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SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW – PART III

MAPPING GLOBAL MIGRATION LAW, OR THE TWO BATAVIAS

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This symposium has marshaled numerous insights regarding the emergence of a general field of inquiry within international law on the movement of people. To move into this conceptual terrain has required a certain amount of defiance of the conventional wisdom that questions of migration are within the purview of the sovereign state, and a matter of sovereign territorial prerogative. Yet this conventional wisdom manifestly no longer describes the times. There are now a host of limitations under positive international law on the prerogative of states to control rights of noncitizens to entry, residence, and work within their territories; and limitations on states' rights to exclude or expel noncitizens therefrom.

The treatment of irregular migrants under international law represents to me an ultimate test of the principles reflected in international law, and a stark example of its internal tensions. "Irregular migration" refers to the whole range of migrants who seek entry without prior authorization. In this essay, I explore three features of contemporary international law as it relates to migration: fragmentation, asymmetry, and exclusion. I elaborate this conceptual map in Part I below, then argue in Part II that this conceptual mapping must be accompanied by an excavation of the history of international law in the context of specific sites of its application.

Conceptual Mapping: Fragmentation, Asymmetry, Exclusion

Fragmentation

The contemporary reality of international law no longer reflects an easy presumption that states maintain autonomy over questions of citizenship and immigration, or legal practices that always rest on a distinction between citizens and aliens. Within and across emerging international legal frames, the articulation of rights of migration has occurred, mediated by tension between the prioritization of individual rights, on the one hand, and state sovereignty on the other.[1]

Thus, the term "fragmentation"[2] aptly describes the varying domains and levels of rights and privileges for irregular migrants across treaty regimes, including human rights and humanitarian law, labor law, trade law, and criminal law. This state of affairs may pose its own inherent set of concerns from a point of view that values the "unity and coherence of international law."[3] On the other hand one might argue that fragmentation expresses the

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[1] For an argument that both of these norms can be understood to stem from the commitments of liberal legality within international law, see Chantal Thomas, *Convergences and Divergences in International Legal Norms on Migrant Labor*, 32 Comp. Lab. L. & Pol'y J. 101, 122 (2011).

[2] Peter Spiro also discusses fragmentation in his contribution to this symposium, Peter J. Spiro, *The Possibilities of Global Migration Law*, 111 AJIL Unbound 3 (2017).

[3] Int'l Law Comm'n, Report, Fifty-Fourth Session para. 498, UN Doc. A/57/10 (2002).

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vitality of international law as evidenced by the "proliferation of rules, regimes and institutions," or in more neutral terms that it constitutes a "natural consequence of international law's expansion."[4]

Yet the lack of coherence exacerbates legal ambiguities that, particularly for vulnerable persons, reinforce political subordination. One example would be what international law says about the rights of undocumented migrant workers—a salient issue because of the increasing prevalence of labor migration and its increasing incorporation into global systems of production and transnational life. There is significant overlap across instruments, suggesting an emerging consensus regarding the claims of migrant workers to nondiscrimination in many respects. However, there are also some instances of divergence between more general instruments that afford broader protection, and instruments specific to migration that, although they have been ratified by many fewer states, distinguish between lawfully and unlawfully present workers, granting greater protection to the former category.[5]

Legal ambiguity extends to situations in which arguably similar factual conditions are potentially subject to categorization under different rights claims. An example is the distinction between victims of trafficking, who under international and domestic law are often entitled to some degree of humanitarian protection, and smuggled migrants, whose level of protection is lower. This can seem arbitrary because of the inherent difficulty in applying the broad concepts involved, such as "coercion" and "exploitation" in the definition of trafficking, which under some interpretations extends to include economic conditions such that many persons otherwise deemed "smuggled" rather than "trafficked" would be brought into the latter category. It also can create almost a perverse lottery amongst undocumented workers. Two workers may for example start out as "smuggled migrants," paying smugglers for transport to two separate work sites in the United States, with identical objectives of working to send remittances back home. If one of those workers subsequently encounters exploitative conditions that rise to the level of trafficking, she may have access to greater rights of residence and social protection.

In sum, the will of states, as the makers of international law, to preserve their own territorial prerogative, has resulted in a hierarchy of rights and privileges, in which varying levels of protection have emerged not only through normative debates, but also through the historical contingencies of their establishment, the relative balance of power between origin and destination states, and domestic pressures. Consequently, refugees and refugee claimants may receive greater protections than trafficking victims,[6] who in turn may receive greater protections than "ordinary" irregular migrants. Because of this hierarchy, the factual distinctions justifying differential legal treatment often do not seem to justify the vast differences in the levels of protection enjoyed. This issue has been raised by those who criticize, for example, the distinction between "political" and "economic" that generally places some irregular migrants within the relatively more generous domain of refugee law, and excludes others.

Asymmetry

The analysis of fragmentation above takes the phenomenon of migration as a given, inquiring into the application of international law to that phenomenon. It also shows that, in the hierarchy of rights and privileges for irregular migration, those deemed "economic" or labor migrants sit at the bottom of the hierarchy. Yet the international legal order does not simply react to the phenomenon of irregular labor migration, but may also help to create it. In part, irregular labor migration can be seen as an epiphenomenon of dynamics of economic integration set into motion by international law itself, through liberalization of economic life generating effects of dislocation and displacement.

[4] *Id.* at paras. 497-98.

[5] Thomas, *supra* note 1, at 118-19.

[6] Jurisdictions have varied on whether status as a victim of trafficking can afford a basis for refugee law protection. *See* Chantal Thomas, Irregular Migration and International Law in a Globalizing Age ch. 2 (forthcoming, 2018).

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For example, as a consequence of the North American and Central American Free Trade Agreements, agricultural exports from the United States to the partner countries in many cases substantially displaced local production (in part thanks to continuing governmental subsidies). Among other sectors, corn exports from the United States displaced local maize production, and dairy exports particularly of powdered milk displaced local dairy farms.[7] Over this same period of time, rural unemployment in Mexico increased, with effects on both domestic and international migration.

While some international economic agreements do provide rights to freedom of movement,[8] a significant portion do not. Further to the example given above, neither the North American nor the Central American Free Trade Agreement established means of migration for "low-skilled" sectors such as farm work. The North American agreement established only limited provisions for certain "high-skill" or professional workers, and the Central American agreement offers no such provisions of any kind.[9]

This asymmetry is also reflected in the World Trade Organization (WTO). Only one aspect of the WTO legal architecture—"Mode 4" of the General Agreement on Trade in Services (GATS), addressing movement of natural persons—directly relates to immigration.[10] Liberalizing commitments under Mode 4 are substantially lower than those for other modes. Additionally, within the commitments that have been made, one study found that 93 percent were for high-skilled labor such as business visitors, executives, and intracompany transferees.[11] Moreover, even pertaining to commitments that have been made, the GATS Annex on the Movement of Natural Persons reserves to Members the right to "regulate the entry" of workers who would otherwise be covered, for example permitting the imposition of differential visa requirements for nationals of different Members.[12]

All of this adds up to a clear normative asymmetry between the liberalization of goods and capital, celebrated and centered in international economic law, and the relative constraints on labor. The sources of this asymmetry are incredibly dense. Legal exceptionalism for work and workers, and their relationship to other factors of production, can be argued and contested from many angles. The complexity of the empirical phenomena involved also render it difficult to establish any kind of direct causality between the silence of these instruments on the status of migrant workers and the production of their illegality. At the very least, however, these dynamics of asymmetry reflect and reinforce preexisting vulnerabilities by ratifying the differential treatment of labor migration.

[7] Chantal Thomas, *Transnational Migration, Globalization and Governance: Theorizing a Crisis*, *in* HANDBOOK ON INTERNATIONAL LEGAL THEORY (Martin Clark et al. eds., 2016) (discussing the large increase in Central American refugees into the United States in 2014); Chantal Thomas, *Effects of Globalization in Mexico, 1980-2000: Labour Migration as an Unintended Consequence*, *in* SOCIAL REGIONALISM IN THE GLOBAL ECONOMY (Adelle Blackett & Christian Lévesque eds., 2011).

[8] Many regional instruments have established freedom of movement of persons to varying degrees, including the European Union, the Economic Community of West African States, the Common Market for Eastern and Southern Africa, and Mercosur. For a discussion of implementation in Mercosur, see Diego Acosta, *Global Migration Law and Regional Free Movement: Compliance and Adjudication—The Case of South America*, 111 AJIL UNBOUND 159 (2017).

[9] Central America Free Trade Agreement art. 11.1(5), May 28, 2004, 43 I.L.M. 514 (2004) & Understanding on Immigration Measures, Aug. 5, 2004; North American Free Trade Agreement art. 1201(3), Dec. 17, 1992, 32 I.L.M. 289, 605 (1993).

[10] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex on Movement of Natural Persons Supplying Services Under the Agreement para. 4, 1869 UNTS 183, 33 ILM 1167, 1187 (1994) [hereinafter MONP Annex].

[11] Antonia Carzaniga, *GATS, Mode 4 and Pattern of Commitments*, *in* MOVING PEOPLE TO DELIVER SERVICES 21 (World Bank Publications, 2003).

[12] *See* MONP Annex, *supra* note 10, at n.1

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Exclusion

Underlying the dynamics of fragmentation and asymmetry is the presumptive exclusion of migrants, which accompanies the way in which sovereignty is envisioned in international law as conferring exclusive territorial control to the state. Without reconceptualizing this most basic of presumptions, immigration crises will continue. In that sense, I join other commentators who have pointed out that immigration "crises" are not crises of numbers, since countries successfully manage legal migration in much greater numbers.[13] Rather, these are crises of institutions, of political imagination and will, and ultimately of law. International law in its current incarnations has often reified and instantiated the problems of fragmentation, asymmetry, and exclusion that reproduce and reinforce these crises. Yet, in contemplating the possibilities for a different world, and a different map of global migration law, it is perhaps necessary to consider international law from a different vantage point: one that looks into the histories behind, and contingencies of, the current order.

Mapping Across Space and Time

Traveling across space and time allows for concrete observance of the malleability of concepts which can otherwise seem firmly entrenched in the predominant instruments of international law. For example, in contrast to the narrow definition of refugee in the 1951 Convention, current regional instruments on refugee law reflect a broader understanding and more expansive definitions. The Organization of African Unity has established that a refugee can be created by "events seriously disturbing public order."[14] Very similarly, several Latin American states have adopted a definition which contemplates "circumstances which have seriously disturbed public order."[15] This expansiveness can be seen historically as well. Treaties on refugees adopted prior to the Refugee Convention, during the interwar period, for example, created remarkably broad definitions,[16] such as "persons proved not to enjoy, in law or in fact, the protection of their government."[17]

Moving further back in time shows that even the foundational presumption of sovereign exclusion need not be seen as immutable. Early modern international law posited a presumptive admissibility of foreigners across territorial boundaries.[18] This historical awareness is essential to a critical understanding of the present. For example, my own research took me to Batavia, New York, which hosts a Federal Detention Facility operated by the U.S.

[13] *See, e.g.*, Alex Aleinikoff, *Remarks, "Syria and the Middle East: Refugees, Internally Displaced Persons and Asylum Seekers in Long-term Global Crises"*, Cornell Law School (Mar. 22, 2016).

[14] Organization of African Unity Convention on the Specific Problems of Refugee Problems in Africa art. 1(2), Sept. 10, 1969, 1001 UNTS 45.

[15] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama art. 3, Nov. 22, 1984.

[16] Chris Szabla, *The History of the Refugee Convention's Definition* (manuscript on file with author, 2015); Gilbert Jaeger, *On the History of the International Protection of Refugees*, 83 ICRC Rev. 727 (2001).

[17] Convention Concerning the Status of Refugees Coming from Germany art. 1, Feb. 10, 1938, CXCII LNTS No. 4461.

[18] Frédéric Megret and Vincent Chetail have discussed this in their contributions to this symposium. *See* Frédéric Mégret, *Transnational Mobility, the International Law of Aliens, and the Origins of Global Migration Law*, 111 AJIL Unbound 13 (2017); Vincent Chetail, *The Architecture of International Migration Law: A Deconstructivist Design of Complexity and Contradiction*, 111 AJIL Unbound 18 (2017). A foundational study was authored by James Nafziger, *The General Admission of Aliens Under International Law*, 77 AJIL 811 (1983). Additional discussion can be found in Vincent Chetail, *Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel*, 27 Eur. J. Int'l L. 901 (2016); Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 Melbourne J. Int'l L. 438 (2013).

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government's Office of Immigration and Customs Enforcement, part of what I describe as the U.S. "border industrial complex."[19] Batavia, New York, was one node in the trajectory of early Dutch commercial expansion: another was Batavia in the Dutch East Indies, founded by the Dutch East India Company in the seventeenth century (now Jakarta in Indonesia).

Both Batavia, New York and Batavia, Dutch East Indies were the product of Dutch commercial expansion, but the contrast between these two Batavias can be said to encapsulate the movement of international law from its prior eras to the contemporary one. The later Batavia, as a site of sovereign territorial control, rests on an international law that upholds the presumptive right of exclusion of foreigners. The early Batavia, as a site of imperial expansion, was justified by an international law which set forth a presumptive right of admission for foreigners.

The relationship of these Batavias to the formation of international law was, in some instances, incredibly direct: Grotius, one of international law's founding fathers, once argued on behalf of the Dutch East India Company that international law established rights of entry and trade in foreign lands.[20] The idea of a world held in commons, so central to the natural law jurisprudence of these early thinkers, and an important predecessor of modern-day movements in human rights and environmental law, consequently can be critically recast as a handmaiden to the birth of imperialism.

In this sense a postcolonial lens is vital to the project of mapping Global Migration Law.[21] This lens brings into stark relief the way in which international law has tracked directionalities of power across time. During the period of conquest and expansion of the global North, international law supported expansionary rights of foreigners; now that the directionality of migration has changed, with most migrants originating in the global South and headed to the global North, international law supports their exclusion.

Yet the postcolonial and historical perspective also, potentially, shows a conceptual fluidity that can support movement towards a more just set of arrangements. Indeed, we are now at the moment where the United Nations General Assembly has called for a "global compact for safe, orderly and regular migration."[22] By recognizing that migration must be brought more centrally into the domain of international law, this initiative may potentially address some of the problems that result from the features of fragmentation, asymmetry, and exclusion. The effort faces numerous internal challenges to its coherence,[23] as well external challenges of a more brute political nature.[24] Yet it may also, still, recognize and reaffirm the vision of those early statesmen of the postcolonial age, towards a new international order.[25]

[19] THOMAS, *supra* note 6, at ch. 1. I fondly recall traversing Batavia, N.Y., with Antony Anghie and Boris Mamyluk on our way to a Toronto Group conference—that wintry adventure helped to form the thoughts expressed here.

[20] Ileana Porras, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' de Iure Praedae – The Law of Prize and Booty, or on How to Distinguish Merchants from Pirates*, 31 BROOK. J. INT'L L., 741 (2006).

[21] *See* E. Tendayi Achiume, *Reimagining International Law for Global Migration: Migration as Decolonization?*, 111 AJIL UNBOUND 142 (2017). For crucial perspectives on the colonial encounter and international law, see ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2007); BANDUNG, GLOBAL HISTORY AND INTERNATIONAL LAW (Luis Eslava et al. eds., 2017).

[22] Secretary-General, Making Migration Work for All, UN Doc. A/72/643 (Dec. 12 2017).

[23] Some of the earlier contributors to this symposium have identified a few. Jaya Ramji-Nogales, *Moving Beyond the Refugee Law Paradigm*, 111 AJIL UNBOUND 8, 9 n. 8 (2017) (in particular noting the problematic binary between the Global Compact on Migration and the parallel initiative towards a Global Compact on Refugees); T. Alexander Aleinikoff, *Toward a Global System of Human Mobility: Three Thoughts*, 111 AJIL UNBOUND 24 (2017).

[24] Patrick Wintour, *Donald Trump Pulls US out of UN Global Compact on Migration*, THE GUARDIAN, (Dec. 3, 2017).

[25] MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ORDER (1979). For a discussion of the legacies of this movement, see Luis Eslava & Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law*, 3 TRADE, L. & DEV.103 (2011).

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