

SYMPOSIUM ON COVID-19, GLOBAL MOBILITY AND INTERNATIONAL LAW

HOMEWARD BOUND? GLOBAL MOBILITY AND THE ROLE OF THE STATE OF NATIONALITY DURING THE PANDEMIC

Frédéric Mégret*

The international law of mobility has by and large been focused on the question of immigration. Its emphasis has therefore been on what I will call, for convenience's sake, the host state. It is there that some of the most intense dilemmas around the question of mobility have arisen in a context of populism, xenophobia, and racism. The state of nationality is not invisible in that context, but this has not typically been the primary variable in trying to understand and assess the normative challenges of global mobility. The COVID-19 pandemic, however, has refocused attention on distinct patterns of mobility, particularly return mobility, of nationals to their country of origin as well as limitations on leaving that country in the first place. The state of nationality has increasingly been asked to mediate demands for security and public health that are extra-territorial and that implicate its nationals in sometimes far-flung locations. I argue that the pandemic is a further opportunity to shift attention onto the state of nationality as a locus of key decisions concerning transnational mobility and thus to rebalance our sense of what goes into the global “mobility equation.”

To be clear, the host country is not absent from that picture. Immigration on its territory continues to raise stark dilemmas of protection, discrimination, and health. More specifically, it may have a clear role in pushing migrants out and therefore triggering return mobility and, in turn, emphasizing the responsibilities for the state of nationality. For example, the United Arab Emirates (UAE) has “stressed the urgency of partner countries assuming their responsibilities towards their nationals working in the UAE who wish to return to their home countries.”¹ There is no doubt, however, that the state of nationality has been thrust into the limelight in the pandemic context, in ways that may lead to a renewed appreciation of its role in its own right.

In the process, the state of nationality has sometimes proved eager to assume a larger role while occasionally exposing its ambivalence in doing so. On the one hand, calls for help from nationals “stranded abroad” reactivate a neo-Hobbesian sensitivity in contemporary statehood that is increasingly called upon to be exercised beyond the state's borders. This sensitivity emerges from core liberal obligations of protection towards one's nationals, as well as more romantic, patriotic feelings often raised to fever pitch by the treatment of those nationals abroad. On the other hand, efforts to attend to the needs of one's nationals abroad raise questions of jurisdiction, create financial and logistical challenges, and intensify an underlying competition for attention between residents (both national and non-national) and nationals abroad. In what follows, I draw on the *double entendre* around the word “bound”: nationals are “bound” as in headed towards home (return), but also “bound” as in “bound to” their home (being denied the ability to leave).

* Professor, McGill University Faculty of Law, Canada.

¹ [MoHRE Reviewing Labour Relations with Countries not Responding to Evacuation Requests](#), EMIRATES NEWS AGENCY (Apr. 4, 2020).

Governing Return

Return mobility is of course a fairly well-known phenomenon in the study of global migration patterns, but it has tended to be neglected by lawyers because it seemed to be one of the few areas of the international law of human mobility that was not particularly problematic. Yet the pandemic has revealed or intensified dilemmas long dormant about the legal politics of returning to the country of nationality. Challenges linked to return arise along a spectrum. At one end, return may occasionally be forced. Being ordered to return is fairly rare in the context of global mobility, outside of war situations. Some recent but not particularly representative cases include North Koreans abroad being ordered to return to attend Kim Jong Il's funeral and Nigeria asking its nationals to return after violence against West African migrants erupted in South Africa. General calls for citizens to return following COVID-19 have been rare, but there have been specific calls to civil servants and the military as well as students, in addition to calls instigated by private entities, often because of insurance fears. Even when not technically forced, some nationals have been strongly encouraged to return as a result of fears of closing borders. Abrupt departures, especially for migrant workers, can have significant personal consequences.

At the other end of the spectrum, return has occasionally been denied or at least significantly hampered and deferred. The right to return to one's country of citizenship is perhaps the most uncontroversial of all mobility rights and as such is relatively little discussed in international law. In fact, it is perhaps largely as a result of its strongly anchoring character—and the implications that most people can *at least* go to *their* country—that restrictive immigration practices have occasionally been justified. Nonetheless, at least one country, Morocco, closed its borders to all, including its nationals, from March to July 2020, much to the frustration of Moroccans abroad. It has also been reported that the U.S. administration has considered a ban on reentry of U.S. citizens if an official “reasonably believes that the individual either may have been exposed to or is infected with the communicable disease.”² In an earlier case, the federal government had basically conceded that a ban affecting both non-citizens and citizens would be legal.³ Although not quite going so far, Romania was very clear about discouraging its diaspora from returning home.⁴ The pandemic has thus occasionally created conditions wherein a schism has appeared between resident and non-resident nationals, reinforcing a certain sense of the primacy of territory over nationality.

Such decisions, privileging the security of the resident population, may well be sound from an epidemiological perspective: evidently, nationals abroad returning to their country of nationality are just as likely to be infected as foreigners and have proved to be key vectors of contagion. In the case of foreigners with no pre-existing title to stay in the country, denying them entry may be relatively easy and discretionary (even in regimes of regional mobility, exceptions exist for reasons of public health). In the case of returning nationals, however, the danger of transmission has to be weighed against a very clear stance by human rights in favor of the ability of nationals to re-enter their own country.⁵ This is a freedom that cannot be denied lightly. It has been pointed out⁶ in the Moroccan context that Article 24 of the constitution anticipates the right “to circulate and to establish oneself on national territory, to exit and return in accordance with the law”⁷ and that Moroccans denied entry might at least be in a

² Michael D. Shear & Caitlin Dickerson, [Trump Considers Banning Re-entry by Citizens Who May Have Coronavirus](#), N.Y. TIMES (Aug. 10, 2020).

³ [J.B.C. v. Wolf](#), No. 1:20-cv-01509-CJN (D.D.C. July 23, 2020).

⁴ Paula Erizanu, [Stranded or Shunned: Europe's Migrant Workers Caught in No-Man's Land](#), GUARDIAN (Apr. 16, 2020).

⁵ [Universal Declaration of Human Rights](#), G.A. Res. 217 A art. 13(2). Although see for some occasional complexity, Rosalyn Higgins, [The Right in International Law of an Individual to Enter, Stay in and Leave a Country](#), 49 INT'L AFF. 341-57 (1973).

⁶ [Shear & Dickerson](#), *supra* note 2.

⁷ [Moroccan Constitution](#), July 29, 2011, art. 2.

position to seek reparations.⁸ To the extent that restrictions on return are understood as affecting a human right to return, they would presumably have to be understood as necessary, reasonable, and proportional limitations to such a right.

In contrast to these efforts, states may also “facilitate” or “assist” return to various degrees. This has tended to be the international norm in practice, although it is unlikely that an internationally sanctioned legal obligation to facilitate such a return in a case of pandemic exists. Return, moreover, has typically been largely outsourced to the private sector, underscoring a somewhat neo-liberal vision of global mobility. Travel is “voluntary” and “at one’s own risk.” Costs of having to return in an emergency are typically to be borne by travelers or at best managed through private, notably insurance, mechanisms (although it is true that even systems of private repatriation are heavily reliant on a public framework of travel advisories and consular assistance). It is in the relatively rare case when those mechanisms fail because of standard exclusion clauses in contracts, for example, that states sometimes step in by organizing targeted evacuation operations. They do so more, it seems, as a result of a certain *noblesse oblige* than as a part of any distinct international law obligation, although domestic law sometimes stipulates obligations of the state towards its emigrants.⁹ Even in such cases, the state may be tempted to recoup the costs of repatriation from its beneficiaries or charge them directly for their subsequent quarantine, thus reinforcing a sense of repatriation as a fundamentally discretionary public service.

The obvious limitation to imagining an international legal duty to rescue is the fact that the state of nationality’s extraterritorial means of intervention are limited. Nonetheless, international human rights law does provide some leads if one were to more dynamically think about an obligation of protection beyond the normal emphasis on territory. The state continues to exercise at least a residual jurisdiction over its nationals abroad, one that is clearly not incompatible with the jurisdiction of the host state. This is particularly the case when it comes to certain administrative services that are sought from consulates and which states are not at liberty to deny arbitrarily.¹⁰ When it comes to the sort of positive consular and sovereign assistance entailed by a complex repatriation process, jurisdiction vis-à-vis one’s nationals would need to be premised less on the default “effective control” of territory¹¹ or persons¹² anticipated by the European Court of Human Rights than on a reasonable ability to provide certain services to nationals seeking them.¹³ Certainly, the state of nationality seems in a more relevant position when it comes to repatriation than the host state.

The degree to which such services ought to be provided will involve a variety of considerations. As to the rights involved, clearly there is a difference between a privileged tourist and a vulnerable migrant worker. As to the risk that these rights will be violated, there is a difference between countries more or less affected by COVID-19 and with more or less vulnerable health systems. As to the ability of the state of nationality to offer repatriation, much will depend on the bilateral relations with the host state and other logistical and economic factors. Still, it is not inconceivable to think of situations where fundamental rights would be at stake (e.g., the right to life), where no territorial alternative provides a modicum of security compared to repatriation, and where the state of nationality has the ability at no undue expense to proceed with repatriation. To not facilitate repatriation in such a case might well be considered a rights violation.

⁸ A.E.H., *Marocains Bloqués à l’Étranger : l’État Peut-il Leur Interdire le Retour au Pays?*, MEDIAS24 (Mar. 31, 2020).

⁹ See Law 3.444/2017, art. 79 (Morocco).

¹⁰ See, e.g., *Sophie Vidal Martins v. Uruguay*, Communication No. R.13/57, UN Doc. Supp. No. 40 (A/37/40), at 157 (1982) (arbitrary denial of a passport).

¹¹ *Loizidou v. Turkey*, App. No. 15318/89 (Eur. Ct. Human Rts., (Mar. 23, 1995).

¹² *Öcalan v. Turkey*, App. No. 46221/99 (Eur. Ct. Human Rts., May 12, 2005).

¹³ Frédéric Mégret, *From a Human Right to Invoke Consular Assistance in the Host State to a Human Right to Claim Diplomatic Protection from One’s State of Nationality?*, in *NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC* (Andreas von Arnould et al eds., 2019).

Governing Departure

The ability to leave one's country is considered a fundamental right, as illustrated by the now slightly dated controversy over the right of Soviet Jews to leave the USSR.¹⁴ From a pandemic point of view, nationals leaving may be marginally less worrying than those returning, except, of course, that departure will frequently entail return. Many states have issued solemn travel advisories against traveling abroad except for essential reasons. Although advisory in nature, in practice such recommendations are amplified by the administrative state and corporate actors (airlines, the health and insurance industries, etc.). In effect, the ability to travel is powerfully mediated by the ability to secure continued coverage and security through a mix of the public and the private. For example, in March 2020, two of Canada's leading travel insurance providers, Manulife and Allianz Global, announced that they would no longer cover emergency medical expenses for those visiting countries for which the Canadian government has issued a negative COVID-19 travel advisory prior to their departure date. The combination of negative travel advisories and this private sector amplification makes travel particularly difficult in practice, if not in law.

Beyond these broad hindrances on the ability to leave one's country, in some cases the limitation on departures has been much more targeted, particularly where the government, for some reason, has more control over such departures. One notable case concerns ongoing labor migration programs, which have been tied to specific security and health concerns related to COVID-19. For example, in June of 2020 Mexico announced that it would suspend the sending of temporary farm workers to Canada (as part of the Temporary Agricultural Workers Program (PTAT)), after three Mexican nationals died (several hundred are estimated to have been infected) as a result of exposure to COVID-19 on Canadian farms. As many as 5000 Mexican farm workers who had been expected to arrive in Canada therefore remained in Mexico. The incident shed light on the vulnerability of such workers, notably in terms of poor living and working conditions, wage theft, racism, and inadequate precautions to protect workers from COVID-19. But the incident also seemed to rekindle an older strand in international law involving the protection of one's nationals abroad, except in this case the nationals emanated from the Global South.¹⁵

This protective policy has to be weighed against economic losses to Mexico as a whole and lost income to Mexican immigrant workers and the families they support. One commentator noted that “[f]arm workers from Mexico would rather risk contracting COVID-19 than starving to death.”¹⁶ The Mexican government's response does seem to have had an impact. Canada's agriculture is particularly reliant on temporary workers. Following Mexico's announcement that it would be discontinuing sending its workers, Canadian Federal Employment Minister Carla Qualtrough apologized for the deaths of the migrant workers and acknowledged the program that brought them to Canada was “in need of an overhaul.”¹⁷ Prime Minister Justin Trudeau expressed his condolences. Indeed, the Mexican government has worked with Canadian officials to design safety protocols and programs, including a provision that workers be paid while in isolation upon arriving in Canada.

Bars on labor migration have on other occasions targeted specific professionals who, it was felt, were urgently needed at home. The Philippine Overseas Employment Administration (POEA), for example, announced a labor department order banning medical staff from working in other countries. The national interest was invoked, in particular the need to “prioritiz(e) human resource allocation for the national healthcare system at the time of the

¹⁴ Mitchell Knisbacher, *Aliyah of Soviet Jews: Protection of the Right of Emigration Under International Law*, 14 HARV. INT'L L.J. 89 (1973).

¹⁵ Frédéric Mégret, *The Changing Face of Sovereign Protection in International Law*, 21 MELBOURNE J. INT'L L. (forthcoming 2020).

¹⁶ Tahmina Aziz, *Migrant Workers Prefer to Risk Getting COVID-19 Than Die From Starvation, Says Journalist in Mexico*, CBC NEWS (June 24, 2020).

¹⁷ Carl Meyer, *Qualtrough Apologizes for Migrant Worker Deaths, Say Program Needs 'Overhaul'*, NAT'L OBSERVER (June 17, 2020).

national state of emergency.”¹⁸ The government argued that “[t]hese types of private rights take a backseat when the issue is one of national survival. Private interests have to give way to State’s right to control the pandemic and to save the lives of its citizens.”¹⁹

Conclusion

The focus on *immigration*, which evidently remains of pressing importance, has historically had the effect of foregrounding a specific set of issues focused on the host state. In particular, it has highlighted the significance of the power to exclude and deny aliens based on both territorial protectionism and nationalist nativism. The pandemic—in what may appear in retrospect as a brief interlude or the sign of things to come—foregrounds a different kind of sovereign power, which one might describe as the power of the state to summon and hold back its own nationals. This prominence of the sending state in the governance of migration patterns is hardly new. States of origin have been active in managing emigration, and sometimes coopted into the policing of immigration by host states. But the pandemic has refocused attention on the nature of the ties of nationality in a context of straining of territorial solidarities.

In fact, it can be said to have already reactivated a number of simmering tensions. First, a tension between resident and non-resident nationals and between national and non-national residents. Should a country favor a broad understanding of its protective obligations towards nationals or should it focus on its territorial obligations? How might the choice impact those who are merely residents and who seek to leave or return? Second, a tension between public and private means of adapting to major crises, and the extent to which the latter tend to significantly extend the decisions of the former. The question is at what point specifically extraterritorial public obligations to rescue crystallize, as opposed to a reliance by the state on individual resilience and actuarial prudence. Third, a tension between host and origin states, and in particular the extent to which the origin states continue to have obligations towards their nationals if the host state is not—or whether or not it is—“able and willing” to discharge its own. As states address these tensions, one can expect that the very notion of what are “host” and “home” states and the sort of normative status one ascribes to them will come to evolve.

¹⁸ *Id.*

¹⁹ Senate of the Philippines, “Bayanihan to Heala as One Act,” Rep. Act. 11649 (Mar. 24, 2020) (Phil).