Migration as a Challenge for International Law

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A. Introduction: The Movement of Peoples – The Potential for Conflict in Migration

1. Conflicts occur when migratory movements become encounters and encounters become confrontations. Migration law is thus often understood as a law of *conflict*, restricted to the *prevention* of migration.

2. From the perspective of world history, migratory movements represent a continuum of human socialisation; at the same time, they are always tied to ever-changing social, political and economic conditions – in short the *real world* context. Rooted in their own time and context, migratory movements thus also colour fundamental assumptions about the establishment of political communities.

3. Approaches that seek to categorise migratory movements by type (forced migration, labour migration, lifestyle migration, &c.) have only limited efficacy, as monocausal migratory movements are the exception not the rule.

4. Faced with migratory movements, the *universalism of human rights* strives towards a concept of *world citizenship*, opening up the nation state. And yet, the right of nations to *self-determination* – understood also as the *democratic sovereignty of the people*, and therefore equally based in human rights – allows for the formation of consciously distinct political communities on the basis of exclusion and inclusion.

B. Point of Departure: Human Rights Guaranties as a Means of Managing Migratory Movements

5. On the management of migratory movements:

    a. The *need* for managing migratory movements is evident. In this regard, the idea of human rights guaranties as such a means of management implies that migratory movements *can* be managed and thereby presupposes the availability of certain courses of action in international law.

    b. Human rights *open courses of action* in international law, as they oblige the responsible actors both within and beyond the State to take creative action.

    c. This idea of migration management has at its heart two components: the reactive aim of defining a framework within which processes of social change can be processed; and the proactive aim of bringing about social change.

    d. Overall, the aim is comprehensively to secure the *rule of law* in questions of migration, without opening avenues for an overhasty retreat into those exceptional situations that lie beyond the law.

e. The management of migration in international law involves the horizontal integration of state and non-state actors alike, whilst making use of all vertical mechanisms typical of *multi-level governance*, including the establishment of "international benchmark norms" (*Ch. Calliess*) as a normatively binding guide for regulation and enforcement at the national level.

f. The individual's right to claim directly under various human rights instruments further contributes to the activation of international law mechanisms for managing migration.

6. Substantiating the human rights approach as a means of managing migration:

a. *Sovereignty* and *human rights freedoms* represent the normative points of departure. Each serve to accord meaning to social events, yet the outcome differs depending on which route is taken. On the one hand self-determined territorial sovereignty, without which the enjoyment of freedom in security would not be possible; and on the other, self-determined individual freedom, so susceptible to control, which must not be completely subordinated to the need for security and thereby crumble at the borders of territorial sovereignty.

b. The sovereignty of nation states has long lost its claim to being absolute and grown increasingly permeable, in particular through universal human rights guarantees. Nevertheless, a State's human rights obligations towards its own nationals can be brought to bear against non-nationals just as well as the right to self-determination. A *binary codification* of international migration law must therefore be avoided.

c. The management of migration is rather concerned with *balancing competing human rights*.

d. The creative potential of human rights derives not least from the fact that they furnish and develop various forms of belonging, both legally and procedurally – defensive rights of protection against the State, as well as positive rights of participation.

e. *Belonging on a human level* starts before the political establishment of communities and forms the basis for a basic right to survival that must have constitutive effect for all migration regimes.

f. This basic survival right is connected to a "right to have rights". These rights become more specific, the more specifically a political community is defined.

g. The central *challenge* posed by migratory movements to international law is to provide a framework based on human rights within which political communities can define their own regimes of belonging independently, according to the principle of subsidiarity, rather than the grandiose idea of global law.

C. Setting out the Framework for Managing Migration – Taking Stock of the Relevant Human Rights Guarantees

7. The use of the phrase "migration" requires *semantic sensitivity*: whilst "migration" in everyday usage implies an exception to the norm of a settled existence, "movement" rather connotes the constitutive norm for the globalised world of the 21st Century and its mobile societies.

8. Migration refers to the *movement of persons across borders* with the aim of taking up permanent, or at least temporary, residence in a country other than the country of origin.

9. All the rules of international law that are applied to migration as understood in this sense can be described in their interplay as *international migration law*, without this establishing an independent field of public international law, or indeed laying claim to an independent intradisciplinary status.

10. International migration law has no unified institutional framework, remaining instead highly *fragmented*. It lacks coherent governance structures.

11. And yet, the management of migration requires *cooperation* – international migration law is the international law of cooperation *par excellence*.

12. Human rights provide a *normative means* of *directing* international cooperation. Those bound by human rights are obliged to establish the minimum level of infrastructure, without which basic human rights would in their substance be empty; in the globally connected world, in which national territories are opened up to transnational jurisdictions, the *status processualis* expands to a *status infrastructuralis*.

13. To begin with, migratory movements are characterised by *two opposing dimensions* of the freedom of movement: whilst human rights instruments explicitly ensure the *freedom to leave* a country, the question of *granting entry* is generally left to the sovereign discretion of the nation state.

14. Likewise the *right to asylum* is at times reduced to the sovereign right of a State to grant asylum.

15. In light of its *ratio legis*, therefore, the principle of *non-refoulement* contains an intrinsic right to asylum to the effect that not only the return to a persecuting State, but also the rejection of the asylum-seeker at the border is prohibited.

16. The interplay between the principle of *non-refoulement* in the 1951 Convention Relating to the Status of Refugees (1951 Convention) and other norms of international law can work to *strengthen human rights* protection. Regional instruments of international law often go much further than universal international law.

17. On account of their limited extraterritorial application, *general human rights obligations* have a primarily protective function once the migrant has reached the receiving State.

D. Consequences – Possibilities for Migration Management on the Basis of Human Rights

18. The need for a human rights-based management of migration exists before migratory movement even occurs. In this regard management must be preventive in both a narrow sense, insofar as it aims to counteract the unwanted pressures of migration, and in a broader sense, insofar as it aims pre-emptively to dismantle infrastructural obstructions to the enjoyment of the freedom of movement ("responsibility to prevent").

19. Deep-rooted conflicts, be they ethical, religious, political or cultural, cannot be resolved through legal management alone. This requires a political process, for which international law can at least to some extent provide a *normative frame* and an *institutional underpinning*.

20. Overall, the human rights-based management of migration is a *cross-sectional task* of international *cooperation*, cutting across a variety of fields of international law.

21. Once migration has occurred, it requires reactive management. There exists a "responsibility to react".

22. The available instruments of international law, however, remain *inadequate*. The 1951 Convention in particular fails to meet the realities of today's world.

    a. The 1951 Convention treats temporary residence as the rule, whilst in fact *permanent resettlement* plays a far greater role in the situation faced today.

    b. Likewise, the 1951 Convention doesn't take sufficient account of *mass migratory movements*.

    c. This is compounded by the fact that the Convention's restrictive definition of "refugee" in Article 1 ignores the *central causes* of refugee flows in today's world, from civil wars to climate catastrophes.

    d. The Convention's principle of *non-refoulement* in Article 33 only applies once the asylum-seeker is in the country (regardless of the legality of entry), or has at least reached the border.

    e. These deficits can only be remedied by an *inter-State duty to cooperate* on the basis of human rights

    f. This requires a *creative mix* of a variety of international law *instruments*, for example: self-obligations, compensation for non-fulfilment of solidarity

obligations, bilateralisation where multilateral regimes don't apply, and procedural instruments.

23. The law dealing with the *consequences of migration* (including the "responsibility to rebuild") is also shaped by human rights. This entails, for example, that rights such as the right to residence and the right to remain, the rights of access to the labour market and family reunification or diplomatic protection for non-nationals are developed in line with human rights.

24. *Who* is allowed to take part *in what way* in a political community is in general a question of national self-determination. If international law sought to negate this, it would simultaneously give up one of its foundational principles: the right to self-determination, with its logic of inclusion and exclusion.

25. The narrow definition of Article 1 of the 1951 Convention defines the most basic right to belong in particularly narrow terms.

26. European refugee law goes further with the subsidiary protection it affords to asylum-seekers.

27. Regional communities of responsibility like the EU develop *independent models of communities of belonging*.

E. Concluding Remarks: International Migration Law in Flux

28. As desirable as a reform of international law instruments, a new international organisation for migration and refugee questions, the inclusion of an explicit right to asylum in human rights treaties, the taking up of climate refugees in the 1951 Convention, or adequate normative responses to mass refugee phenomena would all be – it seems at present a consistent "piecemeal engineering" on the basis of human rights promises the most success.

29. This must tie in to an *idea of belonging* that encompasses the *whole human family*, placing the "freedom from fear" in the joint protective responsibility of the international community as a *new global common* – this is the utopia that must lead the way.