SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW

TOWARD A GLOBAL SYSTEM OF HUMAN MOBILITY: THREE THOUGHTS

T. Alexander Aleinikoff*

Migration is already a significant global phenomenon, and it is likely to become more so. According to a recent World Bank report, there are two hundred million international migrants. The study reports that "migration pressures" will continue "for the foreseeable future." It will take "decades" to close income gaps between developed and developing countries; in 2015, the ratio between the average income of the high-income countries and that of the low-income countries stood at 70:1. A "well-documented demographic divergence" will add further pressure: "Population aging will produce large labor-market imbalances and fiscal pressures in high-income countries as the tax base narrows and the cost of caring for the old surges." This increase in demand will complement an increase in supply. "If current fertility and national employment rates remain as they are in the developing world," the Bank reports, by 2050 "nearly 900 million [will be] in search of work." Climate change and disasters will have a more modest impact on the international level, although "increased drought and desertification, rising sea levels, repeated crop failures, and more intense and frequent storms are likely to increase *internal* migration."[1] And these numbers—measuring persons outside their home country for more than a year—do not include hundreds of millions of persons who cross international borders for shorter periods of time: tourists, students, temporary workers, business persons, asylum-seekers.

While the percentage that migrants represent in the total world population has remained under 5 percent for decades (approximately 10 percent in Europe and North America), the numbers are large and growing.[2] These real-world developments are surely large enough to warrant serious attention by scholars; the search for overarching research questions, interdisciplinary approaches, and policy recommendations need not be driven by claims of a "migration crisis." A new field of legal inquiry exploring the *global system of human mobility* should situate individual interests, rights, and potentialities within a constellation of state-based and multilateral migration regimes. The recent UN-sponsored New York Declaration and advancing regional migration systems supply important focal points for the new field and the possibilities of freer global movement.

Describing our field

In the United States, academic interest in the migration field has generally addressed domestic laws, with law courses in the United States focusing almost exclusively on the Immigration and Nationality Act (including its provisions relating to asylum). Although there is surprisingly little opposition to or discussion of the basics of

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* Director, Zolberg Institute for Migration and Mobility, The New School.

[1] WORLD BANK, MIGRATION AND DEVELOPMENT: A ROLE FOR THE WORLD BANK GROUP (2016).

[2] Migrants as a proportion of the world's population stood at 3.3% in 2015, up from 2.8% in 2010. *See* UNITED NATIONS DEP'T OF ECONOMIC AND SOCIAL AFFAIRS, INTERNATIONAL MIGRATION REPORT 2015, at 21 (2016).

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the U.S. immigration system (which extend permanent residency to around one million noncitizens a year), the cartoonish version of the political debate is pitched as one of exclusionists interested in border control and perhaps ethnic homogeneity versus "open(er) border" advocates, supported by identarian groups and the Wall Street Journal.

International migration, by definition, presupposes the crossing of borders, but international law is largely absent from the research and teaching of immigration scholars (except to the extent that the domestic policies of other states are examined for comparative purposes). Even refugee law, which derives from the widely adopted 1951 Refugee Convention and 1967 Protocol, is viewed through the domestic lens of administrative and judicial decisions that, in the U.S. context, expressly downplay the relevance of opinions from foreign courts and UN organizations. Human rights law protects "persons" irrespective of their status as citizens or immigrants, but it plays only a limited role in immigration scholarship and even less in the decisions of adjudicators and policy-makers.[3] Other areas of international concern apply: the law of the sea sets norms regarding the rescue of asylum-seekers in sinking boats; climate change agreements gesture at interest in issues of displacement; international labor standards apply to migrant worker, even if they are ignored in U.S. courts. We might be able to collect these and other topics, put a circle around them and call them "international migration law"—perhaps in the same manner that "sports law" has been created. But this would simply provide the raw material for serious theorizing about the why and what of the field.

Policy thinkers and international organizations are ahead of legal scholars. For them, discussions of international migration typically frame the topic as about "the *management* of international migration." More liberal policy-types prefer this phrasing to "the *control* of international migration," which is seen as ceding the field to the dark side. "Management" is purportedly a neutral term that both removes the sense of crisis and appeals to strategies for "reaping the benefits" of immigration without unduly upsetting receiving and sending states—thereby implicitly accepting the assumption that international migration is (or can be made to be) generally good for the world.

I want to challenge this framing. Consider an analogy: it would be peculiar, I think, to describe the set of legal norms regarding free speech as "the management of speech" or "free speech law." I recognize that there is not a "right to international travel" that can be compared to a well-established right to freedom of expression. Nonetheless, I want to suggest that we define the intellectual project as about "a global system of human mobility" rather than management of international migration or a global migration law.

This terminology has two benefits. First, "mobility" is a better description of the phenomenon we are considering than "migration"—which has a "from here to there" sense, and misses a range of relevant normative issues, including, for example, the right to leave and re-enter one's state of origin, acquisition of citizenship and dual nationality, refugees, internally displaced persons (IDPs) and other forced migrants. Second, focusing on mobility flips the discussion from state mechanisms for control and regulation to individual agency and needs. This is not a move to "open borders." It is rather movement from questions of how the state should regulate to questions of how to facilitate/organize human mobility. For migrants seeking work, one would address labor gaps in receiving states, skills development for potential migrants, and cracking down on trafficking rather than building border walls, instituting restrictive visa requirements and increasing removals. For refugees, we would open up discussions, for example, of a new form of the Nansen passport rather than perfecting the EU-Turkey deal. In short, "global migration law" suggests and privileges a state-centric approach; "a global system of human mobility" puts human beings front and center.

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[3] U.S. immigration detention policies, for example, are vulnerable under prevailing international human rights standards, were those standards ever to be applied. *See, e.g.,* AMNESTY INTERNATIONAL, JAILED WITHOUT JUSTICE: IMMIGRANT DETENTION IN THE USA (2008).

Freer movement is easier to imagine than one might think. It exists within nations (guaranteed in the United States by bedrock constitutional norms) and is increasingly taking shape at the regional level.[4] We may well be witnessing a historic moment of "renationalization" of immigration controls, but I would bet on a longer and deeper trend of "mobility"—fueled perhaps more by recognized economic benefits and demographic needs than by notions of fundamental human freedoms or the weakening of state sovereignty. From this perspective, a focus on a "global system of human mobility" would examine and evaluate international and domestic norms on the basis of their contribution to mobility.[5] This is not to suggest that there is at present a *right* to international mobility; it is, however, to focus on the interests and goals of human beings, rather than on questions of whether and how immigration serves national interests and the preservation of nation-states.

The thought experiment I would suggest is to imagine what a casebook on the "global system of human mobility" would look like. It would not, I think, be made up of chapters on various areas of law that pertain to migration. Rather, it would start with the phenomenon—with chapters, for example, on motivations for movement (work, family, safety, tourism, education, retirement, medical care), methods of movement, the length of movement (temporary, circular, settlement), degrees of vulnerability, and the impact of movement on home, transit, and destination countries. State interests would be side constraints, not the primary focus of attention; the overarching normative question addressed by the book would be how national and supranational norms and institutions can better facilitate movement.

The international context and call

In September 2016, the United Nations convened a high-level meeting on refugees and migrants. The motivation for the summit was the large-scale movement of persons from the Middle East and Africa to Europe, although the discussion and documents went far beyond the European "crisis"—indeed, little was concluded that would in any way affect the flow in the short term. The result of the meeting was the New York Declaration for Refugees and Migrants,[6] which purported, inter alia, to commit states to promoting the rights of migrants, reaffirming the norms of the international refugee regime, taking steps to assist hosting communities, supporting strengthened efforts at global responsibility-sharing for refugees, fostering a comprehensive response to refugee situations (including development actors and the private sector in addition to humanitarian agencies), and urging the United Nations to launch a global campaign against xenophobia. Given the current state of discourse about and discrimination against migrants and refugees, these are all welcome normative commitments. But the summit yielded no new concrete undertakings, no new goals (compare the recently adopted Sustainable Development Goals and the outcome from the Paris Climate Change Agreement), no new sources of funding for international organizations, NGOs, and hosting states, and no plans for transformation of international organizations and structures that have been unable to adequately respond to large-scale flows of human beings across borders.

The New York Declaration, however, establishes a possible focus for legal scholars in its call for the drafting of a Global Compact for Safe, Orderly, and Regular Migration, to be negotiated over the next two years in a state-led process. An Annex to the Declaration includes a list of elements to be considered in the Compact.[7] It is an eclectic

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[4] The decline and probable fall of the Schengen system may mean that EU citizens will now need to show passports when crossing borders within the Schengen zone but nothing (yet) suggests that the fundamental norm of freedom of movement within the European Union is at risk.

[5] As well as nonmobility—i.e., removing causes that force people to move who would prefer to stay home.

[6] *See* GA, New York Declaration for Refugees and Migrants, UN Doc. A/71/L.1 (Sept. 13, 2016).

[7] *See id.* at para. 21 and ann. 2.

list that lacks an overall theme and reflects—as do most UN documents—the interests of particular UN organizations and member states. For the foreseeable future, discussions at the global level on international migration will be shaped and dominated by the Annex and its list—although the scope, content, and resulting obligations of the Compact are all open at the moment.

Law-related elements in the Declaration and Annex fall into several categories:

a. Facilitating mobility: the "facilitation of safe, orderly, regular and responsible migration and mobility of people"; recognition of foreign qualifications and education; access to and portability of earned benefits;

b. Rights: protection of the human rights regardless of a person's migratory status; combating of trafficking, smuggling and "contemporary forms of slavery" and consideration of legal status and work permission for victims; protection of labor rights, and promotion of labor mobility;

c. Policies of reception, inclusion, and antixenophobia: promotion of inclusion and access to basic services for migrants; combating of "racism, xenophobia, discrimination and intolerance towards all migrants"; consideration of policies to regularize the status of migrants; responsibilities and obligations of migrants towards host countries;

d. International cooperation: greater international cooperation, at regional and international levels, "to improve migration governance," including border control and return and readmission of irregular migrants.

Fields of inquiry can be established in a number of ways. We might, for example, start with a (negotiated) definition of "global migration law" (or, as suggested, a "global system of human mobility") and then see what research questions can be deduced from the overall concept. Or we could work inductively—perhaps by focusing on the range of topics suggested for the Compact on Migration and then seeing if they suggest parameters for the field. One of the strengths of working from the bottom up is that academic interest in the questions arising under the Compact can help provide a counter-balance to the inevitable bias in the UN deliberations toward systems and policies of control that primarily serve state interests.

Regional approaches

Some of the most innovative and successful supranational approaches to mobility are occurring at the regional level. Most significant are intraregional free movement arrangements (the European Union, the Economic Community of West African States, developing in the Southern Common Market (MERCOSUR)). Free movement at the continental level may be next, with the African Union just beginning discussions on a free movement protocol. Regions also get together to improve and coordinate enforcement efforts: the European Union has just announced the establishment of a border control authority for external EU borders,[8] and there are numerous "processes" (the Pueblo process, the Bali process) that are primarily aimed at improving enforcement (while sometimes also seeking to provide enhanced protection for refugees and other vulnerable migrants). There are, of course, regional agreements on refugees (the Organisation of African Unity Convention, the Cartagena Declaration, EU subsidiary protection) and now on IDPs as well (the Kampala Convention). Even the 1951 Refugee Convention began, in effect, as a regional accord.

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[8] *See* European Comm'n, Press Release: Securing Europe's External Borders: Launch of the European Border and Coast Guard Agency (Oct. 6, 2016).

In one sense, the regions can be "laboratories" for the development of global norms and approaches. But the point actually goes beyond this. While much of the impetus for global norms relating both to migration control and migrant rights responds to the South-to-North flow, that flow, as the World Bank report notes, represents a fairly small slice of overall international migration. If, in fact, intraregional movement far exceeds interregional movement (think about U.S.-Mexican-Canadian movement, intra-EU movement—indeed, it was concern about Poles, not Syrians that was central to the Brexit vote), then perhaps our project should see regional movement as the general case and global movement as the special case.

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Human mobility has existed as long as humans have existed. Seas, mountains, and deserts provided obstacles to movement—as did unfriendly human groupings at the destination site. But only fairly recently in human history have hardened national borders—enforced by people with complex systems of regulation and guns—become the major barrier to human migration. International legal scholars can and should problematize the seeming "naturalness" of these controls. We should examine why these controls are in place (whose interests they serve) and begin to theorize the presuppositions and scope of a global system of mobility.