

## SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW

### THE ARCHITECTURE OF INTERNATIONAL MIGRATION LAW: A DECONSTRUCTIVIST DESIGN OF COMPLEXITY AND CONTRADICTION

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[International migration law](#) (hereinafter IML) can be described and conceptualized as a [deconstructivist](#) architecture both literally and metaphorically.<sup>1</sup> It is an architecture of fragmentation based on dissonance and asymmetry that questions the traditions of harmony, unity, and stability.<sup>2</sup> Initiated by the French philosopher Jacques Derrida, the deconstructivist architectural movement distorts the conventional oppositions between form and function, center and margin, outside and inside.

This deconstructivist design of complexity and contradiction unveils both the architecture and the substance of IML. As a cross-cutting field, migration is governed by an eclectic set of superimposed norms that are scattered throughout a wide array of overlapping fields (human rights law, trade law, humanitarian law, labor law, refugee law, maritime law, etc.). This impression of fragmentation and instability is further exacerbated by the ontological dilemma of hospitality in a world of sovereign states. This tension between hospitality and sovereignty represents the foundational but self-contradictory premises of IML. The foundation stones of IML have been set up by scholars through this dialectic, while its overall design has been shaped by states in a rather erratic way that produce a deconstructivist edifice.

#### *The Foundation Stones of IML in the Legal Doctrine*

From the sixteenth to the eighteenth centuries, the movement of persons across borders was a typical subject of discussions among the [founding fathers](#) of international law.<sup>3</sup> Vitoria (1480–1546) was the first early scholar who conceptualized migration as an integral component of the law of nations. His *ius communicationis* established the free movement of persons as a binding norm of international law grounded on the natural sociability of human beings. For him, such a right of communication existed since the beginning of the world and was not called in question by the division of the world into different nations.

On the contrary, the right of communication is at the heart of his whole conception about the law of nations. It is the precondition for establishing relations between nations and constitutes by the same token the *raison d'être* of international law. While conceptually sound and attractive, the edifice of Vitoria suffers from a major paradox: his

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<sup>1</sup> VINCENT CHETAÏL, [INTERNATIONAL MIGRATION LAW](#) (2017).

<sup>2</sup> PHILIP JOHNSON & MARK WIGLEY, [DECONSTRUCTIVIST ARCHITECTURE](#) (1988).

<sup>3</sup> For further discussions: Vincent Chetail, [Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel](#), 27 EUR. J. INT'L L. 901 (2016).

*ius communicationis* is both the underlying principle of a universal society composed by equal nations and the main legal ground for justifying the colonialization of the New World.

While Vitoria set the founding stones of IML, Grotius (1583–1645) consolidated its foundations with more concrete and consistent material. He not only refined the right of communication outside any colonial context as a truly universal rule binding all nations, but he also strengthened it through two building blocks: the right to leave one's own country and the right to remain in a foreign country. He endorsed Cicero's view of emigration as "the foundation of liberty" and reinforced it by a correlative right of immigration grounded on the laws of hospitality. The symmetry between emigration and immigration thus supports and cements free movement of persons into one single continuum. These two imbricated blocks still have some cracks as neither is absolute. For Grotius, emigration can be submitted to restrictions in the interest of the society (mainly for debtors and deserters), while immigration requires a just cause to enter into another country and foreigners can stay therein provided they respect the laws of the host state.

The sophisticated and balanced construction initiated by Vitoria and consolidated by Grotius was subsequently undermined by Pufendorf (1632–1694) who broke emigration away from immigration as two opposite components governed by different norms. Departure from one's own country remains a distinctive right on its own, whereas admission in another country becomes a discretionary power of the sovereign.<sup>4</sup> Wolff (1679–1754) further exacerbated this shift, following a patrimonial conception of the state whereby ownership of a territory equates with sovereignty. From this assimilation with property rights, territorial sovereignty becomes the bastion of the state and captures both immigration and emigration within its domestic jurisdiction. Nonetheless, like Pufendorf, Wolff conceded an exception of free passage as an imperfect right to claim—but not to be granted—admission.<sup>5</sup> As a result of this fragile construction, hospitality becomes charity: the state is morally bound to admit foreigners but legally free to refuse them.

This existential dialectic between sovereignty and hospitality was reframed by [Vattel](#) (1714–1767), the most influential scholar of international law.<sup>6</sup> Although he recycled most of the materials used by his predecessors, he reassembled them in a rather modern fashion with the overall result of renovating the whole structure of IML. Like Grotius, Vattel reaffirmed emigration as a fundamental right when the state of origin is unable to provide subsistence to its own citizens or fails to protect them. Yet he agreed with Wolff that immigration falls within the competence of the host state as a consequence of its territorial sovereignty. This normative asymmetry between emigration and immigration has become today the orthodoxy of IML.

Vattel's construction was however much more nuanced. For him, every nation is bound by both external and internal laws that constitute together the fabric of the law of nations. From this angle, the external right of deciding upon admission is qualified by an internal duty of innocent passage. The latter cannot be refused without strong reasons. Otherwise the state commits an abuse of rights. The right to control entry into its territory can still prevail over its duty of innocent passage when admission of foreigners is prejudicial or dangerous to the state.

This balancing act between sovereignty and hospitality is further refined by another key notion that has been literally forgotten by courts and commentators. The key contribution and modernity of Vattel lie in the right of necessity as a way to reconcile free emigration with immigration control. Instead of acknowledging an unbridled discretion of states, [Vattel endorses a right to illegal entry](#) when there is no other means to flee from a danger or to procure one's own means of subsistence:

<sup>4</sup> *Id.* at 910–911.

<sup>5</sup> *Id.* at 914–914.

<sup>6</sup> [VATTEL'S INTERNATIONAL LAW IN A XXI<sup>ST</sup> CENTURY PERSPECTIVE](#) (Vincent Chetail & Peter Haggemacher eds., 2011); EMMANUELLE JOUANNET, *EMER DE VATTEL ET L'ÉMERGENCE DOCTRINALE DU DROIT INTERNATIONAL PUBLIC* (1998).

When a real necessity obliges you to enter into the territory of others,—for instance, if you cannot otherwise escape from imminent danger, or if you have no other passage for procuring the means of subsistence, or those of satisfying some other indispensable obligation,—you may force a passage when it is unjustly refused.<sup>7</sup>

Necessity is a perfect right of individuals: it leaves no room for the state to refuse foreigners. Nonetheless, necessity prevails over sovereignty insofar as irregular entry is the only way to safeguard an essential interest of the foreigner. Against this frame, Vattel's right of necessity prefigured a postmodern duty of non-refoulement where there is a risk of serious violations of human rights (whether civil, political, economic, or social).

Ironically, his views have been [distorted and instrumentalized](#) to substantiate an unqualified discretion of states for refusing admission of foreigners.<sup>8</sup> The first influential case is provided by the oft-quoted *Ekinu* judgment. The U.S. Supreme Court held in 1892:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vattel, lib. 2, §§ 94, 100.<sup>9</sup>

At that time, the authority of Vattel was instrumental in justifying a radical breakdown from the longstanding tradition of free movement.

Immigration control is indeed a recent invention of states. With few exceptions (in times of war or domestic turmoil), immigration control only emerged at the end of the nineteenth century in some countries and for specific categories of aliens. It was then generalized as [wartime legislation](#) during the First World War and reinforced by the economic crisis of the interwar period.<sup>10</sup> Still today, the vicious circle of armed conflicts, terrorism, and economic recession constitutes an influential factor for justifying border control. Meanwhile, immigration control has become conventionally associated with territorial sovereignty, although the former was not concomitant with the latter.

Despite this late resurgence of sovereignty, the treatment of foreigners in their host states has remained a [classical question of international law](#) which was crystallized during the first half of the twentieth century through the law of state responsibility and the notion of a minimum standard of treatment.<sup>11</sup> At that time, the responsibility of states for injuries to aliens was a branch of international law on its own. It was even acknowledged by Jessup as “one of the most highly developed branches of that law.”<sup>12</sup> This field was however not free from controversies: diplomatic protection was often used by Western states as a pretext for interference in newly independent states. As a result of interstate disputes, a considerable body of jurisprudence has progressively refined the content of minimum standard by reference to a core set of basic rights. From this perspective, the rights of aliens were the forerunner of human rights at the international plane. Since then, the normative expansion of human rights law has largely absorbed the minimum standard inherited from the old law of aliens.

<sup>7</sup> EMER DE VATTEL, [THE LAW OF NATIONS](#) 322 (1797).

<sup>8</sup> See, also, James Nafziger, [The General Admission of Aliens under International Law](#), 77 AJIL 811 (1983).

<sup>9</sup> [Ekinu v. U.S.](#), 142 U.S. 651 (1892).

<sup>10</sup> See notably, JOHN TORPEY, [THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE](#) 111–121 (2000).

<sup>11</sup> For further discussions, see Vincent Chetail, [The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights](#) 28 GEO. IMMIGR. L.J. 225 (2013).

<sup>12</sup> PHILIP C. JESSUP, [A MODERN LAW OF NATIONS](#) 94 (1948).

In parallel to this structural evolution, the very expression “international migration law” was first coined in 1927 by [Varlez](#) in his course at The Hague Academy,<sup>13</sup> before [Plender](#) published *International Migration Law* in 1972 (reedited in 1988).<sup>14</sup> Since the beginning of the twenty-first century, a [substantial number of textbooks have mapped](#) this re-emerging field of international law.<sup>15</sup> Although its epistemic community is growing, IML is still a work in progress: it is not acknowledged as a branch of international law nor as a professional silo, in the way that refugee law is alongside the debatable Western-centric opposition between forced and voluntary migration.

Instead of establishing another subfield of specialization, IML provides a holistic frame of analysis that unveils the complex and contradictory relations between migration and international law. Its apparent instability and fragmentation have inevitably raised some doubts about its overall structure. It is sometimes described as “[substance without architecture](#)”<sup>16</sup> or a “[giant unassembled juridical jigsaw puzzle, \[in which\] the number of pieces is uncertain and the grand design is still emerging.](#)”<sup>17</sup> Both views can be reconciled through a deconstructivist design of IML: the absence of an integrated form *is* the architecture of IML, where contradiction, distortion, and asymmetry are intrinsic to its structure. In contrast with classical architecture based on order and unity, IML is a multilayered construction of norms that coexist and sometimes collide to frame the ontological tension between hospitality and sovereignty.

#### *The Bedrock and Pillars of IML in the Sources of International Law*

The deconstructivist architecture of IML is graphically illustrated by the sources of international law. Its bedrock is customary law from which emerge two uneven pillars (treaty law and soft law). [Customary law](#) provides the substratum of IML by endorsing the basic principles governing the movement of persons across borders along the migration continuum: departure, admission, and sojourn.<sup>18</sup> The customary law nature of the right to leave (with the usual restrictions of national security and public order) finds strong support in a large number of widely ratified treaties, interstate resolutions, and domestic constitutions. As a result of a long normative process, departure has been divorced from admission to constitute a distinctive norm primarily addressed to states of origin and reinforced by the right to return.

Yet the absence of a symmetric right to enter another state does not mean that access to the territory operates in a legal vacuum. State practice is much subtler than an impermeable regime of closed borders. The admission of foreigners is governed by customary law through both substantive and procedural requirements (including the principle of non-refoulement, the prohibitions of collective expulsion and arbitrary detention, access to consular protection). Moreover, the sojourn of migrants in host countries is framed by the customary law principle of non-discrimination, prohibiting any difference of treatment that is not reasonable, objective, and proportionate.

<sup>13</sup> Louis Varlez, [Les migrations internationales et leur réglementation](#), 20 RECUEIL DES COURS 171 (1927).

<sup>14</sup> RICHARD PLENDER, [INTERNATIONAL MIGRATION LAW](#) (2d ed., 1988).

<sup>15</sup> [MIGRATION AND INTERNATIONAL LEGAL NORMS](#) (T. Alexander Aleinikoff & Vincent Chetail eds., 2003); [INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES](#) (Ryszard Cholewinski et al. eds., 2007); [GLOBALIZATION, MIGRATION AND HUMAN RIGHTS: INTERNATIONAL LAW UNDER REVIEW](#) (Vincent Chetail ed., 2007); [FOUNDATIONS OF INTERNATIONAL MIGRATION LAW](#) (Brian Opeskin et al. eds., 2012); [RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION](#) (Vincent Chetail & Céline Bauloz eds., 2014); [ISSUES IN INTERNATIONAL MIGRATION LAW](#) (Richard Plender ed., 2015).

<sup>16</sup> T. Alexander Aleinikoff, [International Legal Norms on Migration: Substance without Architecture](#), INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 479 n. 9.

<sup>17</sup> RICHARD LILICH, [THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW](#) 122 (1984).

<sup>18</sup> For further discussions, see Vincent Chetail, [The Transnational Movement of Persons Under General International Law - Mapping the Customary Law Foundations of International Migration Law](#), in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION, *supra* note 15, at 1.

The general normative framework grounded on customary international law is further detailed and supplemented by treaty law. In contrast to the former source, treaty law follows a segmented approach: it establishes specialized conventional regimes focusing on particular categories of migrants. Although commentators frequently lament that there is no comprehensive treaty governing all aspects of migration, this situation does not differ from that of many branches of international law (like humanitarian law or environmental law). IML is no exception. The plurality of treaties is even necessary in such a complex and multidimensional field.

At the universal level, specialized treaties focus on three categories of migrants: refugees (1951 Geneva Convention and 1967 Protocol), migrant workers (1949 Migration for Employment Convention No. 97, 1975 Migrant Workers Convention No. 143, 1990 Migrant Workers Convention), and smuggled and trafficked migrants (2000 Protocols against smuggling of migrants and trafficking). These seven core treaties of IML establish detailed conventional regimes that are closely interrelated and provide an incremental protection. Indeed, the three categories of migrants covered by these conventions overlap both in law and practice. For instance, according to Conventions No. 97 and No. 143, a refugee may fall within the definition of migrant workers and inversely. Likewise, an undocumented migrant may be protected as an asylum-seeker, a migrant worker, and a trafficked migrant at the same time.

These interdependent treaties still suffer from an uneven number of ratifications when it comes to migrant workers. To contend, however, that migrant workers treaties are irrelevant because they are not widely ratified by Western states is an urban legend. No less than eighty-seven states have ratified one or more of the three universal treaties devoted to migrant workers. States parties are from all continents and encompass both countries of immigration and emigration (including seventeen Western states). Furthermore, like many other fields, the international framework of labor migration cannot be restricted to the specific conventions adopted at the universal plane. It is also governed and reinforced by a vast network of regional and bilateral treaties focusing on various aspects and by many general conventions plainly relevant in the field of migration (such as those adopted by the International Labour Organization or the World Trade Organization). Similarly, human rights conventions are generally applicable to everyone irrespective of nationality or immigration status and frequently include specific provisions on noncitizens. Human rights treaties thus provide a common frame of protection that is applicable to any migrants and supplemented by more specific conventional regimes.

Although IML is solidly anchored in customary and treaty law, soft law is made of a more friable and flexible material. Though not a formal source of law, an impressive number of nonbinding instruments have been adopted during the last decade to guide and foster international cooperation. This development reflects the multilayered nature of global migration governance involving a broad variety of actors at the international, regional, and bilateral levels.

At the international plane, this multilevel governance is based on five superposed layers of institutions and processes: the UN General Assembly (through the 2006 and 2013 High Level Dialogues and the 2016 New York Declaration for Refugees and Migrants), the Global Forum on Migration and Development (a state-owned consultative process organized outside the United Nations every year since 2007), the Global Migration Group (established in 2006 gathering twenty-one UN agencies to promote a better coordinated institutional response), international organizations that have adopted their own soft law instruments within their respective albeit overlapping mandates (e.g. the International Organization for Migration, the Office of the UN High Commissioner for Refugees, the International Labour Organization, and the Office of the High Commissioner for Human Rights), and states (as exemplified by the 2005 International Agenda for Migration Management and the two forthcoming global compacts on refugees and migration).

The proliferation of nonbinding standards and consultative processes among a plethora of actors with different and sometimes conflicting agendas remains however a deeply ambivalent phenomenon: while acknowledging

migration as a discrete field of cooperation, soft law reflects the reluctance of destination states to commit to a binding form of global governance.

*Conclusion: Renovating IML*

IML has been built in a piecemeal fashion through a longstanding process of consolidation. Yet even the most skeptical positivists cannot fail to acknowledge the significant body of existing rules governing migration. Its overall framework still requires some imagination as the great variety of its rules and their overlapping with other fields of international law may disturb or disconcert some. But the heterogeneity of IML reflects the multifaceted dimensions of migration and its cross-cutting character that transcends existing branches of international law. Its superimposed rules remain closely interconnected. They make sense only when understood in relation to one another.

The plasticity of IML opens up [new avenues for rethinking migration](#) as a global phenomenon.<sup>19</sup> While positivism is inevitable to take stock of existing rules, IML can be deconstructed through various perspectives (including critical legal studies, legal pluralism, gender, and third-world approaches). IML is clearly an imperfect law that mirrors the contradictions of our world composed by both independent and interdependent nations. Although customary and treaty law regulate emigration and stay of migrants, admission into the territory largely remains under construction. Refugee law still constitutes an exception to immigration control but the former legitimates the latter within a self-referential logic. This refugee law bias has relegated the admission of migrant workers to domestic law with few encroachments from bilateral and regional agreements.

IML cannot be held responsible for the skill and inspiration of its architects. But the substance of international law constrains states as does the building material of any other architects. Despite its shortfalls, IML is neither the fortress of the state nor the labyrinth of migrants. Like any deconstructivist edifice, IML is an iconoclastic assemblage that disturbs the tradition of order, harmony, and stability. This provocative architecture produces an impression of controlled chaos, a feeling of incompleteness and unease that have never been so acute than today.

<sup>19</sup> See, for instance, Vincent Chetail, [Conceptualizing International Migration Law](#), 110 ASIL PROC. (2017); Jaya Ramji-Nogales, [Migration Emergencies](#), 68 HASTINGS L.J. 118 (2017); Chantal Thomas, [What does the emerging international law of migration mean for sovereignty?](#), 14 MELBOURNE J. INT'L L. 1 (2013).