

Special Issue
Constitutional Identity in the Age of Global Migration

The UN's Search for a Global Compact on Safe, Orderly and Regular Migration

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Abstract

In 2016, the UN's General Assembly called for the negotiation of a Global Compact on Safe, Orderly, and Regular Migration to be adopted in 2018. The consultations began at the start of 2017 and the negotiations began six months later. Yet, it is uncertain what a Global Compact on Migration should include and what it should look like. What should be the key objectives of a Global Compact for Safe, Orderly and Regular Migration? In this Article I examine the issue which the UN seeks to address through an analysis of the three problems: Unsafe migration, disorderly migration, and irregular migration.

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A. Introduction: In Search of Safe, Order and Regular Migration

The objective of the New York Declaration, adopted by UN General Assembly Resolution of 19 September 2016,¹ is to contribute to safe, orderly and regular migration worldwide. The problem which the General Assembly seeks to address is what it terms “the growing global phenomenon of large movements of refugees and migrants.”² In order to do so, the UN has chosen as an overarching framework of the New York Declaration the 2030 Agenda for Sustainable Development. While this choice may be politically expeditious it is perhaps not the most obvious framework as migrant and refugee protection are not self-evidently development issues as such though there may be development angles.³

The immediate objective is that by the end of 2018, the New York Declaration will be provided implementing measures in the form of two Global Compacts, one on refugees and one on safe, orderly and regular migration. The Global Compact on Refugees has been allocated to United Nations High Commissioner for Refugees (UNHCR) to develop and lead. The Global Compact on Safe, Orderly, and Regular Migration⁴ will be led by an intergovernmental process supported by the Secretary General of the UN. The UN Special Representative for International Migration⁵ has a leading role in the process while the International Organisation for Migration (IOM) has been allocated a supporting role.⁶

This Article addresses a number of legal and policy issues which must be addressed in order to achieve an international system which privileges safe, orderly, and regular migration. Many of the issues which are developed here are also relevant for refugees who are frequently among those most at risk from unsafe, disorderly, and irregular movement across borders. Refugees are not the main focus of this article, however, not least as they are beneficiaries of the UN’s Convention relating to the status of refugees 1951 and its 1967

¹ G.A Res. 71/1, para. 24 New York Declaration for Refugees and Migrants Statement of Financial Implications (Sept. 16, 2016).

² *Id.* para. 2.

³ Indeed, the development framework might be criticised as appearing to focus on movement of people from poorer to richer countries rather than a more balanced perspective of the movement of people across borders generally. Adrian A. Smith, *Migration, Development and Security within Racialised Global Capitalism: Refusing the Balance Game*, 37 *THIRD WORLD Q.* 2119–38 (2016).

⁴ See ELSPETH GUILD & STEFANIE GRANT, *MIGRATION GOVERNANCE IN THE UN: WHAT IS THE GLOBAL COMPACT AND WHAT DOES IT MEAN?* (2017).

⁵ See Department of Economic and Social Affairs, *Secretary-General Appoints Louise Arbour of Canada Special Representative for International Migration*, UNITED NATIONS (Mar. 9, 2017), <http://www.un.org/en/development/desa/population/migration/partners/srsg.shtml> (last visited Oct. 25, 2017).

⁶ See ELSPETH GUILD, STEFANIE GRANT & KEES GROENENDIJK, *IOM AND THE UN: UNFINISHED BUSINESS* (2017).

Protocol⁷ which provide for specific obligations of states towards refugees including regarding their admission at border.⁸

The argument of this Article is that achieving safe, orderly, and regular migration requires states to embrace their responsibilities in international human rights law including at their borders. This can only be done effectively by disaggregating border control from migration regulation and law enforcement.⁹ The attempt to use border control to further the latter is one of the most important contributing factors to unsafe, disorderly, and irregular migration. The vast majority of people who cross international borders do so safely, orderly, and in a regular manner. Only a very small proportion of them are placed at risk. By examining the differences between the movement of the majority and the risks suffered by the very small minority it will be possible to take effective measures to promote safe, orderly, and regular migration. The international human rights responsibilities of states when exercising their state sovereign entitlement to control their borders and the movement of persons across them¹⁰ includes an obligation to desist from applying measures which result in unsafe, disorderly, and irregular movement. The New York Declaration affirms that “States have rights and responsibilities to manage and control their borders.”¹¹ The fact that rights come with responsibilities is a generally accepted principle of law. States’ right to control their borders is accompanied by the responsibility to ensure respect for the human rights of those crossing them: Migrants. Their right to dignity and physical integrity is the responsibility of states to assure in their application of border controls and related measures.¹² This is also an intrinsic part of the recognition in the New York Declaration that migrants and refugees are rights holders.

We reaffirm the purposes and principles of the Charter of the United Nations. We reaffirm also the Universal Declaration of Human Rights and recall the core international human rights treaties. We reaffirm and

⁷ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

⁸ See Türk, Volker & Madeline Garlick, From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees, 28 INT’L J. REFUGEE L. 656–78 (2016).

⁹ See William Walters, *Border/Control*, in AN ANTHOLOGY OF MIGRATION AND SOCIAL TRANSFORMATION 151–65 (2016).

¹⁰ See UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, (Apr. 11, 1986), <http://www.refworld.org/docid/45139acfc.html>.

¹¹ G.A Res. 71/1, para. 24 New York Declaration for Refugees and Migrants Statement of Financial Implications (Sept. 16, 2016).

¹² See UN Human Rights Committee (HRC), *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (May 26, 2004), <http://www.refworld.org/docid/478b26ae2.html>.

will fully protect the human rights of all refugees and migrants, regardless of status; all are rights holders. Our response will demonstrate full respect for international law and international human rights law and, where applicable, international refugee law and international humanitarian law..¹³

Starting from this reaffirmation by the international community of their objectives regarding the establishment of an international system of safe, orderly, and regulated migration, this Article will examine why the key to achieving the objective is grounded in a disaggregation of border controls from immigration regulation and law enforcement.

B. Migrants and Migration

Before proceeding further, the terminology needs to be clear in particular: Who are migrants? Many words are used to describe people who cross international borders. The most traditional binary categorization is between citizens of the state—the territory of which being entered—and aliens. “Alien” is a general term which has been commonly used in international law to describe anyone who is not a citizen of the state in which he or she is found.¹⁴ But this simple terminology is out of fashion. Instead, many alternative terms are used such as foreigner, migrant, tourist, visitor, refugee, asylum seeker, and many more. Each term seeks to express differences of attributed intentions and objectives of the person described mainly in terms of length of stay on the territory and activities or links there. Each term also seeks to capture the legitimacy of migratory ambitions of people who cross international borders—hence the terms “illegal,”¹⁵ undocumented, or irregular migrant are in common currency.¹⁶ Yet, mostly the allocation of one term to one group and another elsewhere is based on speculation and assumptions founded on very partial information and knowledge.¹⁷ Only the individual migrant is able to clarify his or her travel plans.

Presumptions by state authorities regarding the objectives of people based on collective characteristics extrinsic to the individual such as place of birth, nationality, or place of

¹³ G.A. Res. 71/1, para. 5 New York Declaration for Refugees and Migrants Statement of Financial Implications (Sept. 16, 2016).

¹⁴ GERHARD VON GLAHN & JAMES LARRY TAULBEE, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* (2015).

¹⁵ The categorization of people as “illegal” has been deplored by the UN and many other institutions but remains current in the language used by numerous states.

¹⁶ See Joseph H. Carens, *The Rights of Irregular Migrants*, 22 *Ethics & Int’l Affairs* 163 (2008).

¹⁷ See CATHERINE DAUVERGNE, *MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW* (2008).

departure are inherently discriminatory and offend the right to dignity of all people.¹⁸ Such presumptions cannot be justified on grounds of immigration control or law enforcement. The UN World Tourism Organization estimates that there are more than 1.2 billion tourists who travel across borders each year.¹⁹ It is worth keeping this figure in mind when thinking about migrants who may simply be tourists or may be tourists who decided to stay a little longer than originally anticipated. The presumption in favor of safe and orderly border crossing which applies to these migrants should apply to all. This argument develops below, particularly in light of the practices of states.

Travelers have many goals which change rapidly and are affected by all kinds of externalities—including such banal events as a telephone call from home.²⁰ The choice of Office of the High Commissioner for Human Rights (OHCHR) to term all aliens as migrants simplifies matters.²¹ Instead of creating normative categories such as travelers, tourists, visitors, migrants, asylum seekers, refugees, repeat border offenders,²² or any of the multitude of other words used, deploying one term only—migrant—creates a level playing field. It is capable of including even the person who is leaving one country to return to enter his or her country of citizenship. In order to describe the cross-border movement of people in a consistent manner which is not tainted by normative constructions which are created by imputing intentions to people moving, the term migrant is useful. If all cross-border travelers are described in the same manner, that is to say as migrants, then the term ‘migrant’ may lose its stigma as a term to describe only unwanted aliens.²³

This also resolves the citizen-alien binary where cross border movement is determined by reference to a state of nationality.²⁴ Oelgemöller has examined in depth the arrival of the “transit country” as a mechanism of migration management by a number of states which

¹⁸ See Adrian Little & Nick Vaughan-Williams, *Stopping Boats, Saving Lives, Securing Subjects: Humanitarian Borders in Europe and Australia*, 23 EUR. J. INT’L REL. 533 (2016).

¹⁹ See Press Release, World Tourism Organization UNWTO, UNWTO Welcomes the World’s One-Billionth Tourist (Dec. 13, 2012), <http://media.unwto.org/search/node/who%20is%20a%20tourist%3F>.

²⁰ See Nicholas P. De Genova, *Migrant “illegality” and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419 (2002).

²¹ See Migration and Human Rights, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER <http://www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx> (last visited April 10, 2017).

²² See Andrew Becker & G.W. Schulz, *Despite ‘Zero-Tolerance’ Policy, Many Who Cross Border Are Repeat Offenders*, REVEAL (May 23, 2013), <https://www.revealnews.org/article/despite-zero-tolerance-policy-many-who-cross-border-are-repeat-offenders/> (last visited Oct. 29, 2017).

²³ See ANDREW GEDDES & PETER SCHOLTEN, *THE POLITICS OF MIGRATION AND IMMIGRATION IN EUROPE* (2016).

²⁴ See DIEGO ACOSTA ARCARAZO, *WHEN HUMANS BECOME MIGRANTS: STUDY OF THE EUROPEAN COURT OF HUMAN RIGHTS WITH AN INTER-AMERICAN COUNTERPOINT* 65–66 (2016).

avoids the conundrum of the rights of citizens by placing people on the move in an intermediate territory—the transit state—where they do not enjoy citizenship rights but are suspected of planning onward movement.²⁵ This allows states to treat some people, in particular those outside their jurisdiction, as migratory or law enforcement risks without having to address the problem that these people are citizens in their own state subject to the laws of their own state. Anxiety about people on the move can then be expressed without offending the authorities of other states about the imputed intentions of their citizens. But migrants are also citizens of some country²⁶ and their home state is entitled to champion their interests irrespective of what country they are in. This is affirmed in the New York Declaration: “We commit to safeguarding the rights of, protecting the interests of and assisting our migrant communities abroad, including through consular protection, assistance and cooperation, in accordance with relevant international law.”²⁷ The international community is composed of all states and its policies must reflect the interests of all states to protect their citizens including when they are migrants in another state.

Prejudices about migrants are often reinforced through specific individual examples widely disseminated by the press. The ubiquitous pictures of small boats full of young black men as representing the arrival of migrants and refugees in Europe across the Mediterranean which media outlets purvey on a regular basis is a good example. In fact, the top three countries of origin of asylum seekers—and those recognised as refugees—in the European Union, according to EUROSTAT—the EU’s statistical agency—are Syrians, Iraqis, and Afghans, none of whom are Sub-Saharan Africans.²⁸ Similarly, women accounted for over 405,000 of the total 1.2 million asylum seekers in the EU in 2016.²⁹ So if the image of the little boat full of desperate people heading to Europe were to be correct, it would mainly consist of people of Arab and Afghan complexion and more than a third would be women.

²⁵ See Christina Oelgemöller, “Transit” and “Suspension”: Migration Management or the Metamorphosis of Asylum-Seekers into “Illegal” Immigrants, 37 J. ETHNIC & MIGRATION STUD. 407 (2011).

²⁶ Except those so unfortunate as to be stateless. See JANE MCADAM, “DISAPPEARING STATES”, STATELESSNESS AND THE BOUNDARIES OF INTERNATIONAL LAW (2010).

²⁷ G.A Res. 71/1, para. 5 New York Declaration for Refugees and Migrants Statement of Financial Implications (Sept. 16, 2016).

²⁸ See *Five Main Citizenships for First Time Asylum Applicants, 4th Quarter 2016*, EUROSTAT, http://ec.europa.eu/eurostat/statistics-explained/images/4/49/Five_main_citizenships_of_first_time_asylum_applicants%2C_4th_quarter_2016.png (last visited Apr. 11, 2017).

²⁹ http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report accessed 4 November 2017.

Yet, the media's picture of the boat continues to inform our imaginations notwithstanding the statistical evidence to the contrary.³⁰ The picture has become representative of everyone who travels unsafely towards Europe.³¹ As a consequence we tend to ask the wrong questions like—what kind of people put their lives at risk—ignoring the diversity and multiplicity of people's motivations.³² It may be helpful to leave motivation out of the equation and speak of people equally. This choice even effaces the citizen-alien distinction which is so central in law to the determination of migrants' rights. For the purposes of this Article, it will describe all people crossing international borders as migrants, following the example of the OHCHR.

The International Organisation for Migration (IOM), which became a related organization of the UN in July 2016,³³ defines "migrant" as:

[A]ny person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is.³⁴

This definition is somewhat too ambitious for my purposes as it includes, for instance, people who move within their own country of citizenship from one town to the next—or even within a town. While human movement in its entirety is important for many academic investigations such as human geography,³⁵ the salience of the UN's call for a Global Compact for Safe, Orderly, and Regular Migration is related to the movement across international borders of people who are not citizens of the destination state. It is not about citizens returning to their countries of nationality nor is it about citizens moving within their countries of nationality. It is about the state sovereign claim to an entitlement to control—

³⁰ See Sei-hill Kim et al., *The View of the Border: News Framing of the Definition, Causes, and Solutions to Illegal Immigration*, 14 MASS COMM. & SOC. 292 (2011).

³¹ See MEDIA AND MIGRATION: CONSTRUCTIONS OF MOBILITY AND DIFFERENCE (Russell King & Nancy Wood eds., 2013).

³² See Tsuda Takeyuki, *Media Images, Immigrant Reality: Ethnic Prejudice and Tradition in Japanese Media Representations of Japanese-Brazilian Return Migrants* (Ctr. for Comp. Immigration Stud., Working Paper No. 107, 2004).

³³ See Elspeth Guild, Stefanie Grant & Kees Groenendijk, *IOM and the UN: Unfinished Business* (Queen Mary University of London, School of Law Legal Studies Research Paper No. 255/2017, 2017).

³⁴ *Who is a Migrant?*, INTERNATIONAL ORGANIZATION FOR MIGRATION, <https://www.iom.int/who-is-a-migrant> (last visited July 12, 2017).

³⁵ See, e.g., Paul L. Knox, Sallie A. Marston & Michael Imort, *Human Geography: Places and Regions in Global Context*, (2016); *GEOGRAPHIES OF MOBILITIES: PRACTICES, SPACES, SUBJECTS* (Tim Cresswell & Peter Merriman eds., 2011).

manage and prevent—the movement of people who are not citizens of that particular state to and into the territory of that state.

Therefore, this Article will use the term migration to cover arrival and stay—of any duration, consistent with the IOM definition, but slightly more limited—of a migrant in a country of which he or she is not a national. Increasingly in policy and even academic papers officials and academics seek to differentiate between mobility and migration.³⁶ Yet there is no clarity what the difference between the terms is other than the insinuation that one is positive—mobility—and the other risky—migration. This creation of different terms for what is fundamentally the same act mirrors the categorical differentiation between tourists and migrants. It is equally empty of real content. I recognize the political objective of some policy makers and academics to “rescue” cross-border movement of persons from the pejorative appellation of migration but I am not convinced that it is intellectually sustainable. Thus, this Article will avoid what may be a false differentiation between mobility and migration and use the term migration to cover all cross-border movement of migrants.

C. Unsafe Migration

Unsafe migration and the loss of life in migratory movements across countries and seas is a stain on the international community’s commitment to protect human rights. It is a tragedy for the people who suffer and sometimes die and for their families. It is unacceptable that states allow these tragedies to occur. According to the IOM’s project—Missing Migrants—by April 2017, 1,178 persons had been lost in international migratory movements worldwide in that year alone.³⁷ The majority of these losses took place in the Mediterranean, 663, accounting for 56.3% of the total. According to the same source, the tally in 2016 was 7,763 losses with Europe accounting for 5,098 of them or 65.7% of the total. These losses are terrible and a blight on the reputation of all countries which are implicated in them.

These losses take place in particular places: In the Mediterranean Sea and in respect of the North America at land border between Mexico and the US. They do not take place at airports. Nor do they take place at sea borders in North America or land borders in Europe.

The migrants who lost their lives crossing the Mediterranean did so because the only boats which they could catch were unseaworthy, the personnel—to glorify the role of those guiding the boats—un-unionized, and the conditions incompatible with European health and

³⁶ See MARTIN VAN DER VELDE & TON VAN NAERSSSEN, *MOBILITY AND MIGRATION CHOICES: THRESHOLDS TO CROSSING BORDERS* (2016). The European Union has entered into mobility partnerships with some countries avoiding the language of migration. See Migration and Home Affairs, *Mobility Partnerships, Visa Facilitation and Readmission Agreements*, EUROPEAN COMMISSION, https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/mobility-partnerships-visa-facilitation-and-readmission-agreements_en (last visited Oct. 30, 2017).

³⁷ See *Migrant Fatalities Worldwide*, MISSING MIGRANTS, <https://missingmigrants.iom.int/latest-global-figures> (last visited Apr. 10, 2017).

safety standards. Those who suffer, and in some cases die, in boating accidents in the Mediterranean do so because they cannot get access to safe travel as a result of obstacles placed in their way by states.³⁸ Over the past ten years there has been a wealth of academic research and publications on the legal basis, scope and effects of these obstacles to which I recommend the reader.³⁹ Migrants do not need to die crossing the Mediterranean—or indeed any other international border.⁴⁰ There are thousands of safe ferry crossings across the Mediterranean from the Southern to Northern shores and vice-versa every day—which are also very cheap—often less than €30.⁴¹

Safe migration is available for most migrants—the 1.2 billion people who move every year as tourists.⁴² Unsafe migration is the exception. It is the result of obstacles which states place in the way of some people which make safe migration unavailable.⁴³ These obstacles include visa requirements, sanctions on carriers which do not refuse transport to migrants without the right documents and databases filled with various bits of personal data of questionable

³⁸ See Tamara Last et al., Deaths at the Borders Database: Evidence of Deceased Migrants' Bodies Found Along the Southern External Borders of the European Union, 43 J. ETHNIC & MIGRATION STUD. 693 (2017); Thomas Spijkerboer, *Are European States Accountable for Border Deaths?*, in THE ASHGATE RESEARCH COMPANION TO MIGRATION LAW, THEORY AND POLICY 61 (2016).

³⁹ See Antonio Cruz, Carrier Sanctions in Four European Community States: Incompatibilities Between International Civil Aviation and Human Rights Obligations, 4 J. REFUGEE STUD. 63 (1991), Sophie Scholten & Paul Minderhoud, Regulating Immigration Control: Carrier Sanctions in the Netherlands, 10 EUR. J. MIGRATION & L. 123 (2008); William Walters, *Border/Control*, in AN ANTHOLOGY OF MIGRATION AND SOCIAL TRANSFORMATION 151 (2016); Mathias Czaika & Hein Haas, The Effect of Visas on Migration Processes, INT'L MIGRATION REV. (2016); DISCIPLINING THE TRANSNATIONAL MOBILITY OF PEOPLE (Martin Geiger & Antoine Pécoud eds., 2013).

⁴⁰ See THOMAS SPIJKERBOER, WASTED LIVES: BORDERS AND THE RIGHT TO LIFE OF PEOPLE CROSSING THEM (2016).

⁴¹ See *Western Mediterranean*, FERRYLINES, <http://www.ferrylines.com/ferries/western-mediterranean/> (last visited Apr. 10, 2017).

⁴² See Press Release, World Tourism Organization UNWTO, International Tourist Arrivals Up 4% Reach a Record 1.2 billion in 2015, <http://media.unwto.org/press-release/2016-01-18/international-tourist-arrivals-4-reach-record-12-billion-2015> (last visited, Mar. 25, 2017).

⁴³ See LEONIE ANSEMS DE VRIES, GLENDA GARELLI & MARTINA TAZZIOLI, MEDITERRANEAN MIGRATION CRISIS: TRANSIT POINTS, ENDURING STRUGGLES (2016); THE POLITICS OF INTERNATIONAL MIGRATION MANAGEMENT 1–20 (Martin Geiger & Antoine Pécoud eds., 2010); Glenda Garelli & Martina Tazzioli, *Arab Springs Making Space: Territoriality and Moral Geographies for Asylum Seekers in Italy*, 31 ENV'T & PLANNING D: SOC. & SPACE 1004 (2013).

quality⁴⁴ about migrants the contents of which databases are then shared among groups of countries⁴⁵ with exclusionary consequences for migrants.

D. Disorderly Migration

Disorderly migration is a lesser misfortune than unsafe migration in that it does not necessarily result in people's lives being at risk.⁴⁶ It is a headache for a relatively small number of state officials, border guards, responsible for orderly border crossing, mainly an administrative issue. When people turn up at borders in unexpected places where border guard facilities are not available then administrative formalities are not completed.⁴⁷ If the numbers become substantial, state authorities may become concerned about the accuracy of their knowledge about who is on their territory. There is always some disorderly border crossing going on, for instance, where owners of pleasure boats decide to change their destinations and arrive at small islands—for instance in the Mediterranean or Caribbean where there are no border guards present. Ramblers on traditional country trails may stray across international borders unwittingly and thus arrive in a “disorderly” fashion in another country.⁴⁸ But these forms of disorderly arrival are not those which the UN's New York Declaration seeks to address. These and many other forms of disorderly border crossing by persons are dealt with by administrative presumptions which resolve, legally at least, the disorder.⁴⁹

The more successful states' efforts to channel movement of persons into and out of their territory, the less disorderly that movement becomes. Thus, airports are places which tend

⁴⁴ Brouwer cites interviews with data protection officers in France, Germany, and the Netherlands regarding their control of personal data submitted by their authorities to one of the EU's databases on foreigners, the Schengen Information System, who confirmed to her that on average more than 40% of the data which they checked was either inaccurate or unlawful. See EVELIEN BROUWER, *DIGITAL BORDERS AND REAL RIGHTS: EFFECTIVE REMEDIES FOR THIRD-COUNTRY NATIONALS IN THE SCHENGEN INFORMATION SYSTEM* (2008).

⁴⁵ The twenty-six European Schengen participating states share extensive personal data collected in the process of visa applications through the Visa Information System, migration processes through the SIS II database, and increasingly through asylum procedures by way of the EURODAC fingerprint database. DIDIER BIGO ET AL., *JUSTICE AND HOME AFFAIRS DATABASES AND A SMART BORDERS SYSTEM AT EU EXTERNAL BORDERS: AN EVALUATION OF CURRENT AND FORTHCOMING PROPOSALS* (2012). Australia, Canada, New Zealand, the UK and the US share biometric data gleaned in visa and immigration procedures which is facilitated by Australia. See U.S. DEP'T OF HOMELAND SECURITY, *PRIVACY IMPACT ASSESSMENT FOR THE US-VISIT FIVE COUNTRY JOINT ENROLLMENT AND INFORMATION-SHARING PROJECT (FCC)*, https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_fcc.pdf.

⁴⁶ See Martin Geiger, *Policy Outsourcing and Remote Management*, in *EXTERNALIZING MIGRATION MANAGEMENT: EUROPE, NORTH AMERICA AND THE SPREAD OF “REMOTE CONTROL” PRACTICES* 261 (2016).

⁴⁷ See *THE POLITICS OF INTERNATIONAL MIGRATION MANAGEMENT* 1–20 (Martin Geiger & Antoine Pécoud eds., 2010).

⁴⁸ See Peter Nyers, *No One Is Illegal Between City and Nation*, 4 *STUD. SOC. JUST.* 127 (2010).

⁴⁹ See François Crépeau & Idil Atak, *Global Migration Governance*, 34 *NETHERLANDS Q. HUMAN RIGHTS* 113 (2016).

to be well organized as regards separating those arriving from another country from those moving within the state. Similarly, those departing to another country tend to be well segregated from those arriving both internationally and nationally. Much of this kind of airport management regarding citizens and migrants is built into the architecture of the buildings.⁵⁰ The construction of highways capable of simplifying arrival of cars and trucks at specific places along international borders has the same function of bringing the majority people crossing the border to places where there are officials expecting them. State efforts to make border crossing more difficult for some people may have the effect of creating disorderly migration by pushing those migrants who are determined to attempt to cross the border towards more perilous and disorderly arrival.⁵¹ There is nothing surprising about the tools which states use to transform disorderly arrival into orderly arrival.

Disorderly migration can, in principle, take place anywhere people arrive across an international border. Whether the arrival is orderly or disorderly depends primarily on whether the relevant state authorities are present in sufficient numbers to undertake the job of border control and whether the job of border control is properly articulated to the numbers of persons crossing the border. It is worth remembering that the EU's border agency, FRONTEX has calculated that each EU border guard has a total of twelve seconds to decide on admission or refusal of each person crossing an EU external border.⁵² The reason for this is very simple and FRONTEX explains it well in its report. Efficiency and the expectations of travelers and authorities that border posts will operate both quickly and smoothly is paramount. Delays in processing travelers can cause tremendous pressures at airports, long queues at land borders, and delays for ships and ferries. These inconveniences are not acceptable to our politicians, our citizens, our businesses, nor ourselves. One common way of dealing with unexpectedly large numbers of people arriving at international borders is to relax the intensity of controls on them. This happens regularly at airports where on account of weather conditions unexpectedly large numbers of airplanes arrive at once causing backlogs.⁵³ Another state response is to claim a crisis is occurring.⁵⁴ What is key is that disorderly migration is a consequence of state authorities' choices regarding border

⁵⁰ See BRIAN EDWARDS, *THE MODERN AIRPORT TERMINAL: NEW APPROACHES TO AIRPORT ARCHITECTURE* (2004).

⁵¹ See BRYCE CLAYTON NEWELL, RICARDO GOMEZ & VERÓNICA E. GUAJARDO, *SENSORS, CAMERAS, AND THE NEW "NORMAL" IN CLANDESTINE MIGRATION: HOW UNDOCUMENTED MIGRANTS EXPERIENCE SURVEILLANCE AT THE US-MEXICO BORDER* (2016); Martina Tazzioli, *The Desultory Politics of Mobility and the Humanitarian-Military Border in the Mediterranean: Mare Nostrum Beyond the Sea*, 23 *REMHU: REVISTA INTERDISCIPLINAR DA MOBILIDADE HUMANA* 61 (2015).

⁵² See FRONTEX, *12 SECONDS TO DECIDE: IN SEARCH OF EXCELLENCE: FRONTEX AND THE PRINCIPLE OF BEST PRACTICE* (2015), http://frontex.europa.eu/assets/Publications/General/12_seconds_to_decide.pdf.

⁵³ See, e.g., *Heathrow Delays: How Was It for You?*, *THE TELEGRAPH* (May 1, 2012: 12:00PM) <http://www.telegraph.co.uk/travel/news/Heathrow-delays-how-was-it-for-you/> (last visited May 10, 2017).

⁵⁴ See Patrick Strickland, *Hungary's Border War on Refugees*, *AL-JAZEERA* (Apr. 1, 2016) <http://www.aljazeera.com/indepth/features/2016/03/hungary-border-war-refugees-160329102030588.html> (last visited May 10, 2017).

control activities. It is neither a natural phenomenon nor a normal one. It is created, to a very large degree, by the actions of state authorities.⁵⁵

The numbers show that disorderly migration is very much the exception. It is much easier for border guards to do their job if migrants arrive where they are expected. Encouraging them to do so through good infrastructure simplified everyone's lives. Taking only two parts of the world, the EU and the US—both of which express substantial concern about disorderly migration—the US admitted over 76.5 million people, in the non-immigrant categories, in 2015.⁵⁶ Its authorities refused admission to 253,509 people at the border in the same year.⁵⁷ The EU admitted about 289.5 million people in 2016 and refused admission to 206,656 persons that year.⁵⁸ The admission figures are particularly conservative leaving out substantial categories of migrants. The refusal figures are particularly accurate at least so the relevant authorities claim.

E. Irregular Migration

Irregular migration introduces quite a different issue from safe and orderly migration. Border crossing is primarily based on rules defined in terms of the possession of travel documents. There is a presumption that a migrant in possession of the requisite travel documents will be admitted to the state, as the statistics above on refusal of admission to the EU and US show. Stay on the territory of a state is normally covered by another set of rules which are based on how long the migrant wants to stay and what he or she wants to do there. These second sets of rules, which apply within the state's territory, determine regularity or irregularity of a migrant's situation. Well-designed immigration rules accommodate the reasonable ambitions of migrants—such as family reunification or studies—so that migrants do not become irregular and outside the applicable national residence laws. The separation of regular from irregular migration presupposes that a state has a system not only of border control but also of migration laws and requirements against which the requests of migrants can be judged.⁵⁹ The immigration laws of the state where the migrant is present apply in respect of stay and activities permitted. States of departure cannot know what the requirements of those laws are. This irrelevance of the immigration

⁵⁵ Vicki Squire, *Governing Migration Through Death in Europe and the US: Identification, Burial and the Crisis of Modern Humanism*, 23 EUR. J. INT'L REL. 513 (2016).

⁵⁶ See DEP'T OF HOMELAND SECURITY, INFOGRAPHICS 2015, <https://www.dhs.gov/immigration-statistics/visualization/2015>.

⁵⁷ DEP'T OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS, <https://www.dhs.gov/immigration-statistics/enforcement-actions>.

⁵⁸ See FRONTEX, RISK ANALYSIS FOR 2017, http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf.

⁵⁹ See Isin F. Engin, *We, the Non-Europeans*, in CONFLICTING HUMANITIES 229 (2016): 229.

laws of destination states is expressed in the US practice of not conducting border controls on migrants, including US citizens, leaving the state. Similarly, in the EU the relevant law, the Schengen Borders Code, requires a border check on everyone leaving the territory but exclusively for the purpose of checking that migrants have complied with the time limit on their EU stay. There is no reciprocity in border controls *vis-à-vis* the immigration laws of a destination state. Equally, law enforcement depends on national criminal and civil laws which are extraneous to border controls.⁶⁰ Law enforcement is an activity which takes place within states and is only relevant in exceptional circumstances with respect of border controls.

Irregular migration is linked to a migrant's presence within the territory of the state not with the state's border practices.⁶¹ The two become linked as states seek to use border control tools to regulated migration and then justify the elision of border and migration control into one process. It is this confusion between border control and immigration control which is at the center of many of the problems of unsafe, disorderly, and irregular migration. The same is true of the elision of border control and law enforcement. These two fundamentally different state activities cannot be merged without negative impacts on safe and orderly migration.

Regular or irregular migration is premised on law. It is the law of destination state which is at issue. That law is entitled to define what the status of a migrant is. Before a migrant arrives at a state's border, he or she is neither a regular nor an irregular migrant by reference to the possible destination state. This is because the law of the destination state does not yet apply to him or her. Extraterritorial application of national law is a complex and controversial field of law. Immigration laws are so varied and complex that it is very difficult if not impossible to reach any international agreement on extra-territorial application of these national rules.

As a matter of consular agreement between host and destination states, authorities may require migrants to obtain visas at their consulates abroad before travelling. But in order to determine whether a migrant is regular or irregular he or she will have to be within the territory of the destination state. This is an immigration control tool not a border control activity. It is the interaction with the state's laws which creates the distinction between regularity and irregularly when they interact with the presence and ambitions of the migrant.⁶² This will only become apparent after the individual has arrived in the state and is

⁶⁰ DIDIER BIGO, *FRONTIERS OF FEAR: IMMIGRATION AND INSECURITY IN THE UNITED STATES AND EUROPE* 689–93 (2016).

⁶¹ See Hein De Haas, *Irregular Migration from West Africa to the Maghreb and the European Union: An Overview of Recent Trends*, 32 GENEVA: INTERNATIONAL ORGANIZATION FOR MIGRATION (2008).

⁶² See DIDIER BIGO, *FOREIGNERS, REFUGEES OR MINORITIES?: RETHINKING PEOPLE IN THE CONTEXT OF BORDER CONTROLS AND VISAS* (2016); Julien Jeandesboz, *Justifying Control: EU Border Security and the Shifting Boundaries of Political Arrangement*, in *EU BORDERS AND SHIFTING INTERNAL SECURITY* 221 (2016); Emmanuel-Pierre Guittet, *Unpacking the*

staying there. Borders are particularly ill adapted for complex decisions on immigration status.

Further, a migrant can be regular one day and irregular the next as the result of the passage of time—the end of a period of permitted entry and residence—or of the law—a change of the migration category which places the migrant outside the new requirements. It can be one of activity for instance where a foreign student is permitted to work for a specific number of hours a week but in fact works more hours one week and thus is no longer regular in accordance with the terms of his or her student visa.⁶³ If the following week the student's hours of work drop below the threshold he or she may dip back into regularity. The place where irregularity takes place is related to the territory of the state—within that territory—and subject to the laws of the state where the migrant is present. Only the officials of that state will know definitively what their laws mean and how they should be applied to migrants. This is their job, not that of officials of other countries or private companies.⁶⁴ This application of national law within the state to migrants is even more pronounced in respect of law enforcement. National laws are under the exclusive control of national authorities and vary dramatically from one state to another. The examples of national criminal and civil law regulation of recreational use of drugs, abortion and euthanasia are particularly clear evidence of the jurisdiction-limited nature of law enforcement. The creation of offences which only migrants can commit such as the criminalization of irregular stay is equally nationally determined.⁶⁵ And has numerous negative externalities which have been highlighted by academics and human rights authorities. Such laws may encourage policy makers to consider border controls as a venue where law enforcement can be used to stop migration crimes from being committed. This is a profound mistake. Border controls on migrants cannot be used to predict who might commit an immigration crime subsequently.

Any attempt to shift of the focus for determining what is regular migration from the destination state to all other states may need to be examined in the UN's process of adopting its Global Compact on Safe, Orderly, and Regular Migration. The argument which the Article develop here is that determining regular migration from its irregular counterpart and law enforcement activities, which should not be woven into border controls. Regularity, irregularity, and law enforcement are matters of national law and under the control of each

New Mobilities Paradigm: Lessons for Critical Security Studies?, in SECURITY/MOBILITY: POLITICS OF MOVEMENT 209 (2017).

⁶³ See Franck Düvell, *Paths into Irregularity: The Legal and Political Construction of Irregular Migration*, 13 EUR. J. MIGRATION & L. 275 (2011).

⁶⁴ See SOPHIE SCHOLTEN, *THE PRIVATISATION OF IMMIGRATION CONTROL THROUGH CARRIER SANCTIONS: THE ROLE OF PRIVATE TRANSPORT COMPANIES IN DUTCH AND BRITISH IMMIGRATION CONTROL* (2015).

⁶⁵ See Tugba Basaran & Elspeth Guild, *Mobilities, Ruptures, Transitions*, in INTERNATIONAL POLITICAL SOCIOLOGY: TRANSVERSAL LINES 228 (2016); FRANCESCO RAGAZZI, *FRONTIERS OF FEAR—IMMIGRATION AND INSECURITY IN THE UNITED STATES AND EUROPE* 696–98 (2016).

state separately, subject only to fairly limited international and supranational obligations. Therefore, they are activities which should take place within state's jurisdictions—and within their territories—and cannot effectively be transferred to the international community. If states want other countries to undertake their immigration control or law enforcement activities, then they need to start by agreeing what laws will apply to immigration. Only after they have reached agreement on common immigration laws can there be any question of common application. Common application will also require common interpretation so a supranational dispute resolution mechanism will be required. This is not impossible, and the EU's laws on free movement of workers is a good example. Since 1967, all nationals of the EU Member States have been entitled to cross intra-EU borders to look for and take work in any other Member State.⁶⁶ Where they do so they are regular because the Member States have agreed on a law which applies to all of them and which requires all states to recognize the regularity of migrant workers from other Member States. This position is not incompatible with expulsion—if an EU migrant worker commits an offense of sufficient gravity to invoke the exception of public policy or security, the host state can expel him or her.⁶⁷ But the key is that these states have agreed a common immigration law which applies to the citizens of all the Member States and which all Member States apply.

Further, in the EU example, a determination whether an EU migrant worker is a threat to public policy or security cannot be taken at the border in the absence of a previous expulsion decision backed up by a lawful re-entry ban. Any issue about the regularity or irregularity of the EU migrant worker's activities or planned activities on the host Member State's territory must be dealt with by the immigration officials within the state. Sadly, these clear and efficient rules which apply to EU nationals moving among the Member States are not applicable to third country national migrants—nationals of countries outside the EU—arriving for the first time at the EU external border. It is worth noting that this common immigration law of the EU has resulted in only 2.8% of the EU population living in a Member State other than that of their nationality.⁶⁸ There are substantially fewer EU national migrants living in other Member States than non-EU national migrants living in the EU.⁶⁹

⁶⁶ Transitional restrictions have only applied for states acceding to the EU after 1967 and these transitional restrictions have been limited to a total of seven years. The only EU Member State nationals of which are still currently subject to transitional restriction on free movement of workers is Croatia.

⁶⁷ See Sandra Mantu, *Nationality: An Alternative Control Mechanism in an Area of Free Movement?*, in *CONSTRUCTING AND IMAGINING LABOUR MIGRATION: PERSPECTIVES OF CONTROL FROM FIVE CONTINENTS* 229 (2016).

⁶⁸ See Migration and Migrant Population Statistics, EUROSTAT, <http://ec.europa.eu/eurostat/statistics-explained/pdfscache/1275.pdf>.

⁶⁹ See ANNETTE SCHRAUWEN ET AL., *INCLUSION AND EXCLUSION IN THE EUROPEAN UNION—COLLECTED PAPERS* (2016).

The vast majority of migrants are regular. The 1.2 billion migrants counted by the UN World Tourism Organisation are mainly regular.⁷⁰ The dividing line between regularity and irregularity is not always clear in national law. For the reasons set out above, it is generally incomprehensible outside the national territory. But one measure of whether a state considers a migrant to be irregular or not is when the state takes expulsion action against a migrant. This is a clear and internationally recognizable act that a state has determined a migrant to be irregular and no longer welcome on its territory. In many countries this is also a law enforcement activity. Thus, it is not unreasonable to have regard to statistics on expulsion in order to understand the seriousness with which states take irregularity and migration law enforcement. These are publicly available for least two parts of the world, both of which express substantial concern regarding the regularity of migrants and law enforcement: The EU and the US.

Expulsion matters as it is the most decisive act of a state regarding the unwanted nature of a migrant. State authorities need to make decisions based on evidence that a specific migrant is no longer welcome and then take action to send him or her home. According to the US Department of Homeland Security, the US expelled 438,000 people in 2013.⁷¹ In 2014, 34.5 million people visited the US.⁷² The state lauded this figure because it was up from the previous year. This would seem to indicate that although a limited number of people are unwelcome after they arrive, that has little influence on state policy to encourage increasing numbers of arrivals.

In the EU, a part of the world much convulsed by unsafe, disorderly, and irregular arrivals of substantial numbers of refugees and migrants in 2015 and 2016, there are fairly reliable statistics on the expulsion of migrants. According to the EU's border agency, FRONTEX, 79,608 migrants were subject to forced expulsions in 2016.⁷³ This figure is consistent with previous years. FRONTEX also counts arrivals, though rather loosely—estimating 289 million people entered the EU in 2016— and this is on the basis of voluntarily reporting by national border guards.⁷⁴ Thus a similar picture emerges for the EU as that seen in the US. These two parts of the world are very concerned about the application of their immigration regulations internally and insist on compliance by migrants. The incidence of failure to comply which

⁷⁰ The New York Declaration posits that in 2015 there were 244 migrants and the number is growing (para 3). The difference between tourists and migrants is not clarified by the Declaration.

⁷¹ See John F. Simanski, *Immigration Enforcement Actions 2013*, DEP'T OF HOMELAND SECURITY (2013), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

⁷² See NAT'L TRAVEL & TOURISM OFFICE, *INTERNATIONAL VISITATION IN THE UNITED STATES*, http://travel.trade.gov/outreachpages/inbound.general_information.inbound_overview.html.

⁷³ See FRONTEX, *RISK ANALYSIS FOR 2017*, http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf.

⁷⁴ See *id.*

results in expulsion is very low in comparison with the migration figures. The facts do not support the argument that immigration regulation must be woven into border control procedures.

F. Conclusion: The Starting Place for Safe, Orderly, and Regulation Migration

This Article suggests that the starting place for a Global Compact which promotes safe, orderly, and regular migration must be the disaggregation of border controls from immigration regulation and law enforcement. Migration regulation and law enforcement should take place within states. Border controls must have clearly limited purposes, permitting states to know who is on their territory and to check that those arriving are documented. They should take place only at the borders of states not within the territory of other countries or international waters. Practices which push even tiny numbers of migrants to arrive undocumented and unsafely must be avoided. This is part of states' responsibilities to the international community regarding their border controls.

Migration regulation must be limited to its field of action within the state determining what migrants can do and for how long while in the territory. Full respect for human rights, including family reunification, labor standards, etc. must be the priority of migration regulation. Migrants who have arrived for one purpose should be permitted to change to another status provided that they meet the relevant national rules. Mandatory prior visa requirements should be used sparingly and only in circumstances where genuinely necessary information to determine an application is only available to the decision maker in the country of origin of the migrant.

Using the border as a mechanism to force people to travel long distances in uncertainty in the application of arcane migration regulations is a key component of unsafe, disorderly, and irregular migration. Families must be allowed to live together, refugees must be given international protection, and businesses must be able to hire the workers they need in accordance with clear and simple migration rules.

The international community needs to recognize a presumption in favor of migration for all people irrespective of their nationality. This presumption should only be displaced where states have specific grounds to refuse entry to a migrant on the basis of facts specific to the migrant's behavior. Rule of law requirements must cover border controls, migration regulation, and law enforcement. These rules must be contained in law which is clear, precise, and accessible to people so that they know what they must do to comply. The international community has now spoken in the New York Declaration—all states need to promote responsible border controls which enhance safe, orderly, and regular migration. In order to fulfil this commitment, states need to re-think their objectives regarding border controls and ensure they are compatible with safe, orderly and regular migration.

