SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW

MOVING BEYOND THE REFUGEE LAW PARADIGM

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Refugees dominate contemporary headlines. The migration "emergencies"[1] at the southern U.S. border and the southern borders of the European Union, as well as the "crisis" in the Bay of Bengal, have drawn global attention to the dire inadequacies of the international refugee regime, even as extended through various principles of non-refoulement, in governing modern migration flows.[2] Political responses to these mass movements, from the Brexit vote to the election of Donald Trump and his executive order halting the refugee resettlement process in the United States, have threatened the viability of refugee law's protections. At the policy level, numerous high-level stakeholders have convened in different constellations, through the United Nations and other bodies;[3] many commentators agree that these meetings have accomplished little thus far in terms of law reform.[4] The refugee law paradigm consumes so much space in the imagination of international lawyers and policymakers that it is hard even to begin to conceptualize an alternate approach to global migration law. The fear of losing even the narrow ground staked out to protect refugees stiffens the resistance to change. Proposals for reform tend to follow the tired old path of suggesting ways in which the refugee definition can be expanded to include new groups of migrants (ranging from climate change refugees to anyone fleeing serious human rights abuses) rather than critically evaluating the structure of global migration law more broadly.

Though it may appear a risky time to suggest revisions to the refugee law regime, the inadequacies of the current approach and the political consequences underline the urgency and importance of envisioning a new legal framework. This essay engages with the structural flaws created by international refugee law in an effort to begin to chart a new path forward for global migration law. It focuses on three central problems produced by migration law's

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[1] For further discussion of the "emergency" paradigm and the role of international law in constructing migration "emergencies," *see* Jaya Ramji-Nogales, *Migration Emergencies*, 65 HASTINGS L. REV. 101 (2017).

[2] *See, e.g.,* EMAN HAMDAN, THE PRINCIPLE OF NON-REFOULEMENT UNDER THE ECHR AND THE UN CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (2016).

[3] *See, e.g.*, United Nations General Assembly, Resolution adopted by the General Assembly on 19 September 2016: New York Declaration for Refugees and Migrants, UN Doc. No A/RES/71/1 (Oct. 3, 2016) [hereinafter New York Declaration]; Organization of American States and United Nations High Commissioner for Refugees High Level Round Table, San Jose Action Statement (July 7, 2016).

[4] *See, e.g.*, Bill Frelick, *Theresa May's Refugee Vision is Narrow and Divisive*, NEWSWEEK (Sept. 20, 2016); Aurélie Ponthieu, *Empty Promises? Radical Policy Shift Needed on Refugees and Migrants*, MÉDÉCINS SANS FRONTIÈRES ANALYSIS (Sept. 22, 2016); ACTNOW, 7 actions world leaders urgently need to take to make a new deal for refugees, migrants and societies a reality (2016). *But see* Kathleen Newland, *New Approaches to Refugee Crises in the 21st Century: The Role of the International Community*, MIGRATION POLICY INSTITUTE POLICY BRIEF 8–9 (Oct. 2016) (Newland's take is more optimistic, noting that the agreements have created frameworks for law reform in the form of two proposed "global compacts" even if they have not yet altered legal standards).

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dependence on the refugee law framework. These are not the only problems with the refugee law framework, but are the most important. First, refugee law says nothing about transit from states of origin to states of destination. In practice, this means that the vast majority of migrants must show up at the border of their destination state in order to obtain the right to move.[5] The obvious irony there is that these migrants must already have moved in order to become eligible for the right to move; this legal Catch-22 enables an entire economy of exploitation and abuse of migrants. Second, contemporary refugee law frames "worthy" migrants narrowly, as vulnerable individuals in need of humanitarian assistance;[6] it fails conceptually to engage with the migrant as a whole human being with labor needs and skills and broader social networks.[7] Rather than tying migration into the global economic system, which depends on and creates migrants, refugee law introduces and reinforces a siloed humanitarian approach.[8] This leads to the last and largest problem, which is that the blinkered focus on refugee law avoids engagement with larger and deeper systemic issues. There are many drivers of migration, most of which are deeply tied to global economic structures. The turn to refugee law distracts attention from income inequality, shifting the conversation from economics to humanitarianism. As a result, most solutions ignore crucial economic dimensions of migration, focusing instead on either criminalization of movement through a smuggling/trafficking frame or charitable humanitarianism through a refugee law frame. This shapes the conversation in ways that are unhelpful both for migrants and for migrant-receiving countries, and, as has been vividly demonstrated of late on the world stage, limits the effectiveness of migration law regimes, which are subject to being overwhelmed by mass movements of people.

The structural failures of refugee law have given rise to calls for an updated international legal approach to migration. This essay concludes by briefly highlighting the potential of a global migration law approach to engage more effectively with central issues faced by contemporary migrants such as the lack of safe transit routes, the refugee/economic migrant binary, and the economic dimensions of migration.

Refugee Law's Paradox: Transit from Origin to Destination

While the Refugee Convention and related instruments prohibit states parties from returning migrants to a country in which they are at risk of persecution or torture, these legal instruments do not address how it is that these migrants should make their way into the destination countries in which they seek protection. In practice, this gap in the refugee law regime means that most refugees do not obtain permission to move to a destination state until after they have undertaken risky journeys to arrive at the borders of that state. Setting to one side for a moment questions about the content of the refugee definition, this approach creates an entirely separate set of

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[5] For a thoughtful assessment of this problem, s*ee* Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 BERKELEY J. INT'L L. 1 (2016).

[6] On this point, *see* Kate Ogg, *The Future of Feminist Engagement with Refugee Law; From the Margins to the Centre and out of the 'Pink Ghetto'?*, forthcoming in RESEARCH HANDBOOK ON WOMEN AND INTERNATIONAL LAW (Edward Elgar ed., 2017). Kate's article applies Martha Fineman's theory of the responsive state and Nedelsky's theory of relational autonomy to the concept of surrogate state protection in refugee law, critiquing "the development of two models of surrogate state protection polarized along gender lines [, namely independence/self-sufficiency and vulnerability/dependence/care responsibilities, as] inconsistent with feminist theories [which stress] that both men and women are dependent on the state or family for care and … both are constituted by relationships."

[7] *See Beyond Survival: Setting Priorities in Livelihoods Research and Education for Refugees in the Middle East*, CONFERENCE PROCEEDINGS REPORT 20–21 (2015), for a brief discussion of the history of the Refugee Convention, which I argue "conceptualized refugees as laborers, either in wage-earning employment, self-employment, or the liberal professions." This was exemplified by the U.S. representative to the drafting conference for the Convention, who stated that "without the right to work all other rights were meaningless."

[8] This binary is reinforced by the New York Declaration, *supra* note 3, which lays the ground work for two separate agreements, a "comprehensive refugee response framework" and a "global compact for safe, orderly and regular migration."

vulnerabilities and opportunities for exploitation in the transit routes between states of origin and destination. Even for migrants whose particular form of vulnerability is protected by refugee law, there are no opportunities for safe passage.

Historical context may be helpful in understanding the genesis and growth of this problem. The Refugee Convention, drafted in 1951, was of course aimed at protecting only migrants in Europe fleeing Nazis, communists, and other fascist regimes. It did not look beyond the continent of Europe and was originally a temporary regime set to expire.[9] Though Europe in the wake of World War II experienced mass movements of people and, at times, closed borders, the geographic scope and scale of migrant flows were vastly different from the contemporary flows covered by the principle of non-refoulement in its various iterations. Though safe transit routes might have helped migrants at the time, the perils of contemporary journeys have made the creation of safe passage options much more urgent both for migrants and for states.

Over the past two to three decades, border securitization has expanded dramatically. Carrier sanctions and increased passport technology and security have made it much more difficult for migrants from the global South to enter countries in the global North by air. Land and sea border security has become a flourishing industry, from policing technologies to border walls. Destination states have externalized their borders, preventing many migrants from even reaching these walls. Australia has essentially stopped the arrival of any migrants by boat to its shores, regardless of their country of origin or claims to protection. FRONTEX patrols the Mediterranean, and the EU's agreement with Turkey as well as other bilateral agreements between European countries and migrant-sending states make it much more difficult for migrants to reach the southern shores of Greece and Italy. The U.S. government has engaged in joint enforcement efforts with its counterparts in Mexico to prevent Central American migrants from reaching the southern U.S. border.

Thus, migration becomes a game with the deck stacked in favor of the hardiest, savviest, and luckiest migrants, or simply those so desperate that they are willing to put their lives and often the lives of their families at risk. This is not a sensible approach to migration from the perspective of the migrant or the destination state. If humanitarian protection is the goal, this approach is unlikely to select for the most vulnerable.[10] If labor needs are to be fulfilled, this approach is again unlikely to create the most appropriate labor pool. This question of safe transit routes is one that must be answered by an effective migration governance regime. There are of course many challenges to establishing effective transit mechanisms, not least of which are resurgent populist politics across the globe. It is time to begin to think through what a safe transit program might entail and assess the obstacles in the way of its creation.

Refugee Law's Binary: Vulnerability not Labor

Contemporary interpretations of refugee law, particularly as interpreted in the popular debate, draw a stark binary between worthy refugees and unworthy economic migrants. Populist politicians capitalize on fears of the latter stealing local jobs to stoke anti-immigrant sentiments and secure votes. In the face of a global economic recession, this has been a successful strategy in many quarters. The media play into this rhetoric by adopting the language and often a perspective that divides migrants into vulnerable refugees seeking protection and lawbreaking economic migrants who are willing to "jump queues" to find work. The power of refugee law creates and reinforces this distinction, somewhat ironically given that the Refugee Convention recognized that refugees would become part of the labor force in their destination state.

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[9] For a terrific discussion of the role that temporary regimes can play, *see* Jean Galbraith, *Temporary International Legal Regimes as Frames for Permanent Ones*, *in* 45 NETH. Y.B. INT'L L. 41 (2014).

[10] *See* Paz, *supra* note 5.

The reality of migrants' motivations is of course far more complex. All refugees have economic needs and many are able workers. Many labor migrants have protection needs, especially in transit, but also from situations in their home country that may fall short of individualized targeting for persecution or torture but still render life intolerable. The same complexity drives the responses of destination states, which may have both noble and self-interested reasons to accept refugees. The economic engines of migrant-receiving states are often deeply dependent on migrant labor, but the political rhetoric often denies the basic humanitarian needs of these migrant laborers. The refugee/economic migrant binary is a gross oversimplification that is amenable to a variety of strategic uses. Its power poses a central challenge to efforts to reinvent global migration law.

A shift in discourse around migrants is a necessary precursor to a new approach to global migration law. An important part of that rhetorical shift is dismantling the refugee/economic migrant binary to draw a more complex and sympathetic picture of migrants of all types. National security concerns, both real and imagined, also come into play in any effort to shift the conversation. This is a chicken or egg problem: the binary must first be shifted in order to undermine refugee law's dominance, but it will be difficult to destabilize the rhetoric without first creating alternate legal channels for migration. The issue presents classic questions around the role of law in altering social norms as well as deeper challenges to conceptions of the liberal state and relevant political commitments.

Refugee Law's Blinders: Global Economic Inequality

Refugee law's dominance plays a magical sleight-of-hand with global economic inequality. The refugee law paradigm contributes to the popular conceptualization of migration as a benevolent humanitarian act on the part of destination states rather than a central pillar of the global economy, both driven by and driving extant economic structures. If migration is conceived narrowly as an act of charity on the part of migrant-receiving states, relevant law and policy can be more easily disconnected from the economic system. A similar phenomenon is at play with respect to the law of trafficking, which turns to the criminal rather than the humanitarian, but is equally effective in disguising the economic drivers of migration.

The resultant failure to engage with inequality in the global economic system is harmful both for migrants and for migrant-receiving states. If a dearth of economic opportunity is a central driver of migration, even for many refugees, a system that addresses migration through a humanitarian framework is doomed to failure. This failure comes at a severe individual cost to migrants, ranging from exploitation to severe abuse, but also leads to policy outcomes that destination states would prefer to avoid, such as mass influxes of migrants and sizeable populations of undocumented and therefore unregulated migrants within state territories. In addition to conceptualizing the whole migrant as a complex human being, an effective global legal regime must engage all dimensions of migration. The law must address equally as many drivers of migration as possible, creating and regulating a variety of migratory routes.

Moving Beyond the Refugee Law Paradigm

The international refugee law regime has provided protection for many migrants over the past half-century, but simply is not up to the task of addressing modern migration flows. The field of global migration law offers the promise of a more integrated and complete approach that "seeks to explore the legal space beyond [the international refugee law] regime." It aims to destabilize the refugee/economic migrant binary by "understanding the migrant as a multidimensional human being with a complex set of needs, interests, and contributions." From that starting point, global migration law "covers a broad temporal scope, from causal factors and motivations for migration to exit, transit, entry, reception, and integration." In other words, the field addresses comprehensively drivers of migration, including links with development and global socioeconomic structures. Global

migration law endeavors to understand not only the transit experiences of migrants but also their situation in host countries. Perhaps most importantly, the field focuses on questions of "human mobility as distinct from movement." Rather than assuming migration is the optimal choice for individual welfare, it emphasizes human agency and ability to determine for oneself whether movement is desirable. These potential migrants might prefer a development-focused approach that enables them to remain with their families in their home country, or a circular migration option that enables safe transit to and from the host country at regular intervals. Global migration law presents an opportunity to move beyond the refugee law paradigm to construct a field of inquiry that reflects more accurately the lived experience of migrants, and seeks to build an international legal regime that is more responsive to the needs of individuals and societies on both sides of the migration trail.