

---

---

# The Fatal Flaw in International Law for Migration

E. TENDAYI ACHIUME\*

There could hardly be a more challenging moment to try to fix the global governance of international migration, or a time when such reform was more pressing. With good reason, international migration has been at the center of global attention, especially where involuntary or forced migrants are concerned—persons whose movement across borders is coerced by conflict, persecution, climate change-related events, and even extreme socio-economic conditions. In a single year, over a million displaced South Sudanese sought refuge in Uganda.<sup>1</sup> Also in a single year over a million Syrian, Iraqi, Afghan, Somali, Eritrean, Nigerian and others did the same in Europe by sea, as almost four thousand involuntary migrants drowned along the way.<sup>2</sup> For at least three years a quarter of Lebanon’s population has been Syrian refugees.<sup>3</sup> The desperation of involuntary migrants in contexts such as these is increasingly matched in intensity by opposition to their admission, especially in countries in the global North experiencing resurgent populist nationalism and more general anti-migrant anxiety.<sup>4</sup> On the one hand, the intensity, chaos and inhumanity of recent international displacement has precipitated some notable momentum towards reform of the global governance of interna-

---

\* Assistant Professor of Law, UCLA School of Law.

1. Catherine Robinson, *South Sudanese Refugees in Uganda Now Exceed 1 Million*, UNHCR (Aug. 17, 2017), <http://www.unhcr.org/en-us/news/stories/2017/8/59915f604/south-sudanese-refugees-uganda-exceed-1-million.html> [https://perma.cc/Q542-7Z98].

2. Jonathan Clayton & Hereward Holland, *Over One Million Sea Arrivals Reach Europe in 2015*, UNHCR (Dec. 30, 2015), <http://www.unhcr.org/en-us/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html> [https://perma.cc/TM6N-XH5C].

3. *PM Hariri: Lebanon at “Breaking Point” Due to Refugees*, ALJAZEERA.COM (Apr. 1, 2017), <http://www.aljazeera.com/news/2017/04/saad-al-hariri-lebanon-big-refugee-camp-170401045951087.html> [https://perma.cc/7FCU-NLD8].

4. See E. Tendayi Achiume, *Governing Xenophobia*, VANDERBILT J. TRANSNAT’L L. (forthcoming 2018) (analyzing recent xenophobic and other backlash against involuntary migrants and arguing that international law exacerbates this backlash).

tional migration.<sup>5</sup> But on the other, it remains unclear whether any of this momentum will ultimately produce meaningful change.

It is this punishing context that frames the herculean enterprise that is the Model International Mobility Convention (MIMC).<sup>6</sup> The MIMC aims to reform the global governance of mobility across a range of issue-areas, and the charge its authors level at the existing regime is that it is fragmented and incoherent. For example, the current siloed international protection regime is at odds with the reality of mixed migration flows that along with refugees include labor migrants, who have no claims to protection even when the latter are as politically and economically vulnerable as refugees. Indeed, the majority of international migrants are labor migrants and “[f]ailing to provide legal pathways for migrants indirectly encourages irregular migration and that in turn makes migrants vulnerable to exploitation and domestic publics concerned about a loss of control over their borders.”<sup>7</sup> According to the authors of the MIMC, what the starkly fragmented universe of global migration governance requires is a new center of gravity—the fact of mobility itself<sup>8</sup>—and coherent treatment of this mobility.

While incoherence and fragmentation is certainly an issue, the extant global governance framework has a more fundamental and much less tractable ticking time bomb. Its cancer—possibly terminal—is the conception of state sovereignty operational within it, and that undergirds our international order as a whole. International law takes as starting point a community of formally sovereign, autonomous nation States, each possessing the largely unfettered right to determine on its own terms which non-nationals it will admit and how. A legal framework premised on such an atomistic conception of nation States and their corresponding entitlements is ill suited to the

---

5. Examples include the 2016 New York Declaration for Refugees and Migrants and the Global Compacts process it initiated. G.A. Res. 71/1, Annex I at ¶ 19, Annex II at ¶ 9 (Oct. 3, 2016) (initiating processes for the adoption of a Global Compact for Refugees and a Global Compact on Migration).

6. See Model International Mobility Convention, *International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States They Leave, Transit or Enter* (2017), [http://globalpolicy.columbia.edu/sites/default/files/mimc\\_document.pdf](http://globalpolicy.columbia.edu/sites/default/files/mimc_document.pdf) [<https://perma.cc/F3Q3-6G88>].

7. Michael W. Doyle, *The Model International Mobility Convention*, 56 COLUM. J. TRANSNAT'L L. 219, 220 (2018).

8. *Id.* (“A holistic approach to human mobility is needed at the international level to address these gaps in protection, regulation and cooperation.”).

deeply interconnected world in which we presently live.<sup>9</sup>

Decisions and national interests in the global North, for example, deeply impact the global South. They are an important factor in the complex matrix that drives the chaotic and unauthorized cross-border movement the MIMC is intended to address. Consider how the largest international movements of people fleeing conflict in the last decade and at least as far back as World War II have been driven by internationalized conflicts that link multiple powerful sovereign States in webs of coordinated intervention.<sup>10</sup> At the same time, international law places no direct obligation on States causing displacement to admit those consequently displaced.<sup>11</sup> Climate-change related displacement is predicted to increase, and the populations that will suffer the most devastation and dislocation (and that already do) are also those least responsible for the human causes of climate change.<sup>12</sup> Again, international law as yet does not require those nations most responsible for environmental degradation to admit those consequently displaced. Even international migration pursued largely in search of better economic outcomes is significantly conditioned by

---

9. See Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 MELB. J. INT'L L. 392, 448 (2013) ("If sovereignty is premised upon an atomistic conception of the state of nature, then surely a more interconnected understanding of nature raises the question whether the basic presumption of autonomy that undergirds sovereignty should shift in favour of a politics of interdependence.").

10. For further discussion, see E. Tendayi Achiume, *The Fact of Xenophobia and the Fiction of State Sovereignty: A Reply to Blocher & Gulati*, COLUM. HUM. RTS. L. REV. ONLINE 13 (2017), <http://hrlr.law.columbia.edu/wp-content/uploads/sites/10/2017/03/Achiume.pdf> [<https://perma.cc/K7P8-69KC>].

11. For a discussion of this and related problems and a proposal for reform see E. Tendayi Achiume, *Syria, Cost-Sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687 (2015).

12. Glenn Althor, James E. M. Watson & Richard A. Fuller, *Global Mismatch Between Greenhouse Gas Emissions and the Burden of Climate Change*, 6 SCIENTIFIC REPORTS (Feb. 5, 2016), <https://www.nature.com/articles/srep20281> [<https://perma.cc/UX7V-FAPS>] ("In line with the results of other studies, we find an enormous global inequality where 20 of the 36 highest emitting countries are among the least vulnerable to negative impacts of future climate change. Conversely, 11 of the 17 countries with low or moderate GHG emissions, are acutely vulnerable to negative impacts of climate change. In 2010, only 28 (16%) countries had an equitable balance between emissions and vulnerability. Moreover, future emissions scenarios show that this inequality will significantly worsen by 2030."). Ian Johnson, *Map Shows How Climate Change Will Hit the Economies of the World's Poorest Countries Hardest*, THE INDEPENDENT (Nov. 7, 2016), <http://www.independent.co.uk/environment/climate-change-poor-countries-world-hit-hardest-affected-india-ethiopia-kenya-moodys-a7403076.html> [<https://perma.cc/CFJ8-LJKU>] ("The report's conclusions fit with the general trend that poor countries which have done the least to cause global warming will suffer its effects the most and the nations that built their wealth on fossil fuels will fare better.").

and responsive to global economic interdependence, including historical political projects that brutally brought the world's peoples closer together, as they remain today.<sup>13</sup>

Today's hand-wringing about the challenges posed by international migration, especially when that migration brings Third World peoples to First World nations, ignores the first and incredibly violent chapter of the story still unfolding today. Between the 19<sup>th</sup> and first half of the 20<sup>th</sup> century over sixty-two million Europeans migrated from colonial metropolises,<sup>14</sup> to participate in a project of political and economic domination over the very peoples that European and kindred nations today seek so vehemently to exclude. The movement of Europeans into colonial territories was accompanied by movement in the reverse direction of natural and human resources for the overwhelming benefit of Europeans, at overwhelming cost to colonized peoples. European colonialism initiated deep interdependence between colonizing and colonized nations, whereby prosperity in the former relied on exploitation of the latter. International law played an important role in structuring this relationship of subordination.<sup>15</sup> And although colonialism is largely (but not entirely) over as a formal matter,<sup>16</sup> First World exploitation of the Third World persists, again with the help of international law.<sup>17</sup> There is a compelling argument to be made that certain forms of unauthorized economic migration today are the partial product of global structures of subordination originating in the European colonial project.<sup>18</sup> These structures

---

13. See E. Tendayi Achiume, *Re-Imagining International Law for Global Migration: Migration as Decolonization?*, 111 AMERICAN J. OF INT'L L. UNBOUND (2017) (introducing a proposal for re-conceiving the movement of certain migrants across international borders today as decolonization in order to achieve a new and productive logic and ethics for international law's application to global migration, one that reflects global interconnectedness).

14. J.L. Miège, *Migration and Decolonization*, 1 EUROPEAN REVIEW 81, 85–86 (1993); Chantal Thomas, *Sovereignty and the New International Law of Migration*, 14 MELB. J. INT'L L. 392, 439 (2013) (noting that as a percentage of population, “[m]easured either as a percentage of the total population, or in terms of economic significance, the impact of the earlier wave of [colonial and New World] immigration was much greater than the [contemporary] one.”).

15. See generally, ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004).

16. See Rahmatullah Khan, *Decolonization*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudiger Wolfrum, ed., 2015) (“[L]ess than 1% of the world's population now lives under colonial rule.”).

17. See ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 196–234 (2004).

18. See Achiume, *supra* note 13.

remain protected by international law, even while this law imposes no obligations on former colonial powers to recognize and admit former colonial subjects.

Each of the scenarios I have described juxtaposes forms of global interconnection that are implicated in transnational migration with international law's atomistic response, which is to leave it to each individual State to determine its own stance vis-à-vis this migration. The point is that, especially in light of its global causes, the heightened human mobility of the present era is fundamentally at odds with an international system that largely leaves it to each nation State to pick and choose whom it deems worthy of admission and inclusion. Although international law presents our global order as composed of mutually sovereign and formally equal nation States, this fiction obscures the obvious imbalances in power and asymmetries in benefits that different States and their respective populations enjoy as part of the international system. It also obscures the origins of these asymmetries making it all the harder to work towards a more promising legal scenario than the status quo.

By making no radical demands on States to cede sovereignty on this issue of territorial exclusion of non-nationals through international law, the MIMC cannot offer a resolution of the existential ills of global migration governance. Indeed, the authors of the Convention make clear that it is intended as a "Realistic Utopia,"<sup>19</sup> a pragmatic compromise, "designed to be an ideal yet realizable framework for what States someday should adopt when comprehensively regulating international mobility."<sup>20</sup> On the one hand, the world would be better off if States were to adopt the MIMC—it is an unquestionable improvement on the status quo. On the other hand, however, it is important not to lose sight of what it would take to achieve systemic resolution, where systemic resolution entails a global framework that is ethical and capable of comprehensively addressing how and why people actually move. Once the fundamental flaw in international law is foregrounded, it is clear that the MIMC can be viewed neither as the sun nor even a lesser star, in that it cannot be a final aspirational destination for global migration governance reform. Instead the

---

19. Doyle, *supra* note 7, at 223 ("[O]ur method was closest to a 'Realistic Utopia,' a term coined by John Rawls to refer to a system which requires using what we know about institutions, attitudes, and preferences while joining 'reasonableness and justice with conditions enabling citizens to realize their fundamental interests . . . . As did Rawls, it builds on Rousseau's injunction to legislate for '[m]en as they are, laws as they might be.' Practically, this means reflecting the world as it is and building a movement toward justice that existing, but better motivated, governments could endorse." (citing JOHN RAWLS, THE LAW OF PEOPLES: WITH, THE IDEA OF PUBLIC REASON REVISITED (2001)).

20. *Id.* at 223.

---

---

MIMC should be assessed as contributing something else. It may well be an important stepping stone in a much longer journey. Viewing it this way leaves room for concurrent investment in imagining ideals and utopias that more fully do justice to the world in which we live.

International law is itself a stumbling block to utopianism in global migration governance in another way, namely on account of the singular prominence it accords nation States as makers of this law. Systemic resolution of the problems of the current system would require controversial and presently unrealistic demands on nation States to cede the rights and the power they have over national immigration policies to better reflect the codependent, interconnected world that is our reality. Achieving an ideal form of global migration governance would, in other words, require remedying the fatally flawed conception of state sovereignty at the heart of international law and which nation States are strongly incentivized to protect. For international lawyers, this signals the need for radical changes in method and horizon. It may mean, for example, imagining and conceptualizing an international law that looks to subnational actors such as cities or regional provinces to create global governance structures that are more inclusive of international migrants. More fundamentally it calls for new political and legal theories that begin from a premise of deep global interconnection.<sup>21</sup> While this may all sound like the beginning of a blueprint for some sort of global migration law Never-never Land, if present-day social, political and technological forces are indeed driving us towards some kind of international migration inflection point, there is a clear need, and may be opportunity, for the previously unthinkable.

---

21. See Thomas, *supra* note 9; Achiume, *supra* note 13 (as well as accompanying text).