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**Mobility without membership: Do we need  
special passports for vulnerable groups?**

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European University Institute

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## **Abstract**

A very small minority of wealthy people can afford to buy 'better' passports, and enhance their mobility and lifetime opportunities. At the same time, millions of others would desperately need the right travel documents to move to places where they can find protection or work. How can we respond to urgent needs and specific disadvantages faced by those for whom mobility is not a luxury but a necessity?

This working paper compiles contributions to a GLOBALCIT Forum debate launched by forum co-editors Jelena Džankić and Rainer Bauböck with a proposal to institute an exceptional mobility regime for vulnerable groups. The Forum debate brought together responses from fifteen authors considering the viability of the proposal in relation to the understanding of what constitutes a vulnerability in different regions in the world. It concludes with reflections from both editors on the critiques of the original proposal.

## **Keywords**

citizenship, mobility, passport, vulnerable groups.





## Kick-off contribution

### Mobility without membership: Do we need special passports for vulnerable groups?

Jelena Džankić\* and Rainer Bauböck\*\*

Passports issued by wealthy countries have become a pricy commodity that is in much demand among Russian oligarchs seeking safe places where to stow away some of their wealth.<sup>1</sup> For middle-class descendants of European ancestry in South America or Israel EU passports are both an insurance policy for an uncertain future and a “positional social good” that raises their prestige vis-à-vis less fortunate members of their societies.<sup>2</sup> Neither of these groups is primarily interested in using their second, third or fourth passports for international migration. Whatever the individual motives, instrumental reasons for acquiring additional citizenships have become stronger with the onset of globalization and have challenged the meaning of the status as an expression of “genuine ties” of individuals to particular countries.<sup>3</sup>

Yet on the other side there are millions who would desperately need the right passports to move to places where they can find protection or work. Some of them want to resettle elsewhere, but greater numbers need to move across borders to build better lives for themselves or their families back in their home countries. Temporary migrant workers and border commuting workers never gain access to the citizenship of their host countries that would allow them to move back and forth as a matter of individual right. Most refugees remain stranded in the regional neighbourhoods of their countries of origin in the global South and stuck in camps where they do not enjoy mobility rights even within their host states.<sup>4</sup> Those who make it to wealthy countries in the global North as asylum seekers or through resettlement programmes get access to a new citizenship only after many years of residence. Before that, they lack opportunities to choose other destinations where their cultural and economic skills might find better uses. Indigenous peoples in the Americas find their traditional patterns of mobility constrained if their homelands are divided by international borders that have become militarised as a result of armed conflicts or efforts to curb irregular migration.

These are just a few illustrations of a problem that results from one of the core functions of citizenship in the international state system – to allocate international mobility rights. Free

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<sup>1</sup> Džankić, J. (2019), *The Global Market for Investor Citizenship*, Palgrave Macmillan.

<sup>2</sup> Harpaz, Y. (2019), *Citizenship 2.0: Dual Nationality as a Global Asset*, Princeton University Press.

<sup>3</sup> Bauböck, R. (2019), ‘Genuine Links and Useful Passports: Evaluating Strategic Uses of Citizenship’, *Journal of Ethnic and Migration Studies* 45(6): 1015-1026; Joppke, C. (2019), ‘The Instrumental Turn of Citizenship’, *Journal of Ethnic and Migration Studies* 45(6): 858-878; Shachar, A. (2018), ‘The Marketization of Citizenship in an Age of Restrictionism’, *Ethics and International Affairs* 32: 3-13; Spiro, P. (2019) ‘The equality paradox of dual citizenship’, *Journal of Ethnic and Migration Studies* 45(6): 879-896.

<sup>4</sup> Achiume, T. (2018), ‘The Fatal Flaw in International Law for Migration’, *Columbia Journal of Transnational Law* 56: 257-262.

movement inside a state's territory is a universal human right, but free movement across international borders is a citizenship-based right. States have to readmit their own nationals almost unconditionally.<sup>5</sup> Those who possess several citizenships can therefore move freely between the states whose passports they carry. The citizens of a regional union of states, such as the EU, MERCOSUR, ECOWAS or the East African Union, enjoy free movement rights because they are nationals of the member states of these unions. Ordinary "third country migrants" and refugees can only gain access to such mobility privileges through acquiring the citizenship of their host country, which is often impossible or paradoxically requires them first to abandon mobility and become long-term residents. Unlike those who buy their way into citizenship of a country where they do not take up residence or those who get it for free because they have the right ancestry, immigrants are expected to first develop genuine links before becoming citizens and voters. And this is not an unreasonable request since citizenship gives them also the vote in national elections through which they can shape the future of the country. Yet this becomes a major hurdle for migrants who need mobility rights rather than a new membership.

The easy response to this conundrum is to advocate for open borders worldwide. This is an attractive utopia, but the question is which path could lead to this "nowhereland". Political philosophers have suggested to extend current catalogues of human rights by complementing the right of free internal movement and the universal right to leave any country with an equivalent right to enter other countries.<sup>6</sup> But this route remains closed off since the power to control immigration is a core aspect of sovereignty in the international state system and can also be justified on grounds of "compatriot partiality", i.e., special duties of states towards the citizens and residents in their territories.<sup>7</sup> As long as they claim this power, states can only be expected to grant free movement rights on a basis of reciprocity; that is, to the citizens of states with which they share membership in a regional union or the citizens of states from which they are not separated by deep disparities in living standards and welfare rights.

A second path might thus be to expand and multiply regional unions of states and to narrow disparities of social welfare between the global South and North through resource distribution and effective development policies. While we are in favour of travelling this path, it is a long and winding road that leaves those who urgently need mobility rights here and now by the wayside.

A third path could be to radically expand extraterritorial access to desired citizenships, making them accessible to those who need but cannot afford them. As a side-effect, this would 'destroy the business of the golden passport sellers' through mass production of the commodity on the scarcity of which their profits depend. If access to the citizenship of wealthy countries were easy for everyone who needs mobility rights, then nobody would need to cough up large sums of money for it or be willing to do so. Yet, widely opening the door to citizenship for those without genuine links is a hard sell in democracies, since it devalues citizenship as a status of equal membership in a political community whose members share an interest in the common good and future of a particular polity. If extraterritorial naturalisation becomes the norm rather than the exception, this could be fateful for the democratic substance of

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<sup>5</sup> 'The Universal Declaration of Human Rights', United Nations, 1948, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

<sup>6</sup> Carens, J. (1987), 'Aliens and Citizens: The Case for Open Borders', *The Review of Politics*, 49(2): 251-273; Cassee, A. (2016), *Globale Bewegungsfreiheit: Ein philosophisches Plädoyer für offene Grenzen*, Suhrkamp; Cole, P. (2006), 'Towards a Symmetrical World: Migration and International Law', *Éthique et économique* 4(1): 1-7; Oberman, K. (2011), 'Immigration, Global Poverty and the Right to Stay', *Political Studies* 59(2): 253-268.

<sup>7</sup> Miller, D. (2005), 'Reasonable Partiality Towards Compatriots', *Ethical Theory and Moral Practice* 8: 63-81.

citizenship. Moreover, its mobility value might suffer as well if states come to regard multiple citizenship as a backdoor for uncontrolled immigration.

In this forum we would like to propose and discuss a fourth option, which is not meant as a pathway towards global freedom of movement, but rather as a response to urgent needs and specific disadvantages faced by those for whom mobility is not a luxury but a necessity. Our proposal is to create a new type of passports that provide limited and tailor-made mobility rights to those who need them most and who have no chance to acquire them via the citizenship route.

The need for this fourth option has come into the limelight particularly during the COVID-19 pandemic, when the privileged mobilities continued, and most of the necessary ones were put to a halt. While the world's wealthiest could find a "safe haven" in one of the Caribbean Islands of which they hold citizenship, or European states like Cyprus or Malta that have become notorious for their investor citizenship programmes, low-skilled temporary labour migrants as well as those fleeing persecution have become destitute, been stranded, left in a limbo, or – in the worst-case scenario – have been deported. Tens of thousands of Indians working in the construction sector or allied industries in the Arab Gulf states faced unemployment and thus the termination of their temporary migrant status due to the pandemic. The United Arab Emirates and Kuwait called for an immediate repatriation of such individuals, threatening that they would impose a quota system in the future.<sup>8</sup> Asylum seekers and refugees unable to obtain documents from their countries of origin, or those stranded in countries that halted the processing of claims during the pandemic face deportation or detention in camps.<sup>9</sup>

Even so, while COVID-19 halted most of the "non-essential" global mobility, exceptional emergency regimes enabled some necessity-based crossing of international borders.<sup>10</sup> These exceptions included freight transporters, pilots, medical personnel, and in some cases cross-border workers and seasonal employees in the agriculture sector. In all these cases, the "necessity" for mobility was not that for individuals, but rather based on the "need of the state". It is still significant that these exceptional emergency regimes transcended citizenship-based mobility rights, indicating that states can indeed enhance and protect mobility rights of certain groups, regardless of which citizenship they hold. Can we generalise from this experience? Would it be possible to create special mobility rights for vulnerable groups in addition to those attached to passports? If so, who would these groups be, what rights should they enjoy and who would guarantee them such rights?

Instituting exceptional mobility regimes for vulnerable groups would start with recognising their individual needs to cross international borders to receive protection or perform a designated service. One such group would be environmental migrants or refugees. The International Organisation for Migration (IOM) has defined this group as 'persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so,

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<sup>8</sup> Nasrallah, T. 'Covid-19: UAE considers imposing restrictions on these countries', Gulf News, 12 April 2020, <https://gulfnews.com/uae/government/covid-19-uae-considers-imposing-restrictions-on-these-countries-1.1586688517978>.

<sup>9</sup> Pelz, D. 'Germany presses on with deportations', DW, 26 March 2021, <https://www.dw.com/en/germany-presses-on-with-deportations-despite-covid-pandemic/a-57011088>.

<sup>10</sup> Dzankic, J. & L. Piccoli. 'Citizenship, Migration and Mobility in a Pandemic', Citizenship, Migration and Mobility in a Pandemic, <https://www.cmm-pandemic.com/>.

either temporarily or permanently, and who move either within their country or abroad'.<sup>11</sup> The legality of international border crossing by people fleeing environmental disasters remains an issue under international law, and they are frequently referred to as "climate migrants" rather than "climate refugees". They clearly do not fit the definition of the 1951 Refugee Convention, according to which a refugee is a person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.<sup>12</sup> Even the broader definition of the non-binding 1984 Cartagena Declaration by Latin American states does not obviously cover them.<sup>13</sup> It refers to 'persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order'. Yet only in 2019, nearly 1,900 extreme weather events such as hurricanes, sea-level rise, draught and water scarcity have resulted in 24.9 million displacements across 140 countries, and an unknown number of border-crossings, mainly in the Americas, Asia and Oceania. Upon arrival in the destination state, individuals fleeing environmental catastrophe are often faced with an extremely precarious situation, and virtually stripped of any rights in international law. Unlike in cases of Pacific island states being submerged by rising sea levels where resettlement is the only remaining option, many more people are displaced temporarily by climate change effects.<sup>14</sup> Enhanced international mobility rights might help them survive in areas where local livelihoods have been destroyed. Hence in the absence of an international regime for climate refugees, setting up a special mobility regime for populations forced to flee due to environmental factors could save millions of lives.

Another example would be the temporary labour migrants working in industries like agriculture, construction or care work. In most cases, mobility rights of these groups are dependent on their citizenship of origin. Their temporary status prevents them from transitioning to a more secure settlement permit or citizenship in the destination country. Their mobility rights and thus their access to work and income remain precarious, while their services are indispensable for the functioning of the host state's society and economy. Apart from the Indian construction workers in the Gulf countries mentioned above, such essential workers would include the East European fruit pickers in Germany and the UK, or the care and nursing personnel from the Western Balkans in northern Europe. Unlike, for instance, highly skilled medical personnel or engineers, these low-skilled temporary workers are at the same time a necessary and a vulnerable category. Regulating their mobility rights through a special regime would thus be beneficial to both individuals and recipient societies.

Special mobility regimes disconnected from citizenship are not a historic novelty. They have only been forgotten. In 1921, upon the initiative of Fridtjof Nansen, the League of Nations started issuing special certificates to Russians who fled their country and whose citizenship

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<sup>11</sup> 'Environmental Migration', Migration Data Portal, [https://migrationdataportal.org/themes/environmental\\_migration#:~:text=Environmental%20migrants%20are%20defined%20as,or%20permanently%2C%20and%20who%20move](https://migrationdataportal.org/themes/environmental_migration#:~:text=Environmental%20migrants%20are%20defined%20as,or%20permanently%2C%20and%20who%20move).

<sup>12</sup> 'The 1951 Refugee Convention', United Nations, <https://www.unhcr.org/1951-refugee-convention.html>.

<sup>13</sup> 'Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama', 22 November 1984, <https://www.refugeelegalaidinformation.org/cartagena-declaration-refugees>.

<sup>14</sup> 'Global Report on Internal Displacement', Internal Displacement Monitoring Center, April 2020, <https://www.internal-displacement.org/sites/default/files/publications/documents/2020-IDMC-GRID.pdf>.

was revoked.<sup>15</sup> In the following decade, the League of Nations expanded the scope of the “Nansen passport” to also include Armenian, Assyrian, and Turkish refugees who needed mobility rights but would not be recognised by their national authorities. The Nansen passports were issued by the country where the person was located, but without any social or welfare entitlements for their holders in that country. They granted the holder the right to leave the country of issue, travel to another country recognising this document, and be readmitted to the country of issue.<sup>16</sup> In other words, Nansen passports provided a vulnerable community with recognition and mobility rights, but not with membership. By 1942, about two million persons held Nansen passports that were recognised in 52 countries – more than half of those existing in the world at the time.

More recently, Alexander T. Aleinikoff and Leah Zamore have argued for exceptional mobility regimes that would better accommodate the reality of refugees in the contemporary world by offering them (regional) free movement rights.<sup>17</sup> They introduce the notion of the “necessary flight” to take the broad array of motives for which people flee their homes into account. Building on the need to go beyond the “fear of persecution”, Aleinikoff and Zamore develop a practical proposal for creating a policy space to protect displaced persons through globalised responsibility-sharing. A “modern-day Nansen passport” would grant the “necessary fliers” the possibility to escape the limbo of being unable to return to their home country and unable to leave a destination state where they cannot build a new life.

Our proposal builds on this idea of the “necessary flight” applying it more broadly to contexts of environmental and socio-economic vulnerabilities and needs. The exceptional mobility regime we envisage would grant to a set of vulnerable groups a special “passport” recognised in a uniform manner by different national immigration systems. Similar to the Nansen passport, the special mobility passport would separate two core aspects of citizenship. While it would not grant its holders any political rights in the destination state, it would give them rights to territorial admission and return. Settlement rights or citizenship would still have to be recognised in case an individual’s life course leads to multiannual residence (e.g., for environmental refugees) but would then involve a transition to the legal status of a regular immigrant. By contrast, the special mobility passport would be temporary, renewable, and subject to conditions of vulnerability and necessity. States would seek to retain national control over access to employment and social welfare rights, although a set of minimum rights in these respects will be essential to prevent that necessity movers end up in extreme exploitation or destitution and host states come to regard them as undermining social standards. The process initiated by the UN Compact on Safe, Orderly and Regular Migration and the more far-reaching initiative for a Model International Mobility Convention could be harnessed to develop such norms also for necessity movers.<sup>18</sup>

Even then, would these exceptional mobility regimes detached from membership not generate even more precarious mobilities? The answer to this question depends on the thorny question of who would issue such passports and how states could be made to recognise them. Commonly, states regulate their immigration through reciprocity and bilateral agreements that benefit their own nationals. States are thus generally willing to accept free movement only if

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<sup>15</sup> Gatrell, P. ‘The Nansen Passport: the innovative response to the refugee crisis that followed the Russian Revolution’, *The Conversation*, 6 November 2017, <https://theconversation.com/the-nansen-passport-the-innovative-response-to-the-refugee-crisis-that-followed-the-russian-revolution-85487>.

<sup>16</sup> Ibid.

<sup>17</sup> Aleinikoff, A. and L. Zamore (2019), *The Arc of Protection: Reforming the International Refugee Regime*, Stanford University Press.

<sup>18</sup> Global Compact for Safe, Orderly and Regular Migration, Dec. 19, 2018, UN Doc. A/RES/73/195; ‘The Convention’, Model International Mobility Convention, <https://mobilityconvention.columbia.edu/about>.

their citizens are granted similar rights by the other states involved. Hence the way to make this exceptional mobility regime acceptable to states is to ensure that their own vulnerable communities would be afforded the same rights should they need them. However, disparities of wealth and power between states in the global North and South make such reciprocity-based incentives probably not strong enough. Negotiating special mobility passports will therefore require an international setting in which states are formally equal as well as strong mobilisation by transnational civil society organisations.

We do not have ready-made responses to the many questions raised by our proposal. We hope that the forum debate that we are now kicking off will not only raise objections on grounds of principle or feasibility, but will also yield some novel practical solutions.

The reason why we think our proposal is both timely and realistic is that the world may be entering a new historic period. Hyper-globalisation since the 1990s has greatly increased the volume of global mobility, but the short-term effects of the pandemic and the long-term effects of the climate crisis are likely to dampen the non-necessary types of mobility, such as international tourism and business travels. Moreover, the digital revolution and securitisation of migration have created “shifting borders” that allow states to control the movement of people far beyond their territory.<sup>19</sup> It is thus possible that there will be a significant reduction of global opportunities for mobility. The pandemic and climate crises have, however, increased the need for mobility rights as individual exit options from intolerable circumstances as well as the societal demand for a transnationally mobile “essential workforce”. States have therefore not only humanitarian reasons for carving out exceptions to citizenship-based mobility regimes. They may also need them to protect their own vulnerable necessity-movers and to keep their national economies and public services afloat when the supply of native workers dries up.

Maybe the most likely development is a proliferation of ad hoc mobility rights that differ for temporary labour migrants, environmentally displaced persons, indigenous peoples and other groups and that are negotiated between particular states. We are not opposed to such tailor-made solutions but believe that they should be embedded in a broader international process in which the principle of necessity-based mobility is recognised and a minimum set of rights for necessity movers become entrenched in international law. What could better express this commitment than creating a new kind of international passport for them?

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<sup>19</sup> Shachar, A. (2020), *The shifting border: legal cartographies of migration and mobility*, Ayelet Shachar in dialogue, Manchester University Press.

## A more pragmatic migration regime for millions: Regularisation, regional free movement and permanent residence

Diego Acosta\*

In their thought-provoking kick-off, Jelena Džankić and Rainer Bauböck propose the creation of a new international passport that would allow certain individuals, such as temporary labour migrants or environmentally displaced persons, to enjoy mobility rights based on necessity rather than on nationality. This would create a new legal category under international law and would offer the respective individuals a right of entry to the territory of other states as well as some limited access to their labour markets. In this respect, this proposal would go beyond both the UN Compact on Safe, Orderly and Regular Migration and the Model International Mobility Convention, which clearly recognise the right of states to determine who can enter into their territory.<sup>20</sup>

The possibility for environmentally displaced persons to obtain residence in a second state is already enshrined in the legislation of some countries. For example in South America, both Bolivia<sup>21</sup> and Ecuador<sup>22</sup> have incorporated in their migration laws the possibility to grant humanitarian residence permits to those affected by climate disasters. The emigration of Haitian nationals accelerated as a result of the 2010 earthquake, and thousands have been able to apply for residence permits at Brazil's Consulate in Porto Príncipe during the last few years.<sup>23</sup> In the European Union, countries such as Finland, Sweden or Denmark either have specific admission routes based on environmental displacement, or have granted such permits in the past under the more general umbrella of humanitarian status.<sup>24</sup> Nothing would impede the EU from proposing a Directive in order to harmonise the definition and rights of environmentally displaced people. The same is true for temporary labour migration and numerous countries have signed bilateral agreements making such mobility possible.<sup>25</sup> A major problem, as Džankić and Bauböck highlight, has been the lack of access to permanent

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<sup>20</sup> Global Compact for Safe, Orderly and Regular Migration, Dec. 19, 2018, UN Doc. A/RES/73/195; 'The Convention', Model International Mobility Convention. <https://mobilityconvention.columbia.edu/about>.

<sup>21</sup> LEY Nº 370, Ley De 8 De Mayo De 2013, Evo Morales Ayma Presidente Constitucional Del Estado Plurinacional De Bolivia, <https://www.acnur.org/fileadmin/Documentos/BDL/2014/9556.pdf>.

<sup>22</sup> Ley Orgánica De Movilidad Humana, República Del Ecuador Asamblea Nacional, <https://vlex.ec/vid/ley-organica-movilidad-humana-847395482>.

<sup>23</sup> Portaria Interministerial Nº 13, De 16 De Dezembro De 2020, Ministério da Justiça e Segurança Pública/Gabinete do Ministro, <https://www.in.gov.br/web/dou/-/portaria-interministerial-n-13-de-16-de-dezembro-de-2020-295228173>.

<sup>24</sup> Kraler, A., T. Cernei, and M. Noack, 'Climate Refugees – Legal and Policy Responses to Environmentally Induced Migration', Study for the European Parliament, [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-LIBE\\_ET%282011%29462422](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-LIBE_ET%282011%29462422).

<sup>25</sup> 'Migration for Employment: Bilateral Agreements at a Crossroads', OECD/Federal Office of Immigration, Integration and Emigration, 2004, OECD Publishing, Paris, <https://doi.org/10.1787/9789264108684-en>.

residence in many of these treaties, as well as the poor observance of basic labour rights in some instances.<sup>26</sup>

In my view, out of the four options advocated by Džankić and Bauböck, it is the second, namely the further deepening of regional free movement regimes, that offers a better promise to accommodate those who find themselves in a situation of “necessary flight” due to environmental or socio-economic needs. I define regional free movement of people law as encompassing the set of regional rules, bilateral agreements, domestic provisions and non-binding norms that facilitate the entry, stay, rights during stay, and protection from expulsion of migrants coming from a particular group of countries in a region. Despite being generally poorly investigated by scholars, there is not a single year in the last two decades where one or various agreements facilitating free movement at regional level have not been adopted, and most countries at the global level are part of either regional or bilateral agreements on free movement of people.<sup>27</sup> For example, in May 2021, the Andean Community adopted the Andean Migratory Statute which not only offers the right to reside, work and equal treatment with nationals to Andean citizens and members of their families, but also extends such rights to non-Andean citizens who permanently reside in one of the four member states.<sup>28</sup>

Regional free movement agreements facilitate not only the mobility of workers in regions like Eurasia, but can also in many instances offer options to those who are affected by an environmental disaster.<sup>29</sup> For example, between 2008 and 2018, more than 8.5 million new displacements – both internal and external – occurred as a result of hurricanes and earthquakes in the Caribbean.<sup>30</sup> While the regional legal frameworks on free movement in the Caribbean are not devised to deal with mobility related to environmental disasters, the fact that persons can access other territories in the region and obtain a residence permit meant that these regimes were used during the 2017 hurricane season, which led to the displacement of more than two million people.<sup>31</sup> This exemplifies the ways in which free movement regimes can offer choices to those affected by environmental change, with potential implications for regions such as the Pacific Islands.

Whilst intra-regional mobility exceeds inter-regional movement, it is true that regional free movement regimes do not offer pathways towards residence to those who fall outside their

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<sup>26</sup> Cholewinski, R. (2015), ‘Evaluating Bilateral Labour Migration Agreements in the Light of Human and Labour Rights’, in Panizzon M., Zürcher G., Fornalé E. (eds) *The Palgrave Handbook of International Labour Migration*, Palgrave Macmillan.

<sup>27</sup> Nita et al. (eds) (2017), *Migration, Free Movement and Regional Integration*, UNESCO Publishing and UNU Institute on Comparative Regional Integration Studies; Acosta, D. (2020), ‘The Expansion of Regional Free Movement Regimes: Towards a Borderless World?’ In P. Minderhoud, S. Mantu, K. Zwaan (eds), *Caught In Between Borders: Citizens, Migrants and Humans*, Wolf Legal Publishers.

<sup>28</sup> DECISIÓN N° 878, Secretaría General De La Comunidad Andina, 12 de mayo de 2021, <http://www.comunidadandina.org/DocOficialesFiles/Gacetatas/Gaceta 4239.pdf>.

<sup>29</sup> Madiyev, O. ‘The Eurasian Economic Union: Repaving Central Asia’s Road to Russia?’ Migration Policy Institute, 3 February 2021, <https://www.migrationpolicy.org/article/eurasian-economic-union-central-asia-russia#:~:text=The%20Eurasian%20Economic%20Union%3A%20Repaving%20Central%20Asia's%20Road%20to%20Russia%3F,-February%203%2C%202021&text=Russia's%20annexation%20of%20Crimea%20in,the%20Group%20of%20Eight%20nations.>

<sup>30</sup> “Caribbean Migration” [https://caribbeanmigration.org/sites/default/files/concept\\_note\\_cmc\\_regional\\_consultation-f2.pdf](https://caribbeanmigration.org/sites/default/files/concept_note_cmc_regional_consultation-f2.pdf).

<sup>31</sup> Francis, A. (2019), ‘Free Movement Agreements & Climate-Induced Migration: A Caribbean Case Study’, Sabin Center for Climate Change Law, Columbia Law School. <https://disasterdisplacement.org/portfolio-item/fma-caribbean>.



scope.<sup>32</sup> For example, Venezuela never ratified the MERCOSUR Residence agreement. This means that the circa five million Venezuelan nationals who have emigrated since 2015 do not enjoy a right to enter, reside and work in other South American states. However, there is nothing impeding the unilateral and non-reciprocal extension of regional free movement rights and this has happened on various occasions in South America. Indeed, Argentina, Brazil and Uruguay have unilaterally extended the scope of the agreement to also include Venezuelans.<sup>33</sup> This was also the case in Ecuador until 2020 and between 2017 and 2019, close to a 100 thousand Venezuelans obtained a residence permit in the country.<sup>34</sup>

In cases where individuals fall outside a regional agreement, regularisation becomes an important policy tool. Whilst organisations like the EU now treat regularisation as a taboo in their policy discourse, the same is not true in many countries around the world, such as the US, European ones like Spain, or entire regions like South America.<sup>35</sup> In early 2021, Colombia adopted a residence permit for Venezuelan nationals, which will in practice function as a regularisation mechanism for the majority of 1.7 million that reside in the country.<sup>36</sup> Apart from offering a residence permit, one of the most interesting features of the Colombian approach is the fact that permits are granted for ten years. Although this does not amount to permanent residence, ten years represents, on paper, a sufficiently lengthy period to facilitate access to other more stable permits.

In fact, access to permanent residence, and potentially citizenship, is the third pillar to ensure protection of rights and mobility. The recognition that at least some of those who migrate will eventually decide to permanently settle has to be accepted as a normal reality. This is even true in countries like the Gulf states where, whilst permanent residence is excluded on paper, it still happens in practice.<sup>37</sup> Permanent residents could then enjoy certain mobility rights in a given region such as in the Andean Community example mentioned above, or in the case of long-term residents in the European Union.<sup>38</sup> To conclude, the opening of further and wider migration paths to those who are in need of movement because of environmental or socio-economic needs is a crucial endeavour that can be better advanced, at least initially, at the regional level by further deepening and improving the legal provisions and the implementation of existing instruments. A more global regime remains an option that

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<sup>32</sup> 'Migration and Development: A Role for the World Bank Group', World Bank, 2016, <http://documents1.worldbank.org/curated/en/690381472677671445/pdf/108105-BR-PUBLIC-SecM2016-0242-2.pdf>.

<sup>33</sup> Acosta, D. & L. Brumat (2020), 'Political and Legal Responses to Human Mobility in South American in the Context of the Covid-19 Crisis. More Fuel for the Fire?' *Frontiers* 2(59) doi: 10.3389/fhumd.2020.592196.

<sup>34</sup> Ramirez, J. (2020), 'De la ciudadanía suramericana al humanitarismo: el giro en la política y diplomacia migratoria ecuatoriana', *Estudios Fronterizos* 21, <https://doi.org/10.21670/ref.2019061>.

<sup>35</sup> 'Communication from the Commission: A New Pact on Migration and Asylum', European Commission, Brussels, COM(2020)609final, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0609&from=EN>; Bolter, J., Chishti, M., & Meissner D., 'Back on the Table: U.S Legalization and the Unauthorized Immigrant Groups that Could Factor in the Debate', Migration Policy Institute, February 2021 <https://www.migrationpolicy.org/research/us-legalization-unauthorized-immigrant-groups>; Moraga, J. (2021), 'Inmigración y políticas migratorias en España', *Estudios sobre la Economía Española*, <https://documentos.fedea.net/pubs/eee/eee2021-10.pdf>; Acosta, D. 'Free Movement in South America: The Emergence of an Alternative Model?' Migration Policy Institute, 23 August 2016, <https://www.migrationpolicy.org/article/free-movement-south-america-emergence-alternative-model>.

<sup>36</sup> Freier, L. & S. Jara, 'Colombia's exceptional migration regularization', Migration and Mobility Bristol, 30 March 2021, <https://mmlatinamerica.blogs.bristol.ac.uk/2021/03/30/colombias-exceptional-migratory-regularization/>.

<sup>37</sup> Lori, N. (2019), *Offshore Citizens: Permanent Temporary Status in the Gulf*, Cambridge University Press.

<sup>38</sup> Acosta, D. (2014), 'Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Postnational Form of Membership', *European Law Journal* 21(2): 200-219.

countries that have endorsed the Global Compact for Migration are expected to pursue under its objective 5.<sup>39</sup> If it were not so obsessed with return, the EU could lead the process of thinking alternative policy options.<sup>40</sup> Some interesting developments in line with those advocated by Džankić and Bauböck might derive from the ongoing review by the Biden administration of the links between climate change, migration and resettlement.<sup>41</sup>

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<sup>39</sup> Global Compact for Safe, Orderly and Regular Migration, Dec. 19, 2018, UN Doc. A/RES/73/195.

<sup>40</sup> 'Communication from the Commission: A New Pact on Migration and Asylum', European Commission, Brussels, COM(2020) 609 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0609&from=EN>.

<sup>41</sup> 'Executive Order on the Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration', White House, 4 February 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/04/executive-order-on-rebuilding-and-enhancing-programs-to-resettle-refugees-and-planning-for-the-impact-of-climate-change-on-migration>.

## Re-thinking mobility under duress

John Torpey\*

Even the most casual observer of international affairs might reasonably think that the system for allocating people to countries – the institution of citizenship – is in disarray and prone to producing the worst possible outcomes. The Mediterranean and the southern US border both provide ongoing examples of human tragedy arising from the norm that each person in the world has one and only one true home, the place where they belong and from which long-term departure is anomalous. This norm emerged from the period following the First World War, when the European land empires collapsed and a great re-sorting of populations, borders, and international law ensued. A good deal of this re-sorting had to do with avoiding confusion about male citizens' military obligations; if push came to bloody shove, countries and soldiers had to know where their loyalties lay.

All that changed with the advent of nuclear weapons and with the shift from interstate to civil wars in the post-WWII period. The norm of unique citizenships began to wane and citizenship itself, understood as a bundle of rights, began to thin as welfare states came under attack by neoliberalism. Before too long, citizenship was no longer a sacred possession but a commodity for sale to the highest bidders, while the world's more impoverished were immobilised by their low 'quality of nationality'.<sup>42</sup> Over time, the Refugee Convention of 1951 seemed increasingly obsolete in regard to those who wanted to move not because of state persecution per se, but because of economic distress, environmental danger, or various kinds of violence.<sup>43</sup> It has been widely noted that more than 60 million people have been displaced by conflict in recent years, the highest number since World War II. Meanwhile, globalisation has undermined the economic prospects of many low-wage workers in the wealthier parts of the world who have come to be seen as "essential" yet, at the same time, "vulnerable" – a pattern especially obvious during the coronavirus pandemic.

### ***Special mobility passports as light citizenship***

How, under these changed circumstances, do we protect the disadvantaged and endangered who believe they need to flee their countries of origin in order to survive? These are questions of the utmost seriousness and consequence, and I applaud Jelena Džankić and Rainer Bauböck for raising them. In their kickoff text for this forum, they offer several proposals to address these questions. The proposals range from the most obvious and venerable – open borders – to expedited access to citizenship and regional free mobility agreements, and, finally, to their own preferred choice, a "special mobility passport." Džankić and Bauböck see such documents not as innovations but as a revival of such experiments as the famous "Nansen

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<sup>42</sup> Surak, K. (2019), 'Millionaire mobility and the sale of citizenship', *Journal of Ethnic and Migration Studies* 47(1): 166-189; Kochenov, D. & J. Lindeboom (2017), 'Empirical Assessment of the Quality of Nationalities', *European Journal of Comparative Law and Governance* 4(4): 314-336.

<sup>43</sup> 'The 1951 Refugee Convention', UNHCR, <https://www.unhcr.org/1951-refugee-convention.html>.

passports” that helped Russians and Armenians find their footing in the chaotic aftermath of the Bolshevik revolution and the Russian Civil War.

In his commentary, Diego Acosta opts for the regional free mobility agreements that proliferate in Latin America, and these do indeed seem appealing – as long as one lives in a region sympathetic to such agreements. Unfortunately, however, if one is in the immigrant-rich Persian Gulf, for example, the prospects of such agreements seem rather limited. The Gulf states show little interest in the sort of arrangements that may be perfectly congenial to more liberal states.

As for Džankić and Bauböck’s preference, the special mobility passport, it would provide a number of vulnerable populations opportunities for cross-border movement without the political rights of citizenship. Their proposal, which builds on Aleinikoff and Zamore’s notion of “necessary flight,” entails a status that is ‘temporary, renewable, and subject to conditions of vulnerability and necessity’.<sup>44</sup> It thus shares the “citizenship light” idea recently proposed by economist Branko Milanovic as a way of facilitating the movement of workers desired by the world’s wealthier countries without provoking the political opposition that often ensues from more expansive immigration policies.<sup>45</sup>

### ***Nativist backlash against temporary migrants who become permanent***

The difficulty with these proposals, it seems to me, goes back to the Swiss novelist Max Frisch’s well-known observation that ‘we wanted workers, but got people’. That is, while the European guest worker programs of the 1950s and 1960s that were intended to make up for the labour shortages of the time were supposed to be temporary stopgaps, those who came ended up making lives for themselves and becoming permanent residents (or denizens, i.e., long-term residents without citizenship). While defining the universe of potential beneficiaries of this sort of policy in terms of necessity and vulnerability, Džankić and Bauböck recognise that the same gradual shift from temporary to permanent residency is entirely imaginable: ‘Settlement rights or citizenship would still have to be recognised in case an individual’s life course leads to multiannual residence (e.g., for environmental refugees)’. As sceptics have noted of these kinds of arrangements in the past, ‘nothing is more permanent than temporary status’.<sup>46</sup>

Džankić and Bauböck propose to use “necessity” as the defining criterion for determining eligibility for a “special mobility passport.” But since the criterion of necessity is inherently slippery, and their understanding of the term fairly broad, a great deal of vetting will be necessary in order to determine who is eligible for one of these passports.

In all events, the way in which “necessity” is determined is likely to be the key element of the political acceptability of these proposals. This problem remains the crucial aspect of proposals to broaden the category of those who have a claim to “necessary” mobility. Again and again in recent politics, we have seen claims to “necessary mobility” as stimulating backlash on the part of the populations of receiving countries. While the German chancellor Angela Merkel generously opined in 2015 in response to the arrival of a million predominantly Middle Eastern and Afghan refugees that ‘we can handle that’ (‘wir schaffen das’), not everyone is so magnanimous or immune to the labour market competition that such an influx

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<sup>44</sup> Aleinikoff, A. & L. Zamore (2019), *The Arc of Protection: Reforming the International Refugee Regime*, Stanford University Press.

<sup>45</sup> Milanovic, B. (2018), *Global Inequality: A new approach for the age of globalization*, Harvard University Press.

<sup>46</sup> Martin, P. (2001), *There is Nothing more Permanent than Temporary Foreign Workers*, Center for Migration Studies.

brings with it.<sup>47</sup> The election of Donald Trump in the United States and the transformation of the Alternative for Germany (AfD) from an anti-Brussels into an anti-immigrant and neo-fascist party had everything to do with immigration and the sense among supporters of these forces that they were being transformed into ‘strangers in their own land.’

Moreover, to the extent that would-be “refugees” (technically, asylum seekers) are perceived in reality to be “economic migrants” who are competitors for the jobs of locals, their arrival is unlikely to be greeted with enthusiasm. We must also remember that democratic political communities have every right to adopt the policies they wish in regard to whom they let in, for how long, under what conditions, and why.

### ***Behind the veil of ignorance we are all necessary fleers***

All that said, we must bear in mind that we might all, at some point, under some circumstances, find ourselves in the position of needing help that we can only get by leaving the place where we currently reside. Whether due to lack of economic opportunities, environmentally-caused erosion of living conditions, political oppression, or other circumstances, we may find ourselves forced to seek refuge in another country. Yet under the terms of the 1951 Convention – or indeed under any circumstances – other communities are only under an obligation not to return someone on their territory to another territory where they face a threat to their life or freedom (the principle of *non-refoulement*); there is no obligation either to admit such persons or to grant them permanent status.

But the language of the 1951 Convention no longer seems adequate to the conditions of today’s world. We need to find new terms under which to help ensure that those who really need help can actually get it. When the drowning are desperately climbing aboard a lifeboat, it is too much to hope for an optimal solution – one that improves everyone’s situation without worsening anyone’s. We are here in a Rawlsian situation, trying to design arrangements in which the least advantaged have a better outcome than they otherwise would, from behind the ‘veil of ignorance’ as to who is in these circumstances. Such criteria should shape the evaluation of the “necessity” of flight and the corresponding obligation to take in “necessary fleers.” But in order to obtain the necessary “buy-in” from all potential recipients of fleers, we must all imagine that we, too, might one day be in the situation of having to flee. After all, ‘there but for the grace of God go I’.

One difficulty in thinking about these arrangements will be the fact that most of those who experience the “necessity of flight” are in the poorer and less democratic parts of the world, as is in fact now the case. If these persons cannot be helped *in situ*, it’s also not obvious that they must be granted the opportunity to go to the destination of their choice. First-country-of-asylum rules are reasonable if the goal is to protect people from calamity rather than to give them the best possible outcome they might hope for. We also have to keep in mind that one of the responses to the necessity of flight must be to provide assistance to the countries in which these fleers find themselves in the medium-term hope that the necessity of flight will diminish.

As noted previously, all of this is going to require a great deal of “vetting” of the individuals seeking refuge and the countries from which they came. But this is not a novel development. After years of having immigration officers determine the validity of asylum claims in the US, the Immigration and Naturalization Service was compelled by a lawsuit in the late 1980s to create a dedicated corps of asylum officers who specialised in evaluating asylum claims. Such

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<sup>47</sup> ‘Two Years since Germany Opened Its Borders to Refugees: A Chronology’, Deutsche Welle, 9 September 2017, <https://www.dw.com/en/two-years-since-germany-opened-its-borders-to-refugees-a-chronology/a-40327634>.

personnel will need to be trained in countries around the world. Funding for both asylum officers and for those fleeing should be subsidised by the world's wealthy countries through an independent UN agency, possibly UNHCR or the IOM.

### **What counts as necessity?**

But the real challenge with regard to “special mobility rights” will be reaching international agreement on the criteria demonstrating the “necessity” of flight. What criteria of “necessity” might find international acceptance among sovereign states? The following groups might plausibly be said to face the “necessity of flight”:

1. building on the language of the 1951 Refugee Convention, those facing a credible fear of persecution on the basis of a variety of sociological characteristics and, of course, for their political views;
2. following the Cartagena Declaration, those ‘who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order’;<sup>48</sup>
3. those whose habitations routinely face inundation and destruction despite meeting whatever regulations their countries impose for construction of safe dwellings, or those who lack the wherewithal to afford such construction despite repeated inundation or destruction;
4. those who have been unemployed for three years when the official unemployment rate in their region of the country has averaged over 10% for, say, the preceding 5 years.

Criteria #1 and #2 build on familiar and widely accepted international agreements that seek to assure some sort of refuge to those who urgently need it. Criterion #3 seeks to address the problem of “climate migrants,” which many believe is a growing category of migrant in certain areas of the globe. Meanwhile, criterion #4 addresses the problems facing those with a lack of economic opportunities; we might call them “desperation migrants.” A provision such as this might, in the optimistic scenario, help pressure the country in question to invest greater resources in the relevant region, promoting economic development there and encouraging outside donors, where relevant, to feel confident that such development is being supported. Migrants of this sort may be less inclined to leave if economic prospects in their regions improve.

The challenges regarding migration and asylum today are in some ways similar but in other ways different from those that faced the world in the aftermath of World War II. The “necessary flight” proposal presents important opportunities for moving beyond the inadequacies of the post-war arrangements. Although there are serious difficulties that will have to be addressed for such a proposal to be successful, it deserves careful thought and consideration.

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<sup>48</sup> ‘Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama’, 22 November 1984, <https://www.refugeelaidinformation.org/cartagena-declaration-refugees>.

## Resettlement through responsibility sharing

Michael Doyle\*, Janine Prantl\*\*, and Mark James Wood\*\*\*

The United Nations High Commissioner for Refugees (UNHCR) recognises refugee resettlement as one of three “durable solutions”.<sup>49</sup> Durable solutions are conditions targeted towards helping refugees to become self-reliant. What makes refugee resettlement so important is the fact that the majority of the 79 million forcibly displaced people (29 million refugees) live in poor or developing nations, where they do not have any prospect of such “durable” solutions.<sup>50</sup> Globally, the developing world bears the cost of hosting refugees with inadequate financial and technical assistance. Those nations face, as the former UN Special Representative of the Secretary-General for Migration and Development Peter Sutherland described, ‘responsibility by proximity’.<sup>51</sup> Yet, only a few refugees are selected for resettlement programmes in wealthy nations. Generally, refugees face the initial hurdle that there is no enforceable right to be resettled, and subsequently, they might still have to wait many years to finally reach the ultimate goal of durable integration, i.e. citizenship.<sup>52</sup> In this regard, Jelena Džankić and Rainer Bauböck aptly point to the issue that free movement across international borders is a citizenship-based right, not a basic human right.

As do Jelena Džankić and Rainer Bauböck, we suggest that mobility regimes for vulnerable groups shall not be restricted solely to “refugees” as defined under the 1951 Refugee Convention.<sup>53</sup> Today, people are forced to flee their countries to save their lives because of many factors that go beyond the Convention’s standards of “persecution” for reasons of ‘race, religion, nationality, membership of a particular social group, or political opinion.’ Civil wars, generalised violence and natural disasters such as floods and droughts all play a part.

When we look at responsibility sharing for resettlement at the global level, we see that richer nations are not contributing their fair share in comparison to their counterparts in less developed countries. But what should and could realistically be done? If we assume that refugees cannot rely on an “utopia” of world-wide open borders and they cannot benefit from

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<sup>49</sup> See e.g., Franken, M. (2003), ‘Admitting Refugees for Resettlement: A Mission of Rescue’, *In Defense of the Alien* 26: 188-200.

<sup>50</sup> United Nations High Commissioner for Refugees, ‘Figures at a Glance’, UNHCR, <https://www.unhcr.org/en-us/figures-at-a-glance.html>.

<sup>51</sup> ‘Interview: Refugees are the responsibility of the world... proximity doesn’t define responsibility – Peter Sutherland’, UN News, 2 October 2015, <https://news.un.org/en/story/2015/10/511282-interview-refugees-are-responsibility-world-proximity-doesnt-define>.

<sup>52</sup> Refugee Studies Centre, Forced Migration Review No. 54 - Resettlement, February 2017, <https://www.refworld.org/docid/58cbcb314.html>.

<sup>53</sup> ‘Convention and Protocol Relating to the Status of Refugees’, United Nations High Commissioner for Refugees, <https://www.unhcr.org/en-us/3b66c2aa10>.

an enforceable obligation of solidarity and responsibility sharing among states under the current voluntary and unilateral regime then what are the viable alternatives?<sup>54</sup>

The Model International Mobility Convention (MIMC), a model treaty drawn up by 40 plus experts in 2016 and 2017, addresses alternative forms of international responsibility.<sup>55</sup> It proposes two viable options: one, richer nations could and should either contribute more funds based on their GDP, or two, they should resettle more refugees. Member states can have a choice on which option they would prefer. This would lift the burden and strain imposed upon poorer nations simply because of their proximity.

Building on a 2015 European Union (EU) responsibility sharing mechanism designed for the purpose of intra-EU relocation, the Model International Mobility Convention (MIMC) proposes using the top 20 economies to resettle refugees with their shares being determined by an equitable formula reflecting GDP, the population of the country (capped at the US population), unemployment and the number of refugees already resettled.<sup>56</sup> The logic is that nations with larger economies and a large population are better equipped for resettlement, and countries with high unemployment and a substantial number of already resettled refugees are less capable of contributing to new resettlement.

We do not imagine that such an allocation can be imposed. It did not work in the EU in 2015.<sup>57</sup> We do propose that countries adopt a national responsibility to assist and agree to be monitored by UNHCR and the international community. The industrial countries have both the capability and the responsibility to act. They have contributed and are contributing to the global warming that has produced the rising toll of natural disasters. Their sale of arms, predatory resource extraction and imports of drugs have helped destabilise many developing countries. And basic human solidarity calls out for assistance to those fleeing in peril of their lives.

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<sup>54</sup> For a moral argument in favour of open borders, see Huemer, M. (2013), 'Citizenism and open border', *Openborders*, 18 February 2013 <https://openborders.info/blog/citizenism-and-open-borders/>; Hathaway, J. & Neve, R. (1997), 'Making international refugee law relevant again: a proposal for collectivized and solution-oriented protection', *Harvard Human Rights Journal* 10: 115-211.

<sup>55</sup> 'Carnegie Council', Model International Mobility Convention, 3 December 2020, <https://www.internationalmobilityconvention.org/>.

<sup>56</sup> 'Model International Mobility Convention', Global Policy Initiative, Columbia University, 2017, [https://mobilityconvention.columbia.edu/sites/default/files/content/pdf/mimc\\_document\\_web.pdf](https://mobilityconvention.columbia.edu/sites/default/files/content/pdf/mimc_document_web.pdf).

<sup>57</sup> Henley, J. 'EU refugee relocation scheme is inadequate and will continue to fail', *The Guardian*, 4 March 2016, <https://www.theguardian.com/world/2016/mar/04/eu-refugee-relocation-scheme-inadequate-will-continue-to-fail>.



## The value of membership

**Rebecca Buxton\***

Jelena Džankić and Rainer Bauböck's thought-provoking call to action asks us to consider the possibility of a new mobility regime, designed to assist "necessary fliers" and other precarious migrants. The proposal takes its inspiration from the Nansen Passport, a travel document that allowed many refugees in the early twentieth century to move across borders safely. I want to underscore here that I am (all things considered) in favour of the proposal. That is, by allowing migrants and refugees to avoid life-threatening journeys and access the rights of movement that are otherwise closed off to them, such a regime would certainly be far superior to the current systems of mobility. I do question why exactly powerful states would ever adopt such a system, though history shows us that, at least in Nansen's time, this was once possible. Yet this will not be the focus of my critique. Instead of thinking about this proposal in terms of feasibility, I want to raise two largely normative questions. First, I want to consider the value of admission as opposed to substantive protection. Second, I want to question the democratic anxiety that underpins the need for such a proposal. I therefore ask why the extension of citizenship is not a better option for necessary fliers.

### ***Admission without protection***

First, the question of entry. Under the scheme proposed by Džankić and Bauböck, certain vulnerable migrants would have access to some level of mobility through the issuing of a special passport. In particular, this scheme is designed to help those who fall outside of the normal protection regimes; for instance, those who do not qualify for Geneva Refugee Convention protection such as the climate displaced. It could also cover those in precarious working environments such as temporary workers. The proposed regime provides 'limited and tailor-made mobility rights to those who need them most and who have no chance to acquire them via the citizenship route.' In other words, this passport is solely a tool for mobility and becomes decoupled from the political and legal status of national citizenship. The individual with such a passport would be able to move in and out of a state without acquiring full or formal status.

An immediate question arises here as to the value of entry as opposed to a more substantive form of protection. Of course, being within the jurisdiction of a particular state immediately places the subject under their care to some limited degree. However, the question of what exactly the individuals in receipt of this passport are entitled to might arise. For instance, if we believe that those displaced by climate catastrophe are owed the same level of protection as refugees recognized under the Refugee Convention, then the idea of entry alone might appear questionable. Such individuals presumably do not merely need to be admitted, they also require protection, resources, and the capacity to exercise their political and social agency. Mobility in this case may enable migrants to move in search of work, to live with their loved ones, and to find more meaningful forms of community. All of these are good things. But there is a question worth asking here as to whether the provision of entry – considering the needs of "necessary fliers" – is really enough. Of course, the conditions that we are operating

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under demand some realism; the likelihood of richer forms of protection are looking increasingly unlikely. A question that we need to ask ourselves in such circumstances, is: Should we settle for another way forward? For others in receipt of this passport, such as temporary workers, we could imagine such a regime leading to an increased level of choice. Such workers would be able to move in search of new opportunities, or re-enter countries that they had lived in previously. Perhaps, then, considering these two categories at the same time is a problem here. Why would a regime that works for temporary workers be well-suited to those in need of something that looks more like refugee status? Mobility on its own *has* often be pursued as a solution to displacement. Katy Long for instance specifically argues for a focus on refugee mobility. In her words, migration might be considered a ‘fourth durable solution’.<sup>58</sup> Mobility then could be part of the puzzle, but it is not obviously all that is required.

### ***Extending citizenship to “necessary fleers”***

My second concern is the underlying question of democratic citizenship. In setting up the case for this new proposal, Džankić and Bauböck argue that several other paths are unavailable. First, one could argue for open borders, though of course such an enormous shift in our conception of sovereignty is highly unlikely (and perhaps even undesirable). In his earlier response to the proposal, Diego Acosta favours the second avenue: better access to regional forms of mobility. The path I want to consider here is the third that Džankić and Bauböck reject: the possibility of new citizenship for precarious migrants and the forcibly displaced. They reject this because of anxiety around the value of democratic citizenship, writing ‘widely opening the door to citizenship for those without genuine links is a hard sell in democracies, since it devalues citizenship as a status of equal membership in a political community whose members share an interest in the common good and future of a particular polity.’

Devaluing the status of citizenship as a form of political status is of real concern here and, as the authors rightly note, citizenship is already being devalued with the increased ability (of the very wealthy) to buy a passport through investment. Likewise, the recent resurgence of denationalisation is another way in which citizenship is becoming more precarious.<sup>59</sup> Rather than being a stable and secure status, citizenship has become increasingly contingent.

Citizenship has value that is perhaps separable from these concerns. That is, citizenship often provides people with robust access to legal protection and resources. This is not the only way in which citizenship can be valuable, but it is surely one core way. As Hannah Arendt famously argued in *The Origins of Totalitarianism* (1951), ‘The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective’.<sup>60</sup> We may think that, in light of the new human rights regime that emerged after the publication of *Origins*, Arendt’s words no longer carry the weight that they once did. However, I think we can still argue that citizenship has serious functional value. Indeed, a commitment to each and every individual holding functioning citizenship somewhere should perhaps be considered a pre-requisite to the legitimacy of the current regime of governance.

Citizenship essentially determines which state is responsible for which set of people. Or, as Rogers Brubaker characterizes it, citizenship is ‘an international filing system, a mechanism

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<sup>58</sup> Long, K. (2014), ‘Rethinking “Durable” Solutions’, in E. Fiddian-Qasmiyeh, G. Loescher, K. Long, and N. Sigona, *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford University Press.

<sup>59</sup> Birnie R. & R. Bauböck eds (2019), ‘The Power to Expel: Deportation and Denationalisation in Historical, Legal and Normative Perspective.’ *Citizenship Studies* 24(3).

<sup>60</sup> Arendt, H. (1951), *The Origins of Totalitarianism*, Harcourt, Brace and Co.

for allocation of persons to states'.<sup>61</sup> Because of this, holding citizenship somewhere is of supreme importance. Peter Spiro (when discussing Bauböck's idea of stakeholder citizenship) agrees that 'membership in the state remains supremely important; by far the most important associational attachment of individuals'.<sup>62</sup> Recent discussions of refugeehood have also attempted to take the idea of state membership seriously. For instance, David Owen's legitimacy repair view of the refugee regime requires that everyone enjoys a sufficient level of political standing in some state.<sup>63</sup> Elsewhere I have argued that this is best interpreted as a view about membership in the state and its importance to security and the protection and claimability of rights.<sup>64</sup>

Džankić and Bauböck argue that the potential extension of citizenship devalues it. Citizenship, if given to anyone who needs it, would no longer be a way to show a commitment or affiliation to a particular place; it would become purely functional. But perhaps we need to rethink why precisely citizenship has value. If we accept that part of the reason why citizenship is so important is that it provides a guarantee of rights and security, then this is precisely a reason for extending it to those most in need.

Another way to spell out this concern is to turn to democratic anxiety that pushes us away from more standard arguments for the extension of citizenship. By "democratic anxiety" I mean the normative concern that extending citizenship to these necessary fleers will undermine the value of citizenship and the democratic institutions that it supports. The view that I have partially defended above advocates for understanding citizenship as a form of protective status, but citizenship is also a form of identity, affiliation, and collective membership.

We can problematise this anxiety by underscoring that it leads to systematic exclusion, particularly for those covered by this proposal who are not able to access now the benefits of citizenship at home. The desire to build and maintain a political in-group necessarily leads to the production of an out-group. If those displaced from their homes are best characterised as lacking the effective guarantee of citizenship, then abandoning the potential expansion of citizenship confines those in need to a "permanent outsider" status. Whilst those captured by this proposal are surely benefitted by the right to move freely across borders, the adoption of this strategy potentially closes the door to more robust forms of protection. What is required, then, is a balance between, on the one hand, the concern that the extension of citizenship will undermine the point of democratic citizenship and, on the other, the concern that migrants freely moving under this scheme will never access the full protective status that is bound up with political membership.

Without functioning citizenship anywhere, and without the ability to access a new citizenship, those with the proposed new travel passports may exist in a precarious position of de facto statelessness. That is, whilst ensured movement and the ability to cross borders safely is certainly preferable to the practices of border exclusion as they currently stand, we are left with the question of how we ensure the protection of people who, like everyone, are entitled to live a decent human life.

I said at the outset that I am all things considered in favour of this proposal. It is far superior to the current migration regimes. In particular, it offers many the dignity and freedom to move

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<sup>61</sup> Brubaker, R. (1992), *Citizenship and Nationhood in France and Germany*, Harvard University Press, p. 31.

<sup>62</sup> Bauböck, R. (2018), *Democratic inclusion: Rainer Bauböck in Dialogue*, Manchester University Press, p. 204.

<sup>63</sup> Fine, S. & L. Ypi (2016), *Migration in Political Theory: The Ethics of Movement and Membership*, Oxford University Press.

<sup>64</sup> Buxton, R. (2021), 'The duty to naturalise refugees', *Critical Review of International Social and Political Philosophy*.

across borders, in search of work and a better life. However, it is worth looking again at the assumptions that lead us in this direction and perhaps questioning again how we think about the value of citizenship in the modern world.

## **Why special passports are not enough. Mobility rights may be similar, but protection claims are different**

**Valeria Ottonelli\* and Tiziana Torresi\*\***

Jelena Džankić and Rainer Bauböck suggest creating special passports to facilitate the mobility of specific vulnerable groups of migrants. Their proposal responds to a crucial insight, which so far has been insufficiently theorised in the normative debate on international mobility. Citizenship rights include and entail mobility rights that are enormously valuable, independently of all the other rights and privileges usually attached to the status of citizen. Moreover, there are many circumstances in which what people need and want is simply those mobility rights, without also necessarily aiming to become full members of the society they move into. In other words, often people on the move do not need (or want) citizenship in the receiving state, but need—sometimes desperately, as a matter of survival—the mobility rights they would enjoy if they were citizens of that state.

This crucial point is often neglected in the current normative theory of migration, which tends to assume that movements are meant to be permanent, and even more importantly tends to see citizenship as an indissoluble and inseparable bundle of rights which cannot be disaggregated, so that a regime of free mobility must necessarily come with some form of citizenship.

Both assumptions are unwarranted. In their discussion, Džankić and Bauböck point to various typologies of migrants who need mobility rights without also requiring the whole set of rights normally associated to citizenship. A typical example, to which we have drawn attention in our previous work, is constituted by temporary migrant workers.<sup>65</sup> Although in many cases temporary migration aims or eventually leads to permanent settlement, there are many other cases in which migrants intend to return home after a period of work or training abroad. In these cases, one of the most important rights they need is the right to move freely back and forth between the receiving country and their home country, without being subject to limitations imposed on migrants by current migration regimes.

### ***Temporary migrants' need for mobility***

A striking illustration of the importance and the effects of these mobility rights is represented by the case of temporary migration across the Mexico-US border. Massey, Durand and Pren show that the introduction of a stricter regime of immigration controls since 1986 has led to an increase in the number of the undocumented Mexicans who settled permanently in the US, and a corresponding fall in returns.<sup>66</sup> In the same years, returns and temporary forms of migration increased for documented migrants and those who had achieved citizenship status

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<sup>65</sup> Ottonelli, V. & T. Torresi (2012), 'Inclusivist Egalitarian Liberalism and Temporary Migration: A Dilemma', *The Journal of Political Philosophy* 20(2): 202-224.

<sup>66</sup> Massey, D., K. Pren, & J. Durand (2016), 'Why border enforcement backfired', *American Journal of Sociology* 121(5).

or permanent residence in the US. This is an apparently paradoxical result: evidently, acquiring citizen status in the destination country is what enabled migrants to return home. The apparent paradox is easily explained away once we consider that along with citizenship or permanent residence in the destination country also come mobility rights that allow for the freedom to travel back and forth at one's convenience, without the need to acquire special visas. This gives migrants the ability to pay frequent visits to their families and communities back home, keep alive their ties to their place of origin, plan their return at the most appropriate time and also, very importantly, decide to return back home with the confidence that the option to travel again or to visit their former destination country at their convenience will always be open to them. In contrast, those who overstay their temporary visa and irregular migrants do not have that option. They know that if they return home, either for a short visit or for good, they will not be able to re-enter the host state, or will be able to do so only at enormous costs and risks. This creates a "caging" effect that traps within the borders of the host state migrants who would otherwise engage in temporary and circular forms of migration.<sup>67</sup>

The case of the US-Mexico border, and more in general of temporary labour migration, is just an example among many others where mobility rights, which are so important in the lives of migrants, could be completely detached from full citizenship in the destination country. Another salient case mentioned by Džankić and Bauböck is that of climate refugees who need temporary resettlement in a foreign country, and more generally displaced people who need to cross international borders. In these circumstances mobility rights are not instrumental to permanent settlement and full membership in the receiving society but are instead useful precisely to facilitate return or further mobility. Džankić and Bauböck's proposal to establish a passport that allows mobility rights without conferring citizenship responds to this fundamental insight.

### ***Limitations of the Nansen passport system***

However, while we share Džankić and Bauböck's advocacy of a more liberal regime of mobility rights detached from citizenship and tailored on the needs of specific groups of vulnerable migrants, we are unsure that the best way to provide such mobility rights should be simply through the institution of a special passport.

Džankić and Bauböck point to the Nansen passport as a close historic prototype of the kind of passport they have in mind. Looking at the Nansen passport, the circumstances in which it was created and the goals it was meant to achieve may help us to focus on the reasons why under the present circumstances establishing a new special kind of passport may not be sufficient.

The Nansen passport was originally created to provide an identification document to stateless people, or people who had de facto lost their citizenship and with that the means to have their identity certified by their state of origin. The need for this form of identification had become vital after WWI, because during the war everywhere in the Western world the practice to require passports as a necessary condition for travelling had been revived, after a period of liberalisation of free movement at the local and international level.<sup>68</sup> Moreover, in the same period states had become the only source of production of passports, and passports had come to be tied to citizenship of the state. Stateless people, then, were automatically deprived not only of citizenship, but also of a necessary condition for enjoying mobility rights.

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<sup>67</sup> Rosenblum, M. (2012), 'Border Security: immigration enforcement between ports of entry', Congressional Research Service <https://hdl.handle.net/1813/78139>.

<sup>68</sup> Torpey, J. (2000), *The Invention of the Passport*, Cambridge University Press.

It is important to note, though, that the Nansen passport, by itself, did not guarantee free mobility.<sup>69</sup> As it was remarked by a commentator a few years after its introduction, without the issue of a visa or an agreement to admit its bearers without a visa, the Nansen passport was “often useless”. This is to say that although a passport was, and is, often a necessary condition for international free movement, whenever a visa is required having a passport is not sufficient to travel freely from country to country.

Still, the Nansen passport succeeded in facilitating the movement of high numbers of refugees and stateless people to countries willing to accept them. One of its main purposes was to provide them with the possibility to travel to countries where they could join the workforce and be able to sustain themselves. In a way, thus, the passport gave stateless people the chance to become immigrant workers.<sup>70</sup> However, given their status of non-citizens, bearers of the Nansen passport were guaranteed none of the welfare and employment protections enjoyed by the citizens of the receiving state.<sup>71</sup>

### ***Today, mobility rights come with protection claims***

Today's situation is of course very different to the one that saw the institution of the Nansen passport. What has critically changed in the meantime are the background international political conditions and the political and social conformation of states.

States today offer to their citizens, and by and large their permanent residents as well, a whole constellation of social, economic and political rights which were not guaranteed to citizens in the past. Destination states in the global North have developed, in other words, a welfare system of rights and entitlements that guarantees a modicum of protection to all members of the political community. This has two notable impacts on policies of entry and mobility. First, it makes inclusion more expensive for states and, second and relatedly, it makes denying rights to individuals present within the territory more problematic. States seek to control their membership very tightly partly because they find it difficult to avoid extending rights and protections to all present within their territory for long periods of time. The presence within liberal democracies of groups of people who do not enjoy welfare protections is impermissible from a normative standpoint and consequently, also politically unfeasible. This is demonstrated in the controversy surrounding temporary migration programmes, and in the difficulty states often experience in removing people they admitted temporarily once they are in the community. Presence within the state's territory normatively grounds a claim to protection which is also politically recognised as such by significant parts of the population, and also recognised by people who oppose further immigration on the basis of the costs associated to such recognition of rights.

Thus, it is hard to imagine that the kind of policy suggested by Džankić and Bauböck could be politically feasible, as it is likely that it would generate similar reactions. The categories of people that Džankić and Bauböck discuss in their opening contribution, such as temporary migrants or climate refugees, do not necessarily and only comprise people lacking citizenship and identification papers – although, of course, missing or lost identification papers may be the result of some of the conditions they find themselves in. Their plight is not generally a lack of political membership such as that suffered by the stateless people the Nansen passport was

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<sup>69</sup> Aleinikoff, A. (2018), 'Taking Mobility Seriously in the Model International Mobility Convention', *Columbia Journal of Transnational Law* 56.

<sup>70</sup> Long, K. (2013), 'When refugees stopped being migrants: movement, labour, and humanitarian protection', *Migration Studies* 1(1): 4-26.

<sup>71</sup> White, E. (2017), 'The Legal Status of Russian Refugees, 1921–1936', *Comparativ* 27(1): 18-38.

primarily conceived to address. Given this, and the changed political and social conditions, it is unlikely that states could bring in guests, without also bringing in people to whom rights are owed. As Torpey reminds us, with guest worker programmes 'we wanted workers, but got people'; similarly, the kind of policy suggested by Džankić and Bauböck gives rise to the question of what rights and protections would be owed to the policy recipients.

The central point here is that mobility rights, as important as they are, by themselves cannot be considered sufficient in meeting the needs of the migrants concerned. Of course, they are certainly better than nothing. For people stuck in very dangerous, precarious conditions the possibility to move, even if not associated to other rights, is obviously precious. But the fact that mobility rights are better than nothing and valuable to the person concerned does not mean that it is acceptable, normatively, to limit entitlements to sheer mobility rights without some other protections and provisions once the migrants are in the receiving country, nor that such a proposal would be politically feasible. Failing to provide such protections would mean engendering for people who exercise their mobility right a condition of extreme vulnerability, and this may follow from an already difficult situation the migrants are leaving behind. Many of the people belonging to the categories Džankić and Bauböck refer to will have been subject to extreme deprivation and trauma to start with and would therefore be in particular need of protection in the receiving country. Affording rights and protections does not, however, mean necessarily giving access to citizenship. As we have argued, Džankić and Bauböck are correct in claiming that the two can be separated. The point remains, however, that some rights and protections must be accorded to migrants present within the territory of the receiving state beyond mere mobility rights.

### ***Coupling mobility with differentiated entitlements***

In sum, we endorse the idea of creating a freer regime of mobility for certain groups of people for which migration serves vital goals, but who do not necessarily need citizenship in the receiving state. To that purpose, it could make sense to establish a new kind of undifferentiated passport to cover the mobility needs of all these diverse categories of migrants, given that mobility rights, per se, constitute a more or less unvaried set of rights. Moreover, it would be optimal not to tie this passport to any purpose-specific type of visa with a short and pre-determined time frame. The case of temporary migrants from Mexico illustrates how short-term and purpose-specific temporary visas may in fact hinder return and the kind of mobility that migrants really need.

However, we insist that the proposed regime must also include some substantive and effective rights and protections to migrants in addition to mobility rights. Such rights and protections should be available to migrants after they have entered the receiving state. We are not suggesting here, therefore, the institution or extension of special visa categories or temporary migration programmes similar to current provisions, but rather the institution of special protections within the architecture of rights guaranteed in the receiving state. It seems necessary that such a rights regime be differentiated on the basis of the needs and intentions of different categories of migrants, the recipients' specific conditions, their needs and vulnerabilities as well as their migratory projects. There are very significant differences both between and within the groups of migrants that Džankić and Bauböck mention. For example, temporary labour migrants and climate refugees will have different needs, specific vulnerabilities and intentions. Temporary labour migrants will most urgently need protection in the labour market, such as all the rights necessary at preventing exploitation. In the case of climate migrants, needs may be different, and may also vary depending on whether their stay is intended to be temporary, whether return is possible, and on how long their stay is likely to be, even when temporary. Moreover, in the case where return is not possible, rights will be needed that aim at integration and permanent settlement. In both categories, where return is



desired and possible, the regime of rights they will need ought instead to be one aimed at return and different from what is needed to facilitate access to citizenship.

But even within the same category, the populations discussed will not necessarily be homogenous. Climate refugees, like refugees and displaced people, will have among them not just young persons, about whom it is imaginable that, if granted mobility rights, they would be able to pay their way in the receiving country, but increasingly also very vulnerable individuals. These populations include today older men and women, individuals who survived trauma and, also, unaccompanied minors, all of whom may find survival in the receiving country very hard without appropriate, substantive protections. Moreover, even in the case of vulnerable people who move with their family who can provide for their material support through independent work, there remains the question of what other specific rights they ought to have. For example, what kind of educational provisions will be available to minors? What degree of access to health care should they receive? Similar questions can be raised in relation to other welfare provisions, such as pensions.

Therefore, it seems that what is required here to address the needs of the groups Džankić and Bauböck discuss is not simply a passport that guarantees mobility rights, nor a generic set of catchall protections, but rather a regime of special and differentiated rights that fit the specific condition of each group considered.

# Reimagining the norms of the international migration system: “Green” passports for medium skilled youth

Oreva Olakpe\* and Anna Triandafyllidou\*\*

## *The challenge*

The current state of the international legal system upholds the right of states to exclude non-citizens from entering their territory, and citizenship remains a privilege. Passports signify membership and access to certain benefits in a state and remain the mark of an exclusionary system. Additionally, the impact of colonialism has underwritten the economic disparities, asymmetries of power, and the structural violence that created the chasm between developed and developing countries. The result is that poorer countries, usually in the global South, have “less desirable” passports, and the international migration system is discriminatory towards migrants from poor countries.

The main question that arises from the compelling call by Jelena Džankić and Rainer Bauböck is whether states will be willing to shed the exclusionary and hegemonic norms that dictate the exclusion of non-citizens, particularly if they are from poorer countries or if they are deemed to have “lesser” skills. At the moment, the norms around citizenship and borders indicate that the answer may be negative. Nevertheless, using the case of EU-Africa migration partnerships we can perhaps imagine a shift in policy and practice. We are suggesting to replace the nationality principle (signifying the legal relationship between a state and an individual) with a passport that prioritizes the vulnerability of the person as well as their potential. We thus propose a special set of “green” passports that are available to citizens from developing countries who are vulnerable and likely to engage in irregular migration.<sup>72</sup> Let us explain our proposal in some more detail.

## *The context*

Stemming irregular migration and returning undocumented migrants have become key political and policy priorities for the EU already since the late 2000s (with the Pact on Migration and Asylum put forward by the then French President Nicolas Sarkozy in 2008<sup>73</sup>) and even more so since the 2015 refugee emergency and the new interest in improving EU relations with African countries (see also the Valetta summit in 2015<sup>74</sup>). Within this framework, stemming irregular migration has become the centrepiece of EU-Africa relations. This is effectively the

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<sup>72</sup> Triandafyllidou, A. et al. ‘Exploring The Links Between Enhancing Regular Pathways and Discouraging Irregular Migration: A Discussion Paper to Inform Future Policy Deliberations’, International Organization For Migration (IOM), Discussion Paper, 2019, [Global Governance Programme], [Cultural Pluralism].

<sup>73</sup> ‘The European Pact on Immigration and Asylum.’ Euractiv 18 September 2008, <https://www.euractiv.com/section/social-europe-jobs/linksdossier/the-european-pact-on-immigration-and-asylum/>.

<sup>74</sup> ‘Valletta Summit on migration, 11-12 November 2015’, European Council, <https://www.consilium.europa.eu/en/meetings/international-summit/2015/11/11-12/>.

context within which the idea of EU-Africa migration partnerships was conceived.<sup>75</sup> Numerous scholars have studied the impact of the EU's fixation on return, readmission, and border control initiatives in Africa, and the reasons why migration partnerships have not been able to take off since they were devised; the asymmetric nature of the relationship between EU Member States and African countries remains at the root of the problem.<sup>76</sup>

The dichotomies between origin and transit versus destination states imitates post-colonial hierarchies. Additionally, the domination of destination countries that have profited from colonialism and post-colonial structures in the international system, as well as the involvement of international organisations in global migration governance decision-making processes, create an outcome where a true partnership between African states and EU member states is implausible. African countries benefit immensely from remittances and a young and large diaspora. As a result, enforced return and readmission, as well as border control measures are not effective in the long-run.<sup>77</sup> Instead, the opening of new legal pathways to migration for poorer people is more sustainable and mutually beneficial.<sup>78</sup> By ignoring the goals and objectives of African states, the EU is rendering its proposed partnerships ineffective.

### ***A bold proposal: Green passports for medium skilled youth***

With these factors in mind, we attempt to imagine how one could create special passports for vulnerable groups that would provide for opportunity for those who need it most, as Džankić and Bauböck advocate in their opening piece.

The proposal for special passports for vulnerable groups could work within existing migration governance initiatives such as the EU-migration partnerships. The EU is already actively involved in migration dialogues with countries in West Africa but has not addressed the issue of legal pathways for poorer and "lesser" skilled migrants in the negotiations around migration partnerships. However, a special passport for vulnerable people (carrying further the idea already put forward in this forum by John Torpey) who would be at risk of migrating irregularly and who want to work in Europe but do not meet the high specifications for the existing permit categories, could be a potential solution. The question of course would be on what basis to issue such passports. Unlike Diego Acosta we have in mind here passports for people who are not normally entitled to enhanced mobility rights in their country or region of destination. We rather focus on those who have the least mobility rights in the current system.

One possibility is a regional pilot for young people stemming from existing EU and EU member state programs. Special passports can play a role in EU-Africa migration partnerships and bilateral schemes between EU member states and West African countries. This regional pilot offering "green" passports could be in the form of a 'human development lottery' similar

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<sup>75</sup> Carrera, S., R. Radescu & N. Reslow (2015), 'EU external migration policies: A preliminary mapping of the instruments, the actors and their priorities', *International European Law*.

<sup>76</sup> De Guerry, O. & A. Stocchiero (2018), 'Partnership or Conditionality? Monitoring the Migration Compacts and EU Trust Fund for Africa', Concord.; Beauchemin, C. (2018), *Migration between Africa and Europe* Springer; Brambilla, C. (2014), 'Shifting Italy/Libya Borderscapes at the Interface of EU/Africa Borderland: A "Genealogical" Outlook from the Colonial Era to Post-Colonial Scenarios', *ACME: An International Journal for Critical Geographies*, 13(2): 220-245.

<sup>77</sup> Adam et al. (2020) 'West African interests in (EU) migration policy. Balancing domestic priorities with external incentives', *Journal of Ethnic and Migration Studies* 46(15): 3101-3118.

<sup>78</sup> Sundberg Diez, O. (2019), 'Diminishing safeguards, increasing returns: Non-refoulement gaps in the EU return and readmission system' European Policy Centre Discussion Paper.

to the visa scheme put forth by McAuliffe and not too distant indeed from the US diversity visa lottery program.<sup>79</sup>

Firstly, it would be available to young people in participating states and managed through a centralised ballot-based selection.<sup>80</sup> The selection criteria would have to exclude high-skilled individuals. This would be necessary to ensure that people who participate in the ballot would be those who are at risk of taking irregular pathways and that high-skilled applicants would not crowd out the people it is intended to help. The pilot would target young people between 18 and 35 years of age, who are medium-skilled (i.e. have secondary education) or have specific vocational work experience and hence a profession. Security and health checks are ingrained into immigrations processes already so integrating them into the passport scheme should be possible. Such a passport lottery would have an annual quota set by participating EU member states, based on unique factors including labour market demand, or hardship at the origin country.<sup>81</sup> The passport lottery pilot would allow migrants who are selected to bring their immediate family members with them (spouse and children).

In line with McAuliffe's suggestions, the scheme could be implemented at the national level in participating African countries through the existing transnational frameworks developed for EU-Africa migration partnerships, as well as other bilateral migration governance schemes between EU member states and West African countries. Additionally, it should also be linked to existing community-based schemes in states of origin, which are already being implemented by civil society and religious organisations cooperating with governments and international organisations to support migrants who are vulnerable at the local level (for example, *Idia Renaissance* in Benin City, Nigeria<sup>82</sup>). People who are returned to their country of origin through voluntary assisted humanitarian return schemes (including the EU-IOM Migrant Protection and Reintegration Initiative in West Africa for example<sup>83</sup>) are actually among those who are most likely to try and migrate again as the reasons for which they migrated in the first place remain compelling. A special passport lottery would bolster these "lesser" skilled or poorer migrants by giving them opportunities for regular migration. When people see that they have options to migrate with dignity and safety, they would be less likely to rely on smugglers or fall into human trafficking traps.

The details and ideas of a regional pilot for "green passports" for "lesser" skilled migrants requires extensive expansion and development. However, the pandemic has shown that behind the economic prowess of the powerful countries in the global North lies the labour of millions of migrants from developing countries working in essential sectors including agriculture, healthcare, retail, food, and transportation. Without their contributions, the impact of the pandemic would have been far worse.<sup>84</sup> Yet, even though it is common knowledge that "lesser" skilled migrant workers are crucial, states are still unwilling to open up pathways to

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<sup>79</sup> McAuliffe, M. (2017) 'The Human Development Visa Scheme: Applying Practical and Sustainable Policy Levers to Actively Encourage Migrants to Undertake Safe, Orderly and Regular Migration', in McAuliffe, M. and M. Klein Solomon (Conveners) (2017), *Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration*, IOM: Geneva.

<sup>80</sup> Triandafyllidou, A., Bartolini, L. and C.F. Guidi (2019), 'Exploring the Links Between Enhancing Regular Pathways and Discouraging Irregular Migration', IOM: Geneva.

<sup>81</sup> Ibid.

<sup>82</sup> 'Our Projects', IDIA RENAISSANCE || Home, <http://www.idia-renaissance.org/>.

<sup>83</sup> 'EU-IOM Joint Initiative for Migrant Protection and Reintegration', Regional Office for West and Central Africa, <https://rodakar.iom.int/eu-iom-joint-initiative-migrant-protection-and-reintegration>.

<sup>84</sup> Reid, A., E. Ronda-Perez, & M. Schenker (2021), 'Migrant workers, essential work, and Covid-19', *American Journal of Industrial Medicine* 64(2): 73-77.

citizenship or long-term residence for them. The allure of exclusivity of membership and access to the state is still an overwhelming reality on the ground.

In the end, recommendations for the creation of long-term regular migration pathways will benefit both destination and origin countries. These recommendations, as well as many others made by migration scholars and practitioners such as for instance a voluntary responsibility sharing scheme among industrialised countries as argued by Michael Doyle, Janine Prantl and Mark James Wood in this debate, hold the potential to contribute to the levelling of the economic disparities between developed and developing countries (rather than the preservation of those disparities) in the long-run. However, states have to be ready to take the first steps towards changing exclusionary norms and practices in migration law and policy.

## Who needs mobility without human rights?

**Yasemin Nuhoğlu Soysal\***

The “birthright lottery” not only sorts people across nation-states but also determines their international mobility rights.<sup>85</sup> Ongoing wars and persecution coupled with environmental and resource pressures and the global pandemic bring into focus the inequalities it foments. Issuing “tailor-made passports,” as envisioned by Jelena Džankić and Rainer Bauböck, could bring temporary relief for some who are in dire need of moving for reasons of self-protection, but their proposal also raises broader questions regarding the political and normative underpinnings of a solution in the long run. The authors invite the respondents to comment not only on grounds of principle but also possible practical solutions; I do not think these can be separated from each other. My two points below thread through both these concerns.

### ***What should special mobility passports entail?***

The starting point for Džankić and Bauböck is “necessity-based mobility”. This is different from having mobility as a matter of individual right (a human rights prerogative) or based on nationality (a nation-state prerogative). It follows on from the instrumental turn of citizenship<sup>86</sup>, where passports are decoupled from “genuine links” to the territory or nation.<sup>87</sup> Passports are already sold to rich foreigners and granted to those with dormant ancestral ties, without expectation of membership.<sup>88</sup> Džankić and Bauböck’s proposal has the possibility of turning the premise of these practices on its head, moving mobility from being a positional good to a necessity-based distribution.

Džankić and Bauböck have a broad understanding of the vulnerable groups who should be granted such mobility, such as refugees in camps in the Global South, asylum seekers on the borders of wealthy states in the Global North, environmentally displaced persons, and temporary labour migrants. Although the vulnerability of each of these groups is obvious, access to mobility is not necessarily the answer in all these cases. Special passports, to the extent that rich and powerful states also recognise them, would certainly be an improvement on the current functioning of the international mobility regime, which forces those fleeing wars, armed conflicts, and environmental disasters to desperate journeys and devastating separation from their families. On the other hand, the vulnerability of economic migrants such as temporary migrant labourers and border commuting workers does not often stem from their lack of international mobility, but rather their lack of labour rights as well as their lack of access

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<sup>85</sup> Shachar, A. (2009), *The Birthright Lottery*, Harvard University Press; Kochenov, D. (2019), *Citizenship*, MIT Press.

<sup>86</sup> Joppke, C. (2019), ‘The instrumental turn of citizenship’, *Journal of Ethnic and Migration Studies*, 45(6): 858-878.

<sup>87</sup> Bauböck, R. (2019), ‘Genuine links and useful passports: evaluating strategic uses of citizenship’, *Journal of Ethnic and Migration Studies*, 45(6): 1015-1026.

<sup>88</sup> Džankić, J. (2019), *The Global Market for Investor Citizenship*, Palgrave Macmillan; Harpaz, Y. (2019), *Citizenship 2.0: Dual Nationality as a Global Asset*, Princeton University Press.

to social security and personal freedoms in the countries in which they are employed.<sup>89</sup> As Valeria Ottonelli and Tiziana Torresi point out, mobility options are not enough for temporary migrant workers who need special rights. Holding special passports that would allow them to move to another country is unlikely to make them less vulnerable, unless standard social security rights, equal pay, and labour protections are established.

Regarding the rights to be attached to the special passports, Džankić and Bauböck are vague. They emphasize the “choice” of destination and thus the opportunities that such passports would provide. I find this a rather limited way forward. In my view, the right to mobility cannot be separated from the right to a decent life. Without a set of standard rights and protections (right to shelter, work, healthcare, and education) attached to it, the proposed scheme would place the burden on the individual and their capabilities, resources and connections for materialising a decent existence. The wealthy can pay their way to housing, health, and education but the disadvantaged would be “stuck” with their newly gained mobility. The Nansen Passport, which Džankić and Bauböck reference as a model, allowed refugees to move on to other destinations where they could join family or find employment. States are much more “selective” today in granting access to their territory and labour markets.<sup>90</sup> Some European countries for example, allow asylum seekers to take up employment and send their children to school but with time restrictions and other conditions attached (e.g. taking jobs that cannot be filled by the domestic workforce). A special passport scheme would need to go beyond such country specific hurdles for it to function. Substantive rights, as the passports themselves, can still be granted temporarily—but if passport holders find work and establish themselves in the country, there is no reason why this should not lead to the right to longer-term settlement, with or without the granting of citizenship. The path to citizenship does not need to be part of the scheme.

### ***What should a global regime entail?***

In putting their proposal forward, Džankić and Bauböck reject a number of alternatives – I think too quickly. Among the commentators, regional forms of mobility (Acosta), citizenship extension (Buxton), and global responsibility sharing (Doyle et al.) find resonance. I am in favour of the global option for which, as has been pointed out, there are various blueprints in place (For example, the Global Compact on Migration, the Global Compact on Refugees, and the Model International Mobility Convention). Although criticised for being legally non-binding (but still founded on legally binding human rights commitments), these frameworks nevertheless set standards and normative legitimacy, and as such have potential for shaping the international agenda and governance.<sup>91</sup> Yet as with any other international frameworks, they should be considered within the political context of the world order in which they are produced.

The postwar refugee regime was a product of the liberal world order established in the aftermath of the war and its institutions of national sovereignty on the one hand, and multilateralism and international cooperation on the other. Initially it was shaped by Cold War politics and Western states’ self-identification as the protectors of liberal values and

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<sup>89</sup> ‘Singapore’s migrant workers have endured interminable lockdowns’, *The Economist*, 19 June 2021, <https://www.economist.com/asia/2021/06/19/singapores-migrant-workers-have-endured-interminable-lockdowns>.

<sup>90</sup> de Haas, H. et al. (2018), ‘Growing Restrictiveness or Changing Selection? The nature and evolution of migration policies’, *International Migration Review* 52(2): 324-367.

<sup>91</sup> Guild, E. et al. (2019), ‘From Zero to Hero? An analysis of the human rights protections within the Global Compact for Safe, Orderly and Regular Migration (GCM)’, *International Migration* 57(6): 43-59.

institutions. Its scope was limited to the settlement of populations displaced by WWII and those ‘fleeing persecution by communist regimes’.<sup>92</sup> Large numbers of refugees from “the Eastern Bloc” were thus settled in the West through this scheme. Only with the institutionalisation of the global human rights regime and massive decolonisation in the 1960s did the refugee regime acquire a more universalistic stance. Its coverage over time extended beyond Europe and political persecution to include wider categories of refugees emerging due to ethnic conflict, domestic violence, and natural disasters. As the regime became more inclusive and universalistic however, Western powers externalised their commitments in the same way as they ‘externalised their colonial memory’.<sup>93</sup> As a consequence, disproportionately large numbers of asylum seekers and refugees are now placed in the Global South, in countries that have a lesser capacity to protect vulnerable populations.<sup>94</sup> While Western countries obsessively guard their boundaries, the humanitarian and financial support they provide falls short of what is needed to support the refugees and host countries in the South.

On the one hand, the establishment of a more inclusive global refugee regime (moving beyond its cold-war imperatives), and the link between broader human rights concerns and asylum, strengthened the liberal underpinnings of the world order. On the other hand, the gap in its international governance and practices has generated significant legitimisation problems, as argued by Börzel and Zuern.<sup>95</sup> They contend that, in the post-Cold War period, the systematic shift from multilateralism and international cooperation to a more “intrusive” and “double standard” liberalism brought on the legitimacy crisis and contestation of the liberal order and its institutions, within and without. Accordingly, the paralysis of the current refugee system is not simply because ‘its scope is limited’ (Džankić and Bauböck), but because its legitimacy is compromised by the very Western states that championed its globalisation.

### **Creating political momentum for collective futures**

Moving forward, the prospect of a sustainable refugee and migrant protection regime, both as a short-term solution (e.g., special passports) and in the long term (e.g. the Global Compacts), is likely to depend on a more inclusive legitimacy and a substantive (re-)focus. Two issues have to be addressed:

- a) The norms of asylum and protection of refugees are highly institutionalised. However, the sharing of responsibility is largely “discretionary,” leading to “operational deficiencies”.<sup>96</sup> The Global Compacts for Migration and Refugees are a comprehensive effort toward global collaboration, firmly grounded in existing human rights standards. Nevertheless, they express the “political will” of those states which sign them, confirming the unresolved tension between the two principles of the liberal world order, state sovereignty and human rights, both re-interpreting each other.<sup>97</sup> While an “imposed”

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<sup>92</sup> Cohen, G. (2011), *In War's Wake: Europe's Displace Persons in the Postwar Order*, Oxford University Press.

<sup>93</sup> Soysal, Y. & S. Szakacs, (2010) ‘Reconceptualizing the Republic: Diversity and Education in France 1945-2008’, *Journal of Interdisciplinary History* 41(1): 97-115.

<sup>94</sup> ‘Global Trends in Forced Displacement –2020’, UNHCR, <https://www.unhcr.org/60b638e37/unhcr-global-trends-2020>.

<sup>95</sup> Börzel, T. & M. Zürn (2021), ‘Contestations of the Liberal International Order: From Liberal Multilateralism to Postnational Liberalism’, *International Organization* 75(2): 282-305.

<sup>96</sup> Betts, A. (2015), ‘The Normative Terrain of the Global Refugee Regime’, *Ethics & International Affairs* 29(4): 363-375; Hathaway, J. (2018), ‘The Global Cop-Out on Refugees’, *International Journal of Refugee Law*, 30(4): 591-604.

<sup>97</sup> Guild, E. et al. (2019), ‘From Zero to Hero? An analysis of the human rights protections within the Global Compact for Safe, Orderly and Regular Migration (GCM)’, *International Migration* 57(6): 43-59.



system may not be in the cards (Doyle et al.), for any proposed scheme within the context of the Compacts or beyond to carry legitimacy and be operational, Western states' willingness to treat the states in the South as equal stakeholders and their commitment to contribute in a systematic and proportionate manner are pivotal. Resettlement quotas, short-term humanitarian visa/passport schemes, direct aid, and long-term development investment could all be part of operational strategies as long as states take responsibility for the common approach.<sup>98</sup>

b) The "collective memory" of past national atrocities was a crucial cultural catalyst in the adoption of the 1951 Refugee Convention.<sup>99</sup> The Convention remains a robust source of norms, and its interpretation expanded over time to become more inclusive. Building on it, it is possible to imagine climate and environmental challenges, as they are a threat to global security and entangle countries in a collective future, reinvigorating mobilisation for global action and cooperation. Environmental causes account for an increasingly bigger proportion of displacements and migrations, and are already incorporated into national legislation in certain countries (Acosta). They affect not only distant places but those closer to home, not only global but also national stability and interests. Importantly, such a re-focus could help go beyond the forced dichotomies between the North and South, between asylum/refugee and economic migrant categories, between mobility and protection.<sup>100</sup> With a growing global movement and awareness supporting it, a collective future optic might have the best chance of creating the political momentum necessary for long term legitimacy and cooperation, despite likely opposition in many quarters.

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<sup>98</sup> Betts, A. & P. Collier (2015), 'Help Refugees Help Themselves: Let Displaced Syrian Join the Labor Market', *Foreign Affairs* 94(6): 84-92; Gammeltoft-Hansen, T. & N. Tan (2017), 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy', *Journal on Migration and Human Security* 5(1): 28-56.

<sup>99</sup> Levy, D. & N. Sznajder (2010), *Human Rights and Memory*, Pennsylvania State University Press.

<sup>100</sup> Awad, I. & U. Natarajan (2018), 'Migration Myths and the Global South', *The Cairo Review of Global Affairs*, <https://www.thecairoreview.com/essays/migration-myths-and-the-global-south/>.

## Special mobility rights: Do they protect vulnerable groups or create new vulnerabilities?

**Julija Sardelić\***

In these times when the COVID-19 pandemic and its related border closures have highlighted even more how mobility is a commodity that only a small proportion of the world population can practice and afford, Džankić and Bauböck have opened up an important debate on mobility out of necessity rather than as a luxury. COVID-19 related border closures have left, for example, asylum seekers and refugees in an even more vulnerable position than they had been in before in their indefinite “waiting room” status for resettlement or protection (as examined by Doyle, Prantl and Wood in this debate).<sup>101</sup> On the one hand, as Džankić and Bauböck pointed out, in many places citizenship has become a commodity. The super-rich people can simply buy passports as an instrumental investment in mobility without necessarily wanting to be members of societies in the states that have issued those passports. On the other hand, for those desperately needing mobility to save their lives, be it fleeing from violent conflicts or their sinking islands in the Pacific due to climate change, such mobility remains inaccessible. That is why the proposal for a special mobility passport without necessarily granting membership rights brought forward by Džankić and Bauböck is not only urgent in terms of theoretical contemplation, but also in thinking about how this could be turned into a practical reality to help make mobility accessible to those who desperately need it.

Though I support the idea of a special passport for vulnerable groups, especially when it becomes a matter of saving their lives, I wonder whether expanded mobility rights are enough to address the complexities that different positions marked by vulnerability bring with themselves. That is why in this commentary I would like to bring forward two examples where extended mobility rights for vulnerable groups were an important step. However, in these cases they were not enough to offer meaningful protection for these groups, and created new forms of inequalities for them. The first example is the position of Romani minorities who gained new mobility rights by becoming EU citizens. The second is the Temporary Protection Directive that the EU introduced to offer immediate protection in case of a large number of asylum seekers.<sup>102</sup>

### ***EU free movement rights generated new discrimination of Romani minorities***

In one of the chapters of my recently published book *The Fringes of Citizenship*, I look at how the position of Romani minorities from Central and Eastern Europe has changed when they became EU citizens with the 2004 and 2007 EU Enlargements.<sup>103</sup> With EU citizenship Roma, as all other EU citizens, also gained new mobility rights under the EU Free Movement Directive (2004/38/EC). These rights seemed like a long-awaited promise. The Council of Europe has

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<sup>101</sup> ‘Covid-19 Migrants, Refugees and Asylum’, Council of Europe, <https://www.coe.int/en/web/portal/covid-19-migrants-refugees-and-asylum>.

<sup>102</sup> ‘Temporary Protection’, Migration and Home Affairs, [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection_en).

<sup>103</sup> Sardelić, J. (2021), *The Fringes of Citizenship: Romani minorities in Europe and civic marginalization*, Manchester University Press.

declared Roma to be Europeans par excellence<sup>104</sup>: 'Apart from constituting a minority in most member states, they constitute, more than any other national minority, a veritable European minority. While national minorities have a country of origin apart from a country of residence the Roma have no country of origin to which they can refer. They are [...] Europeans par excellence, transcending territorial limits without nationalistic pretensions or prejudices'.<sup>105</sup> Before the fall of the Berlin Wall, many socialist regimes, such as socialist Czechoslovakia, had rigorously controlled movement and mobility of their Romani citizens in what amounted both to ethnic discrimination as well as socio-economic disadvantage.<sup>106</sup> The assumption was that with Roma becoming EU citizens, this would bring new opportunities for Europe's most socio-economically disadvantaged ethnic minority.

Yet according to the EU's Fundamental Rights Agency (FRA), even as EU citizens 'many EU Roma face life like the people in the world's poorer countries'.<sup>107</sup> The 2016 FRA survey indicated that around 80% of Roma in the European Union remain at the risk of poverty.<sup>108</sup> EU free movement rights did not improve their position as a vulnerable group. When some Romani individuals used their EU mobility rights to travel to the older EU Member States, they found out that rather than new opportunities and protection, they instead faced new forms of discrimination. Although they enjoy mobility rights as EU citizens, in the 2010 so-called "L'Affaire des Roms", French authorities have found new ways how to expel unwanted Romani citizens from their territory and have approximated their position to third-country nationals with regard to collective expulsions.<sup>109</sup> Mobility rights did not live up to the promise of protection for Romani EU citizens. This example also shows that we cannot assume that when vulnerable populations are awarded equal protections, they will be able to make use of them in practice.

### ***Hyper-temporary transit instead of temporary protection in the 2015 "refugee crisis"***

The second example where extending mobility rights for vulnerable populations did not necessarily bring enhanced protection is the case of 2015/16 movement of refugees and asylum seekers to Europe: Why did the EU Member States not invoke the Temporary Protection Directive although some scholars argued it was the right time to do so.<sup>110</sup> The Temporary Protection Directive was adopted in the context of the Kosovo war when almost 2 million people ended up displaced and in need of immediate protection. According to the European Commission, 'Temporary protection is an exceptional measure to provide immediate and temporary protection to displaced persons from non-EU countries and

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<sup>104</sup> 'Roma as a European minority in the context of the Framework convention for the protection of national minorities', Council of Europe, 1993, <https://rm.coe.int/16806be3f4>.

<sup>105</sup> Ibid.

<sup>106</sup> See Donert, C. (2017), *The Rights of the Roma: The Struggle for Citizenship in Postwar Czechoslovakia*, Cambridge University Press.

<sup>107</sup> 'Many EU Roma Face Life like People in the World's Poorer Countries', European Union Agency for Fundamental Rights, 22 Nov. 2019, <https://fra.europa.eu/en/news/2018/many-eu-roma-face-life-people-worlds-poorer-countries>.

<sup>108</sup> '80% Of Roma Are at Risk of Poverty, New Survey Finds', European Union Agency for Fundamental Rights, 1 Dec. 2021, <https://fra.europa.eu/en/news/2016/80-roma-are-risk-poverty-new-survey-finds>.

<sup>109</sup> 'L'Affaire Des Roms: A Challenge to the EU's Area of Freedom, Security and Justice', CEPS, 8 April 2019, <https://www.ceps.eu/ceps-publications/laffaire-des-roms-challenge-eus-area-freedom-security-and-justice/>.

<sup>110</sup> 'Temporary Protection', Migration and Home Affairs, [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection_en); Ineli-Ciger, M. 'Time to Activate the Temporary Protection Directive; Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe', *European Journal of Migration and Law* 18(1): 1-33.

those unable to return to their country of origin. It applies when there is a risk that the standard asylum system is struggling to cope with demand stemming from a mass influx risking a negative impact on the processing of claims'.<sup>111</sup> The 2015/16 Syrian “refugee crisis” seemed to be a similar context where EU Member states could have used the Temporary Protection Directive. Instead, what most EU as well as EU-neighbouring countries affected by the movement of refugees did was to create a sort of humanitarian corridor and facilitated transit migration through their territories to Germany. The reason for allowing such mobility (in some cases introducing new and amending legislation to support it) did not lie only in humanitarian inclinations of the countries on the so-called Western Balkan Route, but also in their unwillingness to offer protection on their territory even on a temporary basis.<sup>112</sup> Temporary protection has been replaced with hyper-temporary transit, as I have argued in my previous work.<sup>113</sup>

To conclude, both cases I have examined show that extending mobility rights should be something to strive for, but it does not necessarily offer the protections that some vulnerable populations need. In certain cases, as also discussed by John Torpey and Yasemin Soysal in this debate, extended mobility rights could address the position of vulnerable groups in the short term, but in the long term – when they remain an isolated measure – they can even create new hierarchies of disadvantage.

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<sup>111</sup> ‘Temporary Protection’, Migration and Home Affairs, [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection_en).

<sup>112</sup> Stanojoska, A. (2018), ‘The “Refugee Crisis” in Europe: Was Macedonia Prepared?’ In *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis*, Brill | Nijhoff; [https://reliefweb.int/report/world/refugees-and-migrants-western-balkans-route-regional-overview-september-december-2017?gclid=CjwKCAjwXo6lBhBKEiwAXSYBs9oZuecUHI5EO8vjqfqpvcCHNF3xNYi6r6\\_GI-83oEHUDp7-8-pr0BoCkbwQAvD\\_BwE](https://reliefweb.int/report/world/refugees-and-migrants-western-balkans-route-regional-overview-september-december-2017?gclid=CjwKCAjwXo6lBhBKEiwAXSYBs9oZuecUHI5EO8vjqfqpvcCHNF3xNYi6r6_GI-83oEHUDp7-8-pr0BoCkbwQAvD_BwE).

<sup>113</sup> Sardelić, J. (2017), ‘From temporary protection to transit migration: responses to refugee crises along the Western Balkan route’, EUI RSCAS, 2017/35, Global Governance Programme-272, Cultural Pluralism.

## Membership without mobility: The counterfactual as fact

Leanne Weber\*

In this article I contribute to the debate sparked by Jelena Džankić and Rainer Bauböck's proposal for the reintroduction of Nansen-style passports, by taking something of a detour, rather than tackling their arguments head-on. Several authors have responded by emphasising that vulnerable groups need protections beyond permission to enter – protections that are often reserved for members (see Buxton; Ottonelli and Torresi; Soysal).

But, turning that point on its head, what if even full membership no longer conferred a guarantee of mobility? We do not need to imagine what this counterfactual might look like, since that is exactly what has transpired in Australia in response to the global coronavirus emergency.

### *Border control as biosecurity*

Australia has a longstanding reputation for exceptionalism in relation to border control, having implemented extremely harsh measures against asylum seekers in the name of national security with scant consideration of international obligations. Against this backdrop, it is hardly surprising that the Australian government would view its national border as a key site for the production of biosecurity, with strict border controls emerging early in the pandemic as the main arm of its public health response.<sup>114</sup>

It has also been unsurprising to many that these measures have fallen unequally across different groups of non-citizens wishing to enter Australia. In the early stages of the pandemic, arrivals were curtailed selectively from specific countries, ostensibly due to risks posed to public health, but with an inconsistency that reflected pre-existing discriminatory practices.<sup>115</sup> Once the border closed more comprehensively, individual exemptions from travel restrictions were required in addition to visas.<sup>116</sup> Only 7.2% of exemption applications from Indian citizens for entry to Australia were approved between August 2020 and March 2021 (prior to the emergence of the delta variant), while applications from the United Kingdom and South Africa – both heavily affected by the coronavirus – succeeded 23.4% and 30.7% of the time. While these statistics may mask differences in reasons for travel, racism has also been cited as

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<sup>114</sup> Džankić, J. & L. Piccoli, 'Citizenship, Migration and Mobility in a Pandemic', *Citizenship, Migration and Mobility in a Pandemic*, <https://www.cmm-pandemic.com/>.

<sup>115</sup> Weber, L. (2020), 'Could the Covid-19 re-bordering of Australia change it for the Better', *Lens Monash University*, <https://lens.monash.edu/@coronavirus-articles/2020/04/09/1380025/will-covid-19-re-border-australia-for-the-better>.

<sup>116</sup> 'Travel Restrictions and Exemptions', *Home Affairs*, <https://covid19.homeaffairs.gov.au/travel-restrictions>.

contributing to these discrepancies.<sup>117</sup> Even those already holding humanitarian visas that confer permanent residency from the time of arrival have been denied entry.<sup>118</sup>

In relation to Džankić and Bauböck's concept of "necessary mobility", the Australian government has maintained tight control over what cross-border mobility it considers necessary. As John Torpey has noted, 'the criterion of necessity is inherently slippery', leaving space for governments to impose their own interpretations. But, beyond this strict control in relation to non-citizens, it has come as a shock to many that the government has made the same decisions in relation to the mobility of citizens.

### **Generalised caps on entry**

From early in the pandemic, opportunities for Australians to return home have been limited indirectly through caps on the entry of international travellers that have been justified on the grounds that quarantine facilities are limited. In addition, the closure of borders to non-citizens has had the effect of dramatically reducing available commercial flights on many routes and pricing them out of the reach for many travellers, regardless of nationality. Repeated calls for more subsidised repatriation flights and the expansion of quarantine facilities to assist returning Australians have gone largely unheeded. An estimated 34,000 Australian citizens remained "stranded" overseas as of July 2021. In fact, in that month the federal government reduced the quota for international arrivals by half.<sup>119</sup>

Figures from the Australian Bureau of Statistics (ABS) for June 2021 show that New Zealand citizens (who have special entry arrangements under the longstanding Trans-Tasman Travel Agreement, and have enjoyed intermittent access to a relatively open "travel bubble" during the pandemic) were more likely than Australian citizens to enter Australia during that month, making up 42% of all international arrivals.<sup>120</sup> This compared with 39% for Australian passport holders and 9% for permanent visa holders.

Human rights advocates have argued that the arrivals cap breaches Article 12 of the International Covenant on Civil and Political Rights (ICCPR) which guarantees the right to enter one's country of citizenship.<sup>121</sup> Moreover, research into the drafting of the treaty indicates that 'the grounds for restricting this right were intended to be narrowly construed and specifically excluded health grounds, for which other measures such as quarantine should be

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<sup>117</sup> McAdam, J. and R. Jefferies. 'Why the Latest Travel Caps Look like an Arbitrary Restriction on Australians' Right to Come Home.' *The Conversation*, 14 October 2021, <https://theconversation.com/why-the-latest-travel-caps-look-like-an-arbitrary-restriction-on-australians-right-to-come-home-161882>.

<sup>118</sup> Feng, L. 'This Family Is among 8,000 Refugees Left Stranded Indefinitely by Australia', *ABC News*, 11 July 2021, <https://www.abc.net.au/news/2021-07-11/covid-border-restrictions-strands-humanitarian-visa-holders/100283502>; 'Refugee and Humanitarian Visa Options', <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-finder/refugee-and-humanitarian>.

<sup>119</sup> McAdam, J. and R. Jefferies. 'Why the Latest Travel Caps Look like an Arbitrary Restriction on Australians' Right to Come Home.' *The Conversation*, 14 October 2021, <https://theconversation.com/why-the-latest-travel-caps-look-like-an-arbitrary-restriction-on-australians-right-to-come-home-161882>.

<sup>120</sup> 'Overseas Travel Statistics, Provisional, June 2021', Australian Bureau of Statistics, <https://www.abs.gov.au/statistics/industry/tourism-and-transport/overseas-travel-statistics-provisional/latest-release>.

<sup>121</sup> 'International Covenant on Civil and Political Rights.' OHCHR, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

available'.<sup>122</sup> But, without effective apparatus to enforce human rights in Australia, legal challenges in Australian courts have so far failed.

The arrival of non-citizens – including celebrities, but also temporary workers and business travellers – has often been construed in public debate as “taking a place” in quarantine that should rightfully be allocated to a returning citizen. This has prompted complaints about “queue jumping”, reminiscent of the longstanding discourse around asylum seekers. Stranded Australians have, superficially at least, become “Covid refugees” – immobilised in situations of dislocation and sometimes danger by their own country’s border control policies; separated from their families and expected to wait in an ill-defined “queue” for an opportunity to enter<sup>123</sup>

### **Legal bans on outward travel**

The Australian government has acted even more explicitly to restrict the *departure* of citizens. This has been enacted in law through travel bans authorised under Biosecurity Determination 2020 which can only be circumvented by obtaining an individual exemption.<sup>124</sup> The bans have not been instigated out of concern for public health in receiving states but, once again, to limit the burden on quarantine requirements at the time of re-entry and reduce the risk of initiating new outbreaks in Australia.

Citizens effectively need to obtain an exit visa to travel overseas, and these will only be granted in exceptional circumstances for pressing personal or business reasons. Once again, it is the Australian government that decides *whose* outward travel is necessary. As of August 2020 only a quarter of exemption requests had been granted – others apparently failing to convince border officials that there were ‘exceptional and compelling’ grounds for travel.<sup>125</sup> Unsurprisingly, data obtained on applications to leave from August 2020 to April 2021 showed that those engaged in critical industries or business activity had the highest success rate at 55.2%, while applications for urgent and unavoidable personal travel fared the worst at 19.6%.<sup>126</sup> This extraordinary policy has created heart-breaking stories of family separation that have primarily affected naturalised citizens, including inability to attend funerals or care for elderly parents living abroad.

An analysis of exemption applications from August 2020 to April 2021 found major variations in the success of applications to leave, depending on destination.<sup>127</sup> India, China and the UK were the most frequently cited destinations. India had the lowest success rate of

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<sup>122</sup> McAdam, J. and R. Jefferies. ‘Why the Latest Travel Caps Look like an Arbitrary Restriction on Australians’ Right to Come Home.’ *The Conversation*, 14 October 2021, <https://theconversation.com/why-the-latest-travel-caps-look-like-an-arbitrary-restriction-on-australians-right-to-come-home-161882>.

<sup>123</sup> Conifer, D. ‘More than 900 Australians Have Died from Covid-19 – but There’s Been a Hidden Toll’, *ABC News*, 5 Aug. 2021, <https://www.abc.net.au/news/2021-08-05/over-50-australian-citizens-died-abroad-from-covid-19/100354220>; Hadid, D. ‘Aussies Stranded Abroad Include Hundreds of Kids, Folks Short on Cash’, *NPR*, 4 July 2021, <https://www.npr.org/sections/goatsandsoda/2021/07/04/1010891117/aussies-stranded-abroad-include-hundreds-of-kids-folks-short-on-cash>.

<sup>124</sup> ‘Covid-19: Leaving Australia’, *Smartraveller*, <https://www.smartraveller.gov.au/COVID-19/leaving-Australia>; ‘Leaving Australia’, *Home Affairs*, <https://covid19.homeaffairs.gov.au/leaving-australia#toc-6>.

<sup>125</sup> Calderwood, K. “‘Quite Depressing’: Father Who Hasn’t Seen Family in Months Denied Travel Ban Exemption”, *ABC News*, 21 August 2020, <https://www.abc.net.au/news/2020-08-22/australia-corona-travel-restrictions-one-quarter-exempt/12583980>.

<sup>126</sup> ‘Who’s Being Allowed to Leave Australia during COVID? FOI Data Show It’, 5 July 2020, <https://www.kaldorcentre.unsw.edu.au/publication/who%E2%80%99s-being-allowed-leave-australia-during-covid-foi-data-show-it-murky-and-arbitrary>.

<sup>127</sup> *Ibid.*

all (46%), significantly below the overall average of 57%. Travellers to China (59%), and the UK (68%) fared much better. While some of the discrepancy might be related to differing reasons for travel, the researchers concluded that decisions about necessary outward travel by citizens were not being made solely on health grounds. Moreover, anyone with an exemption to travel to India had it revoked after early May, following the emergence of the highly infectious delta strain. Jeffries and McAdam note this action was not taken in relation to any other destination, although all countries other than New Zealand were rated “high risk” at the time by the Department of Health.

Australia appears to be unique amongst western democracies in instigating strict outward travel controls on citizens and permanent residents in response to the Covid crisis.<sup>128</sup> As of April 2020, Australia was in the company of a handful of countries in Africa, South America, the Middle East and the former Soviet bloc in instigating exit controls that either prevented or significantly curtailed the outward mobility of citizens.<sup>129</sup> This small number is not surprising given the guarantees provided in Article 12 of the ICCPR of the right to leave. As to the reasonableness of citing public health grounds to curtail this right in relation to citizens, the UN Human Rights Committee (HRC) has stated that ‘it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary [and] they must be the least intrusive instrument among those which might achieve the desired result’.<sup>130</sup>

With no domestic human rights legislation to call upon, the Federal Court in Australia dismissed a challenge to the exit controls confirming that the Minister for Health had the legal authority to make these orders under emergency powers.<sup>131</sup> According to media reports, surveys have shown that strict border controls to manage the pandemic are popular with a majority of Australians, who are seemingly accustomed to reliance on border control to reduce all manner of real and purported risks.<sup>132</sup> However, it is the 30% of Australians born overseas who have borne the brunt of these emergency restrictions. This calculus has shifted slightly recently, with still further announcements that Australian citizens living abroad may be prevented from leaving Australia if they return home for a short visit.<sup>133</sup>

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<sup>128</sup> Meixner, S. ‘International Travel Is Discouraged across the World, but Australia’s Outbound Travel Ban Sets It Apart’, ABC News, 31 August 2020, <https://www.abc.net.au/news/2020-08-31/coronavirus-covid-outbound-international-travel-ban-morrison/12605404>.

<sup>129</sup> ‘Covid-19 Travel Bans: The Right to Seek Asylum When You Cannot Leave’, 16 April 1970, <https://www.kaldorcentre.unsw.edu.au/publication/covid-19-travel-bans-right-seek-asylum-when-you-cannot-leave-your-homeland>.

<sup>130</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, available at: <https://www.refworld.org/docid/45139c394.html>; ‘The Right to Leave a Country’, Issue Paper by the Council of Europe Commissioner for Human Rights, Council of Europe, October 2013, <https://rm.coe.int/the-right-to-leave-a-country-issue-paper-published-by-the-council-of-e/16806da510>.

<sup>131</sup> ‘Decisions at a Glance: Administrative Law’, AGS, <https://www.ags.gov.au/publications/news/decisions-glance-administrative-law-1>.

<sup>132</sup> Mcguirk, R. ‘Australian Court Upholds Ban on Most International Travel’, AP NEWS, 1 June 2021, <https://apnews.com/article/asia-pacific-australia-lifestyle-travel-coronavirus-pandemic-a1d239e80be05c8cf393ec67d1b6cce2>.

<sup>133</sup> ‘Australians Who Live Overseas May Be Unable to Leave Country If They Return for Visit’, The Guardian, 7 August 2021, <https://www.theguardian.com/australia-news/2021/aug/06/australians-who-live-overseas-now-unable-to-leave-country-if-they-return-for-visit>.



### **Criminal sanctions**

As if these measures were not sufficiently controversial, the Australian government responded to news of the upsurge in Covid cases in India by making an emergency declaration in April 2021 that applied only to travel to and from that country. Not only were Australian citizens banned from entering Australia from India, but anyone attempting to do so was threatened with a substantial fine or prison term. One commentator described this extraordinary development as opening up a 'new front in crimmigration practice' through the merging of border control with criminal sanctions in relation to citizens.<sup>134</sup>

The emergency declaration left 9000 Australian citizens stranded in India, many of them amongst the 3% of Australian citizens born in that country.<sup>135</sup> While the intensified threat from the delta virus was real, no comparable measures had been taken when new variants had emerged in the UK or elsewhere, or when the virus had spiralled out of control in the USA. These targeted measures were widely condemned as racist, especially since the return of the Australian cricket team from their Indian tour was expedited, after a short recuperation stay in the Maldives. While the established relationship between citizenship and mobility had already been undermined by the general travel bans, hierarchies of entitlement were becoming more apparent as the crisis intensified.

No prosecutions have been reported under the emergency provisions, prompting suggestions that the sanctions were intended primarily as public spectacle – just another misguided attempt at using deterrence as a tool of border control.<sup>136</sup> The measures were short-lived, being repealed on May 15. The one legal challenge that was partially heard by the Federal Court upheld the government's actions on several points of law but did not consider the underlying constitutional questions, leaving one legal analyst to conclude: 'With no mention of Australian citizenship in the Constitution, and no case law directly on the point, the case for a constitutional right of entry is very speculative'.<sup>137</sup>

### **Conclusion: Destabilising the citizenship-mobility nexus**

As Džankić and Bauböck remind us, '[s]tates have to readmit their own nationals almost unconditionally' (emphasis added). The response of the Australian government to the bio-security threat presented by the Covid pandemic has revealed the limits of that guarantee, destabilising the long-established citizenship-mobility nexus in unexpected ways. Even confirmed members have been exposed to governmental control over inward mobility that has previously applied only to non-citizens; and have experienced exit controls that are unique to those who enjoy a right to return. One commentator has described this as a

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<sup>134</sup> 'Travel Bans and Crimmigration: A New Front for Australia', Oxford Law Faculty, 12 May 2021, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/05/travel-bans-and>.

<sup>135</sup> 'Is Australia's India Travel Ban Legal? A Citizenship Law Expert', 5 May 2021, <https://www.kaldorcentre.unsw.edu.au/publication/australia%E2%80%99s-india-travel-ban-legal-citizenship-law-expert-explains>.; 'Travel Bans and Crimmigration: A New Front for Australia', Oxford Law Faculty, 12 May 2021, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/05/travel-bans-and>.

<sup>136</sup> 'Travel Bans and Crimmigration: A New Front for Australia', Oxford Law Faculty, 12 May 2021, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/05/travel-bans-and>.

<sup>137</sup> 'Australian Citizenship: Lessons from the India Travel Ban', Law Society Journal, 8 June 2021, <https://lsj.com.au/articles/australian-citizenship-lessons-from-the-india-travel-ban/>.

'casual degradation of citizenship rights' forged against a backdrop of 'racism, risk and emergency'.<sup>138</sup>

Džankić and Bauböck note that pandemic responses have generally allowed for cross-border movement that is judged necessary to meet the 'needs of the state'. What their proposal did not anticipate is that this calculus could trump the individual mobility rights that citizenship is generally understood to confer. An eminent Australian historian has summed up this unprecedented treatment of Australian citizens with considerable insight, noting that '[w]e have learned that governments give priority to "Australia" – understood as a land mass and its citizens (and perhaps permanent residents) – over "Australians", understood as a people who might be found anywhere from Melbourne to Minsk'.<sup>139</sup>

The security fixation that has characterised Australian politics for several decades, and the manipulation of borders to achieve apparent security for members at the expense of certain non-members has taken an unexpected turn in response to a novel bio-security threat – eroding the protection of some, and potentially all, Australian citizens. Border security has become an end in itself; its objective to maintain total control over "necessary mobility" to and from Australia for political gain, with scant regard for the wellbeing of marginalized Australians, and even less for international norms and global responsibilities. The barriers to opening up mobility for *non*-members in this super-securitized environment are therefore profound. At the same time, that goal remains profoundly important.

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<sup>138</sup> 'Travel Bans and Crimmigration: A New Front for Australia', Oxford Law Faculty, 12 May 2021, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/05/travel-bans-and>.

<sup>139</sup> Bongiorno, F. 'How the Pandemic Has Brought out the Worst - and the Best - in Australians and Their Governments', The Conversation, 14 October 2021, <https://theconversation.com/how-the-pandemic-has-brought-out-the-worst-and-the-best-in-australians-and-their-governments-161745>.

## Greater mobility rights? Let us start with a targeted abolition of visa restrictions

Lorenzo Piccoli\*

How can we protect those vulnerable individuals who need to move to places where they can find protection or work? I will answer this question sketching a less daring, but hopefully more immediately feasible option compared to those that have already been proposed in this debate – special passports (Džankić and Bauböck), regional forms of mobility (Acosta), more inclusive access to citizenship (Buxton), global responsibility sharing (Doyle et al.), and green passports (Olakpe and Triandafyllidou). Starting with the observation that lack of access to visas is among the greatest obstacles to freedom of movement, my argument is that necessity-based crossing of international borders would be greatly facilitated if individual states abolished visa requirements for (1) citizens of specific countries and (2) particularly vulnerable groups across all or a range of different countries. The targeted abolition of visa restrictions is not the only answer to the question motivating this debate; but it is one we should not overlook.

### ***Visas are significant hurdles for freedom of choice***

Visas are official documents that allow their bearers to legally enter a foreign country. Depending on the visa category, they may entitle the visa holder to a temporary right to stay, which is sometimes accompanied by the right to perform economic and other activities. For most of the world's population, visas represent the first and major hurdle to travelling abroad. Visa regulations are part of migration management, and they are governed by state policies based on the principle of nationality. As a consequence, the current visa system creates privileges in admission for citizens of richer, more democratic, and culturally closer countries.<sup>140</sup>

If we want to create the conditions for an international system where individuals can more freely exercise their mobility choices, we should start by reducing the hurdles created by travel visas. For would-be travellers in the least privileged countries, these hurdles are significant. Even though there are different types of visas, which come with a diverse set of rights in the destination country (e.g., tourist visa, business visa, student visa), all visas require a substantial investment in terms of money and time spent to collect documents, fill the application, and wait for the response.

In an ideal world, greater mobility rights could be achieved by abolishing visa requirements across countries. This would come close to the first scenario described by Džankić and Bauböck, open borders, but checks upon crossing an international frontier would remain in place, as well as targeted restrictions to border crossings – such as those based on a person's criminal record. The problem with this scenario is that it is far from today's reality. As Acosta's

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\* European University Institute.

<sup>140</sup> Recchi, E. et al. (2021), 'The global visa cost divide: How and why the price for travel permits varies worldwide', *Political Geography* 86; Mau, S. et al. (2015), 'The Global Mobility Divide: How Visa Policies Have Evolved over Time', *Journal of Ethnic and Migration Studies* 41(8): 1192-1213; Laube, L (2019), 'The relational dimension of externalizing border control: selective visa policies in migration and border diplomacy', *Comparative Migration Studies* 7.

contribution shows, visa-free agreements are being developed in parallel to regional integration initiatives – within the EAC, ECOWAS, EU and MERCOSUR – but the general trend is still towards greater rather fewer visa restrictions globally.<sup>141</sup>

### ***A twofold proposal to abolish visas selectively***

While full-blown visa abolition remains a long way to go, it is still possible to reduce the adverse consequences of visa regimes by implementing dedicated visa waivers. There are two different types of visa abolition that could be considered.

The first type is a visa waiver for citizens or groups of citizens of specific countries. An example of such measure is that of the United Kingdom's recent decision to temporarily allow certain groups of Afghan nationals to relocate swiftly following the Taliban takeover in August 2021.<sup>142</sup> These emergency visa waivers do not create long backlogs that keep individuals in limbo while they wait for resettlement or protection – which is often a problem with asylum procedures, as highlighted by Doyle, Prantl and Wood. Instead, they allow individuals to enter and stay in the country temporarily before they can receive an immigration status.

In addition to targeted visa waivers for citizens of specific countries, I propose that governments introduce visa waivers for designated categories of persons, cutting across all or a range of different countries. While similar to humanitarian visas, visa waivers could have a broader scope beyond the protection of refugees who flee from persecution. Possible targets, for example, could be all individuals fleeing a territory where there has been a natural disaster, or all qualified cross-border care providers.

The targeted abolition of visas comes particularly close to two proposals in this forum: special passports (Džankić and Bauböck) and green passports (Olakpe and Triandafyllidou). However, the crucial difference lies in the ad hoc bilateral aspect: country A could issue special visa for group X from country B, which would not entail mobility rights towards country C and thus not require international recognition, as the Nansen passports did.

### ***The three advantages of targeted visa abolition for vulnerable individuals***

Abolishing standard visa requirements for targeted groups of individuals at the discretion of state governments may look like a small step towards the objective of providing 'a response to urgent needs and specific disadvantages faced by those for whom mobility is not a luxury but a necessity' (Džankić and Bauböck). Yet, targeted visa abolition holds three specific advantages.

First, like other proposals that have been advanced in this forum (Olakpe and Triandafyllidou), targeted visa abolition would help reducing the number of irregular migrants. When people see that they have feasible alternatives to travel abroad, they have strong incentives not to recur to smugglers and embark upon life-threatening journeys.

Second, this proposal could be rolled out quickly and incrementally. Governments could first pilot visa waivers for specific groups of individuals (e.g., unaccompanied minors, individuals fleeing a territory where there has been a natural disaster, cross-border care-

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<sup>141</sup> Gülzau, F. et al. (2016), 'Regional Mobility Space? Visa Waiver Policies and Regional Integration', *International Migration* 54(6): 164-180.

<sup>142</sup> Savage, M. 'Afghan Journalists Win Right to Come to Britain after Media Appeal', *The Guardian*, 22 August 2021, <https://www.theguardian.com/world/2021/aug/22/afghan-journalists-win-right-to-come-to-britain-after-media-appeal>.

providers or commuters). They could then expand them gradually to enable a broader range of necessity-based movement, thus avoiding public backlash.

Third, the development of this norm could facilitate the expansion of transnational networks and bilateral agreements. The targeted abolition of visas is not only a tool to uphold human rights; it can also promote student mobility and boost trade.<sup>143</sup> Indeed, there is a risk that targeted visa abolitions lead to what Džankić and Bauböck consider a sub-optimal outcome: the proliferation of ad hoc mobility rights for different groups of individuals in different regions of the world. Perhaps one encouraging signal is that visa liberalisation has been listed as one of the tools to ‘enhance availability and flexibility of pathways for regular migration’ in the Global Compact for Migration (Objective 5, par. 21 b). We can expect successful initiatives to inspire policy emulation and transnational learning.<sup>144</sup>

## **Conclusion**

Contributors to this debate agree on the goal of protecting freedom of choice of those vulnerable individuals who need to move to places where they can find protection or work. Yet, there is substantial disagreement on how this goal can be achieved.

Legally, there are several options to expand the capacity of individuals who have necessity-based reasons to move. One of these options is the targeted abolition of visas. Visa waivers could be implemented for two types of travellers. First, citizens of specific countries: for example, those fleeing Afghanistan in the context of the Taliban takeover. Additionally, visa waivers could target specific groups across all or a range of different countries: for example, those affected by severe floods. The targeted abolition of visas represents a viable path to international mobility outside of the context of asylum and refugee law and with no need of international recognition. My suggestion is that greater freedom of movement can be more easily achieved not by further expanding the bureaucratic apparatus – that is, by creating new passports – but simply by reducing the impact of one of the most flagrant restrictions of today’s international travel system through the targeted abolition of visa restrictions.

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<sup>143</sup> Neumayer, E. (2011), ‘On the detrimental impact of visa restrictions on bilateral trade and foreign direct investment’, *Applied geography* 31(3): 901-907.

<sup>144</sup> Global Compact for Safe, Orderly and Regular Migration, Dec. 19, 2018, UN Doc. A/RES/73/195.

## Special passports for vulnerable groups: Any better than existing legal instruments?

Caroline Nalule\*

Jelena Džankić and Rainer Bauböck's kick-off article on how states should go about facilitating mobility for vulnerable groups has sparked off an engaging and constructive conversation. Džankić and Bauböck propose special passports for those for whom mobility is a necessity, singling out specifically climate-displaced migrants and temporary labour migrants, groups that are largely neglected under protective international frameworks. A number of contributors have eloquently discussed various aspects of the proposal, but I wish to focus mainly on its practicalities in the context of the current norms and state practices.

### *Where does the vulnerability of the special groups lie?*

Džankić and Bauböck single out climate-displaced migrants and temporary labour migrants as vulnerable groups for whom 'mobility is not a luxury but a necessity'. However, with regard to the latter group, their vulnerability may not be so much a factor of denial of mobility or admission into any particular state but rather the inadequate rights-protections in their host state that render them particularly vulnerable. As Soysal points out, and also Džankić and Bauböck illustrate in their examples of the vulnerabilities of labour migrants, what they need most is stronger rights guarantees in the host state. This is not a completely unregulated area as it is what the International Labour Organisation has been pushing virtually since its establishment. Two of its Conventions are specifically on labour migrants.<sup>145</sup> The only problem is that they have been ratified by only a small number of ILO Member States. The United Nations complementary Convention on the Rights of Migrant Workers and Members of their Families has suffered a similar setback.<sup>146</sup> Yet these instruments provide the framework that would ensure that migrant workers are protected from many of those situations that render them particularly vulnerable.

Nevertheless, as Ottonelli and Torresi demonstrate, migrant workers still face mobility challenges when they cannot freely move between their countries of origin and the host countries due to visa or other migration-related formalities and restrictions. The Global Compact for Safe, Orderly and Regular Migration (GCM), despite some scepticism around some of its objectives and its potential impact, recognises the importance of states' 'ratification, accession and implementation of relevant international instruments related to international

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<sup>145</sup> 'C097 - Migration for Employment Convention (Revised), 1949 (No. 97)', International Labour Organisation, [https://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312242](https://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312242); and 'C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)' International Labour Organisation, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C143](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C143).

<sup>146</sup> 'International Convention on the Protection of the Rights of All Migrant Workers', OHCHR, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>.

labour migration, labour rights, decent work and forced labour'.<sup>147</sup> In other words, a significant part of the solution of addressing the vulnerabilities of temporary labour migrants lies in the rights guarantees accorded by states. Possession of a special passport may not necessarily be the most appropriate solution to their particular vulnerabilities, but they definitely would benefit from more flexible migration regimes through say, the abolition of visa requirements, as Piccoli suggests. Alternatively, they could be granted multiple entry visas in a scenario akin to free movement of workers regimes within regional communities (see Acosta).

This brings me to the second category identified as potential beneficiaries of special passports, climate-displaced migrants. Admission into a country other than their own would be particularly challenging in an emergency situation unless they enjoy special admission preferences in the country of destination. Yet there also seems to be an underlying assumption regarding the mobility needs of those affected by climate or environmental disasters, namely that they will want to or need to move far away from their homes rather than stay close. As McAdam notes, climate or environment-induced movement, 'is likely to be predominantly within countries, not across international borders, and temporary in nature' and even where it occurs 'most cross-border displacement will occur within regions, rather than from the global south to the global north'.<sup>148</sup> The fact of internal displacement is borne out by the statistics which estimate internally displaced persons (IDPs) as constituting about 58.3% of all the world's displaced population.<sup>149</sup> The higher proportion of IDPs could conversely raise the threshold of "necessity" or undermine the claim for special passports for similarly-affected persons who seek relocation to another country.

### **Determining "necessity"**

Clearly, not everyone who is displaced by climate change or an environmental disaster will be granted admission in another state in the same way that not all persons seeking refugee status on various grounds, including those listed in the Geneva Refugee Convention, get recognised as refugees in a state of asylum.<sup>150</sup> Even with conflict-induced migration there have been pushbacks by states where there is a legal obligation for them to examine claims. As Sardelić shows the EU member states failed to invoke the provisions of the Temporary Protection Directive for Syrian refugees when its conditions clearly applied. It is to be expected therefore that even though states are slowly awakening to the plight of climate-displaced persons (Acosta), the process of whom to admit and assist on the territory will continue to be highly selective. How is the criteria for necessity then to be determined?

Torpey rightly argues that 'the criterion of necessity is inherently slippery', and that 'the way in which "necessity" is determined is likely to be the key element of the political acceptability of these proposals'. With climate-displaced migrants, states are more likely to shirk any responsibility for admission by invoking the internal flight/relocation alternative option that has

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<sup>147</sup> Martin, P. & M. Ruhs (2019), 'Labour Market Realism and the Global Compacts on Migration and Refugees', *International Migration* 57(6): 80-90; Cholewinski, R. (2020), 'The ILO and the Global Compact for Safe, Orderly and Regular Migration: labour migration, decent work and implementation of the Compact with specific reference to the Arab states region', *International Journal of Law in Context* 16(3): 304-320.

<sup>148</sup> McAdam, J. (2012), *Climate Change, Forced Migration, and International Law*, Oxford University Press: 193.

<sup>149</sup> 'UNHCR: World Leaders Must Act to Reverse the Trend of Soaring Displacement', UNHCR Philippines, <https://www.unhcr.org/ph/23871-globaltrends2020.html#:~:text=%20UNHCR%202020%20Global%20Trends%20Report%20%E2%80%93%20key,displaced%20people%20%2845.7%20million%20in%202019%29%20More%20>.

<sup>150</sup> Hamlin, R. (2014), *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia*, Oxford University Press; Costello, C. et al, (2020) 'Recognising Refugees', *Forced Migration Review* 65: '4-6.

occasionally been applied to deny refugee status.<sup>151</sup> Therefore, the criteria for necessity will probably be narrowed down to those for whom internal relocation is not an available option, particularly where the origin state 'is unwilling to provide adequate protection for populations'.<sup>152</sup> Whereas the climate disaster may be the immediate onset for the flight, a person's need to relocate to another state may intersect with other factors for which one would be eligible for international protection under the 1951 Refugee Convention or respective regional conventions.<sup>153</sup>

The adoption of the Global Migration and Refugee Compacts in 2018 as political commitments rather than binding legal obligations strongly suggests that states are more open to working within existing frameworks than taking on new legal obligations with respect to migration. It is therefore likely that they would interpret "necessity" with regard to climate-induced migration within the parameters of their already existing obligations. In that case, it may not matter greatly whether or not the person to be admitted holds a special passport.

### ***Special passport practicalities and bureaucratisation***

As Džankić and Bauböck admit, the question of who will issue the passports is a thorny one and also one for which no proposals are proffered. Would it be the country of origin? If it were the country of origin, then why would its ordinary passport for its citizens not equally work? Would creating a two-passport system, that is a special passport and the ordinary passport, not create an extra resource burden on the state? Or would it be the country of destination? In this case the country may have to engage in a selection process, not unlike the current highly bureaucratised refugee status determination procedures in order to determine to whom to issue such a special passport. In that event, why not just continue with the current practice of humanitarian visas for persons that would be eligible for the special passports? Would it be an international organisation, as was the case with the Nansen passports? Would states be willing to relinquish part of their sovereignty to an international institution as they once did during Nansen's time? The Global Compacts do not at all indicate any step in this direction at any level, rather they propose to work through existing refugee and migration regimes. The current resettlement practices that are based on select vulnerability criteria and that largely fail to take into account individual autonomy could provide an apt analogy of how states may select those they will admit on their territory even with the mediation of an international organisation.<sup>154</sup> Thus, rather than issue special passports, states would still issue visas for those they wish to resettle and would probably continue to do so for vulnerable persons. The ongoing crisis in Afghanistan is a clear example.

### ***Which way then?***

I principally agree that persons in particularly vulnerable situations who need to migrate need to have pathways created for them to facilitate their mobility. Special passports would, in my view, create an additional set of obligations and bureaucratic processes that states may not

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<sup>151</sup> Eaton, J. (2012), 'The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive', *International Journal of Refugee Law* 24(4): 765–792; Kelley, N. (2002), 'Internal Flight/Relocation/Protection Alternative: Is it Reasonable?', *International Journal of Refugee Law* 14(1): 4–44.

<sup>152</sup> 'Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters', UNHCR, <https://www.refworld.org/docid/5f75f2734.html>.

<sup>153</sup> 'Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters', UNHCR, <https://www.refworld.org/docid/5f75f2734.html>.

<sup>154</sup> Welfens N. & B. Yasemin (2021), 'The Politics of Vulnerability in Refugee Admissions Under the EU-Turkey Statement', *Frontiers in Political Science* 3.



be willing to take on. That said, they may still be an option for persons, who, due to the inability or unwillingness of their state, cannot obtain or do not possess a valid passport.

The current migration regime, disparate as it may be, contains some solutions that can be harnessed for the benefit of those vulnerable persons or groups of persons that are compelled to emigrate. On that basis, I strongly support Acosta's conclusion that 'the opening of further and wider migration paths to those who are in need of movement because of environmental or socio-economic needs is a crucial endeavour that can be better advanced, at least initially, at the regional level by further deepening and improving the legal provisions and the implementation of existing instruments'. The OAU Refugee Convention and the Cartagena Declaration on Refugees contain expansive refugee definitions that can be liberally interpreted to cater for climate-displaced persons.<sup>155</sup> Besides the Refugee Convention, the African Union has adopted a Convention on Internally Displaced Persons that can serve as a template for a regional approach for persons that are externally displaced. This is in addition to some region-specific approaches that have more elaborate frameworks on displacement, particularly the International Conference for the Great Lakes Region.<sup>156</sup> Similarly, the EU Temporary Protection Directive could be extended to persons displaced by climate change.<sup>157</sup>

Beyond the region-specific approaches to displaced persons, the regional free movement regimes that are in place within the various regional economic communities in Africa can greatly facilitate mobility of persons from one country to another. These free movement regimes are one step towards the creation of a visa-free migration regime that Piccoli recommends.

To conclude, while special passports may be the best option for what I think would be a considerably small group of persons, there are available pathways within the current international and regional regimes that can be adapted to provide the protection the vulnerable people would need. The implementation is what seems to be the biggest problem. States need to be constantly urged to fulfil their obligations and commitments under the various legal regimes they are subject to, be it with respect to human rights, labour migration, refugees, displaced persons, or regional free movement of persons regimes.

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<sup>155</sup> 'Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters', UNHCR, 1 October 2020, <https://www.refworld.org/docid/5f75f2734.html>; Wood, T. & C. Hansen-Lohrey (2021), 'Disasters, climate change and public order: A principled application of regional refugee definitions', *Refugee Law Initiative*.

<sup>156</sup> International Conference on the Great Lakes Region. <https://www.refworld.org/pdfid/52384fe44.pdf>.

<sup>157</sup> 'Temporary Protection', Migration and Home Affairs, European Commission, [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection_en).

## New passport or new identity/category/hierarchy?

**Gezim Krasniqi\***

The proposal by Džankić and Bauböck for a special mobility passport, which would provide different vulnerable categories of individuals opportunities for cross-border movement without the political rights of citizenship, is both enthralling and challenging. Above all, it is a compelling invite to the scholarly community as well as practitioners to think in bolder terms about the uneasy linkages between migration, citizenship and (in)equality. While I support the proposal for a special passport based on the idea of “necessity flight”, I would like to raise three key points that I believe require further clarification: legal identity/categorisation, enforceability and hierarchy.

One of the key issues that needs to be addressed in the context of the proposal for a special mobility passport is that of legal identity of individuals entitled to such special travel permits. Albeit the proposal’s scope is broad and applies in contexts of environmental and socio-economic vulnerabilities and needs, in order to be recognised as international travel documents, special mobility passports will need to register a pre-existing legal identity of persons, which normally is that of citizenship in a recognised nation-state. Yet, millions of people today exist in a situation where they lack citizenship (stateless people) and/or documentation to prove their status. Others belong to an in-between category of being neither citizens nor stateless as a result of their residence in irregular territories and polities that are caught up in a half-way state between full sovereignty and recognition or re-integration within the parent state. The latter include territories like Kosovo, Taiwan, Palestine, Somaliland, Western Sahara, Abkhazia, South Ossetia, Nagorno Karabakh, Northern Cyprus, Donetsk and Luhansk.<sup>158</sup>

Establishing legal identity and citizenship of such categories of people can often be a difficult task. For example, examining situations in Syria, Iraq, and Ukraine, Fortin demonstrates how individuals living outside the control of the de jure government struggle to access birth registration and civil status documentation in times of non-international armed conflict.<sup>159</sup> Therefore, in such situations where a pre-existing legal identity and/or citizenship – which the special mobility passport would authenticate and recognise – cannot be established, a possibility arises for such passports to ascribe not only new mobility statuses but also new identities to various vulnerable categories. This could potentially lead to a situation where various individuals, while benefiting from new mobility statuses, would have to contend with unwanted ascribed legal identities as a result of external categorisation. For instance, in the case of individuals who live under a de facto authority (e.g., Somalilanders), the special mobility passport could potentially ascribe an unwanted national identity (that of the de jure authority, i.e. Somalia).

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<sup>158</sup> Krasniqi, G. (2018), ‘Contested territories, liminal polities, performative citizenship: a comparative analysis’, EUI RSCAS, 2018/13, Global Governance Programme-295, GLOBALCIT. Retrieved from Cadmus, European University Institute Research Repository,

<sup>159</sup> Fortin, K.M.A. (2021), ‘To be or not to be?: Legal Identity in Crisis in Non-international Armed Conflicts’, *Human Rights Quarterly* 43(1): 29-69.

### **What issuing authority?**

The question of establishing a (new) legal identity is inherently related to the second issue I want to raise, that of enforceability. Džankić and Bauböck do not provide a clear answer to the thorny question of who would issue such passports and how states could be made to recognise them. They argue that ‘negotiating special mobility passports will therefore require an international setting in which states are formally equal as well as strong mobilisation by transnational civil society organisations.’ Establishing a special “passport” recognised in a uniform manner by different national immigration systems would also require setting up an exceptional global mobility regime with trained personnel in countries around the world. Torpey’s suggestion that funding for both asylum officers and for those fleeing should be subsidised by the world’s wealthy countries through an independent UN agency, possibly UNHCR or the IOM, is a useful one in terms of the operationalisation of such a regime. However, that does not answer the question of the legal authority issuing special mobility passports and enforcing their recognition and acceptance globally.

Establishing an exceptional global mobility regime requires some framework of global consent. Various proposals in place such as the Global Compact on Migration, the Global Compact on Refugees, and the Model International Mobility Convention provide important blueprints on how this new and exceptional mobility regime could be organised. Mandating an existing international organisation or specialised agency such as UNHCR or IOM to issue such special passports would inevitably recognise their legal authority to grant identity, based on a set of pre-defined criteria, to individuals worldwide. In fact, albeit UN agencies are themselves very strict when it comes to recognising identity documentation issued by non-state actors (i.e. non-UN members), they themselves have increasingly engaged in developing digital identification systems for migrants and refugees. For instance, UNHCR has been creating “digital identities” for refugees and displaced people in order to provide persons who lack identification documents with a digital identity that would help make relocation to a different state easier.<sup>160</sup> Importantly, this “identity” is not just centred on basic identity documents such as birth certificates, IDs and passports, but goes beyond and includes other information such as financial status and education credentials.<sup>161</sup>

Biometric technologies are routinely used in the response to refugee crises with the UNHCR already in the process of having all refugee data from across the world in a central population registry. This clearly rivals nation-states’ monopoly over registration of their citizens. Whatever authority is mandated with issuing such passports (and identities), the use of digital technologies will be inevitable.<sup>162</sup> However, according to Madianou, biometrics, artificial intelligence (AI), and blockchain have all become part of a ‘biometric assemblage’, which in turn contributes to accentuating asymmetries between refugees and humanitarian agencies and ultimately entrenches inequalities in a global context, as various contributions to an earlier GLOBALCIT forum have argued.<sup>163</sup> Despite the many advantages that the new digital technologies offer, their use in identity registration raises important questions of data privacy,

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<sup>160</sup> ‘Empowering Refugees through Technology’, UNHCR, <https://www.unhcr.org/events/campaigns/5fc126394/empowering-refugees-through->

<sup>161</sup> Madon, S. & E. Schoemaker (2021), ‘Digital identity as a platform for improving refugee management’, *Information Systems Journal*: 1-25.

<sup>162</sup> ‘Cloud Communities: The Dawn of Global Citizenship?’ GLOBALCIT, <https://globalcit.eu/cloud-communities-the-dawn-of-global-citizenship/>.

<sup>163</sup> Madianou, M. (2019), ‘The Biometric Assemblage: Surveillance, Experimentation, Profit, and the Measuring of Refugee Bodies’, *Television & New Media* 20(6): 581-599; Shachar, A. & R. Bauböck eds. (2014), ‘Should citizenship be for sale?’, Florence: European University Institute, 2014/EUI RSCAS, 2014/01, EUDO Citizenship Observatory.

usage and sharing, in particular in the context of the ever-growing involvement of commercial actors.

### ***A new transnational category of individuals?***

This leads me to the final point of discussion, the issue of hierarchy. The modern institution of citizenship is inherently hierarchical. As Stephen Castles put it, 'all passports are equal, but some are more equal than others.'<sup>164</sup> "Hierarchical citizenship" ultimately reflects the position of a state in the international state system. The question we need to confront is: Will this new passport create a brand-new international category of individuals with differentiated rights in the existing international hierarchy of citizenship? In other words, will 'necessity fleers' constitute a separate 'rights-and-duty-bearing unit'? (see also Ottonelli and Torresi). Obviously, much depends on the criteria demonstrating the "necessity" of flight and the established threshold, which require an international agreement. It seems to me that regardless of the criteria used to define "necessity" (Acosta, Nalule), the proposed special mobility passport will inevitably lead to the emergence of a new transnational legal category on the top of the existing nation state-based citizenship hierarchy.

In sum, Džankić's and Bauböck's proposal provides a much-needed breath of fresh air in the current debates on migration. The real challenge, however, is how to repurpose a 20th century idea and institution in a 21st century context of deepening growing citizenship inequalities and hierarchies, as well as declining international solidarity for "necessity fleers".

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<sup>164</sup> Castles, S. (2005), 'Hierarchical Citizenship in a World of Unequal Nation-States', *Political Science* 38(4): 689-692.

## The sovereignty hurdle that trips good ideas

**Audrey Macklin\***

Jelena Džankić's and Rainer Bauböck's kickoff piece reminds us of the inverse relation between the necessity and ease of transnational movement: those who most need to move are most impeded.

Džankić and Bauböck recite and reject some familiar policy responses to the brutality of a global order that systematically permits and sustains this arrangement. Political realism precludes increasing the supply of security via open borders; reducing demand for movement through more equitable distribution of global resources is too slow; and expanding extraterritorial access to the legal technology permitting entry (citizenship) sits uneasily alongside a normative insistence on a "genuine link" between citizen and state. In light of the infeasibility of these responses, the authors offer a fourth option. They are inspired in part by some states' pandemic-induced innovation in admitting migrant workers deemed "essential", though otherwise regarded as expendable and unworthy of membership. To simplify, they propose an international entry permit (which they call a mobility passport), redeemable in any state, for migrant workers and environmentally displaced people. The refinement of these categories of necessity, the duration of the permit, the entitlements upon entry (to work? to health care? to social assistance? to family unity?) remain to be worked out 'in an international setting in which states are formally equal,' and where civil society organisations are mobilised.

There is much to commend in this proposal, insofar as it could reduce barriers to movement for those who need to move. But I confess to a somewhat cranky initial reaction, which I hasten to add is no fault of the authors or their proposal. As scholars of migration, we all share a sense that the current global regime is unjust. How unjust, the locus of responsibility for the injustice, and whether and how the injustice can be mitigated are questions that preoccupy all of us, even as we diverge in our answers.

When we turn to prescriptive models, many of us make the following moves. First, we identify a problem. Second, we hold some aspects of the present system as fixed and constant, perhaps out of pragmatism, or because of our own normative commitments, or simply because we cannot change everything at once. We reject other models that fail to satisfy our criteria. Third, we recognise and leave open the future task of elaborating the details (where we all know the devil lurks). Most of us do some version of this, including me.

Džankić and Bauböck reject more open borders as politically unrealistic, global redistribution as temporally unrealistic, and extraterritorial access to citizenship as normatively unacceptable. And yet, the same obstacles that make these options unpalatable are no less salient in respect of the "mobility passport." I will focus here on the "open borders" objection.

### ***Sovereignty hurdle #1: We pick you, you don't pick us***

The phrase "open borders" is shorthand for an ability of non-citizens to enter a destination state without individualised assessment by that state according to criteria articulated and applied by

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\* University of Toronto.

agents of that state. The normative objection to open borders in political theory trades on a conception of sovereignty that is calibrated to border control: a state is sovereign to the extent that it exercises an effective power to exclude. One of the many flaws in this cramped version of sovereignty is revealed by the treatment of asylum seekers. States who are party to the UN Refugee Convention engage in a sovereign act by voluntarily binding themselves to an international convention that anticipates the spontaneous arrival at the frontiers of signatory states of people seeking refugee protection. Indeed, Article 31 of the UN Refugee Convention even anticipates that refugees may resort to irregular means to reach or enter the territory of a signatory state, and exempts them from liability for doing so.<sup>165</sup> Yet states persistently and successfully portray the spontaneous arrival of asylum seekers as an affront to state sovereignty, and even as an illegal act. This failure to recognise that states also manifest their sovereignty by making legally binding commitments extends to the entry of non-citizens who are not refugees. During the Brexit campaign, even the free movement of EU citizens, to which all EU member states agreed, was fatally denigrated as a diminution of UK sovereignty. This tells us that states and their publics continue to invoke sovereignty and the menace of “open borders” in order to resist the admission of people whom the state does not individually select, even where the state consents in advance to their admission as a class, and even if their admission is framed as advancing domestic economic self-interest. Diego Acosta helpfully reminds us that some regional “free movement” agreements function reasonably well and are even expanding. It would be useful to learn more about why some succeed more than others (apart from rough socio-economic parity among parties).

### ***Sovereignty hurdle #2: We decide***

Even where states are bound by a common international or regional standard – as with the refugee definition – domestic state actors retain jurisdiction over determination of status. They do not delegate that authority to an international or regional body. To be fair, the United Nations High Commissioner for Refugees prefers that states operate their own refugee status determination systems, and UNHCR only conducts status determination when states cannot or will not do so. The UNHCR also identifies refugees in need of resettlement, but states set their own quotas and are free to accept or refuse candidates for resettlement. The structural hostility of receiving states to asylum seekers plays out partly through the ever-shrinking percentage of asylum seekers who are recognised as refugees by bureaucrats operating within that system. With each new category of vulnerability that is added to the migration regime, whether it is trafficked persons or children, we witness the same trajectory: it begins with the identification of a class of persons indisputably requiring protection from removal, travels through a thickening and curdling culture of suspicion, and arrives at an end state where destination state officials “know” that almost all persons claiming to be trafficked are smuggled (and therefore excludable), virtually all asylum seekers are economic migrants (and therefore excludable), and many children have the skeletal maturity of an adult (and are therefore excludable).

What does this mean for Džankić’s and Bauböck’s proposal? The same sovereignty objection that makes them sceptical about a more straightforward “open borders” claim also comes back to bite their own model. States have amply demonstrated their regret at binding themselves to the obligations contained in the Refugee Convention. So, why would these

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<sup>165</sup> Article 31: ‘The Contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened ... enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.’

same states sign on to the creation of yet more classes of people who could enter their states at will?

To the extent that the “mobility passport” would respect migrants’ autonomy to choose which country to enter, the relevant status would have to be determined by a supranational body and all participating states would need to be bound by the determination. The alternative would be to let any and all states determine status, and require all states to recognise and respect the grant of status by another state. This seems unlikely to work. And, in any event, one would have to anticipate the same ungenerous approach to interpreting and applying the relevant definition of migrant worker or environmentally displaced person as one observes with respect to refugees, trafficked persons and children. So, the proposal would deal a double whammy to sovereignty-as-border-control: first, by endowing millions of people with a status that entitles them to cross international borders on their own initiative; secondly, by ceding authority to a decision-making body beyond the state to endow that status.

If states were willing to pool their sovereignty and cooperate in an international regime in the manner required to achieve lift-off for the proposal, we would be living in a very different world. And in that world, many programmes of action would be feasible, including (but not limited to) Džankić’s and Bauböck’s salutary proposal. In saying this, I do not mean to succumb to the despair of the current moment. It is easy to summon reasons to be pessimistic. It is important to innovate and demonstrate that another world is possible – if there is a will to create it. Unfortunately, a deficit of political will cannot be filled by technology, whether it is the legal technology of citizenship or the material technology of a passport. If and when states come to the table, Džankić’s and Bauböck’s proposal deserves to be on the menu. But something else is required to bring states to the table. So far, a hunger for justice has not been enough.

## Are enhanced mobility rights for temporary labour migrants feasible and desirable?

Martin Ruhs\*

In their thought-provoking opening contribution to this forum on ‘Mobility without Membership’, Jelena Džankić and Rainer Bauböck propose special passports for vulnerable groups to ‘provide limited and tailor-made mobility rights to those who need them most and who have no chance to acquire them via the citizenship route.’ The vulnerable groups Džankić and Bauböck have in mind include temporary migrant workers, especially those employed in lower-paid and often precarious jobs. My reflections are concerned with this specific group of migrants, with a focus on high-income countries where the great majority of migrant workers in the world are employed.<sup>166</sup> To be clear, I concentrate on actual rather than potential future migrant workers, i.e. on people who are living and working in countries where they were not born and do not have citizenship. Would it be feasible and desirable to create special passports with enhanced mobility rights for temporary migrant workers employed in lower-paid jobs in high-income countries?

### ***Greater mobility without membership: The only game in (this) town***

My concern here is with policies that can help improve the situation of temporary migrant workers within the fundamental structures and institutions of the world as it is today (or at least in a world that is not fundamentally different in terms of, e.g., the power and authority of states to regulate immigration and restrict the rights of labour migrants). From this “realistic” perspective, I agree with Džankić and Bauböck that, in the short to medium term, thinking about new forms of mobility without full membership is the main “game in town” when it comes to improving the situation of migrant workers employed on temporary permits in low-paid jobs in high-income countries.

Considering the politics of labour immigration and the actual characteristics of policies toward migrant workers in high-income countries, “open borders” and “extraterritorial access to citizenship” for workers in lower-income countries are not realistic options, and regional free movement that involves high-income countries, such as the framework for the free movement of workers in the European Union, is likely to remain limited to countries with similar levels of average incomes and economic development.<sup>167</sup> The vast majority of the world’s migrant workers in high-income countries has been admitted and employed through legal immigration policies rather than through the various regional free movement agreements around the world. And even in the European Union, the current policy of granting EU citizens unrestricted intra-EU labour mobility and – as long as they qualify as “workers” – equal access to the host

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\* European University Institute.

<sup>166</sup> ‘Global Labour Migration Increases by Five Million’, International Labour Organisation, 30 June 2021, [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_808884/lang-en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_808884/lang-en/index.htm).

<sup>167</sup> Ruhs, M. (2013), *The Price of Rights: Regulating International Labor Migration*, Princeton University Press.



country' welfare states (i.e. near-equal membership) has recently come under political pressure.<sup>168</sup>

Gaining access to permanent residence status can be, and in practise is a way for migrants employed on temporary permits to acquire more rights, including greater mobility rights. In most liberal-democratic countries, migrants with permanent residence status enjoy near-equality of rights with citizens, with a few important exceptions, including the right to vote in national elections, protections against deportation, and international mobility rights (in some countries permanent residence can be revoked because of long absences that exceed a certain number of years). However, the transition from temporary to permanent status is usually discretionary and not automatic. By definition, a TLMP does not guarantee the award of permanent residence after some time (although a conditional and regulated transfer from temporary to permanent residence status is a possibility in many countries). This means that giving migrant workers permanent residence is not an obvious or feasible solution to the problems faced by migrant workers employed on temporary permits in high-income countries.

### ***Sources of vulnerability in TLMPs: The central role of restricted mobility***

What are the key sources of vulnerability of migrant workers employed under TLMPs? To address this question, it is important to consider the broader context of such programmes. TLMPs are designed to facilitate international mobility without membership (just like Džankić's and Bauböck's "special passport", although obviously in different ways, as I discuss further below). Such programmes are, inevitably, associated with a fundamental trade-off for migrants: On the one hand, TLMPs enable workers in lower-income countries to access the labour markets of higher-income countries, thus generating opportunities for increasing the income and human development of migrants and their families and, under certain conditions, also benefit their countries of origin. On the other hand, TLMPs restrict migrants' access to full equality of rights and citizenship in the host country. While there is considerable variation in their design across countries, TLMPs almost always restrict migrants' right to free choice of employment, access to certain welfare benefits, family reunification and, by design, security of residence and access to citizenship. Some of these restrictions vary across policies that target low and higher skilled migrant workers, with the former typically facing most restrictions of their rights after admission.

As is well known and documented by a large research and policy literature on the topic, as a result of these rights restrictions, some migrants working under TLMPs in low-skilled jobs find themselves in highly precarious employment and exploitative situations.<sup>169</sup> The key source of migrants' vulnerability is precisely their restricted mobility, both in terms of their labour market mobility within the host country and their physical mobility across international borders. The vast majority of TLMPs issue work permits that limit the employment of the admitted migrant to the employer specified on the permit. Changing employers may be possible after some time, but it usually requires a new work permit application. This "tying" of the worker to a specific employer can make it difficult or impossible for migrants to escape adverse working conditions unless they are willing and financially able to return home. Having spent considerable amounts of money to finance their migration and recruitment, some migrants can

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<sup>168</sup> Martensson, M. et al. (2021), 'Shielding free movement? Reciprocity in welfare institutions and opposition to EU labour immigration', *Journal of European Public Policy*.

<sup>169</sup> Costa, D. & P. Martin, 'Temporary labor migration programs: Governance, migrant worker rights, and recommendations for the U.N. Global Compact for Migration', Economic Policy Institute, 1 August 2018. <https://www.epi.org/publication/temporary-labor-migration-programs-governance-migrant-worker-rights-and-recommendations-for-the-u-n-global-compact-for-migration/>.

become trapped in highly exploitative employment abroad. This problem may be exacerbated by some employers' illegal practices of retaining migrant workers' passports and/or providing "tied accommodation", i.e. accommodation provided by the employer on the condition that, and as long as, the migrant keeps working for that employer.

The inability to exit from an exploitative employment situation by changing employers in the host country or returning home is, in my view, the key source of vulnerability of migrants employed in low-paid jobs under TLMPs. I therefore agree with the premise of Džankić's and Bauböck's proposal that increasing mobility rights without at the same time demanding full or almost-full membership rights (i.e. citizenship or permanent residence) is the key challenge when it comes to improving the situation of migrant workers in low-paid jobs in high-income countries. The problem, and important constraint that cannot be ignored, is that restricted labour market mobility is also a critical policy element that makes the admission of migrant workers beneficial for host countries.

From the host country's perspective, a fundamental rationale of TLMPs is to help reduce labour and skills shortages in specific occupations and/or sectors. If the admitted migrants were free to take up employment in any occupation or sector, TLMPs would not be able to meet one of their fundamental objectives. The most likely consequence of insisting on complete labour market mobility for temporary migrants in the host country would be a reduction of the size (i.e. numbers of migrants admitted), or in certain cases even the complete abolishment of TLMPs.

### ***How to increase mobility rights for temporary labour migrants?***

One way to increase the mobility of migrant workers within TLMPs would be to grant the right to change employers within certain sectors or occupations (i.e. those considered to be in shortage of labour and skills and thus in "need" of migrant labour) after a relatively short period of time. From the host country's point of view, it is important to limit migrants' employment to certain sectors or occupations, but not to specific employers, as most TLMPs currently do. Indeed, some countries (such as Ireland) have introduced policies that allow temporary migrant workers to switch employers freely within certain sectors or occupations after some time (e.g. one year after admission under the TLMP). However, for the reasons explained above, even when the initial tie between worker and specific employer is lifted, the restriction on employment to the occupations or sectors perceived to be in shortage typically remains.

Another important set of measures to facilitate temporary migrants' de-facto ability to exit from their current situation would ensure that migrants do not incur large debts in the recruitment process and can finance their return (if desired) to their home countries. There is no space to discuss the range of measures that might be required and possible in different contexts, but there has been a considerable research literature on how to regulate recruiters and reduce migrants' costs of recruitment.<sup>170</sup>

### ***Special passports for temporary migrant workers: feasible and desirable?***

This brings me, finally, to the proposal for a special passport with enhanced mobility rights for temporary migrant workers. There are different ways of thinking about this proposal. I focus on the idea that temporary migrant workers in lower-skilled jobs in high-income could be given special mobility rights that enable them to move freely between the host country they have been admitted to and their countries of origin. So, this would constitute a new and privileged

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<sup>170</sup> Martin, P. (2017), *Merchants of Labor: Recruiters and International Labor Migration*, Oxford University Press.

status that falls between the status and rights enjoyed by a migrant working under a TLMP and permanent residence status. More specifically, it would essentially combine the labour market and welfare rights restrictions of a TLMP with the greater international mobility rights typically associated with permanent residence or citizenship status. Could this be feasible? And would it be normatively desirable? I conclude with a few reflections.

With regard to the political feasibility of this idea, I do think the Covid-19 pandemic provides a window of opportunity, perhaps temporary and possibly already beginning to close, for implementing new policies that improve the situation, including the mobility, of migrants employed on temporary permits in what are considered essential jobs and services. The pandemic has highlighted the role that migrant workers play in many essential occupations, including in lower-paid jobs such as carers, health workers, agricultural workers, food processing workers, delivery drivers, etc. What used to be known as low-skilled migrants are now sometimes talked about as essential workers. If “systemic resilience” becomes a new goal in the design of labour immigration programmes, as colleagues and I have recently argued, it is important to think how greater mobility and rights protections for migrants employed in essential services will help not only migrants but also the host country’s population.<sup>171</sup> If it becomes part of public debates and policy-making – an open question – this line of thinking could make enhanced mobility rights for temporary low-skilled migrant workers more feasible politically (also see Audrey Macklin’s contribution for a broader discussion of the feasibility of the idea of a special passport for vulnerable groups).

In my understanding of such a privileged status with greater mobility rights, it would essentially enable unrestricted circular labour migration, so a more liberalised version (in terms of return and mobility rights) of the circular labour migration programmes that already exist in many countries.<sup>172</sup> This would not need to interfere with states’ right to regulate and decide on the initial admission of migrant workers but thereafter states would lose the right to prevent circular mobility of migrant workers between their origin countries and the host country. This would clearly benefit migrants as they could return to their home countries without fear of not being re-admitted (an issue discussed in Ottonelli and Torresi’s contribution to this forum) and it would benefit host country employers because it would most likely create a larger pool of temporary migrant workers available to them, for a longer period of time.

At the same time, such a policy and new status with enhanced mobility rights would clearly also entail potential risks and normative concerns. For example, it could entrench host country employers’ reliance on – and in some cases preferences for – recruiting temporary migrant workers who can be employed with more limited rights than domestic workers. This, in turn, could accelerate processes of labour market segmentation and potentially crowd out of domestic workers from certain jobs. This may not be an issue in occupations where domestic workers show little interest to work, although it is important to remember that labour and skills shortages are slippery concepts and that domestic labour supply depends, at least in part, on the wages and employment conditions on offer.<sup>173</sup>

A related normative issue – that also applies, at least to some extent, to already existing circular migration programmes – stems from the creation of a potentially large pool of

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<sup>171</sup> Anderson, B. et al. (2021), ‘Rethinking labour migration: Covid-19, essential work, and systemic resilience’, *Comparative Migration Studies* 9.

<sup>172</sup> ‘Hire a Temporary Worker through the Seasonal Agricultural Worker Program’, Gouvernement Du Canada, 5 February 2021, <https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural.html>.

<sup>173</sup> Ruhs, M. & B. Anderson (2012), *Who Needs Migrant Workers? Labour shortages, immigration, and public policy*, Oxford University Press.

permanently “second-class” temporary (and circulating) residents, as is the case, for example, in the Gulf States. Various scholars have argued that there are strong moral reasons for limiting the maximum time migrants can spend working under restricted rights in liberal democratic countries. And in practice, most existing TLMPs in rich democracies provide migrants with work permits that are limited to a maximum period of no more than around five years of continuous employment. Special mobility rights for temporary migrant workers that enable them to move freely between home and host country within a TLMP could lead to a scenario where large numbers of migrants circulate in and out of the same high-income country over many more years, always working with restricted rights.

The normative implications of such a policy are not clear-cut: On the one hand, the ability to engage in unrestricted circular labour migration over long periods of time could improve the situation of those temporary migrants who have either no interest or, under current TLMPs, little to no possibility of ever gaining permanent residence in their host countries. At the same time, such a policy could further prolong structural inequalities between temporary migrant workers and other workers in the host country, in a way that is incompatible with long-term standards of equality and inclusion in a liberal democracy. One way of addressing (or at least reducing) these potential risks and normative concerns with (my interpretation of) Džankić’s and Bauböck’s proposal is to minimise the difference between the labour and social rights of temporary migrants on the one hand, and the rights of permanent residents and citizens of the host country on the other. As I have explained, if we argue within a “realistic” approach that accepts the current framework of TLMPs in high-income countries, the rights gap between temporary migrants and permanent residents and citizens cannot be completely closed. However, a smaller gap does, in my view, make a policy of facilitating the long-term circulation of temporary workers with restricted rights more acceptable.

## What not to do when creating special passports for vulnerable groups: Experiments with special passports and the role of the private sector

Noora Lori\*

### ***The challenge: Why we need mobility without membership***

In their opening essay, Jelena Džankić and Rainer Bauböck call attention to the central paradox of the global mobility divide: the people who are most in need of accelerated safe passage face the greatest barriers to crossing international borders.<sup>174</sup> Vulnerable groups fleeing conflict, persecution, poverty, and climate change disasters tend to be concentrated in the Global South. Since mobility is a citizenship-based right, and access to pre-authorized cross-border movement is highly stratified, those groups also tend to hail from states that have “weak” passports and are therefore forced to wait the longest and pay the highest visa fees to cross international borders.<sup>175</sup> Without “humanitarian corridors” that allow for safe passage under duress, vulnerable groups are forced to engage human traffickers and undertake increasingly dangerous journeys as “illegal” migrants. The limited number of displaced persons who are able to resettle to the Global North under current asylum and immigration pathways have to wait long periods of time to acquire citizenship statuses that would provide them with “stronger” passports and greater mobility rights.<sup>176</sup> The challenge at hand is whether—with a healthy dose of imagination—we might conceptualise ways of granting vulnerable groups (likely temporary) mobility rights in the absence of full membership rights in response to specific crises. This would essentially require states to introduce different passport streams to verify the identity and “vouch” for different population categories: their own citizens and non-citizens who meet the criteria of “the necessity of flight.” We already see such variation in residency statuses and local identity documents, since states apply a range of ad hoc and temporary residency statuses that grant non-citizens (typically labour migrants and humanitarian migrants) temporary and partial authorisation to reside in the territory without accruing full citizenship rights.<sup>177</sup>

Heeding this compelling call to reimagine global mobility controls is necessary but not entirely unproblematic for the contributors to this debate, myself included, who have shown that the creation of temporary and ad hoc legal statuses in the absence of full citizenship

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\* Boston University.

<sup>174</sup> Mau, S. et al. (2015), ‘The Global Mobility Divide: How Visa Policies Have Evolved over Time’, *Journal of Ethnic and Migration Studies* 41(8): 1192-1213.

<sup>175</sup> ‘The Official Passport Index Ranking’, Henley & Partners, <https://www.henleyglobal.com/passport-index/ranking>; Recchi, E. et al. ‘The Global Visa Cost Divide: How and Why the Price for Travel Permits Varies Worldwide’, *Political Geography*, Pergamon, 2 March 2021, <https://www.sciencedirect.com/science/article/pii/S096262982100010X>.

<sup>176</sup> FitzGerald, D. (2019), *Refuge beyond reach: How rich democracies repel asylum seekers*, Oxford University Press.

<sup>177</sup> Lori, N. (2017), ‘Statelessness, ‘in-between’ statuses, and precarious citizenship’, in A. Shachar et al. (eds) *The Oxford Handbook of Citizenship*, Oxford University Press.

rights often suspends people in limbo and may lead to systematic precarity.<sup>178</sup> As a social scientist I have been trained to diagnose problems, measure their scope, identify key actors, causes and alternative explanations, and pay attention to the long-term effects and unintended consequences of policy interventions. I have done this work when it comes to special passports, in my previous analysis of a case in which the United Arab Emirates (UAE) purchased passports from the Union of Comoros to issue to stateless persons and ethnic minorities in the UAE.<sup>179</sup> But I focused on the problems this case engendered without bringing that same intellectual rigor to the identification of concrete solutions to statelessness or legal precarity, since (as Audrey Macklin reminds us), elaborating the details of a proposed solution is “where the devil lurks” and I am all too aware that the road to hell is paved with good intentions.

And yet, in an effort to take seriously Džankić and Bauböck’s charge of engaging with practical solutions instead of simply critiquing them, I want to first expand upon the UAE-Comoros Islands experiment to identify what not to do when designing mobility without membership. I then discuss whether there are opportunities to design mobility passports by linking citizenship-by-investment schemes to safe passage under duress. In so doing, I engage with what the conveners of this debate set out as the third path for expanding mobility—‘to radically expand extraterritorial access to desired citizenships, making them accessible to those who need but cannot afford them.’ My response addresses the role of market actors and private companies that has not been discussed in the previous contributions to this debate. I proceed with considerable hesitation, since market actors are most motivated by profit-maximisation and least concerned with human rights. However, since the private sector already plays a key role in facilitating mobility without membership for high-net worth individuals by helping states sell passports for “wealth management” purposes, we should seriously consider how this sector might be engaged in efforts to expand mobility rights to vulnerable groups who do not have the financial means to partake in global mobility markets.<sup>180</sup>

### ***Special passports: De facto statelessness and the pitfalls of mobility without membership***

As several contributors to this debate have already discussed, a notable historical precedent of special passports occurred in the aftermath of World War I when the League of Nations issued Nansen passports to stateless persons and refugees.<sup>181</sup> Another lesser-known contemporary case of special passports emerged in 2008 when a private company (the Comoros Gulf Holding) facilitated a bilateral agreement between the UAE’s federal government and the Presidency of the Union of Comoros.<sup>182</sup> In this case, the UAE government funded infrastructural development in the Comoros Islands in exchange for the printing of Union of Comoros passports. These special passports were then issued to approximately 80,000-120,000 ethnic minorities and bidūn (stateless persons) in the UAE who, in some

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<sup>178</sup> Menjivar, C. (2006), ‘Liminal legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States’, *American Journal of Sociology* 111(4); Lori, N. (2017), ‘Statelessness, ‘in-between’ statuses, and precarious citizenship’, in A. Shachar et al. (eds) *The Oxford Handbook of Citizenship*, Oxford University Press.

<sup>179</sup> Lori, N. (2019), *Offshore Citizens: Permanent Temporary Status in the Gulf*, Cambridge University Press.

<sup>180</sup> ‘Investment Migration Services’, Henley & Partners, <https://www.henleyglobal.com/services>; Džankić, J. (2019), *The Global Market for Investor Citizenship*, Palgrave Macmillan.

<sup>181</sup> ‘Documents from the League of Nations Archives’, *Refugee Survey Quarterly* 22(1): 71-73.

<sup>182</sup> ‘The Bizarre Scheme to Transform a Remote Island into the New Dubai’, *The Guardian*, 11 November 2015, <https://www.theguardian.com/world/2015/nov/11/the-bizarre-scheme-to-transform-a-remote-island-into-new-dubai-comoros>.

cases, were already in possession of Emirati passports that were subsequently revoked. I refer to this passport outsourcing agreement as creating “offshore citizens” because the UAE government transferred its own naturalisation cases to an offshore site, while the individuals themselves never actually moved.<sup>183</sup>

This scheme took its inspiration from existing citizenship-by-investment programmes, but the UAE-Comoros “economic citizenship” programme was novel in several ways.<sup>184</sup> First, and most important, is the question of consent. Under other citizenship-by-investment programmes, individual applicants choose to apply for a new citizenship status, typically to attain more powerful passports to increase their global mobility or evade (or minimise) taxation.<sup>185</sup> In the UAE-Comoros arrangement, the UAE outsourced the citizenship cases of its own residents without their consent. Instead of increasing their global mobility or income, this new juridical status did the opposite, placing the passport recipients in a legal category with lower employment prospects and less mobility. Second, the way these passports were financed was also distinct. Instead of individual investment, this could be considered as a case of “citizenship-by-development,” since the UAE government provided development aid (including the construction of a major highway in Moroni, the capital of the Comoros) in exchange for the printing of Union of Comoros passports. Finally, while citizenship-by-investment is often a pathway for dual or multiple nationalities, this case perpetuated de facto statelessness. These special passports do not confer the recipients with citizenship or membership rights in either the Comoros Islands or UAE. The recipients are not entitled to reside in the Comoros Islands; on the contrary, they are explicitly banned from being able to do so. Instead, those who received these special Comoros Islands passports are allowed to continue residing in the UAE, but as “guest workers” on temporary visas. This arrangement thus invents and codifies a permanently “temporary” legal status that strips the individuals of any meaningful membership or citizenship rights in any territory.

In my analysis of this case I found—precisely as Rebecca Buxton warns—that ‘without functioning citizenship anywhere, and without the ability to access a new citizenship, those with the proposed new travel passports may exist in a precarious position of de facto statelessness.’

Through interviews with people who received these special Comoros passports, I learned that this scheme was particularly disastrous for those who had previously held Emirati passports, generating systematic precarity by foreclosing their access to gainful employment, healthcare, education, welfare benefits and other citizenship rights in the UAE.<sup>186</sup> The special passport recipients also face new problems crossing international borders. For example, one interviewee who previously visited Bahrain several times with his Emirati passport was held at the airport with his new Comoros passport, even though foreign residents in the UAE (including those with “normal” Comoros passports) are authorised to travel throughout the Gulf Cooperation Council (GCC) without visas. When I attempted to intervene on his behalf, I was informed by the immigration officials in Bahrain that they consider these passports to constitute a security risk. Since the Union of the Comoros does not acknowledge who received these passports or provide any diplomatic protection or consular support for passport recipients, external security forces have no way of vetting who received these special passports through

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<sup>183</sup> Lori, N. (2019), *Offshore Citizens: Permanent Temporary Status in the Gulf*, Cambridge University Press.

<sup>184</sup> Abrahamian, A. ‘Who Loses When a Country Puts Citizenship up for Sale?’, *The New York Times*, 5 January 2018, <https://www.nytimes.com/2018/01/05/opinion/sunday/untied-arab-emirates-comorans-citizenship.html>.

<sup>185</sup> Surak, K. (2019), ‘Millionaire mobility and the sale of citizenship’, *Journal of Ethnic and Migration Studies* 47(1): 166-189.

<sup>186</sup> Lori, N. (2019), *Offshore Citizens: Permanent Temporary Status in the Gulf*, Cambridge University Press.

the UAE-Comoros agreement instead of irregular black-market channels. This suspicion is only exacerbated by the fact that people's names were Frenchified and spelled differently in these special passports than in their previous identity documents, creating irregularities that lead border officials to view these documents as fraudulent. Finally, reports (and rumours) of government corruption and leakage in the Comoros passport supply have also contributed to an international perception of these special passports as "high risk" documents that could fall into the hands of terrorists or other security threats.<sup>187</sup> In short, some pitfalls of special passports include a lack of consent, loss of citizenship and membership rights, loss of mobility, and heightened surveillance and suspicion of passport recipients.

### ***Opportunities: The role of the private sector in facilitating mobility without membership***

Having outlined some of the pitfalls of the UAE-Comoros special passports, are there any lessons to be learned from this experiment? As Gezim Krasniqi notes, 'establishing an exceptional global mobility regime requires some framework of global consent' and special passports can only work with a high degree of cooperation between states and checks and balances in place, as well as the consent of the individuals concerned. Ideally, an inter-governmental or international entity would be tasked with acting as an intermediary between states and take on the responsibility of documenting and "vouching" for special passport recipients, as the League of Nations did in the case of Nansen passports, and the UNHCR does with its central population registry of displaced persons.<sup>188</sup> Without transparency, cooperation, and reciprocity issuing special passports will undoubtedly lead to systematic precarity and *de facto* statelessness. At the same time, with some caution we might draw upon certain elements of the UAE-Comoros deal to reimagine the funding structure of citizenship-by-investment programmes. As Džankić and Bauböck note, 'widely opening the door to citizenship for those without genuine links is a hard sell in democracies, since it devalues citizenship as a status of equal membership in a political community whose members share an interest in the common good and future of a particular polity.' While there has certainly been public criticism of passports for sale (such as in Cyprus), this industry has grown exponentially over the past two decades.<sup>189</sup> Mira Seyfettinoglu et. al's recent study examines the emergence of citizenship-by-investment programmes (from 1960-2020) to explain why over 20 percent of sovereign states in the world sell passports.<sup>190</sup> While we might expect that political constraints in liberal democracies would make the introduction of these programmes less likely, the researchers found no evidence that regime type makes the adoption of these controversial programmes more or less likely. States across the political spectrum engage in the global mobility market, and instead of necessarily eradicating the citizenship-by-investment market by incorporating vulnerable groups, we have an opportunity to think through how we might redesign and rescale these schemes to meet the challenge of tailor-made mobility rights.<sup>191</sup>

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<sup>187</sup> Lewis, D. & A.A. Ahmed (2018), 'Exclusive: Comoros passport scheme was unlawful, abused by 'mafia' networks – report, Reuters, 23 March 2018, <https://www.reuters.com/article/us-comoros-passports-exclusive-idUSKBN1GZ37H>.

<sup>188</sup> 'Registration and Identity Management', UNHCR, <https://www.unhcr.org/registration.html>.

<sup>189</sup> 'Cyprus MP Quits in Wake of Passports-for-Sale Scandal', Al Jazeera, 20 October 2020, <https://www.aljazeera.com/news/2020/10/13/cypriot-mp-resigns-after-al-jazeera-investigation>.

<sup>190</sup> 'Who's Selling? Trends and Determinants of Citizenship-by-Investment Programmes around the World', Global Governance Programme, <https://www.eui.eu/events?id=536959>.

<sup>191</sup> For a longer discussion of how citizenship-by-investment programmes may be repurposed, see Bernhard Perchinig, 'Passport for sale: Selling passports to the rich to enable the mobility of the poor' (unpublished manuscript, July 2020).



1. First, each citizenship-by-investment transaction could be “taxed” to create a coffer of funds for special passports: a proportion of individual fees, agency fees, and state revenues from citizenship-by-investment/golden visas could go towards this fund.
2. Second, states could be asked to allocate a certain number of passports to vetted vulnerable groups as a proportion of the total investor visas or investor citizenships that are sold each year.
3. Third, citizenship-by-investment firms could be tasked with taking on a certain number of “pro-bono” cases as a proportion of the total citizenship-by-investment transactions they facilitate each year. We already see some developments in this direction, such as with Henley and Partner’s corporate social responsibility programme in partnership with the UNHCR and Arton Capital’s Global Citizen project.<sup>192</sup>
4. Fourth, the international donor community—including large corporations and private foundations—that already help fund refugee camps could also finance special passports through existing investor citizenship pathways (at a special lower cost).<sup>193</sup>
5. Fifth, states could integrate special passports into their bilateral and multi-lateral “mobility compacts” and current responsibility-sharing efforts to address the “migration-development nexus.”<sup>194</sup> Instead of allocating foreign aid towards migration enforcement (interdicting and containing migrants in sending or transit countries) or economic development in sending countries, these agreements could also entail cooperation over security vetting and issuing special passports.
6. Special passports could also be incorporated into bilateral or multilateral trade agreements and diplomatic negotiations over visa-waivers. These agreements could include clauses for the targeted granting of exit and entry permits to a number of special cases each year, as suggested by Lorenzo Piccoli in this forum.

This brief sketch of a re-imagined global mobility regime that links citizenship-by-investment to mobility under duress will no doubt raise objections, especially on the grounds of security concerns. However, as Kaija Schilde reminds us states, international organisations, and the private sector are all already engaged in the security vetting of travellers and individuals who have the means to purchase more powerful passports.<sup>195</sup> This vetting is undertaken by the transportation industry when visas are checked prior to permitting travellers to cross borders, and when states outsource part of the vetting of travellers to visa-processing centres.<sup>196</sup> Private security firms also run due diligence and clearance checks on individuals on behalf of governments. When it comes to tracking terrorist suspects and other security threats, there is a high level of coordination and intelligence sharing between states and security companies for surveillance purposes. And yet thousands of unaccompanied minors “disappear” in crisis situations.<sup>197</sup> We make conscious choices about how and where security resources are

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<sup>192</sup> ‘Corporate Social Responsibility’, Henley & Partners, <https://www.henleyglobal.com/philanthropy/corporate-social-responsibility/>; ‘Corporate Responsibility’, Arton Capital, 8 October 2019, <https://www.artoncapital.com/arton-capital/corporate-responsibility/>.

<sup>193</sup> ‘Refugee Livelihoods’, IKEA Foundation, 18 May 2021, <https://ikeafoundation.org/refugee-livelihoods/>; ‘Bill and Melinda Gates Foundation’, UNHCR, <https://www.unhcr.org/bill-and-melinda-gates-foundation.html>.

<sup>194</sup> Bohning, R. (2009), ‘Getting a handle on the migration rights-development nexus’, *International Migration Review* 43(3): 652-670.

<sup>195</sup> ‘FMHT: Disrupting the Human Trafficking-Migration Nexus’, The Frederick S Pardee School of Global Studies.

<sup>196</sup> VFS Global, <https://www.vfsglobal.com/en/governments/index.html>.

<sup>197</sup> Allsopp, J. & N. Sigona, ‘Mind the Gap: Why Are Unaccompanied Children Disappearing in Their Thousands?’ *OpenDemocracy*, 22 February 2016, <https://www.opendemocracy.net/en/5050/mind-gap-why-are-unaccompanied-children-disappearing-in-thous/>.

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mobilised, and those decisions can be changed: we can *decide* to bring expedited security vetting to groups who are in desperate need of safe passage.

## Rejoinder

### Mobility without membership: Do we need special passports for vulnerable groups?

Jelena Džankić\* and Rainer Bauböck\*\*

#### Introduction

When we started this forum debate, we hoped that the responses we would get to our proposal for a special passport for vulnerable mobilities would not merely raise objections on the grounds of principle. Rather, we hoped that this exchange would yield some novel practical solutions how to enable mobility across international borders for those who need it most. Few, if any, of the fifteen excellent responses we received in this forum raised any objections on grounds of principle, yet many commentators questioned the feasibility of our proposal. Some have also offered constructive ideas, or alternative proposals and all acknowledged the need for a forward-looking approach to break the circle of precariousness for those who need to move but are constrained by restrictions tied to their citizenship of origin. Unlike the wealthy investors, who can purchase membership-free passports, or those with ancestry in countries of the global North, who obtain them through presumed connections, these vulnerable groups need to become sedentary in order to qualify for naturalisation in a destination state before they can become mobile as owners of a valuable passport.<sup>198</sup> In other words, our main premise – that it is necessary to enhance the mobility rights for these vulnerable groups – has remained uncontested.

Yet, in reading the comments to our proposal, we have realised that we need to clarify its scope. Our proposal does not aim to cover all forms of necessity driven movement across borders. It focuses specifically on people who need mobility more than a new permanent place of residence or country of citizenship. Valeria Ottonelli and Tiziana Torresi capture well our core concern when highlighting that there are numerous ‘circumstances in which what people need and want is simply those mobility rights, without also necessarily aiming to become full members of the society they move into.’ In such contexts, we believe that it is essential to guarantee such individuals ‘the right to move freely back and forth between the receiving country and their home country, without being subject to limitations imposed on migrants by current migration regimes’.

Conditions of environmental risk or economic hardship most strongly affect people in developing countries, who have thus the greatest need for new legal channels of mobility. Yet why would destination states in the global north accept such an approach? John Torpey invokes John Rawls’ idea of the ‘veil of ignorance’: at some point we could all be necessity fleers. This veil has probably become a bit more transparent with the COVID-19 pandemic and recent climate disasters and has revealed a more general – human - vulnerability. We find

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<sup>198</sup> Džankić, J. (2019), *The Global Market for Investor Citizenship*, Palgrave Macmillan; Harpaz, Y. (2019), *Citizenship 2.0: Dual Nationality as a Global Asset*, Princeton University Press.

Torpey's argument convincing, as it highlights that for any proposal akin to ours to materialise, and be accepted globally, the way people in the global north think about mobility needs to be reframed. Or rather it needs to change from 'mobility rights are needed mostly by the poor and endangered countries or the less well-off in the developed world' to 'our lives are not as risk-free as we may be thinking and mobility can be an insurance for the future'. Linking the need for mobility to the contemporary human condition may help prepare the ground for global solutions highlighted also by Michael Doyle, Janine Prantl and Mark James Wood, and Yasemin Soysal.

Yet waiting for a global consensus to emerge might take a very long time. The pathway to a global mobility regime must harness the interests of sending as well as receiving states and must aim to generalise existing good state practices. In our conversation, Diego Acosta highlights the policies of some Latin American and European Union countries that have introduced special humanitarian admission permits. However, as ad hoc arrangements for resettlement from specific regions to specific destinations, such permits enable mostly one-way movement, not mobility between countries. While acknowledging the value of such initiatives, we believe that they are likely to remain small scale and unlikely to set an example for many other states.

### ***Alternative pathways to mobility***

Our idea for a special passport for vulnerable mobilities is not the only answer to the problem. In our kickoff essay we sketched three alternative pathways to enhanced mobility for those who need it most. Each of these has been picked up by some of our respondents and defended in much more nuanced ways than we had initially imagined. These approaches consider broader global mobility regimes, regional solutions, and expanding extraterritorial access to citizenship.

### **Global free movement: still a utopia**

As we expected, none of our commentators has pushed for the global free movement utopia. However, Doyle et al and Soysal argue for focusing on what could be achieved at the global level in terms of strengthening mobility rights. In this view, the Global Compact on Migration and the Global Compact on Refugees point the way. Doyle et al. base their advocacy for an all-encompassing international solution on a global responsibility sharing approach, rather than on "imposition". Soysal highlights that for such a system to be legitimate and operational the developed countries need 'to treat the states in the South as equal stakeholders'. She notes the significance of the Western states' systematic contribution to a broader global strategy of migration and mobility management through resettlement quotas, humanitarian visas and other initiatives that would reflect states' responsibility for the common approach.

First of all, we welcome this broader perspective, and would encourage scholars to explore its potential. So far, there has been a very limited amount of both conceptual and political work on special mobility needs compared to the other types of human movement across borders. Second, we would like to promote mobility options also at levels below the global arena, in which bold solutions are harder to agree on and get more frequently levelled down to a minimum. Unlike responses to the global climate crisis, which must be primarily agreed and pursued at the global level because of the nature of the threat, migration and mobility challenges can often be tackled better at multilateral and regional levels below the global one. Global solutions will never truly enable free movement as a human right, as long as the power to control immigration remains a core feature of sovereignty that states cannot be expected to renounce. At regional levels and for specific kinds of movement states might be more willing

to relax or fully suspend their immigration control powers, since this does not undermine their claims to sovereignty within the international community of states.

### **Expansion and multiplication of regional unions: plausible, but with limitations**

In his response, as well as in his scholarship, Diego Acosta has pointed to a steady increase of regional free movement law and arrangements around the world, and has advocated for further expansion and multiplication of such regimes.<sup>199</sup> Regional free movement arrangements, as the May 2021 extension of the Andean Migratory Statute shows, can be extended to nationals of third countries. They can also unilaterally include non-ratifying countries, as Brazil and Uruguay did when they extended the MERCOSUR Residence Agreement to Venezuela.

While certainly being a more immediately feasible solution compared to global free movement, regional unions have their limitations when it comes to ensuring mobility for vulnerable groups. First, they are unlikely to be possible in all the regions of the world. As Torpey has observed, there are scarcely any prospects of regional free movement in the Persian Gulf, and such initiatives are just as unlikely throughout South and Eastern Asia. Second, as also pointed out by Martin Ruhs, the main limitation of regional free movement is that they are only possible between countries with roughly similar levels of development and social welfare systems. Regional free movement arrangements have so far been established between rich countries in the global North (in Europe), threshold economies in the South (in South America) and poor developing countries (in sub-Saharan Africa), they have never bridged the gap between very rich and very poor countries. Third, regional free movement agreements do not specifically target vulnerable groups. As highlighted by Ovea Olakpe and Anna Triandafyllidou, the focus of new initiatives should be on those who do not already enjoy mobility rights at regional levels.

### **Expanding access to high value citizenships: a twisted route**

A number of commentators in the forum have argued against separating mobility from citizenship, either by emphasising that the rights of necessity fleers at destination will remain vulnerable unless they have access to citizenship there, or by exploring possibilities for obtaining passports extraterritorially. Rebecca Buxton has reminded us that having entry rights through a passport is not enough, but that those who are refugees in a wider sense need to be afforded protection of their basic rights. She also highlights the normative functionality of citizenship in securing the protection of those rights. Refugees who have lost the protection of their citizenship need to be offered the citizenship of another country where they can rebuild their lives. Yet those who need to be temporarily mobile across international borders rather than to settle elsewhere need a passport, temporary residence and access to employment rather than full citizenship. Making access to full membership a normative requirement built into mobility schemes is often neither feasible nor defensible if it would greatly reduce the numbers who are admitted and ignore their own life plans. These insights in work by Martin Ruhs, Valeria Ottonelli and Tiziana Torresi, amongst others, were important for our proposal for special passports that enable mobility, instead of aiming to substitute for an ineffective citizenship, which is what asylum is about, or providing a pathway to citizenship for settled immigrants.<sup>200</sup>

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<sup>199</sup> Acosta, D. (2020), 'The Expansion of Regional Free Movement Regimes: Towards a Borderless World?' in P. Minderhoud, S. Mantu, K. Zwaan (eds) *Caught In Between Borders: Citizens, Migrants and Humans*, Wolf Legal Publishers: 9–15.

<sup>200</sup> Owen, D. (2020), *What do we owe to refugees?* Wiley.

Noora Lori's account of the UAE purchasing Comoros passports for their stateless bidoon populations and some groups who had previously held UAE citizenship illustrates the negative potential of special passports that were designed not to enable mobility but to prevent it while perpetuating or even enhancing the stigmatisation of marginalised groups. One cannot exclude that special passports created for the opposite purpose of enhancing mobility might in some contexts also be used to identify people as a security threat. Does that mean that we should not settle for anything less than full citizenship at destination for necessity movers? As Ottonelli and Torresi point out, doing so would not only forgo tangible improvements for the sake of unrealistic demands on destination states; it would also misrepresent the intentions of migrants whose goal is mobility rather than resettlement.

Even if we accept the citizenship route, we believe that there are some shortcomings to Lori's imaginative proposal to harness the emerging global market for passports by allocating a share of it for migrants in need. As Lori suggests, this could be done by taxing the sale of passports by states, pro bono work by private companies, or setting aside quota of investor passports for vetted necessity movers, all of which would entail accepting and legitimising the industry promoting the sale of citizenship globally (see our earlier forum on this issue). Moreover, it is difficult to imagine that states would "donate citizenships" in addition to selling them. Doing so would undermine the logic of investor citizenship schemes and lower their commercial value. It would be like asking real estate companies selling luxury properties on the Côte Azure to donate a few of these to homeless people. This is why some firms involved in the citizenship industry that want to polish their image through charitable activity invest into resettling refugees in newly created settlements, rather than in awarding them with passports.<sup>201</sup> The mobility value of passports would also likely be curtailed if necessity movers are included in the global market for investor citizenship, since destination states would then be less likely to honour visa waiver agreements.

If extraterritorial access to citizenship is blocked for most necessity movers, the only alternative access to it involves, as noted by Ottonelli and Torresi, a paradox. In order to be mobile between a country of origin and destination, they would need to acquire destination country citizenship through ordinary naturalisation and without having to renounce their citizenship of origin. But ordinary naturalisation presupposes permanent settlement, so they would have to abandon mobility in order to acquire mobility rights.

There are cases where even the naturalisation route may fail to secure mobility rights. Drawing on the Australian experience during the pandemic, Leanne Weber worries that in global emergencies even full citizenship cannot guarantee mobility rights – in spite of the exceptionally strong obligation of states under international law to allow their citizens to leave and to readmit them when they want to return. Her contribution has taught us a valuable lesson: citizenship-based mobility rights may not be as crisis-proof as we had previously thought. Rather than being dictated by the crisis itself, restrictions are political decisions, and their acceptability will depend on the nature of the crisis and available scientific knowledge about its trajectory. We acknowledge that already legally entrenched mobility rights of citizens and residents jeopardized in a state of emergency may need special protection by independent courts that are able to judge whether temporary restrictions are proportionate. Our proposal's guiding idea is, however, that mobility needs that are triggered or enhanced by crises need new legal and policy instruments that are lacking so far. The citizenship route is still the most promising one for expanding free movement between states either through toleration of multiple citizenship or through a common citizenship in a regional union of states; it is not a promising pathway for crisis-induced mobility needs.

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<sup>201</sup> 'Corporate Social Responsibility', Henley & Partners, <https://www.henleyglobal.com/philanthropy/corporate-social-responsibility>.

### **Mobility passports and similar proposals**

The upshot is that none of the fundamental alternatives discussed above seems to respond adequately to the special mobility needs that have come to the foreground in the covid-19 pandemic and that are likely to emerge at much bigger scale as a result of climate disasters.

We support the plea by Doyle et al. that the wealthiest countries should contribute massively to refugee resettlement by either taking in refugees or assisting other countries to do so. But our proposal aims also at sidestepping the political deadlock that has blocked any fundamental redesigning of the international refugee protection system after the end of the Cold War. It focuses on enabling mobility for those who need it most and tries to harness as far as possible state interests in mobility opportunities for their own citizens and in the availability of a mobile workforce for some of their essential industries and services.

Several contributors have accepted this motivation and rationale for our suggestion while proposing different instruments for achieving the same target. This conversation has convinced us that the goal of a single standardised and internationally recognized mobility passport – if it can ever be reached – can be usefully approached, even if not replaced, by smaller scale instruments targeting specific groups.

We therefore fully support Olakpe's and Triandafyllidou's idea of a green passport lottery in the context of EU-African migration-development partnerships. This policy would target young migrants who are otherwise likely to engage in irregular migration to Europe. The proposal seems to us also carefully crafted to take into account the interests of origin as well as destination states (e.g. by selecting migrants at mid-skill level). Moreover, the idea of a passport lottery could have the beneficial effect of preparing the ground for a gradual increase in numbers while incentivising those who fail to get immediate access to wait for a next round instead of buying the services of human traffickers.

Lorenzo Piccoli's proposal of targeted visa waivers provides a similar stepping stone. This measure can be implemented fast as it requires only unilateral action by destination states. Piccoli considers both country-specific and group-specific visa waivers. In cases of country-level emergencies like the one we are witnessing now in Afghanistan, the former would help people exit but would require coordination among destination states since a single one opening its territory could soon be overwhelmed and face severe domestic backlash. The hardening of European visa and border regimes since 2015 and the current humanitarian disaster at the border between Belorussia and Poland do not augur well for such proposals. Group-specific visa waivers seem more realistic. The example quoted by Piccoli concerns only 200 Afghan journalists who had worked for British media.<sup>202</sup> The more innovative proposal would be visa waivers for larger groups including those without previous connection to a destination state, such as 'all individuals fleeing a territory where there has been a natural disaster, or all qualified cross-border care providers'. As Piccoli points out, the advantage but also limitation of visa waivers is that, unlike special mobility passports, they do not require international recognition by other states and limit therefore also the beneficiaries' further mobility options. Moreover, visa waivers merely permit entry and a limited time-period within which migrants can try to sort out their legal status, the regulation of which would remain fully within the powers of the destination state. While they avoid irregular border crossings and thus 'destroy the business model of the traffickers', meeting thus a main goal proclaimed by European policy-makers, they still risk shifting irregularity to overstaying. By contrast, the issuing of special travel documents creates a higher level of commitment than merely abolishing visa restrictions and

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<sup>202</sup> Savage, M. 'Afghan Journalists Win Right to Come to Britain after Media Appeal.' *The Guardian*, 22 August 2021, <https://www.theguardian.com/world/2021/aug/22/afghan-journalists-win-right-to-come-to-britain-after-media-appeal>.

is thus more likely to be combined with positive regulations concerning residence rights and their renewal, or access to employment.

### ***Three critical questions for special mobility passports***

This raises three critical questions that have been discussed in this forum: Who would be the beneficiaries of special mobility passports? What rights would be attached to these? And who will determine the status and claims of special passport holders?

### **Potential beneficiaries**

When discussing which groups would most benefit from special mobility passports we mentioned two: environmentally displaced persons and temporary migrant workers. With regard to the former category, Caroline Nalule rightly points out that most are currently internally displaced persons. This is partly so because of other states' reluctance to open their borders for potentially massive numbers who had to leave their places of residence because of draughts or flooding. The other reason is, however, that people displaced by rapid onset disasters like extreme weather events are unlikely to permanently abandon their homes – unlike those displaced by slow onset disasters like rising sea levels who have no place to return to. The latter group of victims, too, will initially try to find internal flight alternatives, such as joining the millions that have already moved from the countryside into the megacities of the global South. Yet it would be short-sighted to think that this current pattern of predominantly internal climate-driven migrations is likely to persist as temperatures continue to rise and life in big cities in the hottest climates becomes impossible for those who cannot afford air conditioning in their apartments. We expect therefore that climate driven migration will in the near future increasingly spill across international borders with many migrants seeking, however, mobility (e.g. seasonal circulatory migration) rather than permanent resettlement. Our proposal for a special mobility passport for some of these groups builds on this expectation.

With regard to temporary labour migrants in sectors such as agriculture, construction and care, Nalule points out that their vulnerability is not created through mobility restrictions but through a lack of rights in host states. It is true that these migrants usually possess multi-entry visas, but these often come with short expiry dates and persons holding them remain strongly exposed to risks of denial of entry at the border or deportation. Martin Ruhs confirms that the 'key source of migrants' vulnerability is precisely their restricted mobility, both in terms of their labour market mobility within the host country and their physical mobility across international borders.' For Ruhs, the main source of vulnerability of temporary migrant workers is their lack of mobility in the host society's labour market and their risk of running into debts because they need to bear high costs for recruitment and remittances. We agree that the admission of labour migrants is premised on a perceived need and expected benefit of the receiving state, so the problem of cross-border mobility seems somewhat less urgent for this category and the focus should be instead on securing their rights in the destination country. Yet mobility restrictions do remain an important aspect of precarity and our proposal aims to counter it, as Ruhs says by enabling 'unrestricted circular labour migration' for those who have been accepted into a special passport regime for migrant workers.

Ruhs worries that 'such a policy could further prolong structural inequalities between temporary migrant workers and other workers in the host country, in a way that is incompatible with long-term standards of equality and inclusion in a liberal democracy.' This risk is real, but the answer should be, as Ruhs suggests, not to curb the mobility of temporary migrant workers, but rather to narrow the gap between their labour and social welfare rights and those of permanent immigrants and natives.



## **Rights**

One of the questions that have been raised by many in the forum was what rights would be associated with the special passports. Our proposal is based on the premise of ‘mobility without membership’ for vulnerable groups, and thus the special passport would guarantee the rights of admission and return, yet it would be disconnected from political rights. Admission to permanent residence, citizenship and advanced welfare rights would not be automatically conferred to vulnerable *groups* by means of this special document but would remain available to *individuals* meeting immigration or naturalisation conditions. In order to avoid making mobility rights too “expensive” for destination states, it is important to design them with a view towards temporary mobile populations, not resettled refugees or permanent immigrants. Even so, there will always be individual cases where what had been envisaged as temporary mobility becomes permanent settlement. We believe that such changes of status must be possible without being automatic, which would subvert the purpose of a conditional temporary admission scheme.

This is not yet a full answer, since also temporary residents need a protections and rights. Many of the contributors to this forum debate see the access to rights, rather than mobility per se as the key for reducing vulnerability. Ottonelli and Torresi, Julija Sardelić and Soysal argue that our proposal can scarcely make any difference without guarantees of rights at destination, such as those to shelter, work, healthcare, and education. This objection is corroborated by the legacy of the Nansen passports, which did not cover welfare rights. We agree that mobility alone is insufficient to eradicate vulnerabilities, and that additional protection of rights short of citizenship is needed to avoid creating a category of extremely vulnerable migrants. In our scenario, mobility would entail certain protections of rights at destination. In liberal states, fundamental rights are guaranteed also to temporary residents by the constitution and a principle of equal protection under the law. On top of these, the special passport could also be associated with a ‘regime of special and differentiated rights that fit the specific condition of each group considered’, as Ottonelli and Torresi propose.

What this approach suggests is that there is a need for minimum sets of rights that ought to be agreed to by all states participating in a special passport regime, while there must also be significant leeway that allows for differentiation for particular groups of migrants. Variation with regard to schedules of rights across destination states is more problematic, but we have to accept that it is inevitable too, given the different nature of national constitutional and welfare regimes.

Looking at the current situation in EU member states, most of which have been experiencing a political backlash against migration and some of which have also witnessed a serious backsliding of democracy, does not leave much room for optimism. Sardelić’s example of the failure of EU states to use the available instrument of the Temporary Protection Directive in response to the 2015 “refugee crisis” supports a pessimistic view. Where moral migration panics prevail, states cannot be trusted to apply mobility enabling instruments even where they have agreed to these. Hence it is important to put both voluntary and binding instruments into practice before such crises. For instance, some groups of states could work out and implement common standards for the rights of special passport holders that can later serve as a template for agreements with a broader scope.

Sardelić provides another troubling example that demonstrates that even the most comprehensive package of rights for temporary migrants currently available may not be sufficient to overcome entrenched vulnerabilities. EU citizenship enabled mobility for Roma, but ‘did not live up to the promise of protection for Romani EU citizens’. This is indeed an important caveat, but more a reason to consider mobility based on supranational citizenship

as an unfinished project also in the EU, not a reason to doubt that it has been overall beneficial for Europe's most vulnerable ethnic minority compared to the status quo ante.

### Determining necessity and recognition

Torpey has reminded us that "necessity" is an inherently slippery concept that states can use and abuse in pursuit of their own interests, and that it is essential to determine criteria, such as persecution or fleeing violence. Nalule notes that even if such criteria exist, they will be interpreted by states restrictively with reference to existing legal frameworks, like the Global Refugee Compact. Her criticism is that, in this case, special passports would not make much difference. We agree that states are likely to select necessity movers based on a mix of self-interest and recognition of existing legal obligations. Our proposal, however, is not so much focused on criteria for selection (determination of necessity) but on the mobility rights of those whom states agree to select. In such cases multi-entry visas or special passports might improve the situation of those who are not selected for resettlement but who need temporary shelter and return options.

The question of who defines the contours of "necessity" is linked to another one raised by most commentators: who will issue and recognise mobility passports? We do not think that such passports should be issued by countries of origin, as this would amount to merely duplicating existing passports without much added value. What matters is that special passports are recognised by transit and destination states. Destination states that issue such passports would obviously have to recognise them, but then the question is whether humanitarian visa would not meet the same purpose. In line with the responses by John Torpey and Gezim Krasniqi, we believe that passports issued by an international organisation, such as IOM or UNHCR would be most beneficial. If a sufficient number of states signed up to an agreement with an international organisation, this would offer the best chances not just for mobility within a larger group of destination states, but also for visa-free entry and temporary stay in transit countries.

The matter of recognition is also pertinent for Krasniqi's concern that special passports need to register a pre-existing legal identity, normally the beneficiaries' nationality. If such passports were to be issued by countries of origin, this would indeed risk excluding stateless persons. If they were to be issued by individual countries of destination, those living in irregular territories not recognised by the country in question would also be at risk. However, if the document were to be issued by an international organisation, it could be easier to circumvent such obstacles and to create for these persons a new legal identity based on unique biometric data and the territory where they originally resided that could also be recognised by states signing up to the arrangement. This is not meant to belittle the dangers of creating new digital identities, discussed in an earlier GLOBALCIT forum, but emergencies like pandemics create opportunities for social innovations and a push towards globally recognised legal identities that are in principle separable from nationality could be such an innovation.<sup>203</sup> Such identities will not replace nationality, which remains indispensable as a tool for assigning special responsibilities for individuals to states (such as the duty of unconditional readmission). Nationality-based rights and identities inevitably reproduce global hierarchies of power and wealth between states. Creating special passports for those whose mobility is blocked by their nationality seems to us a tool for mitigating, although not fully overcoming, the inequalitarian effects of the birthright citizenship lottery from a global perspective.<sup>204</sup>

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<sup>203</sup> 'Cloud Communities: The Dawn of Global Citizenship?' GLOBALCIT, <https://globalcit.eu/cloud-communities-the-dawn-of-global-citizenship/>.

<sup>204</sup> Shachar, A. (2009), *The Birthright Lottery: Citizenship and Global Inequality*, Harvard University Press.

### **Conclusions: A realistic utopia?**

Audrey Macklin articulates a quite fundamental critique: the objections that we raise specifically against open borders utopias apply also to our own proposal that seems unrealistic given the sovereignty hurdles that she specifies. So why not be more radical and promote open borders in the knowledge that states will resist them fiercely? On Macklin's account, states 'resist the admission of people whom the state does not individually select, even where the state consents in advance to their admission as a class, and even if their admission is framed as advancing domestic economic self-interest.' Second, where they are bound by common standards of admission, they want to retain the power to determine the beneficiaries themselves.

We think this scepticism is only half warranted. Regional free movement in the EU and elsewhere shows that many states do – also for reasons of economic self-interest – agree to admit the citizens of other member states and they even agree that they cannot select the beneficiaries, since these are determined by the other member states' citizenship laws.

We agree, however, that there are few signs that states are ready to waive sovereign immigration control powers for "third country nationals". However, global crises have been incubators of social and political innovations in the past that outlasted the immediate emergency. The creation of the UN system, the coding of international human rights, the emergence of the European Union are all examples of serious self-imposed constraints on state sovereignty born out of exceptional global crises. In retrospect we celebrate the innovators who dared to design then institutions that had seemed completely unrealistic in the preceding period. Why should we not imagine today that the pandemic and the bigger global climate crisis will also provide fertile grounds for challenging and further constraining state sovereignty?

Macklin suggests that if states were willing to pool that much of their sovereignty, bolder moves than ours towards open borders might also be feasible. Yet, we believe it is not a good strategy to present our proposal as a half-way move towards an open-border world. Instead, we take as given that the world consists of independent states that offer vastly unequal opportunities to their citizens and are for that very reason not ready to open their borders indiscriminately. Within this far from ideal world, it has been possible to expand opportunities for free movement in regional unions of states and through the increasing toleration of multiple citizenship. Our proposal is modest rather than utopian in aiming to enhance mobility opportunities also for those who are most disadvantaged by the mobility blockages within the present system and to harness states' self-interest for such reforms, such as their need for "essential migrant workers" or their desire to promote mobility opportunities for their own nationals. Our hope is that the thoroughly dystopian potential of the global crises of our time will make these suggestions sound much less utopian than they might have seemed even a few years ago.

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