

SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW

THE POSSIBILITIES OF GLOBAL MIGRATION LAW

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When I started teaching international law more than twenty years ago, it was still possible to be an international law generalist. In the U.S. legal academy, the likes of Henkin, Schachter, Franck, and McDougal covered the full range of public international law subjects. (Some even managed to stay on top of private international law, too.) Today, being an international law generalist is impractical; it's simply too difficult to keep current with the breadth of international law. From the scholar's perspective, it's a case of "be careful what you wish for." A generalist international law orientation used to be possible because there was so little of it, both on the ground and in the scholarship. Those mid-century saplings—the various distinctive fields within international law—have grown to mature oaks, and expert knowledge of their many crevices and branches is beyond the capacity of any single observer. Not only does international law defy individual mastery, but the level of specialization now makes it difficult to talk across these different areas. My colleague in international criminal law might as well be a domestic family law person for purposes of professional points of connection. We both attend the ASIL Annual Meeting, but we no longer really speak the same language.

International migration law is not one among the oaks. As a descriptive matter, there are two ways to situate migration in the metaphorical arbor. It may be that we can find, or even plant, a sapling that at some point (through nurturing or on its own) stands tall. Or it may be international migration law remains a branch appended to other trees. The latter would bode poorly for the academic subfield of international migration law. As appendages, component parts of migration law require an understanding of the field to which they are attached. Just as no one can master the intricacies of the various international law-related fields, no one could master an international migration law that is split among them.

Of course, the fragmentation phenomenon is well understood in other areas of international law.¹ To deploy the more common metaphor, international migration law is hardly the only field that has its silos. It is impossible to be an international law generalist; it may now be impossible to be a trade generalist, too. But it's a lot easier to identify as a trade generalist than as an expert in international migration law. That owes in the first instance to the lack of a formal multilateral institutional framework. In the absence of an International Convention on Migration or World Migration Organization, would-be international migration law specialists have no shared focal point. There are no institutional processes that draw mutual attention, conversation starters from which we can spin out more particular threads; we don't have dispute settlement body decisions, climate change COPs, or treaty committee reports to help cement communities among both scholars and practitioners.

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¹ See, e.g., Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. No. A/CN.4/L.682 (Apr. 13, 2006).

There are of course the UN Refugee Convention and UN High Commissioner for Refugees (UNHCR). Precisely because they are institutional and migration-specific, they have dominated the migration law landscape (a phenomenon further fueled by the crisis-related origins of refugee flows, which heightens their domination in the public imagination). But that view distorts the fact that most migrants are not refugees. The Refugee Convention has stunted rather than facilitated the development of a coherent international law of migration.² And it hasn't helped that traditional international law situates migration at the core of sovereign discretion. The Refugee Convention aside, states jealously continue to assert near-complete discretion with respect to the admission of noncitizens.³ The insulation of migration practices from international law has retarded the development of a centralized institutional apparatus, and the lack of that apparatus impedes doctrinal footholds from which to expand international law's reach into the area.

Given the improbability in the short or medium-term of a global treaty or the establishment of an international organization with a wide brief in the area,⁴ where does that leave international migration law? There are two tracks which point to possible integration of the field and the insinuation of international law into state migration practice over the long run. One takes a management approach, in which states look collectively in various combinations to maintain control of migration flows. The other looks to impose legal constraints on states in their migration policy and their treatment of migrants (actual and would-be).

Migration can hardly be insulated from multilateral engagement. In both its crisis and "everyday" dimensions, the increasing velocity of cross-border movement forces states to coordinate (or attempt to coordinate) migration flows. Higher migration flows have also spotlighted the plight of migrants in various postures, which in turn has drawn the attention of human rights institutions, broadly defined. These tracks implicate different actors and institutions, and have different dynamic aspects. They may be dichotomous or they may be poles at the ends of a continuum, reflecting a range of approaches to migration-related challenges. They may even be complementary. The blend of management and human rights paradigms will be consequential to the future of global migration law.

The management paradigm is dominated by states and light institutionalization on a traditional model of conventional law and rational actor models. It is anchored in the default understanding of migration constrained by international law only to the extent that states cede such control. Power relations among states may lead states to cede control in some cases. Interesting in this respect is the practice of bilateral agreements between sending and receiving states governing the terms of labor migration. The Philippines has entered into a number of such agreements.⁵ A high-level study group recently sketched one out to regulate labor migration between the United States and Mexico.⁶ These bilateral agreements have historically been targeted on labor migration but more recent initiatives look to manage other migrant flows. Such is the EU agreement with Turkey regarding refugee flows and EU efforts to reach similar agreements with African states.⁷ Destination states looking to stem irregular migration at its source are in effect buying off sending state governments under the guise of development support.⁸

² See Jaya Ramji-Nogales, Migration Emergencies, 68 HASTINGS L.J. 100 (2017).

³ Catherine Dauvergne, Sovereignty, Migration and the Rule of Law in Global Times, 67 MODERN L. REV. 588 (2004).

⁴ But see, e.g., Jagdish Bhagwati, Borders Beyond Control, FOREIGN AFF. (Jan.-Feb. 2003) (proposing a World Migration Organization).

⁵ See Jaya Ramji-Nogales, Undocumented Immigrants and the Failures of Universal Individualism, 47 VAND. J. TRANSNAT'L L. 699, 752–54; Nathan R. Blank, Making Migration Policy: Reflections on the Philippines' Bilateral Labor Agreements, 3 ASIAN POL. & POL'Y 185 (2011).

⁶ See CARLOS GUTIERREZ ET AL., SHARED BORDER, SHARED FUTURE: A BLUEPRINT TO REGULATE US-MEXICO LABOR MOBILITY (2014). See also, e.g., DEMETRIOS G. PAPADEMETRIOU ET AL., THINKING REGIONALLY TO COMPETE GLOBALLY: LEVERAGING MIGRATION & HUMAN CAPITAL IN THE U.S., MEXICO, AND CENTRAL AMERICA (2013).

⁷ See Ramji-Nogales, supra note 2, at 133–136.

⁸ See, e.g., Somini Sengupta, Europe Banks on Incentives and Persuasion to Keep Migrants Home, N.Y. TIMES (Nov. 11, 2015).

These agreements (which in other forms date back more than a century)⁹ point to the emergence of migration-related norms, but only of the softest description. They variously set quotas, the terms of recruitment, employment conditions, and return. They look to keep migration orderly. Sending states have leverage to the extent that migrant labor is required in destination countries; migrants are the functional equivalent of a natural resource. Although protections for workers are now featured, they still tend to be incidental to sending state incentives to maintain income flows. Destination states are able to evade thicker obligations in these regimes. Workers are substitutable; sending states can demand only so much before their nationals are priced out of competitive migrant labor markets.

In some respects, the management paradigm resembles trade regimes. States remain centered in a conventional international law model (that is, international law as made by consenting states through the vehicle of treaties). The game is two-level: in both trade and migration, states face various political pressures at home (corporate, consumer, organized labor) which then inform action at the international level. In both the trade and migration contexts, the international action is permissive. Just as nothing in international law forces states to enter into free trade agreements, states are free to enter into bilateral migration-related agreements, or not. Most migration, of course, is not subject to this kind of international legal regulation, so (obviously) the management of migration lags far behind the management of trade. But they both play to a similar sentiment of state-ness, and the kind of noblesse oblige to which states and their functionaries have become so accustomed.

Also within the management paradigm are less formal processes which states have established on a multilateral basis. The regional consultative processes and the Global Forum on Migration and Development (GFMD) look to address migration flows on a [management basis](#) without locking destination states into the harder obligations that come with formal agreement-making.¹⁰ These venues demonstrate the multilateralization of migration management, an understanding of complexity, the importance of data collection, and the need to approach migration in a holistic way. But there isn't much law here. (The GFMD describes itself as a "voluntary, informal, non-binding and government-led process"¹¹; the regional consultative processes as an "informal and non-binding dialogue and information exchange on migration-related issues of common interest and concern.")¹² Among scholarly disciplines, this activity plays to labor economists and development specialists, not legal academics. In U.S. [legal scholarship](#) there appears to be no major treatment focusing on either the GFMD or the regional processes.¹³

The human rights paradigm is more comfortable for lawyers for obvious reasons. But on the ground the curve is a steep one. State resistance to bringing migration under the ambit of international law is really about state resistance to the application of human rights law to migration. Beyond the principle of non-refoulement, there is almost no migration-specific, binding customary international law. The refusal of even a single destination state to sign on to the [Migrant Workers Convention](#) evidences the anemic position of human right vis-à-vis migration.¹⁴ To the extent that one can detect even nascent human rights norms in the area, they are procedural rather than

⁹ See, e.g., GUTIERREZ ET AL., [supra note 6](#), at ch. 1 (describing the history of bilateral work agreements between the United States and Mexico dating back to 1909).

¹⁰ See, e.g., Alexander Betts & Lucie Cerna, [High-Skilled Labor Migration](#), in GLOBAL MIGRATION GOVERNANCE 60, 66–67 (Alexander Betts ed., 2011).

¹¹ See Global Forum on Migration & Development, [GFMD Process](#).

¹² See International Organization for Migration, [Regional Consultative Processes on Migration](#).

¹³ Lesley Wexler has undertaken an interesting analysis situating the regional consultative processes in a soft law frame. See Lesley Wexler, [The Role of Human Rights in Migration Regional Constitutive Processes](#), 106 ASIL PROC. 65 (2012); Lesley Wexler, [The Non-Legal Role of International Human Rights Law in Addressing Immigration](#), 2007 U. CHI. LEGAL F. 359, 377–81 (2007).

¹⁴ [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#), July 1, 2003, 2220 UNTS 3.

substantive. States may now (arguably) have to afford [some process](#) to those who are turned away at the border, if only to satisfy the harder, exceptional constraints of the refugee regime.¹⁵ [Expulsion](#) is perhaps more clearly subject to due process requirements, at least for migrants lawfully present.¹⁶ But states retain wide discretion with respect to the substantive grounds for removal, even more so with respect to admissions criteria. Even the recent [New York Declaration](#) “recalled” that “each State has the sovereign right to determine whom to admit to its territory,” conditioned only by unspecified “international obligations.”¹⁷

But human rights have come a long way in the context of migration. The migration crises have helped to bring it more centrally to public attention as an issue involving human dignity and to make it a frontburner issue for human rights activists. There is a [growing understanding](#) that even in the crisis mode, a large proportion of individuals comprising migrant flows is not eligible for refugee protections.¹⁸ Procedural rights map out onto migration and enforcement of immigration controls.¹⁹ There are footholds beyond the refugee context for substantive entitlements as well, as with the insulation within some regimes of long-term permanent residents from [deportation](#)²⁰ and constraints on immigration incidental to the right to a family life.²¹ [Powerful human rights groups](#) are making migration a priority.²² Takers include regional courts and human rights components, the international human rights treaty committees, and other semi-official expert bodies. [UNHCR](#) appears to be [broadening](#) its brief,²³ and the [International Organization for Migration](#) may morph with its new status as a related organization of the United Nations.²⁴ There seems to be a cognitive pivot towards normalizing migration to international human rights law. The implications of this shift are immense, especially to the extent that human rights come to govern more robustly the terms of admission.

That is a very different destination than the management track, which is oriented towards controlling migration in the interest of states. The contrast is exemplified by the orientation of the management paradigm to matching migrant flows (in and out) with labor demands where human rights work from the touchstone of integration and equality. Human rights are beginning to constrain [state citizenship practices](#), something on which the management paradigm would not focus.²⁵ The management track looks to restore order to migrant flows that have strained state capacities; it looks to buttress the state. By contrast, the human rights track points to an interrogation of borders, citizenship, and the state construct.

That doesn’t mean that the two tracks are incompatible. For now, there should be few points of conflicts, in large part because they both remain underdeveloped. The ubiquity of human rights norms is already informing the

¹⁵ [Hirsi Jamaa and others v. Italy](#), App. No. 27765/09, Eur. Ct. H.R. (2012).

¹⁶ [Case Concerning Ahmadou Sadio Diallo](#) (Guinea v. Dem. Rep. Congo), 2010 ICJ REP. 639, paras. 65–67, 161 (Nov. 30).

¹⁷ [New York Declaration for Refugees and Migrants](#), GA Res. 71/1 (Sept. 19, 2016).

¹⁸ See, e.g., Hein de Haas, [Refugees: A Small and Relatively Stable Proportion of Migrants](#) (Aug. 22, 2016).

¹⁹ [Hirsi Jamaa and others v. Italy](#), App. No. 27765/09, Eur. Ct. H.R. (2012); but see [Sale v. Haitian Centers Council](#), 113 S.Ct. 2549 (1993).

²⁰ Notably, by interpreting the right to enter one’s “own country” under Article 12(4) of the International Covenant on Civil and Political Rights to include long-term residents lacking nationality in some cases. See [Nystrom v. Australia](#), UN Doc. CCPR/C/102/D/1557/2007 (July 18, 2011).

²¹ See Ramji-Nogales, [supra note 5](#), at 737–738 (describing European Court of Human Rights jurisprudence).

²² See, for example, the Human Rights Watch portal page for migrant-related issues, [Migrants](#), HUMAN RIGHTS WATCH.

²³ To include stateless persons. See UNGA [Res. 61/137](#) para. 4 (Dec. 19, 2006); UNHCR, [Note on the Mandate of the High Commissioner for Refugees and His Office](#) 8 (Oct. 2013).

²⁴ See [Agreement concerning the Relationship between the United Nations and the International Organization for Migration](#), UN Doc. No. A/70/976 (July 8, 2016).

²⁵ See Peter J. Spiro, [A New International Law of Citizenship](#), 105 AJIL 694 (2013).

management processes, a phenomenon overdetermined by politics, norms, and global culture.²⁶ The better job states do at managing migration, even in the interests of states, the more that pathological forms of migration will be mitigated. But there will likely come a point where state management incentives conflict with human rights requirements. The management approach will never satisfy its ambition of complete (or possibly not even substantial) control; the human rights optic would demand international law constraints on state policies on irregular migration where the management paradigm would orient towards state discretion. To the extent that human rights agents seize themselves of the management track sooner rather than later, they may avoid having to play come-from-behind ball in the way they have been forced to do in the trade context. Perhaps it would be that moment of contestation that unifies the field, comprising not a convergence between the two paradigms but a resolution of their differences. That might also be the consolidation point for academics studying global migration law.

Of course, this trajectory can only be put forward in the most speculative fashion. In some other areas (trade, for instance), states are backing away from centralized universal regimes to smaller-set undertakings, regional or otherwise. Global migration missed the boat on the first wave of top-down lawmaking. Who knows if there will be a second, especially in the face of a backlash against global institutions. Both the management and human rights tracks are bottom-up. Even the human rights track clearly gravitates to soft law. It may then be a question of institutional end-points and equilibria. Can migration law settle in at some level below the global? For the moment, international migration law will continue to be characterized by fragmentation. The fragmentation will be mirrored in the academic community. That may or may not turn out to be a permanent condition.

²⁶ See, e.g., Wexler, *Non-Legal Role of International Human Rights Law*, supra note 13, at 377 (describing how human rights have been incorporated into work of regional consultative processes).