

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

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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

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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.