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SYMPOSIUM ON COVID-19, GLOBAL MOBILITY AND INTERNATIONAL LAW

THE CONTESTED BOUNDARIES OF EMERGING INTERNATIONAL MIGRATION LAW IN THE POST-PANDEMIC

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One measure of how and whether the COVID-19 pandemic reshapes the emerging field of international migration law will be the extent to which transnational civil society and activist movements can counteract the intensification of state border controls that the pandemic has triggered. Before the pandemic, transnational efforts to establish a new normative framework for migration seemed to be accelerating. These efforts included new, if non-binding, global compacts on refugees and migration, and new, if modest, efforts at facilitating global cooperation, alongside innovative approaches to scholarly engagement.[1] Such developments arguably contributed to an emerging framework for protecting migrants under international law. Has the pandemic defeated this potential? State responses to the pandemic have eschewed multilateralism, brought migration to a near standstill, and ignored well-established human rights obligations. Moreover, states are poised to deploy a range of new border management technologies and even more assertively manage migration in the name of "health proofing" borders.[2] Yet at the same time, some progressive state practices have emerged alongside a call from the UN Secretary-General to "reimagine human mobility for the benefit of all."[3] In this essay, we chart some areas of potentially progressive expansion beyond the status quo, noting not only the substance but also the process by which these norms are emerging.

An Opportunity for Progressive Development of the Law?

In one important sense, the COVID-19 pandemic has provided an object lesson in the nature of international migration law. This law has been portrayed by scholars as "a work in progress" and "substance without architecture."[4] The status quo remains a system marked by failed multilateralism and legal fragmentation. The movement of people crossing international borders is often governed in harmfully chaotic ways. While there are several global

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[1] *See* Global Compact for Safe, Orderly and Regular Migration, UN Doc. A/Res/73/195 (Dec. 19, 2018); Global Compact on Refugees, UN Doc. A/73/12 (Part II) (Sept. 13, 2018); Jaya Ramji-Nogales & Peter J. Spiro, *Introduction to Symposium on Framing Global Migration Law*, 111 AJIL Unbound 1 (2017).

[2] UN Network on Migration, Webinar, COVID-19 and People on the Move 2020 (June 2020).

[3] UN Secretary-General, Policy Brief: COVID-19 and People on the Move (June 2020).

[4] Vincent Chetail, *The Architecture of International Migration Law*, 111 AJIL Unbound 18, 21 (2017); T. Alexander Aleinikoff, *International Legal Norms on Migration: Substance Without Architecture*, *in* International Migration Law: Developing Paradigms and Key Challenges 479 n.9 (Ryszard Cholewinski et al. eds., 2007).

fora for coordinating state responses to migration, the primary engines of this coordination to date have been regional and enforcement-centric. There is no global treaty which allocates or organizes migration flows. The new UN Network on Migration has fostered discussion in the midst of the pandemic and issued useful policy guidance, but it does not yet appear to have emerged as a significant locus for state cooperation on the response. It is likewise a truism to say that the rights of migrants, including refugees, have been incompletely protected by a fragmented patchwork of international institutions and norms. There is, of course, no widely-ratified treaty restating the rights of *all* migrants. These features have often intensified the most extreme of human consequences, even more so in times of crises like the current pandemic.

Against this background, scholars, including the two of us, have sought to promote a more integrated field.[5] This movement towards greater internationalization, of course, has been both vulnerable to nationalistic political contestation for the protections it has sought to reinforce, and subject to critiques for its shortcomings. From within a human rights framework, instruments like the new Global Compact for Safe, Orderly and Regular Migration have at times appeared ambiguous. On the one hand, they reinforce the propriety of addressing migrants' rights as an objective of international law rather than the exclusive domain of national sovereigns. Yet, on the other, they arguably bear an equivocal relationship to existing rights and progressive rights jurisprudence, if only because they inconsistently reflect the content of treaty obligations.[6] Moreover, a vantage point more critical of the human rights frame generally has argued that pursuing the goal of "global cooperation," as it has emerged in the migration context, has not redounded to migrants' benefit, and instead has facilitated or at least legitimated schemes of border control and repatriation.[7] And, finally, there remains the vital question of the efficacy and enforceability of a globalized migration law. Notwithstanding these many flaws, we assert that the field, protean and fragmented as it has been, has also provided moments of opportunity and contestation to shape human rights discourse in a way that would value the humanity of migrants over the prerogative of states.

The pandemic cannot change, and may exacerbate, some of the biggest near-term drivers of migration: conflict, climate change, and socioeconomic dislocation. Yet we may also be on the cusp of a new era of state restriction and assertive management of migration, with states attempting to "health-proof" migration through public health-justified testing and surveillance regimes, limitations on entry, and expanded reliance on overseas processing—all of which will have consequences far beyond any dividend to health. Practically, these restrictions may radically limit the freedom to move, further concentrating the ability to migrate among the most structurally empowered and amplifying the law's excesses when it comes to policing the bodies and movement of migrants. Insofar as global migration regimes can check these restrictive trends, they have arguably never been more important. And there may be some grounds for optimism.

The work of civil society movements has long served as something of a counterbalance to the anemic investment by states in multilateral cooperation to facilitate migration and protect a baseline of migrants' rights. Civil society has played a key role in agenda-setting in the field, both before and during the COVID-19 pandemic. Given

[5] The two of us have contributed to this integration from different perspectives—one arguing for an undergirding ethics that accommodates fragmentation and supports a new migration politics; the other arguing for a comprehensive soft law bill of migrants' rights to promote crystallization of international human rights law protecting all migrants. *See* Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty*, 14 Melb. J. Int'l L. 392, 447, 449-50 (2013); Ian M. Kysel, *Promoting the Recognition and Protection of the Rights of All Migrants Using a Soft-Law International Migrants Bill of Rights*, 4 J. Migration & Human Sec. 29, 32 (2016).

[6] *See* Andrea Spagnolo, *We are Tidying up: The Global Compact on Migration and its International with International Human Rights Law*, EJIL Talk!, (Mar. 1, 2019); Justin Gest et al., *Protecting and Benchmarking Migrants' Rights: An Analysis of the Global Compact for Safe, Orderly and Regular Migration*, 57 Int'l Migration 60 (2019).

[7] Marie-Bénédicte Dembour has critically pointed to the "Strasbourg reversal." *See* Marie-Bénédicte Dembour, When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint 184-87 (2015).

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a reevaluation of migration triggered by the pandemic, a comprehensive rights-based approach could be a vital grounding for any new migration law. Indeed, efforts to promote the crystallization of a uniform baseline of rights for all migrants may have a realistic potential to inform the post-pandemic migration law landscape. Two recent initiatives—one regional, one global—illustrate what might be possible.

Mere months before the declaration of the COVID-19 pandemic, the Inter-American Commission on Human Rights issued what is arguably the most expansive articulation of the rights of all migrants ever to be issued by an international body.[8] This document, the Inter-American Principles on the Human Rights of Migrants, Refugees, Stateless Persons and Victims of Trafficking (*Inter-American Principles*), was the result of a multi-year partnership between the Commission's rapporteurship on the rights of migrants and the International Migrants' Bill of Rights Initiative.[9]

The *Inter-American Principles* include several provisions urgently relevant to the challenges of human migration in the midst of the pandemic. Provisions guarantee cross-border justice and safe return. They also affirm rights to health, work, just and favorable working conditions, liberty, and security of person. While treatment of all eighty *Inter-American Principles* is beyond the scope of this essay, they reflect several progressive developments that anchor their position as a welcome innovation. One particularly interesting provision affirms a right of access to territory for child migrants regardless of whether they are refugees. Another recognizes a prohibition against discriminatory or arbitrary expulsion, affirming that individualized status determination is a necessary safeguard.

A second initiative emerged in the early days of the pandemic, when experts drafted *Principles of Protection for Migrants, Refugees, and Other Displaced Persons* (*14 Principles*).[10] This document articulates how rights—to non-discrimination, health, privacy, and non-return to harm, among others—apply to migrants. It also affirms that human rights treaty provisions ensuring basic guarantees in times of crisis apply to migrants. The *14 Principles* hew closely to existing law and jurisprudence. But they still contain several notable provisions. For example, while recognizing state power to restrict movement where demonstrably necessary to the health of individuals and the community, the *14 Principles* reflect a robust view of liberty of movement both between and within states. The *Principles* also use the language of "access to territory" and note that the law bars blanket exclusion of refugees and asylum-seekers without ensuring status determination procedures and protection from *refoulement*. The document was recently cited by the UN Secretary-General for the proposition that the human rights of people on the move in the time of COVID-19 have not been sufficiently taken into account.[11] To date, more than one thousand experts (including both of us) have endorsed it as an authoritative articulation of the law.

Comprehensive rights frameworks are perhaps most useful as states consider wholesale overhauls of entire areas of law and policy, as may happen in response to the pandemic. As states consider these overhauls, civil society, including in partnership with human rights bodies at the regional and global level, should affirm soft law principles on migrants' rights as a way for states to crystallize existing law and promote its progressive development.

[8] *Compare* Inter-American Principles on the Human Rights of Migrants, Refugees, Stateless Persons and Victims of Trafficking, Inter-Am. Comm'n H.R., Res. No. 04/19 (Dec. 7, 2019) *with* Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which They Live, UN Doc. A/RES40/144 (Dec. 13, 1985).

[9] The multi-year partnership was established between the International Migrants Bill of Rights Initiative and the Commission's Rapporteurship in 2015 to adapt a set of Inter-American Principles from the International Migrants Bill of Rights. Adina Appelbaum et al., *International Migrants Bill of Rights*, 28 Geo. Immigr. L.J. 9 (2013); *see also* IMBR-IACHR Guidelines on the Protection of the Rights of All Migrants in the Americas (Aug. 14, 2015) (memorandum proposing collaboration between the IMBR Initiative's Georgetown Law chapter and the Inter-American Commission to develop a set of guidelines on the rights of all migrants in the region) (on file with authors).

[10] One of us co-authored and co-coordinated the drafting of the *14 Principles*. *See* T. Alexander Aleinikoff et al., Human Mobility and Human Rights in the COVID-19 Pandemic: Principles of Protection for Migrants, Refugees, and Other Displaced Persons (May 2020).

[11] *See* Chetail, *supra* note 4, at 19 n.50.

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Dispelling the Myth of Absolutist Sovereignty: A Role for Soft Law

If the substance and architecture of international migration law have reached an inflection point, where do we go from here? We argue that any normative shift should start with a reexamination of sovereignty and a commitment to a migration politics built from the perspective of interdependence. Civil society and activist movements centered on a universal baseline of rights for all migrants may offer one pathway for tempering a monolithic sovereignty and developing something else in its place.

Scholars have made a compelling case that the conception of unconstrained power to exclude as a fundamental attribute of sovereignty is most properly understood as an historically contingent development of international law, and at odds with earlier formulations,[12] rather than natural and inevitable. Canvassing the history of international law suggests that the weight of the doctrine has arguably favored, not an unconstrained power to exclude, but a qualified right to migrate: the notion that some migrants in some cases have a right to enter long predates the contemporary legal order.[13] This indicates that there is important work to be done in pushing back against the incantation that, as a majority of the U.S. Supreme Court put it this past summer, "'the power to admit or exclude aliens is a sovereign prerogative'" and a "fundamental proposition[]."[14] A framework of rights for all migrants can do that in ways both expressive and material.

More critically, other scholars have argued that the concept of sovereignty has always been tainted by inequality, as it "was not simply a European idea extended to peripheral areas [but] developed out of the colonial encounter."[15] Indeed, that both critical and realist approaches cast the entire architecture of international law, and perhaps international migration law in particular, as a product of power[16] complicates any prospect of international law's transformative potential, whatever the formal status of the sovereign power to exclude migrants.

In response to such long-standing theoretical debates, and relevant to a project of reimagining international migration law for the post-pandemic era, one of us has proposed an ethics of *new organicism* as a normative basis for a new international law of migration.[17] *New organicism* is grounded in the idea that the universe is intrinsically interconnected while also characterized by fundamental unpredictability. An ethics grounded in interconnection calls into question the basic presumptions of autonomy that undergird extant conceptions of sovereignty. By challenging absolutist conceptions of sovereignty, these transnational movements strengthen momentum towards a migration politics of interdependence. Among other things, any systematic reimagining of international migration law that is to be consistent with this ethical vision must abandon knee-jerk commitments to a vision of the absolute sovereign power of exclusion that have driven both law- and policy-making (and the violence and inequality which such exclusion works on migrants).[18] It is fitting that a new UN mantra for the post-pandemic era is that "no one is safe unless everyone is safe."[19]

[12] *See, e.g.*, James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AJIL 804, 805, 809 (1983).

[13] *Id.*; *see also* Vincent Chetail, *Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel*, 27 EJIL 901 (2016).

[14] Dept. Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020).

[15] Antony Aghie, *"The Heart of My Home": Colonialism, Environmental Damage and the Nauru Case*, 34 HARV. INT'L L.J. 445, 448 (1993).

[16] *Cf.* Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195, 1220 (2000).

[17] Thomas, *supra* note 5, at 447.

[18] For a brilliant argument that might be seen as a prescription consistent with *new organicism*, see E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1520 (2019) (arguing that racist and colonial legacies, together with a reformulation of sovereignty towards interconnectedness, must be seen as grounding a right of entry for migrants as a form of "distributive justice").

[19] *See* UN Secretary-General, *supra* note 3, at 3.

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We suggest that civil society and activist movements offer a potential site for building a politics of interdependence, through efforts like those described above, to create and leverage "soft law" that puts pressure on states and on the absolutist view of sovereignty in particular. As theorists of international relations have put it, "most international law is 'soft' in distinctive ways."[20] In the interstitial space of soft law, civil society and activist mobilization can be a powerful catalyst in the development of legal norms that constrain states as a matter of formal obligation. This property of political engagement in international lawmaking may offer transformational potential in the field of migration. The success of such engagement may serve as an index of the ability of civil society to develop a politics of migration reflecting interconnection and epitomizing the ethics of *new organicism*.

Such claims expose the fault lines in our international legal terrain. The assertion of "the right to have rights" on the part of migrants constitutes in some ways a fundamental challenge to, and in other ways a logical application of, an international legal system putatively organized simultaneously around sovereign states and individual rights.[21] It is a fundamental challenge in the sense that it claims the right, *contra* Hannah Arendt's original observation, as resting not in formal legal status recognized by states, but rather in the simple fact of humanity. Yet this challenge flows directly from the normative premise behind individual human rights. When civil society and activist movements push states to recognize such an underlying right, irrespective of citizenship or other formal immigration status, they, too, contest the boundaries of international legal inclusion and exclusion that Arendt identified. In doing so, they engage in a foundational form of political participation, through the "staging of a dissensus in which those who are deemed to lack speech make themselves heard."[22] It is through this dissensus, this dissidence—an insistence on claims to humanity that some states would accord only on a more limited and exclusionary basis—that migrants' rights movements can potentially reshape the contours of international law for the post-pandemic era.[23]

Conclusion

The COVID-19 pandemic may create a new opportunity to reimagine international migration law. We suggest that the success or failure of efforts by civil society and activist movements, including in partnership with regional human rights bodies, to center the rights of migrants, may provide an index of how and whether the COVID-19 pandemic reshapes the landscape. The two recent efforts described above illustrate the potential role that nonstate actors can play in contesting absolute and exclusionary sovereign prerogatives when it comes to borders. Through political and legal action, such efforts both address the practical realities of increases in future migration and engage conceptual debates regarding sovereignty and the nature of international law. In doing so, they expose the violence and inequality at the heart of an exclusionary regime of international migration law.

[20] Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Int'l Org. 421, 421-22 (2000).

[21] Hannah Arendt, The Origins of Totalitarianism 294 (1951).

[22] Andrew Schaap, *Enacting the Right to Have Rights: Jacques Rancière's Critique of Hannah Arendt*, 10 Eur. J. Pol. Theory 22, 23 (2011). Rancière challenges Arendt's groundbreaking observation as nevertheless being depoliticized and rearticulates it as a site whose boundaries of inclusion and exclusion are fundamentally contested. *See, e.g.*, Jacques Rancière, *Who Is the Subject of the Rights of Man?*, 103 S. Atl. Q. 297 (2004).

[23] For one theorization of this process of contestation, see Itamar Mann, Humanity at Sea: Maritime Migration and the Foundations of International Law (2016).

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