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AVOIDING EVASION: IMPLEMENTING INTERNATIONAL MIGRATION POLICY

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The fundamental impediment to the implementation of a migrants' bill of rights is that such a charter warrants certain entitlements that only national governments and their local partners are in a position to render. This means that—unlike other global issues such as environmental regulation and doctrines of sustainability—private actors are not able to sufficiently uphold the standards that states may ignore. This also means that—unlike regional free trade agreements—the ratification of international regulations is insufficient to ensure adherence by empowered stake-holding actors. Indeed, as the primary provider of social, economic and political entitlements to an exceptionally disempowered group, the state is—in many matters of migration policy—the *only* actor. There are few other providers of public goods and care, no other entities that mind border crossings, and no alternative judiciaries to appeal to about residency or nationality.

Despite the broadening range of international arbiters of global migration, the state—with its sovereign control of its territory and its subjection to the politics of its society—remains the only arbiter that oversees the actual interactions during which a proposed bill of rights would be followed. "As long as the nation-state is the primary unit for dispensing rights and privileges,[1] it remains the main interlocutor, reference and target of interest groups and political actors, including migrant groups and their supporters."[2] This suggests that the normative persuasion and mobilization of even the most powerful non-state actors can only be in the ultimate interest of altering the practices of states.

Premised on this uncompromising truth, this article will first outline the debate about the role of international law in shaping national migration policies. It will next examine (a) the ways that states have been able to clutch their national sovereignty in matters pertaining to migration, and (b) the ways that international normative pressure has superseded state control. With these

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1. Virginie Guiraudon & Gallya Lahav, *A Reappraisal of the State Sovereignty Debate: The Case of Migration Control*, 33 COMP. POL. STUD. 163, 166 (2000) (citing John Meyer, *The World Polity and the Authority of the Nation-State*, *in* STUDIES OF THE MODERN WORLD SYSTEM (A. Bergesen ed., 1980)).

2. *Id.* (citing RIVA KASTORYANO, LA FRANCE, L'ALLEMAGNE ET LEURS IMMIGRÉS: NÉGOCIER L'IDENTITÉ [FRANCE, GERMANY AND THEIR IMMIGRANTS: NEGOTIATING IDENTITY] (1996)).

lessons of history and political structure in mind, this article will then consider the avenues of implementation of the proposed International Migrants Bill of Rights.[3] In the end, I will argue that rather than portray the charter as a new act of international law that states should approve, it must be framed as a selection of fundamental entitlements that are lifted from existing regimes to which states are currently subject. In this manner, the Bill of Rights simply needs to ask for adherence to laws that state governments have already enacted. This resolution enables activists to circumvent the backyard politics that have poisoned efforts to coordinate globalized standards in the sphere of migration law.

DO BORDERS MATTER?

Quite absolutely, David Martin began an article twenty years ago by writing that "Under what many still consider the time-honored classical doctrine, international law plays no real role in shaping migration policy and practice. Migration policy," he continues, "[i]s often regarded as the last major redoubt of unfettered national sovereignty."[4] This view has not been without support. Heikki Mattila similarly argues that governments, as the acceding parties to international human rights instruments, remain the principal actors as guardians of the human rights of all individuals residing in their territories.[5] Thomas Schindlmayr writes that, while the phenomenon of human migration has been global, "the legal frameworks in place to deal with [it] have been nationally oriented, diverse and fragmented."[6] Such a contention echoes previous studies that observed states' increasing desire to curtail unsolicited flows of migrants.[7] This represents one side of a debate that has inspired a great deal of response.

On the other side, some scholars argue that there has been a decline in state power that is attributable to the increasing relevance of an international human rights regime that overrides state decisions about border crossings.[8] Other commentators argue that the international regulation of migration must not be reduced to a competition between the strength of state sovereignty and

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3. IMBR Network, *International Migrants Bill of Rights: Draft in Progress*, 24 GEO. IMMIGR. L.J. 399 (2010).

4. David A. Martin, *Effect of International Law on Migration Policy and Practice: The Uses of Hypocrisy*, 23 INT'L MIGRATION REV. 547 (1989).

5. Heikki S. Mattila, *Protection of Migrants' Human Rights: Principles and Practice*, 38(6) INT'L MIGRATION 53, 55 (2000).

6. Thomas Schindlmayr, *Sovereignty, Legal Regimes, and International Migration*, 41(2) INT'L MIGRATION 109, 111 (2003).

7. *See generally* Rogers Brubaker, *Are Immigration Control Efforts Really Failing?*, *in* CONTROLLING IMMIGRATION (Wayne Cornelius et al. eds., 1994); Gary Freeman, *The Decline of Sovereignty? Politics and Immigration Restriction in Liberal States*, *in* CHALLENGE TO THE NATION-STATE: IMMIGRATION AND CITIZENSHIP IN EUROPE AND NORTH AMERICA (Christian Joppke ed., 1998); Christian Joppke, *Immigration Challenges the Nation-State*, *in* CHALLENGE TO THE NATION-STATE: IMMIGRATION AND CITIZENSHIP IN EUROPE AND NORTH AMERICA (Christian Joppke ed., 1998).

8. *See generally* David Jacobson, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1996); Yasemin Soysal, LIMITS OF CITIZENSHIP (1994).

human rights. Alex Aleinikoff writes, "It is sometimes said that states have complete authority to regulate the movement of persons across their borders—that anything less than complete authority would undermine their sovereignty and threaten their ability to define themselves as a nation. Against this claim, it is regularly asserted that migrants have fundamental human rights that state regulations of migration cannot abridge."[9] Such a model, Aleinikoff argues, fails to reflect the reality that states have already circumscribed themselves by ratifying "a fairly detailed—even if not comprehensive—set of legal rules, multilateral conventions, and bilateral agreements that constrain and channel state authority over migration."[10] For this reason, Aleinikoff and other scholars argue that considerations of this conflict must acknowledge the roles played by sending countries, social networks, employers in the destination state, smugglers, traffickers, and the migrants themselves. They contend that the empowerment of such non-state actors has diluted state control.[11]

Given this debate, it is important to investigate empirical trends that exhibit the extent and means of state control over migration into their territories. Yet, it is also important to consider the ways that international normative pressure has been (and has failed to be) exerted to supersede the strength of state institutions and their monopoly on rights and the distribution of public goods. The next two sections examine the actions of state governments and non-state actors in the interest of informing an effective implementation strategy for the International Migrants Bill of Rights.

SANCTIFYING SOVEREIGNTY

Despite the influence of the international human rights regime and the flurry of globalized non-state actors, state sovereignty remains salient in the governance of international migration. Indeed, the international human rights regime had to be approved by states before becoming relevant, and in the same manner, states retain the capacity to afford migrants certain protections and also deny them any such provision. Indeed, a review of the recent history of migration policymaking is a testament to the enduring freedom states possess to determine their own policy despite international commitments, enforce such policy with often arbitrary discretion, and eschew international obligations with impunity. Much of this is the product of promoting what governments deem to be the "national interest"—often political expediency shrouded by the subjective interpretation of international legal regimes that apply to "human beings," without differentiating citizens from migrants.

This reflects a fundamental difference between migration and other global

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9. T. Alex Aleinikoff, *International Legal Norms and Migration: A Report*, *in* MIGRATION AND INTERNATIONAL LEGAL NORMS 1 (T. Alex Aleinikoff & Vincent Chetail eds., 2003).

10. *Id.*

11. *See generally* CONTROLLING IMMIGRATION (Wayne Cornelius et al. eds., 1994).

issues such as trade liberalization and environmental degradation, to which states are equally susceptible. Money changes hands faster than governments can follow, and an open border for imports represents an open border for exports. Rising seas do not discriminate one shore from another. Polluted air and water flows across one border after the next simultaneously. However, an individual migrant can only approach one border at a time. Thus, migration's macrocosmic transnationalism is merely bilateral at the microcosmic level—meaning that each individual's border crossing is controllable, one at a time. Moreover, unlike the (conventionally perceived) exclusively economic benefits that trade can usher, migrants represent 'more than just a pair of hands.' Migrants require social, economic, and political provisions, which entail significant social costs that—unlike the costs of environmental deterioration—are not spread across societies. They are situated in the specific community which permits their entry.

Because of this very localized impact, debates about immigration and refugee policies have been exceptionally inflammatory. Indeed, migrants often inspire a variety of political disputes: ethno-cultural diversity and assimilation; civil rights and law enforcement; unemployment and industrial needs; family unity and welfare provisions; freedom of association and dissent; taxation and political representation. As the citizenry becomes aroused by such debates, "some politicians inevitably draw upon this arousal to mobilize voters, thus politicizing the process of migration policy formulation . . . ."[12] Indeed, "as the volume of immigration has risen, as the presence of migrants has become more permanent, as economic growth has slowed, and as wage inequality has increased, policymaking has progressively shifted from the bureaucratic to the public arena . . . ."[13] In navigating such political minefields, political leaders perform a delicate balancing act "between the views of those representing often segregated and mutually conflicting interests."[14] Of course, one view that is rarely, if ever, represented is that of migrants themselves. Their relative disempowerment is a product of state governments being primarily responsive to the local electorate. The result has been the frequent portrayal and definition of migrants as social, economic, cultural, political, and physical threats, in such a way that often racializes the debate.[15]

As a result of the implied costs and threats of migration, recipient countries have placed greater emphasis on separating themselves from migrants and the societies from which they emigrate. According to Pierre Hassner, "[T]here is an increasing contrast between the developed world, where war seems to

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12. Douglas S. Massey, *International Migration at the Dawn of the Twenty-First Century: The Role of the State*, 25 POPULATION & DEV. REV. 303, 313 (1999).

13. *Id.*

14. Mattila, *supra* note 5, at 64.

15. *See* Ronaldo Munck, *Globalisation, Governance and Migration: An Introduction*, 29 THIRD WORLD Q., 1227, 1232-34 (2008).

have been made obsolete by interdependence and democracy, and the periphery, which is plagued by ethnic and religious, national and social strife, by poverty, revolution and war. The first world more and more sees the second either as a threat or as a Pandora's box of insoluble problems, for whom nothing much positive can be done but from which one should above all be isolated, so as not to sink into its quicksands or be contaminated by its illnesses."[16] Such a quarantine has not exactly been feasible. Wars against transnational terrorism ignited by Western countries have produced new fluxes of transnational refugees to Western borders, and most ironically, the ideologies and customs from the periphery have been transported to the core via new forms of communication, rather than via the baggage of individual persons.

Nevertheless, national governments have made concerted efforts to evade the enforcement of international laws pertaining to migration. In a meticulous breakdown of national government tactics, Virginie Guiraudon and Gallya Lahav explain how national governments circumvent normative constraints:

> [National governments] have shifted the level at which policy is elaborated and implemented. We identify the devolution of decision making in monitoring and execution powers upward to intergovernmental fora, downward to elected local authorities, and outward to private actors such as airline carriers, shipping companies, employers, and private security agencies. This multifaceted devolution of migration policy has not resulted in states losing control over migration. Rather, it shows the adaptiveness of agencies within the central state apparatus in charge of migration control and their political allies. By sharing competence, states may have ceded exclusive autonomy yet they have done so to meet national policy goals, regaining sovereignty in another sense: capabilities to rule.[17]

Elaborating further, Guiraudon and Lahav write that states engage transnational actors and institutions for policymaking, policing, and border control (with organizations such as the Ad Hoc Immigration Group, Schengen Group, TREVI, and the Vienna Group) precisely because such organizations are exempt from the oversight of representative bodies or international courts. The lack of transparency also makes it difficult for national actors to oversee the process.[18] National governments often shift decision-making powers to local elected officials, who can impose more stringent controls on

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16. Pierre Hassner, *Refugees: A Special Case for Cosmopolitan Citizenship?*, *in* RE-IMAGINING POLITICAL COMMUNITY 278 (Daniele Archibugi et al. eds., 1998) (characterizing the "prophecies" of Jean-Christophe Rufin, Max Singer, and Aaron Wildavsky).

17. Guiraudon, *supra* note 1, at 164-165.

18. *See id.* at 177-79.

migration in accordance with reactionary constituent demands.[19] National governments also incorporate third parties, such as transportation companies and employers, to share the burden of regulation.[20] Those governments which are otherwise unable to enact substantive controls tend to rely on symbolic policy instruments, such as citizenship tests and cultural legislation, which suggest control but do little more than marginalize migrant communities. Given states' capacity to maneuver around international law and define their own standards according to perceived national interests, this is a significant hurdle for implementation.

CIRCUMVENTING SOVEREIGNTY

States' evasion of international law, discussed above, implicitly suggests that there are indeed certain established legal regimes to evade. In what he terms "the belated blessings of hypocrisy," David Martin notes that many of the instruments now cited as part of the international law of human rights were first adopted as resolutions, recommendations, declarations, conclusions or accords that were not strictly binding on the states whose representatives were involved in creating them.[21] Martin writes that, despite disappointment at the time about the gap between pronouncement and practice, the "seemingly costless rhetoric" has produced one of history's auspicious ironies:

> Government officials picked up and engrained a habit that has proven hard to shake—a conviction that at the verbal and ceremonial level . . . they must speak in the vocabulary of human rights. In the sheltered environment provided by the accepted cocoon of false piety, government officials did not feel a need to be cautious, to hedge their statements of standards with intricate exceptions and qualifications. Government leaders who cared little for human rights thus contributed to a process of proliferation and expansion in the instruments and solemn repetition of their principles. This sequence of events eventually made those norms both more progressive and seemingly more powerful (because of their frequent repetition) than they probably would have become had the government leaders of the day been frightened into being more cautious by the thought of a genuine international accountability.[22]

The resulting soft law derived from customary international standards and rhetoric has legitimated non-state actors' demands for the observance of agreed-upon norms. Institutions have been established on the basis of such

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19. *Id.* at 181.
20. *Id.* at 184-85.
21. Martin, *supra* note 4, at 552.
22. *Id.* at 553-54.

soft law. As a result, governments now hesitate to commit to any new international legislation—even those acts which are ostensibly benign to national interests—because they are wary of the repercussions of their initial support. However, given popular expectations of governments' habituated rhetoric about human rights and international law, states remain more likely to evade those laws to which they have committed than attempt to renounce them altogether.[23] This has opened the door for substantial attempts by members of global civil society to hold states' feet to the proverbial fire.

Non-state actors have attempted in a variety of ways to implement international migration law at the state level. Most subtly, institutions of global governance and transnational actors are able to disseminate common conceptions about the treatment of migrants in order to mold the views of domestic states and their societies.[24] This requires global civil society to more rigorously define the more interpretable, subjective terms of binding international treaties to make states' circumvention more difficult. Another means of defying state sovereignty is by establishing an international enforcement institution that implements agreed-upon standards. Martin suggests focusing such institutions on the regional level, "where shared outlooks, history and culture maximize the chances that well-designed legal institutions will find" amenable partner states.[25] A third alternative would be for non-state actors to appeal to domestic judiciaries for the acknowledgment and adoption of "customary international law"—consistent state practices performed under the impression that the state was legally obligated to conform to the international standards. Martin warns that such a path risks the backlash of state legislators.[26] Considering all such ideas, Hassner argues that "soft law" tactics utilizing normative pressure are "fair-weather" arrangements that collapse in times of crisis and competition.[27] For this reason, the implementation of international migration policy would greatly benefit from references to "hard law."

In this spirit, a fourth alternative would be for global governance institutions to more closely enforce migrant-specific obligations such as the International Convention on the Protection of the Rights of All Migrant

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23. *Id.* at 559.

24. *See* Martha Finnemore, *International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy*, 47 INTERNATIONAL ORGANIZATION 565, 566 (1993) ("[I]n most cases the causes of . . . changed understandings lie not at the national level but at the systemic level: it is an international organization that persuades states to adopt . . . changes.").

25. Martin, *supra* note 4, at 562 (citing Burns H. Weston, Robin Ann Lukes, & Kelly M. Hnatt, *Regional Human Rights Regimes: A Comparison and Appraisal*, 28 VAND. J. TRANSNAT'L L. 585, 589 (1987)).

26. *Id.* at 568 ("But if the court seeks to impose too much of a change, these other actors will assess the situation differently. The higher the perceived political costs from compliance with an over-ambitious court ruling, the more likely government officials are either to defy the ruling, seek to overrule it by legislation, or else undercut it by evasions.").

27. Hassner, *supra* note 16, at 282.

Workers and Members of their Families ("Convention"), which was adopted by the United Nations in 1990.[28] "Although the Convention defines various categories of migrant workers, it affirms in Article 7 that the basic human rights enumerated in the Convention shall be applied to all without any distinction";[29] and "[a]lthough reference is made to irregular workers, the Convention lists a comprehensive set of civil, political, economic, social and cultural rights applicable to all migrant workers and their families regardless of their status."[30] While most classic destination countries have not adopted it, many of the Convention's signees and ratifiers are states that were once "sending" societies, but now also receive many migrants. As most contemporary human migration is South-South in direction,[31] the list includes Southern migration hubs like Turkey, Chile, Mexico and Morocco.[32] This maneuver inspires the recommendations of the following section.

PRE-RATIFYING A MIGRANTS' BILL OF RIGHTS

States are the incorrect level at which to legislate migrants' rights, precisely because membership in states is subject to a lengthy qualification process that only renders rights with the attainment of citizenship. Indeed, many of the various entitlements that one may deem to be universally owed represent the proverbial carrots on the path to national citizenship. The key transnational distinction which states must realize is that between minimum rights that afford migrants equal opportunity to subsist, succeed, and participate in their new society—*fundamental* rights, perhaps—and those entitlements which benefit individuals and families beyond this baseline minimum—these are *supplemental*. A migrants' rights regime suggests that fundamental rights should be extended to all people, regardless of citizenship, by virtue of their situated coexistence, codependency, and co-humanity. This requires a leap of faith by citizens to perceive migrants as fellow partners in the creation of a more prosperous and successful community. However, given the aforementioned politicization of migration, this is not a leap that states and their societies are currently in a condition to make, particularly as migration is increasingly comprised of undocumented persons or refugees.[33] Before any new international regime can be incorporated, it appears necessary for states to reconcile an often exploitative image of labor migrants and an often racialized image of undocumented and refugee migrants. In this way, the

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28. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, Annex, U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

29. Mattila, *supra* note 5, at 58.

30. *Id*. *See generally* Mattila, *supra* note 5, at 58-60.

31. Munck, *supra* note 15, at 1230.

32. International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW), G.A. Res. 45/158, U.N. Doc./A/Res/45/158 (Dec. 18, 1990), *available at* http://www2.ohchr.org/english/law/cmw.htm,

33. Munck, *supra* note 15, at 1232.

institutions of international governance are subject to the most local of sentiments.

The charter of the International Migrants Bill of Rights states that "in blending aspiration and binding law, the IMBR is envisioned as a set of soft-law norms. However, the IMBR has been carefully drafted to include both exhortations and obligations such that it can be incorporated into law." Yet, as the last few sections of this article have exhibited, the effect of soft law on national migration policy is weak, and the prospect of incorporation in the contemporary era is weaker. In expressing the authors' awareness of this truth, the charter concedes that "while protection of the rights of migrants is among the oldest areas of international law, increasingly the discourse of rights triggers concerns about the subversion of sovereignty." This reveals the crux of the dilemma facing the implementation of a Migrants Bill of Rights—the obstacle of sovereignty and typically uncompassionate local societies.

However, if we are to learn from the preceding review of state maneuvers and institutional responses, it is clear that the way around the relative inefficacy of soft law and the enduring strength of state sovereignty is by reinforcing the legitimacy of established "hard law." In light of this, the charter mistakenly laments that "there is no single legal framework that unequivocally—and effectively—protects the rights of all migrants." Indeed, there are *many* legal frameworks that do. There are a plethora of international conventions and laws that recipient countries have agreed upon that together protect the rights of migrants as humans. It is from these human rights documents that many of the charter's articles are inspired or plainly lifted. In the interest of enforcing enacted "hard law," the framing of the Migrants Bill of Rights must be as a collection of ratified international laws relevant to the plight of migrants. Rather than an act of new international law that states are asked to approve, the charter should therefore be proposed as a selection of fundamental entitlements that are excerpted from the regimes to which states are already subject. In this manner, the IMBR does not need to ask otherwise competitive political communities for anything more than the incorporation of laws previously enacted.

As Virginie Guiraudon explains, "[r]ather than global processes constraining domestic action, what we observe in the case of aliens' rights is a legally driven process of self-limited sovereignty"[34]—meaning that, in accepting certain migrants and acquiescing to earlier international law, the state has self-limited its capacity to freely dispose of foreigners. The International Migrants Bill of Rights can exploit this self-limitation by grounding its specific articles in the legitimacy of ratified treaties rather than in the debatable subjectivity of politicized 'good practice.' In today's world, politi-

34. Guiraudon, *supra* note 1, at 189.

cal executives resist soft law norms as they would any other constraint, creating a divide not between the international and national, but between law and politics.[35] International migration law will find it difficult to supersede the expediency of politics unless it refers to law that has already been approved.

The argument of this article is complicated by the different approval records of different international regimes. A great many were adopted in rhetoric, while others were adopted in letter. A great many were passed as resolutions, understandings and declarations, without the promise of enforcement. Indeed, a great many laws which were accepted by states as they pertain to their inhabitants often only implicitly extend to migrants, who occupy the gray space between citizenship and foreigner. Nonetheless, these represent commitments—whether officially approved or officially expressed—which only reinforce the claims of rights-based frameworks. A state's defiance of such frameworks can therefore only be portrayed as a contradiction—a powerful tool of advocacy and implementation—if these histories of ratification and rhetoric are engaged. An implementation strategy that ignores them, and undeservedly gives states the benefit of the doubt, ignores the most powerful retort to sovereignty claims available.

Inevitably, different state governments will also have different histories of ratification, with some laws approved by some countries and not others, without any pattern. This article does not suggest that these differences should be overlooked in favor of an all-or-nothing approach. Instead, it suggests that each state should be held accountable to the treaties and laws that it previously ratified—even if that leaves the implementation of other rights stipulations to soft law means. In this way, my proposal embraces the proliferation of advocates' contestation to address migrants' rights at different levels of government and with different holders of state sovereignty. The point here is that soft law should be viewed as a secondary implementation strategy when there is no hard law to which civil society can refer. Indeed, why *create* norms in an environment which is driven by state cynicism when advocates have the legal wherewithal to *implement* norms that were created (and to a significant degree, approved) in an environment that reflected the aspirations of the contemporary migrants' rights movement?

Such an approach is not beyond the capacity of the charter, which is already substantially inspired by existing international law. As commentaries demonstrate, the International Migrants Bill of Rights derives from a great deal of existing international law and convention to which states have previously agreed. The adjustment is therefore much more a matter of framing than structural change. None of the conditions known to play a role in the politicization of international migration—market failures, labor market

35. *Id.*

segmentation, and the expansion of social networks, global transportation and communication—is likely to end soon.[36] Until the future of human migration and its regulation is more promising, this implementation strategy finds strength in the past.

36. Massey, *supra* note 12, at 317.