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INTERNATIONAL LAW AND THE GLOBAL GOVERNANCE OF MIGRATION

This panel was convened at 9:00 a.m., Friday, April 6, 2018, by its moderator, Chantal Thomas of Cornell University Law School, who introduced the panelists: Alex Aleinikoff of the Zolberg Institute on Migration and Mobility, The New School; Janie Chuang of American University Washington College of Law; Jean-Christophe Dumont of the Organisation for Economic Co-operation and Development; Michelle Leighton of the International Labour Organization; and Alice Thomas of Refugees International.

Introductory Remarks by Chantal Thomas*

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Without further ado, our really fabulous group of speakers. We will begin with Professor Alex Aleinikoff. He is the university professor and director of the Zolberg Institute on Migration and Mobility at The New School in New York City, formerly the United Nations (UN) deputy high commissioner for Refugees, and before that dean of the Georgetown Law School here in Washington. After that we will be hearing from Alice Thomas, who is the climate displacement program manager for Refugees International. And then Michelle Leighton, who is the chief of the Labor Migration Branch of the International Labor Organization.

Then we will hear from Janie Chuang, who is professor of law at American University here in Washington. She is an expert on human trafficking and has served as an advisor to the UN, the International Labor Organization, and other international bodies. And last, but certainly not least, Jean-Christophe Dumont, who is the head of the International Migration Division at the Directorate for Employment, Labor, and Social Affairs of the Organization for Economic Cooperation and Development.

Truly an illustrious and expert body. We are very much looking forward to your remarks, and I will ask Alex to begin. Thank you.

Remarks by Alex Aleinikoff†

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Thanks, Chantal, and thanks for putting together this panel. I look forward to hearing the presentations of the other panelists.

If we think about global migration law, refugee law is the place to start, since this seems to be the area in which the institutions, the norms, the system are the clearest example of a global migration law. Unlike most other migrants, refugees have their own convention and their own agency—the UN High Commissioner for Refugees (UNHCR) dating from 1950—and a set of regional

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agreements on refugees, and that has produced a solid foundation of rights, seventy years of practice, and billions of dollars a year in assistance, as well as coordinated international action on resettlement and return. I think it is fair to call it a legal regime on refugees.

Saying that, however, we have to recognize the last few years have shown tremendous strains on the system. Obviously, the crisis over the Mediterranean, where more than five thousand people have lost their lives as boats have gone down. Barriers have been put in place around the world, from Australia, all through Europe, and also in the United States at the Southwest border, that burden asylum seekers. Most troubling is that the system has created what I have called a "second exile" for refugees, meaning that people are forced out of their country of origin but when they get to another country they cannot leave there and are not integrated into that society. You have millions of people living as refugees for years, decades—living lives in limbo.

The Convention provides a strong set of rights. It is written in the 1950s, just a few years after the Universal Declaration of Human Rights. But there is no enforcement mechanism provided for in the Convention, not even a strong monitoring process. And there is no structure—this is perhaps the biggest weakness—for ensuring international responsibility sharing. The vast majority of refugees are able to flee across a border, seek and get safety in a neighboring state, and then they stay there. The way the regime works is that refugees are people who are forced out of their home country and then locked into a country of first asylum, and that, to me, is a failed and broken system, despite the fact we have a host of legal norms and a legal regime.

Now what is being debated is the Global Compact on Refugees, which is a product of the 2016 New York Declaration on Migrants and Refugees, adopted by the General Assembly, and it called on UNHCR to draft a Global Compact on Refugees (GCR). There is a similar compact on migrants being drafted through an interstate negotiation that I think some of the speakers will talk about. But UNHCR has been charged with drafting what I will now call the GCR.

There have been several drafts released and there will be several more before the final one is presented to the General Assembly in mid to late this year. The central foci are two. One is on improving response where refugees are. The big movement here is bringing development actors in, alongside the humanitarian actors, to help provide support for hosting communities, work on livelihoods, improve education—the kinds of things the development actors do—and that is all through what is called the Comprehensive Refugee Response Framework. What I want to talk more about today, though, are the steps that are being taken to improve international responsibility sharing.

The drafts of the GCR begin to fill the gap by providing some new structure, but I want to propose going one step further—with a proposal that I think will strike you first as absurd but I hope by the end of my ten minutes will seem obvious. Let us see if I can make that happen.

I want to talk about refugee mobility. I have just said the big problem is that people are forced out of a country and then locked into a country of first asylum. The way this works is like this: Syrian nationals flee Syria, go to Turkey, and are recognized as refugees. Turkey actually signed the Convention but it kept the part of the Convention that limited it to European refugees, so technically Turkey does not call a Syrian a refugee, but they are in effect treated by the international community as refugees. There are more than three million Syrian refugees in Turkey. And then they stay in Turkey.

Suppose they get on a boat and want to come to Europe and arrive in Germany? In Germany they are not treated as refugees. They are treated as either illegal aliens or asylum seekers, and then a determination is made through German procedures as to whether or not they, in fact, are entitled to asylum. One might think that if we had a real regime that states were all members of and signed onto that a person adjudicated a refugee in one place would be seen as a refugee in other places as well. This might be a well-functioning system where people, as I say, sign on to support the system

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as a whole. Refugees would then have a right to travel the way citizens of the EU do, to other members of the system of the EU, to travel and reside in other states.

Now, of course this sounds very unlikely in today's climate, but I want to say that this harkens back to the earliest days of the refugee system—the system that began after World War I, when the Ottoman Empire, the Austro-Hungarian Empire, and the Russian Empire collapsed. There were large numbers of refugees throughout Europe. And a High Commissioner for Refugees was chosen—long before the creation of UNHCR: Fridtjof Nansen. Nansen was a Norwegian explorer. He was famous for an expedition that got near the North Pole, and then became an important diplomat and the first High Commissioner for Refugees.

What Nansen noticed was that people, particularly Russian refugees and Armenian refugees in Europe, had no documentation. They fled their countries. There was not a way to say who they were, what their rights were, or how they could be understood to exist in another state. Nansen began to issue documentation papers, and these ultimately became known, legally, as Nansen passports. They were documents that refugees had saying "this is who I am," "this is where I stay." The benefit of a Nansen passport was that it helped people enter other countries—to search for work, to undertake activities to rebuild their lives, and achieve self-reliance. It did not guarantee them entry. The other state would still have to say, "We will let you in." But it said this is who the person is. An international organization had identified them and verified their identity. And, importantly, a Nansen passport gave people a right to go back to the state in which they had been issued the passport, because otherwise a state might have said, if someone came to Germany, got a passport and then left for France, Germany might say to the refugee, "Done. You have left and cannot come back." But the Nansen passport allowed refugees to return.

In the earliest days of the refugee regime, before it actually became a regime, it was recognized that refugees would benefit from a right to travel so that they could begin to rebuild their lives, and that the international community could help in terms of facilitating that travel. Now take that forward and think about whether we could have so-called Nansen passports today.

Suppose the UN now, or some other entity, issued a document like that, which would mean that refugee status adjudicated in one country would be refugee status for all countries and would give refugees a right to move. You could think of this either as a new super Nansen passport, Nansen Passport Plus, or, as we have in the United States and the U.S. Constitution the Full Faith and Credit Clause, meaning that legal decisions reached in one state have to be given full faith and credit in other states. You could imagine some kind of refugee adjudication in one state that would then entitle you to be a refugee elsewhere, and then travel to those other places. That might require some kind of certification by an international organization of the adjudication, or perhaps certain countries can enter into bilateral arrangements that a recognition of refugee status in one place counts for the other. Surprisingly, we do not even have this in Europe at the moment; we do not have a unified adjudication system in Europe, but the proposal I am discussing would move us in that kind of direction.

Now there might also have to be some limits on numbers. If the goal is to improve global responsibility sharing, it would not be reasonable to think that all the people who could travel freely could all go to Germany. Germany might say, "No, if we are going to have reasonable responsibility sharing system then maybe we can put in place some quota, some limits on the number of people who could come." And you could imagine some kind of rough allocation of places around the world that might mean that refugees, as they exercise their freedom to move, would travel to maybe their second or third or fourth choice as a place to move.

And maybe, also, like in the EU, before you can settle in another country you might have to show you have a job or you can take care of yourself—you can support yourself once you get to that new place.

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If we recognize the right for refugees to move, think what it would do. One, you would not need the kind of assistance that we provide to refugees when they are locked into a country and cannot move and often cannot work; or even if they have a right to work, they work in marginal areas unprotected by laws. Now they would be able to move to where they be allowed to work or improve their working conditions. That was the purpose of the original Nansen passport. Then you would not need to have a new big influx of development assistance to hosting states, since refugee populations would presumably decline. What I am proposing, then, is a kind of self-help or a self-resettlement scheme where people could go where they could most take care of themselves, and it would dramatically further the goal of responsibility sharing, because refugees would then place themselves around the world. I think it is a win-win-win.

I recognize politically we are not there yet. I think the way to operationalize this would be to start with regional arrangements. The Intergovernmental Authority on Development (IGAD) countries—Kenya, Ethiopia, Djibouti, Eritrea, and Uganda—have put together a regional plan for refugees, allowing them to work and hoping to redevelop Somalia so people will return. But suppose that, as part of that plan, there were a recognition that people could move among those countries to fill jobs or start businesses. Another example: there is a plan that UNHCR is sponsoring in Central America among hosting states. Again, could we think about including in the plan this ability to move among those countries? I think you could build this right to mobility by starting at the regional level and then ultimately getting to the goal of freedom of movement. This would be the basis for a strong refugee regime, where people could take care of themselves, reduce the dependency that exists, and have a well-functioning system.

That is the modest proposal. I am sure I have convinced you of the wisdom of it now, even if you were initially somewhat skeptical.

Chantal Thomas

Thank you so much. Great opening shot and a proposal for a new form of governance of migration. I think then we will hear from Alice Thomas.

Remarks by Alice Thomas*

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Thanks. That was a particularly good introduction to some concepts that I am going to try to address here, when I get into a much more messy, complex area—which is how climate change is affecting human mobility, and where the myriad of people who are moving or may move in the future of this, where would they fit within the current regimes for refugees and migrants and how do those regimes need to be amended or extended in order to better protect the human rights of people that are moving in this context.

It has long been recognized that climate change adverse effects, either alone or in combination with other factors, are going to drive displacement and migration. This creates a risk that, at present, many vulnerable people, particularly those that have little to no responsibility for climate change, are going to be compelled to mov., And because there is no existing comprehensive regime to protect them, they are going to be forced to move irregularly, which puts them at risk of further human rights abuses and exploitation and abuse.

In the brief time I have I would like to discuss, first, some of the reasons why incorporating what I am going to call "climate migrants," although none of this terminology works, but I am going to

* Refugees International.

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