Introduction to Symposium

T. Alexander Aleinikoff,† Ian M. Kysel†† &
Monette Zard†††

A little over one year ago, the scope and scale of the COVID-19

---

† T. Alexander Aleinikoff is University Professor at The New School and has served as Director of the Zolberg Institute on Migration and Mobility since January 2017. He received a J.D. from the Yale Law School and a B.A. from Swarthmore College. Aleinikoff has written widely in the areas of immigration and refugee law and policy, transnational law, citizenship, race, and constitutional law. Aleinikoff is a co-author of leading legal casebooks on immigration law and forced migration. Before coming to The New School, Aleinikoff served as United Nations Deputy High Commissioner for Refugees (2010-15) and was a professor at Georgetown University Law Center, where he also served as dean and Executive Vice President of Georgetown University. He was co-chair of the Immigration Task Force for President Barack Obama's transition team in 2008. From 1994 to 1997, he served as the general counsel, and then executive associate commissioner for programs, at the Immigration and Naturalization Service (INS). Aleinikoff was inducted into the American Academy of Arts and Sciences in 2014.

†† Ian Matthew Kysel is a Visiting Assistant Clinical Professor of Law at Cornell Law School. He is the founder and director of the Cornell Law School Transnational Disputes Clinic and of the International Migrants Bill of Rights (IMBR) Initiative, co-directs the Asylum and Convention Against Torture Appellate Clinic and is a core faculty member in the Migration and Human Rights Program. He is also a non-resident fellow at the Zolberg Institute for Migration and Mobility at The New School. His scholarship has focused on the rights of migrants, children's rights and the domestic implementation of international human rights law in the U.S. Kysel previously held appointments at the University of Oxford and at the Georgetown University Law Center. Kysel has written and edited several human rights reports; his opinion articles have appeared in *The New York Times*, *The Washington Post* and *The New Humanitarian*. Kysel has argued or participated in litigation before international tribunals as well as U.S. immigration, federal and state courts. He has provided testimony to various legislative bodies and commissions. Kysel was previously a staff attorney at the ACLU of Southern California. He also served as the Aryeh Neier Fellow at both the National ACLU and Human Rights Watch and practiced in Shearman & Sterling's International Arbitration Group and its Public International Law Practice. Kysel holds an LLM in Advocacy, with distinction, a JD, Magna Cum Laude, Order of the Coif, and a Certificate in Refugees and Humanitarian Emergencies from Georgetown University Law Center. He holds a BA, with high honors, Phi Beta Kappa, from Swarthmore College.

††† Monette Zard is an expert on forced migration and human rights, and her career has spanned the fields of policy, advocacy and philanthropy. She has served as the Global Human Rights Program Officer at the Ford Foundation in New York and as Research Director at the International Council on Human Rights Policy in Geneva, Switzerland, a think tank focused on applied human rights research. Her work there explored issues of political violence and the human rights obligations of armed groups, economic and social rights and human smuggling. From 2000-2003, she was a Policy Analyst at the Migration Policy Institute in Washington, D.C. and held a visiting research fellowship in law at the Refugee Studies Centre, Oxford University. Prior to that, she directed the international refugee work of the Lawyers Committee for Human Rights, where her work focused on the use of legal strategies to strengthen refugee protection in Africa and the particular issue of how international law should deal with refugees and asylum-seekers accused of serious international crimes. She has consulted on international human rights and forced migration issues for a number of organizations, including Amnesty International, the Brookings

pandemic was becoming apparent, as first China, and then Italy and the United States grappled with the spread of the virus. We began to witness a number of trends in national responses that raised profound implications for all of us, but in particular for migrants, refugees and asylum-seekers.

First was the reflexive and default response on the part of States to unilaterally close international borders and limit mobility, both international and internal. Second, we saw attempts by politicians to assign a nationality to the virus and to scapegoat certain groups, usually foreigners or marginalized groups. There have been many examples of stigma and xenophobic violence during the current pandemic, which the UN Secretary-General has described as a "tsunami of hate." And third was the sense, in those early days, by States and even amongst the general public, that to battle a public health emergency, anything was permissible in terms of restrictions on rights and civil liberties.

These troubling developments made apparent the need for a human rights-based approach to State responses to the pandemic. It was not just the "right" thing to do; it was, and continues to be, a necessary part of an effective public health strategy, both to build predictability into the response—to the extent that it can be cabined within the boundaries of State commitments and duties—and to ensure that everyone in society feels safe being voluntarily tested, treated and vaccinated.

A group of international lawyers came together to spell out some key human rights principles that should guide policy responses to the pandemic. These "14 Principles," as they have become known, garnered over 1,000 signatures from legal and migration scholars across the globe, endorsing the document as an authoritative restatement of the law, and have been translated into multiple languages.

To some degree, the *14 Principles* have served as an effective tool in advocacy and outreach. They have, for example, been invoked by the United Nations Secretary-General. But significant encroachments on human rights have not abated. Restrictions on cross-border movement, though eased to some extent, remain in place throughout much of the world. These measures fall with particular harshness on asylum-seekers who are denied access to territories in which they seek safety and protection from *refoulement*. Also, in many States, refugees and other migrants continue to be excluded from medical treatment and pandemic-related benefit programs or have difficulty accessing them.

Equally important, as the pandemic and responses to it have evolved, new challenges to fundamental rights of refugees and migrants have arisen. Central among these is nondiscriminatory access to vaccines. COVID-19 has also been the impetus for new forms of bio-surveillance, particularly as an aspect of border control, which raises fundamental issues of the right to privacy, among others. And an emerging issue—not foreseen in the drafting of the 14 Principles—is whether States may condition admission on proof of vaccination or whether such measures would violate the right to refuse medical treatment.

Institute, Human Rights Watch and the United Nations High Commissioner for Refugees.

The four papers in this Symposium, some of them written by co-authors of the *14 Principles*, along with two closing essays, take up these challenges and provide new thinking on the scope of the human rights of refugees and other migrants in a pandemic. They should also be of relevance to conscientious government policy-makers as they continue to fashion responses to COVID-19. These papers were also the subject of a three-day symposium jointly hosted in the spring of 2021 by the Zolberg Institute on Migration and Mobility at The New School, the Migration and Human Rights Program at Cornell Law School, and the Program on Forced Migration and Health at Columbia University's Mailman School of Public Health (the recordings of which can be viewed here, here and here).

We would like to thank symposium authors for the opportunity to edit their work and the editors of the *Cornell International Law Journal* for their partnership in publishing the Symposium.

The Right to Health

Joanne Csete†

Among the "14 Principles" for protection of migrants, refugees and displaced persons in the COVID-19 pandemic is that all persons have a right to health, which, in essence, means an equal right to basic health services. In more than a year of COVID-19 challenges, it has become clear that migrants, refugees and displaced persons are easily left behind in access to basic health services. Stigma and entrenched discrimination, regulatory exclusions from health services based on immigration status, and lack of access to user-friendly information about COVID-19 services have impeded migrants' ability to enjoy health rights in the current emergency. States must make special efforts to overcome these barriers.

I. The Core of the Right to Health

The right to health is the right to a progressively realized package of health services that are available, accessible, affordable and of good quality and that are of the highest standard that can be attained with available resources. The articulation of this right in the International Covenant on Economic, Social and Cultural Rights (ICESCR) includes the right to "prevention, treatment and control of epidemic, endemic, occupational and other diseases" (Art. 12.2(c)). The same treaty enshrines the state's responsibility to ensure access to "medical service and medical attention in the event of sickness" (Art. 12.2(d)), a provision many countries have established in national law.

The committee overseeing compliance with the ICESCR in a 2000 General Comment (no. 14) defined minimum "core" state duties on health rights, including ensuring non-discrimination in services; access to essential drugs; immunization against major infectious diseases; ensuring access to information about health concerns; and efforts at progressive realization of adequate water, food, sanitation and housing (paragraphs 43, 44). As with all progressively realized rights, defining "core" commitments helps to ensure that, even with resource constraints, certain services will be available, sometimes with international assistance. Ensuring universal core services is challenging in the best of times; the COVID-19 crisis has shone a light on inequities in access to services affecting many populations, including migrants and refugees.

Health-related rights are also included in treaties focusing on the rights of women, children, persons with disabilities and migrant workers. Virtually

---

† Joanne Csete, Ph.D, is an Associate Professor in the Heilbrunn Department of Population and Family Health of the Mailman School of Public Health, Columbia University. She was the founding director of the Health and Human Rights Division at Human Rights Watch and the executive director of the HIV Legal Network in Toronto. Her research has focused on health services for criminalized persons and rights-based reform of policy on illicit drugs.

all UN member states have ratified at least one treaty with provisions on health-related rights.

II. The Right to Health of All Migrants

The right to health of migrants is recognized in a number of international treaties and guidelines. ICESCR General Comment no. 14 on the right to health notes that states must refrain from "denying or limiting equal access for all persons, including. . .asylum-seekers and illegal immigrants, to preventive, curative and palliative health services. . ." (paragraph 34). The same Committee, in a 2020 statement about COVID-19 cites refugees, persons affected by conflict and undocumented migrant workers as particularly vulnerable groups for which states should make special efforts to ensure access to all prevention and treatment services.

The World Health Organization (WHO) draft global action plan for 2019-2023 entitled "Promoting the health of refugees and migrants" is based on the premise that "nationality should never be a basis for determining access to health care." The plan asserts the responsibility of governments to ensure that no migrants are left behind in health services, including during emergencies. It urges the integration of refugee and migrant health into global, regional and country health programs and policies. Attention to legal and social protection is promoted as a necessary complement to health services. The plan also notes the central importance of providing migrants and refugees "appropriate, factual, timely, culturally-sensitive, user-friendly information" on services available to them (paragraph 35a).

Realizing the right to health is partly about the "what"—the components of a core package of services—but also about the "how" of service delivery. As the Committee on Economic, Social and Cultural Rights has noted, meaningful participation of the population using the services is central to the design, implementation and evaluation of rights-based health services. Delivery of health services to refugees and migrants has too often been top-down with little effort at any level of consultation. In stable refugee settlements, health committees comprised of refugees themselves can be organized. For more mobile populations, "meaningful participation" may be difficult, but rapid participatory assessments and consultations may still be possible. Accountability is another feature of rights-based health services. Migrants and refugees should have the means of notifying authorities of cases of exclusion from health care or other complaints, and there should be functioning means of follow-up and redress.

III. Barriers to Migrants Realizing the Right to Health

The ability of migrants and refugees to claim their right to health services may hinge on their ability to cross borders. The 2005 International Health Regulations (IHR) of WHO are meant, among other things, to minimize non-essential closing of borders during health emergencies when there are "reasonably available alternatives that would achieve the appropriate level of health protection". (Art. 17) Where it is decided that a border must be closed, member states are in theory, required to "provide to WHO the public health

rationale and relevant scientific information" behind the decision. (Art. 43.3) In practice, these justifications are often not provided. During COVID-19, travel restrictions based on nationality have been widely, almost cavalierly, imposed, contributing to discrimination, especially against Asians. That nearly all countries imposed nationality-based travel restrictions of some kind in 2020 is virtually unprecedented in recent decades.

Even if they are able to reach an amenable host country, migrants and refugees often face enormous impediments to realizing their right to health services. Xenophobic or stigmatizing attitudes in the host population may make it politically easy to exclude migrants from national health schemes. Migrants may fear deportation or other consequences of seeking health care even if they are in desperate need. They may face high user fees and administrative barriers. They may not have been able to travel with their medical records. Without special efforts on the part of a host state, migrants are often without access to linguistically and culturally appropriate information on health problems and services.

Migrants are often in need of special and intensive care; they may arrive at a host country's borders undernourished or having contracted foodborne or waterborne diseases. The post-traumatic psychosocial support they may need is often inaccessible. Treatment for chronic diseases may have been interrupted in the course of migration, which may lead to the development of resistant strains of infectious diseases. Unaccompanied children require special care. Young children, even with parents, may suffer the effects of disruption of regular feeding practices and care. Pregnancy and lactation also raise the need for special health and nutritional care.

A few countries have endeavored to meet these special needs. Portugal announced in April 2020 that it would temporarily regard all persons seeking asylum and visas as citizens for the purpose of gaining access to health services during the COVID-19 emergency. Ireland also extended resident permits during COVID-19 for persons awaiting immigration decisions. In both cases, however, the lack of preventive measures in lodging intended for some migrant groups has been criticized in the media. On-paper policy changes are clearly insufficient.

IV. COVID-19 Has Dramatically Affected Migrants' Ability to Enjoy their Right to Health

International consensus on the expansive health rights of migrants and refugees, then, is not easily translated into a realization of these rights, especially at a moment when immigration policy has been highly politicized and "populist" nationalism reigns. Even before COVID-19, migrant "invasions" were portrayed as a national security threat to invoke emergency measures to undermine asylum rights and in some cases return asylum-seekers to situations of danger, as at the southern border of the US. It is especially heinous for a respected public health authority such as the US Centers for Disease Control and Prevention to use COVID-19 as an excuse to deny people the right to initiate an asylum claim when there are less restrictive case management practices that could be invoked without denying

asylum rights.

Vaccine access is also a particular challenge. UN officials have called for COVID-19 vaccination for refugees as a high priority, recognizing however that 85% of refugees are hosted by low- and middle-income countries where vaccine rollouts have been slow or non-existent. If vaccine supplies materialize, immunization of refugees in relatively stable living situations may be logistically manageable, but for migrants and refugees on the move, vaccine programs are very difficult to access, especially where vaccines require two doses. In many countries, low-income workers in jobs deemed essential include many undocumented immigrants who may be ineligible for vaccines even if vaccine programs target "essential" workers.

There is an international consensus that the detention of immigrants who await asylum hearings and have not committed crimes should be a measure of last resort. Article 31 of the UN Refugee Convention protects refugees and asylum seekers from restrictions imposed based on illegal entry, including detention. But immigration detention has flourished, and detention facilities in many parts of the world have proven to be very dangerous for the health of detainees. With respect to COVID-19, facilities may be overcrowded with poor access to protective equipment and sanitation and no possibility for physical distancing. In the US, many immigration detention facilities are operated by for-profit companies that provide poor-quality health services and, in the worst cases, have engaged in practices such as forced labor. Exacerbating the health problems of migrants through cruel and degrading conditions of detention is a gross violation of international law and standards.

The WHO ideal of integration into regular primary care systems of health services that meet the special needs of migrants, refugees and displaced persons is far from reality. Most states have made commitments to well-defined universal health rights and to legal protections for migrants and refugees. But in the face of a health emergency, the targeted efforts to ensure access to core prevention and care services for these vulnerable populations—let alone in a manner that ensures meaningful participation—have been largely absent. COVID-19 has shown the political ease with which the health rights of migrants and refugees can be denied.

Implementing Principle 2: The Legal Framework vs. the Reality

Iain Byrne†

The international legal framework mandates that everybody, including all people on the move, should enjoy their right to health without discrimination. However, the reality for refugees, asylum seekers and other migrants during the last 12 months of the pandemic has been very different. This is explored below through discussion of the lived experience of millions of people on the move with respect to their right to health, highlighting the neglected issue of mental health and access to vaccination. This essay closes with some of the most important concrete responses states should be undertaking to meet their human rights obligations—better integration of migrants, including refugees, to ensure access to services and significantly ramping up international cooperation and assistance.

I. The Legal Framework—What States Should be Doing

Principle 2 of the *14 Principles* not only reflects a range of international and regional treaties safeguarding the right to health for all, as clearly articulated by Csete, but also the 2016 UN New York Declaration for Refugees and Migrants, in which governments reaffirmed the human rights of all refugees and migrants, regardless of status, and pledged to fully protect such rights recalling that, "[t]hough their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms."

This universalism is echoed by the UN Committee on Economic, Social and Cultural Rights (CESCR) in its 2017 statement on the rights of refugees and migrants where it emphasised that, "[a]ll people under the jurisdiction of the State concerned should enjoy Covenant rights. That includes asylum seekers and refugees, as well as other migrants, even when their situation in the country concerned is irregular."

In the same statement, CESCR made clear that although States should accommodate refugees and migrant inflows in line with the extent of their

---

† Iain Byrne is an international human rights lawyer specializing in economic and social rights. Since 2011 he has worked at the International Secretariat of Amnesty International as a Law and Policy Advisor and Researcher in the Economic and Social Justice (ESJ) team. He has also managed a number of Amnesty teams—the ESJ and Refugee and Migrants Rights teams and the Gender, Sexuality and Identity Programme. In all three roles he has managed a range of major research outputs including for Global Campaigns. He is a Special Advisor on Strategic Litigation and has been involved in litigation in both domestic fora and before international and regional bodies including the European Committee of Social Rights, the European Court of Human Rights, the UN Committee on Economic, Social and Cultural Rights, the UN Human Rights Committee and ECOWAS. He is a Fellow of the Human Rights Centre, University of Essex.

available maximum resources, this does not justify restricting the enjoyment of the essential content of Covenant rights on the basis of a lack of resources, even when confronted with a sudden and significant flow of refugees noting that, "because core obligations are non-derogable, they continue to exist in situations of conflict, emergency and natural disaster."

Yet this inclusive and progressive approach has not been reflected in the reality for millions of people on the move both during and prior to the COVID-19 pandemic, as widespread and systemic human rights violations are endemic, including with respect to the right to health.

II. The Reality During Covid-19—Repression and Neglect

A. A Harsh Welcome: Exacerbating the Socio-Economic Determinants of Poor Health

As Csete points out, most countries have imposed severe restrictions on international travel and cross border movements during the pandemic. Whilst restrictions may be justified on public health grounds, provided they are proportionate and not discriminatory, they mostly fail to take into account the reality that the driving factors that make people move—conflict, persecution, poverty, etc.—do not stop during a pandemic and indeed can be exacerbated by it.

When and if they manage to enter a country, those seeking asylum often find themselves living in extremely overcrowded environments whether in camps or urban settings, making social distancing impossible, and often without access to running water or appropriate sanitation impacting the risk to their health. People need about 20 litres of water per day as a minimum standard—one that most camp authorities are unable to meet due to problems with delivery and infrastructure. Population densities in many camps are often at extremely high levels—on the Greek islands for example, it is around twenty times the population density of New York City.

Detaining new arrivals has proved to be particularly dangerous with cramped detention centres not being able to guarantee people's right to health during this pandemic. In Australia detainees were desperate to be released due to fear that staff without adequate Personal Protective Equipment (PPE) could be transmitting the virus whilst in the US there were reports of punishment for those who sought to communicate their concerns about overcrowding and sickness. Consequently, Amnesty International and others have opposed all immigration-related detention during the pandemic where people's health cannot be safely protected.

B. Inequitable Access to Vaccines

States are obliged to ensure equitable access to vaccines to foreign nationals they host, regardless of their nationality and migration status. This is further reinforced by UN Security Council Resolution 2565 passed in February 2021 calling for vaccination plans to include the "most vulnerable", including "refugees, internally displaced people, stateless people" and migrants.

On the face of it, refugees appear not to have been neglected, even if more broadly people on the move have been. As of April 2021, 153 countries had developed national COVID-19 vaccination strategies which include refugees in their plans, according to UNHCR. However, few plans specify practical arrangements as to how refugees will be vaccinated and as a result the reality is very mixed: these range from vaccinating from the outset (Jordan and Rwanda}; including refugees in plans but with no details on roll out (Bangladesh and Uganda); deliberate exclusion (Colombia although it subsequently backtracked but it remains unclear when refugees will be vaccinated); months of delay before being eligible (Greece) and administrative barriers (Lebanon where Syrian refugees account for only 1.9% of vaccine registration and 0.5% of vaccination, even though they make up more than 20% of the population).

Lack of access to accurate information remains a major barrier exacerbating vaccine hesitancy which may also be due to other historic reasons (see Sandvik). It is essential that host countries, donors, humanitarian agencies and NGOs work together to design gender-sensitive outreach campaigns and activities in order to provide information about availability of vaccines for refugees, eligibility and registration modalities as well as credible information about effects of vaccines in order to combat misinformation.

C. The Neglected Issue of Mental Health

The COVID-19 pandemic has simultaneously shed light on and exacerbated many widespread but neglected human rights issues. One of these is the right of everybody, including refugees and migrants, to the highest attainable standard of not only physical health but also mental health.

In May 2020, the UN Refugee Agency, UNHCR, stated that the pandemic was already "triggering a mental health crisis" among refugees and other displaced people. Contributing factors included people's fear of infection, quarantine and isolation measures, stigma, discrimination, loss of livelihoods as well as overall uncertainty about the future.

Confronted by such huge need, the lack of effective responses by governments and the international community must be seen in the wider context of the overall neglect of mental health. In June 2020, the UN Special Rapporteur on the right to health stated that the pandemic has aggravated the, "historical neglect of dignified mental health care," at a time when it is even more urgently needed due to factors such as social distancing, economic decline, unemployment, and domestic and other violence driving a rise in anxiety and mental distress.

This historic neglect is reflected in the extremely low levels of expenditure on mental health particularly in low and lower-middle income countries, where 85% of the world's refugees live. The per capita median government mental health expenditure in those countries is USD 0.02 and USD 1.05 respectively. This dire situation is compounded by the fact that high-income countries are failing to prioritize the issue in their international cooperation and assistance—between 2007 and 2013, only 1% of the world's budget for international health aid was devoted to mental health.

At the same time as this abject failure to address mental health as Csete points out, many states are actively pursuing migration policies that exacerbate the mental suffering of people on the move—a non-virtuous circle.

What then could be a human rights-consistent alternative? The UN Special Rapporteur has recommended that states should develop: a national mental health strategy that includes migrants and refugees; a concrete plan to form a coordination mechanism that will address the health and wellbeing of people on the move, which includes the people themselves; and a road map that moves away from coercive treatment and towards equal access to mental health services.

III. What States Should be Doing Now

A. Effective Integration of People on the Move to Access Services

As Csete emphasises, effective societal integration of people on the move is vital to their ability to overcome bureaucratic hurdles and access services including operationalizing the key human rights principles of participation and accountability. In this respect CESCR has recommended that pending a decision on their claim to be recognized as refugees, asylum seekers should be granted a temporary status, allowing them to enjoy economic, social and cultural rights without discrimination. In addition to relaxing documentation requirements, states need to ensure that language is not a barrier and that firewalls are put in place between public service providers such as in the health-care system and law enforcement authorities. Another key aspect is the collection and monitoring of disaggregated data to ensure services are appropriate and well targeted.

B. Ramping up International Cooperation and Assistance

For many middle and low-income countries, receiving international assistance and cooperation from wealthier states is crucial in order to comply with their human rights obligations when dealing with sudden and large flows of refugees and migrants. The alternative option is likely to be more closed borders and/or people living in inhumane and unhealthy conditions. Effective global cooperation in ensuring the right to health for everybody regardless of their status and circumstances is not only morally and legally right, it is also clearly in the interests of public health. Only by safeguarding the health of everyone, including those who are most marginalized can all of our collective health be secured.

COVID-19, Surveillance, and the Border Industrial Complex

Petra Molnar†

Technological experimentation at the border is being given free rein, knit together into what amounts to a tapestry of an increasingly powerful global border industrial complex. This experimentation legitimizes techno-solutionism at the expense of human rights and dignity and has only been accelerated by the COVID-19 pandemic. Powerful actors—often in the private sector—increasingly dictate what technology should be developed and deployed, while communities experiencing the sharp edges of this innovation—including refugees and others on the move—are consistently left out of the discussion. Unfortunately, despite the key State obligations reflected in the *14 Principles*, rights abuses are rampant when it comes to COVID-19, surveillance, and border control. Indeed, evaluation of the intersection of technology, COVID-19, and the border demonstrates that the border industrial complex proliferates opportunities for rights abuses while reducing avenues for redress.

Below, I start by grounding the border industrial complex in the lived experience of people on the move. I then describe how the European Union (EU) is increasingly turning to technology as a way of managing migration and that this turn has only increased in response to the pandemic. I then consider the role of rights and turn to the case study of Greece during the pandemic. What my ongoing fieldwork with colleagues reveals is effectively a pandemic panopticon on the borders of the European Union. I close with some reflections on the political economy of the border industrial complex.

I. Grounding the Border Industrial Complex in the Lived Experience of People on the Move

The people I have interviewed for my work share feelings of dehumanization, of being reduced to data points and fingerprint scans. They talk about systemic and anti-Black racism that is so pervasive in immigration and refugee decision-making, and their fear that biases that are firmly baked into the current system will be exacerbated through the use of automation and algorithmic technologies. Unfortunately, the communities that become the experiments for technological development have been historically made

† Petra Molnar is a lawyer and researcher specializing in migration, technology, and human rights. She is the Associate Director of the Refugee Law Lab at Osgoode Hall Law School and the Centre for Refugee Studies, York University. Molnar is currently working on a project studying the human rights impacts of AI and automated technologies on migration control. Molnar regularly shares her work domestically and internationally and also works on immigration detention, gender-based violence, and the politics of refugees, immigration, and international law.

marginalized. Techno-solutionism at the border is exacerbating these divisions of power and privilege, keenly felt during a global pandemic that clearly highlights whole perspectives matter.

II. Migration Management Technologies: A Regulatory Free-For-All Amplified During the Pandemic

Borders and other spaces of migration continue to be the setting of various migration management experiments with technology. The pandemic has only exacerbated this trend. Unfortunately, technology generally—and its use during the pandemic in particular—is shielded from scrutiny, leaving people with few avenues for redress.

Many of the most troubling experiments with technology as a means of migration management can be found in Europe. Indeed, they have been actively encouraged by the EU, as codified most recently in its Migration Pact, and confirmed at various press conferences with EU officials. Such policies and conferences are replete with explicit messaging around the "management" of migration, a "Europeanized" deportation process, protecting the border, and strengthening the work of Frontex, the EU's border force. The EU is increasingly exploring various experiments with technology as a primary way to strengthen its migration management machine. Technologies, such as automated decision-making, biometrics, and unpiloted drones, and most recently violent border sound canons are increasingly controlling migration and affecting millions of people on the move.

However, this is by no means an EU-only phenomenon, with examples from algorithmic immigration detention at the U.S.-Mexico border to Canada's automated visa decision-making. Nor is it limited to States, as with the use of biometrics by international organizations like the United Nations High Commissioner for Refugees (UNHCR). Actors in various contexts across the world are experimenting with techno-solutionism as a primary means of migration management.

Governments quickly moved towards bio-surveillance as a way to contain the spread of the COVID-19 pandemic. Indeed, there has been an increase in surveillance and automation projects presented as a viable way to stem the flow of the pandemic, such as through controlling the movement across borders, including through the use of drone surveillance.

III. Technology, Pandemic Migration Management, and Rights

If previous use of technology is any indication, refugees and people crossing borders will be disproportionately targeted and negatively affected. Various technologies that have been presented to combat COVID-19, including virus-targeting robots, cellphone tracking, and AI-based thermal cameras can all be used to limit the freedom of movement of—and for discrimination against—people crossing borders, with far-reaching human rights impacts. In particular, border technologies frequently exacerbate systemically discriminatory border logics that have been historically weaponized against communities on the move.

This use of technology to manage and control migration amid a global

pandemic is also shielded from scrutiny because of its emergency nature. In addition, the current regulatory free-for-all creates a gray zone of accountability. The basic protections available to more politically powerful groups are often simply not available to people crossing borders, leaving non-citizens without access to mechanisms of redress and oversight.

It also clearly plays into broader regional strategies of border enforcement, expanding the mandate of entities like Frontex, bolstering deportations and return, and at the most extreme, facilitating violent and illegal pushbacks at the frontiers of Europe.

IV. A Pandemic Panopticon on the Frontiers of Europe

My fieldwork with colleagues in Greece reveals that the proliferation of migration management technology, accelerated in connection with the response to COVID-19, has effectively created a pandemic panopticon on the frontier of Europe. This is revealed through the lived experience of people who interacted with these technologies.

In my work with colleagues, Greece is an ideal case study, both because it is a frontier space for migration and because it happens to be a technological testing ground—a sandbox. In September 2020, colleagues and I went to the ruins of Moria camp, one of the biggest refugee camps in Europe on the island of Lesbos, in the aftermath of a huge fire that displaced thousands of people. We witnessed the creation of a new camp from the ground up. The building of this camp on a barren windswept peninsula has paradoxically been coupled with an EU-wide obsession to introduce more and more draconian technology and surveillance equipment to manage migration and control people who are experiencing the harmful, sharp edges of this technological testing ground. Unfortunately, the COVID-19 pandemic was explicitly weaponized by the Greek government, resulting in refugee camps on the islands remaining closed much longer than the rest of Greece. The government also used the pandemic as an excuse to limit access to lawyers, NGO workers, and even journalists.

I have been back to Lesvos multiple times since the burning of Moria, as recently as May 2021, and these issues remain live. In Greece, the five proposed Multi-Purpose Reception and Identification Centres (MPRICs) on Lesvos, Samos, Chios, Leros, and Kos have all been reported to include "camera surveillance with motion analysis algorithms monitoring the behaviour and movement of centre residents." This new system, called Centaur, boasts an "integrated digital system of electronic and physical security management placed inside and around the facilities using cameras and a motion analysis algorithm (AI Behavioral Analytics)." These camps and their technological interventions are generously funded by the EU. On March 26, 2021, Frontex put out a press release trumpeting a fulsome report from the Rand Corporation on uses of AI in border operations, including "automated border control, object recognition to detect suspicious vehicles or cargo, and the use of geospatial data analytics for operational awareness and threat detection.

V. *14 Principles* and Human Rights in Technological Experiments

COVID-19 and its impacts crystalize many of the human rights issues already inherent in the unregulated free-for-all of migration management technologies. As my work in Greece and globally tries to highlight, the very real impacts of surveillance, automation, and border enforcement on people's lives and rights crosscut numerous of the 14 Principles, including rights to equal treatment and freedom from discrimination, limits on arbitrary restrictions of movement, detention, obligations to protect life and health, particularly for people in refugee camps, as well as privacy. For example, using automated drone technology to police borders and facilitate pushbacks impacts people's right to the protection of life as well as their ability to move freely (not to mention the internationally protected right to claim asylum). The opaque nature of immigration and refugee decision-making also creates an environment ripe for algorithmic discrimination. New technologies are likely to only widen the scope of privacy infringements for people on the move, whose data is often sensitive and needs to be robustly protected. These and other rights reflected in the *14 Principles* are especially important to think about in high-risk contexts, where the repercussions of incorrect decisions can be far-reaching, particularly during a global pandemic.

VI. Why is this Happening? The Political Economy of the Border Industrial Complex

The attempt to understand how border technological experiments are playing out is also an attempt to highlight how power operates in society and how technology reinforces hierarchies of oppression, with very real impacts on people's rights and lives. While technology can offer the promise of novel solutions for an unprecedented global crisis, we must ensure that COVID-19 innovation does not unfairly target refugees and other people on the move, racialized communities, indigenous communities, and other marginalized groups, nor make discriminatory inferences that can lead to detention, family separation, and other irreparable harms. This type of experimentation foregrounds certain framings over others, which in turn prioritize certain types of interventions (i.e., "catching liars at the border" vs. "catching racist border guards") and drive regional policy decisions to fortify borders. In the COVID-19 reality, making people on the move more trackable and detectable justifies the use of more technology and more data collection in the name of public health and national security, often without adequate safeguards and mechanisms of oversight. This in turn impacts people's fundamental human rights and can contravene various of the *14 Principles*.

In this crucial global moment, the conversation must also be about broader questions: who gets to participate in conversations around innovation and what our post-COVID-19 world may look like. How can we ensure that we are not reinforcing hierarchies of power and systemic oppression through the very tools that purport to help shepherd us through this crisis? Pandemic responses are clearly political, as are the technological testing grounds that may remain with us long after COVID-19.

Refugees and the Scope for Mandatory COVID-19 Vaccination

Kristin Bergtora Sandvik†

Introduction

Vaccination programs are regularly celebrated as one of the most successful and cost-effective public health interventions ever developed. Yet, in a global context characterized by an acute lack of vaccines coupled with unfair distribution, COVID-19 vaccination schemes are controversial. Inaccurate and misleading stories about the vaccines risk becoming a "second pandemic." However, long before COVID-19, growing vaccine hesitancy and skepticism were affecting the uptake for vaccination schemes in humanitarian contexts and considered a serious threat to global health.

How should international refugee law grapple with COVID-19 vaccine hesitancy, mistrust, and refusal? According to the Principles of Protection for Migrants, Refugees, and Displaced People During COVID-19 (the "*14 Principles"*), States must respect the right to health of migrants, refugees, and other displaced persons by ensuring that the provision of essential medicines, prevention, and treatment are provided in a non-discriminatory manner (Principle 2). Refugees have the right to access COVID-19 vaccination schemes on a non-discriminatory basis under international law. But do they have a right to refuse?

Given the devastating global impact of the pandemic, old debates about compulsory vaccination schemes resurface with new disease outbreaks—as do familiar issues of fear and stigmatization. For COVID-19 vaccinations, we need to engage in critical work to flesh out pertinent legal dilemmas and emergent protection scenarios. To that end, this intervention considers the legality of mandatory vaccination schemes and asks whether vaccination can be a prerequisite for access to legal protection (at entry points or at in-country facilities), given the prohibition on *refoulement* (as reiterated in Principle 6). Considerations applying to third-country resettlement (as a durable solution) and the *refoulement* prohibition under international human rights law applicable to migrants should be considered separately.

---

† Kristin Bergtora Sandvik is a professor of legal sociology at the Faculty of Law, University of Oslo and a Research Professor in Humanitarian Studies at Peace Research Institute Oslo (PRIO). Her research focuses on the development of a political and legal sociology of humanitarianism. She teaches sociology of law, legal anthropology, legal technology and artificial intelligence and robot regulations. In 2011, Sandvik cofounded the Norwegian Center for Humanitarian Studies (NCHS), where she was the director from 2012 to 2016. Sandvik graduated from the University of Oslo with a Masters in Women's Law in 2002. She obtained an LL.M (waived) from Harvard Law School in 2003, and a doctorate in Juridical Sciences (S.J.D) from Harvard Law School in 2008. Sandvik has also studied social anthropology at the University of Oslo, and she has been a guest researcher at the Oxford Refugee Studies Centre and the Refugee Law Project (Uganda).

I. Vaccine Hesitancy in Highly Fragile Systems of Trust

In the forced displacement context, vaccination refusals are not necessarily caused by irrationality and deviance, but may be due to a broader mistrust of humanitarian government. Can vulnerable people trust humanitarians to give aid fairly and to behave respectfully? Refusals may also be based on experiences with authoritarian enrollment of communities in vaccine programs. Prior to COVID-19, the challenges limiting migrants' access to vaccination in Europe included mobility, lack of access to information on immunization status, non-access to vaccines in the host community, refusal of medical registration due to fear of legal (and penal) consequences, as well as organizational and political failures of cross-border coordination among health authorities to cover vaccination gaps. The poor treatment of refugees and asylum seekers during the pandemic has included virus scapegoating, stigmatization, and the use of public health exception clauses to block their entry, suspend asylum processing, or trigger deportations (see here and here). New research indicates significant skepticism vis-à-vis COVID-19 immunization in migrant communities. In sum, grasping the historical and contemporary reasons for hesitancy and refusal is key to identifying, analyzing, and solving evolving legal dilemmas concerning vaccination.

II. Individual Choice and Mandatory Vaccinations

From the perspective of the State, the issue is whether the risk of COVID-19 spread by unvaccinated asylum seekers and refugees constitute a harm to public health which is concrete and serious enough to mandate vaccination in return for access to legal protection mechanisms. The scenario is not moot: We do not know if existing vaccines will cover new mutations. We do know that vaccines lose efficacy over time. Turning back international travelers is different from turning back individuals requesting protection. Citizens and residents and others on whom States confer rights to enter can be referred to quarantine hotels. This leaves States facing a dilemma with respect to those seeking protection and who arrive without the ability to enter.

The key issue with respect to vaccines is how States strike a fair balance between protecting the community and interfering in individuals' private lives. What is the scope of individual choice? Vaccinations require free and informed consent, with strict criteria for derogation in exceptional circumstances. While international human rights law is silent on the right to refuse medical treatment, under the torture-prohibition in ICCPR article 7, there is a right not to be subjected to medical experimentation without appropriate consent (see also the Helsinki Declaration of 1964). According to the 1997 Council of Europe Convention on Human Rights and Biomedicine (Oviedo), vaccine measures must not violate the right and liberty of an individual to bodily autonomy and informed consent. According to Article 2, the interests and the welfare of the individual prevail over the interest of "society or science", and Article 5 emphasizes that interventions in the health field require free and informed consent. It should be noted that coercion in health care settings may cross the threshold of mistreatment tantamount to

torture or cruel, inhuman or degrading treatment or punishment. However, mandatory schemes entail a combination of administrative, legal, and penal sanctions. Research indicates that sanctions usually involve fines, parental rights penalties, conditionality for benefits and services and, in rare instances, jail time. Sanctions can also involve termination of professional duties and dismissal from work.

At the same time, according to CESCR general comment No. 14, governments must also safeguard citizens' lives by preventing and controlling disease and protecting citizens, thus allowing for certain legally demarcated restrictions on individual vaccine choice. The recent decision in *Vavřička and others v. The Czech Republic* by the European Court of Human Rights (ECHR) seems to pull in the direction of giving States a broad margin of discretion with respect to mandatory vaccinations, albeit on a subject matter (education) quite different from *non-refoulement*.

Declaring something to be an "emergency" requiring urgent interventions shapes notions of what needs to be done and by whom. In many jurisdictions, COVID-19 has been recognized as an emergency requiring highly intrusive measures. Thus, a possible basis for formulating such restrictions is Oviedo Article 8, which reiterates that, in emergency contexts when appropriate consent cannot be obtained, a medically necessary intervention may be carried out *immediately* for the benefit of the health of the individual concerned. Yet, while COVID-19 constitutes an emergency, it is not clear that it constitutes an emergency for individuals where consent "cannot be obtained" (where an individual is incapacitated or cannot give timely consent, for example, to a blood transfusion after a terror attack). Furthermore, a refusal is not the *absence* of consent; it is a *negation* of consent. In sum, Article 8 does not work here.

Instead, focus must be given to Oviedo Article 26, which provides for a possible exception for the protection of collective interests, including public health, and the 1984 Siracusa principles, which further demarcate the scope for derogations. These instruments limit the restrictions on the exercise of the rights and protective provisions to those prescribed by law and necessary in a democratic society in the interest of public safety, for the prevention of crime, for the protection of public health or for the protection of the rights and freedoms of others. Any curtailment of rights must consider the disproportionate impact on specific populations or marginalized groups. Specifically, vaccination should be voluntary unless it becomes critical to "prevent a concrete and serious harm." COVID-19 and its ensuing (and future) mutations seem to pass these tests.

Individual rights must be balanced against the type and severity of emergency the State is faced with and the resources the State has at hand. The rights of individuals must also be calibrated vis-à-vis the existence of the State's other rights and duties. This includes a country's rights to protect its sovereign borders and to jurisdictional sovereignty over its territory. States must protect their domestic populations vis-à-vis the threat of infectious diseases. This obligation includes the protection of medical and bureaucratic frontline workers against infectious disease (but, conversely, also the rights of health personnel not to be required to engage in unethical medical

interventions, for example, to provide forced or unsafe vaccinations, or vaccinations lacking informed and free consent).

To be legally sustainable, a mandate for compulsory vaccination cannot amount to medical experimentation and would require extensive scientific documentation of the safety of a vaccination scheme (a challenge illustrated by the AstraZeneca controversy related to mortality rates following rare blood clots) and passing the proportionality and necessity tests. This has implications not only for the legality of mandatory vaccination schemes but also concretely for how States organize their vaccination efforts.

III. Requirements for Mandatory COVID-19 Vaccination Schemes

If a State were to decide that, to protect a domestic population, refugees must be vaccinated before accessing legal processes, attention would then need to be given to what it takes (in terms of capacity, institutional arrangements, financial resources, and procedures) to make such schemes legal. The complexity of this endeavor suggests that mandatory schemes should not take a top-down, command-and-control approach.

Instead, States must give adequate financial, logistical, and medical attention to non-coercive, acceptance-driving aspects of vaccination programs. States must ensure appropriate organization of their vaccination programs; that programs for refugees and asylum seekers are not of lesser quality; and that there are safeguards against abusive applications of vaccination programs. Central here (also noted in Principle 9 on the right to information about COVID-19) is the importance of health information and making clear its relationship to refugee law, *i.e.*, the rights and obligations of States. Adequate, appropriate, and accessible information about vaccination *and* the rationale for requiring vaccination before processing of legal claims must be provided to those seeking legal protection. This necessitates providing accurate and credible information in a language and culturally appropriate format recipients will understand—as well as adapting information for people with special needs or no literacy or internet access.

Conclusion

States may mandate COVID-19 vaccination for refugees under certain narrowly tailored circumstances. Correspondingly, the right to health for refugees does not appear to include *a right to refuse* COVID-19 vaccination with no administrative consequences if certain requirements are fulfilled by the State. Admittedly, this is only the beginning of the discussion: How a mandatory vaccination scheme may be meaningfully coupled with the *non-refoulement* obligation needs more elaboration. Neither States nor UNHCR are left with many options faced with refusal: As noted, physical coercion has no place in a mandatory vaccination program, and *refoulment* remains prohibited. Detaining or quarantining those refusing is costly and may engender broader problems with communal vaccine acceptability, including among populations that do not have a track record of refusing immunization. The same will probably be the case with fines and deferment of access to status determination procedures. Doing nothing, *i.e.*, letting people disappear

in the crowd, undermines emergency health objectives. Thus, even with a mandatory vaccine scheme, authorities and humanitarian staff will be left to persuade, nudge, and cajole to get people vaccinated. It would be welcome if a revised version of the *14 Principles* addressed this dilemma.

Concluding Comments: Revisiting the Principles of Protection for Migrants, Refugees and Other Displaced Persons, One Year On

Guy S. Goodwin-Gill†

Within the context of the 14 Principles and to conclude this symposium, I provide a few reflections below on the greatest human rights challenges faced by migrants, refugees, and the displaced in the last year.

As expected, things have gotten worse, and it will take time to re-establish—or even to establish for the first time—protection on a sure footing. The widespread failure of States when it comes to vaccinations is a sobering illustration: Research undertaken by World Health Organization (WHO) and reported in The Guardian on May 7th indicated that more than 70% of 104 government vaccination plans excluded migrants; most did not include refugees and asylum seekers; while 11.8 million internally displaced were also omitted.

Apart from this, I see three major rights challenges.

First, COVID-19 has proven to be a useful distraction for governments that want to allow ill-treatment and abuse to continue at their borders and on the high seas. At the same time, it has proven to be a useful vehicle for greater control over migrant and refugee populations.

For example, on May 14th Australia enacted new legislation, with no advanced notice and no consultation, authorizing the indefinite detention of certain individuals who could not be removed, either on "refugee" grounds or because there was no country able and willing to accept them. Ostensibly,

---

† Guy S. Goodwin-Gill is a Professor at the Kaldor Centre for International Refugee Law, University of New South Wales, Emeritus Fellow of All Souls College, Oxford, Emeritus Professor of International Refugee Law, and an Honorary Associate of Oxford's Refugee Studies Centre. He practiced as a Barrister at Blackstone Chambers, London, from 2002-18, is the Founding Editor of the *International Journal of Refugee Law*, and was Editor-in-Chief from 1989-2001. In February 2020, he received the Stefan A. Riesenfeld Memorial Award at Berkeley Law, for his contributions to international refugee law. Among his many publications dealing with international law and the movement of people between States is The Refugee in International Law. The fourth edition, now coauthored with Professor Jane McAdam and Emma Dunlop, was published by Oxford University Press in September 2021.

this was done in the interest and with the aim of "strengthening" the implementation of the country's *non-refoulement* obligations. The very same week, the Government's budget included a huge expenditure on detention facilities. COVID-19 as pretext and as cover is a theme that echoes throughout this symposium.

Secondly, while there have been very few *formal* derogations from human rights treaties (see here and here), there have been many derogations *in fact*. This is an important distinction, because the process of formal derogation implies certain safeguards, and the absence of formal derogation means that such safeguards are missing or diluted. In addition, in many States, oversight, monitoring, and the judicial review of police measures, among others, were already absent or circumscribed; thus, the pandemic has led to even fewer remedies for those detained, for example, in conditions that expose them to the risk of infection. This theme, too, is echoed throughout the symposium.

Thirdly, controls over movement, both internally and externally, have been ramped up. Even though many States have *not* imposed a barrier on access to protection procedures, the *means* for getting there have been curtailed—sometimes to zero. As we know, technology is already at the border and beyond, with drones now engaging in aerial maritime surveillance, but with little oversight. At the level of individual decision-making, we could be moving from a rules-based order to one in which the rule is generated directly by an algorithm, not by human beings, and applied in a context where the lived experience of the refugee and migrant are *not*, as they should be, front and center.

To what extent, without being pushed, will governments be ready to give up what to them appear to be useful and productive controls, either generally or specifically? In Australia—where I am currently based—the government has denied the right of citizens to return (see here and here), ostensibly in the interests of protecting the wider community from the risk of infection. It now treats the citizen as "the other", as it does the refugee and the migrant. What's to be done when a government can change the law at will, with no constitutional control or oversight?

The answers are not obvious, nor are they simple. Governments have the power to control, but we have the power to react and to resist, across many fields. Above all, we have the information directly from those impacted by COVID-19 restrictions. These stories, this narrative, must continue being told: told in litigation, told in policy meetings, told in legislative discussions and, above all, told in our conversations with people at large.

This means also that we must be prepared to identify the border police and the prosecutor individually responsible for push-backs and criminal proceedings; it means continuing to pressure State authorities that refuse disembarkation and those that will not support it with appropriate guarantees; it means combatting indifference—aided perhaps by the death toll due to COVID-19—as to whether people live or die, as well as to the woeful lack of basic decencies and common humanity that have been effectuated during the pandemic. It means recognizing that we all live with risk, and can do so quite successfully.

As Saint-Exupéry put it in *Flight to Arras/Pilote de guerre* (1942), "Each of us is responsible for all of us. Each of us is alone responsible. Each of us is alone responsible for all of us."

This is not, as some might suppose, a Panglossian ideal. Pangloss, in Voltaire's *Candide* (1759), proposed that the worst events, human and non-human, could be justified as being for the best "in the best of all possible worlds". This definitely was *not* what Saint-Exupéry had in mind, nor do I intend to imply an idea of "negative responsibility"—that we are as much responsible for what we do as for what we do not do, for deliberately harming others, as for failing to relieve their suffering, however remote. That, as J. R. Lucas cogently remarked, "loads everyone with unbearable burdens and induces unassuageable feelings of guilt." (*Responsibility*, 1993).

What I intend is that the protection of rights is and ought to be the business of everyone; and that each of us is and ought to be responsible for finding a way to make protection a part of our life, professional or private, no matter how small the contribution may appear to be.

Concluding Comments: (A) Few Promising Avenues for Promoting the Rights of Migrants in the Post-Pandemic

Ian M. Kysel†

More than eighteen months on, the COVID-19 pandemic may have unraveled the idea of human mobility—at least through regular channels—as an inexorable constant of life in the twenty-first century. Thankfully, it has nonetheless made it dramatically clear that the world's hundreds of millions of migrants are essential members of our communities, particularly as the health of those on the move is as vital to the safety of our communities as anyone else's.

Unfortunately, this symposium leaves no doubt that States continue to fail to uphold binding commitments to adequately respect, protect, and fulfill the human rights of people on the move. With the shadow of the 75th year of the United Nations (U.N.) Charter stretching long behind us, it is difficult to imagine formal inter-governmental multilateralism *alone* rectifying these failures in the future—nor being a source of transformational change.

In the face of an uncertain future, I propose three new targets for civil society activism using tools like the *14 Principles*: (1) binding the International Organization for Migration (IOM) to recognize a core set of rights for all migrants; (2) supporting regional leadership to promote migrants' rights; and (3) increasing civil-society advocacy using strategic, transnationally-coordinated, litigation. I argue below that these three things could become key avenues for foregrounding migrants' human rights obligations anew and, in doing so, pushing for a rights-respecting governance

† Ian M. Kysel is a Visiting Assistant Clinical Professor of Law at Cornell Law School. He is the founder and director of the Cornell Law School Transnational Disputes Clinic and of the International Migrants Bill of Rights (IMBR) Initiative, co-directs the Asylum and Convention Against Torture Appellate Clinic and is a core faculty member in the Migration and Human Rights Program. He is also a non-resident fellow at the Zolberg Institute for Migration and Mobility at The New School. His scholarship has focused on the rights of migrants, children's rights and the domestic implementation of international human rights law in the U.S. Kysel previously held appointments at the University of Oxford and at the Georgetown University Law Center. Kysel has written and edited several human rights reports; his opinion articles have appeared in *The New York Times*, *The Washington Post* and *The New Humanitarian*. Kysel has argued or participated in litigation before international tribunals as well as U.S. immigration, federal and state courts. He has provided testimony to various legislative bodies and commissions. Kysel was previously a staff attorney at the ACLU of Southern California. He also served as the Aryeh Neier Fellow at both the National ACLU and Human Rights Watch and practiced in Shearman & Sterling's International Arbitration Group and its Public International Law Practice. Kysel holds an LLM in Advocacy, with distinction, a JD, Magna Cum Laude, Order of the Coif, and a Certificate in Refugees and Humanitarian Emergencies from Georgetown University Law Center. He holds a BA, with high honors, Phi Beta Kappa, from Swarthmore College.

architecture that does more than manage and restrict migration.

I. The Pandemic & Migrants' Rights: From Bad to Worse

Migrants and migrants' rights have fared poorly during the pandemic. For periods, orderly and regular migration dramatically ground nearly to a halt. So, too, did compliance with some basic norms.

The U.N. High Commissioner for Refugees (UNHCR) reported that, in the spring of 2020, nearly half of U.N. member States had imposed border restrictions without exceptions allowing access to territory—and therefore to fair and efficient status determination—for refugees. Both the Biden and Trump administrations have closed U.S. land borders using an arcane public health statute, expelling hundreds upon hundreds of thousands and all but closing the U.S.-Mexico border to asylum-seekers (though not to other travelers). Recent photos of border guards repelling Haitian migrants by whipping them with lariats brought renewed attention to the Biden embrace of Trump's use of a law. Human rights concerns have driven high-profile resignations of U.S. Department of State officials, citing the U.S. role in returning Haitians to harm.

Hundreds of thousands of migrant laborers were effectively pushed to return to their home countries, with many stranded at borders on their way home. The U.N. Special Rapporteur on racism repeatedly called out States for failures to protect migrants against harassment, hate speech, and worse as the pandemic fanned the flame of xenophobia, with migrants portrayed as the source of its spread.

Though migrant workers were at long last publicly recognized as "essential" to the economy, given their frequent overrepresentation in industries which continued to operate, such as healthcare and food production, they were also locked down and frequently denied adequate personal protective equipment.

Meanwhile, migrant children, who already face huge barriers to accessing education in most States, encountered even greater burdens during the pandemic, with senior U.N. officials suggesting some might never return to school as a result.

As the pandemic has advanced, widespread lack of migrant access to healthcare or to the determinants of health (food, clean water, etc.) has only been compounded, with exclusion from vaccination plans and global inequality in distribution of doses to countries hosting large numbers of migrants, and particularly refugees—what Monette Zard and colleagues call a "double burden of access."

Certainly, there are shining or promising counterexamples, such as Portugal treating migrants as residents for purposes of access to public services and Colombia pledging to extend a temporary protections status to over 1.7 million Venezuelans. But the overall trend is decidedly retrograde.

II. Three Avenues for Re/Asserting the Rights of all Migrants

This Symposium highlights that the *14 Principles* can act as an important reference point for States—and those seeking to recalibrate State action—to

ensure that responses to the pandemic comply with basic rights obligations. Efforts like the *14 Principles* take seriously the overlapping challenges of people on the move (rather than considering distinctly those groups of migrants who might have rights under specific legal regimes, such as refugees or victims of human trafficking). The *14 Principles* urge the utility of using a set of measures, packaged together, to recall existing State duties, and they could be a vital tool to reasserting rights in the post-pandemic period.

I have argued with Chantal Thomas that civil society leadership in this area may be the best way to do so. But *where* should civil society look to advance these arguments, cross-nationally?

At the global level, civil society should certainly continue to use tools like the *14 Principles* to leverage fora for dialogue with States—and also to name and shame. The foregoing suggests that State-led multilateral cooperation on human mobility will continue to recede from its "heights" in the hortatory New York Declaration on Refugees and Migrants and the ensuing, non-binding, Global Compacts. Even so, the new UN Network on Migration and the State review fora and mechanisms created by the Global Compacts on Migration and for Refugees, as well as the long-running Global Forum on Migration and Development, still present opportunities for convening dialogues to directly question States about the rights failures of State responses to the pandemic. If States so significantly failed when it came to key norms, though, how will they commit to do better, *and* what will States do to hold themselves accountable for these failures (generally and in relation to individual migrants)?

There are at least three new targets for civil society activism that could make use of the *14 Principles*.

First, ambitiously, the scope of State failure during the pandemic should spur civil society to invest in building the political will to support a formal articulation of the rights of all migrants, regardless of the cause of their displacement, at the global level, as a binding mandate governing the actions of IOM. While States recently failed to exert the political will to include a robust or binding set of rights obligations in the Global Compacts (which generally avoided and sometimes watered down rights language), the pandemic has shown the pitfall of not making rights central.

Such an articulation could be made via empowering/constraining the IOM to respect, protect, and fulfill the rights of all migrants in its extensive project and operational work on migration (thus without undermining the role of the U.N. Office of the High Commissioner for Human Rights (OHCHR), nor, for that matter, that of the U.N. High Commissioner for Refugees). Such an innovation could take the *14 Principles* (or the International Migrants Bill of Rights (IMBR) which I co-authored, an idea others have proposed) as a starting point. There are at least two formal routes for achieving this.

One way this could be done is directly, through amending IOM's constitution to mandate compliance with a bill of rights reasserting binding international law (and thereby not displacing OHCHR's mandate). As it stands, IOM's current constitution does not use the term human rights—not even in connection with the core purposes and functions of the organization. The entity was founded in 1951—separate and apart from the U.N.— to help

States resettle and manage the mass displacement in Europe after World War II and has never had a formal human rights mandate. Human rights groups have long criticized IOM's involvement in violations of the rights of migrants—refugees and asylum-seekers in particular—and called for the need for a baseline standard of accountability.

Another route for this is indirect, through a U.N. General Assembly resolution supplementing that which established the 2016 relationship agreement between the U.N. and IOM (bringing IOM into the U.N. system for the first time) and obligating compliance with rights as a condition of that relationship. The current agreement merely obligates IOM to conduct its activities "in accordance with the Purposes and Principles" (i.e., Articles 1 and 2) of the U.N. Charter, which include promoting and encouraging respect for human rights, but only directly requires IOM to give "due regard" to "relevant instruments" in the fields of international migration, refugee, and human rights—a weak standard indeed. Binding the IOM to respect a core soft law articulation of the rights of all migrants set out in a General Assembly resolution (building on the *14 Principles* or the IMBR and serving to update the 1985 U.N. General Assembly Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which they Live) would hold the IOM accountable and help the IOM push States to comply with the same standards.

Even if States may be unlikely to take up my recommendations in the immediate term, achieving a soft law complement to IOM's mandate, through either mode, should be a long-term priority for civil society. Looking to the later stages of this, as well as to the next, pandemic—and also to future increases of climate-induced displacement across borders and myriad other challenges—such a soft law complement to IOM's mandate could make it a more effective tool for those States which recognize the limits of uncoordinated attempts to respond to both migration and public health and seek to incentivize a race to the top, rather than to the bottom. A rights mandate for the IOM could make it a more powerful agency in its contribution to rebuilding a post-pandemic rules-based system for coordinated multilateral responses to challenges involving mobility, and affirming its general duty to call out—and never facilitate—retrograde State practice.

Second, at the regional level, civil society should engage with regional human rights bodies to support their active engagement on migrants' rights within the relevant political bodies. Indeed, regional bodies are already leading international organizations on this. In 2019, the Inter-American Commission on Human Rights, the rights body of the Organization of American States (OAS), adopted a set of Principles on the rights of migrants, including refugees, arguably the most progressive such articulation ever adopted by an international body. In addition to informing Commission advocacy promoting rights-respecting migration policy with States, the Principles could also inform the migration work of the OAS.

The African Commission on Human and Peoples' Rights, the human rights body of the African Union (AU), just recently adopted a resolution paving the way for a set of guiding principles on the rights of all migrants, including refugees. Assuming such principles are eventually adopted, they

could similarly inform both Commission engagement with States and AU efforts on migration, including, for example, supporting the entry into force of the relevant AU Protocol on freedom of movement in a manner that promotes migrants' rights.

Regional efforts like this in Africa and the Americas—home to significant migration corridors and to many of the world's migrants, including large numbers of refugees—could strengthen the ability of bodies like the AU and OAS to influence State responses to this and future pandemics. They could also serve as shining examples for other regions where rights are under attack and as models for global leadership

Third, at the national level and in transnational partnership, civil society should dramatically amplify coordinated, strategic litigation campaigns to promote the rights of people in the context of human mobility. This has arguably long been an area where transnational activism has been lacking (with some notable exceptions, see e.g., NGO work here, here, here and here and commentary on UNHCR role here).

The pandemic has shown—as in other assaults on mobility, such as the externalization of migration controls—that States borrow liberally from each other and that retrograde practices proliferate. At a minimum, civil society should also borrow strategies from each other to *push back.* More ambitiously, civil society should develop coordinated strategies for affirmative litigation to promote changes favorable to migrants. Such efforts, like national ones, must be pursued in dialogue with grassroots campaigns and also elevate the leadership of migrants and refugees.

Litigators could begin by mapping where and via what kinds of cases they could advance the recognition and protection of a particular right and how this could catalyze the crystallization of custom in State practice and the progressive development of the law, and then pursue such a program of court-based advocacy. A network like this would be poised to go to the Courts in multiple countries when, for example, a pandemic, as COVID-19 did, makes immigration detention substantially more disproportionate, and then to leverage wins to knock-on effect in other jurisdictions. Such a network could likewise quickly develop model pleadings addressing the discriminatory exclusion of migrants and refugees from access to testing, healthcare treatment or vaccination programs.

In part to address this gap, other advocates and I recently launched the Global Strategic Litigation Council for Refugee Rights (GSLC). The GSLC will serve as a hub for civil society actors seeking to use strategic litigation and related legal advocacy to advance the protection of refugee rights and the consistent and progressive development of international law worldwide.

Admittedly, the migrants' rights movement faces headwinds. Despite State failures in this pandemic and the widespread appeal of xenophobic, nationalistic politics in many States, there are in fact (a few) new avenues for seeking to hold States to their existing commitments using tools like the *14 Principles*. Who knows, such work might even create the conditions for a new migration politics, reflecting our interconnectedness as humans and facilitating safe and dignified migration.