ETHICAL LIMITS OF PANDEMIC GOVERNANCE: POPULATIONS ON THE MOVE AND THE LAW

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Abstract

This article explores the context-bound qualities of the legally sanctified practices of 'quarantine' and border closures as it examines the normalized invisibility of populations on the move who have not been 'protected' through the use of such standard Covid-19 measures. Inside national borders, isolation and quarantine orders are traditionally issued by states in accordance with the state's broad powers to protect public health. Throughout the Covid-19 pandemic, these orders have been either not applied to or on certain occasions intervened with or suspended when a quarantine was deemed unreasonable or inapplicable with reference to migrants, refugees and displaced people. The article proposes a redefinition of death as 'death-in-living' and 'grievable lives' as 'disposable lives' in order to understand the conundrum concerning the selective application of Covid-19 measures to irregular migrants, refugees, undocumented and non-status peoples and stateless communities. Legal responses to the pandemic continue to have a far greater impact upon populations on the move, displaced communities and refugees in radically unequal ways. The article reveals the ethical limitations of global pandemic governance in terms of how legal and policy-based practices systemically fail and desert certain populations and advances a notion of justice that starts from a deeper understanding of existing injustices.

Keywords: global governance; death-in-living; grievable lives; populations on the move; Covid-19 pandemic; ethical limits of law.

[A] INTRODUCTION

The motto that Covid-19 knows no boundaries, and that it is blind to all differences, is a colossal misrepresentation. As Covid-19 continues to spread across the globe, the crowded and unsanitary conditions in prisons, juvenile detention and immigration detention centres, factories and mines, farmlands and sweatshops, shantytowns, urban social housing units, refugee camps and border crossings leave specific categories of individuals unequivocally more vulnerable than others.

As governments continue to impose quarantines and travel bans at an unprecedented scale, locking down whole cities, subjecting people to legally enforceable quarantines, regularly banning entry by non–nationals travelling from specific locations, certain populations have been frequently kept exempt from purview of such measures put in place for protecting public health. Putting aside the limited utility of these aforementioned measures for highly transmissible diseases, and the repercussions of their imposition with too heavy a hand on the general population, in this article I explore the context-bound qualities of the legally sanctified practice of 'quarantine'. Specifically, I examine the invisibility of populations who cannot or have not been 'protected' through the use of standard Covid-19 measures.

In public health terminology, 'quarantine' refers to the separation of persons (or communities) who have been exposed to an infectious disease for a limited duration. Quarantining is different from 'isolation' practices, as the latter applies to the separation of persons who are known to be infected. However, both practices are legally enforceable interventions, along with limits on travel and border closures. Inside national borders, isolation and quarantine orders are traditionally issued by states in accordance with the state's broad powers to protect public health and most states do not require an emergency declaration in order to issue a quarantine. What is of specific concern is that throughout the Covid-19 pandemic, and at a global scale, these orders have been either not applied to, or on certain occasions intervened with or suspended with reference to, refugees, migrant workers and non-status people. In such cases, prevention of the spread of communicable diseases into the country or across state borders appears to become a secondary concern. In the following pages, I thus propose the redefinition of death as 'death-in-living' (Mbembe 2003) and 'grievable lives' (Butler 2004) as 'disposable lives' in order to understand the conundrum concerning the selective application of Covid-19 measures.

The Covid-19 pandemic has had a vast array of social, economic and legal implications at a global scale. In addition to political and civil rights such as liberty and privacy being curtailed in the name of public health, legal responses to the pandemic continue to have a far greater impact upon populations on the move, displaced communities and refugees in radically unequal ways. The dimensions of their subjectification to unequal measures are related to their nationality, legal status, race, gender, disability, vulnerability and social class. Furthermore, legal interventions and resort to extreme measures causing further hardship in the plight of migrant workers, asylum seekers and internally displaced peoples under Covid-19 governance regimes are often presented as unequivocal and as not open to public debate. Making sense of the relationship between law and the pandemic requires us to recontextualize our understanding of the use of law in ways to limit, to exclude and to create exceptions, as well as the lacunae created by the anxious and panicked publics' lack of responses to the suffering and exclusion of certain populations under the pandemic circumstances. As governments declared states of emergency and assumed exceptional powers, the relevant obligations, principles of protection and procedures under public international law pertaining to migrant workers, refugees and asylum seekers have been regularly suspended. The strongest instrument of pandemic governance is national legislation. However, the effects of national pandemic governance upon displaced and dispossessed populations assumed the shape of a disaster at a global scale. The sum-total of the parts that make the migration governance regime led to an unprecedentedly stark treatment of non-nationals. A selective mapping of events unfolding in global refugee and migration hubs where we witness chronic crises situations such as the Greek Islands, Columbia, Bangladesh and India allows for a critical legal analysis of repercussions of national bodies' compliance/lack of compliance with established international obligations and ethical limits of global governance of the pandemic as it is imposed on populations on the move.

[B] LAW, JUSTICE AND THE COVID-19 PANDEMIC

Legal interventions that took place in the name of protection against the spread of Covid-19 have been consistently justified on the basis of public health needs, which are assumed to be unequivocal. At the same time, lack of protection measures or their limited application in a select set of circumstances have also been apparent, the latter primarily affecting displaced populations and populations on the move and often

in a disproportionately violent manner. Concerning migration governance regimes, as cascades of public policy measures were introduced leading to border closures and suspension of admissions, national systems of legal regulation of migration and their compliance with international law have been modified or suspended in the name of necessity, with no indication as to when or how they would be restored. Moreover, the relationship between law and discretionary decision-making has been reshaped, allowing for more and more *ad hoc* policy measures to be introduced. These developments, in turn, have adversely impacted individuals and communities who live in between and at the margins of nation-state boundaries. Overall, the Covid-19 pandemic has significantly impacted racialized, gendered and marginalized communities at a global scale, who have been not only disproportionately affected by the health crisis but also were rendered invisible with little or no recourse to alternative modes of protection. The specific challenges faced by these groups require us to develop a frame of critical analysis concerning the protection of non-citizens, the displaced and the stateless.

The contrasting experiences of people falling under two categories of 'political subjecthood', one pertaining to those who have nationality and legal status and the other pertaining to peoples on the move and with semi- or clandestine status, reflect the polarized understanding of what constitutes justice and legally enshrined protection within the framework of the Covid-19 pandemic (Ahmed 2000: 85). Under global health crisis circumstances, legal justice has been parsed out as policies and protective measures informed by the governing norms of political membership to the nation-state rather than an unqualified service to humanity at large. In this article, I discuss how such circumscribed 'justice-related interventions' to protect public health operated within an already established normative and material framework of the logic of global capital feeding upon a global mobile labour force that profits from racial, ethno-religious, cultural, sexual and regional differences (Achiume 2019). No doubt these differences inform the international and postcolonial legal apparatus of migration governance. What I specifically examine here is how claims and pursuits of legal justice through Covid-19 measures were led by the precarious desires of 'native populations' to protect what they already have and thus obviated the possibility of justice both within national borders and at a global scale for others who lack status. As such, this article exposes the limits of law and justice as formal processes defined by the letter of the law concerning public health measures under Covid-19 pandemic circumstances and the global governance of the resultant health crisis. As an alternative, I invite the readers to explore understandings of justice

as everyday practices affecting the lives and livelihoods of people that fall under different categories of political subjecthood and to relate them to the Covid-19 measures at different registers. In the specific context of lives marked by mobilities and uncertainties, the everydayness of injustice not only exceeds the standard readings of legal justice, but acts as a disruptive and disquieting optic forcing us to consider the possibility of developing a more nuanced reading of the governance of a global pandemic through law.

Henceforth, I focus on some of the common features of applications of Covid-19 governance measures in the context of global mobilities and, with reference to these, how some political subjects are recognized as bearers of rights and worthy of protections while others experience injuries and harms that are not deemed as unjust, reparable or remediable.[2] I also examine how legal justice operates to normalize and sustain governing norms that exclude migrants, refugees, undocumented and non-status people from the normative structure declaring individuals worthy of protection. I argue that the experiences of peoples on the move in the Covid-19 pandemic clearly indicate a need to shift our attention away from legal justice as an end goal, and instead to focus on the work of enlarging the sphere of justice by redefining political belonging and rightful ownership of the right to live and die with dignity.

[C] THE PRIVILEGE OF LIVING TO TELL THE TALE: PANDEMIC GOVERNANCE AND POPULATIONS ON THE MOVE

In order to adequately capture the pandemic experiences of populations on the move, there are three recurrent themes that need to be addressed. First, there is a systemic lack of access to medical, social and financial protections for communities on the move, or without status. Second, there is widespread presence of subcontracted/indentured employment, sub-standard employment, and the threat of forced returns to the country of origin, with no support mechanism or healthcare protection available at either end. In relation to this, there is also a preponderance of high-risk employment often requiring work outside of the home or clandestine work such as in sweatshops, agricultural fields and mines. Finally, populations on the move generally lack access to information about unfolding policy measures concerning Covid-19, and hence there is potential for confrontations with law enforcement and increases in

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[2] On the subject of the continued coloniality of power, coloniality of knowledge and coloniality of being, see Mbembe 2019.

incarceration, detention and summary deportations. Given these three characteristics marking their everyday lives, the chances of irregular migrants, refugees, stateless people and the displaced to live through the pandemic and be able to tell the tale are significantly diminished.

Migrant workers, refugees and displaced populations have been both more directly affected by, and more vulnerable to, the spread of Covid-19. At the same time, as the pandemic evolved, especially migrant workers continued to play an important role in the response to Covid-19 by working in critical sectors such as agriculture, mining, infrastructure maintenance, food-production and service/delivery. Overall, immigrants accounted for at least 3.7 per cent of the population in 14 of the 20 countries in one survey, and they always had the highest number of Covid-19 cases.[3] This list includes states in the Global North, as well as regional hubs of migration such as Turkey, Malaysia, the Gulf countries, Columbia and India. Suffice to say, these numbers only reflect registered or regular migrants with status, and they do not include irregular or undocumented migrants, refugees, asylum seekers, stateless peoples or other displaced communities. Migration-related data collected by the United Nations (UN) *Twelfth Inquiry* also reveal that migrants' access to essential healthcare services do not entirely depend on their legal status.[4] Migration and global mobilities have been and remain as essential components of the global economy. If so, what was curtailed by the Covid-19 restrictions on movement and border crossings? It was the underbelly of the global migration regime: the irregular migrant, the forced migrant, the non-status and stateless peoples on move.

As to be expected, increased border restrictions did not necessarily curtail the mobility of forced and irregular migrants as they escaped from violence, deprivation and suffering, but they altered the role played by humanitarian organizations and governance regimes concerning forced migration movements. They have also been put into effect in a selective manner to respond to the ongoing needs of the migrant-receiving economies. At the onset of the pandemic and just between 11 March 2020, when the World Health Organization (WHO) declared Covid-19 as a pandemic, and 22 February 2021, nearly 105,000 movement restrictions were implemented around the world (International Organization for Migration (IOM) 2021). During the same time period, however, 189 countries, territories or areas

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[3] See Global Migration Data Analysis (2019–2021) section at 'Migration Governance Indicators'.

[4] This specific inquiry collected data from 111 countries between late 2018 and early 2019, and it posits that more than three-quarters (86 per cent) of governments provide essential and emergency healthcare to all non-nationals, regardless of their migratory status, while 8 per cent indicate that they provide such services only to those whose status is regular. See UN 2018–2019.

issued 795 exceptions to these restrictions, thus enabling mobility for select groups (ibid). This dataset precisely proves the point that, while border regimes became highly restrictive in response to Covid-19, they remained flexible to accommodate the need for migrant labour. This is despite the fact that migration flows to countries of the Organisation for Economic Co-operation and Development (OECD) – which are measured by new permits and visas issued – are estimated to have fallen by 46 per cent in the first half of 2020.[5] These lower numbers largely pertain to a drop in new intake rather than a decrease in cyclical or long-term/renewable permits or special arrangements. The regular workings of regional economies continued to be fuelled by migrant labour, albeit many faced novel challenges. Ultimately, if we were to define capitalism as a forward-looking movement that reduces all future gains to the current value of what is exchangeable at present (Bichler & Nitzan 2010), one of the best examples to observe this reduction is migrant, indentured and clandestine labour on the move. Global capitalism flattens qualitative distinctions among different populations on the move, often to the point of sheer irrelevance as in principle, all of them are potentially disposable and ultimately 'ungrievable' (Butler 2004).

[D] LOST IN TRANSITION?

As the Covid-19 pandemic unfolded, by mid-July 2020, the IOM estimated that the pandemic had left at least 3 million migrants stranded, often without access to consular assistance, or a means to ensure that they did not slip into irregular status and hence were faced with the situation of having insufficient resources to meet their basic needs.[6] Furthermore, these figures only refer to 'international migrants' and not to those who are the millions of internally displaced or the clandestine labour force of undocumented migrants. Three cases of immigrants 'lost in transition' to global pandemic governance are particularly revealing in this context. First, thousands of migrants were stranded in Panama's jungles while attempting to travel north to the United States, as part of the long-standing Caravan movement. Second, migrant workers in Lebanon from Syria, Iraq, Libya and select African countries were exposed to extremely difficult conditions after the August 2020 explosion in Beirut and subsequent surge of Covid-19 cases, whereby they ended up having no place to return to and no means to survive. And third, in India, stranded outside of their

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[5] See OECD data provided by OECD's annual publication analysing developments in migration movements and policies in OECD countries (OECD 2020).

[6] As of 13 July 2020, IOM's Return Task Force had identified at least 3 million stranded migrants (IOM 2020). Of these, more than 1.2 million migrants were stranded in the IOM region of Middle East and North Africa.

home state, many migrant workers had to risk life and limb by walking hundreds of miles in the midst of a raging pandemic to return home from destinations where they regularly performed seasonal or temporary work. Here, I will closely examine the Indian case to understand the general dynamics of dispossession under pandemic circumstances.

India was quick to close its international borders and enforce an immediate lockdown. Still, India's population of 1.3 billion, which is spread across diverse states, with health inequalities and widening economic and social disparities, presented unique challenges for its hundreds of thousands of (internal) migrant workers (Suresh & Ors 2020). Preparedness and response to Covid-19 have differed at the state level. Kerala, for instance, has drawn on its experience with the Nipah virus in 2018 to use extensive testing, contact tracing and community mobilization to contain the Covid-19 virus. It has also set up thousands of temporary shelters for migrant workers. Similarly, Odisha's experience with previous natural disasters allowed for repurposing already existing emergency structures. Some states such as Maharashtra resorted to more draconian measures and employed drones to monitor physical distancing during lockdown and applied cluster containment strategies (Maji & Ors 2020). However, with all these measures came the danger of stigmatization and coercion of migrant workers who were not in their home state. The Government's sudden enforcement of the lockdown disadvantaged these already vulnerable populations. The mass exodus of migrant workers and starvation among people who work in the informal economy, which constitutes close to 90 per cent of the labour force in many of India's states, has gone largely unnoticed as the rest of the world struggled with their own Covid-19 related crises.

Implementing public health measures is difficult in places with overcrowded living conditions and inadequate hygiene and sanitation at the best of times. With non-Covid-19 health services severely disrupted, the Indian Government's efforts to provide financial support and food security could not alleviate the dire needs of the migrant populations on the move. As hundreds of thousands of India's migrant workers walked back to their home towns and villages amidst the pandemic, nationwide lockdowns for Covid-19 caused public transportation operations to cease, which led to thousands being stranded in different parts of the country. The service volume to repatriate India's massive migrant worker population, based on a forecast from the 2011 census data, reveals a population reaching several millions who are on the move (Singh 2020). The disproportionate impact of the pandemic on the livelihood and survival of these populations, not caused by Covid-19 but due to their

socio-economic status or lack thereof within Indian society, is but one example concerning the ethical limits of pandemic governance through emergency laws and generic policy measures. India continues to witness a massive crisis. In this context, the impact of Covid-19 on migrant workers and their families—particularly women with accompanying children—including loss of livelihoods and resulting debt, disrupted access to social services, insufficient support, and lack of recognition of the widespread and devastating nature of the problem, indeed constitutes a key chapter in the saga of disposable lives of peoples on the move during the Covid-19 pandemic.

[E] OUT OF SIGHT, OUT OF MIND: FORCED DISPLACEMENT AND COVID-19 GOVERNANCE

As a substantive sub-category of irregular migration, displaced peoples fleeing conflict and disaster zones across borders, and struggling to apply for international protection, have been facing severe difficulties under the terms of global governance of the Covid-19 pandemic. First and foremost, border closures severed the ability of displaced peoples to seek legal status and protection. Secondly, they reduced or in some cases permanently stalled the options for asylum-seeking populations living in overcrowded camps with alarmingly high infection rates—such as among the Rohingya population in Bangladesh and Syrian refugees in Greece—for moving on to possible safety.

Currently, over 1.3 million Rohingya refugees are living in highly congested camps with high risk of Covid-19 in Bangladesh (Khan & Ors 2021; Mistry & Ors 2021). The majority of the displaced Rohingya population live in 34 camps with poor access to water and sanitation, and very limited health services (UN High Commissioner for Refugees (UNHCR) 2021a). Even before the Covid-19 pandemic, continuous outbreaks of various infectious diseases, including measles, hepatitis C, HIV and diphtheria, were already prevailing conditions in these camps. In addition, a high proportion of Rohingya refugees are suffering from noncommunicable diseases (WHO 2019). While Bangladesh seriously struggles to address its Covid-19 crises, it is almost impossible for the country to provide vaccinations for Rohingya refugees as it cannot deliver vaccines to its own population of 167 million citizens. As a result, Rohingya refugees continue to suffer the insufferable under the special circumstances of a population already devastated by prior genocide and mass displacement.

The Covid-19 pandemic has also further highlighted discriminatory limitations in terms of access to healthcare, including preventative care, hospital beds, oxygen supplies, intensive care capacities and vaccination, as we see in the case of Syrians stranded on the Greek islands (UNHCR 2021b). The response to Covid-19 in these refugee camps is marked by the lack of human resources, laboratory and hospital facilities for testing and treating Covid-19, and *ad hoc* or absent vaccination programmes. As a result, these populations are not only dangerously unprotected, but the deaths that occur among them go unrecorded. The plight of Syrian refugees and other refugee communities stranded on the Greek islands, and by definition on the external border of the European Union (EU), has worsened dramatically since the Covid-19 pandemic (Oztig 2020).

The priorities concerning the spread and outcomes of the Covid-19 pandemic in Greece as well as in the EU at large have been squarely determined according to state territories, state borders and in terms of citizens and those who can declare a legal status within a given state (Fouskas & Ors 2020). Furthermore, the media and related statistical information portrayed and discussed the effects of the pandemic in such a way that those who were stranded at the borderlands rarely if ever were included in the discussion. Again, an ethically engaged legal perspective is needed in order to address the protection of health of refugees stranded in places such as the Greek island of Lesvos (Marceca 2017). Keeping in mind the basic definition of public health not only as the eradication of a particular disease but also as the maintenance of the entire spectrum of health and wellbeing of individuals regardless of their citizenship or legal status, the fate of close to 40,000 children, women and men contained in the five centres for reception and identification on the Greek islands could only be explained through concepts such as disposable lives or the death-in-living. This is a situation of 'chronic emergency' which originally led to the EU–Turkey statement of March 2016 reassuring that 'all people on the move would be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement' (European Council 2016; Veizis 2020: 266). The majority of the asylum seekers in these island camps have arrived from Syria, Afghanistan, Iraq and the Democratic Republic of Congo with no chance of return. They were huddled together in uninhabitable conditions even before the onset of the Covid-19 pandemic. In Lesvos, for instance, in excess of 20,000 people have been living in a space designed for 2,840 (Veizis 2020: 265). As things stand, with no emergency plan in place, it would be impossible to contain major outbreaks in the camp settings in Lesvos, Chios, Samos, Leros and Kos, especially in the face of the most

current mutations of the virus. And yet, as Covid-19 spread rapidly across European countries, the human tragedy experienced by refugees on the Turkish–Greek border and the Aegean Sea ceased to be a relevant item in political discussions. Meanwhile, ships and dinghies carrying human cargo continued to sink to the bottom of the Aegean and Mediterranean Seas. Attempted crossings include sea arrivals in Spain, Italy, Cyprus and Greece, while no data on interceptions by the Tunisian Navy, nor by Egyptian or Moroccan authorities, are currently available.[7] What we do know is that the total tally of dead bodies lacing the deep blue yonder of the Eastern Mediterranean increases by the day, most of whom remain nameless and go unrecorded.

Similarly, hundreds of displaced Venezuelans arriving in Colombia, Peru, Chile, Ecuador and Brazil have already lost their means of livelihood. While having no means to return home, they faced Covid-19 under circumstances of extended legal limbo. Back in June 2018, the first official register of irregular migrants who moved from Venezuela to Colombia revealed that more than 800,000 Venezuelans were already living in Colombia.[8] Constituting a part of the larger trend of 'survival migration' (Betts 2010), there are approximately 4.5 million Venezuelan refugees and migrants worldwide, close to half of them currently in Colombia (Botia 2019; UNHCR 2020). Irregular migrants in Colombia cannot gain employment and cannot access the contributory public services or regular health insurance until their legal situation is resolved. Though such individuals are entitled to emergency care and public health interventions, only pregnant women can access other services (Fernández-Nino & Ors 2018). These are the circumstances under which the displaced Venezuelan populations are experiencing Covid-19.

It is apt to state that not only the Covid-19 pandemic itself but also the way states and societies responded to it have left a deadly mark on displaced populations and on populations on the move. At the peak of the first wave of the pandemic in April 2020, almost the entire roster of states refused entry to travellers with no exceptions for asylum seekers. With the temporary suspension of refugee resettlement services by the UNHCR and IOM in March 2020, only half as many refugees could depart for resettlement countries in the first six months of 2020 as in the same period in 2019. Similarly, returns of internally displaced persons (IDPs)

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[7] According to the IOM data, 20,000 arrivals in 2020 and 21,000 arrivals in 2021 led to recorded deaths in 2020 as 279 and in 2021 as 685. Deaths by year, starting at 2014 were successively 3320, 4054, 5143, 3139, 2299, 1885, 1417: the total being 23,150 recorded deaths thus far. See Missing Migrants Project.

[8] See the figures provided by Wolfe (2021).

became almost impossible. This is despite the fact that, throughout the pandemic, conflict- and violence-driven displacement continued if not increased on a global scale. The Syrian war did not come to a stop, the violence against the Rohingya did not ease, the plight of the Venezuelans did not diminish, and the Afghan crisis did not come to a sudden halt, to name just a few instances. Even more alarmingly, the number of new IDPs within Cameroon, Mozambique, the Niger and Somalia during the first half of 2020 had already surpassed the figure for the entirety of 2019.[9] And yet, the legal framework of pandemic governance scarcely mentioned these millions who were on the move.

[F] COVID-19: REDEFINING LAW, INEQUITIES AND INJUSTICE

Disparities in infection and death rates during pandemics are due to three main factors: disparities in exposure to the virus, disparities in susceptibility and underlying causes that increase the chances of contracting the virus, and disparities in the adequacy and appropriateness of subsequent treatment (Yearby & Mohapatra 2020). The inequities witnessed in this current pandemic were predictable, as there has been no plan to protect populations on the move who lack status, legal standing or who are undocumented. Existing inequities simply worsened during a pandemic. As the examples discussed illustrate, these populations are not even counted as 'groups at risk' by public health authorities since they are not included in the public domain. Although jurisdictions have been collecting data concerning Covid-19 infections and deaths, undocumented and non-status people are not included in this tally. Hence, there is no political conversation taking place to address disparities in exposure, susceptibility, or treatment through legal or policy measures concerning populations on the move. Structural problems causing increased death and illness of irregular migrants, the dispossessed and the displaced, in effect amount to *health injustice* for these communities. Allocation policies for testing, emergency care, ventilators, clinical attention, future treatment and vaccine access are practically out of reach for them. Thus, they are bound to continue to bear the brunt of Covid-19 at a global scale.

Since early 2020, there have been several changes made to asylum and immigration statutes, or their equivalents, across Europe and in North America, all of which have promoted the furthering of policies of control and containment (Miller & Ors 2020; Bissonnette & Vallet 2021). The

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[9] See the figures provided by the 'Global Report on Internal Displacement' (Internal Displacement Monitoring Center 2020).

everyday affairs of irregular and undocumented migrants and asylum seekers—often deemed criminals or potential criminals—are increasingly managed by expanding police powers, detention, collection of biometric data and electronic monitoring (Amon 2020). Policies of dispersal and withdrawal of support in the form of denial of social resources for refugees have become all too common as well. These are part and parcel of the denigration of the institution of asylum throughout Western Europe and immigrant-settler societies such as Canada, the US and Australia. The term 'culture of disbelief' refers to this already restriction-oriented and deterrence-laden environment (Anderson 2014). Here, I put this term to use in a slightly different context: the legal invisibility of Covid-19-related experiences of undocumented and irregular migrants signals the transformation of the already entrenched culture of disbelief into an institutional culture of denial of the regular loss of life and livelihoods among these communities.

[G] CONCLUSION

Writing in the immediate aftermath of the 9/11 attacks on the twin towers in New York City, and the 'legalized' response to these attacks, Judith Butler posited that some lives are not apprehended as *grievable* since they were not appreciated as living in the first place (Butler 2004).[10] Butler elaborates upon this duality further in her *Frames of War* and asks us under which conditions we apprehend a life (Butler 2009)? In this article, I referred to Butler's discussion on precariousness in order to examine how certain harms or injuries in relation to the legal status of populations on the move as insiders or outsiders of the national polity came to determine the life chances of these individuals in legal frameworks pertaining to the governance of the Covid-19 pandemic and, in particular, the pandemic-related regulation of global migration and mobilities. In order for a political subject who experiences harm or injury to be able to seek remedy or protection, she must be recognized as such in the first place. Global mobilities continuously produce hierarchies of who counts as a recognizable political subject worthy of legal recognition and hence protection, and who does not. Covid-19 protection regimes made these distinctions not only starker, but also normalized and naturalized them in the name of public health and through the use of law.

As a result, during the pandemic, specific lives were marked as not to be 'mourned, or grieved' (Butler 2004: 147). In the language of social death

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[10] In *Precarious Life* (2004: xiv), Butler states that 'the differential allocation of grievability that decides what kind of subject is and must be grieved, and which kind of subject must not, operates to produce and maintain certain exclusionary conceptions of who is normatively human'.

which is defined as part of necropolitics by Achille Mbembe via his notion of 'death-in-life', the undocumented migrant and the non-status refugee are not included in the registers of public health for protection against Covid-19 (Mbembe 2001, 2003). But just like Mbembe's master cannot afford to lose the slave, the migrant labourer, the refugee indentured worker, the stateless child soldier, etc cannot be removed altogether. The complete loss of these lives is not to the benefit of the system at large which relies on globalized irregular labour regimes. As a result, we witness a hierarchy being established, which is determined by practical calculations. In the specific context of legal status determination and uneven distribution of protection during the Covid-19 pandemic, the death or disappearance of an asylum seeker receives no recognition under domestic legal regimes that regard them either as criminal or as outsiders to the (national) polity. At best, these lives are governed by a human rights apparatus that reduces the people on the move to victims in need of rescue, rehabilitation and, ultimately, reintegration. Similarly, the undocumented or temporary migrant is deemed unworthy of protection until and unless she finds a recognizable use for herself within the system in place. Until then, the harms she may endure are neither reparable, nor is the life that may be lost deemed grievable. The Covid-19 pandemic and its governance made this harsh reality of the everydayness of injustice experienced by these populations all the more 'natural'. The 'collateral damage' of this global health crisis includes the millions who are on the move, many of whom are an essential part of how the system of global capitalism works, above and beyond the protected mirage of the nation-state and its coveted citizenship.

Legal justice is always followed by the long shadow of those who are not included under its cloak, who cannot make claims through it, and who are not considered to be a part of it. Critiques of international migration governance and related legal regimes, including refugee law, must therefore at least be partly directed to deconstructing the ways in which 'the project of Empire' has operated and continues to operate through international law (Anghie 2005; Esmeir 2012; Achiume 2019). Postcolonial critiques of migration governance reveal how historical legacies of past injustices shape the contours of legal justice in the contemporary moment. Covid-19 measures related to immigration control and selective border closures, and their effects on vulnerable populations at a global scale, make these legacies all the more visible and challenge the articulation of legal justice as a disembodied system. Pandemic governance clearly revealed how legal justice operates in accordance with existing historical and political formations dictated by those who

already set the rules pertaining to political subjecthood. In this sense, it has clear ethical limitations and it is not value-neutral. Legal justice is an intervention—it is claimed from a structural position where historical power relations are already deeply embedded and normalized. As Martti Koskenniemi argued more than a decade ago, moralizing international law could easily lead to very dangerous results by turning law into a sanctified instrument in the hands of those who already have power and privilege (Koskenniemi 2008).

I will conclude by stating that *declaring all lives as grieveable* in legal terms is a politically potent and timely move. We must reveal the connections between those who are deemed worthy of protection and those who are not, and yet who are relied upon for the sustenance of the very system that legal regimes are designed to uphold. Recognition of precariousness and suffering as shared experiences is an absolute ethical necessity; experiences which nonetheless regularly fall outside of the legal order and notions of justice, but particularly so during 'extraordinary times' such as the Covid-19 crisis. Rallying marginalized migrant and refugee communities into political action through shared grief or injustices at a time of a global pandemic is no doubt beyond utopian. However, registering systemic human suffering and death as death-in-life exposes the very limits of (pandemic) governance that are not only against the core principles of fundamental justice but also of humanity.

Nergis Canefe is a scholar of public international law, comparative politics, forced migration studies and critical human rights. She has published several books and articles in the area of memories of atrocities and injustice for marginalized groups, critical studies of human rights, genocide and crimes against humanity, the relationship between nationalism and minority rights in the Balkans and the Middle East, decolonization as method, forced migration, debates on ethics in international criminal law pertaining to mass political violence and state criminality. Professor Canefe has more than 20 years of experience in carrying out in-depth qualitative research with displaced communities and teaching human rights and public law globally. Her research experience includes working with the Muslim and Jewish diasporas in Europe and North America, refugees, and displaced peoples in Turkey, Cyprus, India, Uganda, South Africa, Bosnia and Colombia. She has held posts in several European and Turkish universities and has been a faculty member at York University, Canada, since 2003. She is also a trained artist and her designs and murals have been showcased regularly since 2008.

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