

A Global Migration Law Perspective on Structural Reform

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Over twelve and a half million Syrians, nearly eight million Colombians, and over four million Sudanese forcibly displaced from their homes.¹ Over 25,000 deaths along migratory routes since 2014.² Nearly half a million migrants arriving at the southern border of the United States in 2014.³ Over one million migrants landing on the shores of southern Europe in 2015.⁴ Over 600,000 Rohingya migrants fleeing to Bangladesh since August 2017.⁵ Regardless of one's geographic location or political preferences, the statistics tell the story of a dysfunctional global migration system.

Structural reform of international migration law and institutions is urgently needed both from the perspective of migrants and states. Conceptually, efforts to improve these structures should begin from a migrant-centered perspective and take a human mobility approach.⁶ In terms of concrete goals, safe transit and effective cost-sharing should be prioritized. The political obstacles are legion and growing, and will require a concerted political effort on the part of a broad range of constituencies to overcome.

Large-scale unregulated migration is problematic from the viewpoint of both migrants, who pay exorbitant prices for unnecessarily dangerous journeys, and states, which lose the ability to decide who enters their territory. Raising concerns of national security, public safety, and limited resources, states generally resist opening their borders to migrant flows. Migrants fleeing violent conflict and severe poverty are willing to risk everything they have to reach a destination where they believe they will find political and economic security. Their efforts meet walls and push-backs, despite the fact that, for states in the Global North, migrant labor is a key driver of many economies, migration has begun an irreversible process of demographic diversification, and human rights are trumpeted as core values.

The statistics demonstrate a classic collective action problem. Countries in the Global North do not want to act as a “magnet”, whether for economic migrants or refugees, an attitude that has spurred increasingly restrictive border control policies in most of these nations over the past two decades.⁷ Migration is inherently transnational, involving

¹ United Nations High Commissioner for Refugees, *Statistical Yearbook 2016*, at 12, 15 available at <http://www.unhcr.org/en-us/statistics/country/5a8ee0387/unhcr-statistical-yearbook-2016-16th-edition.html> (last visited March 21, 2018).

² International Organization for Migration, *Missing Migrants Project*, available at <https://missingmigrants.iom.int/> (last visited March 21, 2018). Given the difficulties in locating the bodies of dead migrants at sea and in the desert, this number is quite conservative.

³ United States Border Patrol, Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, available at <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> (last visited March 21, 2018).

⁴ Heaven Crawley et al., *Destination Europe? Understanding the dynamics and drivers of Mediterranean migration in 2015* (Nov. 2016), available at <http://www.medmig.info/wp-content/uploads/2016/12/research-brief-destination-europe.pdf> (last visited March 21, 2018).

⁵ United Nations High Commissioner for Refugees, *Rohingya Emergency*, available at <http://www.unhcr.org/en-us/rohingya-emergency.html> (last visited March 21, 2018).

⁶ Jaya Ramji-Nogales and Peter J. Spiro, *Introduction to Symposium on Framing Global Migration Law*, 111 AJIL UNBOUND 1 (Apr. 2017).

⁷ See, e.g., Amnesty International, *The Human Cost of Fortress Europe* (2014), available at http://www.amnesty.eu/content/assets/Reports/EUR_050012014__Fortress_Europe_complete_web_EN.pdf (last visited March 21, 2018).



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journeys from one state to another, so one might naturally look to international law to play a coordination function that could overcome this race to the bottom.

Unfortunately, international law and institutions do little to encourage coordination.⁸ International law relating to migration is largely focused around refugees, offering robust protections to those who are able to enter the territory of a destination state and prove that they fit within a narrow and rather anachronistic definition.⁹ Law relevant to migration exists in a variety of subfields of international law: international human rights law,¹⁰ international labor law, international trade law, the law of the sea, and transnational criminal law to name just a few.¹¹ But these laws do not come together to form anything like a framework; international law governing migration is relatively thin and riddled with holes. Lacking a mechanism for progressive development, the law entrenches outdated approaches to international migration.

In order to be effective, efforts to reform this system should start from a migrant-centered perspective.¹² The first step is thoughtful and systematic research on root causes of migration as well as choices around migration routes and destination countries.

Enforcement oriented approaches that do not incorporate the views of migrants will simply be unable to match the sheer force of

determined and creative human beings. Similarly, state interests must be met in order to generate sufficient political will for any proposed solutions. A human mobility approach, focused on human capacity and stepping away from the assumption that migration is the optimal solution for all humans facing violent conflict and severe poverty, may be a location where migrants and states can find common ground.

Reform of international migration law must connect the various subfields of international law relating to migrants, both from an expressive and a practical perspective. Bilateral or multilateral trade agreements should begin to acknowledge their impact on human mobility, and must build in effective responses and approaches. Recognizing the limited availability of lawful migration routes, international labor law should focus both on the protection of undocumented migrant workers as well as on creating paths to lawful status – for the sake of both migrant labor and local workers who may be displaced from labor markets by workers not subject to labor laws. Transnational criminal law should take a more nuanced view of human smuggling, recognizing that efforts to assist migrants to move across borders can in some cases be a legitimate response to exclusionary global economic and legal structures.¹³ Perhaps most importantly, development law and policy must be a central component of international laws and

⁸ Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS LAW JOURNAL 609 (2017).

⁹ See Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 BERKELEY J. INT'L L. 1 (2016).

¹⁰ Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualism*, 47 VAND. J. TRANSNAT'L L. 699 (2014).

¹¹ Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS LAW JOURNAL 609 (2017).

¹² Jaya Ramji-Nogales and Peter J. Spiro, *Introduction to Symposium on Framing Global Migration Law*, 111 AJIL UNBOUND 1 (Apr. 2017).

¹³ See, e.g., Sheldon X. Zhang, Gabriella E. Sanchez and Luigi Achilli, eds., *Smuggling as a Collective Strategy and Insurance Policy: Views from the Margins*, 676:1 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE (Mar. 2018).



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structures around migration, focusing on building human capacity rather than containment of migrants in the Global South.

Safe and lawful transit must be a key feature of any reform effort. The lack of attention to means of transit in the contemporary law of international migration results in exploitation and abuse of migrants, inefficient use of state resources, and dangerous political backlash.¹⁴ Current treaties require migrants to reach the shores of destination states in order to claim protection or seek low-wage employment.¹⁵ Rather than providing migrants with agency and states to with choice, this haphazard approach benefits neither.

This gap could be filled at least in part through a technological solution that solicited the preferences of migrants and states, enabling the issuing of visas in advance of departure from home countries. Such an approach would of course require a more realistic level of visa availability from destination countries and should entail training of migrants in both job skills and cultural competence prior to departure.¹⁶ It would offer a different route for migrants seeking protection from violence, while also recognizing that most migrants needing protection also need jobs, and migrants needing jobs often also need protection.¹⁷ In addition to more effectively meeting the needs of migrants and states, this solution offers the political benefit of ensuring that

movement of migrants is lawful, avoiding the dramatic scenes of influx and pushback that have provoked much anti-immigrant sentiment of late.

Similarly, technology could be put to work in predicting migration flows responding to conflict and disaster. This information could then be incorporated into a more equitable distribution of migrants seeking protection. In 2016, 84% of the world's refugees were hosted in the Global South.¹⁸ Though these countries are the least able in terms of resources and infrastructure to support additional populations, they receive enormous numbers of migrants simply due to their geographic proximity to conflict and disaster and the porous nature of their borders.¹⁹ As vividly demonstrated by massive onward movement of migrants from these countries, this is not a sustainable response to conflict or disaster. A more coordinated and evidence-driven approach could predict growth of migrant flows in advance, enabling resettlement of migrants into the Global North and the dedication of increased development aid and other resources to countries proximate to mass movements.

In this age of populism and xenophobia, the obstacles to reform of international law and institutions are legion. The severe lack of political will that has strangled prior efforts at reform has taken a dark turn into virulent

¹⁴ Jaya Ramji-Nogales, *Moving Beyond the Refugee Law Paradigm*, 111 AJIL UNBOUND 8 (Apr. 2017).

¹⁵ This is of course not true for high-wage migrant labor, but this paper focuses on low-wage movement.

¹⁶ South Korea offers a promising example of this approach on a regional level. ASIAN DEVELOPMENT BANK AND INTERNATIONAL LABOR ORGANIZATION, *ASEAN COMMUNITY 2015: MANAGING INTEGRATION FOR BETTER JOBS AND SHARED PROSPERITY* 94 (2014), available at <http://www.adb.org/sites/default/files/publication/42818/asean-community-2015-managing-integration.pdf>.

¹⁷ Jaya Ramji-Nogales, *Moving Beyond the Refugee Law Paradigm*, 111 AJIL UNBOUND 8 (Apr. 2017).

¹⁸ United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2016*, available at <http://www.unhcr.org/globaltrends2016/> (last visited March 21, 2018).

¹⁹ See, e.g., Tendayi Achiume, *Syria, Cost-sharing, and the Responsibility to Protect Refugees*, 100 MINNESOTA L. REV. 687 (2015).



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anti-immigrant sentiment. Indeed, it is arguable that mass movement of migrants inspired support for nationalist politics, playing a role in the global rise of populism.²⁰ Those who seek to protect migrants fear that change at this juncture risks making the law far worse. Simply maintaining current standards has become a struggle that consumes the bandwidth of most champions of migrants' rights.

The depth of contemporary political challenges demands that successful law reform efforts begin by addressing politics. Effective political change requires engagement of a range of groups, from diaspora settled in destination countries as citizens and lawful residents to constituencies in home countries that can pressure their governments to advocate on behalf of their nationals abroad.²¹ These political strategies will by necessity be tailored to local populations, drawing on societal norms to build support for safe and lawful migration and oppose populist rhetoric.²²

The traditional benchmark of the multilateral treaty may have to be set aside for a more flexible and less politically threatening approach. An iterative process like the Paris Agreement that allows countries to set their own goals and institutionalizes regular revisions and updates might be a good place to start.²³ Alternatively, or complementarily, regional bodies offer a promising starting

point. The European Court of Human Rights and the Inter-American human rights system offer examples of the progress that regional bodies can make on the protection of migrants' rights.²⁴ The MERCOSUR region provides an even more promising example of regional approaches to safe and lawful migration for all migrants.²⁵ In short, creativity in political strategies and law reform methods will be key to improving international migration law and institutions in an age of populism.

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²⁰ Jan-Werner Muller, *WHAT IS POPULISM?* (Univ. of Penn. Press 2016).

²¹ Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualism*, 47 *VAND. J. TRANSNAT'L L.* 699 (2014).

²² Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 *MICH. J. INT'L L.* 1 (2010).

²³ United Nations Climate Change, *The Paris Agreement*, available at http://unfccc.int/paris_agreement/items/9485.php (last visited March 21, 2018).

²⁴ Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualism*, 47 *VAND. J. TRANSNAT'L L.* 699 (2014).

²⁵ Diego Acosta, *Free Movement in South America: The Emergence of an Alternative Model?*, *MIGRATION INFORMATION SOURCE* (Aug. 23, 2016, available at <https://www.migrationpolicy.org/article/free-movement-south-america-emergence-alternative-model> (last visited March 21, 2018)).