Summary

Regulating and Shaping Migration Movements through International Law

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I. Introduction

(1.) As a rule, migration movements unfold without an international legal framework. Rather, the decision to accept or to reject migrants lies with the sovereign State. This chilling *status quo* will be explored in part III.

(2.) Nevertheless, present international law comprises some means to regulate and to shape migration movements. These means will be analysed in part IV.

(3.) When legal reality remains unsatisfactory even after careful analysis, committed legal scholarship is called upon to open avenues of thought for a better world, even if they may appear utopian. This will be attempted in the last part (V).

II. Preliminary Clarifications

(4.) This report deals with migration movements that occur when a multiplicity of individuals migrate in a similar way within a certain temporal and spatial context and thereby pass international borders in order to relocate in another State at least temporarily.

(5.) Refugee law as laid down in the Geneva Convention on Refugees only covers a small part of migration since it presupposes persecution. Forming such a category of migrants is an attempt to structure migration.

(6.) This report is based on a broad concept of migration that includes all causes of migration.

(7.) For a country of destination such as Germany, migration may be relevant under economic and demographic aspects. Migration is increasingly discussed under security aspects as well. Finally, migration may challenge a nation State's identity.

(8.) Countries of origin may understand migration as a chance, especially if the economic situation is bad. On the other hand, countries of origin may lose highly qualified work force, which is needed at home, through emigration.

(9.) Narrating migration from a migrant perspective corresponds to a human rights approach. The present report does not choose this perspective. Rather, it enquires the potential of States and other international actors to regulate and to shape migration.

(10.) Migration movements that involve permanent or at least long-term relocation will only succeed if migrants are integrated into the society of their new home State. It is hardly possible, however, to achieve integration through international law. At best, international benchmarks for good integration may be fixed.

III. The Chilling *Status Quo*

1. The Sovereign Right of Border Control

(11.) State governance is primarily territorial in nature. As a consequence, each State has the sovereign right to decide which foreigners may access the State's territory and stay there.

(12.) In a historical perspective, there is no compelling link between the right of border control and the Westphalian system of sovereign territorial States. *Hugo Grotius* still advocated what would be called a human right to migration today. As far as practice is concerned, it seems that States have hardly made attempts to control the access of foreigners to their territory until the late 19th century. Worldwide systematic borders controls were not established until the First World War. Since then, the sovereign right to border control, which is rooted in the theory of sovereignty, is equally settled in practice.

(13.) This reveals a certain asymmetry: From an international law point of view, countries of destination have the legal power to stop migration, whereas countries of origin are rather powerless unless they effectively close their borders and compromise the freedom to leave one's country.

2. International Migration Prevention Law

(14.) The sovereign right of border control is corroborated by international mechanisms that may be categorized as international migration prevention law.

a) Readmission Agreements

(15.) Readmission agreements constitute an important pillar of migration prevention law. They build on the customary obligation of a State to readmit its own nationals and back up this obligation through procedural means. In some cases, they extend the obligation to readmit to third-country nationals immigrating from or via the other country.

(16.) It is striking that the European Union seems to prefer informal arrangements recently. Thus, the EU and Afghanistan reached an understanding in order to facilitate the readmission of Afghan nationals on 2 October 2016. Flexibility and the interest of saving time militate in favour of a purely political agreement, while financial and other considerations may ensure the effective implementation of the agreement at least as good as the legally binding nature of an international treaty could do.

b) Fighting Migration Causes

(17.) Undesired migration may also be prevented by eliminating the root causes of migration. Thus, States expressed their determination "to address the root causes of large movements of refugees and migrants" in the New York Declaration for Refugees and Migrants of 19 September 2016.

(18.) Meanwhile, the interrelationship between migration and development has been recognised in international development and refugee law.

(19.) In order to effectively mitigate migration pressure, it would be necessary to reduce social inequality, to pacify the world, and to undo climate change. Thus, creating a better world is at stake.

IV. Realist Options of International Migration Management

1. International Migrant Worker Management

(20.) A series of labour recruitment agreements, which the Federal Republic of Germany concluded as of 1955 with a view of covering its labour force demand, essentially served the interests of the States of origin. In fact, these agreements charged the States of origin with pre-selecting applicants and thereby enabled them to control the emigration of labour force.

(21.) Germany did not need this service. Applications could also be submitted at German consular posts, and German enterprises could use private employment services in order to recruit applicants abroad. Thus, it was possible to bypass the authorities of the other State, and Germany actually opted for direct recruitment alongside with recruitment through labour recruitment agreements.

(22.) As long as the freedom to leave one's country is granted, whereas receiving States control the entry of foreigners, there is an imbalance of forces between recruiting and sending States. Labour recruitment agreements are the only way for a State of origin to regain the power to shape migration.

(23.) A glance at universal migrant workers law confirms that the international regulation of labour migration primarily serves the interests of countries of origins and of migrants. States, which attract labour migrants, are hardly in favour of international regulation. This explains why the ILO Migrant Workers Convention No. 97 of 1 July 1949 has but 49 contracting parties; important States of destination of labour migration have not ratified it.

2. International Refugee Management

(24.) The Memoranda of Understanding concluded by Australia with the small Pacific States Nauru and Papua New Guinea are an extreme example of consensual migrant transfer. If the rules of both agreements were correctly applied, they would hardly cause concern under international law. Unfortunately, the human rights claim underlying both agreements is left behind in practice.

(25.) In contrast, the international community of States has developed three durable solutions for refugees since the interwar period: voluntary return, local settlement, and resettlement in a third state. The shaping element of resettlement is particularly strong. The Orderly Departure Program, through which the international community responded to the Vietnam boat people crisis in 1979, is an eminent example.

3. The Institutional Framework

(26.) Today's migration law goes back to the first half of the 20th century. In retrospective, the development of international refugee protection in the 1920[ies] appears as a success story.

(27.) The mandate of the United Nations High Commissioner for Refugees (UNHCR) focuses primarily on current crises. In this context, UNHCR also looks for durable solutions including resettlement in third States.

(28.) The International Organization for Migration (IOM) is, above all, a service provider. As such, the IOM is hardly able to develop an agenda of its own.

(29.) Thanks to its comprehensive mandate, the UN General Assembly is able to integrate substantially and regionally highly differentiated discussions on migration. Thus, the Assem-

bly was able to host the World Summit for Refugees and Migrants in New York on 19 September 2016.

(30.) The present institutional regime does not prevent individual States from taking the lead. In 2016, for instance, US President Obama, the UN Secretary General, Germany and other States invited to a Leaders' Summit on Refugees, which was held in September in close vicinity to the UN World Summit for Refugees and Migrants and where States made concrete commitments for financial aid and refugee quotas. The complementary summits show a division of labour between the UN and individual States.

V. Utopia

1. Foundation of an International Responsibility for Migration
(31.) The UN General Assembly has repeatedly claimed the value of solidarity. In international refugee law, the idea of solidarity is particularly strong and amounts to a legal principle. However, States have consistently refused to deduce individual and concrete legal obligations to act from this principle.

(32.) Recently, the idea of solidarity has been supported by the concept of the responsibility to protect. If a receiving State is clearly overburdened, the international community of states is called upon to assist that State. This corresponds to the second pillar of the responsibility to protect.

2. Shaping an International Responsibility for Migration
(33.) A responsibility for migration based on solidarity may take various forms ranging from the resettlement of refugees to financial support for States of first asylum. Moreover, it is possible to conceive different distribution keys. There are good reasons to believe that States in the relevant region bear a primary responsibility. All things considered, it seems impossible to derive an obligation to provide specific solidarity contributions from an overall responsibility for migration. Nevertheless, the responsibility for migration puts States under pressure to justify their individual contributions.

3. Concretizing an International Responsibility for Migration through Security Council Practice
(34.) If migration movements threaten international peace and security, the UN Security Council will be able to act under Chapter VII of the UN Charter. Security Council practice with regard to Iraq and Syria shows that a massive influx of war refugees may threaten international peace and security.

(35.) Security Council Resolution 2240 (2015) on refugee smuggling off the coast of Libya, however, primarily aims at combatting forms of organized crime; the resolution is part of international migration prevention law.

(36.) If the risk that a mass influx of migrants destabilizes a host country constitutes a threat to international peace and security, Article 41 UN Charter enables the Security Council to relocate refugees to a greater number of States. Alternatively, the Security Council could authoritatively demand the financial solidarity of Member States with an overburdened State of first asylum.