Levinski Meets Asmara: Social and Legal Aspects of Israel's Asylum Policy, *supra* note 49, at 88.

[69] See, e.g., UNHCR, UNHCR's Position on the Status of Eritrean and Sudanese Nationals Defined as 'Infiltrators' by Israel, UNHCR 1–2 (Nov. 2017), https://www.refworld.org/docid/5a5889584.html; AdminA 8908/11 Asefu v. The Ministry of Interior, ¶ 16 (2011) (opinion of Justice Vogelman); HCJ 7146/12 Adam v. the Knesset, 64(2) PD 717, ¶ 9 (Justice Arbel) (2013); State Comptroller's Annual Report 68c, Chapter 2: On Minister of Interior—The Population and Immigration Authority: The Treatment of Political Asylum Seekers in Israel, 1428 n.19 (May 2018) (in Hebrew), http://www.mevaker.gov.il/he/Reports/Report_627/8eaa80a0-a426-4424-aefa-8fdc4e8b176a/221-zarim-2.pdf; Where Levinski Meets Asmara: Social and Legal Aspects of Israel's Asylum Policy, *supra* note 49.

[70] Law for the Prevention of Infiltration (Offenses and Jurisdictions) (Legislative Amendments and Temporary Order), 5774-2014, SH 2483 p. 84. Following a petition to the High Court of Justice, the Israeli government introduced some easements, allowing to place a more modest amount in the deposits of vulnerable asylums seekers, such as women,s single fathers, the elderly and minors. Migrant Workers' Regulations Types of Cases and Conditions That If Materialized the Infiltrator Migrant Worker Would Be Eligible to Reciee the Deposit Prior to Leaving Israel for a Non-Temporary Exit, 5778-2018, KT No. 8042 p. 2486.

[71] Kritzman-Amir, T., and Rothman-Zecher, K. *Mainstreaming Refugee Women's Rights Advocacy*, 42 Harv. J. L. & Gender 501, 546 (2019).

[72] Petition and Amicus Brief in HCJ 2293/17 Ester Tsegay Gresgeher v. Knesset (Isr.) (in Hebrew) [on file with author].

[73] Yaron, L. *Without a Room for Isolation or Money for Food: Asylum Seekers Need to Deal Alone With Coronavirus*, Haaretz (Mar. 24, 2020), https://www.haaretz.co.il/health/corona/.premium-MAGAZINE-1.8703263.

[74]

[75] Physicians for Human Rights et al., Effects of Coronavirus Pandemic on Asylum Seekers in Israel (2020), https://hotline.org.il/wp-content/uploads/2020/03/25.3-%D7%94%D7%A9%D7%9C%D7%9B%D7%95%D7%AA-%D7%9E%D7%92%D7%A4%D7%AA-%D7%94%D7%A7%D7%95%D7%A8%D7%95%D7%A0%D7%94-%D7%A2%D7%9C-%D7%9E%D7%91%D7%A7%D7%A9%D7%99-%D7%9E%D7%A7%D7%9C%D7%98-.pdf.

[76] *Id.*

[77] *Id.*

[78] Zvi Cohen, N. *"Give Them Their Money Back"*, Davar (Apr. 17, 2020), https://www.davar1.co.il/217962/.

[79] Schleifer, D. *Dangerous Coronavirus Grant: Israeli Government Considers Giving Each Infiltrator on Account of Their Return Grant*, Chadshot HaMeshek (Apr. 16, 2020), https://www.meshekil.com/ReadNews/gocpGavpa-%D7%90%D7%A8%D7%92%D7%95%D7%A0%D7%99-%D7%94%D7%A9%D7%9E%D7%90%D7%9C-%D7%A0%D7%9C%D7%97%D7%9E%D7%99%D7%9D-%D7%91%D7%A9%D7%91%D7%99%D7%9C-%D7%9E%D7%A2%D7%A0%D7%A7%D7%99%D7%9D-%D7%91%D7%A9%D7%95%D7%95%D7%99-%D7%90%D7%9C%D7%A4%D7%99-%D7%A9%D7%A7%D7%9C%D7%99%D7%9D-%D7%9C%D7%9E%D7%A1%D7%AA%D7%A0%D7%A0%D7%99%D7%9D-.

[80] Weill & Kritzman-Amir, *supra* note 14.

manner[81]. In the closing paragraph of her opinion, Chief Justice Hayut, who wrote the majority opinion in this case, mentioned that the Court stands behind its holding as a general matter, but that the pandemic outburst and its economic implications on this disempowered population give additional force to the decision[82].

This decision thus, stands against the common wisdom, which suggests that courts would be inclined to extend deference to the executive and legislative[83], and thus would be ineffective guardians of human rights in situations of emergency, fearing loss of legitimacy should they intervene in the management of the crisis[84]. In fact, it seems that it is the emergency that allowed the Court to reach this decision, without fearing loos of legitimacy. Interestingly, the Court's decision received little news coverage and public attention[85] and thus infringed the Court's legitimacy to a minimal degree. In the last few years the Court has made continuous, seemingly conscious attempts to preserve its legitimacy and appear to be respectful of sovereign decisions in the realm of immigration. In this case, whether intentional or not, it was probably an institutionally solid strategic move on the Court's end to publish the decision in the height of the pandemic. This way, its decisions managed to fly under the radar of the majority of the population in Israel, and — to some extent — the Israeli government and parliament, which were too busy dealing with the pandemic and the constitutional crisis. Additionally, the decision received additional publically-needed justification, in light of the dire situation and the immediate need to alleviate the pressure off the asylum seeking communities. To some extent, the constitutional crisis in Israel and the emergency situation triggered by the pandemic have paradoxically made it possible to protect the rights asylum seekers in an otherwise challenging environment. The bigger questions of the lack of access of asylum seekers to the Israeli welfare state was not fully addressed yet by either the government or the Court, and thus asylum seekers continue to struggle even after the decision of the Court.

Palestinians

On the far end of the spectrum is the most excluded population: Palestinian migrants. Shortly after the 1967 war, during which Israel occupied the West Bank and Gaza, Israel started allowing Palestinians from these occupied territories to come into Israel as frontier workers[86]. While their employment in Israel was often restricted for various political and security related reasons, the ability to employ Palestinians became an important feature of the Israeli economy[87]. Similarly, the income generated from employment in Israel constitutes an important contribution to the Palestinian economy[88].

For many years, Palestinians who used to reside in what is now Israel prior to its independence and their descendants had a very limited ability to acquire citizenship[89], since those who fled Israel before or during the 1948 war[90] were ineligible for citizenship. Perhaps most importantly, the possibility of naturalization for Palestinians and enemy nationals, even for the purpose of family reunification, has been almost completely blocked by temporary legislation, which has been renewed over the course of 18 years, but for rare and exceptional circumstances[91]. Despite judicial challenges to the legislation, it was upheld twice by a slim majority in the Supreme Court[92].

Palestinians are also most likely to lose their citizenship status, since one of the grounds on which citizenship may be revoked is entering into enemy countries or acquiring citizenship in one of those countries, in which many of the Palestinian citizens of Israel have family ties or other affiliations[93]. Calls for broadening the authority to revoke the citizenship of Palestinians are often heard within the judicial process or the public debate[94], and the few rare occasions on which citizenship has been revoked involved Palestinian citizens[95]. It should also be noted that

[81] HCJ 2293/17 Gersegher vs. the Knesset, ¶¶ 32-52 to the opinion of President Hayut, https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts%5C17%5C930%5C022%5Cv53&fileName=17022930.V53&type=2.

[82] *Id.* at ¶ 61 to the opinion of President Hayut.

[83] DYZENHAUS, D. The Constitution of Law: Legality in a Time of Emergency, 18-19 (2006).

[84] See, e.g., ROSSITER, C., and LongakeR, R. THE SUPREME COURT AND THE COMMANDER-IN-CHIEF 52 (expanded ed. 1976); Cole, D. Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis 101 Mich. L. Rev. 2565, 2568-2571 (2003).

[85] See, e.g., Yaron, L. *HCJ Instructed the Annulment of Deposit Law That Obliges Asylum Seekers to Withdraw 20% of Their Paycheck*, Haaretz (Apr. 23, 2020), https://www.haaretz.co.il/news/law/.premium-1.8793832; Grinzaig, A. *HCJ Annuled Deposit Law That Obliges Asylum Seekers to Withdraw 20% of Their Paycheck,* Globes (Apr. 23, 2020), https://www.globes.co.il/news/article.aspx?did=1001326446; Milman, O. *HCJ Annulled Asylum Seekers' Deposit Law*, Calcalist (Apr. 23, 2020), https://www.calcalist.co.il/local/articles/0,7340,L-3810354,00.html; Freidson, Y., and Alon, A. *HCJ Annuled the Privision of "Deposit Law" That Cuts Infiltrators' Wages to Promote Leaving*, Ynet (Apr. 23, 2020), https://www.ynet.co.il/articles/0,7340,L-5719803,00.html; Levy, A. *Deposit Law Invalidated: "HCJ Stops Every Attempt to Protect State Sovereignty"*, Mida (Apr. 23, 2020), https://mida.org.il/2020/04/23/%D7%97%D7%95%D7%A7-%D7%94%D7%A4%D7%99%D7%A7%D7%93%D7%95%D7%9F-%D7%A0%D7%A4%D7%A1%D7%9C-%D7%91%D7%92%D7%A5-%D7%91%D7%95%D7%9C%D7%9D-%D7%9B%D7%9C-%D7%A0%D7%99%D7%A1%D7%99%D7%95%D7%9F-%D7%9C%D7%94/.

[86] Mundlak, G. Power-Breaking or Power-Entrenching Law? The Regulation of Palestinian Workers in Israel, 20 Comp. Labor L. & Pol'y J. 569 (1999).

[87] *Id.*

[88] Farsakh, L., Palestinian Labor Migration to Israel: Labour, Land and Occupation 76-90, 117-41 (2005).

[89] Nationality Law, *supra* note 35 §§ 3-3a.

[90] The question of whether the Palestinians fled Israel voluntarily or whether they were forced to leave by the State of Israel has been well-debated by historians and falls beyond the scope of this paper. *See* Morris, B., The Birth of the Palestinian Refugee Problem, 1947-1949 (1989).

[91] Nationality and Entry into Israel (Temporary Order) Law, 5763-2003, SH 1901 p. 544. The existence of such rare and exceptional circumstances is supposed to be considered by a committee, but such exceptions are rarely recognizaed.

[92] HCJ 7052/03 Adalah—The Legal Center for Arab Minority Rights in Israel v. Minister of Interior, 61(2) PD 202 (2006); HCJ 466/07 M.K. Galon v. Attorney General (2012), https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/07/660/004/o30&fileName=07004660_o30.txt&type=2.

[93] Nationality Law, supra note 35, §§ 11.

[94] See, e.g., HCJ 2934/07 Israel Law Center v. The Chair Person of The Knesset (2007), https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/07/340/029/M06&fileName=07029340_m06.txt&type=2; HCJ 7803/06 Abu Arfe v. The Minister of Interior (2017), https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/06/030/078/m42&fileName=06078030.m42&type=2.

[95] Letter from Adv. Oded Feller, Association of Civil Rights in Israel, to the Legal Advisor of the Ministry of Interior 6 (Jan. 10, 2007) (on file with author).

a significant number of Palestinians do not have citizenship status, but rather hold an inferior residency status, which they can easily lose if they relocate, even temporarily, to another country[96] and which carries only limited rights and partial participation in the Israeli welfare state. To put it differently, Israel's immigration and citizenship regime are engaged in the exclusion and "othering" Palestinians[97].

When it comes to migration for employment, Palestinians – as frontier workers – are even more excluded than the other migrant workers, as they are not eligible for some of the (few) rights protections that are afforded to migrant workers and expected to receive them at their homes. It is therefore interesting how Israel approached the issue of employment of Palestinians during the Coronavirus outbreak. At the peak of the pandemic outbreak, when Israelis were asked to shelter in place and borders were by and large closed, Israel imposed a closure on the West Bank and Gaza[98]. It also placed restrictions on Palestinian workers, allowing them to continue working in Israel but prohibiting their return to their homes for several weeks at a time[99]. To some extent, the prohibition to return home turned Palestinian frontier workers to migrant workers and was somewhat counterintuitive. It ran against the decades of efforts to exclude Palestinian workers and make them as temporary, as excluded and as disposable as possible. Yet this measure allowed for Palestinians to have a longer presence than usual in Israel. Aiming to protect the Israeli public, this step also protected the Palestinians, who reported that a significant number of those tested positive for COVID-19 contracted the virus during their employment in Israel[100]. At the same time, this forced people to make a tough choice between providing for their families or staying with them in a tense and challenging time. Additionally, the requirement from Palestinian workers to remain in Israel was not accompanied by any form of inclusion in the Israeli welfare state. Thus, amidst this global health crisis, Palestinians were not offered either access to the national healthcare system, nor were their employers required to provide health insurance for them[101]. The result was that Palestinians who were suspected to have contracted the virus had no recourse in Israel, and were dumped by their Israeli employers, in an act triggered by fear and disregard, next to checkpoints, at the hope that they would be picked up by Palestinian ambulances[102]. Additionally, employers were not held to any significant standard regarding the type of housing they need to provide, and the immediate result was that workers often resided in their work places[103]. Generally speaking, there was no authority overseeing the employment conditions and access to rights of Palestinians workers in this tense time[104].

This practice was challenged in a petition to the Israeli High Court of Justice, requiring that Palestinian workers be provided adequate housing, health insurance[105]. Additionally, the petition required monitoring of the conditions of the Palestinian employees[106]. In response to the petition, the government issued emergency regulations, requiring provision of health insurance, setting clear guidelines for physical distancing and adequate housing standards[107]. In addition, employers were instructed to refrain from confiscating identity documents of their employees, which was previously required, allegedly by mistake, since it is illegal according to Israeli law[108]. Nevertheless, it seems that enforcement of these regulations is partial at best, and Palestinians continue to face difficult challenges during their employment in Israel[109].

CONCLUSION

This paper is written as the number of persons tested positive for the Coronavirus is rapidly increasing in Israel. Though initially able to respond quickly and "flatten the curve" in the spring of 2020, Israel has become quite vulnerable to the pandemic come summer 2020[110].

It is often true that through examination of immigration policy – a policy directed at vulnerable persons on the edge of society – we learn a lot about the society as a whole. It is also true

[96] See, e.g., Adm.Pet. (Jerusalem) 384/07 Siaj v. The Minister of Interior (2008) (regarding the loss of residency of a person who left Israel to study abroad); Adm.Pet. (Jerusalem) 247/07 Omri v. The Minister of Interior (2010) (regarding the loss of residency of a person who left Israel to live with a spouse in his country of citizenship and wanted to regain his residency following the divorce).

[97] Kritzman-Amir, *supra* note 41.

[98] Petition in HCJ 2730/20 Kav Laoved V. The Ministry of Health, ¶ 24 (Apr. 28, 2020) (in Hebrew, on file with author).

[99] *Update Notice for Employers of Palestinian Workers in Agriculture in Light of the Coronavirus Crisis*, Ministry of Agriculture and Rural Development (June 28, 2020), https://www.moag.gov.il/subject/covid19/Pages/palestinian_worker.aspx; Rasheed, Z., et al., *WHO Reports Record Daily Surge in Global Coronavirus Cases: Live*, Al Jazeera (July 10, 2020), https://www.aljazeera.com/news/2020/07/mexico-south-africa-post-record-coronavirus-cases-live-updates-200710000611381.html.

[100] Rasheed et al., *supra* note 92.

[101] Petition in HCJ 2730/20 Kav Laoved V. The Ministry of Health, ¶¶ 1-8 (Apr. 28, 2020) (in Hebrew, on file with author).

[102] Al-Waara, A. *'They Dumped Him Like Trash': Palestinian with Suspected Coronavirus Symptoms Thrown Out of Israel*, Middle East Eye (Mar. 23, 2020), https://www.middleeasteye.net/news/coronavirus-palestine-labourer-found-near-west-bank-checkpoint-covid19.

[103] Yaron, L., and Shezaf, H., *While the Public is at Home, Construction Workers Are Sent to Work – Unprotected*, Haaretz (Mar. 19, 2020), https://www.haaretz.co.il/health/corona/MAGAZINE-1.8689671; Ayyub, R. *Palestinian Workers Find Temporary Israeli Abodes in Coronavirus Crisis*, Reuters (Mar. 23, 2020), https://www.reuters.com/article/us-health-coronavirus-israel-palestinian/palestinian-workers-find-temporary-israeli-abodes-in-coronavirus-crisis-idUSKBN21A2BS.

[104] Shezaf, H. *Israel Doesn't Oversee Palestinian Workers' Health Amid Coronavirus*, Haaretz (Apr. 20, 2020), https://www.haaretz.com/israel-news/.premium-israel-doesn-t-oversee-palestinian-workers-health-amid-coronavirus-1.8783881.

[105] Petition in HCJ 2730/20 Kav Laoved V. The Ministry of Health (Apr. 28, 2020) (in Hebrew, on file with author).

[106] *Id.*

[107] Emergency Regulations (Novel Coronavirus) (Medical Insurance and Adequate Housing for Workers from the Territories), 5780-2020, KT 8536.

[108] Ministry of Agriculture and Rural Development, Important Update Notice For Employers of Palestinian Workers in Agriculture in Light of the Coronavirus Crisis 3 (2020), https://www.moag.gov.il/subject/covid19/Documents/update_palastinian_workers.pdf.

[109] Hasson, N. Garbage Recycling Factory in Jerusalem Forced Palestinian Workers to Sleep in Its Territory in Fear of Lockdown, Haaretz (July 14, 2020), https://www.haaretz.co.il/health/corona/.premium-1.8991956?fbclid=IwAR1P1wuqm7azZtDkfIiZf-BhVe4HCnymo_k2Z_C452KbOH-2SqoIikG_SVY.

[110] Kershner, I. *After Early Success, Israel's Netanyahu Faces Fury for Flubbing Virus Fight*, New York Time (July 24, 2020), https://www.nytimes.com/2020/07/24/world/middleeast/israel-virus-protests-netanyahu.html.

that we can learn a lot about a society by looking at its operation in crisis mode. Both of those elements are demonstrated in this paper. The pandemic management did not focus on immigration, but inevitably touched it. It touched it in a way that to some extent builds on the existing approach to the different categories of migrants. Arrival or even expression of desire to arrive of Jewish migrants was celebrated, despite the lack of data on the scope of the phenomenon, and even though some of those arriving were sick or on the brink of destitution – and to some extent because of that. This was seen as a fulfillment of the raison d'etre of the state of Israel — to be a home for the Jewish population of the world. Absorption agencies were prepared, planning for those arrivals. Israel seemed willing to pay a public health and economic price for allowing the arrival of additional Jewish immigrants.

The treatment of non-Jewish migrants was impacted by the government through a different sort of calculus, with a single focus on the immediate, over-simplified perception of utility to the Israeli employers and the Israeli economy, and little attention to the needs and rights of the migrants. Emergency regulations and responses were hastily done, without sufficient thought given to their broad implications. Thus, migrant workers were required not to leave the nursing homes they work in out of concern for their employer, and in an effort to prevent spread of the virus in nursing homes, but without sufficient thought to the psychological impact of such restriction, and how that would impact the quality of care provided to the elderly employers. Only a negotiation with the migrants' rights NGOs brought to an easement of the restrictions. Negotiations with employers ended up with gradually opening possibilities for migrant workers to return to working in Israel or to arrive to work in Israel for the first time.

Asylum seekers were largely neglected, untouched, and forced to be self-sufficient in a situation in which they had no access to employment. Their neglect in this difficult situation was challenging for the communities, and ultimately backfired as their inability to shelter-in-place in an adequate manner translated into growing number of contractions of COVID-19 in the asylum seeking communities[111].

Palestinian workers were required to almost immediately make a decision to stay in Israel in order to continue their work, but no adequate thought was given to their safety or health situation, or to the issue of their need for housing. In this case too, the negotiations with the NGOs and the pressure of a Court decision resulted in the enactment of regulations to address all of these matters. This oversight was perhaps a result of the constitutional crisis in Israel, or just a result of the many challenges of managing this situation. But to some extent, this oversight reflects the perception of non-Jewish migrants in terms of their labor market contribution, rather than in terms of their complex, rich and demanding humanity.

Through the management of the pandemic, the volatile nature of Israeli immigration policy was exposed. It is a policy formed in response to pressures from employers, NGOs and Courts, in a dispersed, incoherent manner. In a country that does not have a codified immigration law, this is a well-expected and well-known dynamics. Interests in exclusion were sometimes outweighed by economic, religious, and health considerations, whereas in other time they weren't. Most of the decisions were done absent a public debate, through regulations, memorandums and procedures, without parliamentary supervision. The responsive, erratic, changes immigration policy occurred in a time in which predictability and organization were crucial for economic planning in a crushed economy; human rights preservation in a country undergoing a constitutional crisis; and public health management in a world dealing with a global pandemic, and are a cause for concern.

At the same time as the policies during the pandemic have thus far been in line with those taken with respect to the different groups of migrants, the pandemic presented to be an opportunity to alter some fundamentals of the Israeli immigration regimes. In its shadow, the Court felt confident enough to strict down the unconstitutional "deposit law," which also violated asylum seekers rights under international law, without suffering from a significant loss of legitimacy. Additionally, the pandemic brought a historic change to the employment patterns of Palestinians in Israel, turning frontier workers to migrant workers and allowing them some access to the Israeli welfare state. It remains to be seen to what extent some of those alterations will institutionalize for the long-term.

DATA AVAILABILITY STATEMENT

The original contributions presented in the study are included in the article/supplementary materials, further inquiries can be directed to the corresponding author/s.

AUTHOR'S NOTE

Visiting Assistant Professor, Boston University School of Law (2020-2021); Visiting Associate Professor, Harvard University Department of Sociology (2018-2021); Senior Lecturer, The College of Law and Business, Israel. LL.B and Ph.D., Tel Aviv University School of Law, Israel. I am grateful to the feedback provided by the reviewers of this paper, the editor of this volume, and Prof. Daphne Hacker. As always, I am thankful for the thorough editing of Dr. Keren Yalin-Mor. The description in this paper reflects the changes in immigration policies which took place until the submission of this paper, in August 2020

AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

[111] Bar-Tuvia, S., and Drori Avraham, A. *There Is a Responsible Body for the Rise in Coronavirus Among Asylum Seekers*, YNET (June 14, 2020), https://www.ynet.co.il/articles/0,7340,L-5747284,00.html.

FUNDING

Part of a COVID19 Research Topic. This article is fully waived.

Conflict of Interest: The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

frontiers in Human Dynamics

PERSPECTIVE
published: 08 October 2020
doi: 10.3389/fhumd.2020.584486

Does Evidence-Based EU Law Survive the Covid-19 Pandemic? Considering the Status in EU Law of Lockdown Measures Which Affect Free Movement

*Gareth Davies**

Department of Transnational Legal Studies, Faculty of Law, Vrije Universiteit Amsterdam, Amsterdam, Netherlands

When Member States restrict free movement on public health grounds they must show that their measures have a sound scientific basis. However, during the pandemic Member States have imposed a wide variety of restrictions, at the border, and internally. While Member State governments have invariably had local scientific advice, the variety of their measures suggests that their actions have also been driven, to some extent, by public opinion, contrary to what EU law generally allows. This situation could be seen as a defeat for EU law as traditionally conceived, and the triumph of local preferences over scientific standards. Perhaps we learn that in a crisis, local desires for symbolic security and closure trump both law and science. Alternatively, it can be argued that the Court of Justice's emphasis on exclusively objective justifications for measures is unrealistic and over-strict. The pandemic responses show that (i) science is often neither clear nor determinative, and (ii) policy is invariably a mix of science and values, even in apparently technical fields. In either case, the absence of legal challenges to Member State actions leaves free movement in an uncertain state. Have we entered a new phase, where national fears are a more legitimate justification for restricting movement, or will the pandemic be treated as so exceptional as to be beyond law, and thus not a precedent?

Keywords: EU law, free movement of persons, evidence-based lawmaking, COVID-19, lockdowns, pandemic (COVID-19), treaty derogations, public health

OPEN ACCESS

Edited by:
Iris Goldner Lang,
University of Zagreb, Croatia

Reviewed by:
Dimitry Kochenov,
University of Groningen, Netherlands
Adam Lazowski,
University of Westminster,
United Kingdom

***Correspondence:**
Gareth Davies
g.t.davies@vu.nl

Specialty section:
This article was submitted to Migration and Society, a section of the journal Frontiers in Human Dynamics

Received: *17 July 2020*
Accepted: *21 August 2020*
Published: *08 October 2020*

Citation:
Davies G (2020) Does Evidence-Based EU Law Survive the Covid-19 Pandemic? Considering the Status in EU Law of Lockdown Measures Which Affect Free Movement. Front. Hum. Dyn. 2:584486. doi: 10.3389/fhumd.2020.584486

INTRODUCTION

EU law traditionally has an evidence-based bias, at least in theory (Dawson, 2016) and EU legislation must satisfy objective tests of effectiveness and necessity[1]. Analogous constraints are imposed on Member States when they restrict free movement (Chalmers et al., 2019, p. 828–837). However, during the pandemic Member States have imposed a wide variety of restrictions, at the border, and internally (OxCGRT., 2020). These have had significant social effects, impacting most harshly on the less wealthy, urban, those at risk of domestic abuse, and those without residence rights, who are particularly imprisoned by their fear of controls. While Member State governments have invariably had local scientific advice, the variety of their measures suggests that they cannot all be seen as purely scientific responses to public health needs. They have also involved a degree of political responsiveness to local majoritarian fears and desires.

[1] Article 5 TEU; *Fedesa*, Case C-331/88 EU:C:1990:39.

Usually in EU law the Court of Justice rejects apparently scientific arguments tailored to public wishes, and seeks to separate objective public health needs from local preferences[2]. However, despite some criticism from EU Commissioners there has been no significant legal challenge to national measures.

This could be seen as a defeat for EU law doctrine, and the triumph of local preferences over scientific standards. Perhaps, in a crisis, local desires for symbolic security and closure trump both law and science. Alternatively, it can be argued that the traditional line in EU law is unrealistic and over-strict. The pandemic responses show that (i) science is often neither clear nor determinative, and (ii) policy is invariably a mix of science and values, even in apparently technical fields.

In either case, the absence of legal challenges leaves free movement law in an uncertain state. Have we entered a new phase, where national fears are a more legitimate justification for restricting movement, or will the pandemic be treated as so exceptional that it has no precedential value?

THE EVIDENTIAL REQUIREMENTS IMPOSED BY EU FREE MOVEMENT LAW

The European Union endorses an evidence-based vision of law. EU legislation must comply with procedural and substantive requirements aiming to ensure it effectively addresses genuine needs and does not go beyond this (European Commission, 2015; Meuwese, 2017). The mere fact of popular desire for a measure does not make it legal.

Proposed harmonization measures therefore undergo an impact assessment, which is a structured and technocratic assessment, rather than a political judge of desirability (Meuwese, 2017). A measure may even be annulled after adoption it if does not comply with requirements of objective necessity and effectiveness.

These constraints follow from the nature of EU competences: it is typically granted powers to achieve a specific goal, rather than merely to take measures of a certain type or within a certain field. The exercise of its powers is only legitimate where it actually contributes to that goal (Davies, 2015).

This purpose-limitation arises because the EU is a creature of conferred powers[3]. It may only act within the range of its purposes because the alternative, to give it an open-ended democratic mandate such as a state enjoys, would eliminate any legal constraint on full federal integration of the Member States into a unitary legal order (Davies, 2018). The day may come when this is seen as desirable, but for the moment, constraints on EU power remain prominent in the EU Treaties.

The emphasis on goal-oriented, evidence-based law is also found in Court of Justice caselaw reviewing national measures, particularly those restricting free movement between the Member States. The caselaw now contains a number of principles which subject national law to the same "objective" and "scientific" scrutiny to which EU law is accustomed.

These principles apply whenever Member States take measures which impact, directly or indirectly, on free movement[4]. Not only explicit restrictions on crossing borders are caught, but also other measures which in practice make it harder for individuals or companies to engage in cross-border activities (Tryfonidou, 2014).

These principles aim to ensure that restrictions on movement are genuinely necessary, and not covert protectionism or xenophobia. However, the law goes beyond uncovering disreputable motives. It also examines domestic laws to see whether their goals can be achieved in ways that are less restrictive of movement and more compatible with openness (Tryfonidou, 2014)[5]. Consequence for "outsiders" are often neglected when national law is made. Free movement law re-opens insular regulatory processes (Maduro, 1998).

As this implies, measures restricting free movement cannot be legally justified merely by popular support. Many national measures enjoying widespread domestic support and sometimes deep cultural roots have been ruled incompatible with EU law because they were not justified in sufficiently objective and scientific terms[6]. That the *Rheinheitsgebot* was a part of German history was not only insufficient, it was not even apparently relevant, when that measure was successfully challenged as a restriction on imported beer[7].

The public mood was addressed in *Commission v France*, where French farmers sought to exclude foreign agricultural produce[8]. When France was finally—after years of problems–sued for failing to remove protesters and clear the roads for foreign trucks, it claimed that such measures could lead to popular uprisings and a breakdown in public order. The Court of Justice found that such justifications could only be accepted in extreme cases, and the burden was on the state to show that it was incapable of maintaining order without the measures in question. In this case, France lost. The public desire for strong action, and for closure, could, in theory, legitimate a measure but only if the evidence is convincing that without that measure public order would break down.

Even where a measure is justified by reference to science, that does not mean it escapes scrutiny. Restrictions imposed in the name of public health must be based on demonstrable scientific arguments, corresponding to international scientific consensus[9]. Where states rely on a domestic scientific consensus that is out of tune with the international scientific community, the Court has ruled this unlawful[10]. Science is not, in principle, nationally specific.

Where, however, science is not yet conclusive, Member States are free to differ in their understandings, and may take

[2] *Commission v United Kingdom* (Newcastle Disease), 40/82, EU:C:1982:33.
[3] Article 5(1) TEU.
[4] *Gebhard*, C-55/94 ECLI:EU:C:1995:411.
[5] *Cassis de Dijon*, 120/78, ECLI:EU:C:1979:42.
[6] E.g., *Zoni*, 90/86, ECLI:EU:C:1988:403; *Commission v Denmark* (Danish Bottles) 302/86 ECLI:EU:C:1988:421; *Garcia Avello,* C-148/02, ECLI:EU:C:2003:539; *Coman*, C-673/16, ECLI:EU:C:2018:385.
[7] *Commission v Germany* (German Beer), 178/84, ECLI:EU:C:1987:126.
[8] *Commission v France* (French Farmers), C-265/95, ECLI:EU:C:1997:595.
[9] *Commission v Netherlands* (Vitamins), C-41/02, ECLI:EU:C:2004:762; *Geraets-Smits and Peerbooms*, C-157/99, ECLI:EU:C:2001:404.
[10] *Geraets-Smits and Peerbooms*, above.

any position that can be objectively defended—even if other approaches are possible too. In the absence of a mainstream consensus on the safety of vitamins added to food, the Court found that it was for each Member State to decide its own position, provided that their choice was defensible on scientific grounds and not just an expression of political will (Nic Shuibhne and Maci, 2013)[11].

Also, where a risk is in issue, Member States may choose to tolerate different degrees of that risk[12]. The degree of safety or security that a population demands in different contexts can vary and such national differences are generally respected. That is provided, however that the measures they take correspond objectively to the chosen level of risk. The burden is on Member States to demonstrate this, using substantive or procedural evidence or both (De Witte, 2013), or to cease applying their measures. The legal frame applied here is the proportionality principle—the requirement that the measure has a legitimate goal, is an effective way of pursuing this goal, and does not go beyond what is necessary or effective.

These principles are applied with varying degrees of intensity. Where constitutional or national values are put forward to justify restrictions, the Court is often surprisingly, perhaps problematically, deferential (Kochenov, 2018)[13]. However, the more severe the restrictions on movement involved, the less likely such deference becomes. Moreover, and most relevant here, where an apparently objective and science-based justification is put forward, such as the protection of public health, evidential requirements will generally be applied strictly (Chalmers et al., 2019, p. 842). If a state claims to be following the science, it will have to show that this is the case.

MEASURES TAKEN BY MEMBER STATES TO PREVENT SPREAD OF COVID-19

The Existence of Variation in Approach Between Member States

All Member States of the EU have taken measures to limit the pandemic. Common features include hygiene and social distancing, restrictions on cross-border and domestic movement and on time spent outside, and closures of non-essential businesses. However, the particular combinations of measures, and the severity of restrictions, have varied greatly from state to state (OxCGRT., 2020). There has also been considerable variation in how and when states have begun to relax their restrictions (Pacces and Weimer, 2020; Van Elsuwege, 2020).

The question here is how this variation fits the framework of the law. One might expect that a response based on scientific best practice would be largely uniform from country to country. It may seem that at least some Member States must have been not really following the science (Van Elsuwege, 2020). That would raise the question whether their measures were compatible with EU law (Carrera and Chun Luk, 2020).

However, it is suggested here that policy variations can be explained in ways that fit existing law. Four explanations are considered below. Just one, the last, raises uncomfortable questions about free movement doctrine and its future. The explanations are:

(i) Scientific advice varies between states
(ii) Populations differ in their preferences regarding risk and liberty
(iii) Policies are tailored to local circumstances and attitudes
(iv) Governments are responding to varying public fears and desires (even when these have no scientific basis).

Variation in Scientific Advice

In the early months of the pandemic there was uncertainty about many basic questions—mechanisms of transmission, effectiveness of masks, and lockdowns, the role of children as spreaders, and the fatality risk, for example. Expert policy prescriptions varied significantly. In such circumstances, Member States, who invariably turned to their domestic expert institutions, may well have received differing advice. This was a "vitamins" situation: where the science cannot provide certain answers, any standpoint which enjoys a reasonable scientific basis can be accepted[14].

The causes of that variation in advice will have been complex, recommendations being influenced by institutional and professional factors, the character of key individuals, and, quite possibly, factors to do with the culture and habits of that state.

Different Risk Tolerance/Liberty Attachment

This brings us to the second explanation: that some populations—majorities–may have a greater appetite for risk than others, or a greater distaste for limitations on their freedom. Such differences are to be expected between states, and are observable in other situations of threat, such as wars, terrorism or economic crises. They need not be stable features of national culture—although they could be—but can be products of the prevailing majority of the moment, and of the resulting government in power. In either case, the law should not have a problem with this: Member State are generally entitled to choose the level of protection from risk that they wish to establish[15]. The mere fact that they take stricter, or less strict, measures than other Member States does not make their actions unlawful provided the measures are appropriate to the level of risk they have chosen.

Controlling Transmission Using Methods Adapted to Local Circumstances

However, it may also be that differing packages of measures reflect differences in what is acceptable to the public, and what is likely to be effective in that particular national context.

[11] *Greenham and Abel*, C-95/01, ECLI:EU:C:2004:71.
[12] *Greenham and Abel*, above; *Scotch Whisky*, C-333/14, ECLI:EU:C:2015:845; *Stoß*, C-316/07, ECLI:EU:C:2010:504.
[13] E.g., *Runevič-Vardyn*, C-391/09, ECLI:EU:C:2011:291; *Groener*, C-379/87, ECLI:EU:C:1989:599.
[14] *Sandoz*, 147/82, ECLI:EU:C:1983:213; *Greenham and Abel*, above.
[15] *Greenham and Abel*, above; *Scotch Whisky*, above; *Stoß*, above.

Some countries take more naturally to social distancing than others, and the infrastructure of cities and public spaces affects how easy this is to maintain. Facemasks are seen by some as comforting, and as minor infringements on liberty, by others as a dehumanizing last resort. Similar remarks can be made about strict lockdowns, in particular for children; are these examples of precaution, or of panic? The closure of businesses, its acceptability, is also dependent to some extent on the economic structure of society and on government. Thus, different packages of measures can, to some extent, be seen as different ways of achieving essentially the same end. All states seek to reduce transmission, but do so in ways that reflect the particular socio-economic, institutional, physical and cultural circumstances of that state (Pacces and Weimer, 2020), as well as the particular stage and progress of the epidemic in that state.

Differing attitudes toward the state and the individual play a role here. Some majorities may expect a strong role for the state, and experience strict measures and formalized enforcement (forms to be filled, uniformed checks) as comforting—the state as parent is showing its presence. In others, this kind of behavior is seen as threatening, and a sign of breakdown of order, a symptom of impending collapse. In more liberal Member States the emphasis has been on individual responsibility, and minimizing restrictions on freedom has been understood to show that the state is still functioning normally, that matters are under control, and that the core principles of social order are not threatened. The freedom to go shopping, or spend the day in a park, can give the same feeling of safety in one context as the obligation to remain inside can in another.

These differences can be accommodated within the law. The fact that measures must be effective does not imply a uniformity of approach. The Court accepts that it is for Member States to decide how to protect interests such public health, for which they have primary competence, so long as they respect EU law principles such as proportionality[16]. Given variations in epidemiological circumstances, economy, infrastructure and public attitudes, varied approaches could show Member States are taking this seriously: considering what works in their state. Uniform measures across the EU would almost certainly have differing degrees of success in different Member States, and not in fact be as effective as locally-tailored approaches.

Responses to the Public Mood

Despite the above, it seems inevitable that Member States have sometimes taken measures because the public mood demanded it, not on the basis of expert advice, and perhaps even contrary to it. The Dutch prime minister, Mark Rutte, acknowledged this when announcing the closure of schools, saying that the Dutch Public Health Institute had advised him that this was neither necessary nor effective, but he could see that parents and teachers were nervous and he wanted to avoid public unrest[17] Whether recognized in public or not, similar concessions to the public will have been made in other Member States.

Examples may include restrictions on internal travel, on being outside, and, above all, the closure of borders. Expert opinion on these has been divided, but what they have is a strong political, symbolic, aspect—they cultivate a sense of emergency which helps to keep the public obedient. In particular, the closure of borders may satisfy an instinctive desire to create safety by excluding, to lock the door to strangers. There may also have been expert support, but that may not have been the primary reason for the measures (Carrera and Chun Luk, 2020).

However, the *French Farmers* logic—a public desire for closure only justifies restrictions if not meeting that desire would lead to catastrophic consequences—while it failed in that case, might legitimately succeed here. Controlling the pandemic required public support and acquiescence, and compliance with restrictions. While in general EU law expects Member States to resist, and reform, the public mood, in this situation it may genuinely be the case that they have a justification for conceding to it. The late spring and summer brought an increase in resistance to lockdown measures and public demonstrations. Acceptance is clearly not self-evident. However, were there widespread rejection of the measures, then even a well-designed pandemic policy would fail. Thus, pandering to unfounded fears, and adopting symbolic measures, may have been politically necessary in order to make the genuinely scientific measures accepted and successful.

CONCLUSION

EU law allows for variation in responses to public health, and other, threats, and allows the taking into account of particular national circumstances, including behavioral and cultural factors. However, it does not usually allow for political responses to public calls for action, when those calls are not themselves scientifically founded.

To the extent that pandemic measures have gone beyond science, and also been aimed at calming public fears—an extent which is still unknown, but will perhaps become apparent in coming years—they may seem to challenge existing law. The need for public support may seem to have entered the law as a justification for restricting free movement. On the other hand, the pandemic clearly is exceptional, which limits its precedential value.

Absent legal challenges, we are left in a degree of uncertainty. However, this may itself revitalize discussion about when national measures derogating from free movement are justified, and about the meaning of ideas such as necessity and effectiveness. An overly political interpretation of these threatens to make EU law ineffective and undermine its mission to transform national societies. Yet an overly scientific interpretation can undermine its legitimacy, for as the pandemic measures show, science often speaks with many voices, and good policy decisions take account of science, value choices and the need for support. Treating the public interest as a largely technical matter is an adequate, even optimal,

[16] *Geraets-Smits and Peerbooms*, above.

[17] See Q and A in the text of a later press conference: https://www.rijksoverheid.nl/documenten/mediateksten/2020/04/21/letterlijke-tekst-persconferentie-minister-president-mark-rutte-en-directeur-jaap-van-dissel-centrum-infectieziektebestrijding-na-afloop-van-crisisberaad-kabinet

approximation to the truth in many situations. In more serious ones, a more complete engagement with reality may be required. The future challenge for the law is to incorporate this distinction.

AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

REFERENCES

Carrera, S., and Chun Luk, N. (2020). *Love thy Neighbour? Coronavirus Politics and Their Impact on EU Freedoms and Rule of Law in the Schengen Area*. CEPS Paper in Liberty and Security in Europe No. 2020-04. Brussels: Centre for European Policy Studies.

Chalmers, D., Davies, G., and Monti, G. (2019). *EU Law, 4th edn*. Cambridge: CUP.

Davies, G. (2015). Democracy and legitimacy in the shadow of purposive competence. *Eur. Law J.* 21, 2–22. doi: 10.1111/eulj.12079

Davies, G. (2018). Does the court own the treaties? interpretative pluralism as a solution to over-constitutionalisation. *Eur. Law J.* 24, 358–375. doi: 10.1111/eulj.12298

Dawson, M. (2016). Better regulation and the future of EU regulatory law and politics. *Common. Market Law Rev*. 53, 1209–1235.

De Witte, F. (2013). Sex, drugs and EU law: the recognition of moral and ethical diversity in EU law. *Common. Market Law Rev*. 50, 1545–1578.

European Commission (2015). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Better regulation for Better Results - An EU Agenda*. COM/2015/0215 final. Brussels: European Commission.

Kochenov, D. (2018). "When equality directives are not enough: taking an issue with the missing minority rights policy in the EU," in *EU Anti-Discrimination Law beyond Gender*, eds U. Belavusau and K. Henrard. (Oxford: Hart Publishing), 119–140.

Maduro, M. P. (1998). *We the Court*. Oxford: Hart Publishing.

Meuwese, A. C. M. (2017). Regulatory review of European Commission Impact Assessments. *Eur. J. Law Reform*. 19, 16–33. doi: 10.5553/EJLR/138723702017019102002

Nic Shuibhne, N., and Maci, M. P. (2013). Proving public interest: the growing impact of evidence in free movement case law. *Common Market Law Rev*. 50, 965–1005.

OxCGRT. (2020). *Oxford Coronavirus Government Response Tracker*. Avaialble online at: https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker (accessed September 09, 2020).

Pacces, A., and Weimer, M. (2020). From diversity to coordination: a European approach to COVID-19. *Eur. J. Risk Regul.* 11, 283–296. doi: 10.1017/err.2020.36

Tryfonidou, A. (2014). The notions of "restriction" and "discrimination" in the context of the free movement of persons provisions: from a relationship of interdependence to one of (almost complete) independence. *Yearbook of Eur. Law* 33, 385–416. doi: 10.1093/yel/yeu023

Van Elsuwege, P. (2020). *Lifting Travel Restrictions in the Era of COVID-19: In Search of a European Approach*. Verfassungsblog. Available online at: https://verfassungsblog.de/lifting-travel-restrictions-in-the-era-of-covid-19-in-search-of-a-european-approach (accessed June 5, 2020).

Conflict of Interest: The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

frontiers in Human Dynamics

ORIGINAL RESEARCH
published: 30 November 2020
doi: 10.3389/fhumd.2020.606299

Covid-19 Using Border Controls to Fight a Pandemic? Reflections From the European Union

*Elspeth Guild**

School of Law, Queen Mary University of London, London, United Kingdom

When Covid-19 was acknowledged to have arrived in Europe in February-March 2020, politicians and public health authorities scrabbled to find appropriate and effective responses to the challenges. The EU obligation contained in Article 9 Treaty on the Functioning of the European Union (TFEU) requiring the EU (including the Member States to achieve a common protection on human health, however, seems to have been missing from the responses.) Instead, borders and their control became a site of substantial political debate across Europe as a possible venue for effective measures to limit the spread of the pandemic. While the most invasive Covid-19 measures have been within EU states, lockdown, closure of businesses etc., the cross-border aspects (limitations on cross border movement) have been important. In the European Union this had important consequences for EU law on border controls, in particular free movement of persons and the absence of controls among Schengen states. It also implicated border controls with third countries, including European Free Trade Area (EFTA and Switzerland) all states neighboring the EU, the UK (having left the EU on 1 January 2020) the Western Balkans and Turkey. While EU law distinguishes between Schengen borders where no control takes place on persons, non-Schengen EU borders, where controls take place but are limited to identity checks and border controls with third countries and external borders with third countries (non-EFTA or Swiss) the responses of many Member States and the EU institutions abandoned many aspects of these distinctions. Indeed, the difference between border controls between states (inside Schengen, the EU, EFTA, or outside) and internal restrictions on movement became increasingly blurred. Two approaches—public health and public policy—were applied simultaneously and not always in ways which were mutually coherent, or in any way consistent with the Article 9 TFEU commitment. While the public health approach to movement of persons is based on ensuring identification of those in need of treatment or possibly carrying the disease, providing treatment as quickly as possible or quarantine, the public policy approach is based on refusing entry to persons who are a risk irrespective of what that may mean in terms of propagating the pandemic in neighboring states or states of origin. I will examine here the ways in which the two approaches were applied in the EU from the perspective of EU law on border controls.

Keywords: European Union, free movement of persons, border controls, Schengen area, COVID-19

OPEN ACCESS

Edited by:
Iris Goldner Lang,
University of Zagreb, Croatia

Reviewed by:
Tamara Hervey,
The University of Sheffield, United Kingdom
Matej Avbelj,
New University, Slovenia

***Correspondence:**
Elspeth Guild
e.guild@qmul.ac.uk

Specialty section:
This article was submitted to Migration and Society, a section of the journal Frontiers in Human Dynamics

Received: *14 September 2020*
Accepted: *05 November 2020*
Published: *30 November 2020*

Citation:
Guild E (2020) Covid-19 Using Border Controls to Fight a Pandemic? Reflections From the European Union. Front. Hum. Dyn. 2:606299. doi: 10.3389/fhumd.2020.606299

THE EU LEGAL FRAMEWORK ON MOVEMENT OF PERSONS

The overarching framework of EU and Member States includes an obligation to coordinate action (the mainstreaming duty in Article 9 TFEU) which includes cooperation to promote the protection of public health. In the first phase of the Covid-19 pandemic, there has been little evidence of Member State coordination let alone promotion of this EU duty. Taking the perspective of movement of persons, it is apparent that the border control reflex took priority over the EU cooperation on public health leading to incoherence and inconsistency in the field. This article examines the consequences of this incoherence.

There are two complementary legal regimes on movement of persons in the EU both are embedded in the Treaty on the Functioning of the EU—the EU's "constitution-lite" (Spaventa, 2007). The first, and oldest representing one of the four fundamental freedoms of the EU, is free movement of persons. It dates from the establishment of the European Economic Community in 1957. The detail of how this freedom is exercised is set out in Directive 2004/38 (Guild et al., 2019). Basically, every EU national and his/her family members of any nationality have the right to move and reside in another Member State without formalities for 3 months. Thereafter if they wish to stay longer they must fulfill fairly light criteria in one of the following categories: workers (including part-time and very low paid), self-employed persons, service providers or recipients, students, pensioners, or economically inactive but self-sufficient persons (self-sufficiency only requires resources at the level of national social benefits). EU nationals and their family members have a right to leave any Member State and enter any other Member State without being required to give reasons. States can only interfere with this right on the basis of public policy, public security or public health (Stehlík, 2017). All three grounds for exclusion have been carefully limited by the legislator and faithfully interpreted as exceptions by the Court of Justice of the EU. EU nationals and their family members are also entitled to enter the EU from any third state on the basis of the same rules—they have a right of entry in EU law completely unrelated to their right to enter their country of underlying nationality.

The second EU legal framework on movement of persons is the Schengen regime within which there are common rules on entry of third country nationals at the common external borders and no border controls on persons of any nationality moving within the Schengen participating states (De Somer, 2020). The Schengen regime commenced as an intergovernmental treaty among five Member States in 1985 expressing an ambition for the EU which had not yet been realized. It was incorporated into EU law in 1999. This regime includes 22 of the 27 EU Member States (excluded are Bulgaria, Cyprus, Ireland and Romania, with Croatia approved for participation but not yet incorporated). But it also includes four non-EU states (Iceland, Liechtenstein, Norway and Switzerland) and de facto three microstates: Monaco, San Marino, and the Vatican City. The implementing legislation of this regime is Regulation 2016/339. It provides that third country nationals entering at the external border can be refused entry if they are a threat to public policy, internal security, public health, or the international relations of any of the Member States (article 6). But re-introduction of intra-Schengen state border controls on persons (EU nationals or third country nationals) can only be justified where there is a serious threat to public policy or internal security (article 25).

The dual form of the EU law on free movement of persons across external borders, as well as internal, is far from tidy but according to the EU's public opinion agency, Eurobarometer, it is the most popular of EU policies among EU nationals (Guild, 2020).

THE COVID-19 CHALLENGE

The WHO declared Covid-19 a global pandemic on 11 March 2020. However, from February 2020 some EU states, in particular Italy, was already experiencing a spectacular rise in the number of Covid-19 cases. Lombardy (among the richest parts of the country), was most affected and had substantial difficulties in providing medical care to sufferers (Remuzzi and Remuzzi, 2020). Among the first measures which EU states began to take in February and March 2020 as Covid-19 took hold, was to close their international borders. There was a dramatic slowdown in air-traffic (according to the European Commission, by 31 March 2020 the overall reduction was 86.1% compared to a year earlier [COM(2020)148)]. Ferry, coach and rail transport followed suit. These international border measures started in a rather uncoordinated manner, notwithstanding the 10 March statement of the EU Heads of State or Government of the need for a joint EU approach (Zemskova, 2020). The Commission was quick to remind Member States that any action at the external border must be applied to all parts of the EU's external border to be effective [COM(2020)115]. People who continued to travel were frequently directed by the destination state authorities to place themselves in quarantine for 14 days (with variations). But not all EU and Schengen states followed this approach (Renda and Castro, 2020). Very few states closed all their international (or intra-EU) borders. But the permitted reasons for international travel varied substantially. Among the challenges was reaching agreement on essential and non-essential but permitted travel (Paterlini, 2020). The European Commission was particularly active in seeking agreement among the Member States that all EU (and Schengen Associated states) citizens and their family members must be exempt from temporary travel restrictions for the purposes of returning to their homes [COM(2020)115]. Schengen Member States also began to apply border controls on intra-Schengen free movement. Here the Schengen Regulation and the Free Movement Directive were both engaged (Davies, 2020). While the Free Movement Directive permits Member States to refuse entry to EU nationals on the basis of public health risks, the Schengen Borders Code does not (Eckardt et al., 2020).

Among the most common (though not universal) measures adopted by EU states was confinement or lockdown. People were required to stay at home with limited periods of time when they could go out and for specific purposes. In much

of Europe these lockdown measures, adopted under emergency legislation, took effect in mid-March and were not lifted until mid-May at the earliest. The objective from a public health perspective was similar to the closure of borders—preventing people from passing on the virus from one to another by preventing them from coming in contact with one another. The measures included the mandatory closure of restaurants, bars and cafes across much of Europe. The result, however, was an exponential rise in home cooking and consequentially an increased demand for food in the shops (and to be delivered). Food supply chains in the EU are complex and cross many states. The increased demand in cities meant that special regimes had to be established for lorry drivers to cross borders to bring produce from countries which produced it to states where supermarket shelves needed to be filled to meet increased demand. The European Commission engaged in negotiating special corridors for this purpose and allowed temporary relaxation of strict EU rules on working time for the transport sector to meet the need (Akter, 2020; Loske, 2020).

The timing of the pandemic's rise in Europe also corresponded with the beginning of the Spring harvests (early vegetables like asparagus and fruit such as strawberries) which require seasonal workers, normally EU nationals who move annually across the EU carrying out harvesting work. Arrangements had to be found to permit these workers, categorized as "essential" in some Member States, to move. But there were concerns not only that seasonal workers must be able to move to bring in the harvests but also that their health and safety should be protected when moving across borders (Rasnaca, 2020).

The integration of the EU's markets and supply chains were laid bare by the Coid-19 measures—while on the one hand public health ministry's sought solutions on the basis of reducing drastically contact among people, on the other hand, to prevent food shortages (and storages of other essential items) increased movement of persons across the EU was essential.

What is particularly evident from the responses to the pandemic is that EU states engaged in very little coordination even when pushed by the EU institutions to adopt more coherent approaches. This failure of the Member States to take into account their mainstreaming duty undoubtedly caused much waste or duplication of efforts across the region.

THE LEGAL CHALLENGE

What happened over this period as regards borders and their control on persons moving can only be explained on the basis of the institutional framework within which measures were adopted. National responses to the pandemic were driven by public health ministries and authorities, not interior ministries. Public health authorities faced an enormous challenge—how to provide medical treatment for people suffering from a disease about which little was known at the time and within public health systems which in many cases had been underfunded after the banking crisis of 2008 (Anderson et al., 2020). Institutionally, this meant that the logic of the measures was primarily based on the objectives of public health authorities which sought to diminish contact among people to prevent spread of the disease and to secure the integrity of their health systems and their capacity to cope (World Health Organization, 2020). The complex EU legal regime around border controls was an issue for interior ministries but they were not in the driving seat as measures were being adopted. Yet, what unfolded was a profound challenge to the EU legal regime and one in respect of which there is still no clear solution.

EU states' right to prohibit entry (or intra-EU border crossing) to EU citizens and their family members on the ground of public health is limited in the legislation. It can be invoked solely for infectious diseases listed by the World Health Organization (WHO). According to the WHO fact sheet on infectious diseases (46 in total), Avian flu is one but Covid-19 has not (yet) been added. It may well be that greater flexibility will be allowed as regards the public health proviso in light of the pandemic. However, there is also the EU principle of non-discrimination on the basis of nationality at issue. Where states place a limitation of, for instance, quarantine on both their own nationals and third country nationals entering their state, the limitation of entry of other EU (Schengen) state nationals to transit raises questions of compatibility (Barnard, 2020). This issue was partially resolved, or at least addressed, by the Commission's Communication (2020/C 102 1/03) guidelines concerning the exercise of free movement of workers.

A number of third country nationals were expressly included in the Commission's communications and guidelines to Member States on measures at the external borders. These include long term resident third country nationals under Directive 2003/109. For the purposes of repatriation/return to a home country, the position of nationals of Serbia, North Macedonia and Turkey was assimilated to those of Member States [Com(2020)2050]. The UK was also included. The inclusion of long term resident third country nationals seeking to transit to the EU state of residence supports the UN Human Rights Committee's interpretation of the human right contained in Article 12(4) UN International Covenant on Civil and Political Rights (to enter one's country) as extending also to resident aliens (General Comment 27; Nowak, 1993; Conte and Burchill, 2016). But it is neither fundamental right under Article 45 of the EU Charter of Fundamental Rights which is reserved for EU citizens nor is it a human right under Article 4(2) Protocol 4 European Convention of Human Rights (ECHR) which is limited to nationals (Peers et al., 2014; Schabas, 2015). There is no obvious fundamental right source for this inclusion of some candidate states but not others (e.g., Albania, Bosnia Herzegovina, Montenegro etc.).

To protect free movement of workers, the Commission issued a Communication at the end of March providing guidelines (2020/C 102 1/03). It is linked to the Guidelines for border management referred to above. The free movement guidelines require all restrictions to be necessary, proportionate and based on objective and non-discriminatory criteria. Frontier

workers, posted workers and seasonal workers were singled out for particular attention and protection. However, the Commission linked the free movement rights of those workers to their existing cross-border economic activities and to critical occupations. This leaves open the question of new entrants to the labor market across borders (Peers, 2013). The Commission listed 17 occupations as belonging to the "critical" category including health professionals, but perhaps less foreseeable, fishermen, staff of public institutions in a critical function and firefighters, police officers, prison guards, security guards, and civil protection personnel. The guidelines also stated that health screening must be carried out in a non-discriminatory manner. Limits on screening at intra-EU borders are specified. Seasonal workers merit a special section where the Commission insists on their health and safety rights when working in another Member State.

From the perspective of European human rights, the EU Charter requires full compliance with the ECHR (Peers et al., 2014). European human rights law does not recognize a human right to free movement across international borders. This is an EU right (Guild et al., 2019). But coupled with the right to non-discrimination on the basis of nationality, EU nationals must be treated similarly to nationals of the state of entry, but also in accordance with EU law (Barnard, 2019). If citizens of the Union are entitled to access to the whole of the EU territory then do they enjoy rights equivalent to access to their home state? This argument is countered by the continuing right of Member States to refuse admission and expel nationals of another Member State but only on the specified grounds (which do not include Covid-19, see above). The Schengen area entails even more complex questions as border control free travel across these states includes everyone (Jeandesboz, 2020). It is not limited to EU citizens and their family members. But this is not a fundamental right. It is part of a fundamental freedom—free movement of persons which is realized through the Schengen system.

Even more contentious is the application of confinement or lockdown regimes within states. There is a general principle of EU law that to enjoy its protection, an EU national must have crossed an EU border to exercise an EU right in another Member State (Sánchez, 2018). So, EU nationals caught by the lockdown regimes in a host Member State are entitled to the protection of EU law as regards their free movement (Tryfonidou, 2017). While the Commission sought to find ways to allow such persons to return to their home Member State that did not resolve the question of the compatibility of lockdown regimes with EU law. As lockdown regimes in those Member States which used them were as varied as the states with no coherence of consistency regarding the nature of the confinement, the questions of non-discrimination, proportionality and necessity as EU law principles must be considered (Koutrakos et al., 2016). A simple example is that of rules on physical distancing to avoid transmission of the disease. In France, the rule is that the distance between people must be one meter. Across the (Schengen) border in Belgium the rule is one and a half meters. Similarly, while in Belgium shops not selling essential materials were required to close across the border in the Netherlands they were permitted to stay open. The incoherence reveals the differences in opinion among EU public health ministries, less accustomed to EU coordination (and law) than their interior counterparts. The lack of coherence also indicates a failure by Member States to mainstream cooperation as an EU duty in their policies.

THE WAY FORWARD?

On 15 May 2020 the European Commission issued a Communication entitled: Toward a phased and coordinated approach for restoring freedom of movement and lifting internal border controls (2020/C 169/03). The objective is to gradually reduce the exceptional and emergency measures adopted to fight the pandemic and re-establish the free movement regimes in the EU. The Commission candidly states that there are three issues: (1) epidemiological criteria; (2) health system capacity and (3) monitoring capacity. But the Communication is startling in so far as it makes virtually no reference to EU law. There is only one reference to the Schengen regime, return to which is expressed as an objective (not a legally binding obligation). All of the measures are proposed as options for Member States not obligations under EU law. This is surprising from the perspective of the objective of EU integration which is achieved first and foremost through law.

As the EU has now not only agreed a new multiannual budget but also negotiated an immense economic recovery package to counter the negative impacts of Covid-19 measures on national economies, closer attention may be warranted to binding EU law and the need to achieve coherence in all EU policy areas. It is time for the EU institutions and the Member States to recognize the relevance of their Article 9 TFEU obligation to guarantee adequate protection of human health through coordination of pandemic responses. On 10 July 2020, the European Parliament called for a European Health Union which would entail a coherence and consistent public health policy applicable across the EU (https://www.europarl.europa.eu/news/en/press-room/20200710IPR83101/parliament-wants-a-european-health-union). This proposal may be considered bold by EU constitutionalists but it may be the best way forward to achieve the Article 9 TFEU objective.

DATA AVAILABILITY STATEMENT

The original contributions presented in the study are included in the article/supplementary materials, further inquiries can be directed to the corresponding author/s.

AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

REFERENCES

Akter, S. (2020). The impact of COVID-19 related "stay-at-home" restrictions on food prices in Europe: findings from a preliminary analysis. *Food Security* 12, 719–725. doi: 10.1007/s12571-020-01082-3

Anderson, M., Mckee, M., and Mossialos, E. (2020). Covid-19 exposes weaknesses in European response to outbreaks. *BMJ* 368:1075. doi: 10.1136/bmj.m1075

Barnard, C. (2019). *The Substantive Law of the EU*. Oxford: Oxford University Press. doi: 10.1093/he/9780198830894.001.0001

Barnard, C. (2020). *European Union Law*. Oxford: Oxford University Press. doi: 10.1093/he/9780198855750.001.0001

Conte, A., and Burchill, R. (2016). *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*. Abingdon, VA: Routledge. doi: 10.4324/9781315576244

Davies, G. T. (2020). Does evidence-based EU law survive the covid-19 pandemic? Considering the status in EU law of lockdown measures which affect free movement. *Front. Human Dyn.* 2:584486. doi: 10.3389/fhumd.2020.584486

De Somer, M. (2020). Schengen: quo vadis? *Eur. J. Migration Law* 22, 178–197. doi: 10.1163/15718166-12340073

Eckardt, M., Kappner, K., and Wolf, N. (2020). *Covid-19 Across European Regions: The Role of Border Controls*. Rochester: SSRN; Amsterdam: Elsevier.

Guild, E. (2020). "Who wants to be an EU citizen?" in *EU Citizenship and Free Movement Rights*. (The Hague: Brill Nijhoff), 17–35. doi: 10.1163/9789004411784_003

Guild, E., Peers, S., and Tomkin, J. (2019). *The EU Citizenship Directive: A Commentary*. Oxford: Oxford University Press. doi: 10.1093/oso/9780198849384.001.0001

Jeandesboz, J. (2020). 13 security in the Schengen area: limiting rights and freedoms? *Governance Politics Post-Crisis European Union* 258:16. doi: 10.1017/9781108612609.016

Koutrakos, P., Shuibhne, N. N., and Syrpis, P. (2016). *Exceptions From EU Free Movement Law: Derogation, Justification and Proportionality*. London: Bloomsbury Publishing.

Loske, D. (2020). The impact of COVID-19 on transport volume and freight capacity dynamics: an empirical analysis in German food retail logistics. *Transport. Res. Interdiscipl. Perspect.* 6:100165. doi: 10.1016/j.trip.2020.100165

Nowak, M. (1993). *UN Covenant on Civil and Political Rights: CCPR Commentary*. Warsaw: NP Engel.

Paterlini, M. (2020). "Closing borders is ridiculous": the epidemiologist behind Sweden's controversial coronavirus strategy. *Nature* 580:574. doi: 10.1038/d41586-020-01098-x

Peers, S. (2013). Equal treatment of atypical workers: a new frontier for EU Law? *Yearbook Eur. Law* 32, 30–56. doi: 10.1093/yel/yet002

Peers, S., Hervey, T., Kenner, J., and Ward, A. (2014). *The EU Charter of Fundamental Rights: A Commentary*. London: Bloomsbury Publishing. doi: 10.5771/9783845259055

Rasnaca, Z. (2020). Essential but unprotected: highly mobile workers in the EU during the COVID-19 pandemic. *ETUI Res. Paper Policy Brief* 9:3699377. doi: 10.2139/ssrn.3699377

Remuzzi, A., and Remuzzi, G. (2020). COVID-19 and Italy: what next? *Lancet*. 395, 1225–1228. doi: 10.1016/S0140-6736(20)30627-9

Renda, A., and Castro, R. (2020). Towards stronger EU governance of health threats after the COVID-19 pandemic. *Eur. J. Risk Regul.* 11, 273–82. doi: 10.1017/err.2020.34

Sánchez, S. I. (2018). Purely internal situations and the limits of EU law: a consolidated case law or a notion to be abandoned? *Eur. Constitut. Law Rev.* 14, 7–36. doi: 10.1017/S1574019618000111

Schabas, W. A. (2015). *The European Convention on Human Rights: A Commentary*. Oxford: Oxford University Press.

Spaventa, E. (2007). *Free Movement of Persons in the EU. Barriers to Movement in Their Constitutional Context*. The Hague: Kluwer Law International.

Stehlík, V. (2017). Discretion of member states vis-à-vis public security: unveiling the labyrinth uf EU migration rules. *Int. Comp. Law Rev.* 17, 127–142. doi: 10.2478/iclr-2018-0019

Tryfonidou, A. (2017). "Free movement of persons through the lenses of "discrimination" and "restriction"." in *The Reach of Free Movement*. (The Hague: TMC Asser Press), 57–83. doi: 10.1007/978-94-6265-195-1_3

World Health Organization (2020). *Strengthening the Health Systems Response to COVID-19: Technical Guidance# 6: Preventing and Managing the COVID-19 (No. WHO/EURO: 2020-804-40539-54460)*. Copenhagen: World Health Organization; Regional Office for Europe.

Zemskova, A. (2020). Guest note on the impact of the COVID-19 outbreak of EU law. *Nordic J. Eur. Law* 3–9.

Conflict of Interest: The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

frontiers in Political Science

ORIGINAL RESEARCH
published: 11 February 2021
doi: 10.3389/fpos.2020.618664

The COVID Virus Crisis Resurrects the Public Health Exception in EU Migration Law

Philippe De Bruycker[1]*

[1]*Institut d'Etudes européennes, Université libre de Bruxelles, (ULB) Brussels, Belgium*

Keywords: public health, COVID, schengen, competence, external border, internal border, border closures, border controls

A Commission communication of 1999 states that "*The public health reason grounds are somewhat outdated given the current level of integration of the European Union and the development of new means to handle health problems. Therefore, restrictions of free movement can no longer be considered as necessary and effective means of solving public health problems. The situation has changed radically from what it was in 1964, even though the concept of public health still forms part of Community law*"[1].

The current public health crisis linked to covid-19 proves scathingly that this statement is wrong. Indeed, border controls reappeared inside the Schengen Area during the last two weeks of March 2020 in emergency[2] without coordination between Member States to limit the spread of the virus. By mid-April 2020, around 17 Schengen States[3] had officially notified the Commission on the reintroduction of internal border controls due to the pandemic, including entry bans and special health requirements like tests or quarantines. The consequence was disorder: extremely long queues of cars at some internal borders; EU citizens prevented to transit through another Member State to go back home; persons unable to know if and under which conditions they would be allowed to travel within the EU. More spectacularly, the decision was also taken simultaneously to close the EU external borders toward the rest of the world for the same reason!

A similar disorder that has been well described[4] happened with the lifting of these internal controls foreseen by the Commission for 15 June, 2020[5]. One could have expected more coherence at this stage due to the fact that a decrease of the epidemic was not an unforeseen circumstance, and Member States had the time to prepare themselves on the basis of a Commission Communication of May 13, 2020 titled "Toward a phased and coordinated approach for restoring freedom of movement and lifting internal border controls"[6]. It is only on October 13, 2020 with the second wave of the Covid-19 pandemic that a "Council Recommendation 2020/1,475 on a coordinated approach to the restriction of free movement in response to the covid-19 pandemic" was adopted to coordinate the measures taken by Member States within the EU[7].

The implementation of the closure of EU external borders happened in a more coordinated way and led to the adoption on June 30, 2020 by the Council of a recommendation 2020/912 on the temporary

Edited by:
Iris Goldner Lang,
University of Zagreb, Croatia

Reviewed by:
Evelien Brouwer,
Vrije Universiteit Amsterdam, Netherlands
Mario Savino,
University of Tuscia, Italy

****Correspondence:***
Philippe De Bruycker
debruyck@ulb.ac.be

Specialty section:
This article was submitted to Comparative Governance, a section of the journal Frontiers in Political Science

Received: *17 October 2020*
Accepted: *23 December 2020*
Published: *11 February 2021*

Citation:
De Bruycker P (2021) The COVID Virus Crisis Resurrects the Public Health Exception in EU Migration Law . Front. Polit. Sci. 2:618664. doi: 10.3389/fpos.2020.618664

[1]Communication on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health (COM (1999) 372, p. 12).

[2]It is interesting to note that the Council of Ministers had adopted one month before on 13 February 2020 conclusions following which measures regarding travel should safeguard the free movement within the EU (OJEU, 20 February 2020, C 57, p.6, point 15, b).

[3]For the full and regularly updated list of all Member States' notifications of temporary reintroduction of internal border controls since 2006, see https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control.pdf

[4]VAN ELSUWEGE, P., Lifting travel restrictions in the Era of Covid-19: in search of a European Approach, Verfassungsblog, June 5, 2020: https://verfassungsblog.de/lifting-travel-restrictions-in-the-era-of-covid-19-in-search-of-a-european-approach/

[5]Commission communication on the third assessment of the application of the temporary restriction on non-essential travel to the EU (COM (2020) 399 of June 11, 2020, p. 2).

[6]C (2020) 3250.

[7]OJEU L 337 of October 14, 2020, p. 3.

restrictions of non-essential travel into the EU and the possible lifting as from July 1, 2020 of such restriction to which a list of third countries (see below) whose residents should not be affected by temporary external borders restrictions[8] was attached.

How can such disorder happen at the internal borders of the Schengen area in the most integrated space of the world made of an internal market and of an area of Freedom, Security and Justice? The first element of answer to be clarified refers to the competent authority, in other words which level of power can decide to close or reopen borders of the Schengen Area? (1). The legal basis of those controls also needs to be analyzed as it is less clear than one could imagine (2). The type of the diverse restrictive measures taken is another interesting element rarely considered (3). Finally, there is the procedure to be followed by Member States when they take such decisions (4) as well as the definition of the different categories of persons targeted (5). Answering these questions is quite complex in the case of the EU because of the existence of two levels of power (national and European) and the issue of coordination of their action depending upon the distribution of competences between them, the difference between internal and external borders of the Schengen Area, and the existence of the intermediate category of European citizens between nationals and third-country nationals.

1.THE COMPETENT LEVEL TO ADOPT RESTRICTIVE MEASURES

When reviewing the relevant documents, one could get the impression that it is the EU that decides to open or close its borders instead of Member States as shown by the following examples:

- On 16 March 2020 in a communication to the European Parliament, the European Council and the Council, the Commission recommended[9], "*to the European Council to act with a view to the rapid adoption by the Heads of State or Government of the Schengen Member States together with their counterparts of the Schengen associated States, of a coordinated decision to apply a temporary restriction of non-essential travel from third countries into the EU + area*"[10]. This passage reads as if the decision had to be taken by the Heads of the Schengen States upon the initiative of the European Council acting on the basis of a Commission recommendation. This is actually a quite complex institutional framework, in particular if the responsible body is not the European Council as an EU institution, but rather the Heads of States or of Government of the Schengen Area acting together as an intergovernmental body.
- On 17 March 2020, as a follow up of the previous point[11], the European Council President stated in a video conference that "*To limit the spread of the virus globally, we agreed to reinforce our external borders by applying a coordinated temporary restriction of non-essential travel to the EU for a period of 30 days, based on the approach proposed by the European Commission*". It reads as if the European Council decided to reinforce external border controls on the basis of a proposal made by the Commission.
- On 15 April 2020, a "Joint European Roadmap toward lifting Covid-19 containment measures"[12] was presented jointly by the President of the European Commission and the President of the European Council including a chapter four (p. 12) titled "a phased approach for the opening of our internal and external borders". This gives once more the impression that the EU decides, otherwise why to gather its two highest political representatives forming a rather curious and unusual team?
- On 30 June 2020, the Council adopted the recommendation 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction following which "*Member States should gradually lift the temporary restriction of non-essential travel to the EU as from July 1, 2020 in a coordinated manner with regard to the residents of the third countries listed in annex 1" (point one).* This list attached to the previous recommendation that has been revised on several occasions and was made of 11 third states[13] on 7 August 2020 reminds the so-called white list annexed to Regulation 2018/1806 by which the EU decides not to request a visa for stays of less than three months from nationals of the enumerated third countries[14,15].

One point commonly agreed is that the *implementation* of border controls on the ground belongs to the competence of the Member States. The existence of European legislation about borders - the Schengen Borders Code[16] (SBC) in particular - does not change this. The reason is very simple: Member States are in charge of applying EU legislation in line with article 291 (1) TFEU, so that they are the only ones that can decide to open or close their borders. The creation of Frontex did not change that either: article 7 (1) of Regulation 2019/1896 states clearly that "Member States shall retain primary responsibility for the management of *their* sections of the external borders"[17]. The Agency is not there to replace Member States but to assist them, so that the title "European Border and Coast Guard" used

[8]See the consolidated version at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02020H0912-20200811&qid=1602603621458&from=EN

[9]COM (2020)115.

[10]COM 2020(115), p.2.

[11]https://www.consilium.europa.eu/en/meetings/european-council/2020/03/17/

[12]https://ec.europa.eu/info/sites/info/files/communication_-_a_european_roadmap_to_lifting_coronavirus_containment_measures_0.pdf

[13]Australia, Canada, Georgia, Japan, New Zealand, Rwanda, South Korea, Thailand, Tunisia, Uruguay and China subject for the later to confirmation of reciprocity (see the consolidated version at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02020H0912-20200811&qid=1602603621458&from=EN).

[14]Regulation 2018/1806 of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJEU, L 303, November 28, 2018, p. 39).

[15]COM (2020) 287.

[16]See the consolidated version of Regulation 2016/399: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R0399-20190611&qid=1602892501911&from=EN

[17]OJEU, L 295, November 14, 2019, p.21.

in Regulation 2019/1896 is simply usurped[18]. Legally, the EU has no territory, neither borders, except the ones of its Member States.

While reading the documents quoted above, one should pay particular attention to the fact that they recommend at EU level a "coordinated" decision or temporary restriction at national level. The object of those instruments was actually not to decide anything, but to ensure that the decisions taken by Member States are coordinated. This refers to the European procedures that Member States must respect when they manage their borders (see below point four).

2.THE LEGAL BASES OF RESTRICTIVE MEASURES

The protection of public health is obviously the aim of the measures taken to restrict migration flows at the borders. Surprisingly, public health is not always mentioned in all EU secondary law instruments. One should distinguish between rules about the crossing of external borders (2.1.), about free movement through internal borders (2.2.) as well as the rules about the reintroduction of controls at the internal borders (2.3.).

2.1.The Crossing of the External Borders

The crossing of the external borders is regulated by the SBC. Article 6 refers to public health in paragraph 1(e) regarding entry conditions: a person must not be "considered to be a threat to the public health of any of the Member States (of the Schengen Area)"[19]. It is clear that a person might be refused entry at the border for public health reasons defined by article 2, 21) SBC as "any disease with epidemic potential as defined by the International Health Regulations of the World Health Organization, and other infectious or contagious diseases if they are subject of protection provisions applying to nationals of the Member State" which is without any doubt the case of Covid-19. There is no differentiation made by article 8 SBC on this point between the "light" checks for persons enjoying the right of free movement under Union law[20] and the thorough checks for third-country nationals.

2.2.The Rules About Freedom of Movement Inside the EU

The rules about freedom of movement inside the EU are spread in different instruments concerning EU citizens or third-country nationals.

Regarding EU citizens, directive 2004/38 is the most detailed instrument. Article 29 allows Member States to take measures restricting freedom of movement within the limits foreseen by article 29 (2) prohibiting the expulsion of EU citizens "when the sickness appears more than three months after their arrival" and article 29 (3) allowing Member States to "impose only a free medical exam during the first three months of their stay". For the rest, Member States may for instance, as envisaged in the recommendation 2020/1,475 of October 13, 2020 on a coordinated approach to the restriction of free movement in response to the covid-19 pandemic[21], impose the completion of passenger locator forms, tests for the detection of the Covid-19 virus, periods of quarantine for persons suspected of being sick and even a prohibition to leave the territory of the host Member State in order to limit the spread of the virus. All those measures can only be taken within the limits of EU law, and in particular the general principles of non-discrimination and proportionality.

Regarding third-country nationals, all the directives organizing a certain level of mobility for stays of more than three months which remains more limited than the freedom of residence guaranteed to EU citizens[22], contain a public health exception that can be opposed by the Member State where the concerned person desires to stay. The most detailed provision can be found in directive 2003/109 on long-term residents[23] inspired by article 29 of directive 2004/38 for EU citizens.

2.3.The Possibility of Reintroducing Controls at the Internal Borders

The possibility of reintroducing controls at the internal borders is regulated by the SBC. Interestingly, article 25 (1) envisages only the reasons of *public policy* or *internal security* for the temporary reintroduction of internal borders controls. One wonders why public health is not mentioned. Very interestingly, the history of the SBC informs us that "while the European Commission legislative proposal had included the threat to public health among these grounds, the European Parliament succeeded in deleting it by arguing that in the event of an outbreak (of a public health threat), the most appropriate reaction would not be border controls but rather health-related measures such as quarantines"[24].

It is thus clear that public health has been voluntarily omitted by the legislator in that provision. This historical element being forgotten, nobody has defended an interpretation following which it would be forbidden to reintroduce internal controls for the protection of public health. Confronted to the absence of that specific reason, the

[18]DE BRUYCKER, P., The European Border and Coast Guard: a new model based on an old logic, European Papers, 2016, Volume 1, number 2, pp. 559–569.

[19]The Schengen Convention of 1990 did curiously not mention public health among the entry conditions under article 5 (O.J.E.U., September 22, 2000, p. 21).

[20]Meaning two categories: (a) Union citizens within the meaning of Article 20(1) TFEU, and third-country nationals who are members of the family of a Union citizen exercising his or her right to free movement to whom Directive 2004/34 applies; (b) third-country nationals and their family members, whatever their nationality, who, under agreements between the Union and its Member States and those third countries, enjoy rights of free movement equivalent to those of Union citizens.

[21]See above.

[22]On this issue, see DE BRUYCKER, P., The European Union: from freedom of movement in the internal market to the abolition of internal borders in the area of freedom, security and justice, in Migration, Free movement and regional integration, Unesco, 2017, pp. 304–305.

[23]See article 18.

[24]This point is mentioned by Sergio CARRERA and Ngo CHUN LUK, In the name of Covid: An assessment of the Schengen internal controls and travel restrictions in the EU, Study for the European Parliament PE 659.506 of September 2020, p. 57, footnote 258. These authors refer to the preparatory work of the SBC, in particular an amendment n 171 introduced by MEP Sylvia-Yvonne Kaufmann but the precise EP document is not indicated and can hardly be found without a more precise reference.

Commission considered that "in an extremely critical situation, a Member State can identify a need to reintroduce border controls as a reaction to the risk posed by a contagious disease"[25]. An epidemic such as covid-19 threatening the entire population of each EU Member State for which no medical treatment exists, can indeed be considered as an issue of public policy or internal security defined by the Court of Justice as "the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society"[26].

3.THE TYPE OF RESTRICTIVE MEASURES

The nature of the measures taken by Member States at their borders has not been questioned. Almost all observers consider implicitly that they consist of 'controls', while more precisely they also consist of border *closures* sometimes called travel bans. The difference is that a border closure implies logically that people are not at all allowed to cross it. In other words, there is no place for a control and more precisely for a check as defined by article 2, points 10 and 11 SBC, because people are rejected if they try to cross unless exceptional cases. Border closures that took place were however not absolute, but selective as they foresaw exceptions in relation with a certain number of categories of persons like workers in critical occupations (health professionals, workers in pharmaceutical and medical devices industry, information and communications technology professionals, transport workers, etc[27]) allowed to cross. It is also crucial to underline as Vincent Chetail reminds us[28], that border closures can never be absolute as the principle of non-refoulement, the right to access asylum procedures, the prohibition of collective expulsion, the best interests of the child and the principle of non-discrimination must always be respected, and this requires always at least an examination of any request to cross a border on the basis of those basic rights.

Border closures are not explicitly envisaged by the SBC that only foresees controls and checks on persons, so that one may wonder if such measures are authorized under EU law. A first interpretation of the SBC builds upon the notions of border controls and checks defined respectively by article 2 (10)[29] and (11)[30] of the SBC. Considering that they are about the verification of the authorization of persons to cross or not a border, their definition seems large enough to include border closures.

Another interpretation emphasizes the specificity of the notion of border closures, in particular if they pretend to be absolute - quod non - so that there is no place anymore for border checks, and where it is then about surveillance (as defined by article 2 (12) of the SBC)[31] at border crossing points which is not foreseen by the SBC. Regarding external borders, one may consider that the SBC has not regulated entirely the issue of borders, so that closures are still possible because they are outside the scope of the SBC. The situation might be considered under a different light regarding internal borders. One may indeed wonder if the European legislator has not limited the prerogatives of Member States by excluding closures because of the very high level of integration of the European Union and the Schengen area in particular. A positive answer to this question has not been envisaged to our knowledge, in particular by the European Commission that has never argued in such way. Keeping in mind that following article 4 TEU the Union "shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security", pretending to deprive Member States of the prerogative of closing their internal borders would open a fundamental debate about the way sovereignty is shared inside the EU.

There is still another issue. Article 4 of the SBC states that "in accordance with the general principles of Union law, decisions under this regulation shall be taken on an individual basis", while article 14 (2) adds that "entry may only be refused by a substantiated decision stating the precise reason for the refusal". So, Member States would not be allowed to close borders if this means a negative decision taken without consideration of individual cases. There is no problem with selective closures as they require, by definition, individualized decisions. It is not the same with absolute border closures where all persons would automatically be prevented to cross which is legally impossible (see above). It is always possible to take individualized decisions with a standard motivation that would not transform them into prohibited collective expulsions as long as the cases of the persons rejected at the border are not different from a legal point of view.

[25]Commission guidelines for border management measures to protect health and ensure the availability of goods and essential services, C (2020) 1753 of March 13, 2020, p.4, point 18.

[26]CJEU, C-373/13, 24, June 2015, H.T., point 79.

[27]See the Guidelines concerning the exercise of free movement of workers during Covid-19 outbreak (C (2020) 2051 of March 30, 2020, p. 2, OJEU, March 30, 2020, C 102 I, page 12). A list of "specific categories of travelers with an essential function or need" has also been adopted in annex II to the recommendation 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction (OJEU, July 1, 2020, L 208 I, p. 7). This list targets large categories of persons (health care professionals, frontier workers, transport personnel, diplomats, humanitarian aid workers, seafarers, etc including seasonal workers in agriculture, passengers traveling for imperative family reasons and even third-country nationals traveling for the purpose of study whose function can hardly be considered as essential but whose presence is in the interest of the EU (see also about this list the guidance provided by the Commission Communication COM (2020)686) of October 28, 2020).

[28]Crisis without borders: what does international law say about border closure in the context of Covid-19: https://www.frontiersin.org/articles/10.3389/fpos.2020.606307/full?&utm_source=Email_to_authors_&utm_medium=Email&utm_content=T1_11.5e1_author&utm_campaign=Email_publication&field=&journalName=Frontiers_in_Political_Science&id=606307

[29]"Border control means the activity carried out at a border in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance".

[30]"Border checks means the checks carried out at border crossing points, to ensure that persons may be authorized to enter the territory of the Member States or authorized to leave it".

[31]"Border surveillance means the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks".

Moreover, one may consider that the exception of public health does not require individualized decisions when it is linked to a collective phenomenon like a pandemic that by nature leads to take standard decisions except in specific cases. Such interpretation is supported by the provisions of directive 2004/38 on free movement of EU citizens as article 29 does not require public health measures to be based on the personal conduct of the individual concerned, as it is the case for public order and security following article 27 (2). Public health justifications are not based on the behavior of the person but on his/her medical condition, or the existence of a general public health issue[32]. In other words, justifications based on public health could rely on considerations of general prevention that are forbidden by article 27 (2) second indent of directive 2004/38 regarding public order or security.

Now that most internal border controls have been lifted, the recommendation 2020/1,475 of October 13, 2020 on a coordinated approach to the restriction of free movement in response to the covid-19 pandemic[33] favors the use of tests or of quarantine measures instead of refusals of entry at the internal borders. Those health measures, even when they are implemented at the border, should not create a legal problem as long as they do not have an effect equivalent to border checks in the sense of article 23, 1) of the SBC, and they do not represent a disproportionate obstacle to freedom of movement.

4.THE PROCEDURE FOR ADOPTING RESTRICTIVE MEASURES

If the Members States are clearly the competent authorities for implementing border controls as analyzed above, article 17 (1) of the SBC states in a general way that Member States "*shall assist each other and shall maintain close and constant cooperation with a view to the effective implementation of border controls*" and that "*they shall exchange all relevant information*". Article 27 of SBC gives further details about the procedure that Member States must follow when they reintroduce controls at their internal borders[34]. Firstly, the concerned Member State must notify the Commission and the other member States; Secondly, the Commission may request additional information and can issue an opinion if it considers that a consultation with the concerned Member State is appropriate; In case, consultations with the other Member States and the Commission should then take place including, where appropriate, joint meetings with a view to organizing mutual cooperation.

The vehicle used to organize the cooperation between Member States has been the EU Integrated Political Crisis Response (IPCR)[35] that includes informal roundtables, integrated situational awareness and analysis, a protected web platform for the exchange of information and a central 24/7 contact point at Union level. A Covid-19 Information Group - Home Affairs has also been created.

The obligation to cooperate regarding internal border controls has been specified by a Council recommendation 2020/1,475 of October 13, 2020 on a coordinated approach to the restriction of free movement in response to the covid-19 pandemic obliging Member States to inform each other and the Commission prior (if possible 48 h in advance) the entry into force of the restrictions that they impose like passenger locator forms, tests, or quarantines.

The obligation of Member States is literally to "cooperate" and not to coordinate as usually mentioned. Article 28 SBC stipulates that in case of unforeseen circumstances requiring an immediate action by Member States, the notification should take place simultaneously with the reintroduction of internal controls and the consultations organized without delay. So, it seems that everything is in place in theory to have a more or less coherent border management by Member States. The report that each Member State has to produce for the Commission, Parliament and Council within four weeks of the lifting of their internal border controls, as well as the annual report that the Commission has to present on the functioning of the area without internal borders following article 33 of the SBC, could provide the occasion to evaluate Member States reactions, and to draw lessons for the future. However, it appears that those reports are not always undertaken, including those expected from the European Commission since 2015 as underlined by the European Parliament in its resolution of June 10, 2020 on the situation in the Schengen area following the covid-19 outbreak[36].

5.THE PERSONS TARGETED BY THE RESTRICTIVE MEASURES

As anybody can potentially be at risk and spread the Covid-19 virus, the measures taken logically target everybody. However, all persons are legally not in the same position as their relation to Member States depends upon their nationality, in particular when they are confronted to a border closure. During the pandemic, one prominent issue has been the case of persons willing to go back home known as the issue of the "right to return" to their state of nationality or of residence. A difference regarding the legal basis of this right must be made between three categories depending upon the nationality of the persons:

- First, nationals have the right to enter and stay in their country of origin which is recognized as a human right that can even be considered as absolute under the ECHR[37];
- Secondly, EU citizens whose position is different. They have a right to enter, stay and return in a host Member State on the basis of EU law putting them in an extremely favourable position comparable to that of nationals, and more favourable than the position of third-country nationals. Still, they remain foreigners and can be prevented to enter or stay in their host Member State precisely for reasons of public health. However, Member States are in principle not allowed to distinguish between EU citizens on

[32]BROSSET, E., Santé publique, in ILIOPOULOU-PENOT, A., Directive 2004/38, Commentaire article par article, Bruxelles, Bruylant, 2020, p. 460.

[33]See above.

[34]There is a similar mechanism of cooperation established in the area of health policy by a decision 1,082/2013 on serious cross-border threats to health (OJEU, November 5, 2013, L 293, p. 1).

[35]See Council decision implementing decision 2018/1993 of December 11, 2018, OJEU, December 17, 2018, L 320, p. 28.

[36]Document B9-0165/2020: https://www.europarl.europa.eu/doceo/document/B-9-2020-0165_EN.html

[37]See article 3, §2 of protocol 4 to the ECvHR.

the basis of their nationality, as Hungary envisaged to do, because of the principle of non-discrimination.

- Thirdly, third-country nationals have in principle no individual right to enter or stay and need therefore under national law on immigration an authorization that can also be refused for public health reasons. Once they have been admitted by a Member State, they receive a residence permit allowing them to stay on its territory and they also acquire the right to return to their host State on this basis, knowing nevertheless that they can lose their right of residence under circumstances that are broader than in the case of EU citizens. More specifically, there is among third-country nationals the category of migrants residing for a long-term[38]. They benefit from a human right to return to their host state that can considered as their "own"[39] due to the close links that they have built with that State (in particular, but not exclusively, due the length of their stay)[40].

Refusing entry of EU citizens registered for a stay of more than three months or of third-country nationals holding a residence permit for reasons of public health could be considered disproportionate as it deprives those persons from the right to stay in their host Member State where they have settled while it should be possible to protect public health by other measures less harmful to their right of residence like quarantine. Moreover, rules foresee quite often that a sickness contracted after a certain period of time spend in the host State cannot be taken into consideration for expelling the person. In practice, Member States have generally accepted, on top of their own nationals, all EU citizens and third-country nationals residing legally on their territory to return independently of their nationality[41]. The criterion of residence appears indeed to be more appropriate than nationality from the point of view of public health policy. Despite the difference underlined above regarding the legal foundations of the right to enter, stay or return, it obviously makes sense that all persons are subject to the same public health measures, such as restriction of movement (confinement) on the territory of one State, obligation to take a medical test or to be placed in quarantine, etc.

CONCLUSION

Public health is again a relevant element for the European borders policy and the Schengen Area and could in the future become increasingly important with the apparition of new viruses due to globalization, climate change, etc. This comes as a surprise for those opposed to the use of border controls for fighting a pandemic on the basis of the idea that they do not stop viruses, and certainly for the Europeans used to benefit from the comfort of an area without internal border controls.

The disorder that the EU faced with the reintroduction of internal border controls is due to the fact that Member States remain the competent level of power to take such decisions. This system of multi-level governance that is generally admired, makes coordination more difficult in case of a crisis requiring swift actions. Due to the speedy reactions of Member States that were uncoordinated, it has been impossible for the European Commission to organize the necessary cooperation between them as it was often running after the events by producing communications, recommendations, guidelines, statements, roadmaps and assessments that were certainly useful but often came late.

Without entering in the meta-legal debate about the impossibility to genuinely share sovereignty, or the symbolic function of borders for States, some concrete lessons can be drawn from the ordeals that the European Union passed through with the covid-19 crisis.

Firstly, regarding the revision of the Schengen Borders code that will come back on the policy agenda, a debate should take place about what is necessary to protect public health in times of crisis. The minimum for the sake of clarity is to explicitly add public health to the reasons allowing the reintroduction of internal border controls, and to allow to have recourse to measures of general prevention in that case. In addition, on may wonder if the endless discussion about the maximum period of time during which Member States can reintroduce controls at their internal borders could be solved by considering that it is impossible to fix a general limit in terms of days, weeks or months due to the diversity of circumstances (for instance a pandemic) that may justify them, and instead to simply rely on the principles of proportionality and reasonableness with, as a compensation, a supervisory mechanism by the Commission that should be much stricter than it has been the case until now.

Secondly, it should be agreed once for all that nationals, EU citizens and third-country nationals having the right to reside for more than three months in a Member State have the right to go back to their country of nationality *or* of residence, despite the closure of borders, so that they should not be blocked when they have to transit through the territory of another State to go back home. Let us add that those persons can legitimately expect from EU Member

[38]In EU law, this refers to the category of long-term residents on the basis of directive 2003/109 (OJEU, 23 January 2004, L 16, p.44) binding this status to a legal stay of five consecutive years.

[39]Following article 12(4) of the UNCCPR "No one shall be arbitrarily deprived of the right to enter his *own* country'.

[40]CHETAIL, V., International Migration Law, Oxford University Press, 2019, pp. 93–95.

[41]See for instance the communication on Covid 19 where the Commission states that "temporary travel restrictions must exempt all EU citizens and citizens of the Schengen Associated States and their family members, and third-country nationals who are long-term residents under the long term residence directive 2003/109 and persons deriving their rights to reside from other EU directives or national law or who hold national long-term visas (COM (2020)11 of 16 March 2020, p. 2.); see also the Commission communication on "Guidance on the implementation of the temporary restrictions 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 of March 30, 2029, p. 4).

States that they facilitate their travel through a common area like Schengen.

Thirdly, the information placed at the disposal of people on the measures taken should be improved as it has been (and may still be) difficult to plan a journey inside the EU by consulting different websites of Member States with long information not always easy to understand (and not always available in another language that the official one!). This could be done by strengthening the interactive web platform 'Re-Open EU'[42] launched by the European Commission on June 15, 2020[43] as a central point of real-time information in the framework of the tourism and transport package of May 13, 2020.

Finally, there is no need to dismantle border controls or closures that have been put in place inside the EU at the peak of the crisis, as they have been progressively replaced by health measures imposed at the borders like completing a passenger locator form, passing a medical test, or accepting a period of quarantine, that do not seem at first look to constitute disproportionate restrictions under EU law. The good news is that those who predicted that the reintroduction of internal border controls due to the pandemic on top of the ones reintroduced to fight terrorism, is one more step toward the end of Schengen, are luckily wrong.

DATA AVAILABILITY STATEMENT

The original contributions presented in the study are included in the article/Supplementary Material, further inquiries can be directed to the corresponding author.

AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

Conflict of Interest: The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

[42]https://reopen.europa.eu/en/

[43]https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1045

frontiers in Human Dynamics

PERSPECTIVE
published: 11 November 2020
doi: 10.3389/fhumd.2020.594420

COVID-19 Migration Policy Measures for International Students and Graduate Job Searchers: A Lost Round in the Battle for Brains

*Tesseltje de Lange**

Centre for Migration Law, Radboud University Nijmegen, Nijmegen, Netherlands

Global policy responses to COVID-19 in terms of international students migration and foreign graduate job searchers demonstrate huge disparities and insecurities regarding their migration status. Three main issues can be distinguished in COVID-19 related visa and migration policy measures for international students and graduate job searchers: Policies on returning or remaining during the lockdown, policies on extending students' and job searchers legal stay and policies allowing new students to arrive. This contribution maps migration policy responses in five popular destination countries across the globe. This mapping exercise identifies three patterns of response to COVID-19: Facilitating, blocking or ambiguous. The policy responses are critically assessed in the context of the so called "battle for brains." From a concise overview of the interests at stake with international student migration policy a change in perspective from development of the country of origin to development of the labor markets and innovation in the countries of destination can be distinguished. International students are stuck between the interests of their countries of origin, the destination countries and HEI, and their own interests in receiving an international education, onward migration, and an international career are not always represented. The COVID-19 crisis has shown how in some countries of destination, international students and graduates, although high-skilled, and "home-trained," are not treated as belonging to the country of destination. Their home is still in their country of origin. The crisis reveals that they may be little more than future (high-skilled) guest workers, disposed of in times of crisis.

Keywords: COVID-19, international student migration, foreign graduate job searchers, migration policy, high-skilled migration, HEI, global policies

OPEN ACCESS

Edited by:
Iris Goldner Lang,
University of Zagreb, Croatia

Reviewed by:
Alina Tryfonidou,
University of Reading, United Kingdom
Stephen Weatherill,
University of Oxford, United Kingdom

***Correspondence:**
Tesseltje de Lange
tesseltje.delange@jur.ru.nl

Specialty section:
This article was submitted to Migration and Society, a section of the journal Frontiers in Human Dynamics

Received: *13 August 2020*
Accepted: *06 October 2020*
Published: *11 November 2020*

Citation:
de Lange T (2020) COVID-19 Migration Policy Measures for International Students and Graduate Job Searchers: A Lost Round in the Battle for Brains. Front. Hum. Dyn. 2:594420. doi: 10.3389/fhumd.2020.594420

INTRODUCTION

Global policy responses to COVID-19 in terms of international students and foreign graduate job searchers demonstrate huge disparities and insecurities regarding their migration status. In the past decades, international students were highly coveted migrants. In fact, some higher educational institutions build their business model on international students. Migration policies have been adjusted to facilitate the international students to remain, search for jobs and stimulate innovation and the economies of the home nations of their alma mater. When the world went into a lockdown in early spring 2020, international students and foreign graduate job searchers were at

a loss. Higher Educational Institutions (HEI) were at a loss too, investing in online teaching and expecting fewer international students to arrive for the 2020–2021 academic year. Across the globe, international students and educational institutions have cried out for a solution to international students' despair. Students have lost income from often precarious student jobs and might not be able to pay next years' tuition fees or their subsistence, and they are also concerned for their future careers. Some have gone home with the help of their countries of origin, others stay put or simply cannot go home because of border closures.

This contribution maps global policy responses to international student migration and COVID-19. International students are, following the UNESCO definition, students "who have crossed a national or territorial border for the purpose of education and are now enrolled outside their country of origin" (UNESCO, 2020). Physical movement is key, and it is this movement that COVID-19 migration measures (have) and are impeding. Graduate job searchers are not defined globally, but in the growing body of literature on the topic, they have become a distinct group of international labor migrants (see e.g., a special issue edited by Faggian et al., 2017). This mapping exercise concerns five top twenty popular destination countries (United States, Canada, Australia, France, and the Netherlands). I identify three patterns of response to COVID-19: Firstly, a policy and discourse of continued welcome and facilitation of international students, seen in for example in the case of Canada and France; Secondly, a blocking attitude, as seen in the USA; and thirdly, an ambiguous policy, for example as seen in Australia and the Netherlands. The country of origin perspective is relevant too, but left aside in this contribution.

Early August 2020, three main issues can be distinguished in COVID-19 related visa and migration policy measures for international students and graduate job searchers: Policies on returning or remaining during the lockdown, policies on extending students' and job searchers legal stay and policies allowing new students to arrive. Pre-COVID-19, receiving countries' need for international students had been dominating migration policies and exempting the international students from the anti-migrant politics. According to the OECD (2019, p. 14) the internationalization of higher education has resulted in increased movement of international students—in 2017 around 1,450,000 visas were granted to tertiary-level students and over 3.5 million international students enrolled globally. COVID-19 has upset this international playfield: For the new academic year 2020–2021, 41% of international students have changed their plans and choose to study in a different country than their originally intended destination (Studyportals, 2020).

After a brief overview of the development of international student migration and graduate job searchers, I continue with mapping some policy approaches followed by a discussion. The contribution is based on an online search of websites [performed between April 1 and August 11, 2020 on timeshighereducation.com, universityworldnews.com, studyinternational.com, studyportals.com and media (financialtimes.com), and snowballing into government websites and local media].

A CONCISE SUMMARY: THE DEVELOPMENT OF INTERNATIONAL STUDENT MIGRATION POLICY

International student migration once was a form of development "aid": Foreign students, often from the global South, would come to the "West" and would return home upon completion of their studies (Altbach, 1989)—bringing home knowledge would help their countries of origin "develop." Keeping these students from going home was perceived as unethical brain drain. In the 1990's the debate shifted to a discourse of brain gain, train, and circulation (Robertson, 2006; Dassin et al., 2017). International student migration turned into a "battle for brains," a booming business for receiving countries, whose HEI and economies in general thrive on international students: In the USA, in 2016, international students were responsible for over $32 billion worth of contributions to the economy (Foundation for Economic Education, 2018).

Growing international alumni communities and global citizenship became a goal of international education (Knight, 2012), the idea is that student mobility develops global citizens intercultural aware and with knowledge and commitment to global issues. However, what has possibly grown to be just as important is international students' (post-study) work. In times of skill shortages and demographic changes, the European Union for instance, through Directive 2016/801/EU, aims not just to achieve "internationalization" of education and research by attracting students and researchers from outside the EU, it also grants international students a right to work (since 2018 a minimum of 16 h per week); additionally, they should be stimulated to stay in the EU for (self)employment after their studies for which EU member states are to grant graduates at least a 9-month period, after their studies, to find (high skilled) employment. The brain drain is only mentioned on the side, the need for a new well-trained work force seems key. This fits with the observation on the Asia-Pacific region where student migration and high-skilled migration are increasingly entangled; opportunities for onward migration have become one of the deciding factors for international students to pick their destination country and university (Baas, 2019).

International students are stuck between in a mix of interests of countries of origin and destination, HEI, and their own interests, which are not always represented. COVID-19 has jeopardized their ambition not just for acquiring a degree abroad, but also for onward migration as a foreign graduate job searcher and high-skilled migrant worker, and possibly for a future international career.

COVID-19 RESPONSES

Facilitating Migration Policies

In both Canada and France, at least at the time of writing, facilitating the continuation of international student migration is more important than either the fear for spreading of the virus through international students' mobility or the fear for international students and graduates taking jobs and possibly

leaving national work force unemployed. Immigration policy and international student interests are in line. As before COVID-19, international student migration is still supported by HEI and government migration policies. Anecdotal evidence from media reports, however, presents a less facilitating picture of stranded students during the lockdown.

In Canada the facilitating nature is illustrated by three policy measures: Firstly, online-only teaching or temporary closure of a HEI would not jeopardize students' residence status as long as they stay enrolled in their HEI and continue to take part in the online program. If a HEI is permanently closed due to COVID-19, students have 150 days to either enroll at another HEI, change their residence status or leave Canada. HEI are asked to provide international students leaving Canada with a letter of support for future visa applications. Secondly, students can increase their number of hours at work off campus (usually 20 h) if they provide COVID-19 related essential services. The Canadian measures will be in effect until (at the time of writing) August 31, 2020.

Although in France hundreds of international students were stranded, lost their student jobs and had little money left for food during the lockdown, France is looking forward to welcoming (back) international students. This welcoming immediately followed the June 11, 2020 communication of the European Commission presenting a roadmap to opening up travel from outside the EU. It called on EU member states to "ensure that those traveling to study are exempted, together with highly skilled non-EU workers, if their employment is necessary from an economic perspective and the work cannot be postponed or performed abroad" (European Commission, 2020). The French Ministry for Europe and Foreign Affairs tweeted on June 16 that as of July 1 visa and resident permit applications by international students will be processed as a priority and international students will be allowed to travel to France, no matter where they are traveling from. The "importance of the attractiveness of French higher education" is, once again, the reason for facilitating student migration (France24, 2020).

Blocking Migration Policies

The USA was late to respond to the pandemic, but early March 2020, HEI were already advised to cancel international student exchange programs and tell their international students to go home (and American students to return home), in order to prevent spreading the virus (National Center for Immunization and Respiratory Diseases (NCIRD), 2020). This advice was followed by a rather restrictive migration policy for which American universities took the federal immigration authorities to court. The Trump administration policy published on July 6 said that international students were either to transfer schools or leave the country if their classes were going to be entirely online. This was a rather extreme policy response to the COVID-19 crisis with respect to the approximately one million international students in the USA. It didn't hold long. More than 200 HEI's backed the lawsuit initiated by Harvard and MIT and by July 14 the Trump administration reversed the policy. Some of the changes might seemingly be consequences of COVID-19 migration policies. However, the number of international students coming to the USA was already going down and uncertainties over work visas were already at play (Demirci, 2019).

Ambiguous Migration Policies

Australia's policy response is more ambiguous. International education generates billions of dollars each year (Knight, 2012). Like in the USA, international students were advised to return home. Not all of them did or could. Many lost their casual student job during the lockdown and had to turn to foodbanks for daily meals (Bavas, 2020). Australia did introduce a special 1-year visa extension to those stuck in Australia (with an expiring visa) which would allow migrants to work in essential professions. This measure was to help, amongst others, international students unable to return home due to travel bans (Study International, 2020). However, those migrants who are not performing essential work and are on a temporary visa, are not eligible for government help, and if they cannot make ends meet they are asked to go home (Stayner, 2020). Furthermore, Australia maintains an international travel ban until January 2021 but is still considering to what extent this will apply to international students. If they wait too long, international students will choose different destinations. In the meantime, Australian universities are laying-off teaching staff in order to survive (WSWS.org, 2020).

As mentioned, in June the European Commission (2020) called for re-opening HEI for new international students. Until then, each EU member state chose its own path for its international students. We've seen how France chose a welcoming path although those stuck in France during the lockdown received little help. A smaller and less popular destination country in the EU is the Netherlands. It is an example of an ambiguous approach toward international students. Graduates in the Netherlands can apply for a residence permit for an orientation year to look for a job as a high-paid migrant worker, within 3 years after graduation. If graduates find a job as a high-paid migrant before the end of their orientation year, they are eligible for continued residence as migrant workers. Former graduates are allowed to meet a low salary requirement. However, if they fail to find a job during the orientation year, a higher salary requirement is then applicable (which employers are unlikely to pay for, especially for a recent graduate) (de Lange et al., 2019, p. 18).

Not all international students left the Netherlands to wait out the lockdown at home. Those that remained lobbied for an extension of their visas, like Canada and Australia implemented. Like elsewhere, they lacked income (thus), could not complying with the required subsistence level, had difficulty in finding a job before the end of their orientation year, and more generally, faced visa expiration. Three measures combine a facilitating and blocking attitude: First, international students were temporarily exempted from the obligatory subsistence level (but not supported otherwise). Second, the orientation year would not be extended. Thus, international graduates who fail to find a job within their orientation year have to leave. Third, and this is how the Dutch government services the interests of international students but even more so national labor market needs, the low salary threshold remains in force for 3 years after the end of their orientation year. So if they succeed (from abroad)

in finding a job that would qualify for a high-paid migrant status, the graduates are welcome to return. The government explained its choice with reference to the time it will take for the labor market to be back on track; granting international students an extension of their right to remain would, not be useful as long as employers are not hiring. Returning, if that is an option, or remaining as irregular migrants is the looming scenario at the moment. Although visa's might be available for new students Dutch HEI decided not to welcome exchange students in the first semester of the new academic year, uncertain of what kind of education they could offer them and out of fear of spreading the virus.

DISCUSSION

The COVID-19 crisis has laid bare an ongoing fundamental shift in international student migration, which was once a means to develop talent from less developed countries and through them aid these countries in their development. However, it has now become an instrument of "reverse development": International students from countries like China and India bring their talent and money to support economies, labor markets and the demographic needs in receiving countries, and help cover the costs of HEI who have built, in some cases, a business model around international students.

The COVID-19 crisis has shown how in some countries of destination, international students and graduates, although high-skilled and "home-trained," are not treated as belonging to the country of destination, their home is still in their country of origin; the crisis reveals that they may be little more than future (high-skilled) guest workers. Due to the COVID-19 crisis there may no longer be work for them, maybe apart from some essential jobs in health care. Some international students might have been in receiving countries for 4 years and in search for permanent jobs. Still, the push on returning home during COVID-19 lockdowns and the slow opening up (mostly only for those with a job, or already enrolled at a HEI before the lockdown and holding a residence permit) shows that students and graduate job searchers were not full members of the society that educated them. They are easily cast off. With their (forced) departure and lack of new international students coming in, restrictive COVID-19 migration policies altered the landscape of HEI in some of the receiving countries (for example Australia). In others, such "protectionist" migration policies lead to legal conflicts between HEI and the immigration authorities (for example the USA). We have also seen a turn to protect national workforce from the uncertain times to come (for example the Netherlands). Again, elsewhere authorities and HEI aim at keeping an open climate and welcome international students back and anew (such as in France). Future research may reveal underlying reasons for the different attitudes beyond HEI lobbying and political pressure.

The crisis reveals that in migration policy, international students may be little more than future (high-skilled) guest workers, disposed of in times of crisis. Border closures, forced return home, and uncertainty over visa's will not easily keep the aim of raising global citizens alive: receiving countries and their HEI risk losing a round in the "battle for brains." Maybe, for starters, we need to take out the "crossing of national borders" in the UNESCO definition of international students and include virtual movement across borders into HEI to keep the opportunities of raising global citizens with intercultural skills. Restrictive migration policies not just designed for health protection should not stand in the way of raising a next generation of global citizens.

AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

ACKNOWLEDGMENTS

The author would like to thank Huub Verbaten for illuminating on the Canadian approach.

REFERENCES

Altbach, P. G. (1989). The new internationalism: foreign students and scholars. *Stud. High. Educ*. 14, 125–136. doi: 10.1080/03075078912331377446

Baas, M. (2019). The education-migration industry : international students, migration policy and the question of *skills. Int. Migr*. 57, 222–234. doi: 10.1111/imig.12540

Bavas, J. (2020). Coronavirus pandemic leaves Australia's international students 'stranded', struggling to buy food. *ABC News*.

Dassin, J. R., Marsh, R. R., and Mawer, M. (2017). *International Scholarships in Higher Education: Pathways to Social Change*. Cham: Palgrave Macmillan. 1–407. doi: 10.1007/978-3-319-62734-2

de Lange, T., Oomes, N., Gons, N., and Spanikova, V. (2019). *Labour Migration and Labour Market Integration of Migrants in the Netherlands : Barriers and Opportunities*. Amsterdam.

Demirci, M. (2019). Transition of international science, technology, engineering, and mathematics students to the U.S. Labor Market: *the role of visa policy. Econ. Inq*. 57, 1367–1391. doi: 10.1111/ecin.12795

European Commission (2020). *On the Third Assessment of the Application of the Temporary Restriction on Non-Essential Travel to the EU, Communication*. Brussels.

Faggian, A., Corcoran, J., and Rowe, F. (2017). Special issue on youth and graduate migration. *Ann. Reg. Sci*. 59, 571–575. doi: 10.1007/s00168-017-0845-2

Foundation for Economic Education (2018). *How International Students Add Billions to the U.S*. Atlanta, GA.

France24 (2020). *In France, Foreign Students Struggle With Fallout from Pandemic*. Available online at: https://www.france24.com/en/20200522-in-france-foreign-students-struggle-with-fallout-from-pandemic (accessed August 10, 2020).

Knight, J. (2012). Student mobility and internationalization: trends and tribulations. *Res. Comp. Int. Educ*. 7, 20–33. doi: 10.2304/rcie.2012.7.1.20

National Center for Immunization and Respiratory Diseases (NCIRD) (2020) *Guidance for Student Foreign Travel for Institutions of Higher Education*. Washington, DC.

OECD (2019) *International Migration Outlook 2019*. Paris.

Robertson, S. L. (2006). Brain drain, brain gain and brain circulation. *Global. Soc. Educ.* 4, 1–5. doi: 10.1080/14767720600554908

Stayner, Y. (2020). Australias Temporary Visa Holders Remain Locked Out of JobKeeper and JobSeeker. *SBS News*. Available online at: https://www.sbs.com.au/news/australia-s-temporary-visa-holders-remain-locked-out-of-jobkeeper-and-jobseeker#nav-main (accessed August 10, 2020).

Study International (2020). *Extend Your Stay with this New Australian Visa Extension*. Available online at: https://www.studyinternational.com/news/australian-visa-covid19-temporary/ (accessed August 10, 2020).

Studyportals (2020). *The Impact of Covid-19 on International Students Perceptions*.

UNESCO (2020). *Glossary*. Available online at: http://uis.unesco.org/en/glossary-term/international-or-internationally-mobile-students (accessed October 19, 2020).

WSWS.org (2020). *Thousands of Sackings at Australian Universities*. Available online at: https://www.wsws.org/en/articles/2020/07/17/auni-j17.html (accessed August 10, 2020).

Conflict of Interest: The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

frontiers in Human Dynamics

ORIGINAL RESEARCH
published: 09 December 2020
doi: 10.3389/fhumd.2020.594987

EU Citizenship, Free Movement, and Covid-19 in Romania

*Sandra Mantu**

Centre for Migration Law, Faculty of Law, Radboud University, Nijmegen, Netherlands

Traveling freely, smoothly and unburdened by excessive formalities and the adjoining right to reside in another EU state for work, leisure or study are the hallmarks of the mobility regime applicable to EU citizens and their family members. Measures taken by the majority of EU states to deal with Covid-19 have severely disrupted EU mobility and led to the reestablishment of internal border controls, the introduction of restrictions to travel and even travel bans. These obstacles to mobility have highlighted the EU economy's reliance on EU migrant labor in several sectors, which was further exacerbated by the introduction of an EU travel ban at the external border. This contribution discusses measures taken by Romania that sought to restrict travel to and from Romania, while simultaneously allowing exceptions for nationals to travel to other EU states as essential workers. The Romanian response is discussed in relation to the wider EU attempts to reply to the proliferation of national measures affecting EU free movement and the functioning of the internal market and as an illustration of the need to ensure that mobility goes hand in hand with protection.

Keywords: mobility, repatriation, Romania, seasonal workers, critical occupations, air corridors

OPEN ACCESS

Edited by:
Iris Goldner Lang,
University of Zagreb, Croatia

Reviewed by:
Mislav Mataija,
European Commission Headquarters, Belgium
Martijn Van Den Brink,
University of Oxford, United Kingdom

***Correspondence:**
Sandra Mantu
s.mantu@jur.ru.nl

Specialty section:
This article was submitted to Refugees and Conflict, a section of the journal Frontiers in Human Dynamics

Received: *14 August 2020*
Accepted: *16 November 2020*
Published: *09 December 2020*

Citation:
Mantu S (2020) EU Citizenship, Free Movement, and Covid-19 in Romania. Front. Hum. Dyn. 2:594987. doi: 10.3389/fhumd.2020.594987

INTRODUCTION

The right to free movement is generally understood to be the best known and valued right of EU citizenship. Traveling freely, smoothly and unburdened by excessive formalities and the adjoining right to reside in another EU state for work, leisure or study are the hallmarks of the mobility regime applicable to EU citizens and their family members which sets them apart from nationals of third countries (TCNs). EU citizens can enter other EU states by simply producing a valid ID card or passport and reside there for an initial period of 3 months without meeting further conditions. Working in another EU state is not conditioned by a work permit or quotas and mobile EU workers are entitled to equal treatment with national workers as a matter of EU law (Article 45 TFEU). The abolition of internal border controls within the Schengen area coupled with the precedence given to EU free movement rules by the Schengen Border Code, including when crossing external borders, provide further evidence of the privileged position enjoyed by EU citizens.

Yet, for the best part of 2020, the reestablishment of internal border controls and the introduction of restrictions or outright bans on travel in response to the Covid-19 pandemic have severely affected EU citizens' right to move freely. Reports of EU citizens blocked or stranded at internal Schengen borders as a result of national border closure measures raise questions about the added value of EU citizenship and of the right to free movement in times of crisis.

The initial lack of a quick EU response to the proliferation of national restrictive measures raised similar questions. Moreover, the closure of EU internal borders has highlighted the reliance of the EU economy on migrant EU labor, which was further exacerbated by the introduction of an EU travel ban at the external border.

In this contribution, I take Romania as a case study to examine some of the practical implications of the restriction of the right to free movement. Romania has been an EU state since 2007. According to Eurostat (2020), Romanians of working age (20–64) are by far the largest national group among mobile EU citizens, most of which move for labor purposes. Since the start of the pandemic, mobile Romanians have been affected by measures taken at both EU and national levels. Firstly, the contribution sketches the EU response to the proliferation of national measures restricting mobility to show that EU citizens continued to be treated as privileged migrants, although internally this was most visible when moving as EU workers. Secondly, the contribution discusses measures taken by Romanian authorities during the months of March, April, May and June 2020. These measures sought on one hand, to restrict the mobility of Romanian citizens, while on the other hand, they allowed exceptions so that Romanians could be flown via air corridors to work in other EU states as "essential" workers. The later aspect is a practical illustration of EU guidelines that emphasized the need to keep the EU economy going by allowing the mobility EU workers exercising critical occupations, and of their limitations in terms of ensuring that said workers are not abused, exploited or harmed. Seen from this perspective, the Romanian example highlights the need to start an EU-wide conversation on how to better arrange the protection of mobile EU workers and citizens between the national and EU levels.

EU CITIZENS DURING COVID-19: STILL PRIVILEGED MIGRANTS?

While in the past EU states have made use of existing possibilities to derogate from free movement rules to re-introduce internal border controls, Member State responses to the Covid-19 pandemic have led to an unprecedented closure of internal and EU external borders with a profound impact on the EU systems of free movement and border management (Montaldo, 2020). In the face of mounting national responses derogating from the normally applicable rules with far-reaching consequences for the economy, the EU attempted to come up with an at least coordinated, if not, unified response to mobility into and within the EU.

Generally speaking, the EU response has been questioned for its failure to scrutinize the legality and proportionality of national restrictive measures from the perspective of EU law (Carrera and Chun Luk, 2020). Nevertheless, there was an attempt to do justice to the privileged treatment normally enjoyed by EU citizens and their family members. In relation to the EU external border and travel into the EU+ area, the Member States were called to introduce temporary restrictions for non-essential travel from third-countries between March and June 2020, when the Council recommended the gradual lifting of temporary travel restrictions for selected countries in light of the epidemiological situation (European Commission, 2020a,d). The introduction of restrictions was linked to the obligation for the Member States to admit their own citizens in line with their obligations under international law (European Commission, 2020a, p. 2). Moreover, the Member States were equally instructed to allow entry into the EU+ area and facilitate onward transit for EU citizens and their family members irrespective of nationality and for TCNs holding a residence permit and their dependents who were returning to their Member State of nationality or residence (European Commission, 2020b). EU efforts to facilitate and coordinate policy measures aimed at ensuring that EU citizens can return home are illustrative of its ongoing efforts to develop through legislative measures the EU right to consular protection (Article 20/c TFEU) for EU citizens present in the territory of third countries as an extra source of protection derived from EU citizenship and functioning alongside state nationality (Mantu, 2020).

While EU citizens continued to enjoy privileged treatment in relation to the crossing of the external EU border with a view to return home, their treatment in relation to intra-EU mobility is more problematic. According to Thym (2020) even if restrictive measures, including travel bans, can be justified within the Schengen area under the public health exception as a matter of principle, there is still an obligation for such measures and their practical implementation to comply with relevant EU law and Court of Justice jurisprudence limiting state discretion in this area.

Instead of scrutinizing national measures affecting intra-EU mobility for compliance with EU law standards, the EU response focused on safeguarding economic interests and the functioning of the internal market. The restriction of intra-EU mobility and the EU travel ban for TCNs showed the essential role played by migrant workers in the economy, with several sectors standing to be severely disrupted as a result of the lack of migrant labor (Fasani and Mazza, 2020). The Commission adopted several communications designating workers exercising critical occupations as special categories of persons whose mobility should not be hindered (European Commission, 2020c). EU citizens retained their privileged position in as much as they performed critical and essential work.

"Critical workers" are defined based on the European Skills, Competences, Qualifications and Occupations (ESCO) classification and include a variety of occupations at all levels of skills, from health professionals, to scientists in health-related industries to food manufacturing and processing and related trades maintenance workers or, transport workers. As a novelty, this category of workers in critical occupations breaks through existing divisions in the legal regimes applicable to posted and regular workers. It combines regular mobile workers, frontier workers and posted workers, and in certain circumstances seasonal workers, if performing crucial functions. Agriculture and the food industry proved particularly vulnerable in some EU states, which explains why seasonal workers in agriculture, if performing critical harvesting, planting or tending functions, are assimilated to workers exercising critical occupations (European

Commission, 2020c: 9&10). The Commission advised the Member States to create burden-free and fast procedures for border crossings with a regular flow of frontier and posted workers as well as establish specific procedures for seasonal workers (European Commission, 2020c), which several EU states did, including Romania.

ROMANIA: LABOR MOBILITY DURING LOCK-DOWN

Romania has relied on the special procedures (e.g., air corridors) advised by the European Commission to allow its nationals to work in other EU states as essential workers, mainly in agriculture and the meat industry. An EU state since 2007, Romania is a country of emigration, with an estimated 3 million Romanians having left the country to work abroad relying on their EU right to free movement. Italy, Spain, Germany, France and UK are main destinations. Covid-19 related measures adopted in these countries had an impact on mobile Romanians. For example, the Italian lock down measures had negative consequences for Romanian workers some of which lost their jobs. During early March, Romanian authorities started to repatriate Romanians from Italy and press releases issued by the Romanian Ministry of Foreign Affairs around this time confirm that many were Romanians who had lost their jobs and who lacked financials means to return home. Likewise, Romanians who were in transit or on vacation were unable to leave Italy since commercial flights between Italy and Romania were suspended by Romanian authorities in February 2020 (Ministry of Foreign Affairs, 2020a). Romanian truck drivers and road travelers got blocked in Austria and Hungary, as a result of national quarantine or lock down measures requiring the intervention of Romanian authorities to negotiate bilateral solutions with their EU counterparts (Ministry of Foreign Affairs, 2020b).

At the same time, Romanian media circulated stories about Romanians dying of Covid-19 in Italy. Fear of a mass exodus of Romanians returning from Italy and bringing with them the virus started to influence public opinion leading to a wave of hate toward them (Udisteanu, 2020). The deteriorating healthcare situation, the unpreparedness of the national healthcare system and the fear of returning Romanians all played a part in the decision of the Romanian President to declare a national state of emergency for 30 days as of 16 March 2020 (Decret al Preşedintelui României nr. 195), which was extended for another 30 days until the 15th of May. The state of emergency allowed for an unprecedented restriction of rights and liberties, including freedom of movement, the right to private and family life, the inviolability of domicile, the right to education, freedom of association, the right to private property, the right to strike and economic freedom. Other envisaged measures included isolation and quarantine for persons coming from high risk areas, gradual closure of border crossings, restriction or prohibition of road, rail, maritime, water and air travel.

During the state of emergency, the Minister of Internal Affairs issued 12 military ordinances (MO) containing measures for preventing the spread of Covid-19 that affected all persons entering or leaving Romania. Commercial flights to and from most EU countries were suspended; later this extended partly to international road traffic (Military Ordinance no. 1 of 18 March 2020; Military Ordinance no. 4 of 29 March 2020). The entry through border crossing points of foreigners and stateless persons was prohibited except if they transited Romania through corridors organized by agreement with neighboring countries. In line with the EU position, exceptions were introduced for certain categories of TCNs and stateless persons (Military Ordinance no. 2 of 21 March 2020). On the 24th of March, Romania entered a lock down and the military was called to support police and Gendarmerie personnel in enforcing the new restrictions. Movement outside one's home or household was prohibited, with some exceptions, such as working, and buying food. Likewise, home isolation or institutional quarantine (in case of symptoms) was introduced for all persons entering Romania (Military Ordinance no. 3 of 24 March 2020).

At the height of the national lock down, the Romanian authorities decided to allow the transport of seasonal workers from Romania to other states with the approval of the competent authorities of the country of destination via irregular flights (charters), including toward EU states with whom international air and road transport of persons was suspended (Military Ordinance no. 7 of 4 April 2020). Days later Romanian media showed chaotic images of about 1,800 Romanians amassed in the parking lot of the regional airport in Cluj-Napoca without any respect for social distancing measures waiting to be flown to Germany where they were eagerly awaited to start picking asparagus and strawberries. In light of this public embarrassment, Military Ordinance no. 8 of 9 April introduced the obligation to obtain the approval of the Romanian authorities for the transport of seasonal workers from Romania to another state via charters but failed to detail the procedure itself.

Quarantine measures for persons entering Romania, partial closure of border crossing points and of international road, rail, maritime and air travel remained applicable after 15 May 2020 when Romania entered a state of alert (Decision no 24 from 14.05.2020 and its annexes; Decision no. 476 from 16.06.2020 and its annexes). During the months of May and June 2020, the exceptions for critical seasonal workers were maintained and, gradually, expanded due to an improved epidemiological situation in Romania and elsewhere. These exceptions follow EU guidelines as well as an economic logic. Concerning the transportation of seasonal workers more requirements were introduced, e.g., to operate such a charter flight, the authorizations of Romanian Civil Aeronautical Authority and of the competent authorities in the destination state are needed (Article 10 Decision no. 24 from 14.05.2020). A further exception was introduced for charter flights repatriating Romanian citizens and for charter flights transporting international transport workers in line with EU guidelines [Annex 3 to C(2020) 1897 from 23.03.2020].

Although international road transport for persons to and from several EU states was suspended until 1 June 2020, an exception was introduced for the benefit of workers with a valid contract, persons holding a residence permit from those states or persons returning to Romania from the state where they

worked or lived (Article 11 Decision no. 24 from 14.05.2020). Occasional road transport was allowed for the above categories provided that: all necessary authorizations for all transited states were present, the Romanian authorities were informed about the future travel and the transport company, the recruitment agency and the transported persons comply with health and safety measures (incl. social distancing) during travel. From the legal text it is unclear if this provision concerns seasonal workers or it applies to all workers; the exception concerning chapter flights is clearly about seasonal workers. As of the 1st June 2020, the Romanian government started to relax travel restrictions and opened up international travel by rail, road (Decision no. 26, 28.05.2020) and, for some EU countries, air travel as of 15 June 2020 coupled with lifting off quarantine/isolation measures for persons traveling from those countries (Decision no. 29 from 13.06.2020). The possibility to reintroduce restrictions to travel and quarantine measures remains an option linked to the evolution of the epidemiological situation.

ECONOMY V. PROTECTION

The Romanian case offers an opportunity to study the interaction between the EU level response that emphasized the need to keep the EU economy going despite the closure of borders, and national measures that were concerned primarily with preventing the spread of Covid-19. The decision of the Romanian authorities to open air corridors for seasonal workers should be understood in light of the number of Romanians who have returned from abroad as a result of Covid-19 measures taken by other EU states. In a video conference held in May 2020 the Romanian prime minister stated that since 23 February 2020, when the government started to monitor the situation more closely, about 1,279,000 Romanians had entered mainly from European states badly hit by the pandemic (Italy, Spain, Germany, France and UK) and that according to estimates about 300,000–350,000 would be looking for a job in Romania (Agerpres, 2020a). He equally confirmed that the decision to close the borders was linked with fears that the large Romanian diaspora would return en masse due to economic hardship in their host states. At the same time, the national lock down had an important economic impact with more than 1 million Romanians benefiting from technical unemployment payments in April 2020 (Radioa Europa Libera, 2020a) and a national labor market that was contracting; unemployment is expected to reach 6.5% in 2020 as opposed to 3.9% in 2019 (Radio Europa Libera, 2020b). The expectation of Romanian authorities and other experts was that the majority of the 1.3 million Romanians had returned "home" temporarily, to weather the crisis, and, when possible, they would leave again (Dobreanu, 2020).

Initially, the Romanian government showed no interest in safeguarding the health and safety of those Romanians whom it allowed to leave the country. At first, recruitment companies were not required to announce Romanian authorities about the number of workers who had been recruited as seasonal workers, nor to attest to their state of health or provide information as to where exactly they would work in other EU states. No provisions were made to deal with seasonal workers upon their return to Romania, who at that point in time should have been placed in quarantine, nor was it clear what should happen to them if contracting the virus. A parliamentary inquiry into the incident at the Cluj-Napoca airport confirmed that at the time there was a legislative void concerning the mobility of seasonal workers (Agerpres, 2020b). While later measures introduced more requirements for transportation, it was unclear how compliance was monitored.

This disinterest in ensuring migrant workers' safety during travel and safe work conditions came at a high price for Romanian authorities when it came to the repatriation of Romanian nationals. The general policy on repatriation is that only Romanians who find themselves abroad temporarily are to be repatriated and only as a last resource. Data on repatriation compiled based on press releases issued by the Ministry of Foreign Affairs shows a big jump in numbers during the months of May and June for Germany, UK and the Netherlands (see **Table 1**). This is linked with the opening of air corridors from Romania to those countries for seasonal workers as media reports and the press releases confirm that among those repatriated were seasonal workers.

The EU advised relaxation of restrictions for critical workers ended up highlighting the poor working and living conditions of seasonal workers that place them at a higher risk of contracting the virus. Romanian seasonal workers are known to have contracted Covid-19 while at work in the Netherlands (Ministry of Foreign Affairs, 2020c), Germany (Ministry of Foreign Affairs, 2020d) and the UK (Ministry of Foreign Affairs, 2020e). Concerning Germany, a number of distressing incidents were reported where the much-needed Romanian seasonal workers were left on the street without any money or a return ticket by their employers because they had complained about work conditions (Kühnel, 2020). The Romanian Ombudsman officially raised questions with the relevant German authorities about the measures taken to safeguard the health and safety of migrant Romanian workers during travel from Romania to Germany and while there, and required an EU intervention (Avocatul Poporului, 2020). The Romanian authorities were eventually forced to take a stand and engage in bilateral talks with their German counterparts on how to ensure safety and appropriate working conditions for Romanian workers.

The treatment and lack of protection experienced by Romanian workers during the pandemic had visible effects at the EU level. The European Parliament (2020) adopted a Resolution on seasonal workers and the Commission published guidelines to highlight their vulnerability to precarious working and living conditions and issues relating to occupational safety and health conditions (European Commission, 2020e). Yet, the guidelines limit themselves to remind the Member States of their many obligations toward seasonal workers stemming from several EU legislative measures and stress the need to strengthen field inspections, enforce existing rules and better inform migrants of their rights. They do not explain why the existing legislative framework failed to provide protection, nor do they propose actions to remedy failures in protection brought to light by the Covid-19 crisis going beyond requesting the Member States to

TABLE 1 | Repatriated Romanians during February-July 2020.

Country	Feb	March	April	May	June	July	Total
Spain	0	203	330	786	966	216	2,501
Italy	0	1,109	0	331	111	0	1,551
UK	0	0	0	137	726	0	863
cruise ships	6	90	0	825	0	0	921
Netherlands	0	0	41	139	480	65	725
France	0	0	42	204	407	0	653
Germany	0	0	0	92	342	0	434
Belgium	0	0	34	134	91	0	259
Saudi Arabia	0	0	92	85	77	0	254
UAE	0	0	56	130	0	0	186
Malta	0	74	0	93	0	0	167
Egypt	0	144	0	0	0	0	144
Cyprus	0	0	0	140	0	0	140
Jordan	0	78	0	10	26	0	114
Portugal	0	101	0	0	0	0	101
Austria	0	0	0	55	16	0	71
Turkey	0	0	0	0	70	0	70
Iraq	0	0	52	14	0	0	66
Morocco	0	87	0	0	0	0	87
Hungary	0	59	0	0	0	0	59
Kuwait	0	0	56	0	0	0	56
Lebanon	0	0	0	41	0	0	41
Syria	0	0	0	11	0	0	11
Total	6	1,945	703	3,227	3,312	281	9,474

Source: Data compiled by the author based on press releases issued by the Romanian Ministry of Foreign Affairs.

comply with existing obligations. As such, they are illustrative of a structural weakness in EU's mobility framework since reliance on national authorities' cooperation, preparedness and willingness to enforce existing rules has not always been sufficient to ensure the protection of the rights of mobile EU citizens, workers or otherwise (Valcke, 2019). The need to issue these guidelines highlights the failure to make migrant workers' vulnerability – which was known to both national and EU institutions – a key issue when designing policy solutions to keep the EU internal market going.

CONCLUSIONS

The examination of EU and national measures shows that in terms of mobility EU citizens remain a privileged group even in times of crisis. While the external border was in principle "closed" to TCNs, EU citizens, EU residents and their dependents were nonetheless exempted for the purpose of returning home. The right to be repatriated is normally associated with state nationality, but the crisis revealed its EU dimension since EU citizenship became another source of protection alongside state nationality. In relation to intra-EU mobility, EU institutions did not seek to challenge the imposition of national travel bans or the closure of internal borders. Rather, the priority was on safeguarding the EU's economy, parts of which are dependent on migrant EU workers. However, the EU's clear standpoint on the need to ensure the mobility of EU workers in critical occupations in light of the consequences of a complete standstill for the internal market, was not matched by convincing EU efforts to ensure that said workers are not abused, exploited or harmed.

The Romanian case offers food for thought on how to juggle economic interests, safety and healthcare concerns in a multilevel system of mobility governance. Faced with the possible return of its migration diaspora, the Romanian government sought to rely on border closure and quarantine/isolation to control and, maybe more importantly, dissuade mobility. The later aspect sits uncomfortably with the EU response to Covid-19 that emphasized EU nationals' right to return to the state of nationality as an important aspect of the governance of EU citizenship and of its mobility regime. Romania's approach to mobility during Covid-19 can be summed up as "discouraging return while encouraging emigration" and without safeguarding rights or ensuring protection. For Romanian nationals holding EU citizenship has clear advantages even in times of crisis since, as migration scholars and politicians alike know very well, borders can never be hermeneutically sealed off. Since legal privilege does not seem to automatically translate into protection for EU migrant workers, the argument put forward is that the Romanian case illustrates the limitations of an EU approach that emphasizes a primarily economic reading of EU

mobility, that treats mobile EU citizens as economic actors but lacks a well-functioning framework to ensure protection. For EU institutions, it is a good reminder that enforceable mobility rights must be accompanied by enforceable workers' rights as a matter of normalcy.

AUTHOR'S NOTE

Due to the measures taken by several EU states to deal with the effects of Covid-19, EU free movement has been severely disrupted as a result of the reestablishment of internal border controls, the introduction of restrictions to travel and even travel bans by some EU states. The (initial) lack of an EU response and the proliferation of national measures affecting free movement can be interpreted as the reassertion of national citizenship and the limited reach of EU citizenship. Likewise, the Commission's guidelines on dealing with Covid-19 and its insistence on the need to ensure mobility for essential workers as part of ensuring the survival of the internal market point toward the assertion of a primarily economic reading of mobility. This perspective on EU citizenship is discussed alongside policy measures aimed at facilitating and coordinating the repatriation of EU citizens stranded in or out of the EU due to the closure of internal borders and restrictions to international travel. Measures taken by Romania that sought to restrict the mobility of its citizens while simultaneously opening up airbridges so that Romanians could go work in other EU states illustrate some of the contradictions inherent in the EU response.

DATA AVAILABILITY STATEMENT

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author/s.

AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

REFERENCES

Agerpres (2020a). *VIDEO Orban. Din 23 Februarie s-au Întors în Tară 1.279.000 de Cetăteni Români, 2020-05-04*. Available online at: https://www.agerpres.ro/politica/2020/05/04/video-orban-din-23-februarie-s-au-intors-in-tara-1-279-000-de-cetateni-romani--498675 (accessed October 26, 2020).

Agerpres (2020b). *Comisia de Anchetă/Oprea, Despre plecarea la Cules de Sparanghel a Românilor în Starea de Urgentă: A Fost un Vid Legislative. 2020-09-02.* Available online at: https://www.agerpres.ro/viata-parlamentara/2020/09/02/comisia-de-ancheta-oprea-despre-plecarea-la-cules-de-sparanghel-a-romanilor-in-starea-de-urgenta-a-fost-un-vid-legislativ--566324 (accessed October 26, 2020).

Avocatul Poporului (2020). *Solicitare Adresată Ministrului Federal al Muncii și Afacerilor Sociale din Republica Federală Germania Privind Siguransa Sanitară a Muncitorilor Români Sezonieri, 22 Aprilie 2020*. Available online at: https://avp.ro/index.php/2020/10/22/postare-4/ (accessed October 25, 2020).

Carrera, S., and Chun Luk, N. (2020). *In the Name of COVID-19: An Assessment of the Schengen Internal Border Controls and Travel Restrictions in the EU*. Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, PE 659.506 - September 2020.

Decret al Președintelui României nr. 195/16 Martie 2020 privind instituirea stării de urgentă pe teritoriul României, intrare în vigoare la data de 16 martie 2020 data publicării în MO nr. 212, partea I (Presidential Decree no 195 from 16 March concerning the state of emergency in Romania, Official Bulletin no. 212, 16 March 2020).

Dobreanu, C. (2020). *Ce Perspective Sunt Pentru Românii Rămași fără Locuri de Muncă. Piața Muncii nu are în Acest Moment 300.000 de Posturi Disponibile'*. Available online at: https://romania.europalibera.org/a/ce-perspective-sunt-pentru-romanii-ramasi-fara-locuri-de-munca-piata-muncii-nu-are-300-000-de-posturi-disponibile-/30597729.html (accessed August 13, 2020).

European Commission (2020a). *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*. Brussels: European Commission.

European Commission (2020b). *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*. Brussels: European Commission.

European Commission (2020c). *Communication from the Commission. Guidelines Concerning the Exercise of the Free Movement of Workers During COVID-19 Outbreak*. 2020/C 102 I/03. Brussels: European Commission.

European Commission (2020d). *Communication from the Commission, COVID-19: Towards a Phased and Coordinated Approach for Restoring Freedom of Movement and Lifting Internal Border Controls*. Brussels: European Commission.

European Commission (2020e). *Communication from the Commission, Guidelines on Seasonal Workers in the EU in the Context of the COVID-19 Outbreak*. Brussel: European Commission.

European Parliament (2020). *Bold Measures Needed to Protect Cross-border and Seasonal Workers in EU, MEPs Say*. European Parliament. Available online at: https://www.europarl.europa.eu/news/en/press-room/20200615IPR81233/bold-measures-needed-to-protect-cross-border-and-seasonal-workers-meps-say (accessed October 26, 2020).

Eurostat (2020). *EU Citizens Living in Another Member State - Statistical Overview*. Eurostat. Available online at: https://ec.europa.eu/eurostat/statisticsexplained/index.php/EU_citizens_living_in_another_Member_State_-_statistical_overview#Key_messages (accessed November 12, 2020).

Fasani, F., and Mazza, J. (2020). *Immigrant Key Workers: Their Contribution to Europe's COVID-19 Response. IZA Policy Paper No. 155*. Available online at: http://ftp.iza.org/pp155.pdf (accessed August 13, 2020).

Kühnel, A. (2020). *Sezonierii Români: Nu Toti Sunt Bineveniti în Germania Deutsche Welle*. Available online at: https://p.dw.com/p/3cNpY (accessed August 10, 2020).

Mantu, S. (2020). "EU citizenship and EU territory. unsettling the national, embedding the supranational," in *EU Citizenship and Free Movement Rights. Taking Supranational Citizenship Seriously*, eds S. Mantu, P. E. Minderhoud, and E. Guild (Leiden: Brill), 410–434. doi: 10.1163/9789004411784_019

Ministry of Foreign Affairs. (2020a). *Press Releases Regarding the Situation of Romanian Citizens in Italy in the Context of Measures Adopted to Manage and Prevent the Spread of COVID-19 Infection*. Press Release from 11.03.2020. Available online at: http://www.mae.ro/node/51878 (accessed August 14, 2020).

Ministry of Foreign Affairs. (2020b). *Approaches of the Ministry of Foreign Affairs to Facilitate the Return to the Country of Romanian Freight Carriers*. Press Release from 14.03.2020. Available online at: http://www.mae.ro/node/51944 (accessed August 14, 2020).

Ministry of Foreign Affairs. (2020c). *Press Release*. Release from 21.05.2020. Available online at: http://www.mae.gov.ro/node/52578 (accessed November 26, 2020).

Ministry of Foreign Affairs. (2020d). *Press Releases*. Press Release from 18.06.2020. Available online at: http://www.mae.ro/node/52863 (accessed August 14, 2020).

Ministry of Foreign Affairs. (2020e). *Press releases - 28 Other Romanian Citizens Tested Positive for COVID-19 Infection in the United Kingdom*. Press Release from 21.07.2020. Available online at: http://www.mae.ro/node/53170 (accessed August 14, 2020).

Montaldo, S. (2020). The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area: Never Let a Serious Crisis Go to Waste. *European Forum*. 25 April 2020. pp 1-19.

Radio Europa Libera (2020b). *Comisia Europeană: Scădere de 6% în România a Economiei. Șomajul va Ajunge la 6.5%*. Radio Europa Libera. Available online at: https://romania.europalibera.org/a/comisia-europeanbrevea-scadere-de-6-în-romania-a-economiei-somajul-va-ajunge-la-6-5-/30596130.html (accessed August 11, 2020).

Radioa Europa Libera (2020a). *Coronavirus în România. Violeta Alexandru: Șomajul Tehnic se Poate Prelungi Și După 15 Mai*. Radioa Europa Libera. Available online at: https://romania.europalibera.org/a/coronavirus-Înromânia-violeta-alexandru-.omajul-tehnic-se-poate-prelungi-.i-dupa-15-mai/30589311.html (accessed August 13, 2020).

Thym, D. (2020). *Travel Bans in Europe. A legal appraisal (Part I and II). Odysseus Blog*. Available online at: http://eumigrationlawblog.eu/travel-bans-in-europe-a-legal-appraisal-part-i/ (accessed October 26, 2020).

Udisteanu, A. (2020). *Poveștile Românilor Întorși Acasă*. Available online at: https://recorder.ro/povestile-romanilor-intorsi-acasa/ (accessed August 13, 2020).

Valcke, A. (2019). EU Citizens' rights in practice: exploring the implementation gap in free movement law. *Eur. J. Migrat. Law* 21, 289–312. doi: 10.1163/15718166-12340052

Conflict of Interest: The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

frontiers in Human Dynamics

REVIEW
published: 22 April 2021
doi: 10.3389/fhumd.2021.595189

Migration in the Time of COVID-19—Policy Responses and Practices in Croatia Concerning the Western Balkan Routes and Readiness for the Post-COVID-19 Society in Which the Right to Health Care for the Most Vulnerable Is Guaranteed

Sunčana Roksandić[1]*, *Krešimir Mamić*[2,3] and *Robert Mikac*[4]

[1]University of Zagreb, Zagreb, Croatia, [2]Independent researcher, Zagreb, Croatia, [3]Ministry of the Interior, Zagreb, Croatia, [4]Faculty of Political Science, University of Zagreb, Zagreb, Croatia

OPEN ACCESS

Edited by:
Jaya Ramji-Nogales,
Temple University, United States

Reviewed by:
Paul Jame Cardwell,
University of Strathclyde,
United Kingdom
Saša Zagorc,
University of Ljubljana, Slovenia

***Correspondence:**
Sunčana Roksandić
suncana.roksandic@pravo.hr

Specialty section:
This article was submitted to Refugees and Conflict, a section of the journal Frontiers in Human Dynamics

Received: 15 August 2020
Accepted: 08 February 2021
Published: 22 April 2021

Citation:
Roksandić S, Mamić K and Mikac R (2021) Migration in the Time of COVID-19—Policy Responses and Practices in Croatia Concerning the Western Balkan Routes and Readiness for the Post-COVID-19 Society in Which the Right to Health Care for the Most Vulnerable Is Guaranteed. Front. Hum. Dyn 3:595189. doi: 10.3389/fhumd.2021.595189

This research article aims to provide answers on how COVID-19 pandemics influenced migration law, policy responses, and practices in Croatia, particularly concerning migrants on the Western Balkan route. Throughout the EU, governments have reinstituted border controls in the Schengen region and any "nonessential travel" to the EU has been suspended. In this study, it is analyzed whether asylum seekers have been denied entry in violation of international refugee law and whether immigration officers held detainees because of the risks posed by COVID-19 alongside Croatian borders. In addition, the study addresses the question whether and to what degree the COVID-19 pandemic influenced the overall approach toward migrants and their access to services, primarily the right to health care. Also, it is researched whether facilities for migrants and asylum seekers have appropriate health care and whether the measures imposed by the Croatian Institute of Public Health and by the National Emergency Response Team are respected when dealing with migrants. In addition, it is researched whether the EU, UN, and WHO policies and recommendation concerning COVID-19 and migrants, where applicable, are respected in the Republic of Croatia and whether specific policies concerning migrants and COVID-19 were introduced. All legislation, policy responses, and practices will be critically approached and examined. The text will make proposals for implementation of best practices and policy responses for migrants in the context of COVID-19. All statistical data that are necessary for this research are requested from the Ministry of the Interior of the Republic of Croatia.

Keywords: migration, refugees, COVID-19, policy responses, Croatia, Western Balkan routes

INTRODUCTION

This research article aims to provide answers on how COVID-19 pandemics influenced migration law, policy responses, and practices in Croatia, particularly in relation to migrants on the Western Balkan route. Since the pandemic is (far) from over, the authors hope that some of the underlined issues in this article will lead to changes in law, policy, and practice in Croatia, even during the COVID-19 pandemic.

To reach this aim, the research is both content-related (relevant regulations, policy, and practice concerning migration, asylum seekers, health rights, and restrictions of freedom) and response-related (changes in the regulations, policy, and practice with the first wave of COVID-19 pandemic). It is inevitable that, in this study, some of the pre-COVID-19 issues are addressed.

In order to detect the main challenges in law, policy, and practice, the multidisciplinary team of the authors established a common research question, which answer should help to reach the aim of this study: is the Croatian policy toward migrants and asylum seekers in the midst of the COVID-19 pandemic consistent with four tenets of the UN policy brief on COVID-19 (UN Comprehensive Response to Covid-19 Disaster 2020). In doing so, this study analyzes, according to the available data, whether the health rights of migrants and asylum seekers are respected in Croatia and how the risk of spreading COVID-19 in the first wave of pandemic (March–Autumn 2020) was addressed in this vulnerable population. Namely, whether the facilities for migrants and asylum seekers have appropriate health care and whether the measures imposed by the Croatian Institute of Public Health and the Civil Protection Headquarters of the Republic of Croatia are respected. In addition, the study addresses the question whether and to what extent the COVID-19 pandemic influenced the overall approach and attitude toward migrants in Croatia.

Having this aim in mind, this article analyzes whether the EU, UN, and WHO policies and recommendations concerning COVID-19 and migrants were respected and if there were any specific policies introduced in relation to this subject in the Republic of Croatia.

Regulations, policy responses, and practices will be critically approached and examined to the extent possible. The Ministry of the Interior of the Republic of Croatia provided the authors with statistical data that are detrimental for this research and the critical assessment of published data. Interviews with relevant stakeholders were also conducted. However, lack of available data constrains this research. Lack of information or impossibility of supervision of state authorities' actions in some instances should not be taken lightly, and the lack of all information and transparency was taken into account while assessing overall policy and practice in Croatia and served as an incentive for some proposals.

This study provides proposals for the implementation of best practices and policy responses in relation to migrants in the context of the COVID-19 pandemic in the Republic of Croatia, all in the context of human security, emphasizing the most urgent ones.

This analysis represents a qualitative desktop research of primary and secondary normative and academic sources with the interpretation of received statistical indicators of the Ministry of the Interior of the Republic of Croatia and other institutions and NGOs were available to examine whether Croatia's official policy is in line with the aforementioned goals. The study consists of seven sections. The first section, titled Theoretical and Methodological Framework, provides an overview of the research methodology. The second section, Introduction to COVID-19 and Human Security Challenge, provides an insight into the topic and the scope of the research. COVID-19 and Migrants presents key issues that link the discussion of the COVID-19 pandemic and migrants. The fourth section, Analysis of Overall Policy Toward Refugees and Migrants, outlines policy analysis for refugees and migrants in Croatia with an overview of the developments in Southeastern Europe. The next section titled Migration Flows on Western Balkan Routes During COVID-19 Outbreak provides insight into the developments in the field and a display of statistical indicators. The sixth section, Regulation and Recommendations Concerning Prevention of COVID-19 Among Asylum Seekers and Migrants in Croatia, is the central part of the research and connects all of the elements from the previous sections. The final section outlines a summary of the research and a review of all of the collected materials and results of the analysis.

Throughout the EU, governments have reinstituted border controls in the Schengen region and any "nonessential travel" to the EU has been suspended, especially during the first wave of the COVID-19 pandemic (Ramji-Nogales and Goldner Lang, 2020, 596). The last mass-migration crisis already led to reintroduction and maintenance of border controls since 2016 and 2017. Croatia was no exception to this rule. This, in our opinion, although aware that refugees, in general, do not pursue always legal ways of entry into EU and further on, itself represents a *human security risk* (The Commission on Human Security, 2003) for the migrants seeking refuge in the EU. Due to its particular geographical location, Croatia represents a country in which it is challenging to provide security to migrants and to successfully contain the spread of COVID-19 at the same time. However, if the historical experience is invoked, Croatia should not be taken by surprise and unprepared for such challenges. On part of the territory of today's Croatia, during the Habsburg Monarchy, the *Military Frontier (Vojna Krajina) was formed* in the XVIst century to serve as a defense against the Ottoman Empire. In the XVIIIth century, as part of this Military Frontier, a sanitary cordon was created that would become "the most comprehensive and one of the most durable systems to combat infection known as the sanitary cordon, which rested on a line 1900 km on over 10 thousand guards." (Roksandić and Mamić, 2020, 686). As the maintenance of the sanitary cordon required enormous financial and human resources, it was abolished in 1872 after lasting for almost 200 years. Of course, the sanitary cordon was not a perfect system, and the overall geopolitical structure and human rights standards were different at that time.

THEORETICAL AND METHODOLOGICAL FRAMEWORK

Three key theoretical elements are used in this research in addressing main research questions—policies, theories, and research methods.

In general, politics is multidimensional. Overall, we distinguish three basic concepts for politics (politics in its narrower sense, polity, and policy) that reflect and describe its totality and represent its dimensions. Politics is primarily a struggle for power, authority, and management of the institutions of the political system. We designate this dimension as politics in the narrower sense, which is characterized by political decision-making based on the power and interests of political actors. The second dimension is polity, which denotes the institutional dimension and consists of the rules, procedures, and institutions that form the political system. The third dimension is policy or public policy, which refers to the content of political decision-making (Petak, 2007 in Miošić et al., 2014: 9). In this analysis, we focus on the policy dimension of the Croatian policy related to the COVID-19 pandemic, the following crisis, and the overall consequences related to the dynamics of the treatment of migrants. We will analyze this at three levels: cooperation at the EU level; stopping the smuggling, illegal crossings, and the spread of COVID-19; and refugees' relief on the national territory in relation to COVID-19.

These theories are important because they enable the understanding of complex phenomena and processes through the generalization and creation of logical categories. The chosen theoretical approach for this article consists of a combination of two theories: the New Institutionalism theory and Crisis Management theory. Peters (2007) describes the New Institutionalism theory as a combination of series of different research approaches toward the functioning of institutions. This theory is particularly important in analyzing the policy approaches of different institutions and their interactions. We will use this theory to describe how the Croatian government and its bodies acted in activities of interest to our research. The Crisis Management theory according to Kešetović and Toth (2012) represents the ability of an organization to prepare for a crisis through development of rapid and efficient response once a crisis has struck, as well as an ability to efficiently manage the crisis. This is important to analyze the path and results of the Republic of Croatia, with which it responded to the COVID-19 crisis, particularly concerning the migrants on the Western Balkan route.

Research methods are used to interpret various phenomena and processes and to arrive at a scientific conclusion. In this research, we have used the following research methods: induction, deduction, analysis, and synthesis by which we analyzed documents, processes, and phenomena related to the focus of this research.

INTRODUCTION TO COVID-19 AND HUMAN SECURITY CHALLENGE

The COVID-19 pandemic is a human security challenge, which has now lasted for more than eleven months. In some ways, the world has stopped, and the normal ways of functioning were altered. The "new normal" became the "it" word of 2020, and it continues in 2021. Suddenly and especially at the beginning of the pandemic, a new "war" emerged: the "war on COVID-19" alongside the "war on terrorism" and the denial of basic rights of migrants and refugees. At the same time, invoking human security worldwide became even more important. Human security can be understood as an emerging normative framework in international relations (Oberleitner, 2005: 188). The human security concept partly emerged from the United Nations Development Programme Development Report (1994) and lists seven types of security: economic, food, health, environment, personal, community, and political security. With the adoption of the Sustainable Development Goals (SDGs), the United Nations General Assembly has reaffirmed the notion of human security (United Nations Department of Economic and Social Affairs Sustainable Development, 2015). Therefore, the notion of human security provides an even more integrated approach relevant to governments and societies affected by extreme poverty, underdevelopment, recurring violent conflicts, systemic violence, and human rights violations. As an EU country, there is a necessity for Croatia to maintain higher standards of respect for human rights. Additional human security risks for migrants could also be, among others, activities and omissions of authorities concerning illegal pushbacks and their nonprosecution. As emphasized by *Arbour*, the importance of economic, social, and cultural rights cannot be overstated in the protection of security (Arbour, United Nations High Commissioner for Human Rights, 2005: 5) and that should have an impact in creating a holistic policy in relation to asylum seekers in times of the COVID-19 pandemic:

> The importance of economic, social and cultural rights cannot be overstated. Poverty and exclusion lie behind many of the security threats that we continue to face both within and across borders and can thus place at risk the promotion and protection of all human rights. Even in the most prosperous economies, poverty and gross inequalities persist and many individuals and groups live under conditions that amount to a denial of economic, social, civil, political and cultural human rights. Social and economic inequalities affect access to public life and to justice. Globalization has generated higher rates of economic growth, but too many of its benefits have been enjoyed unequally, within and across different societies. Such fundamental challenges to human security require action at home as well as international cooperation.

As underlined by Drumbl and Roksandić Vidlička (2020), "social distancing is the tactic; we all are enlisted in solidarity; the epidemiologists lead us; . . . our weapons are masks, ventilators,

mobile hospitals, and sanitizers. These two wars nonetheless mingle. Just last week, in the United States, a memo from the Justice Department instructed that individuals who intentionally spread the novel coronavirus could be charged with terrorism for the "purposeful exposure and infection of others." ... Links also emerge between the virus, treaties and laws that address biological and chemical weapons. . . .Hundreds of Kenyans are assaulted by police who fire tear gas and swung batons to enforce COVID-19 related curfews and a young boy was shot and killed by a police sniper on his own balcony for breaching curfew. An 18-year old Canadian employee was arrested for allegedly lying to her employer (McDonald's) about having COVID-19 in order to get out of going to work and charged with fraud. The state is becoming increasingly engaged in intrusive surveillance. Croatia imposes misdemeanors, criminal sanctions and is thinking of implementing AI surveillance over quarantine-breakers."

In this period of the "new normal," as somewhat described above that manifest itself in physical distancing, states have again become the main subjects of international relations. International organizations have fallen into the "second role" and their strength heavily depends on national states. It is the time of bringing back border controls in places where they have not existed for decades and a time of significantly tightening all types of border crossings. However, it seems that this approach is beginning to fade away and the need for mutual trust and cooperation is yet again gaining its momentum (e.g., the call from the EU for a joint health security policy from November 2020 and common policy and approach in receiving appropriate amount of vaccination). With this, the breaches of human rights of migrants and asylum seekers are resurfacing on the political agenda.

The ending of the "new normal" is not yet on the horizon. However, global outcries for the respect of human rights while responding to the pandemic seem to have a certain positive effect. Also, to avoid overcriminalization and the use of criminal law measures to ensure respecting the health measures, by November 2020, Croatia filed only 13 criminal charges against the spread of contagious diseases, an offence described in Article 180 of its Criminal Code (Croatia. Criminal Code, 2011). None of these charges were filed against migrants or asylum seekers. The police forces did not become the main enforcement body of the introduced health measures. However, this ongoing battle against COVID-19 also means that the focus of the public is not on the refugees, migrant seekers, and the violations of their human rights. The results of this fact are twofold. First, there was not a lot of media news or social media coverage to detail the hatred aimed toward migrants or the blaming of refugees for the spread of COVID-19 in Croatia. At the same time, pushbacks and violations of the human rights of migrants and asylum seekers are occurring on Croatian borders. Issues of national security and self-orientation have become commonplace. The humanitarian crisis concerning refugees and asylum seekers seems to go almost unnoticed by the general population in Croatia, regardless of the outcry of UN agencies and different NGOs. Official reports are (still) missing as well. However, at the same time, this pandemic has revealed many violations of human rights of migrants and a disproportionate spread of the COVID-19 amongst them.

In order to tackle the challenges that Croatia faces in relation to migrants and asylum seekers, it is necessary to underline the characteristics of the country's geostrategic and geopolitical position. Located in the politically unstable area of the southeast of Europe, it has one of the longest land borders of all EU members to nonmember countries. This is why the abovementioned Military Frontier's has been formed in history in a large part of the Croatian territory. It is located on the Western Balkan route where people, narcotics, and weapons are smuggled to the West and stolen items and synthetic drugs to the East. Although a full member of the EU since 2013, it has not yet become part of the common Schengen area and it is not part of the single area of freedom of movement within the EU. This was especially evident during the refugee-migrant crisis of 2015/2016 when Hungary laid a razor wire along the entire length of the common border, as did Slovenia also for the most part. By these actions, Hungary and Slovenia cut off Croatia from the rest of the EU and the Schengen area with a razor wire. In such a situation and with the extremely porous borders of its eastern neighbors (primarily Bosnia and Herzegovina and then Serbia and Montenegro), Croatia is challenged with preventing the illegal entry and pressure of an ever-increasing number of irregular migrants at its borders. All the while, Croatia is preventing the flow of migrants not only to its own territory but also to the EU as a whole. The situation in which Croatia finds itself is best illustrated by the opinion of German Chancellor Angela Merkel: "From the perspective of a country that must protect its external borders, it looks different than from the perspective of a country in the middle of Europe" (tportal.hr, 2020). In addition, the responses of the European Union and the United States to the COVID-19 pandemic put serious pressure on the international refugee law regime (Ramji-Nogales and Goldner Lang, 2020, 599) and to Croatia to respect human rights standard while facing the described challenges.

COVID-19 AND MIGRANTS

As already underlined, the COVID-19 pandemic, which led to a global crisis, emerged by an uncontrolled spread of the coronavirus (SARS-CoV-2) that caused the disease (COVID-19) at the end of 2019. Early in 2020, it affected all layers of society, leaving almost nobody immune to its wide socioeconomical consequences. Due to our modern way of life and the wide availability of transportation, the current pandemic is different from all of the previous pandemics, since it is only possible for the virus to spread in such a short time all over the world in today's contemporary society. It is the first global health crisis of contemporary times that affects the whole of humanity (Mikac, 2020, p. 1). At the same time, what also makes this pandemic differ from the previous ones is that this pandemic is occurring in the era of internationally recognized human rights, including the right to health care and recognized rights of migrants and asylum seekers. As seen with border closures, "The human rights implications of all of these border closures

are alarming, putting at grave risk vulnerable populations who are ostensibly protected by these domestic and international legal obligations." (Ramji-Nogales and Goldner Lang, 2020, 599). The same is valid with other human rights violations, primarily the right to health care and food security (UNICEF Report for Yemen, July 2020), which is again triggering migration.

This pandemic led to new rediscoveries on the responses and lessons learned from the influenza that had a devastating effect in the last century (1918–1919) (McMillen, 2016, pp. 89–102). It is by now clear that the COVID-19 pandemic affects all strata of society and everyone is at a potential risk of infection, particularly the most vulnerable (e.g., Yemen and Ethiopia). Having said that, "many refugees, migrants, IDPs and stateless people are at increased risk. Specifically, three quarters of the world's refugees and a large number of migrants are located in developing regions where health systems are already overloaded and do not have sufficient capacity. Many of them live in overcrowded camps, settlements, makeshift shelters or reception centers, where they do not have adequate access to health services, clean water and sanitation" (OHCHR, IOM, OHCHR and WHO Joint Statement, 2020). Therefore, in their attempt to reach security and the economic well-being in the EU, migrants and asylum seekers arriving at Croatian borders do not arise from a vacuum, but from the entire global inadequate system that fails to adequately protect this particularly vulnerable group and provide them with adequate health care in the first place and all seven types of security. During the refugee-migration crisis of 2015/2016, international organizations such as the International Red Cross or Médecins Sans Frontières put in big efforts to help migrants and refugees with the access to health care (Roksandić Vidlička, 2020, 145). However, illegal migration flows during the COVID-19 pandemic represent a new challenge, which should not be left to voluntary organizations and medicine enthusiasts. It warrants and deserves a systematic approach. The latter is in line with the fourth tenet of the UN brief.

According to the UN Comprehensive Response to Covid-19 Disaster (June 2020), "migrants, refugees, internally displaced persons, children, older persons, persons with disabilities, indigenous communities and those on low-income are more likely to suffer devastating consequences from this pandemic" (p. 12). The impact of COVID-19 "is disproportionately hard for millions of people on the move, such as migrants in irregular situations, victims of trafficking in persons, as well as refugees and internally displaced persons fleeing persecution, war, violence, human rights violations. . . . This impact presents itself as three interlocking crises: a health crisis whereby people on the move may lack the tools to protect themselves against the virus; a socio-economic crisis exacerbating the risks to their already precarious livelihoods; and a protection crisis that engenders human rights issues and stigmatization. . . The tightening of border controls, travel restrictions or limitations on freedom of movement may complicate their access to protection measures" (pp. 22–23).

The UN policy brief on COVID-19 offers four basic tenets to guide our collective response (United Nations Sustainable Development Group, 2020, p. 23): First, excluding people on the move from our COVID-19 response is costly in the long run, whereas inclusion pays off for everyone. Only an inclusive public health and socioeconomic response will help suppress the virus, help to restart our economies, and help ensure we stay on track to reach the Sustainable Development Goals (United Nations Department of Economic and Social Affairs Sustainable Development, 2015). Second, an effective response to COVID-19 and protecting the human rights of people on the move are not mutually exclusive. Third, no one is safe until everyone is safe. Lifesaving humanitarian assistance, social services, and learning solutions must remain accessible, as must safe diagnostics, treatment, and vaccines, without discrimination based on migration status. Fourth, people on the move are part of the solution and we should use this crisis as an opportunity to leverage their full potential.

Croatia is not an example country for rendering the appropriate health care to migrants with clear set policies from the Public Health Institutes that gives recommendations concerning COVID-19 targeting this population, what will be presented in the sections to come, but it is hardly the only one in this position. However, providing separate recommendations for migrants concerning the spread of COVID-19 is hardly the only problem in Croatia.

ANALYSIS OF THE OVERALL POLICY TOWARD REFUGEES AND MIGRANTS

The Republic of Croatia is an active participant and stakeholder in all efforts of the European Union and its institutions in resolving the issue of refugees and migrants, as well as protecting their rights and providing the necessary support in resolving their status. However, in practice, violations of fundamental human rights in practice is occurring, although continuously publicly denied by officials but continuously (re) confirmed by available national and international NGO reports. The incident if holds true as reported by the Croatian media on January 31, 2021, is particularly troublesome. Euro parliamentarians that came to independent inspection at the Croatian border with Bosnia and Herzegovina faced impediments during inspection by the Croatian police in reaching border controls to assess the response of Croatia toward migrants (Jutarnji list, 2021a January 31, 2021 at 14:53). Just couple of hours later in the same media, the Minister of Interior, Mr. Božinovć, provided different viewpoints on the same story (Jutarnji list, 2021b January 31, 2021, at 17:25).

Since 2015 and the refugee-migrant crisis when more than 660,000 people passed through the country, Croatia supported the negotiation processes of the European Union and Turkey related to the prevention of mass migration from Turkey to Greece, accepted in its policies quota systems, refugee families, and children refugees from war-torn areas (see more on the consequences of the Agreement in Reitano and Micallef, 2016). In addition to the above, Croatia is actively cooperating with FRONTEX and other agencies responsible for the issues in question through the Ministry of the Interior. The Republic of Croatia held the presidency of the Council of the European Union

during the first half of 2020, but the COVID-19 pandemic significantly affected all the agendas planned. It was also planned to address migration policy and to place the emphasis on the protection of freedom and democracy during this period (Croatia Godišnje izvješće za, 2020 godinu o migracijama i azilu u Hrvatskoj (2. Dio), 2020, 7). Thus, the entire EU was primarily focused on internal challenges, and consequently, issues of refugees and migration were not discussed a lot in this period, so violations of human rights continued. In addition, at the beginning of the pandemic, on March 22, Croatia's capital city Zagreb and its surroundings were hit by a strong earthquake, so "Croatia temporarily postponed the reception of unaccompanied children from refugee camps in Greece" and "informed Brussels that it would need more time for acceptance" (Frlan Gašparović, 2020). Furthermore, "international migration is likely to remain limited for some time due to fear of virus transmission, transport restrictions, political reasons, but also xenophobia" (Gregurović, et al., 2020, p. 19) and Croatian politics are not excluded from these trends. Additionally, xenophobia did not rise since the pandemic started. However, "while even the most intractable wars end, the economic systems that enable conflict or making a profit from the chaos are typically far more durable" (Reitano and Micallef, 2016, 297), more refugees and asylum seekers were created. Another earthquake hit Croatia on December 29, 2020. This time, it affected the most underdeveloped area of Croatia, once belonging to Military Frontiers (Petrinja, Sisak, Glina, and surrounding villages) placing focus to yet another crisis.

In terms of stopping smuggling and illegal crossings of the state border, it is necessary to highlight the multiple challenges that Croatia faces regardless of the COVID-19 pandemic (Hotspots of Organized Crime, 2019; Zvekić and Roksandić Vidlička, 2020). First, Croatia has been a full member of the European Union since 2013, while at the same time, it is still not a full member of the Schengen area—which is one of the key medium-term foreign policy goals it has been devotedly working on for many years. Of all the members of the EU, Croatia has one of the longest land borders with nonmember countries (1,377 km toward Serbia, Montenegro, and Bosnia and Herzegovina). Secondly, Croatia shares 1,001 km of border with Bosnia and Herzegovina, which has significant problems with controlling its eastern borders and the uncontrolled entry of refugees and migrants into its territory, challenges of illegal accommodation camps, and the movement of all these persons on its territory that are trying (due to the geographical location and terrain configuration) to continue their journey further west through Croatia. Third, in all its strategic documents and public reports (e.g., National Security Strategy and Intelligence Service's Public Reports), Croatia recognizes the risk of illegal migration, smuggling, and trafficking in human beings, participation of organized crime groups in illegal activities of transfer, accommodation, and further transport of persons trying to cross the state border illegally. Like any other state, it is determined, at least in its policies, to prevent and, as far as possible, stop all illegal activities and to provide assistance to victims and helpless people within the limits of its own capabilities. Western Balkan countries "find themselves in between sources of supply and demand for drugs and weapons, and along a major route for the smuggling of migrants. The more vulnerable the region becomes, the more attractive it is as a trafficking route" (Hotspots of organized crime, 2019, 4).

When it comes to refugees and asylum seekers assistance, Croatia has certain capacities that it has allocated for this purpose, such as the well-known public space accommodation facilities in the former Porin Hotel in Zagreb, where asylum and subsidiary protection seekers are located (see e.g. United Nations International Children's Emergency Fund, 2020). There are a number of nongovernmental organizations in the hotel with which the state has contracted certain tasks related to the care and support of refugees and migrants. Due to the COVID-19 pandemic "since the beginning of May 2020, the Ministry of the Interior and the Ministry of Health of the Republic of Croatia have taken over the coordination of all activities to help children and families accommodated in this reception center" (UNICEF, 2020). However, it is not barely enough. According to the report of the Croatian Legal Centre (HPC), in May 2020, the epidemiological situation in migrant camps has not even come close to the scale of the health crisis. On the other hand, what has emerged as the main problem is frequent and gross violations of fundamental human rights and noncompliance with the minimum health conditions but also the minimum conditions for a dignified life (Croatia Hrvatski pravni centar (HPC), 2020, 23).

Challenges that are not new in Croatia also relate to a number of activities that have not been finished in order to complete the overall system of integration of refugees and persons received by Croatia. In addition, the last Croatian Migration Policy was adopted for the period from 2013 to 2015, and it is a matter of urgency to have a new one. Integration policies are insufficient and incomplete, such as ensuring Croatian language learning, access to the labor market, and health services. Some of these activities are conducted by volunteer associations and individuals who point out that the state does not take sufficient care of refugees and migrants on its territory and are often left to fend for themselves. This means that the Croatian policy dimension has significant space in order to improve the content of its public policies and also the treatment of people who need protection and assistance.

When the refugee-migration crisis started in 2015, a significant number of international humanitarian organizations have filed complaints against the Croatian police. Namely, during 2018, the Human Rights Watch (HRW) organization interviewed migrants attempting to cross the Croatian–Bosnian border and they confirmed that the Croatian police was pushing back migrants and asylum seekers back to Bosnia and Herzegovina, often violently (Human Rights Watch, 2018). Also, on May 15, 2019, the Swiss national television SRF published video footage of Croatian police officers involved in collective expulsions of migrants to Bosnia and Herzegovina. The video was published on the Facebook page of Border Violence Monitoring Network (BVMN, 2020). Deutsche Welle (DW) reported the case of brutal beatings of migrants in the Croatian–Bosnian border on October 19, 2020 (Deutsche Welle, 2020). Migrants on the Western

Balkan Route are using legal or illegal camps in Turkey, Bosnia and Herzegovina, or elsewhere before they continue their journey to the European west.

Since the NGOs started to continuously report violence by the Croatian police and violent pushbacks of migrants and refugees, the Croatian Prime Minister and the Croatian Minister of the Interior denied repeatedly allegations of violence from the Croatian police. This circle is omnipresent (e.g., Vrabec, 2020). It seems that what was stated in May 2020 is still valid: the main problem is frequent and gross violations of fundamental human rights and noncompliance with health conditions and, also the conditions for a dignified life. It is expected that the forthcoming Report of the Croatian Ombudsman for Human Rights for 2020 will address some of those issues and take a stance on the contradicting reports and lack of official data concerning migrants, asylum seekers, and the spread of COVID-19. It is also expected that the new Croatian migration policy is prepared, taking into account all detected shortcomings. It is worth to remind here obligation to investigate and sanction perpetrators is a positive obligation of the right to life and prohibition of torture (Arts 21 and 23 Constitution of Croatia and Arts 2 and 3 European Court of Human Rights) (Croatia. The Constitution, 2020).

MIGRATION FLOWS ON WESTERN BALKAN ROUTES DURING THE COVID-19 OUTBREAK

Since the end of the refugee-migration crisis and the EU–Turkey Agreement on March 18, 2016, which halted refugees and migrant flows on the Western Balkan Route, the pressure of migrants smuggling on Croatian external borders started. "In March 2016, the Europe Union (EU) and Turkey agreed that all refugees who reached Greece through unauthorized means would be returned to Turkey. The deal was the latest effort to "stem the tide" of refugees fleeing the Middle East" (Goalwin, 2018: 121). Although the agreement was reached, it did not prevent the continuation of illegal attempts to cross the borders from Turkey to Western Europe. There were no longer uncontrolled migrations of large numbers of people like during 2015 and 2016, but there were smaller groups or individual attempts of illegal border crossings.

According to the official statistics of the Ministry of the Interior of the Republic of Croatia, a significant increase in previous years was recorded in the commission of the offence *Unlawful Entry into, Movement or Residence in the Republic of Croatia, Another Member State of the European Union or a Signatory to the Schengen Agreement* (Art. 326 of the Croatian Criminal Code) (Croatia. Criminal Code, 2011). This criminal act is committed by enabling or assisting another person to illegally enter, leave, move, or reside in the Republic of Croatia, another member state of the European Union or a signatory to the Schengen Agreement, and it criminalizes organized criminals—irregular migrant smugglers. If during the commission of this criminal offence, the life or limb of a person illegally entering, moving, or residing in the Republic of Croatia is endangered, or the said person is treated in an inhumane or degrading manner, or the offence is committed by a public official in the performance of his/her official duties, the perpetrator shall be punished by imprisonment from 6 months to 5 years. The attempt of this criminal offence is punishable.

The elements of this offence as constructed show that an illegal entry in itself in not a criminal offence but a misdemeanor prescribed by the State Border Surveillance Act (Articles 42–46). Unauthorized stay is a misdemeanor prescribed by the Residence Act (Articles 16–17). This approach of the criminalization of illegal entry is justified that having misdemeanors will be preventive enough for illegal entry in the Republic of Croatia. The aiding of illegal entry is a criminal offence, which was required by the EU Directive 202/90/EZ from November 28, 2002 (Turković et al., 2013 Komentar Kaznenog zakona, 2013, pg. 401).

According to official statistics, the Croatian police recorded 156 criminal acts of unlawful entry (Art. 326) during 2016. In 2017, that number rose to 365, 619 in 2018, and 946 in 2019. The linear growth of this statistic is evident.

But, the comparison of the statistics for the first half of 2020 with the same period in 2019 show that, in the first 6 months of 2019, the Croatian police recorded 377 of these criminal acts and, at the same time, in 2020, there were 267 criminal acts, i.e., 29,18% less than in the first half of 2019. As we are aware off, there are no estimations in official reports of how many criminal acts of aiding of illegal entry/smuggling go unnoticed by the Croatian police. However, according to the Annual Report on migration and asylum in Croatia Godišnje Izvješće za (2019) (May 2020), in 2019, the number of illegal state border crossings increased by 147.1% compared to 2018, amounting to 20,278 irregular state border crossings.

During the first half of 2019, the Croatian police recorded 7,364 irregular migrants and, at the same time, in 2020, there were 8,374 irregular migrants or 13.7% more than in the same period in 2019. Most of irregular migrants recorded by the Croatian Police in the first half of 2020 were from the MENA region (2,217 from Afghanistan, 1780 from Pakistan, 850 from Morocco, 698 from Iraq, 669 from Syria etc.). It can be concluded that the lockdown measures implemented by the Croatian Government for the prevention of spreading COVID-19 resulted in lowering of the activities of organized criminal groups—irregular migrant smugglers—but the interest of individuals for illegal crossing of the borders remains the same and even increased during the pandemic (Ministry of the Interior, 2020). Also, it could be due to the introduction of lockdown in Croatia in the period from March to May and from November to December, when a larger number of police officers were in the field. Also, due to the earthquakes that hit Croatia, a large number of police officers were present in the area where the largest number of illegal crossings was previously recorded.

However, it seems that like in all areas concerning migrants and asylum seekers, official data could not alone provide a realistic overview of the treatment of these vulnerable groups, which need to be approached with extra care in the ongoing pandemic that is additionally threatening their human security.

REGULATION AND RECOMMENDATIONS CONCERNING THE PREVENTION OF COVID-19 AMONG ASYLUM SEEKERS AND MIGRANTS IN CROATIA

On August 4th, Croatia had registered 647 active cases of COVID-19 and a total of 5,318 cases since the beginning of the pandemic. As a result of this disease, 154 deaths have been reported (OECD, 2020). In November of 2020, this number is much higher, a total of 81.844 registered cases since the beginning of the pandemic and 1,006 deaths. On January 31st, 2021, there was a total of 232,426 registered cases from which 2,923 are active and overall 5,027 deaths (official statistics, Croatia, 2020).

Like other member states of the Council of Europe, Croatia has a positive obligation to protect the health of the people in the state, which includes people in police detention and immigration detention centers and places of quarantines (Turković, 2020). This includes providing accurate information about the known risks related to the pandemic and about behaviors or measures to avoid spreading of the virus (Turković, 2020). Some of the protective measures used to combat the virus like confinement, restriction of movement, and lockdown hit the migrants (including interstate) and asylum seekers disproportionally and led to further discriminatory practices (see the World Bank Group and KNOMAD, 2020. Also see Drumbl and Roksandić Vidlička, 2020).

As noted in the (European Union Agency for Fundamental Rights (FRA), 2020, p. 9), one of the first available reports addressing the first wave of the COVID-19 pandemic, "xenophobic articles and behavior toward Chinese nationals were registered in January and February, while the xenophobic articles and comments toward refugees were recorded in March. The Ministry of the Interior reacted stating that the seekers of international protection in Croatia are not infected by Coronavirus in order to prevent cases of discrimination toward international protection seekers." Although the main underlying principle in rendering health care is protecting human dignity (Oviedo Convention, Art. 1 and 2) (Council of Europe, 1997), many news reports and health records are showing that the disregard for the rights of migrant workers led to the disproportionate spread of COVID-19 among them in some of the most developed EU member states (Fassani and Mazza, 2020; Sorić, 2020; Also see). Particular data for Croatia are not available in this respect.

It must be underlined that in Croatia, the population takes their constitutional right to health care seriously (Constitution, Article 59) (Croatia. The Constitution, 2020) and deems it as a fundamental right (Roksandić Vidlička, 2018, pp. 254–259). Denial of health care could also be deemed as a criminal offence as prescribed in the Croatian Criminal Code (Croatia. Criminal Code, 2011). Under the title of "Violations of Social Insurance Right," whoever denies to or limits the right of another that derives from pension, health, or unemployment insurance right established by law or limits this right or withholds the payment of contributions for the employment of disabled persons, where this does not satisfy the elements of another criminal offence, shall be sentenced to imprisonment not exceeding for a term of up to one year (Article 134 of the Criminal Code, Turković et al., 2013, p. 186). Croatia, being generally proud of its dr. Andrija Štampar legacy (see Borovečki et al., 2020), reacted to COVID-19 with transparency from responsible state authorities. This was especially visible in the first wave of pandemic in the spring of 2020 by the work of the Minister of Health and the Civil Protection Headquarters of the Republic of Croatia (Croatia. National Civil Protection Authority, 2020). Transparency was sometimes mixed with confusion concerning the legal procedures on how measures should be issued and understood (e.g., Bačić Selanec, 2020; Roksandić and Grđan, 2020).

The Croatian Institute for Public Health gives general recommendations in relation to COVID-19 (Croatia. Croatian Institute for Public Health, 2020), while the Civil Protection Headquarters of the Republic of Croatia issues measures. The main legal act that governs the legally permissible actions and measures is the Law on the Protection (Croatia, 2007) of the Population from Infectious Diseases, which was amended during the first outbreak of COVID-19 (in April 2020) as well as the Civil Protection System Act (amended in March 2020) (Croatia. Civil Protection System Act, 2015). This legislative change caused a debate among experts, e.g., whether retroactive effects of some measures are legally valid. However, as underlined in the FRA Report: Coronavirus COVID-19 Outbreak in the EU Fundamental Rights Implications (Country: Croatia, p. 5.) (European Union Agency for Fundamental Rights (FRA), 2020), the Croatian Government regularly updates the information on the website koronavirus.hr in Croatian and partly in English. All information is shared on television and on social media with subtitles and by sign language translators. As an *ultima ratio* response, Croatia has a separate offence in its Criminal Code, the Spread and Transmission of Contagious Disease (Art. 180), that prescribes criminal responsibility for breaching the regulations concerning prevention of contagious disease, both for natural and legal persons.

In general, during the COVID-19 pandemic, Croatia protected all age groups and the elderly with extra care (see for details European Union Agency for Fundamental Rights (FRA), 2020). Even the biggest scientific conference held during the Croatian Presidency of the EU (January-June 2020) was devoted to healthy ageing (in June 2020, Anić et al., 2020). However, it cannot be concluded that the abovementioned fact was and/or is valid for migrants and asylum seekers, which makes this discrepancy even more worrisome. However, the authors were not able to gather enough information and data from the responsible authorities that would either confirm or deny this stance.

In the first three months of 2020, there were 521 registered asylum seekers in Croatia, and in the same period, 13 people were granted refugee status and 14 families (22 people) were provided with housing solutions under the Regional Housing Program (altogether 315 families with 749 people) are receiving RHP assistance. As of April 14,452 asylum seekers have been accommodated in Zagreb and Kutina (41 percent children, 38 percent men, and 21 percent women). According to the UNHCR Report (Croatia: COVID-19 response) dated April 2020, refugees

and asylum seekers have access to health services in a nondiscriminatory manner in Croatia and no special provisions have been announced targeting UNHCR persons of concern. However, this finding is somewhat contradicted by the abovementioned report of the Croatian Legal Centre (HPC) from May 2020, where it was concluded that there is noncompliance with minimum health conditions and also the minimum conditions for a dignified life (Croatia Hrvatski pravni centar (HPC), 2020). It remains to be seen whether this statement will hold truth when the report of the Human Rights Ombudsman will be published for 2020. In addition, if the available health resources become scarce as the COVID-19 pandemic continues, the contingency plan must exist, which would address the health needs of migrants, including irregular ones, and asylum seekers.

As underlined by Candian (2020): "since 2016, when the Balkan Route has become one of the most important ways for the migrants to try to enter into the European continent, the countries of the Balkan area had to face the consequences that the migrant flows have brought with them. The outbreak of the Covid-19 pandemic had made this situation more problematic both for the migrants and the countries of this region: on one hand, the Balkan States had to impose a new way of living, and issue new laws on social distancing (wear masks and gloves) and also on freedom of movement; on the other hand, migrants and refugees are living a more precariousness situation. Even if, at the moment, no case of Covid-19 has been recorded among the migrants present in the Balkans, their conditions are fragile and the risk of an explosion of an epidemic is real."

In addition to the legal flow of migrants, migrants who are trying to cross the state border illegally expose Croatia to significant pressure. In such a situation, the Croatian Government and police are under additional pressure from a number of activists, NGOs, and the media for violations of refugee law and the denial of basic human rights since they are preventing people in need of protection from entering the country toward their path to freedom and security. Hopefully, this will lead to less violation of human rights and to enhanced protection of dignity of migrants.

However, the desk analysis of available recommendations and decisions concerning prevention and measures to combat the spread of COVID-19 reveals no particular existence of special measures and recommendations for asylum seekers and migrants in Croatia. The Croatian Institute for Public Health did not as of yet issue any special recommendation concerning the measures in Regional Housing Programs or special measures for asylum seekers. It is expected that general measures are applied, but this fact could not be verified based on desk research. It is also questionable whether the appropriate instructions exist in the language that is understandable and available to migrants and asylum seekers. We find this very problematic for guaranteeing an appropriate access to health care to this vulnerable group. In addition, while some shortcomings could be present in the beginning of the pandemic in this respect, there should be no excuse for their existence in January 2021.

As with other EU member states, crossing the state borders in March 2020 was temporarily prohibited except in explicitly indicated cases (National Civil Protection Authority Decision, 2020), but this measure eased with time and was amended several times for third countries. A special regime for crossing the border has been introduced and it is regularly updated. According to available data, the access to reception centers of applicants to international protection in Zagreb and Kutina is temporarily restricted, with the exception of persons who ensure the normal functioning of the facilities (ECRE AIDA Report (2020a) Report, p. 14). It must be underlined that temporary restriction of access is also valid for other social and health services, including elderly homes. According to FRA Report (p. 5), the following states for Croatia concerning asylum seekers (see also for more details AIDA Report) (European Union Agency for Fundamental Rights (FRA), 2020):

> Reception centers for Seekers of International Protection in Zagreb and Kutina have temporarily restricted access to the facilities. The Ministry of the Interior of the Republic of Croatia has restricted access to Reception Centers for Seekers of International Protection in Zagreb and Kutina for all persons who are not necessary for the normal functioning of these facilities. Persons seeking international protection who reside in the Zagreb and Kutina shelters are under constant medical supervision. In addition, Seekers of International Protection located in Reception centers have been warned about the occurrence of the disease and the measures that need to be taken to prevent its further spread (Global Detention Project, 2020). A doctor is present at the Reception Centers every day, and all international protection seekers are constantly monitored by healthcare staff. People accommodated in the Reception Centers are advised to stay inside, and measures are taken inside the facilities to protect them (i.e., markings on the floor for distance, hygienic supplies, medical staff).

According to the Report UNHCR Croatia: COVID-19 response (April 2020) (UNHCR, 2020), as of yet, there are no confirmed cases among refugees and asylum seekers, as reported by the Ministry of the Interior. The reception centers for asylum seekers remain calm and safe. This finding, however, must be continuously re-evaluated and double-checked. It is doubtful, however, that the regular supervisions of these facilities are done by the State Inspectorate of the Republic of Croatia, responsible for the implementation of measures against COVID-19. Too many cases of COVID-19 are occurring (January 2020), and it is very doubtful that the findings of this report are still valid in January 2021. It is unacceptable to the authors that these data are not transparent to the extent possible.

In order to be able to analyze the effectiveness of all introduced measures, including human rights concerns, more data should be available, e.g., the latest number of infected persons in the Reception Centers for Seekers of International Protection in Zagreb and Kutina (if any) taking into consideration the available health care services for the same population and restrictions of their movements in comparison to other population and/or vulnerable groups, etc. In addition, the

available health services for refugees and migrants waiting to enter Croatia must be analyzed as well.

According to ECRE Information from May 2020 (ECRE (2020b), p. 2. Also see: Ministry of Interior (2020)):

> The Ministry of Interior published a notification according to which no measures prescribed by the Law on Foreigners will be taken against foreigners on short stay as a certain number of persons cannot leave the Republic of Croatia within the time limit prescribed by the Schengen Borders Code. However, there is no information available on whether similar measures should apply to rejected applicants for international protection who were ordered to leave Croatia or those who decided to voluntary return. In addition, it is not clear whether rejected applicants for international protection are allowed to stay in the Reception center for Applicants for International Protection.

In addition to the aforementioned setback and lack of regular public control of the available health care in the refugee centers, or publicly available data concerning COVID-19 and registered migrants, the control of spreading COVID-19 among irregular migration flows represents a much harder task. Furthermore, it makes it even a harder task if the pushbacks are occurring as a regular practice, as many NGO reports indicate for Croatia. If that is a fact, although denied by the Ministry of the Interior on several occasions (see, e.g., AIDA, Access to the Territory and Push Backs, Croatia), the spread of COVID-19 would and will be very hard to contain among irregular migrants. There is a potential human disaster occurring that is not yet even detected and especially if none of the Independent Commissions or NGOs is allowed to inspect the border. We find this fact among the most pressing points that demand immediate action. In such setting, rights to life, human dignity, and health care are denied and meaningless if asylum seekers are wrongfully denied access to territory and administrative proceedings.

As the Commissioner of the Council of Europe emphasized on June 20, 2020, "governments should start with tackling the most blatant violations of refugees' rights (Council of Europe, 2020). Pushbacks are a case in point in Croatia. They are becoming more normalized and are carried out in an increasingly violent way across Europe. The illegal practice of pushbacks not only deprives those who may seek asylum from this opportunity. It also eats away at the foundation of international human rights law which protects refugees and their right to appropriate health care. According to the Special Report: Covid-19 and border violence along the Balkan Route by Border Violance Monitoring Network (2020), "The development of pushback practice in countries such as Croatia has shown a disturbing turn." Augmentation of border violence as a result of the pandemic appeared with the crude paint tagging of transit groups near Velika Kladusa. Meanwhile two officers actively involved in pushbacks in the Topusko area were tested positive for COVID-19, putting people-on-the-move at direct risk of contracting the virus at the hand of perpetrating officers."

In any case, independent monitoring would be helpful and urgently needed in investigating to which extent do pushbacks exist and whether this contributed to the spreading of COVID-19. It is also urgently necessary to detect the spreading of COVID-19 amongst the most vulnerable members in this group. Only then, official policies could be issued that address the most urgent matters concerning migrants and providing them with adequate health care and measures aimed toward preventing the spread of COVID-19. The problem is complex, and lack of available data makes the situation in Croatia alarming while it cannot be objectively assessed.

CONCLUSION

The conducted analysis showed the complex and interdisciplinary nature of researching the migration phenomenon in Croatia during the COVID-19 pandemic. There are many open issues related to migration. The main research question was whether Croatian law, policy, and practice in relation to providing adequate health care to migrants is in line with the UN policy brief on COVID-19 (United Nations Sustainable Development Group, 2020). The following is the answer.

Croatia seems not to be completely aware that excluding people on the move from our COVID-19 response is costly in the long run, whereas inclusion pays off for everyone. However, from its overall approach and imposed measure to contain COVID-19, it seems that Croatia is aware that only an inclusive public health and socioeconomic response will help suppress the virus, help to restart our economies, and help ensure we stay on track to reach the Sustainable Development Goals (United Nations Department of Economic and Social Affairs Sustainable Development, 2015). Croatia seems not to be completely aware that an effective response to COVID-19 and protecting the human rights of people on the move are not mutually exclusive. Third, it cannot be fully assessed whether lifesaving humanitarian assistance, social services, and learning solutions are equally accessible and that safe diagnostics, treatment, and vaccines are guaranteed to all without discrimination based on migration status. Croatia did not discriminate or had separate recommendations and measures for refugees or migrants concerning the prevention measures and COVID-19 (third tenet of the UN Policy brief). However, all recommendations are not available in the languages of refugees or migrants and there is not enough available data to conclude how these recommendations are applied in practice toward migrants and asylum seekers that are in the facilities under the jurisdiction of Croatian authorities. Some NGO reports are contradictory, as indicated in the study. Limitations posed by lack of available and verifiable official reports on these issues are easily leading to wrong or superficial conclusions. Fourth, with its law, policies, and practices, Croatia has not yet showed understanding and the acceptance of the fourth tenet that people on the move are part of the solution and we should use this crisis as an opportunity to leverage their full potential. The accusations of pushbacks occurring on Croatian borders should be another cause for concern.

In addition to the earlier results in the text, we outline several policy recommendations for the Republic of Croatia.

In any case, independent monitoring without hindrances of state officials as reported last in the media on January 31, 2021, however later differently explained by Mr. Božinović, would be most helpful and is in the opinion of the authors of this study urgently needed in investigating to which extent pushbacks do exist and whether this contributed to the spreading of COVID-19 and denial of appropriate health care for the people on the move in designated facilities, including those set for irregular migrants. It is also urgently necessary to detect the spreading of COVID-19 amongst the most vulnerable members in this group and to provide adequate health care in all of the facilities that are dealing with migrants and asylum seekers that are under Croatian jurisdiction. An urgently needed new Croatian migration policy should address all issues concerned with migration in the time of COVID-19 and make sure that a specific monitoring mechanism exists, which is adequate to measure the implementation of the proposed measures. Measures must be in line with the UN policy brief on COVID-19 (United Nations Sustainable Development Group, 2020).

Furthermore, another concern arises. The implementation of the lockdown measures in many EU member states influence migration flows—both legal and illegal. Due to the prevention of spreading of COVID-19, activities of the law enforcement agencies in the EU member states focus on the restrictions of movement. Hence, this results in the reduction of organized crime activities such as irregular migrants smuggling. However, in comparison to 2019, the number of irregular migrants is on the rise in Croatia as presented in the study. Since irregular migrants who try to reach western European countries go unnoticed and avoid contacts with legal, health, and other authorities of the countries on their way, spreading of the virus amongst irregular migrants is harder to control. The same is valid for proving adequate health care. Consequently, this notion reveals that sole reliance on the official data is unsatisfactory. As stated, all migrants on the Western Balkan Route are using legal or illegal camps in Turkey, Bosnia, and Herzegovina or elsewhere before they continue their journey to the European west. Without addressing the right to health care and implementation of COVID-19 prevention measures in those camps as well, the implementation of measures for the prevention of COVID-19 in that population remains a particular challenge for Croatia. Pushbacks make the situation even worse.

Croatian and the EU institutions should put in additional efforts to enhance capacities for the prevention of spreading of COVID-19 in those third countries to enhance their human security. Unfortunately, it seems that Croatia and other EU countries are more focused on containing the spread of the virus in their own territories and thus forget the global interconnectivity that led to a global spread in such a short time in addressing appropriately the health needs of migrants and asylum seekers.

As an EU member state and a country with one of the longest borders with non-EU member states, Croatia should follow EU values and its long established right to health care and intergenerational solidarity to provide effective health care. It should also follow the recommendations concerning COVID-19 to keep the number of infections as low as possible, but not only to registered asylum seekers, as is the case according to the available statistical data. Croatia should raise awareness among the European Commission and other member states of the problem of controlling the spreading of COVID-19 among irregular migrants and propose a systematic approach for medical treatment of migrants and refugees in camps in third countries. Naturally, the most urgent need for Croatia is to stop pushbacks and provide adequate health care to the people waiting to enter the EU in their quest for freedom. Without doing so, Croatia is breaching its own values and violating the right to health care to the most needed and vulnerable. In that case, the fight against COVID-19 and building a post-COVID-19 society in which the right to health care and human security to the most vulnerable is guaranteed is not fulfilled. Post-COVID-19 world should be one where human security is guaranteed to everyone, regardless of their passports or nationality.

AUTHOR CONTRIBUTIONS

All authors listed have made a substantial, direct, and intellectual contribution to the work and approved it for publication.

REFERENCES

Anić, B., Bellantuono, I., Brkljačić, B., Borovečki, A., DiLuca, M., Đogaš, Z., et al. (2020). Policy paper on healthy ageing – BFHA2020 conference. *Lije Vjesn* (Suppl 1), 153–158. doi:10.26800/LV-142-Suppl1-6

Border Violance Monitoring Network (2020). SPECIAL REPORT: COVID-19 AND BORDER VIOLENCE ALONG THE BALKAN ROUTE. Croatia's response to COVID-19: on legal form and constitutional safeguards in times of pandemic, VerfBlog. Available at: https://verfassungsblog.de/croatias-response-to-covid-19-on-legal-form-and-constitutional-safeguards-in-times-of-pandemic/. (Accessed August 10, 2020).

Borderviolence (2020). Available at: https://www.borderviolence.eu/special-report-covid-19-and-border-violence-along-the-balkan-route/ (Accessed August 10, 2020).

Borovečki, A., Šogorić, S., and Tiljak, K., (2020). Are Štampar's principles valid in the light of the sustainable development goals?. *Croat. Med. J.* 61 (2), 173–176. doi:10.3325/cmj.2020.61.173

Border Violence Monitoring Network (BVMD) (2020). Border violence monitoring network, new footage of push-backs on the Croatian-Bosnian border. Available at: https://www.borderviolence.eu/new-footage-of-push-backs-on-the-croatian-bosnian-border/?fbclid=IwAR1W_Y5fPXJPJ9TpoRIMQMcNwjL5HMqfFXVPFYVJPI6O8K5e4VNu2tAA2BA (Accessed November 2, 2020).

Candian, G. (2020). Balkan route: Covid-19 pandemic's consequences for migrants. *Hybrid Neighborhood Analysis Centre*. Available at: https://hybridneighbourhood.com/2020/06/03/balkan-route-covid-19-pandemics-consequences-for-migrants/ (Accessed August 10, 2020).

Council of Europe (2020). Commissioner for human rights. (June 19 2020). Pushbacks and border violence against refugees must end. Available at: https://www.coe.int/en/web/commissioner/-/pushbacks-and-border-violence-against-refugees-must-end (Accessed August 10, 2020).

Council of Europe (1997). The Convention for the protection of human rights and dignity of the human being with regard to the application of biology and medicine: convention on human rights and biomedicine. *(ETS No 164) (Oviedo Convention).*

Croatia (2020). Ministry of Interior's formal statement published on 18 March 2020, Available at: https://www.koronavirus.hr/trazitelji-medjunarodne-zastite-nisu-zarazeni-koronavirusom/171 (Accessed August 10, 2020).

Croatia Godišnje Izvješće za (2019). Godinu o migracijama i azilu, Nacionalno izvješće (2. dio) (Annual Report for 2019 on Migration and Asylum in Croatia, NAtional Report, Part 2) [in Croatian with English summary], (National Report Part 2, May 2020), Available at: https://www.irh.hr/docm/izvjestaji/114-godisnje-izvjesce-o-migracijama-i-azilu-za-republiku-hrvatsku-za-2019-godinu/file (Accessed January 30, 2021).

Croatia Hrvatski pravni centar (HPC) (2020). Ministarstvo vanjskih i europskih poslova (2020). Utjecaj širenja bolesti COVID-19 na migracijsku politiku - izvještaj o pracenju (Effect of COVID-19 disease on migration policy - monitoring report), [in Croatian with English summary] Available at: https://www.hpc.hr/wp-content/uploads/2020/07/UTJECAJ-%C5%A0IRENJA-BOLESTI-COVID-19-NA-MIGRACIJSKU-POLITIKU-izvje%C5%A1taj-o-pra%C4%87enju.pdf (Accessed January 30, 2021).

Croatia (2007). Law on the protection of the population from infectious diseases (Zakon o zaštiti pučanstva od zaraznih bolesti). Official Gaz. No. 79/07, 113/08, 43/09, 130717, 47/20.

Croatia. Civil Protection System Act. (2015). (Zakon o zaštiti pučanstva od zaraznih bolesti) Official Gazette No. 82/15, 118/18, 31/20.

Croatia. Criminal Code. (2011). Official Gazette No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19.

Croatia. Croatian Institute for Public Health. (2020). Coronavirus - the latest recommendations. Available at: https://www.hzjz.hr/sluzba-epidemiologija-zarazne-bolesti/koronavirus-najnovije-preporuke/ (Accessed August 10, 2020).

Croatia (2020-2021). Available at: https://www.koronavirus.hr/en (Accessed August 10, 2020).

Croatia. National Civil Protection Authority. (2020). Decision temporarily prohibiting crossings at the border crossings of the Republic of Croatia, Available at: https://civilna-zastita.gov.hr/odluke-stozera-civilne-zastite-rh-za-sprecavanje-sirenja-zaraze-koronavirusom/2304;in Croatian at: https://bit.ly/3aoKwOi (Accessed August 10, 2020).

Croatia. The Consitution (Ustav) (1990). Official gazette No. 56/90, 08/98, 113/00. 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

Deutsche Welle Sorić, M. (2020). Coronavirus: 'Modern Slavery' at the heart of German slaughterhouse outbreak. Available at: https://www.dw.com/en/coronavirus-modern-slavery-at-the-heart-of-german-slaughterhouse-outbreak/a-53396228 (Accessed August 10, 2020).

Drumbl, M., and Roksandić Vidlička, S. (2020). Virus and terrorism. Available at: https://justice-360.com/virus-terrorism/ (Accessed August 10, 2020).

European Council on Refugees and Exiles (ECRE) (2020a). AIDA (asylum information database) (2019 update). *HPC. Country report: Croatia*. Available at: https://www.asylumineurope.org/sites/default/files/report-download/aida_hr_2019update.pdf (Accessed August 10, 2020).

European Council on Refugees and Exiles (ECRE) (2020b). Information sheet 28 May 2020. COVID-19 measures related to asylum and migration across Europe. Available at: https://www.ecre.org/wp-content/uploads/2020/05/COVID-INFO-28-May.pdf (Accessed August 10, 2020).

European Union Agency for Fundamental Rights (FRA) (2020). Coronavirus COVID-19 outbreak in the EU Fundamental Rights implications. *Croatia. Centre for Peace Studies*. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/croatia-report-covid-19-april-2020_en.pdf (Accessed August 10, 2020).

Fasani, F., and Mazza, J.European Commission (2020). Immigrant key workers: their contribution to Europe's COVID-19 response. *Briefing*. Available at: https://ec.europa.eu/knowledge4policy/sites/know4pol/files/key_workers_covid_0423.pdf (Accessed August 10, 2020).

Frlan Gašparović, I. (2020). Croatia has postponed the reception of refugee children (hrvatska odgodila prihvat djece izbjeglica), Available at: https://www.telegram.hr/politika-kriminal/doznajemo-hrvatska-odgodila-prihvat-djece-izbjeglica/ (Accessed August 10, 2020).

Global Detention Project (2020). Croatia immigration detention. Available at: https://www.globaldetentionproject.org/countries/europe/croatia (Accessed August 10, 2020).

Goalwin, G. (2018). Population exchange and the politics of ethno-religious fear: the EU–Turkey agreement on Syrian refugees in historical perspective. *Patterns of Prejudice* 52 (2-3), 121–134. doi:10.1080/0031322X.2018.1433011

Gregurović, M., Gregurović, S., Klempić, B., Bogadi, S., Kumpes, J., Kuti, S., et al. (2020). Pandemics and migrations (pandemije i migracije). *Ekspertiza*, 1–21. doi:10.11567/zomdi.2020.1

Hotspots of Organized Crime (2019). Hotspots of organized crime in the Western Balkans, local vulnerabilities in a regional context. The global initiative against transnational organized crime. Available at: https://globalinitiative.net/wp-content/uploads/2019/05/Hotspots-Report-English-13Jun1110-Web.pdf (Accessed November 2, 2020)

Human Rights Watch (2018). Croatia: migrants pushed back to Bosnia and Herzegovina. Violence, abuse; denied opportunity to apply for asylum, Available at: https://www.hrw.org/news/2018/12/11/croatia-migrants-pushed-back-bosnia-and-herzegovina (Accessed November 2, 2020).

Jutarnji list (2021a). Incident na granici. Božinović: 'ovo je još jedna u nizu provokacija, a jednu stvar ne mogu razumjeti' (Incident on the Boarder. Bozinovic: 'This is another in a series of provocations, and one thing I cannot understand'), Available at: https://www.jutarnji.hr/vijesti/hrvatska/bozinovic-ovo-je-jos-jedna-u-nizu-provokacija-a-jednu-stvar-ne-mogu-razumjeti-15046994 (Accessed January 31, 2021).

Jutarnji list (2021b). Incident na granici. Talijanski list: 'Hrvatski policajci ganjali su eurozastupnike, nisu im dali da vide tretman migranata' (Incident na granici. Incident on the Boarder. Italian newspaper: 'Croatian police persecuted MEPs, did not let them see the treatment of migrants'), Available at: https://www.jutarnji.hr/vijesti/hrvatska/talijanski-list-hrvatski-policajci-ganjali-su-eurozastupnike-nisu-im-dali-da-vide-tretman-migranata-15046965 (Accessed January 31, 2021).

Kešetović, Ž., and Toth, I. (2012). *Problemi kriznog menadžmenta (Crisis management problems)*, Velika Gorica: University of Applied Sciences Velika Gorica

McMillen, C. W. (2016). *Pandemics, A very short introduction*. New York NY: Oxford University Press

Mikac, R. (2020). How is Croatia managing the crises it is caught up in?. *Institute for Security Policies*, Number 007., Available at: http://insigpol.hr/download-file/8347/ (Accessed August 10, 2020).

Ministry of Interior. (2020). Notice to third-country nationals. Available at: Croatian at: https://bit.ly/3bilKRa; and in English at: https://bit.ly/2Vdwj2s (Accessed August 10, 2020).

Ministry of the Interior of the Republic of Croatia (2020). Ministry of Interior, official statistics. Available in Croatian at: https://mup.gov.hr/pristup-informacijama-16/statistika-228/statistika-mup-a-i-bilteni-o-sigurnosti-cestovnog-prometa/283233 (Accessed August 10, 2020).

Miošić, N., Berković, J., and Horvat, M. (2014). *Policy analysis and advocacy (Analiza i zagovaranje javnih politika)*, Zagreb: GONG and Faculty of Political Science.

Oberleitner, G. (2005). Human security: a challenge to international law? *Global Governance* 11, 188–203.

OECD. (2020). The covid-19 crisis in Croatia. Available at: https://www.oecd.org/south-east-europe/COVID-19-Crisis-in-Croatia.pdf (Accessed August 10, 2020).

Peters, G. (2007). *Institucionalna teorija u političkoj znanosti: novi institucionalizam (institutional theory in political science: new institutionalism)*, Zagreb: Faculty of Political Science. [in Croatian with English summary]

Ramji-Nogales, J., and Golder Lang, I. (2020). Freedom of movement, migration, and borders, *J. Hum. Rights* 19 (5), 593–602. doi:10.1080/14754835.2020.1830045

Reitano, T., and Micallef, M. (2016). *Breathing space. The impact of the EU-Turkey deal on irregular migration*. Geneva, Switzerland: Institute for Security Studies&The Global Intiative Against Transnational Crime.

Roksandić, S., and Grdan, K. (2020). COVID-19 i razumijevanje pravnih propisa vezanih uz suzbijanje zaraznih bolesti u Republici Hrvatskoj - osvrt na bitna pravna pitanja od početka pandemije do listopada 2020 (COVID-19 and understanding of legal regulations related to the control of infectious diseases in the Republic of Croatia - a review of important legal issues from the beginning of the pandemics to October 22). *Pravni Vjesnik* 36 (3–4), 327–344.

Roksandić, S., and Mamić, K. (2020). Širenje zaraznih bolesti kao prijetnja ostvarivanju ljudske sigurnosti i kaznenopravni mehanizmi u sprječavanju širenja bolesti COVID-19 (the spread of infectious diseases as a threat to human security and criminal mechanism in preventing the spread of COVID-19), *Hrvatski Ljetopis za Kaznene znanosti i praksu* 27 (2), 681–714. [in Croatian with English summary]

Roksandić Vidlička, S. (2020). "Deprivation of access to essential medicine and medical care – a crime against humanity? u fournet". in *Bio law and international criminal law, towards interdisciplinary synergies* Editors C. Fournet and A. Matwijkiw. (Leiden, Boston: Brill Nijhoff).

Roksandić Vidlička, S. (2018). "Kaznena djela protiv zdravlja ljudi," in. *Kazneno pravo posebni dio*, Editors C. Leo, D. Davor, D. Prtenjača Marta, M. Aleksandar, M. Vajda Maja, R. Vidlička Sunčana, et al.(Zagreb: Pravni Fakultet u Zagrebu).

The Commission on Human Security (2003). *Human security now*. New York.

tportal.hr (2020). Merkel pohvalila hrvatske napore u obrani granica EU-a, odbacila pritužbe za kršenje prava migranata (Merkel praises Croatia's efforts to defend EU borders, rejects complaints of migrants' rights violations). [Bosnian with English summary] Available at: https://www.tportal.hr/vijesti/clanak/merkel-branila-hrvatske-napore-u-zastiti-vanjskih-granica-eu-a-20191120 (Accessed October 10, 2020).

Turković, K. (2020). Clash between positive and negative obligations of the state under the European Convention of Human Rights in combating the present pandemic. Abstract retrieved from frontiers special issue. Migration in the time of COVID-19: comparative law and policy responses.

Turković, K., Novoselec, P., Grozdanić, V., Kurtović Mišić, A., Derenčinović, D., Bojanić, I., et al. (2013). *Komentar Kaznenog zakona*. Zagreb: Narodne Novine.

UNHCR (2020). Croatia: COVID-19 response. Available at: https://www.unhcr.org/hr/wp-content/uploads/sites/19/2020/05/UNHCR-Croatia-COVID-19-April-Update.pdf (Accessed August 10, 2020).

United Nations, Office of the United Nations High Commissioner for Human Rights; International Organization for Migration; United Nations High Commissioner for Refugees; World Health Organization (OHCHR, IOM, UNHCR, WHO) (2020). The response to COVID-19 must include the protection of the rights and health of refugees, migrants and stateless persons (odgovor na COVID-19 mora uključivati zaštitu prava i zdravlja izbjeglica, migranata i osoba bez državljanstva). Available at: https://www.unhcr.org/hr/3949-odgovor-na-covid-19-mora-ukljucivati-zastitu-prava-i-zdravlja-izbjeglica-migranata-i-osoba-bez-drzavljanstva.html (Accessed August 10, 2020).

United Nations International Children's Emergency Fund (2020). Life continues at the Porin reception center in Zagreb, despite the uncertainty of COVID-19 (U zagrebačkom prihvatnom centru Porin život se nastavlja unatoč neizvjesnosti s COVID-19), Available at: https://www.unicef.org/croatia/price/u-zagrebackom-prihvatnom-centru-porin-zivot-se-nastavlja-unatoc-neizvjesnosti-s-covid-19 (Accessed August 10, 2020).

United Nations Department of Economic and Social Affairs Sustainable Development (2015). The 2030 agenda for development, sustainable development goals. United Nations, General Assembly, Resolution A/RES/70/1, 21 October 2015, the 2030 Agenda for Sustainable Development. Available at: https://sustainabledevelopment.un.org/?menu=1300 (Accessed August 10, 2020).

United Nations Sustainable Development Group (2020). United Nations comprehensive report to covid-19: saving lives, protecting societies, recovering better. Available at: https://www.un.org/sites/un2.un.org/files/un_comprehensive_response_to_covid-19_june_2020.pdf (Accessed August 10, 2020).

Vrabec, V. (2020). Pojavila se nova mučna snimka na kojoj navodni hrvatski policajce mlate migrante; evo što kažu MUP I Božinović (A new harrowing footage which purported Croatian police beating migrants; here is what the Ministry of the Interior and Bozinovic say). Available at: https://www.telegram.hr/politika-kriminal/pojavila-se-brutalna-snimka-koja-navodno-prikazuje-kako-hrvatski-policajci-stapovima-mlate-migrante-oglasili-se-bozinovic-i-mup/ (Accessed January 30, 2021).

World Bank Group and KNOMAD (2020). The global knowledge partnership on migration and development. COVID-19 crisis through a migration lens. Migration and development brief. Available at: https://openknowledge.worldbank.org/handle/10986/33634 (Accessed August 10, 2020).

UNICEF, WFP, FAO and OCHA (2020). Yemen sees return to alarming levels of food insecurity. Available at: https://www.unicef.org/press-releases/yemen-sees-return-alarming-levels-food-insecurity-unicef-wfp-fao-ocha (Accessed November 2, 2020).

Zvekić, U., and Roksandić Vidlička, S. (2020). Corruption and anti-corruption pledges in the Western Balkans. Executive summary. Global initiative against transnational organized crime. Available at: https://globalinitiative.net/wp-content/uploads/2020/10/Infrastructure-of-Integrity-GI-TOC.pdf (Accessed November 10, 2020).

Conflict of Interest: The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

frontiers in Political Science

PERSPECTIVE
published: 10 December 2020
doi: 10.3389/fpos.2020.595407

COVID-19 Crisis and Labor Migration Policy: A Perspective From Estonia

Mari-Liis Jakobson[1]* *and Leif Kalev*[2]

[1] Study Area Politics and Governance, School of Governance, Law and Society, Tallinn University, Tallinn, Estonia, [2] Study Area Politics and Governance, Study Area of International Relations and Future Studies, School of Governance, Law and Society, Tallinn University, Tallinn, Estonia

Crises can function as catalysts for policy change, but change depends on multiple factors such as the actual content of the event, the agenda-setting power of the advocates of change, and their abilities to foster advocacy coalitions and break up policy monopolies. The COVID-19 crisis is an event that halted virtually all movement, including labor migration across the world, thus having great potential to act as a major focusing event. This article will look into the possibilities of this crisis to induce permanent labor migration policy change based on the case of Estonia. The article thus contributes to the literature on migration policy change from the Central and East European perspective.

Keywords: labor migration, migration policy, immigration, Estonia, COVID, politics of migration, focusing events, policy change

OPEN ACCESS

Edited by:
Iris Goldner Lang,
University of Zagreb, Croatia

Reviewed by:
Michal Natorski,
Maastricht University, Netherlands
Konrad Pędziwiatr,
Kraków University of Economics, Poland

***Correspondence:**
Mari-Liis Jakobson
mari-liis.jakobson@tlu.ee

Specialty section:
This article was submitted to Comparative Governance, a section of the journal Frontiers in Political Science

Received: *16 August 2020*
Accepted: *16 November 2020*
Published: *10 December 2020*

Citation:
Jakobson M-L and Kalev L (2020) COVID-19 Crisis and Labor Migration Policy: A Perspective From Estonia. Front. Polit. Sci. 2:595407. doi: 10.3389/fpos.2020.595407

INTRODUCTION

In the spring of 2020, most human mobility came to a halt, as states issued travel bans, entered state-of-emergencies or even full lockdowns due to the spread of the COVID-19 virus. These restrictions had a dramatic effect on labor migrants across the world (ILO, 2020). While the crisis prompted some countries to give easier labor market access to immigrants with skills needed for essential jobs, or even temporarily regularize irregular labor migrants, more countries decided to "pull up the drawbridge" and create new restrictions for labor immigration due to the negative economic effects of the lockdowns (Abella, 2020). The crisis is expected to have long-lasting effects on labor migration (Papademetriou and Hooper, 2020), thus making the COVID-19 pandemic a potential focusing event.

Focusing events are situations, which make policy-makers aware of a pre-existing problem (Atkinson, 2019) or help to set an agenda for the public opinion (Baumgartner and Jones, 2009) and thus, can contribute to policy change. In order to open a window for policy change, a focusing event needs to have a big effect, e.g., in terms of the number of people affected, the geographic extent of harm caused or be reoccurring, thus accumulating attention (Kingdon, 2003; Birkland, 2006; O'Donovan, 2017). Others have noted that focusing events ought to be attractive to the media and able to dissolve policy monopolies (Baumgartner and Jones, 2009).

Focusing events are often associated with migration policy change. For instance, the Great Depression of 1929, the Oil Crisis of 1973, the 9/11 terrorist attacks, the financial crisis of 2008 and many others are often seen as pathbreaking events followed by restrictions to labor immigration (see e.g., Koser, 2010). While the COVID-19 crisis differs from the above mentioned in many respects, there are at least two similarities which can be conducive to focusing events: the magnitude of the crisis and high probability of long-term effects. However, each crisis may have particular effects in different regions, and the question remains, how is this event utilized by political actors.

This paper outlines the pandemic-induced labor migration policy process in Estonia, a case interesting for two reasons. First, Estonia is a late liberalizer regarding labor migration policy. As in many Central and Eastern European (CEE) countries, the significance of immigrant labor force has increased only rather recently, and this labor migration policy context has not been investigated thoroughly yet. Secondly, the case of Estonia demonstrates a scenario much anticipated across Europe, where anti-immigrant parties get in charge of immigration policy. Since April 2019, the anti-immigrant Conservative People's Party of Estonia (EKRE) has been a junior partner in a conservative governing coalition. While EKRE had not been able to achieve substantial change in immigration policy in their first year in government, the COVID-19 pandemic was an opportunity to set the agenda for more restrictive labor migration policy.

ESTONIAN MIGRATION AND POLICY CONTEXT

Like most CEE nations (see e.g., Black et al., 2010), Estonia has been primarily a sending country in the global labor migration scene (Jakobson, 2020).

However, the resulting structural labor force shortages as well as the economic growth of the past years have increased the attractiveness of immigrant labor. Poland, Czech Republic, Hungary, Slovakia, Slovenia and Estonia have already become net-immigration countries, hosting notable numbers of labor migrants (see e.g., KCMD, 2020).

Estonia's immigration history has been somewhat traumatic—the Soviet time state-led immigration campaigns from other parts of the Soviet Union led newly independent Estonia to introduce an annual immigration quota of 0.1% of the resident population, i.e., 1,314 permits in 2020. However, its labor migration policy has become increasingly flexible and pragmatic over the more recent years. Although the number of residence permits for remunerated activities is still guarded by the quota and a wage criterion to avoid the usage of low skilled immigrant labor (foreign workers have to be paid at least the national average salary), numerous exceptions have been made to the quota to foster labor immigration with higher added value—e.g., start-up entrepreneurs, IT specialists, engineers, researchers, and highly skilled specialists who earn at least double the average salary, are exempt from the quota (Aliens' Act[1] §115).

Since the quota ceased to meet the demand for labor force around 2016, temporary access to Estonian labor market was simplified by offering immigration counseling to migrants and host institutions and enabling third country nationals to work while holding a visa or being in Estonia based on a visa free regime, provided that they register their short-term employment with the Police and Border Guard Board (PBGB) and that they are paid at least the national average salary (1,404 euros per month in the first quarter of 2020—Statistics Estonia, 2020a). Since 2018, third country nationals can work in Estonia for up to 1 year in a 1.5-year time frame, when holding a D-visa (Aliens' Act[1] §106, §60).

From 2017 onwards, when Estonia transposed the EU directive on seasonal migration (EC 2014/36/EU[2]), labor migrants can also come to Estonia as seasonal workers to work in select sectors (agriculture, forestry, fishing, food and non-alcoholic beverage production, hospitality and catering; Government Decree, 2017). While there is only a minimum salary threshold for seasonal workers, their employers have more obligations (e.g., providing housing, being obliged to pay the salary even if the contract is terminated prematurely) and the period of stay is also shorter (9 months during 1 year).

The reforms have resulted in a considerable increase of labor immigration, and most notably, of short-term labor mobility (see **Table 1**). The influence of the immigration quota on the number of first residence permits for remunerated activities is still evident, although the number of permits issued is almost double the size of the quota, meaning that the number of permits based on the exceptions is nearing the number of permits issued under the quota.

The liberalizations have been accompanied by reforms ensuring the reinforcement of migration management rules, e.g., correct registration of short-term labor migrants, ensuring that the salary requirement is met and taxes are paid from the labor migrants' salaries by increasing fines and other sanctions on employers evading these requirements. The first package of amendments was ratified in 2018, along with extending the duration of the D-visa and new exceptions to the immigration quota (Draft Law 617[3]).

While several preceding ministers of the interior overseeing immigration policy making had aimed both to reassure the relatively immigration-wary public and satisfy the advocacy coalition of employers, EKRE changed track. After becoming minister of the interior, the then chairman of the party Mart Helme likened immigrant labor to slave labor that is endangering Estonia as a nation state, attacked employers using migrant labor and declared that migrant workforce should be substituted by activating those permanent residents who are inactive in the labor market and bring Estonian labor migrants back from Finland (ERR, 2019a). Two months later he dismissed the immigration regulation working group, a body of public officials of related ministries, stakeholders and experts which had been tasked with proposing ideas for immigration regulation reforms (Ministry of the Interior, 2019), a step resembling what Baumgartner and Jones (2009) have termed breaking a policy monopoly. However, the minister did not attempt to establish an alternative policy monopoly in the form of an alternative working group, and most of Helme's attempts to change immigration legislation were blocked by other cabinet

[1]RT I 2010, 3, 4; …; RT I, 10.07.2020, 4. 253 https://www.riigiteataja.ee/en/eli/521072020002/consolide (accessed August 14, 2020).

[2]*Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.* https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32014L0036 (accessed August 15, 2020).

[3]https://www.riigikogu.ee/tegevus/eelnoud/eelnou/9b435cf2-3c6d-44e9-85b1-6ef0dd90e67a/\penalty\z@V%C3%A4lismaalaste%20seaduse%20muutmise%20ja\penalty\z@%20sellega%20seonduvalt%20teiste%20seaduste%20muutmise\penalty\z@%20seadus.

TABLE 1 | Labor immigration statistics for Estonia.

	2016	2017	2018	2019
First residence permits for employment	1,325	1,501	1,851	2,218
D-visas	3,087	7,346	16,756	25,672
Short-term labor registrations	1,782	7,509	19,783	32,245
Of which seasonal workers	–	1,037	2,624	4,762

Sources: Rändestatistika ülevaade (2015–2019); seasonal workers statistics: Eurostat Database migr_ressw1_1; (Eurostat, 2020).

ministers (Delfi, 2019; ERR, 2019b). Eventually, Helme succeeded in making some amendments to migration regulation, which extended the enforcement regulations of 2018 also to rental labor from companies registered in other EU member states (Draft Law 145[4]), but did not impose any new restrictions.

MIGRATION POLICY RESPONSE TO COVID-19

Estonia declared an emergency situation on March 12, 2020. Swiftly after that came the decisions to halt the issuing of visas to third country nationals, reintroduce border controls, close the border to everyone except Estonian citizens, permanent residents, the transporters of essential goods, repairers of essential equipment and those providing essential services (Government Decree, 2020). Subsequently, international air and sea travel largely stopped.

Those third country nationals who were already in Estonia could apply to extend their visa or residence permit until 31 August, 2020. In case they became unemployed or their period of short-term employment (365 days in the past 455 days) was exhausted, their visa was terminated prematurely [Aliens Act[1] §52 (1)9], but they could remain in the country until 31 August, 2020. The amendments were made in order to avoid having to deal with a considerable number of irregularly staying immigrants later (Government Hearing Minutes, 2020).

While the European Commission had encouraged member states to treat seasonal workers as essential workers who should be allowed to travel (EC, 2020), Estonia kept its borders closed to them. EKRE ministers tried to reframe the ensuing debate by claiming that entrepreneurship models depending on cheap migrant labor are outdated and that employment of Estonians and returnees from Finland needed to be prioritized (Äripäev, 2020).

As the farming season was starting, the agricultural entrepreneurs became the most vocal critics of the restrictions. While labor migrants who were already in Estonia were allowed to find work or keep working in agriculture even if their visa had expired (EMN, 2020), this was not sufficient, as only few seasonal workers had arrived by March and many farmers had already prearranged contracts with their farm hands in Ukraine. The farmers claimed to be short of at least 2,000 seasonal workers. The unemployment level in Estonia did not increase notably, rising from 4.4% in the fourth quarter of 2019 to 7.1% in the second quarter of 2020 (Statistics Estonia, 2020b), and the farmers were skeptical of whether the recently unemployed would be willing to work in agriculture before fall (EPKK, 2020a). The demand for Estonian laborers in Finland even increased in some sectors, as e.g., many schools underwent renovations during the distance learning period, thus increasing demand for workers in the construction sector there and disincentivizing returning to Estonia (Helsingin Sanomat, 2020).

The farmers accused politicians of endangering the sustainability of domestic agriculture and brought the example from Finland where seasonal workers were allowed into the country despite travel restrictions as essential workers (EPKK, 2020b).

The COVID crisis did not bring consensus to the governing coalition over migration policy. Although Mart Helme came to the cabinet with ambitious plans for immigration restrictions, the cabinet was reluctant to approve them. While the Centre Party and Isamaa have rather been proponents of conservative migration policy, allowing EKRE to pursue with the reform would have brought political gains to EKRE exclusively, who is perceived as the issue owner by the society. By curbing EKRE's enthusiasm, the other two coalition partners could also make some political gains vis à vis the employers' and universities' advocacy coalitions EKRE refused to work with. Also, extensive restrictions on migration might have a negative effect on the already ailing economy. The short-term labor migrants have already become a notable group of tax payers and an indispensable labor force (ERR, 2019c) for many sectors, e.g., construction or farming, where the labor force demand was not affected by the COVID-19 crisis.

The government agreed to some enhanced regulations on study, family and labor migration, e.g., the obligation of the sponsor (e.g., the employer) to guarantee testing, transportation and a 14-day period of self-isolation of newly arrived immigrants before they can assume work, but also new restrictions on seasonal migration, i.e., a salary requirement for seasonal workers and the reduction of the time limit of seasonal work from 9 to 6 months per year (Postimees, 2020; Draft Law 617). However, there was one additional restriction not communicated by the government which had entered the draft law, namely, a restriction to third country nationals to work in most sectors

[4]https://www.riigikogu.ee/tegevus/eelnoud/eelnou/7c3765b5-b4be-4fab-a037-1711e4603961/V%\penalty\z@C3%A4lismaalaste%20seaduse%20tulumaksuseaduse%20ja%20maksukorralduse%20seaduse%\penalty\z@20muutmise%20seadus%20(Eestis%20t%C3%\penalty\z@B6%C3%B6tamise%20reeglite%20v%C3%A4%C3%A4rkasutuse%20v\penalty\z@%C3%A4hendamine).

based on a C-visa or visa-free stay (Draft Law 617). Thus, EKRE managed to take some additional steps toward restricting short-term labor migration to Estonia.

DISCUSSION

The Estonian case demonstrates that while the COVID-19 crisis notably obstructed labor migration in 2020, its long-term impact is diminished by the fact that the crisis did not affect all sectors alike. Sectors where migrant labor is typical in Eastern Europe, e.g., construction, industry or farming, were not negatively affected. It might be speculated that some immigrant labor intensive sectors may even grow due increased emphasis on self-sustainability brought into focus by the pandemic, e.g., food security or independence from global production chains. However, the temporary restrictions still enabled EKRE to campaign for policy change and thus use the COVID-19 crisis as a focusing event.

Previous research has shown that often, political considerations have a bigger impact on immigration reforms as compared to the events themselves (Gsir et al., 2016). Similar conclusions can be drawn from the Estonian case: the nature of the COVID-19 crisis offers no direct reason for why restrictions were imposed on seasonal migration in particular. Political considerations are also reflected in the critical role other governing coalition partners played in hampering EKRE's ambitions in migration policy reform. The example also demonstrated that policy monopolies cannot be broken without proposing an alternative solution—during the crisis, the interest groups that previously voiced their interests in the working group, now did the same via the media, effectively challenging EKRE's attempts to reframe the debate. Yet, EKRE seems to have discovered the failing forward tactics for policy change (Scipioni, 2018), i.e., moving forward through incomplete agreements, creating conditions for the emergence of new crises, and via these reaching new concessions on their journey toward a more restrictive labor immigration policy.

DATA AVAILABILITY STATEMENT

Publicly available datasets were analyzed in this study. This data can be found here: the Statistics Estonia online repository http://andmebaas.stat.ee/?lang=et; and the Eurostat Database https://ec.europa.eu/eurostat/data/database.

AUTHOR CONTRIBUTIONS

M-LJ wrote most subchapters and edited the main body of the article. LK wrote the first version of the migration policy response chapter, contributed to the discussion, and copyedited the article. All authors contributed to the article and approved the submitted version.

FUNDING

This research has been supported by the European Union's Horizon 2020 research and innovation program under Grant Agreement No. 857366.

REFERENCES

Abella, M.I. (2020). Commentary: labour migration policy dilemmas in the wake of COVID-19. *Int. Migr.* 58, 255–258. doi: 10.1111/imig.12746

Äripäev (2020). Helme välistööjõust: see pidu lõpeb ära. Available online at: https://www.aripaev.ee/uudised/2020/05/16/helme-valistoojoust-see-pidu-lopeb-ara (accessed August 15, 2020).

Atkinson, C.L. (2019). "Focus event and public policy," in *Global Encyclopedia of Public Administration, Public Policy, and Governance*, ed A. Farazmand (Cham: Springer), 1–5. doi: 10.1007/978-3-319-31816-5_274-1

Baumgartner, F. R., and Jones, B. D. (2009). *Agendas and Instability in American Politics. 2nd Edn.* Chicago, IL; London: The University of Chicago Press. doi: 10.7208/chicago/9780226039534.001.0001

Birkland, T. A. (2006). *Lessons of Disaster: Policy Change after Catastrophic Events*. Washington, DC: Georgetown University Press.

Black, R., Pantîru, C., Okólski, M., and Engbersen, G. (2010). *A Continent Moving West? EU Enlargement and Labour Migration from Central and Eastern Europe.* Amsterdam: Amsterdam University Press. doi: 10.5117/9789089641564

Delfi (2019). *Mart Helme algatatud välismaalaste seaduse eelnõu tabalised Tanel Kiige teravad kriitikanooled*. Avaialble online at: https://www.delfi.ee/news/paevauudised/eesti/mart-helme-algatatud-valismaalaste-seaduse-eelnou-tabasid-tanel-kiige-teravad-kriitikanooled?id=87075139 (accessed August 10, 2020).

EC (2020) *Communication from the Commission Guidelines Concerning the Exercise of the Free Movement of Workers During COVID-19 Outbreak 2020/C 102 I/03*. Available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0330(03) (accessed August 15, 2020).

EMN (2020). *Working Document to Support the EMN Inform*. Available online at: https://www.emn.ee/wp-content/uploads/2020/07/emn-inform-covid19-residence-permits-en.pdf (accessed August 15, 2020).

EPKK (2020a). *Pöördumine*. Available online at: http://epkk.ee/poordumine-valismaa-pollutoolised-tuleb-ka-eriolukorra-ajal-eestisse-lubada/ (accessed August 15, 2020).

EPKK (2020b). *Avalik kiri maaeluministrile*. Available online at: http://epkk.ee/pollumehed-maaeluminister-arvo-aller-tulge-kohe-tagasi/ (accessed August 15, 2020).

ERR (2019a). *Mart Helme: Majandus peab olema tark, mitte orjatööjõul põhinev*. Available online at: https://www.err.ee/928411/mart-helme-majandus-peab-olema-tark-mitte-orjatoojoul-pohinev (accessed April 09, 2019).

ERR (2019b). *Keskerakondlastest ministrid ei kooskõlastanud Helme sisserände eelnõu*. Available online at: https://www.err.ee/989466/keskerakondlastest-ministrid-ei-kooskolastanud-helme-sisserande-eelnou (accessed August 15, 2020).

ERR (2019c). *Tööandjad on sunnitud üha enam välistööjõudu palkama*. Available online at: https://www.err.ee/951262/tooandjad-on-sunnitud-uha-enam-valistoojoudu-palkama (accessed November 3, 2020).

Eurostat (2020). *First Permits by Reason, Length of Validity and Citizenship (migr_resfirst)*. Available online at: https://ec.europa.eu/eurostat/data/database (accessed August 15, 2020).

Government Decree (2017). *Hooajatööle esitatavad nõuded ja hooajast sõltuvate tegevusalade loetelu*. Available online at: https://www.riigiteataja.ee/akt/117012017013 (accessed August 15, 2020).

Government Decree (2020). March 15 no 78. *Temporary Restriction on Crossing the State Border Due to the Spread of the Coronavirus Causing the COVID-19 Disease*. Available online at: https://www.riigiteataja.ee/en/eli/517032020004/consolide (accessed August 14, 2020).

Government Hearing Minutes (2020). Available online at: https://www.valitsus.ee/et/uudised/valitsuse-2420-istungi-kommenteeritud-paevakord (accessed August 10, 2020).

Gsir, S., Lafleur, J.-M., and Stanek, M. (2016). Migration policy reforms in the context of economic and political crises: the case of Belgium. *J. Ethnic Migr. Stud.* 42, 1651–1669. doi: 10.1080/1369183X.2016.1162352

Helsingin Sanomat (2020). *Matkustusrajoitukset iskevät vuokratyöntekijöihin rakennuksilla ja tehtaissa – "Virolaisia on vedottu pysymään Suomessa"* Available online at: https://www.hs.fi/koti/art-2000006443915.html (accessed August 15, 2020).

ILO (2020). Policy Brief. *Protecting Migrant Workers During the COVID-19 Pandemic*. Geneva: ILO. Available online at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_743268.pdf (accessed August 15, 2020).

Jakobson, M.-L. (2020). *Immigration to and Emigration from Estonia*. Available online at: https://www.bpb.de/gesellschaft/migration/laenderprofile/308819/estonia (accessed November 2, 2020).

KCMD (2020). *Immigration by Residence, Emigration by Residence*. Dynamic Data Hub. Available online at: https://bluehub.jrc.ec.europa.eu/migration/app/ (accessed October 20, 2020).

Kingdon, J.W. (2003) *Agendas, Alternatives, and Public Policies*, *2nd Edn*. New York, NY: Longman.

Koser, K. (2010). The impact of the global financial crisis on international migration. *Whitehead J. Diplomacy Int. Relat.* 11, 13–20. Available online at: http://blogs.shu.edu/wp-content/blogs.dir/23/files/2012/05/04-Koser_Layout-11.pdf

Ministry of the Interior (2019). *Sisserände Töörühm Lõpetab Tegevuse*. Available onlne at: https://www.siseministeerium.ee/et/uudised/sisserande-tooruhm-lopetab-tegevuse (accessed November 25, 2020).

O'Donovan, K. (2017) An assessment of aggregate focusing events, disaster experience, and policy change. *Risk Hazards Crisis Public Policy* 8, 201–219. doi: 10.1002/rhc3.12116

Papademetriou, D.G., and Hooper, K. (2020). Commentary: how is COVID-19 reshaping labour migration? *Int. Migr.* 58, 259–262. doi: 10.1111/imig.12748

Postimees (2020). *Intervjuu: EKRE esitas valitsuse plaaniga nõustumiseks oma tingimuse*. Available online at: https://www.postimees.ee/7011378/ekre-esitas-valitsuse-plaaniga-noustumiseks-oma-tingimuse?fbclid=IwAR2YmVt1dhyl0FM1gN9ijpvoUeRb_36Kk7lsVmKXrPgzQgRoOVyDeyrJfTk (accessed November 2, 2020).

Rändestatistika ülevaade (2015–2019). Available online at: https://issuu.com/siseministeerium/docs/randestatistika_2015-2019_est (accessed August 13, 2020).

Scipioni, M. (2018) Failing forward in EU migration policy? EU integration after the 2015 asylum and migration crisis. *J. Eur. Public Policy* 25, 1357–1375. doi: 10.1080/13501763.2017.1325920

Statistics Estonia (2020a). *Keskmine brutokuupalk*. Available online at: https://www.stat.ee/et/avasta-statistikat/valdkonnad/tooelu/palk-ja-toojoukulu/keskmine-brutokuupalk (accessed August 14, 2020)

Statistics Estonia (2020b). *Töötuse määr*. Available online at: https://www.stat.ee/et/avasta-statistikat/valdkonnad/tooelu/tooturg/tootuse-maar (accessed November 2, 2020).

Conflict of Interest: The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

Advantages of publishing in Frontiers

OPEN ACCESS
Articles are free to read for greatest visibility and readership

FAST PUBLICATION
Around 90 days from submission to decision

HIGH QUALITY PEER-REVIEW
Rigorous, collaborative, and constructive peer-review

TRANSPARENT PEER-REVIEW
Editors and reviewers acknowledged by name on published articles

Frontiers
Avenue du Tribunal-Fédéral 34
1005 Lausanne | Switzerland

Visit us: www.frontiersin.org
Contact us: frontiersin.org/about/contact

REPRODUCIBILITY OF RESEARCH
Support open data and methods to enhance research reproducibility

DIGITAL PUBLISHING
Articles designed for optimal readership across devices

FOLLOW US
@frontiersin

IMPACT METRICS
Advanced article metrics track visibility across digital media

EXTENSIVE PROMOTION
Marketing and promotion of impactful research

LOOP RESEARCH NETWORK
Our network increases your article's readership