

SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW – PART II

THE MULTIPLE LEVELS OF GOVERNANCE OF INTERNATIONAL MIGRATION: UNDERSTANDING DISPARITIES AND DISORDER

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Introduction

There is no corpus of law that is global in nature. Rather, “global” migration law is a collection of legal instruments situated at levels ascending from the subnational to the international levels. International law instruments contribute to the global governance of international migration at the international and regional levels. Two issues arise with respect to the effectiveness of these instruments: voluntary state accession and subsequent enforcement, even when states are parties to them. Domestic law regulates issues of international migration at the national and subnational levels. Enforcement is assumed to be more effective here. But this effectiveness varies according to the power of states, their levels of development and their capacities.

The result of disparities in accession to and in enforcement of legal instruments at the international and national levels is disorder in the governance of international migration. This disorder is not alien to the [anarchy of the imperfect international system](#).¹ Disorder also results from the differential rules governing international migration in different regions and states. Even assuming that all states were bound by the same international law instruments at the international law level, varying rules at the regional, national, and subnational levels make for different degrees of authorized international migration, protection, and equal treatment of migrants with nationals. Differences also exist in the conditions of establishment of migrants and of their access to the labor market in the various regional and subregional integration schemes. Free mobility and the steps leading towards its achievement are not uniformly understood and applied in all regions and subregions.

Understanding the global governance of international migration helps to bring some order to its conceptualization. [Karns and Mingst](#) define global governance as, “[t]he multilevel collection of governance-related activities, rules and mechanisms, formal and informal, public and private, existing in the world today.”²

[James Rosenau](#) sheds additional light on the concept of global governance. He describes a “set of norms, rules, arrangements and institutions meant to manage an issue-area in the absence of central government.”³ This

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¹ On anarchy in the international system, see HANS J. MORGENTHAU, [POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE](#) (1948).

² MARGARET P. KARNS ET AL., [INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE](#) (2015).

³ James N. Rosenau, [Governance in the Twenty-First Century](#), 1 *GLOBAL GOVERNANCE* 13, (1995).

definition reveals that the absence of a central government that can globally govern is a central challenge to the governance of affairs of common interest. [Rosenau further explains](#) that:

The study of global governance should not focus exclusively on actors and structures that are global in reach: the organizing perspective is that of governance in the world rather than governance of the world [which] suggest[s] patterns of governance wherever they may be located—in communities, societies, non-governmental organizations, [and] international relationshipsTo assess global governance . . . is to trace the various ways in which the processes of governance are aggregated.⁴

Beyond the international system's lack of a central government, Rosenau draws attention to *processes of governance that are not necessarily international in nature*. He highlights the anarchy of the international system, in which not all regulations are international in nature. Rosenau's elaboration makes clear that the activities, rules, and mechanisms pointed out by Karns and Mingst may be situated at the international, regional, national, and subnational levels.

Global governance of international migration may thus be visualized as a maze of norms, rules, and activities regulating international migration and the institutions responsible for their application. Norms, rules, activities, and institutions are situated at the international, regional, national, and subnational levels.

Setting to one side refugee movements, this essay provides an overview of these four levels of migration governance.

Governance at the International Level

At the international level, global governance of international migration operates through norms of international law as well as international institutions. Institutions generally ensure compliance with the norms that they produce. However, institutions may actively promote international legal norms that are beyond their own normative framework in order to produce effective international migration governance. This is the case of UNESCO, which has specifically taken upon itself to promote the ratification of the UN Migrant Workers Convention.

Enforcement of international migration norms is highly problematic. States of destination consider migration policies to be intrinsic to sovereignty. More often than not, they refrain from adhering to binding norms. States of destination are even averse to *soft law*, as revealed during the negotiations that resulted in the approval of the [ILO Multilateral Framework on Labour Migration](#).⁵

The four principal branches of international law that contribute to the governance of international migration are international labor law, human rights law, trade law, and criminal law.

International labor law governs migrants as workers and regulates their employment and protection. This field of law is of particular importance since, according to the ILO in 2015, migrant workers [represented 72 percent](#) of international migrants over the age of fourteen.⁶ The 1919 ILO Constitution was the first instrument of international law to address international migration. Among the objectives of the organization, the preamble to the constitution refers to “the protection of interests of workers employed in countries other than their own.” The 1944 [Philadelphia Declaration](#) also contains provisions on the employment of migrant workers.⁷ [Two ILO](#)

⁴ JAMES N. ROSENAU, [ALONG THE DOMESTIC-FOREIGN FRONTIER: EXPLORING GOVERNANCE IN A TURBULENT WORLD](#) (1997).

⁵ International Labour Office, [ILO Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration](#) (2006).

⁶ ILO, [ILO Global Estimates on Migrant Workers Results and Methodology Special Focus on Migrant Domestic Workers](#) (2015).

⁷ The Philadelphia Declaration was included in the ILO constitution in 1946. International Labour Office, [ILO Constitution](#).

conventions, two associated recommendations and one soft law instrument are migrant-specific.⁸ The eight fundamental conventions include two that are directly pertinent to one [criminal type](#) of international migration, namely trafficking.⁹ In any case, all international labor conventions apply to migrant workers. Some conventions, such as the 1997 Private Employment Agencies Convention (No. 181), are especially pertinent for present-day international migration.¹⁰ The supervisory machinery of the Organization and the International Labour Office are the institutions that correspond to international labor law instruments on migrant workers. The former ensures that norms are respected. The latter assists with the implementation of the norms.

Though international human rights law applies to all humans, irrespective of nationality, immigration is not recognized as a right in international law. But norms of international human rights law protect the rights of migrants once they have migrated. Among the international human rights instruments, one is migrant-specific: the 1990 [International Convention on the Protection of All Migrant Workers and Members of their Families](#).¹¹ With exception of Argentina and Libya, no state of destination in the industrialized world or elsewhere is party to this convention. Treaty bodies, such as the Migrant Workers Committee and the Human Rights Committee, monitor the implementation of international human rights instruments. They are supported by the Office of the High Commissioner for Human Rights.

Even though institutions of international trade law deny it, the [General Agreement on Trade in Services](#)' Mode 4 on the Movement of Natural Persons may be deemed a migration instrument.¹² Under the statistical definition, natural persons residing in a state other than that of their birth for twelve months plus one day are [migrants](#).¹³ The Secretariat of the World Trade Organization ensures the implementation of international trade law. The clout of the Organization's Dispute Settlement Mechanism brings it the closest to a supranational adjudicating body.

The United Nations Convention against Transnational Organized Crime and more specifically its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and its Protocol against Smuggling of Migrants by Land, Sea and Air are the international criminal law instruments concerned with migrants. They provide for the protection of migrants against the crimes of smuggling and trafficking through the punishment of their perpetrators, and do not criminalize victims. No treaty body monitors the implementation of the two protocols. However, this is the most actively promoted branch of international law concerned with migration. In the Euro-Mediterranean space, states of destination finance activities in states of origin that enable them to honor their commitments under the two Protocols. The United Nations Office on Drugs and Crime (UNODC) ensures compliance with and implementation of the two protocols.

⁸ ILO, [Migration for Employment Convention \(Revised\) 1949 \(No. 97\)](#); [Migrant Workers \(Supplementary Provisions\) Convention 1975 \(No. 143\)](#); [Migration for Employment Recommendation \(Revised\) 1949 \(No. 86\)](#); and [Migrant Workers Recommendation 1975 \(No. 151\)](#). See also, the soft law instrument, ILO, [Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration](#) (2005).

⁹ ILO, [Forced Labour Convention 1930 \(No. 29\)](#) and the [Abolition of Forced Labour Convention 1957 \(No. 105\)](#).

¹⁰ For pertinent ILO conventions, see ILO, [supra note 5](#), at 33–34.

¹¹ [International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families](#) ch. IV, Dec. 18, 1990, 330 UNTS 3.

¹² [General Agreement on Trade in Services](#), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183.

¹³ See [Who Counts as a Migrant? Definitions and their Consequences](#), THE MIGRATION OBSERVATORY AT THE UNIVERSITY OF OXFORD.

Governance at the Regional Level

Regions and subregions have disparate approaches to the global governance of migration. The European Union is the regional institution most involved in such governance. It adopts two different and opposed approaches to human and labor mobility. For nationals of Member States, the approach is one of complete free mobility of persons and labor, which is supposed to serve the supreme goal of European integration. But even in this EU free mobility regime, there are exceptions. Some older Member States still do not allow free access to their labor markets to workers from states that joined the Union in the 2000s.

For Third Country Nationals, movement into and mobility within the EU territory are restricted. These migrants are regulated by the [Global Approach to Migration and Mobility](#) (GAMM).¹⁴ Putting elements of GAMM into practice, Mobility Partnerships offered by the European Union to third countries typically associate opportunities for legal migration with joint action to stop irregular migration and reinforced migration and development linkages. The European Union also includes provisions on migration in the international treaties it enters into with other individual states or groups of states. Examples are the [Cotonou Convention with African, Caribbean, and Pacific](#)¹⁵ states and the different [association agreements](#) with South and Eastern Mediterranean states.¹⁶

In Africa, the 1991 Treaty Establishing the African Economic Community commits state parties to taking measures, individually, bilaterally, and in regional groups with a view to achieving progressively the free movement of persons and the enjoyment of the rights of residence and establishment by their nationals within the Community. The African Union's overarching approach to migration is articulated in two 2006 policy documents: the [African Common Position on Migration and Development and the Migration Policy Framework for Africa](#).¹⁷ Neither document is binding but they both provide [expansive guidance](#) on how African states should regulate migration.¹⁸ In contrast to the largest part of Europe, there is no free mobility regime in Africa. Continental institutions only aim at realizing it.

At the subregional level, in 1979 the Economic Community of West African States (ECOWAS) adopted a [Protocol on the Free Movement of Persons, Residence, and Establishment](#).¹⁹ The revised treaty and the [2008 ECOWAS Common Approach to Migration](#) later reiterated the intention of Member States to place the free movement of persons at the heart of the regional integration process.²⁰ At the other end of the continent, in 2010 the [East African Community](#) adopted a protocol that put migration front and center in the subregional integration process.²¹ The protocol provided for facilitating cross-border movement of persons, the adoption of integrated border management, the removal of restrictions on movement of labor and services and the right of establishment and residence. In contrast, the southern Africa subregion was [not able to agree](#) upon a free mobility regime.²²

¹⁴ [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Global Approach to Migration and Mobility](#), COM (2011) 0743 final (Nov. 18, 2011).

¹⁵ [The ACP-EU Partnership Agreement](#), June 23, 2000.

¹⁶ [Euro-Mediterranean Agreement](#), Mar. 18, 2000, 2000 O.J. (L 70) 2.

¹⁷ African Union Executive Council, [African Common Position on Migration and Development and Migration Policy Framework for Africa](#) (June 25–29, 2006).

¹⁸ Loren Landau & Tendayi Achiume, [The African Union migration and regional integration framework](#), ACCORD POLICY & PRACTICE BRIEF No. 36 (Nov. 2015).

¹⁹ ECOWAS, [Protocol Relating to the Free Movement of Persons, Residence and Establishment](#), May 29, 1979.

²⁰ [ECOWAS Common Approach on Migration](#), Jan. 18, 2008.

²¹ East African Community, [Protocol on the Establishment of the East African Community Common Market](#), Nov. 20, 2009.

²² Mark Chingono & Steve Nakana, [The Challenges of Regional Integration in Southern Africa](#), 10 AFR. J. POL. SCI. & INT'L REL. 3 (2009).

In South America, the [Common Market of the South \(MERCOSUR\)](#)²³ treaty and the MERCOSUR Residence Agreement provide that nationals of Member States may reside and work for a period of two years in another Member State if they can prove citizenship and a clean criminal record. The treaty also recognizes a number of rights for these migrants, including the right to equal working conditions, family reunification, and access to education for their children.²⁴

Governance at the National and Subnational Level

The preeminent level in global migration governance is still the national one. Having largely forgone control of flows of goods, services, capital, and ideas through trade liberalization and the globalization process more generally, nation states appear particularly keen on maintaining control of some aspects of the entry and stay of foreign nationals. Even in the most integrated European Union, Member States decide on the [volumes of third-country nationals](#) allowed entry in their territories.²⁵ They have not relinquished this authority to the European Commission.

Laws and policies formulated at the national level are influenced to different degrees by international norms. National laws bear primarily on volume, but they also relate, inter alia, to residence, security, labor, education, health, and integration. Policy may be formulated centrally but implemented at the subnational level. Implementation could also be jointly undertaken.

Derived from the monopoly on determining volume of admission, amnesty of irregular migrants is characteristically formulated and implemented at the national level. There are [many examples](#) here: the Amnesty Program for Irregular Migrants implemented by Saudi Arabia in 2013, regularization processes carried out in Italy between 1982 and 2011, and a variety of regularizations in the United States, France, and Spain.²⁶

Governance at the subnational level depends on the political and administrative systems of the states concerned. Units of federal states, provinces, and municipalities are the typical subnational actors involved in the governance of some areas of international migration. Integration of migrants, as well as other policy interventions, are typically implemented at the subnational level in industrialized states of destination. In the European Union, subnational authorities play a central role in governing migrant integration. “[Regional and local authorities in Member States \[control\] the implementation and delivery of a wide array of integration-related services.](#)”²⁷ Local authorities also carry out interventions on employment, political participation, and health care.²⁸

Conclusions

International cooperation in the governance of migration unfolds at the international, regional, and subregional levels. Its tools are instruments of different branches of international law and their governing institutions. International cooperation is motivated by the promise of high economic growth that results from free mobility of persons and labor. The ideals of the international system require that conditions of equality and nondiscrimination undergird this governance. Behind this veneer of uniform standards, states’ attachment to the principle of

²³ [Southern Common Market \(MERCOSUR\) Agreement](#), Mar. 26, 1991, 30 I.L.M. 1041.

²⁴ Mercosur Residence Agreements, 2002.

²⁵ Sibrich Gaastra, *The European legislative framework regarding economic migration: Economic Units vs. Holders of Human Rights* (2013).

²⁶ Joaquin Arango & Maia Jachimowicz, *Regularizing Immigrants in Spain: A New Approach*, MIGRATION POL’Y INST. (Mar. 28, 2014).

²⁷ Özge Bilgili and Llire Agimi, *Supporting Immigrant Integration in Europe: What Role for Origin Countries’ Subnational Authorities?*, MIGRATION POL’Y INST. (Feb. 2015).

²⁸ *Id.*

sovereignty makes them reserve for themselves, at the national level, decisions on laws and policies that they consider as directly affecting their demographic composition and security. Monopoly of action on these issues at the national level is generally not questioned. States are only expected to respect international instruments they have adhered to, such as those on human rights. But sovereignty considerations often diminish adherence to international law instruments specific to international migration, thus undermining the potential effectiveness of the global governance of migration. Cooperation at the regional level is considered to stand a better chance of achieving the interests of all concerned since it groups states that are proximate to each other. This is a valid assumption but again not completely so. Free mobility is accepted neither as norm nor objective in some regions and subregions. Below the international level of governance, analysis of global migration law needs to be region-, subregion- and nation-specific. [Acosta](#) in this volume analyzes compliance with and adjudication of the agreement on free movement at the subregional level of MERCOSUR.²⁹ The inconsistency he signals in the implementation at the national level of the agreement between members of MERCOSUR is a good indication of the disorder in the governance of international migration even when considered in the same subregional scheme.

²⁹ Diego Acosta, *Global Migration Law and Regional Free Movement: Compliance and Adjudication – The Case of South America*, 111 AJIL UNBOUND 159 (2017).