

## SYMPOSIUM ON COVID-19, GLOBAL MOBILITY AND INTERNATIONAL LAW

### BORDER REGIMES AND PANDEMIC LAW IN TIME OF COVID-19: A VIEW FROM BRAZIL

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COVID-19 has had a profound impact on migrants and refugees the world over. Their pre-existing vulnerabilities were immediately exacerbated as national health systems were often overwhelmed and many disease control measures were either inaccessible to them or had disproportionate socio-economic effects. But migrants and refugees have also been framed as *prima facie* causes for the transboundary spread of the virus, and public health exception and derogation clauses in both national and international refugee and human rights instruments have been used to block their entry, suspend asylum processing, or trigger deportations. Taking the example of Brazil as a point of departure, the present contribution argues that (for at least some states) the appearance of the virus seems to have served as a legal *carte blanche* for fundamentally reconfiguring or closing down border regimes. More specifically, we argue that the strategic mainstreaming of global health regulations into border regimes points to the emergence of a “pandemic law” that encroaches upon already fragile transnational legal regime complexes, with the potential to upend or hollow out existing frameworks for migrant and refugee protection.

#### *Legal Long Games and International Regime Complexity*

COVID-19 has hit Brazil hard, both in terms of infection and mortality rates and in relation to the immediate and foreseeable mid- and longer-term economic consequences.<sup>1</sup> In the context of migrants and refugees, however, the government appears to have embraced the pandemic as offering a new legal passageway enabling the circumvention of both international law and domestic obligations relating to refugees and migrant populations. Once the pandemic emerged, Brazil’s federal government quickly identified internationally sanctioned public health exceptions—both in the national Migration Law and in Article 33.2 of the 1951 Convention Relating to the Status of Refugees—as presumptive grounds for not just border closures but also summary deportations of migrants and refugees without regard for the *non-refoulement* principle. For a government otherwise at the forefront of COVID-negationism, World Health Organization (WHO)-mandated disease control measures seemed to offer themselves as a powerful tool to undermine international human rights and refugee law.

The government’s actions have produced some Kafkaesque outcomes. In August 2020, for example, a migrant group was initially allowed to cross from Peru into Brazil upon presenting (Brazilian) Ministry of Health-approved health certificates and signing pledges to comply with all national COVID-19 measures. Shortly after entering

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<sup>1</sup> See *Evolução dos Casos de Coronavírus no Brasil*, EL PAÍS (Sept. 3, 2020); *Entrevista: Migrações e Refúgio no Contexto da Pandemia*, CONECTAS (June 18, 2020) (interviewing Renan Sotto Mayor, president of Brazil’s National Human Rights Council).

Brazilian territory, however, the group was picked up by the Federal Police, summarily deported, and left in “no person’s land” on the border bridge between the two countries, as Peru had in the meantime also closed its border.<sup>2</sup>

This episode, which is a mere snippet of the situation in Brazil, highlights a complex interplay of domestic, international, and transnational legalities that configure not only the particular protection landscape in border regions but also physical and legal zones of blurred responsibility, in which migrants and refugees are all too easily trapped. This legal landscape is not static but rather constantly on the move, with valleys capable of changing into heights and heights into valleys. The drivers of change are not unidimensional or unidirectional but complex and entangled. In many cases, shifts result from competing clusters of public authorities within the same state, who align themselves with different national and international legal logics that are pitted against one another.

In the context of migrant and refugee protection, Thomas Gammeltoft-Hansen and Nikolas Tan have proposed a “topographical approach” to these conditions.<sup>3</sup> Mapping out the regime complexity around borders, they show how states routinely navigate the legal landscape to “cloud questions of responsibility and liability” through either complex governance setups or by exploiting conflicting legal framings across regimes. Adding a further dimension to this analysis, we argue that events like COVID-19 can also prompt sudden and radical transformations within these legal landscapes. In this case, public health regulations are combined with existing regime clusters to form a new kind of “pandemic law.”<sup>4</sup>

The episode involving the migrants from Peru is a case in point: Whereas the Federal Police interpreted WHO-generated disease-prevention measures as a free hand for summary deportation, the initial border crossing had only been made possible through the intervention of the Federal Public Defender’s Office, which had, in turn, negotiated the terms of admission with the Federal Ministry of Health. The imposition of health law in the context of border regimes was, however, itself challenged as the migrant group was later “freed” from what it had termed its “prison without walls” in the border zone through a preliminary injunction granted by a Brazilian federal court. Relying on domestic legislation incorporating the 1951 Refugee Convention and the 1984 Cartagena Declaration on Refugees, the court found that the humanitarian exceptions clause had not been applied.<sup>5</sup> Subsequently, a class action was filed jointly by an unlikely alliance of the Federal Prosecutor’s Office, the Federal Public Defender’s Office, a prominent national human rights NGO (*Conectas Direitos Humanos*), and one of Brazil’s chief humanitarian organizations (*Caritas Brasil*) to obtain a blanket stop to COVID-19-related deportations. This action cited violations of both Brazil’s constitution and international human rights law.<sup>6</sup>

In some circumstances, the emergence of pandemic law may further serve to disrupt or unhinge existing relationships between different international legal regimes. The much-discussed “human rights turn” in international refugee and migration law has generally been credited with expanding both access to asylum and protections during exile through a combination of interpretive cross-pollination and the establishment of complementary

<sup>2</sup> The subsequent class action summarizes the facts and law. See [Ação Civil Pública No. 1004501-35.2020.4.01.3000](#) (Aug. 17, 2020). On the restrictive measures, see also [Portaria 01/2020](#), CC-PR/MJSP/MINFRA/MS n° 1, arts. 3 & 4 (July 29, 2020).

<sup>3</sup> Thomas Gammeltoft-Hansen & Nikolas Feith Tan, *A Topographical Approach to Accountability for Human Rights Violations in Migration Control*, 21 GERMAN L.J. 335 (2020).

<sup>4</sup> On international regime complexity more generally, see Frédéric Mégret, *Transnational Mobility, the International Law of Aliens, and the Origins of Global Migration Law*, 111 AJIL UNBOUND 13 (2017); Vincent Chetail, *The Architecture of International Migration Law: A Deconstructivist Design of Complexity and Contradiction*, 111 AJIL UNBOUND 18 (2017); Karen J. Alter & Kal Raustiala, *The Rise of International Regime Complexity*, 14 ANN. REV. L. & SOC. SCI. 329 (2018).

<sup>5</sup> See [Migration Law \(Lei da Migração\)](#) (Brazil), 13.445/17 (May 24, 2017); [Statute on Refugees \(Estatuto dos Refugiados\)](#) (Brazil), 9.474/97 (July 22, 1997); [Portaria 01/2020](#), *supra* note 2. For discussion, see generally [Conectas, Boletims Direitos na Pandemia no. 1-4](#) (2020).

<sup>6</sup> [Ação Civil Pública No. 1004501](#), *supra* note 2.

rights.<sup>7</sup> In Brazil, however, with a social demographic characterized by extreme social inequality and with significant sections of the population permanently exposed to precarious living conditions, migrants and refugees tend, even under “normal” circumstances, to live on the margins of the margins.<sup>8</sup> With the pandemic having dramatically exacerbated existing health- and socio-economic vulnerabilities for the entire population, migrants and refugees risk being pushed over the edge (or, literally, across the border).<sup>9</sup> In this context, a generalized human rights response is less likely to provide the necessary remedies, as, by its nature, it is not well equipped to distinguish between migrants and refugees, on the one hand, and the many other affected vulnerable populations, on the other. Hence, paradoxically, the legal specificity of migrants and refugees might be lost in the generalized human rights calamity that COVID-19 represents.<sup>10</sup>

*From Border Regime to Humanitarian Corridor and Back*

As another illustration of the implications of pandemic law, consider the Brazil-Venezuela border. Even before the pandemic, the regime complexity surrounding the border produced highly dynamic and sometimes spurious outcomes. This border is somewhat atypical, as Brazil has traditionally been neither a stereotypical Global Northern destination country for refugees nor a typical Global Southern recipient country bordering zones of large-scale armed conflict. Until 2015, Brazil was a relatively new and small-scale player in the international refugee theater. A “nation of immigrants” by pedigree, groomed in the Latin American tradition of open—albeit always racialized—borders and openness toward political asylum,<sup>11</sup> contemporary Brazil first experienced a large-scale influx of forced migration in 2010, when a significant number of Haitians made their way down in the context of Brazil’s leading role in the UN Stabilization Mission in Haiti (MINUSTAH).

The watershed, however, came in 2015, when the Venezuelan food crisis resulted in the cross-border dislocation of approximately 4.7 million Venezuelans, of which around 264,000 have so far migrated to Brazil, with most crossing the land border into the northern Brazilian state of Roraima.<sup>12</sup> This quickly turned into a bottleneck, as the state is geographically isolated and economically precarious. To make matters worse, Brazil was, when the crisis broke, on the verge of a major period of instability that resulted in prolonged political turmoil, a steep economic downturn, and, eventually, the election of a right-wing populist government.

In this climate, Venezuelan refugees arriving in Roraima found themselves between a rock and a hard place, facing growing and violent xenophobia while being physically stuck in the border region and without local

<sup>7</sup> RUTH RUBIO-MARIN, [HUMAN RIGHTS AND IMMIGRATION](#) (2014); Thomas Gammeltoft-Hansen, [International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law](#), 20 EUR. J. MIGRATION & LAW 373 (2018).

<sup>8</sup> See Deisy Ventura, [Mobilidade Humana e Saúde Global](#), 107 REVISTA USP 55 (2015); UNHCR, [The COVID-19 Crisis: Key Protection Messages](#) (Apr. 1, 2020).

<sup>9</sup> See Daniel Chiaretti et al., [Mobilidade Internacional em Tempos de Pandemia: Reflexos da COVID-19 nos Direitos dos Migrantes e Refugiados](#), 24 REVISTA DA SEÇÃO JURÍDICA DO RIO DE JANEIRO 59 (2020); Julia Bertino Moreira, [Migrações Internacionais à Luz da Pandemia do Novo Coronavírus](#), 216 COMSCIENCIA (Apr. 9, 2020).

<sup>10</sup> For an earlier defense of the legal specificity of international refugee law, see James C. Hathaway, [Forced Migration Studies: Could We Agree Just to ‘Date’?](#), 20 J. REFUGEE STUD. 349 (2007).

<sup>11</sup> See Diego Acosta, [Open Borders in the Nineteenth Century: Constructing the National, the Citizen and the Foreigner](#), in THE NATIONAL VERSUS THE FOREIGNER IN SOUTH AMERICA: 200 YEARS OF MIGRATION AND CITIZENSHIP LAW 31 (2018).

<sup>12</sup> See [O Êxodo Venezuelano que Muda a Face da América do Sul](#), EL PAÍS (Nov. 14, 2019); Shannon Doocy et al., [The Food Security and Nutrition Crisis in Venezuela](#), 226 SOC. SCI. & MED. 63 (2019); UNHCR, [Brasil Torna-se o País com Maior Número de Refugiados Venezuelanos Reconhecidos na América Latina](#) (Jan. 31, 2020).

economic prospects.<sup>13</sup> A more robust humanitarian response only came in 2018, when the (then) federal administration tied emergency funds to the establishment of Operation Shelter (*Operação Acolhida*), a mission led by the armed forces and broadly modelled on a humanitarian emergency operation. This represented a de facto militarization of the refugee and border regime in Roraima as its administration was largely removed from local civilian control.

Unlike the dominant deterrence paradigm characteristic of most Global Northern border regimes, Operation Shelter was, arguably, primarily driven by precepts of public order and territorial security.<sup>14</sup> Groomed in the logic of MINUSTAH, the military's vision was essentially to operate on an international humanitarian law basis and chaperone the implementation of the national and international refugee framework by the Federal Police and the UN High Commissioner for Refugees (UNHCR) with a view toward demonstrating state capacity and securitizing the border regime. On the ground, the situation was characterized by a complex interplay between local and municipal authorities, UNHCR, the International Organization for Migration, an incongruent network of local and transnational NGOs serving as implementing partners, and the growing number of refugees living in shelters, in rented accommodation, or on the streets.

The efficacy of this operational logic was, however, partly frustrated by the absence of a legally dependable and fully federalized "interiorization" policy (which would allow the accelerated resettlement of refugees across the country's large territory), as well as the consistent attempt by municipal and state authorities to undermine federal control. The latter took the form of aggressive lawfaring through state-level legislation and lawsuits aimed at forcing summary border closures as well as at curtailing access by refugees to basic services. While most of these measures were subsequently quashed by the courts, they still occasioned diversion and delay.<sup>15</sup>

In this highly charged environment, the nature of the border regime began itself to mutate from one governed by a predominantly refugee law-oriented framework to one resembling a cross-border humanitarian safe zone. This subtle and largely unacknowledged change did not emanate from the responsible public authorities, but from the refugees themselves, who began permeating the border in both directions and intermittently in accordance with their specific needs: in one direction for affordable food, shelter, basic health care, and some limited economic sustenance; in the other direction for the continued and necessary provisioning of extended family and community members, as well as a temporary retreat from outbreaks of xenophobic violence or backlash from local authorities.

Within this particular legal and political configuration, the de facto permeability of the border was neither condoned nor suppressed, since none of the responsible actors could actually provide the durable solutions necessary to de-escalate the crisis on either side. Yet, this space at the interstices of the border regime could not have emerged without the nominal applicability of both international refugee law and the humanitarian legal framework applied by the military as part of Operation Shelter. It was this umbrella of legality that, underneath it, provided the necessary maneuvering space for an otherwise locked-in refugee population to augment its own resilience, if only by a little.<sup>16</sup>

That resilience was, however, entirely eroded with the arrival of COVID-19. Its first victim was the fragile de facto mobility corridor that had emerged around the Brazil-Venezuela border. This was not a foregone conclusion.

<sup>13</sup> See *Nota Técnica* No. 3/2019/CONERE (June 13, 2019).

<sup>14</sup> See Audrey Macklin, *Brazil's Humane Refugee Policies: Good Ideas Can Travel North*, THE CONVERSATION (Feb. 11, 2020); João Carlos Jarochinski Silva & Juliana Lyra Jubilit, *Venezuelans in Brazil: Challenges of Protection*, E-INT'L REL. (July 12, 2018).

<sup>15</sup> See, e.g., *Ação Direta de Inconstitucionalidade No. 9000025-43.2020.8.23.0000* (Mar. 6, 2020) (declaring that said municipal law is unconstitutional in preliminary proceedings); Chiaretti et al., *supra* note 9.

<sup>16</sup> See Carolina Moulin Aguiar & Bruno Magalhães, *Operation Shelter as Humanitarian Infrastructure: Material and Normative Renderings of Venezuelan Migration in Brazil*, 24 CITIZENSHIP STUD. 642 (2020).

The pandemic could just as easily have been used to formalize and legalize the corridor as an emergency response exception to the ordinary refugee regime—a form of “safe travel zone” or “humanitarian corridor” similar to those adopted in a number of other international border regions.<sup>17</sup> Instead, the border was closed on public health grounds, initially just to Venezuelans as if to highlight that an emergent pandemic law could easily be used to trump even deeply enshrined norms of international law, including non-discrimination and *non-refoulement*.<sup>18</sup>

### *Conclusion: Border Regimes and Pandemic Law*

As the Brazilian case shows, migrants in general and refugees in particular are all too likely to be among the first to be instrumentalized in the political struggle over global mobility and de-globalization that is emerging against the backdrop of the pandemic. National and international law, or rather the fragmented yet intersecting transnational legal regimes that compete for regulatory hegemony over borders and those who cross them, are the main weapons in this struggle. The situation involves an increasingly complex “dance” in which one side will mobilize hybrid formations to skirt its legal responsibilities and put the brakes on global mobility, and the other side will engage in the “pragmatic disaggregation” of cross-border accountability regimes in order to block the next move.<sup>19</sup>

We have used the term “pandemic law” as a short-hand to describe the process through which an event or crisis such as COVID-19 has the potential to fundamentally impact these processes as hitherto extraneous legal considerations and logics insert themselves and further complicate existing border regimes. At the empirical level, this observation is, of course, not new. Historically, pandemics, and public health concerns have long played a crucial role in reconfiguring national and international border regimes and in driving regulatory innovations from quarantine laws to carrier sanctions.<sup>20</sup> The question remains, though, in which direction this regulatory “dance” will take us.

Like in the past, many of the current measures applied in Brazil will likely be subjects of judicial review. Some will eventually be quashed or simply abandoned. However, with the final scale of the pandemic and the timing and effectiveness of vaccines and crowd immunity being as yet utterly uncertain, and with a new and generalized pandemic sensitivity possibly emerging, it is equally uncertain how the balance between current forms of pandemic law and existing refugee and human rights standards by judicial and quasi-judicial bodies will evolve in the near and longer-term future.

<sup>17</sup> Int'l Org. for Migration, *Global Preparedness and Response Plan* (May 15, 2020).

<sup>18</sup> See Juliana Lyra Jubilut & João Carlos Jarochinski Silva, *COVID-19 at the Brazil-Venezuela Border: The Good, the Bad and the Ugly*, OPEN DEMOCRACY (June 18, 2020).

<sup>19</sup> Gammeltoft-Hansen & Tan, *supra* note 3, at 353.

<sup>20</sup> Michael Edelstein et al., *Health Crises and Migration*, 45 FORCED MIGRATION REV. 36 (2014).