

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

### FORTRESS EUROPE, GLOBAL MIGRATION & THE GLOBAL PANDEMIC

*John Reynolds\**

The European Union's external border regime is a manifestation of continuing imperialism. It reinforces particular imaginaries of Europe's wealth as somehow innate (rather than plundered and extorted<sup>1</sup>) and of Europeaness itself as whiteness—euphemistically packaged as a “European Way of Life” to be protected.<sup>2</sup> This exposes international law's structural limitations—if not designs—as bound up with racial borders in the global context. In the wake of COVID-19 and with a climate apocalypse already underway, these realities need to be urgently ruptured and reimagined.

#### *Liberalism with Borders: Fortress Europe and International Law*

In the EU institutional worldview, Europe must be “shielded” from the threats of human mobility. The physical and administrative externalization of the EU border is designed to limit the scope for non-Europeans to legally access refuge in Europe. Those seeking to enter the EU from the Global South are cast in pejorative terms as presumed “economic migrants”—a loose category without mobility rights under international law—and rendered “illegal.” Europe's access barriers for such communities contrast with both historical experiences of European colonial economic migrants who benefitted from an international legal regime “that facilitated, encouraged, and celebrated white economic migration,” and contemporary entitlements of First World passport holders whose global movement is expedited by a “robust web” of international visa agreements.<sup>3</sup> People from the Third World—most of the world—are denied such arbitrary passport privilege. This is a recurring bifurcation in classical liberal thought since colonial times, when some movements were “configured as freedom” while “others were deemed improper and were conceived as a threat.”<sup>4</sup>

The convergence of sovereignty and racialized exclusion has produced a nefarious necropolitics on Europe's sea borders. Perceptions of migration from the South as existential emergency for European states have prompted more ruthlessly restrictive border regimes. Migrants drown in their thousands. Their rescue is criminalized. The European Union enters international arrangements—most notoriously with Turkey and Libya—to offshore the border and outsource enforcement. On the longer historical arc of human mobility, the border regimes currently

\* Associate Professor, Department of Law, National University of Ireland, Maynooth, Ireland.

<sup>1</sup> WALTER RODNEY, [HOW EUROPE UNDERDEVELOPED AFRICA](#) (1972); KWAME NKUMAH, [NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM](#) (1965).

<sup>2</sup> I discuss this further in John Reynolds, *Emergency and Migration, Race and the Nation*, 67 UCLA L. REV. (forthcoming 2020).

<sup>3</sup> E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1517-18, 1530 (2019).

<sup>4</sup> Achille Mbembe, *The Idea of a Borderless World*, AFRICA IS A COUNTRY (Nov. 11, 2018).

imposed by rich, white-majority jurisdictions are an absurd, morbid anomaly. But they are effectively facilitated and legitimated by the international legal system.

Under current international law, border sovereignty over immigration is almost absolute. The sovereign right to exclude non-citizens has only limited exceptions for distinct categories of refuge-seekers, and even those are rendered notional by Global North states.<sup>5</sup> This highlights the further contradictions of liberalism: aggressive pursuit of universal free movement for capital and goods, but obstruction of any equivalent universal free movement for people—especially the racialized working classes of the South. Transnational capital, “free” trade, and foreign investment all depend on cheap, disciplined, enclosed labor forces.

The result is “liberalism with borders,” which is perhaps a good description of actually-existing international law.<sup>6</sup> Tom Farer argues that closed borders are indeed necessary to preserve European liberalism and—on the basis of an overtly racial culture-clash narrative—that Global North states have a legal and moral right to exclude migrants from the South.<sup>7</sup> Regrettably, liberal lawyers like Farer ignore the vital critical scholarship advocating for ethical reconceptualization of international migration law to better address social needs and realities in an interconnected world.<sup>8</sup> Instead, the liberal position—racial underpinnings included—aligns fully with international law’s existing norms, whereby the sovereign right to exclude foreign migrants is “not only permissible but even righteous.”<sup>9</sup> As Tendayi Achiume shows, “international law as a whole still most faithfully reflects the political theory of liberal nationalists, who defend the sovereign right to exclude as existential.”<sup>10</sup> This has long been the case and has only been reinforced during the coronavirus crisis.

### *The COVID-19 Conjuncture*

In early March 2020, the Turkish government suspended its commitment to the EU to prevent migrant movements towards Greece. The EU’s Frontex agency immediately mobilized, and Greek coastguards attacked migrants in the Aegean Sea.<sup>11</sup> The European Commission President promptly pledged €700m in EU funds to bolster such border policing: “This border is not only a Greek border, it is also a European border. . . . I thank Greece for being our European shield in these times.”<sup>12</sup>

That was arguably the last of the normal-emergency border violence before the public health emergency took hold on the scale that we now understand it. The following week, the World Health Organization declared a pandemic, and most European countries began to impose closure and quarantine measures. From the outset,

<sup>5</sup> See, e.g., Daniel Ghezlbash, *Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees*, 68 AM. J. COMP. L. (forthcoming 2020).

<sup>6</sup> TOM FAREER, *MIGRATION AND INTEGRATION: THE CASE FOR LIBERALISM WITH BORDERS* (2019).

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., Achiume, *supra* note 3; Jaya Ramji-Nogales & Peter J. Spiro, *Introduction to Symposium on Framing Global Migration Law*, 111 AJIL UNBOUND 1 (2017); Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 MELBOURNE J. INT’L L. 392 (2013).

<sup>9</sup> Achiume, *supra* note 3, at 1515.

<sup>10</sup> *Id.* at 1516.

<sup>11</sup> Maheen Sadiq, *Greek Coastguards in Altercation With Migrant Dinghy as Turkey Opens*, GUARDIAN (Mar. 2, 2020); Helena Smith, *Child Dies in Lesbos in First Fatality Since Turkey Opened Border*, GUARDIAN (Mar. 2, 2020).

<sup>12</sup> Ursula von der Leyen, President, Eur. Comm’n, *Remarks at the Joint Press Conference* with Kyriakos Mitsotakis, Prime Minister of Greece, Andrej Plenković, Prime Minister of Croatia, President Sassoli and President Michel (March 3, 2020); Jon Stone, *EU Chief Praises Greece as ‘Shield’ of Europe After Police Attack Refugees at Border*, INDEPENDENT (March 3, 2020).

right-wing forces in Europe were quick to blame migrants from Africa for the spread of the coronavirus, contrary to the evidence, and to exploit the virus to pursue further hardened borders.<sup>13</sup>

Movement limits are obviously a crucial part of the response to an infectious disease outbreak. That said, we should not take it as given that state borders are automatically the natural or most efficient apparatus to base a set of policies around. In the European context, we should also certainly not take it as given that national border policies have been imposed in a uniform, evidence-based, non-discriminatory manner. The reimposition of internal border controls within the EU between March and June 2020 marked a suspension of the Schengen free movement zone. The haphazard impacts of the pandemic on global and regional mobility may have given Europeans pause for thought about the assumed permanence of their own free movement and, one might hope, about the long-standing reality of border regimes for most of the rest of the world. The disruption of internal movement was nonetheless accompanied by a more robust collective closure of the EU's external borders, with incoming travel banned for non-EU citizens/residents. The internal national borders that had been closed reopened through May–June, with quarantine and testing requirements continuing to fluctuate several months later. From July, the EU Council recommended a gradual lifting by members of the global closures to allow for certain necessary travel. There remained effectively a blanket ban on mobility from most of the Global South, however, regardless of respective infection rates and the reality that some parts of the South—including notable examples with socialist structures or traditions like Cuba, Kerala and Vietnam—appeared to be handling the pandemic far more effectively than most Western capitalist states.<sup>14</sup>

The contrasts in many contexts are stark. In Italy, as I write this in September 2020, there are more public health checks and precautions in place at local petrol stations than at the land border crossing from France—at a time when infections in France have increased exponentially.<sup>15</sup> Simultaneously, a range of countries in the Global South, from Brazil to Bangladesh, remain under an absolute travel ban for the purposes of entry to Italy. The ban list is premised on COVID-19 infection levels, but the country with the highest number of cases of all, the United States, is not on that list.<sup>16</sup> Even amidst a pandemic, the operation of the border remains an exercise in class and racial coding. Concepts of safety and public health metrics are deeply entangled with political and economic hierarchies.

Amidst this conjuncture, when organic support for the racial justice uprisings in the United States surged around the world, the EU Commissioner for Promoting the European Way of Life took the opportunity to engage in the type of “gestural anti-racism”<sup>17</sup> that has become pervasive among ruling classes. While condemning the killing of George Floyd, he presented racialized police brutality as exceptional to the United States and not something that exists in Europe.<sup>18</sup> This jars profoundly with reports of the “blood on the ground” along EU land borders as young migrants are shot or beaten by police, left with “[b]roken teeth, truncheon wounds on their shoulders, shins slashed by the teeth of police dogs.”<sup>19</sup> Through the pandemic, the EU's border violence against people of color has persisted and in some contexts intensified. Greece continues to be used by the EU as its “shield,”

<sup>13</sup> Lorenzo Tondo, *Salvini Attacks Italy PM Over Coronavirus and Links to Rescue Ship*, GUARDIAN (Feb. 24, 2020); Daniel Trilling, *Migrants Aren't Spreading Coronavirus – but Nationalists are Blaming Them Anyway*, GUARDIAN (Feb. 28, 2020).

<sup>14</sup> TRICONTINENTAL INSTITUTE FOR SOCIAL RESEARCH, *CORONASHOCK AND SOCIALISM* (July 2020).

<sup>15</sup> Kim Willsher, *France Records 'Exponential' Increase in Covid-19 Cases*, GUARDIAN (Aug. 29, 2020).

<sup>16</sup> The United States is not included on Italy's list of countries which are specifically designated for an absolute ban on entry. Travel from the United States is subject to a more general set of restrictions on travel for tourism, whereas travel for work, business, health, study, or family reasons is permitted.

<sup>17</sup> Cedric Johnson, *We Can't Let Corporations 'Blackwash' Capitalism*, TRIBUNE (June 24, 2020).

<sup>18</sup> Michael Peel & Sam Fleming, *US-Style Policing Crisis 'Unlikely' in Europe, Claims Top EU Official*, FIN. TIMES (June 3, 2020).

<sup>19</sup> Lorenzo Tondo, *"Blood on the Ground" at Croatia's Borders as Brutal Policing Persists*, GUARDIAN (Dec. 22, 2019); see also Agnes Callamard, Special Rapporteur of the Human Rights Council, *Unlawful Death of Refugees and Migrants*, UN Doc. A/72/335 (Aug. 15, 2017).

deploying repurposed rescue rafts to propel migrants back into open waters,<sup>20</sup> and rounding up and deporting others who were already living and working in Greece.<sup>21</sup> In the Mediterranean, the EU-funded Libyan coast guard and its militias act as not just shield but sword—shooting dead Europe-bound migrants and disappearing hundreds more.<sup>22</sup> The pandemic has redoubled EU members' determination to keep rescued migrants offshore, in one case leaving a group stranded on board a commercial tanker for more than a month and counting.<sup>23</sup> In all of this, the EU and its frontier states insist they are acting in line with international law. The notion of non-refoulement is systematically eclipsed by the sovereign right to exclude.

These exclusion policies and the COVID-19 lockdowns have affected the nature and scale of irregular migration, but not its necessity. Migrants continue to move<sup>24</sup>—though in smaller self-organized groups more than large-scale smuggling operations, and from different departure points (Tunisia rather than Libya, for example). Europe's ethnonationalist and right-wing parties have continued to use the pandemic to frame migration from the South, in racializing terms, as an inherent public health contamination. Negligible numbers of cases are seized on to stir anti-migrant sentiment. Commentary by Matteo Salvini, leader of Italy's Lega party, is illustrative: "An invasion of illegal migrants, a boom of infections, Sicily is collapsing." This characterization is thoroughly negated by data from the Italian health authorities showing coronavirus cases among new migrants to be "minimal" compared to infection numbers across the general population and residents who had travelled.<sup>25</sup> The impact of Salvini-esque rhetoric and the electoral threat of far-right politics across Europe over recent years, however, has been significant in pushing EU liberalism and its institutions further to the right on migration. This is accentuated in the context of public health concerns.

The pandemic has certainly shaped the timing and content of the proposals for the EU's new migration pact, published in September 2020 and due to be finalized and adopted by mid-2021.<sup>26</sup> While dressed up in the progressive terms of "shared responsibility" and "solidarity," and the management-speak of "partnership" and "resilience," the politics of the pact are clearly oriented towards merely a more managed and procedural Fortress Europe. The EU Commissioner for Promoting the European Way of Life describes the pact as a three-storey house. The first floor, he says, is "a very strong external dimension with agreements with countries of origin and transit to keep people . . . in their countries."<sup>27</sup> The architectural foundation thus remains externalization and exclusion—the intention is to bring Turkey back into the fold and to implement similar deals elsewhere. The second floor of the house is a further beefing up of an already over-sized Frontex: "a robust system of managing our external border with a new European Border and Coast Guard with many more staff, boats, instruments and tools."<sup>28</sup> The top floor is characterized by the Commissioner as a "system of permanent, effective solidarity" to relieve the "burden" from frontier states and better distribute responsibility throughout the

<sup>20</sup> Niamh Keady-Tabbal & Itamar Mann, *Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations*, JUST SECURITY (May 22, 2020).

<sup>21</sup> *Greece Secretly Expels Over 1,000 Refugees, Abandoning Them at Sea*, MIDDLE EAST MONITOR (Aug. 17, 2020).

<sup>22</sup> Mat Nashed, *What Happens to Migrants Forcibly Returned to Libya?*, NEW HUMANITARIAN (Aug. 5, 2020).

<sup>23</sup> Daniel Trilling, *A Commercial Ship Saved 27 Migrants, but Now the EU Has Abandoned it at Sea*, GUARDIAN (Sept. 4, 2020).

<sup>24</sup> According to International Organization for Migration [figures](#) as of Sept. 23, 2020, 47,156 migrants arrived across Mediterranean routes to Spain, Italy, Cyprus, and Greece from January to September 2020.

<sup>25</sup> Gaia Pianigiani & Emma Bubola, *As Coronavirus Reappears in Italy, Migrants Become a Target for Politicians*, N.Y. TIMES (Aug. 28, 2020).

<sup>26</sup> Eur. Comm'n, *New Pact on Migration and Asylum* (Sept. 2020).

<sup>27</sup> Quoted in Nikolaj Nielsen, *New EU Migration Pact "To Keep People in Their Country"*, EU OBSERVER (Sept. 14, 2020).

<sup>28</sup> *Id.*

EU for receiving, processing, and deporting asylum-seekers.<sup>29</sup> This view reinforces that particularly distinctive EU brand of “solidarity”: a solidarity between member states, not with migrants themselves. It is in fact the “de-solidarity” of “us and them.”<sup>30</sup>

Taken as a whole, the most likely material consequences of the pact will be faster processing of arrivals in hot-spots, more deportations of those excluded from the narrow definition of refugee, and even more extensive push-backs at sea. The justifications for all of that will be bolstered by reference to public health exigencies.

On the other hand, the pandemic has also reminded us of the deceit of the idea that “there is no alternative,” and has given us glimpses of different possible paths. At the outset, Portugal granted temporary regularized status to all migrants with open visa and asylum applications, effectively treating them (though not all undocumented people) as citizens for purposes of access to health care and social services. While Italy did follow with partial regularization for certain undocumented workers, this has clearly been the exception rather than the rule and does not address the prior question of the border itself. But such regularization does demonstrate that there are alternatives to the status quo, as do the calls from migrant communities themselves. For the thousands left reeling after the fire that destroyed Europe’s largest refugee camp in Mória in September, their call was not for the bare life and liminality of another replacement “hotspot” camp, but something larger: “*aḡadi!*” [freedom], came the chants; “we don’t want food, we want freedom,” read the banners.<sup>31</sup>

#### *Beyond the Pandemic: Migration as Redistribution?*

If the pandemic is a portal, “a gateway between one world and the next,” as Arundhati Roy put it,<sup>32</sup> what the other side of the portal will look like remains an open question. The dangers are clear: further stratification of global society and entrenchment of global apartheid; disaster capitalism profiteering in post-crisis partitions of green, orange, and red zones. This will feed the increasing capacity and desire of the flying classes to socially distance and self-segregate from the classes who move on foot and by boat—particularly the proletariat of the Global South, compressed in more confined spaces and cast as biohazardous.<sup>33</sup> As David Graeber put it in one of his final interventions: “In a way, you can see what’s been happening as a trial run for the fascist solution to the kind of climate emergency that we have to expect in five or ten years if we don’t stop all this idiotic carbon production: close the borders, blame foreigners, triage the population into worthy and unworthy, normalize authoritarianism.”<sup>34</sup>

At the same time, Graeber was conscious of the potential of the pandemic to instead provoke mass mobilization in a radically progressive direction: “We have suddenly entered the zone where historical agency has re-appeared. Humanity has just received what may be . . . history’s greatest wake up call.”<sup>35</sup> The inconsistencies and fluctuations of EU border policies over the past few months demonstrate that nothing is set in stone, that there are different

<sup>29</sup> *Id.* Ultimately, however, it does not even achieve those goals and is as much about appeasing the most staunchly anti-immigration regimes within the EU. Primary responsibilities will in many cases remain with the state of first arrival and the shared responsibilities are of an optional and “à la carte” variety which member states can buy themselves out of, effectively by paying for deportations.

<sup>30</sup> Obiora Chinedu Okafor, *Cascading Toward “De-Solidarity”?: The Unfolding of Global Refugee Protection*, THIRD WORLD APPROACHES TO INT’L L. REV. (Aug. 30, 2019).

<sup>31</sup> *Moria Migrants and Greek Islanders Protest Over New Camp*, BBC (Sept. 11, 2020).

<sup>32</sup> Arundhati Roy, *The Pandemic is a Portal*, FIN. TIMES (Apr. 3, 2020).

<sup>33</sup> I have adapted these formulations from comments made by Arundhati Roy in an interview with Nick Estes. See *Fascism, Freedom, Fiction w/ Arundhati Roy*, RED NATION PODCAST (Sept. 3, 2020).

<sup>34</sup> Lenart J. Kučić, *David Graeber on Harmful Jobs, Odious Debt, and Fascists Who Believe in Global Warming*, DISENZ (May 16, 2020).

<sup>35</sup> *Id.*

horizons when it comes to border regimes. Though the standard assumption may be that the pandemic will precipitate a sovereign tightening of borders, it also seems inevitable that states implementing restrictive regimes in contexts of global health and environmental emergencies will be even less capable of controlling their borders to the benefit of transnational stability and planetary sustainability.

While we clearly should not return to a pre-pandemic status quo of people routinely flying across borders near and far simply because they can, we can nonetheless radically reimagine the possibilities of migration and mobility for those who move because they must. There is no predetermined reason that nation-state borders need to be the dominant marker of mobility, nor that migration policy should be based on racial exclusion rather than redistributive inclusion. From the point of view of transnational and internationalist class struggle, the pandemic reinforces the necessities of open borders, inclusive labor rights, and abolition of bordered capitalism.<sup>36</sup> It also shows that movement regimes might be better determined by evolving health priorities rather than entrenched wealth partitions, by needs of communities and place rather than exclusions of class and race. Migration and mobility can be conceptualized and regulated on the basis of environmental and public health agendas, rather than stratified bases of free movement as birthright for some and race replacement myths as barrier for others.

The reality that international law has facilitated is that capital and goods can move freely, but most people—on the basis of nationality (or, more often than not, race laundered through the prism of nationality)—cannot. If international legal liberalism means that free trade and free markets are sacrosanct, the economic exploitation of the Global South will continue to deepen global inequality and accelerate climate catastrophe. In that context, many more people will be forced to move, mostly from the Global South towards regions that will remain habitable for longer, such as Europe. European capitalist economies built and maintained their wealth through exploitation and extraction of Third World peoples and resources. They are also among the primary polluters and drivers of climate change over the past century. The call for climate justice is a call for a just distribution of responsibility, wealth, and resources. The call for reparations for racial injustice in its various manifestations will be increasingly difficult for international law to continue to ignore.<sup>37</sup> Migration from Global South to North is one (incomplete—and unsatisfactory in the bigger scheme of global economic inequality—but nonetheless important) way that people of the South can assert themselves and claim reparation for economic injustices of past and present, and environmental injustices of present and future.

It is to correct such colonial injustices and neocolonial trajectories that conceptualizations of migration as decolonization and reparations have been advanced,<sup>38</sup> and arguments made for international law to recognize this.<sup>39</sup> Those who have migrated from the Global South to Europe typically think of their own predicament and agency in such terms. West African migrants stuck in temporary accommodation in Italy “talk about what an injustice it was for Europe to treat them—people from the former colonies—in this way. ‘We remember the past, we remember slavery; they started the world wars and we fought for them.’”<sup>40</sup> A young man from Mali who survived the desert and sea route laments “France’s role as the former colonial power,” saying the European

<sup>36</sup> Justin Akers Chacón, *The Only Way Out of the Crisis is to Fight for Open Borders*, SPECTRE (Apr. 28, 2020).

<sup>37</sup> For an overview of the persuasive arguments for state obligations in relation to reparations for the historic wrongs of slavery and colonialism and the persisting global structures of racial inequality, subordination, and discrimination, see [Report of the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Tendayi Achiume](#), UN Doc. A/74/321 (Aug. 21, 2019).

<sup>38</sup> HARSHA WALLA, [UNDOING BORDER IMPERIALISM](#) (2013); E. Tendayi Achiume, *The Postcolonial Case for Rethinking Borders*, 66 DISSENT 27 (2019); Joseph Nevins, *Migration as Reparations*, in *OPEN BORDERS: IN DEFENSE OF FREE MOVEMENT* (Reece Jones ed., 2019); Reece Jones, *Europe’s Migration Crisis, or Open Borders as Reparations*, VERSO (Oct. 26, 2016).

<sup>39</sup> [Achiume](#), *supra* note 3.

<sup>40</sup> See DANIEL TRILLING, [LIGHTS IN THE DISTANCE: EXILE AND REFUGE AT THE BORDERS OF EUROPE](#) 132 (2018).

countries “sowed chaos in African countries and if it wasn’t for that we wouldn’t have had to flee for our lives.”<sup>41</sup> And yet, he says: “I want to contribute to the evolution of Europe, do my bit.”<sup>42</sup> By his very presence, he embodies the most basic aspect of the idea of migration as decolonization; by his contribution and his commitment to changing the polity, he embodies the possibilities of migration as redistribution.

This is the historic task now facing Europe and the richer states. Political education of revolutionary scale is required to meet the challenge laid down by James Baldwin almost sixty years ago, which we can read today as highlighting that our very survival as a species is dependent upon upending preexisting assumptions of class and citizenship birthrights: “in order to survive as a human, moving, moral weight in the world . . . all the Western nations will be forced to reexamine themselves and release themselves from many things that are now taken to be sacred, and to discard nearly all the assumptions that have been used to justify their lives and their anguish and their crimes for so long.”<sup>43</sup> As Adom Getachew makes clear, “reparations should not focus only on the former colonies”—colonialism lives on inside and through Europe’s borders, so redress means “treating Black Europeans, and all migrants from the colonized world, as equal participants in European society.”<sup>44</sup>

The idea of migration as reparations in this sense is not a substitute for the deeper structural transformation of the economic order needed to reverse the environmental destruction that capitalism has wrought and to ensure that fewer people ultimately have to migrate to survive or thrive. But in connection to those broader political economy and redistribution questions, this idea can underpin an approach to mobility and migration law based on the imperative of redressing gross global structural inequalities. And it can be a crucial starting point, at least, for the transformation of international law and the necessary move—for human and ecological survival—from liberalism with borders towards a more viable world of socialism without borders.

<sup>41</sup> *Id.* at 100, 157.

<sup>42</sup> *Id.* at 156.

<sup>43</sup> James Baldwin, *The Fire Next Time* (1963), in JAMES BALDWIN, *COLLECTED ESSAYS* 312 (Toni Morrison ed., 1998).

<sup>44</sup> Adom Getachew, *Colonialism Made the Modern World. Let’s Remake It*, N.Y. TIMES (July 27, 2020).