

## SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW – PART II

### GLOBAL MIGRATION LAW AND REGIONAL FREE MOVEMENT: COMPLIANCE AND ADJUDICATION – THE CASE OF SOUTH AMERICA

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#### *Introduction*

The field of [global migration law](#) looks beyond international law to incorporate all levels of the law, including the regional.<sup>1</sup> This essay explores the regional regulation of mobility, which has indeed become a central subject of discussion and academic analysis. The expansion of human rights law coupled with the explosion of regional processes of integration are the [two most important phenomena](#) that have limited the state's capacity to restrict the entry of foreigners and their rights.<sup>2</sup> It should come as no surprise that regional agreements facilitating mobility have [proliferated](#) and now involve around 120 countries, either at a bilateral or multilateral level.<sup>3</sup> For one thing, [most global migration is regional](#), whether in Europe, Africa, Asia, or Southern and Central America.<sup>4</sup> In addition, regional instruments can be agreed on more rapidly and, in principle, introduce higher standards of protection and rights due to the more limited number of actors involved in the negotiations. There is, of course, [huge variation](#) across regions as to the degree of development of the various agreements, the categories of individuals entitled to mobility and equal treatment and their effective application and enforcement mechanism devices.<sup>5</sup>

The European Union has been often considered the paradigmatic example of a functioning regional mobility framework. In the EU's case, two features have been identified as easing implementation on the ground. First, the principles of supremacy and direct effect mean that individuals can invoke rights granted by EU law before national courts and that EU law prevails over any inconsistent domestic provision. Second, the duo of the European Commission and the European Court of Justice—in their roles as overseer and supreme interpreter of EU law respectively—have facilitated the effective access to rights of those individuals exercising their free movement rights in Europe. Such a robust supranational component—a peculiarity in comparative perspective

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<sup>1</sup> Jaya Ramji-Nogales & Peter Spiro, *Introduction to Symposium on Framing Global Migration Law*, 111 AJIL UNBOUND 1 (2017).

<sup>2</sup> Sara Iglesias Sánchez, *Free Movement of Persons and Regional International Organisations*, in ISSUES IN INTERNATIONAL MIGRATION LAW 223 (Richard Plender ed., 2015).

<sup>3</sup> 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 1, 35 (Vincent Chetail & Céline Bauizou eds., 2014).

<sup>4</sup> The only exceptions to this trend are North America (Canada and the USA) and Oceania (Australia and New Zealand). See Richard Bedford, *Contemporary patterns of international migration*, in FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 17 (Brian Opeskin et al. eds., 2012).

<sup>5</sup> See generally, [MIGRATION WITHOUT BORDERS: ESSAYS ON THE FREE MOVEMENT OF PEOPLE](#) (Antoine Pécoud ed., 2007).

—makes it a challenge to imagine other type of effective mechanisms of compliance and implementation in stronger intergovernmental contexts. Using South America as an example, I will present three different options in this essay—intergovernmental dialogue, supranational non-legally-binding committees, and national courts—to contribute to the thinking on the future of regional free movement regimes.

### *Free Movement of People in South America*

Free movement of regional citizens has been discussed in South America since independence in the early Nineteenth Century. More than a century earlier than in Europe, free movement for regional migrants, equal treatment, privileged access to naturalization, recognition of diplomas or common consular protection abroad, became part of a shared legal vocabulary enshrined in numerous international agreements and domestic constitutional provisions. After a period of increasing border closures during the Twentieth Century, which peaked during the military dictatorships that devastated the rule of law in most countries in the 1970s and 1980s, free movement of people reentered the agenda at the turn of the century.<sup>6</sup>

The most important framework regulating mobility in South America, the Southern Common Market (MERCOSUR) Residence Agreement, was nonetheless the result of a particular historical conjunction. Brazil held the rotating MERCOSUR presidency at the time, and Brazilian President Fernando Enrique Cardoso wanted to end his final term by leaving his personal stamp via a measure advancing regional integration in the social sphere. On August 30, 2002, Brazil proposed a migration amnesty for MERCOSUR nationals living elsewhere in the bloc without authorization. As originally proposed, the agreement would have initiated an exceptional regularization procedure over a six-month period for unauthorized regional migrants in all four Member States at the time (Argentina, Brazil, Paraguay, and Uruguay). Based on its own experience, having conducted numerous regularizations since 1949, Argentina was unconvinced that this approach would lead to any long-term solution. Thus, it offered a counterproposal to establish a permanent, rather than a temporary, mechanism for MERCOSUR citizens to gain access to regular status.

As signed, the treaty transformed the migration regime for South Americans. Its main objective, as declared in the preamble, is to solve the situation of intraregional irregular migration while deepening the regional integration process and implementing a policy of free circulation of people. All countries in South America (i.e. not just MERCOSUR countries) have ratified the agreement and apply it with the exception of Venezuela, Surinam, and Guyana where it is yet to be adopted. Nationals of state parties may reside and work for a period of two years in another Member State if they can prove citizenship and a clean criminal record. After two years, the permit may be transformed into permanent residency. The treaty also provides a number of rights to these migrants, including the right to equal working conditions, family reunification, and access to education for their children, thus surpassing the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in many respects.

Analyses of the effects of the agreement remain scarce and incomplete. A 2014 report by the International Organization for Migration highlights several problems regarding implementation.<sup>7</sup> These include a lack of administrative resources to process applications, the introduction of additional requirements beyond those included in the original agreement, and a lack of information generally available to potential beneficiaries. Moreover, the agreement has not been implemented consistently in each country. Unlike free mobility in the

<sup>6</sup> DIEGO ACOSTA, *SOUTH AMERICAN CITIZENSHIP AND MIGRATION LAW: THE CONSTRUCTION OF THE NATIONAL AND THE FOREIGNER SINCE INDEPENDENCE* (forthcoming 2018).

<sup>7</sup> Int'l Org. Migration, *Estudio sobre Experiencias en la Implementación del Acuerdo de Residencia del MERCOSUR y Asociados*. Documento de Referencia, Presented at the XIV Meeting of the South American Conference on Migration, Lima (Oct. 16–17, 2014).

European Union, where EU law supersedes national law, the MERCOSUR agreement is an international treaty implemented by individual states. For example, the agreement mentions the right to equal treatment with regard to social, cultural, and economic rights but does not further define this obligation. Consequently, discrimination with regard to entitlements such as welfare benefits is common. The same is true with regard to withdrawal of residence permits, which is allowed due to exceptional restrictions imposed on grounds of public order or public security.<sup>8</sup> Argentina, however, has amended its migration law to make it easier and faster to expel foreigners, including regional migrants, having committed any type of crime, even minor offences, something that may violate the letter and spirit of the MERCOSUR agreement.

The question thus arises: Are regional free movement regimes without a strong supranational component or coercive intraregional mechanisms capable of imposing sanctions feasible or are they bound to become dead letters? What alternatives can be envisaged to ensure compliance, consistent interpretation, and access to rights and remedies?

### *Compliance, Interpretation and Adjudication*

The issue of compliance in public international law has been long debated. An increasing body of literature suggests the need to move beyond compliance in order to understand the normative effects of international law. The central enquiry here is whether a more diffuse approach to compliance could be enough when it comes to free movement regimes. The answer is possibly not. Thus arises the need to approach the matter with a fresh perspective, especially when supranational tribunals are not a likely option.<sup>9</sup> The usual assumptions about what amounts to effective oversight are (a) difficult to construct and (b) not necessarily that effective in any case. Alternative approaches may be easier to establish and perhaps even more effective.

The interpretation of the MERCOSUR Residence Agreement has thus far occurred through a dialogue of government officials at the level of the MERCOSUR Migration Forum. In principle, access to the MERCOSUR tribunals could also be an option since there is a two-tiered procedure with the first instance decided by an ad hoc Arbitration Tribunal, and the second by the Permanent Revision Tribunal. For states parties, decisions of these tribunals are *res judicata* and binding. In addition to states, natural or legal persons may initiate the procedure. However, their chances of reaching the Permanent Revision Tribunal are slim, depending on a [cumbersome procedure](#) and the participation of a Member State.<sup>10</sup> This and other factors explain why a natural person has initiated none of the handful of cases already concluded.

An alternative model is that of the UN human rights treaty bodies. The UN Committee on the Rights of Migrants Workers (CMW), for example, which oversees the implementation of the Migrant Workers Convention, requires states parties to submit reports to it one year after acceding and then every five years. The Committee proposes recommendations regarding correct national implementation of the Convention which then feed into national legislative frameworks and lead to their amendment. These concluding observations have, in the words of [Malcolm Evans](#), “an ‘adjudicatory’ flavor.”<sup>11</sup> However, the CMW’s reports demonstrate that there is often a considerable gap between the convention’s formal ratification and its implementation in legislation

<sup>8</sup> MERCOSUR Residence Agreement art. 8 (2002).

<sup>9</sup> The Andean Community has a supranational court but after three decades of activity it has only produced two rulings affecting free movement of Andean nationals. See Acosta *supra* note 6.

<sup>10</sup> [Olivos Protocol for the Settlement of Disputes in MERCOSUR](#) arts. 39–44, Feb. 18, 2002; Amending Protocol to the Olivos Protocol, Jan. 19, 2007.

<sup>11</sup> Malcolm Evans, *Adjudicating Human Rights in the Preventive Sphere*, in *ADJUDICATING INTERNATIONAL HUMAN RIGHTS: ESSAYS IN HONOUR OF SANDY GHANDHI* 212, 216 (James A. Green & Christopher P.M. Waters eds., 2015).

and administrative practice. Whereas the role of the Committee has been described as [rather positive](#) by observers,<sup>12</sup> individual communications—a possibility so far only accepted by four out of the ten necessary countries to put into place—could signify a step forward. Under this mechanism the Committee will be able to issue views in a [quasi-judicial procedure](#) but with no legally binding force.<sup>13</sup>

The suitability of setting up similar committees to oversee the application of regional free movement agreements, including in South America, remains debatable. In any case, the regional level should learn from international committees' deficiencies and limitations. In that regard, it would arguably be more interesting to establish committees based on a constant dialogue with national authorities and other stakeholders to achieve prevention, rather than concentrating on compliance to the letter of the particular agreement. This could include incorporating a [national implementation and monitoring mechanism](#) similar to that found in some international treaties.<sup>14</sup> As Evans has explained with respect to the work of the Committee against Torture, the focus must be “on practical steps that might be taken to improve the enjoyment of the right ... [and] the pursuit of bettering the immediate situation as a stepping stone toward an end which might either be as yet unachievable in full, or is not yet an agreed outcome.”<sup>15</sup> This would favor prevention through innovative approaches rather than a replication of the flaws of international committees. In other words, if the objective is to achieve effective regional migration regimes, these less widely used means of oversight and implementation, with the inclusion of national independent mechanisms, may be both more achievable and similarly effective. National independent mechanisms would also allow for a much more comprehensive and holistic understanding of migration regulation, as involving various ministries and bureaucracies in any given country, and thus going beyond the dialogue between ministries of foreign affairs and the CMW taking place now.

National courts—mainly constitutional and supreme courts—emerge then as the last crucial actor with the challenging task to determine the meaning of international norms in South America. During the last two decades, the protective capacity of domestic courts in the region has been reinforced through three different interrelated elements, which could potentially play an important role in our discussion. The first one is the “[constitutionalization of human rights treaties](#).”<sup>16</sup> In other words, human rights become a central pillar through the incorporation of public international law and the jurisprudence of the Inter-American Court on Human Rights (IACtHR) into the “[block of constitutionality](#).”<sup>17</sup>

The second element is the IACtHR's doctrine on conventionality control. This doctrine requires the state—both national courts and other state authorities—to interpret domestic law, including the Constitution, in accordance with the American Convention on Human Rights (ACHR). This obligation also extends to consistent interpretation with other Inter-American treaties on human rights, and with the IACtHR's jurisprudence and its advisory opinions—known as the Inter-American *corpus juris* or the real “[block of conventionality](#).”<sup>18</sup> Thus,

<sup>12</sup> Carla Edelenbos, *Committee on Migrant Workers and Implementation of the ICRMW*, in *MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHTS* 100 (Ryszard Cholewinski et al. eds., 2010).

<sup>13</sup> Malcolm Evans, *Challenging Conventional Assumptions: The Case for a Preventive Approach to the Protection of the Freedom of Religion or Belief*, in *THE CHANGING NATURE OF RELIGIOUS RIGHTS UNDER INTERNATIONAL LAW* 25, 37 (Malcolm Evans et al. eds., 2015).

<sup>14</sup> [UN Convention on the Rights of Persons with Disabilities](#) art. 33, UN Doc. A/RES/61/106 (Jan. 24, 2007).

<sup>15</sup> Malcolm Evans, *supra* note 13, at 46.

<sup>16</sup> MANUEL EDUARDO GÓNGORA MERA, *INTER-AMERICAN JUDICIAL CONSTITUTIONALISM. ON THE CONSTITUTIONAL RANK OF HUMAN RIGHTS TREATIES IN LATIN AMERICA THROUGH NATIONAL AND INTER-AMERICAN ADJUDICATION* 1 (2011).

<sup>17</sup> Armin von Bogdandy, *Ius Constitutionale Commune en América Latina: una Mirada a un Constitucionalismo Transformador*, 34 *REVISTAS DERECHO DEL ESTADO* 3, 11, 17 (2015) (Colom.).

<sup>18</sup> Eduardo Ferrer Mac-Gregor, *The Constitutionalization of International Law in Latin America: Conventionality Control The New Doctrine of the Inter-American Court of Human Rights*, 109 *AJIL UNBOUND* 93, 98 (2015).

national judges should not be limited to the issue of whether a norm is unconstitutional but in addition they must address (upon the request of the interested party or *ex officio*) whether the norm in question is **unconventional**, that is, whether the norm restricts or violates the rights recognized in the Inter-American treaties ratified by the State.<sup>19</sup>

Should that be the case, state authorities should abstain from applying such law. Today, most South American states recognize the supremacy of international human rights law over domestic provisions either through a specific reference in their constitutions or through judicial interpretation.<sup>20</sup>

Whereas international law has obtained primacy over domestic law, the same cannot be argued when it comes to constitutional law. Possible clashes are however theoretically solved by the third element, namely the *pro homine* principle of interpretation. This establishes that, faced with a particular legal problem, the interpreter “may give preference to the norm that provides the widest and most extensive protection of human rights, regardless of the source (international/inter-American or national) and its rank in the normative order.”<sup>21</sup> To put it differently, since the ACHR aims at preserving human rights and upholding human dignity, “its interpretation must be done in favor of the individual.”<sup>22</sup> This principle is now largely accepted by domestic courts and even enshrined in some constitutions<sup>23</sup> as well as in some recent immigration laws.<sup>24</sup>

These three principles (constitutionalization of human rights, conventionality control doctrine, and *pro homine* principle of interpretation) offer national courts a fertile legal soil to develop norm interpretation with a strong focus on a rights-based approach. Although the MERCOSUR Residence Agreement is not a human rights international treaty *stricto sensu* it recognizes many of the fundamental rights enshrined in the ACHR including freedom of religion and association, right of the family and of the child—including to education and the right to nationality.<sup>25</sup> Thus, national courts interpreting the agreement will have to give it priority over any conflicting more restrictive domestic law, will have to follow the ICtHR’s jurisprudence to flesh out its content, and will have to give preference to the norm providing the widest protection, in line with the *pro homine* principle also indirectly recognized in the MERCOSUR agreement itself in Article 11.

### Conclusion

Compliance with regional free movement agreements will be the crucial factor determining their effectiveness. Lack of compliance is not always the result of bad faith on the part of state authorities but may be due to shortcomings in administrative capacity or information for all relevant actors including potential beneficiaries, bureaucracies, and courts. There needs to be a serious debate on how to make access to rights deriving from regional mobility agreements effective, moving beyond intergovernmental dialogue, notably in scenarios where supranational courts remain an elusive option. It is here that supranational committees working in conjunction with national independent mechanisms focusing on prevention emerge as possible tools to facilitate the realization of rights deriving from the international or regional sphere at national level. These committees and national

<sup>19</sup> GÓNGORA MERA, supra note 16, at 55.

<sup>20</sup> Id. at 58.

<sup>21</sup> Id. at 58.

<sup>22</sup> Id. at 59.

<sup>23</sup> See Art. 256, CONSTITUCIÓN POLÍTICA DEL ESTADO (Bol.); Art. 427, CONSTITUCIÓN DEL ECUADOR; Art. 23, CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA.

<sup>24</sup> LEY ORGÁNICA DE MOLIVIDAD HUMANA, 938 REGISTRO OFICIAL 3 (2017) (Ecuador).

<sup>25</sup> MERCOSUR Residence Agreement art. 9 (2002).

prevention mechanisms could also facilitate the role of domestic courts in a global scenario where an important number of countries recognize the supremacy of international law over the national legal order. This can be done through the training of judges on regional instruments but also through the establishment of databases collecting relevant rulings. They could also have a role in the legislative procedure as expert advisors setting the limits on what national law can or cannot do considering already existing regional and international law. Finally, they could be a point of reference for expertise and best practices at regional level thus helping executives overcome administrative difficulties and challenges. Intergovernmental dialogue alone will not be sufficient in ensuring effective access to rights and the success of regional free movement regimes. This will need to be coupled with a more active role of national courts and a rethinking of softer, in the absence of regional courts, supranational non-legally-binding committees focusing on prevention, sharing of expertise and best practices to overcome common deficiencies in implementation.