

Reimagining Global Migration Governance: From Insufficient Ideas to South-South Solutions

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The disarray produced by the “global migration crisis” has resulted in a number of ongoing and proposed reforms of global migration governance, defined as the international law and institutions concerned with all migration. Yet these reforms or proposals appear insufficient or ineffectual—especially to the extent that they often ignore political realities. Fulfilling the promise of global migration governance requires an architecture that instead materially addresses political difficulties. This Article reviews problems with the current and proposed models of global migration governance and proposes to ground reform in consideration of those realities, using a successful model that promoted and protected European emigration in the Twentieth Century. Today, a similar system could help achieve ambitions within the Global South to promote South-South migration among disadvantaged States. Such a model could shift the material incentives (and hence, politics) holding back openness toward migrants, help fulfill migrants’ rights or needs, and promote the fair distribution of migrants toward existing migrant destinations. It could also redress the historical injustices of earlier migration governance systems that advantaged Europeans.

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INTRODUCTION

For over the last half-decade, world politics and policy debates have been suffused by questions about both the movement and treatment of refugees and migrants. These have ranged from the rise of populism in Europe and the United States and the United Kingdom’s vote to leave the European Union (“EU”) to struggles with the consequences of armed conflict in Libya and Syria to concerns about displacement from islands submerged by rising seas to less often-noticed

discussions about the needs of Venezuelan exiles.¹ They have also included ongoing issues as disparate as the capacities of cities in countries near war-ravaged South Sudan and reckonings over how to sustain social services and an adequate labor force in aging Japan and Europe.² In short, there is no inhabited continent on which questions about how to protect migrants or ensure their fair or desirable intake have not become issues of foremost significance.

Scholars debate whether there has actually been a migration “crisis” in the sense that such a characterization might imply that there are more international migrants or refugees than ever.³ Yet the existence of *consistently* large numbers of migrants prior to, during, and after the “crisis” and their effect on the political *discourse*—which, in turn, impacts migrants themselves—begs attention either way. To the extent there has been or is a global migration crisis, it has always been less a function of the size of global movement than the disarray with which legal and political institutions have responded to it. In the wake of the spread of

1. On populism and migration *see, e.g.*, Christian Joppke, *Immigration in the Populist Crucible: Comparing Brexit and Trump*, 8 COMP. MIGRATION STUD., art. 49 (Dec. 21, 2020) (“It is a truism that opposition to immigration [was] central to both Brexit and the rise of Trump, much as it has been central to the entire phenomenon of nationalist populism whose crest the two events represent”); on European populism and the role of migration *see, e.g.*, Albana Shehaj, Adrian J. Shin, & Ronald Inglehart, *Immigration and Right-Wing Populism: An Origin Story* 27 PARTY POL. 282 (2021). For examples of some of the policy struggles over migration from Middle East conflict zones in the EU alone *see, e.g.*, Peter Seeberg, *The Arab Uprisings and the EU’s Migration Policies—The Cases of Egypt, Libya, and Syria*, 9 DEMOCRACY & SEC. 157 (2013); Andrew Geddes & Leila Hadj-Abdou, *Changing the Path? EU Migration Governance After the ‘Arab Spring.’* 23 MEDITERRANEAN POL. 142 (2018). The literature on potential “climate refugees” is vast, but an overview is available in DENISE ROBBINS & JOHN R. WENNERSTEN, *RISEING TIDES: CLIMATE REFUGEES IN THE TWENTY-FIRST CENTURY* (2017); Chapter 3 concerns “drowning countries” specifically. On concerns about the response to Venezuelans *see, e.g.*, Organization of American States, *New Report Warns Number of Venezuelan Refugees and Migrants Could Rise to 7 million in 2021* (Dec. 30, 2020), https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-128/20.

2. On South Sudanese refugees *see, e.g.*, Chris Matthews, *South Sudanese Refugees Struggling to Survive in Uganda’s Cities*, THE NEW HUMANITARIAN (Apr. 12, 2017), <https://www.thenewhumanitarian.org/feature/2017/04/12/south-sudanese-refugees-struggling-survive-uganda-s-cities>; on Japan *see, e.g.*, Naohiro Ogawa, *Population Aging and Immigration in Japan*, 20 ASIAN & PAC. MIGRATION J. 133 (2011); for a brief overview of demographic problems and the politics of migration in Europe *see, e.g.*, Paul Taylor, *Aging Europe needs the migrants it doesn’t want*, REUTERS (Dec. 1, 2014), <https://www.reuters.com/article/us-europe-demographics-idUSKCN0JF1KA20141201>.

3. While the “crisis” has been called unprecedented or drawn comparisons to the number of displaced persons during the Second World War, scholars dispute these claims statistically and question whether the “crisis” is less material than perceptual. *See, e.g.*, Leo Lucassen and Felicita Tramontana, *Migration in Historical Perspective*, OPENDEMOCRACY (Aug. 11, 2017), <https://www.opendemocracy.net/can-europe-make-it/leo-lucassen-felicita-tramontana/migration-in-historical-perspective>. Hein de Haas has also demonstrated that the number of *de jure* refugees has remained at about a stable 0.3 percent of the world’s population for decades. DE HAAS, *Refugees: A Small and Relatively Stable Proportion of World Migration* (Aug. 22, 2016), <https://heindehaas.blogspot.com/2016/08/refugees-small-and-relatively-stable.html>. This follows on earlier research demonstrating that migrant levels were relatively constant between 1960 and 2000, political “crises” aside. Mathias Czaika & Hein de Haas, *The Globalization of Migration: Has the World Become More Migratory?* 48 INT’L MIGRATION REV. 283 (2014).

the COVID-19 pandemic, widespread border closures interrupting migration flows have only added to the pressing importance of questions concerning the governance of migration and mobility.

Questions common to the law and governance applicable to all types of refugees and migrants have included: How can the global community keep migrants' movements safe and free from exploitation? What rights should or can migrants possess outside their countries of nationality or origin? How can migrants' movement to places in need of their labor and other contributions be reconciled with resistance to their presence? In essence, these concerns focus on two things: 1) how to fulfill the rights of migrants, or—in the absence of the clarity of what such rights are and when they need to be respected—ensure migrants' ethical treatment; and 2) how migration can be directed in a way that is most useful and equitable for both migrants themselves and for the economies, societies, and sovereign rights of destination States. Both the “migration crisis” of the last half-decade and the pandemic more recently have evidenced how poorly these issues are being addressed at an appropriate level for such cross-border concerns: that of international law and institutions, which, taken together, this Article defines as global migration governance.⁴

As Alexander Betts observes, “there is no formal or coherent multilateral institutional framework regulating States' responses to international migration.”⁵ At the same time, T. Alexander Aleinikoff writes that “there is no single, coherent body of norms that might be termed a regime of international migration law.”⁶ What political scientists call a “regime” of international law and institutional rules

4. International law is often characterized as part of global governance, despite arguments that they should be considered separate due to governance's greater flexibility. See Martti Koskenniemi, *Global Governance and Public International Law*, 37 KRITISCHE JUSTIZ 241, 243, 251 (2004) (conceptualizing governance as a “mindset” of “thinking” about international law in a “deformalized” way). This Article follows Alexander Betts and Lena Kainz's definition of global migration governance as “the norms and organizational structures that regulate States' and other actors' responses to migration.” Betts & Kainz, *The History of Global Migration Governance* (Oxford Refugee Studies Centre Working Paper Series No. 122 1, 2017), <https://www.rsc.ox.ac.uk/publications/the-history-of-global-migration-governance>. There are other, slightly different ways to understand the phenomenon that go beyond international legal and institutional activities. Antoine Pécoud, for example, adopts a definition at times of “global migration governance” that includes both formal international frameworks and the collective actions of individual States. His conception of a “[g]lobal forced immobility governance,” for example, is not the product of a “UN-sponsored declaration,” but “the multitude of ad hoc and often disconnected initiatives that, taken together, make for an implicit regime.” See Pécoud, *Philosophies of Migration Governance in a Globalizing World*, 18 GLOBALIZATIONS 103, 106–07 (2021). To distinguish frameworks encompassing both international law and institutions from both international law in and of itself and from “global law” in the form of trends in domestic law and administration, however, this Article adopts a definition that focuses on laws and institutions at the international level.

5. Alexander Betts, *Introduction: Global Migration Governance*, in GLOBAL MIGRATION GOVERNANCE 1 (Betts ed. 2011).

6. T. Alexander Aleinikoff, *International Legal Norms on Migration: Substance without Architecture*, INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 471 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds. 2007).

barely exists for migration. Such a regime may be understood, at best, as a less cohesive “regime *complex*”: a series of overlapping rules and institutions.⁷ Such “complexes” can possess some flexible features and even overcome political conflicts through such flexibility. But they come with the resultant pitfalls of a lack of clarity or the enforcement ability necessary to resolve large-scale global problems.⁸ “Complexes” therefore evince even greater problems of State influence than those that some critics see in the “flexibility” of norm-based global governance institutions in general.⁹ A “regime” does more clearly exist for providing rights to and resettling refugees—particularly those who fall under international legal definitions of a refugee (“statutory refugees”).¹⁰ Yet not only are refugee rights themselves often disregarded, but the distinction between migrant and refugee groups is frequently unclear in a way that makes the availability of protections to statutory refugees (as opposed to others) often relatively arbitrary.¹¹

Many migrants consequently face difficulties not unlike those of statutory refugees but lack the legal ability to avail themselves of refugee protections. Yet refugee protections remain their best or clearest option.¹² When migrants cannot obtain, or do not know to seek refugee protections, remaining avenues of international law and institutional support offer them much weaker support. With few additional legitimate pathways under international law, or facilitated by international institutions, migration thus has the additional effect of placing enormous strain on the refugee system, or of increasing pressure on—and increasing the acrimony of—domestic debates over regular or illegal immigration. In South Africa, for example, these difficulties have led to the characterization of the country’s asylum system as a “catch all” for all migration that has a tendency to be “abus[ed],” placing the rights of asylum-seekers in jeopardy.¹³

7. See Alexander Betts, *The Refugee Regime Complex*, 29 REFUGEE SURV. Q. 12 (2010).

8. See, e.g., Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSPECTIVES ON POL. 7 (2011); Karen J. Alter & Kal Raustiala, *The Rise of International Regime Complexity*, 14 THE ANN. REV. OF L. & SOC. SCI. 329 (2018); Karen J. Alter, *Comprehending Global Governance: International Regime Complexity vs. Global Constitutionalism*, 9 GLOB. CONSTITUTIONALISM 413 (2020).

9. See Koskenniemi, *supra* note 4, at 251.

10. Indeed, one scholar of migration governance goes so far as to say that “[w]hen it comes to human mobility, only refugees are the object of a regime.” Pécoud, *supra* note 4, at 2.

11. On the lack of clarity between these categories see, e.g., Heaven Crawley & Dimitris Skleparis, *Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe’s ‘Migration Crisis,’* 44 J. ETHNIC & MIGRATION STUD. 48 (2018).

12. For a discussion of the relative paucity of “migrant rights” for non-statutory refugees and ways that migrants have claimed and can claim rights under refugee and asylum law see *infra* Part I(A).

13. JONATHAN CRUSH, CAROLINE SKINNER & MANAL STULGAITIS, *RENDERING SOUTH AFRICA UNDESIRABLE: A CRITIQUE OF REFUGEE AND INFORMAL SECTOR POLICY* 5 (2017), <https://samponline.org/wp-content/uploads/2017/08/SAMP-79.pdf>.

The lack of clear international migration rules and effective international migration institutions is perhaps most visible in the recent stress placed on alternative regional or bilateral frameworks for governing migration. These frameworks have produced tensions between States over balancing the management of migrant movement with respect for migrant rights. An example is the EU's Dublin III Regulation, which mandated that asylum-seekers remain in their country of first arrival in the European bloc. This rule has been criticized for crowding asylum-seekers in Mediterranean States, angering those States' populations, leading other migrants to seek dangerous routes around those States, and producing hostility among States that were asked to share the "burden" of hosting these newcomers.¹⁴ Insufficiencies can also be seen in the recent EU-Turkey and EU-Libya "deals." In each, the EU—while still attempting to accommodate migrants' needs or desires to leave their home countries—nonetheless appeared to compromise those migrants' human rights by stationing them in the territories of rights-neglecting States rather than permit their entry onto EU soil.¹⁵ Further afield, US and Australian refusals to admit refugees, and their externalized staging of migrants on the Mexican border and nearby Pacific islands, respectively—despite valid claims of asylum—have evidenced a similar disavowal of international legal responsibilities for migrant acceptance.¹⁶

The ongoing difficulty of addressing protection and distribution problems for *all* types of migrants has resulted in a number of new ideas for the legal and institutional reform of the *global* system governing migration. These have led to the adoption of a new international instrument, the Global Migration Compact, and the rebranding of the International Organization for Migration ("IOM") as part of the UN, which have gone some way toward improving global migration governance.¹⁷ These ideas have also included more grandiose proposals, including advocacy for open borders or for development aid that is meant less to govern migration than to curtail it.¹⁸ Yet this Article argues that neither existing reforms nor more expansive proposals address a fundamental *political* problem that has continued to plague the migration regime: how to balance the irrepressible desire to migrate (and economies' need for migrant labor) against anti-migrant sentiment.

Improving migration governance therefore demands a new approach. In order to tackle the problem of political will, improvement demands a structure that does not merely require States that are migrant destinations—both in the "Global North" and States where treatment has been an even greater concern, such

14. For an analysis of the troubles with the Dublin Regulation *see generally* SUSAN FRATZKE, NOT ADDING UP: THE FADING PROMISE OF EUROPE'S DUBLIN SYSTEM (2015), <https://www.migrationpolicy.org/sites/default/files/publications/MP1e-Asylum-DublinReg.pdf>.

15. *See infra* Part I(C).

16. *Id.*

17. *See infra* Part II(A) and (B).

18. *See infra* Part II(C).

as South Africa or the Persian Gulf—to agree to place legal requirements on themselves.¹⁹ This structure must be reimagined in a way that helps shift destination States’ politics in order to induce them to arrive at such an agreement or to comply with such requirements. Moving toward such an approach could begin by becoming conscious of the roots of migration governance’s current struggles and of past achievements in both promoting migrant rights and directing movement, using history as a touchstone of the possible. As one option that takes this history as a relevant precedent, this Article proposes a system of global governance that appeals to destination States, but which ultimately creates *material* pressure on them to expand migrant admission and improve treatment in conformity with international law.

This proposal involves using international institutions to train and direct migrants to destinations within currently disadvantaged portions of the Global South, with the aim of rendering migration an attractive, enhanced tool of economic growth within these regions. Doing so would also allow this sponsored migration (and, consequently, its benefits) to be withheld if enforcement of improved migrant rights and treatment is not achieved. Such operations are neither unprecedented nor merely assume interest within the South. They build off aspects of the recent reforms of global migration governance, off examples of past successes in its history, and off existing Southern-led regional proposals.

Such a system could appeal to the interests of more recalcitrant destination States by initially redirecting some migration away from them. This redirection could ultimately increase migrant bargaining power relative to existing destinations as more States will need to improve their approach to, and treatment of, migrants to continue to compete for and attract what remains, for many countries, a critical labor force. Reframing immigration as “growth” or “development” for new destinations in the South could also contribute to a more positive image of migrants worldwide. In turning a historical precedent that

19. This Article defines “Global North” as principally long-wealthy economies in the North Atlantic, East Asia, and Australasia, with the “Global South” largely characterized by States with a postcolonial or quasi-colonial relationship with the North. For an overview of the origins, evolution of, and alternatives to, this terminology *see, e.g.*, Nour Dados & Raewyn Connell, *The Global South*, 11 CONTEXTS 12 (2012). While wealthy economies in, for example, the Gulf (*e.g.* Kuwait, Qatar, Saudi Arabia, and the United Arab Emirates) have become major migrant destinations, they are rarely classified as being within the Global North. Nevertheless, while these States are not as averse to migrant workers as those in the North, their treatment of migrants has been even more fraught. To that end, they must be considered *akin* to Global North States in this analysis. Thus, for the sake of consistency, this Article maintains traditional definitions of “Global North” while noting where similarly-situated States must be considered alongside it, rather than including them in the North or fashioning a new terminology. This approach is not unprecedented in discussing migration and has been employed by, *e.g.*, the World Bank. *See* World Bank Migration and Remittances Team, *Leveraging Migration for Economic Development: A Briefing for the World Bank Board*, 4–5 (2019), <http://documents1.worldbank.org/curated/en/167041564497155991/pdf/Leveraging-Economic-Migration-for-Development-A-Briefing-for-the-World-Bank-Board.pdf> (defining “Global North” as countries in the Organization for Economic Co-operation and Development, “OECD,” alongside “other high income countries”).

largely involved the sponsored migration of Europeans to the advantage of migrants from and within the Global South, moreover, this proposal would help reverse discriminatory injustices.

Of course, such an approach is not a panacea and invites numerous criticisms of its own. It presents its own risks, including, *inter alia*, Northern distrust of its ultimate aims and a possible increase in overall migration that could dilute improvements in migrant bargaining power. The proposed system might appear designed to promote South-South migration as another means to externalize migrants “offshore” in the South. It could stoke culturalist anti-migrant sentiment in the South and lead the system to break down. This Article, however, will present evidence to dispute such risks and counterarguments. Many such risks, moreover, would not be newly created, but are current problems with global migration governance that might continue.

This proposal is, moreover, merely one suggestion for a means to reform global migration governance in a way that addresses political opposition to its aims by using legal and administrative tools to reshape the contours of politics themselves. This Article’s critiques of the present system of global migration governance and its reforms, as well as its description of the prehistory of contemporary migration governance, may suggest other options. Even beyond migration, reforming legal and institutional architectures to undermine the barrier of “political will” could present a broader model for reform applicable to other complex and contradictory global governance regimes, such as the regime for climate change.

The Article proceeds in four additional Parts. Part I reviews in greater detail the difficulties with the structures of contemporary international migration law and governance. Part II discusses ongoing and proposed attempts to reform this system, and their drawbacks—in particular, their failure to engage the material realities and politics of anti-migration. Part III introduces the forgotten history of global migration governance as a means to consider what models it offers for more effective reforms in the present, and what warnings it offers as well. Part IV distills the Article’s normative suggestion from this historical background. It argues for the potential benefits of reemphasizing a system of assisted training, transportation, and placement for migrants, but by doing so among disadvantaged States in the Global South. This Part also explains how this system could provide a material basis for States worldwide to improve the overall condition of migrant rights and distribution. The Part, finally, defends this proposal against objections, concluding that reimagining global migration governance in such a way would represent a just historical re-appropriation of a discriminatory tool that could be wielded with anti-discriminatory intent.

I.

THE MESS OF MODERN INTERNATIONAL MIGRATION LAW AND GLOBAL
MIGRATION GOVERNANCE

The greatest fundamental obstacle to any system governing migration at an international level is that the admission, or rejection, of new populations into an area within a State's borders has long been considered one of States' core sovereign prerogatives.²⁰ This conception of sovereignty not only impacts the problem of migrant distribution and motivates many of the dangerous actions migrants often take to circumvent border controls. States also claim broad rights to define citizenship, and the rights and privileges it entails, diminishing any ability to govern migrant treatment at a level beyond individual States.

While this notion of sovereignty presents difficulties from the perspective of international law's regulation of how States engage migrants, it may be mitigated by international *institutions'* ability to work cooperatively with States, providing managerial services and relief to migrants and refugees. Yet just as laws impacting all migrants remain more limited in both scope and application than laws concerned with statutory refugees, international institutions concerned with all migrants have hardly proven as capable as those performed by their refugee-oriented counterparts. This Part reviews the limitations of the legal and institutional systems that have constituted global migration governance up to the most recent drive for major reforms, which commenced with dawning awareness of the "global migration crisis" in 2015.

A. International Migration Law: Limitations and Contradictions

International law, as it concerns all migrants, is chiefly focused on their protection rather than their distribution. Yet measures that mandate the acceptance of migrants, permit their rejection or deportation, or incentivize or disincentivize migration inherently shape both distribution questions and problems as well. Despite challenges to its implementation, one of the strongest exceptions to States' assertions of sovereignty on migrant acceptance and treatment has been the 1951 Refugee Convention. Relatively few forced migrants clearly fall under the definition of "refugee" used by the Convention, which emphasizes the need not only for the putative refugee to have crossed an international border, but also for "a well-founded fear of persecution for reasons of race, religion, nationality,

20. Exemplary in the context of the US is *Nishimura Eiku v. United States*, 142 U.S. 651, 659 (1892), proclaiming that "[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." See also in a European context *Chahal v. United Kingdom*, App. No. 22414/93, Eur. Ct. H.R. (1996), ¶ 73, noting a right "as a matter of well-established international law...to control the entry, residence and expulsion of aliens." For a general discussion of the centrality of border control to sovereignty, see also Catherine Dauvergne, *Sovereignty, Migration, and the Rule of Law in Global Times*, 67 MOD. L. REV. 588 (2004).

membership of a particular social group, or political opinion,” in order to be gain the right to legal entry and be protected from return and other deprivations.²¹

While there is room for this definition’s interpretation, such room has also led to variance in national courts’ understanding of who falls into these groups.²² Moreover, the definition requires a fear of *persecution* connected to these categories, a concept that can be highly indeterminate.²³ Consequently, the definition has been criticized not only for omitting persons internally displaced within a State, but also potentially those fleeing common forced migration-inducing phenomena that do not amount to the overt discrimination that may seem implied in the Convention definition, including general violence, economic collapse, famine, or—the subject of an increasing number of critiques—disasters and long-term degradation of the habitability of territory associated with climate change.²⁴ According to one estimate, the Convention definition of “refugee” could exclude 80 percent of forced migrants, including those fleeing general violence, economic collapse, or environmental catastrophe.²⁵ Even the willingness to concede rights to the relatively small number of statutory refugees covered by the 1951 treaty appears so fragile that many refugee rights advocates fear proposing to expand the treaty’s definition. They worry that doing so could open all of international refugee law for renegotiation, to the great disadvantage of statutory refugees.²⁶

Migrants who cannot make out a case for inclusion under the refugee definition may be able to receive aid thanks to the “good offices” of the United Nations High Commission for Refugees (“UNHCR”), an organization which the next Section will discuss in more detail. Yet UNHCR provides such aid on the basis of cooperation with States; States have few direct obligations to other migrants at international law. States have been willing to concede rights at international law to *some* migrants who do not facially fall under this definition only on a more limited basis. The General Agreement on the Trade of Services

21. Convention Relating to the Status of Refugees, Art. 1, Jul. 28, 1951, 189 U.N.T.S. 153 [hereinafter 1951 Convention or Refugee Convention].

22. For example, “membership in a particular social group” has required an “immutable characteristic” in the US and Canada but being set off as distinct from the rest of society in Australia. See Joseph Rikhof & Ashley Geerts, *Protected Groups in Refugee Law and International Law*, 8 LAWS 25, 27-28 (2019).

23. See, e.g., José H. Fischel de Andrade, *On the Development of the Concept of ‘Persecution’ in International Refugee Law*, 3 ANUÁRIO BRASILEIRO DE DIREITO INTERNACIONAL 114, 123 (2008) (“since ‘persecution’ has not been defined in normative terms in International Refugee Law, its meaning has been developed by a substantial body of academic, administrative and judicial interpretations, there being no uniform scholarly definition or practice.”).

24. For a look at the difficulties of applying the Refugee Convention definition to victims of climate change in particular see, e.g., Jane McAdam, *Climate Change Displacement and International Law, Side Event to the High Commissioner’s Dialogue on Protection Challenges, 8 December 2010, Palais des Nations, Geneva*, <https://www.refworld.org/pdfid/4d95a1532.pdf>.

25. STEPHAN HOBE, EINFÜHRUNG IN DAS VÖLKERRECHT 458 (2008).

26. See, e.g., Luara Ferracioli, *The Appeal and Danger of a New Refugee Convention*, 40 SOC. THEORY & PRAC. 123 (2014).

(“GATS”), for example, provides some guarantees to relatively elite economic migrants.²⁷ Treaties negotiated by the International Labor Organization (“ILO”) also provide a number of migrant worker rights, although they are poorly ratified.²⁸ The Convention on the Rights of All Migrant Workers and their Families (the “Migrant Workers Convention”) could provide protections to the largest number of migrants, providing migrants with rights to labor organization, equal standing with host State nationals, and equal rights to some welfare benefits.²⁹ Yet its focus remains limited to “workers” engaged in “remunerative activity” and those related to them, potentially excluding many forced migrants unable to locate such positions.³⁰ It is also rarely applicable. The instrument has lingered as the least ratified major human rights treaty, with only a small number of States, all in the Global South, acceding since its adoption in 1990.³¹

Of course, treaties and norms of International Human Rights Law (“IHRL”) that are not specific to migrants nonetheless provide numerous rights applicable or relevant to migrants.³² As such, the broad and (in theory) universally applicable provisions available in human rights treaties have led academics and practitioners alike to try to adopt existing instruments that are not necessarily focused on non-refugee migrants (or focused on limited subsets of them) as tools for the admission and protection of a wider range of migrant groups. Advocates have used IHRL to, for example, argue for the rights of asylum-seekers (individuals seeking refugee status who are not necessarily clearly covered by the Refugee Convention in all cases).³³ The Universal Declaration of Human Rights (“UDHR”), some of which is now considered to possess the status of binding customary international law, or even to exist as a general principle of international law, also provides a right to asylum independent of the Refugee Convention.³⁴ *Non-refoulement*, the norm of

27. Rey Koslowski, *Global Mobility and the Quest for an International Migration Regime*, 21 *CTR. FOR MIGRATION STUD. SPECIAL ISSUES* 114, 114–15 (2008).

28. On their ratification see Ryszard Cholewinski, *Human Rights of Migrants: The Dawn of a New Era?* 24 *GEO. IMMIGR. L. J.* 585, 585 (2010).

29. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Arts. 22, 25, 26, 27, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter *Migrant Workers Convention*].

30. *Id.* at Art. 2(1).

31. On its ratification status see Martin Ruhs, *Rethinking International Legal Standards for the Protection of Migrant Workers: The Case for a “Core Rights” Approach*, 111 *AJIL UNBOUND* 172, 173 (2017).

32. For a discussion of all the human rights treaties applicable to migrants, see generally Cholewinski, *supra* note 28.

33. For discussions of the rights of asylum seekers vis-à-vis the Refugee Convention see, e.g., Alice Edwards, *Human Rights, Refugees, and the Right to Enjoy Asylum*, *INT’L J. REFUGEE L.* 293, especially 303 (2005) (noting little overt application of the Refugee Convention to asylum-seekers); Ryszard Cholewinski, *Economic and Social Rights of Refugees and Asylum Seekers in Europe*, 14 *GEO. IMMIGR. L.J.* 709 (2000).

34. Universal Declaration of Human Rights, G.A. res. 217A (III), Art. 14(2) (10 Dec. 1948) [hereinafter *Universal Declaration*]. For a discussion of the Universal Declaration’s consideration as

prohibition on return, is present in a number of more concretely binding human rights instruments as well, and can be (and has been) raised explicitly for similar purposes of protection.³⁵

To some extent, the use of IHRL for migrant protection has been so successful that such protections have extended even beyond those formally seeking refuge. Not only has the European Court of Human Rights (ECtHR) found availing claims that asylum-seekers enjoyed rights until their status was determined; UN human rights bodies have found these rulings persuasive and have even surpassed the ECtHR in their protectiveness of asylum-seekers.³⁶ The ECtHR has also taken its logic beyond asylum-seekers whose status is pending, protecting even failed asylum-seekers from removal or even mandating prospective asylum seekers' entry.³⁷ In *Hirsi Jamaa v. Italy*, it held that because migrant vessels' passengers could *theoretically* seek asylum, they therefore enjoyed asylum-seekers' right of *non-refoulement*, or non-return, and could not be "pushed back" from Europe by authorities.³⁸

Yet asylum-seekers' rights still have limitations as a tool for all migrants: they still often only extend to the point at which authorities determine whether the seeker can, or cannot, be considered a refugee.³⁹ To the extent they are applied

a form of customary international law *see* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 317–51 (1996). For its discussion of asylum specifically *see id.* at 346.

35. *See, e.g.*, the human rights treaties in which a right of *non-refoulement* is present listed in Off. of the High Comm'r for Hum. Rts., *The principle of non-refoulement under international human rights law* (2018), <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>.

36. For cases of the ECtHR applying rights to asylum seekers *see, e.g.*, *M.A. v. Cyprus*, app. no. 41872/10, 2013-IV Eur. Ct. H.R. 193 (right not to be detained while asylum status pending); *M.S.S. v. Belgium and Greece*, app. no. 30696/09, 2011-I Eur. Ct. H.R. 255 (extreme deprivation of economic and social opportunities in a country could constitute grounds not to transfer an asylum-seeker there). On the application the treatment of such rights by UN bodies *see* Başak Çalı, Cathryn Costello, & Stewart Cunningham, *Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies*, 21 GER. L.J. 355 (2020).

37. For an example of the former *see N. v. the United Kingdom*, app. no. 25904/05, 2008-III Eur. Ct. H.R. 227 (acknowledging the possibility of blocking a failed asylum-seeker's deportation for health reasons).

38. *Hirsi Jamaa & Others v. Italy*, App. No. 27765/09, 2012-II Eur. Ct. H.R. 37, ¶¶ 133, 157; *see also* Concurring Opinion of Judge Pinto du Albuquerque ("A person does not become a refugee because of recognition, but is recognised because he or she is a refugee. As the determination of refugee status is merely declaratory, the principle of non-refoulement applies to those who have not yet had their status declared [asylum-seekers] and even to those who have not expressed their wish to be protected. Consequently, neither the absence of an explicit request for asylum nor the lack of substantiation of the asylum application with sufficient evidence may absolve the State concerned of the non-refoulement obligation in regard to any alien in need of international protection").

39. *See, e.g.*, *N. v. the United Kingdom*, app. no. 25904/05, 2008-III Eur. Ct. H.R., ¶¶ 34, 42 (noting the extremely limited circumstances in which ill health would protect a failed asylum-seeker from return). Beyond Europe, pushbacks arguably have even more legal support. These include the

prospectively—such as in situations involving “pushbacks”—they can depend on a finding of at least “functional” jurisdiction or some form of a State’s “effective control.”⁴⁰ This requirement has led to unintended consequences like States de-territorializing portions of the sea, arguing that they have no obligation to welcome vessels filled with potential asylum-seekers on “territory” that is not their own.⁴¹ One consequence of the *Hirsi Jamaa* ruling was States that previously engaged in “pushbacks” also increasingly cooperated with States of origin to restrain movement in the name of preventing smuggling instead.⁴² One scholar asserts that for 99 percent of even those genuinely seeking refuge in the Global North, protection was unavailable without reaching a State’s territory where they could make an asylum claim.⁴³

Asylum-seekers’ rights also tend to be rarely respected fully by many States even where those claims have been made.⁴⁴ One difficulty is that both definitions of *non-refoulement* and the right of asylum are grounded in “persecution,” whether explicitly in the UDHR, or implicitly in the purpose of other human rights treaties, such as the Convention Against Torture (“CAT”), in which *non-refoulement* is also found.⁴⁵ As such, it can be difficult to apply these definitions to migrants with different motivations for their flight or movement, just as it is in applying the terms of the Refugee Convention to those who cannot show a “persecution” ground for refugee status, as discussed above.⁴⁶

U.S. Supreme Court’s ruling in *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993)—despite a different finding by the Inter-American Commission on Human Rights—and analogous Australian cases. See Annick Pijnenburg, *Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control?* 20 HUM. RTS. L. REV. 306, 309, 317 (2020).

40. See Tom De Boer, *Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection*, 28 J. REFUGEE STUD. 118 (2015) (exploring how far extraterritorial jurisdiction can be taken in protecting migrants who are prospective asylum-seekers approaching by sea).

41. See Seline Trevisanut, *The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea*, 27 LEIDEN J. INT’L L. 661 (2014). The ability to de-territorialize was not necessarily superseded by the *Hirsi Jamaa* case, which neither necessarily applies outside the jurisdiction of the European Court of Human Rights, nor addresses situations not arising from the territorial disposition of vessels belonging to the State with a purported duty of *non-refoulement*. *Id.* at 673.

42. See Patrick Müller & Peter Slominski, *Breaking the legal link but not the law? The externalization of EU migration control through orchestration in the Central Mediterranean*, J. EURO. PUB. POL. (published online, 2020).

43. DAVID FITZGERALD, REFUGEE BEYOND REACH: HOW RICH DEMOCRACIES REPEL ASYLUM SEEKERS 3 (2019).

44. For a relatively recent consideration of this lack of respect see, e.g., Colin Harvey, *Time for Reform? Refugees, Asylum-seekers, and Protection Under International Human Rights Law*, 34 REFUGEE SURV. Q. 43 (2015).

45. Universal Declaration, *supra* note 34, at Art. 14(2); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

46. *N. v. the United Kingdom*, app. no. 25904/05, 2008-III Eur. Ct. H.R., ¶ 46 emphasized the need for a “risk of deliberate, politically motivated, ill-treatment” to compel *non-refoulement*. Concerns about the persecution standard have also been raised in scholarship concerning migrant

Interpretations of IHRL are also not guaranteed to stretch in migrants' favor when countervailing concerns appear to be at stake.⁴⁷ Already, the ECtHR appears to be limiting the kind of expansive approach it took to migrant rights in *Hirsi Jamaa*, indicating that the right against "mass expulsion" relied on by migrants facing deportation cannot apply where migrants did not avail themselves of legal pathways for entry. A 2020 decision, *N.D. & N.T. v. Spain*, concerned migrants rushing a border fence, resulting in the court limiting the right against expulsion due to its concerns about "managing and protecting borders" in such a situation.⁴⁸ In doing so, the ECtHR seemingly showed its own susceptibility to fears about what it termed "'new challenges' facing European States in terms of immigration control as a result of the economic crisis and recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East."⁴⁹ These concerns appeared especially salient to the court when the migrants' actions looked like what one opinion in an earlier decision in the case characterized as an "invasion."⁵⁰ Even actors in the human rights space have motivations for *not* expanding interpretations of IHRL provisions. Like refugee advocates, human rights advocates may object to attempts to stretch standards like the CAT's to apply to many new situations involving a migrant's risk of return—since doing so diminishes support for the implementation of the treaty in even more extreme situations.⁵¹

In light of difficulties with IHRL, scholars have made proposals to advance migrant rights using additional areas of law, such as the doctrine of State responsibility.⁵² Yet as the foregoing discussion suggests, one overarching

protection. See Cathryn Costello & Itamar Mann, *Border Justice: Migration and Accountability for Human Rights Violations*, 21 GERMAN L. J. 311, 331 (2020). Shirley Llain Arenilla, *Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States*, 15 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 283, 291 (2015) notes that interpretations of the persecution standard as applied to refugees could also impact asylum-seekers, given asylum-seekers are prospective refugees. In the U.S., she goes on to demonstrate, prevention of deportation has tended to depend on making out a narrowly-construed claim about the risks of persecution.

47. For example, one critic of the decision in *N. v. the United Kingdom*, app. no. 25904/05, 2008-III Eur. Ct. H.R., alleges that its narrowly constructed understanding of "persecution" was premised on concerns about "resources," because of the idea that a more expansive standard for upholding *non-refoulement* involving "socio-economic" risks would open the "floodgates" to migrants. See Virginia Mantouvalou, *N v UK: No Duty to Rescue the Nearby Needy?* 72 MODERN L. REV. 815 (2009).

48. *N.D. & N.T. v. Spain*, App. Nos. 8675/15 and 8697/15, Judgment (Eur. Ct. Hum. Rts., Feb. 13, 2020).

49. *Id.* at ¶ 169.

50. *N.D. & N.T. v. Spain*, App. Nos. 8675/15 and 8697/15, Judgment (Eur. Ct. Hum. Rts., Oct. 3, 2017), Partly Dissenting Decision of Judge Dedov.

51. There is a broader concern about the "proliferation" of the expansion of human rights norms, as well as their expansive interpretation into which such worries fit, including the proliferation of human rights in the context of migration. See, e.g., Rosa Freedman & Joseph Mchangama, *Expanding or Diluting Human Rights? The Proliferation of United Nations Special Procedures Mandates*, 38 HUM. RTS. Q. 164 (2016).

52. See, e.g., Pijnenburg, *supra* note 39, at 307.

problem to which the considerable amount of law with any potential application to migrants speaks is the tendency for redundancy and overlap. Attempting to expand the scope of any single area of this law, whether refugee law or IHRL, only exacerbates the issue. This is coupled with the fact that treaties such as the GATS, potentially applicable ILO agreements, and many IHRL conventions are hardly *lex specialis* concerning migrant treatment. As a consequence, the many instruments relevant to migration may be overlooked or ignored in considering the rights of migrants compared to more specific provisions offered to, for example, qualifying migrants under the Refugee Convention. The complexity of this legal corpus may also have a tendency to promote confusion about duties owed to migrants. Vincent Chetail consequently describes the totality of international migration law as a “deconstructionist design of complexity and contradiction,” while Aleinikoff characterizes it as “substance without architecture.”⁵³ In effect, international migration law is a severe victim of international law’s overall fragmentation problem.⁵⁴

This web of law cannot only be overly complex, but contradictory. An example of an instance in which laws relevant to migrants may work at cross-purposes concerns the treatment of migrant vessels at sea. The UN Convention on the Law of the Sea imposes a duty of rescue for such vessels. But if those vessels are potential smuggling operations, doing so could violate the requirements of the Protocol against the Smuggling of Migrants by Land, Sea and Air, which prohibits assistance of migration for profit.⁵⁵ Additionally, opponents of rescue operations claim such assistance *incentivizes* smuggling operations.⁵⁶

This complex and contradictory body of international law applicable to migration can contribute to perverse incentives among States, as well. As Jaya Ramji-Nogales demonstrates, any provisions designed to protect migrants could also effectively result in harm; when the availability of protections seems dependent on migrants reaching certain destinations, migrants might feel compelled to reach those locations without States providing safe pathways to transit there.⁵⁷ In other words, broad interpretations of IHRL in favor of migrant rights upon their arrival in States may actually convince many to attempt to make

53. Vincent Chetail, *The Architecture of International Migration Law: A Deconstructionist Design of Complexity and Contradiction*, 111 AJIL UNBOUND 18 (2017); Aleinikoff, *supra* note 6, at 467.

54. For an overview of the phenomenon and attempts to reconcile conflicting specialty areas of law see Martti Koskeniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 1–30 (2007).

55. Compare United Nations Convention on the Law of the Sea, Art. 98, Dec. 10, 1985, 1833 U.N.T.S. 3 and generally Protocol against the Smuggling of Migrants by Land, Sea and Air to the United Nations Convention Against Transnational Organized Crime, G.A. res. 55/25, Annex III (8 Jan. 2001).

56. For examples of such claims, see Eugenio Cusumano, *Migrant rescue as organized hypocrisy: EU maritime missions offshore Libya between humanitarianism and border control*, 54 COOP. & CONFLICT 3 (2018).

57. Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L. J. 609 (2017).

dangerous maritime crossings or other forms of perilous journey. The former also puts migrants at greater risk because of the lack of clarity about the duty of rescue on the seas. The potential of rights to attract migrants has also led States to decline to extend such rights, because they might serve as “incentives” to movement.⁵⁸

Recent academic initiatives have sought to address the problems of international migration law’s complexities and contradictions through what is effectively a restatement approach. Scholars have compiled guides from amalgams of various migrant-relevant duties that States are said to owe to *all* individuals under their responsibility or control under treaties concerning human rights, labor law, the law of the sea, and other areas. They aim to present a more cohesive and coherent version of “international migration law” that States would, in theory, more readily respect.⁵⁹ This is a worthwhile effort. Yet sorting these bodies of law into an integrated narrative of what such a corpus “is” may still prove insufficient. Structural contradictions between these bodies of law in some cases continue to persist beyond the tidy phrasing of any restatement. They may also prove to have limited relevance in practice, given that many of the individual provisions that make up these restatements—particularly those derived from human rights law—face their own difficulties with ratification, adherence, and enforcement.⁶⁰

B. International Organizations and Migration: Limited and Overlapping Applications

International institutions have, at times, proven to be a somewhat more successful means to provide the benefits of global migration governance. This success can come even without imposing feared infringements on sovereignty, which may be seen as inherent in international legal requirements. Of course, such institutions can serve as monitors of the implementation of extant treaties that, for example, protect migrant rights, in which case, they may be seen as *facilitating* such infringements on sovereignty. Yet international institutions also often have oversight, aid, and diplomatic functions that allow them to engage in problem-solving in ways that are quite distinct from the adversarial nature of legal

58. For examples from Europe, see Thomas Gammeltoft-Hansen & Nikolas F. Tan, *The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy*, 5 J. MIGRATION & HUM. SEC. 28, 39–40 (2018). In the Americas, the Organization of American States’ autonomous human rights body has documented the US engaged in detention as a deterrent. See INTER-AMERICAN COMM’N ON HUM. RTS., HUMAN RIGHTS SITUATION OF REFUGEE AND MIGRANT FAMILIES AND UNACCOMPANIED CHILDREN IN THE UNITED STATES OF AMERICA 37 (2015), <https://www.oas.org/en/iachr/reports/pdfs/refugees-migrants-us.docx>.

59. Betts & Kainz, *supra* note 4, at 4 (2017). This effort has included a number of academic publications trying to reframe relevant provisions from these areas of law as a cohesive whole. See, e.g., VINCENT CHETAIL, INTERNATIONAL MIGRATION LAW (2014); FOUNDATIONS OF INTERNATIONAL MIGRATION LAW (Brian Opeskin et al. eds. 2012).

60. On the general inadequacy of human rights as a tool for addressing labor migration, for example, see Yash Ghai, *Migrant Workers, Markets, and the Law*, in GLOBAL HISTORY AND MIGRATIONS 179 (Wang Gungwu ed. 1997).

commitments' enforcement. Such tools give these institutions means to skirt the problem of jealously guarded sovereignty in the service of global migration governance.⁶¹ Still, they have not proven efficacious at doing so for all, or even most, migrants.

Through its mandate—which is an interpretation of its statutory authority, coupled with tasks conferred on the organization by the General Assembly—UNHCR has been able to provide oversight of the rights and treatment of many forced migrants not included in the Refugee Convention definition.⁶² It has even been able to articulate more expensive definitions of refugee law.⁶³ The organization even engages in the distributary function of negotiating and facilitating refugee resettlement beyond countries of first refuge. The ILO also oversees some conditions of labor migration.⁶⁴ But for the vast majority of the world's migrants, there is no body comparable to UNHCR engaging in both aid and legal advocacy on a large scale.

The closest such body, the IOM, describes itself as the “leading inter-governmental organization in the field of migration.”⁶⁵ It does ostensibly engage in some concern with migrant rights and conditions of migration.⁶⁶ The IOM can also “discipline” State officials into the acceptance of its professional “norms” of migration control.⁶⁷ It also, at times, smooths disagreements between States over migrant movement.⁶⁸

But for the last several decades the IOM's operations have, like UNHCR's, focused on emergency humanitarian assistance—which can largely overlap with refugee aid—to the exclusion of migrants as a whole.⁶⁹ The IOM's interest in

61. See Antoine Pécoud, *Introduction: The International Organization for Migration as the New 'UN Migration Agency*, in *THE INTERNATIONAL ORGANIZATION FOR MIGRATION: THE NEW 'UN MIGRATION AGENCY' IN CRITICAL PERSPECTIVE* 7 (Martin Geiger & Antoine Pécoud eds. 2020).

62. For the “core” of the UNHCR's mandate see Statute of the Office of the United Nations High Commissioner for Refugees, G.A. res. 428 (V) (14 Dec. 1950); for the extent to which UNHCR regards its mandate as extending beyond this statute see, e.g., UNHCR Division of International Protection, Note on the Mandate of the High Commission of Refugees and his Office (Oct. 2013), <https://www.unhcr.org/en-us/protection/basic/526a22cb6/mandate-high-commissioner-refugees-office.html>.

63. See INGO VENZKE, *HOW INTERPRETATION MAKES INTERNATIONAL LAW* 114–32 (2012).

64. Khalid Koser, *Introduction: International Migration and Global Governance*, 16 *GLOB. GOVERNANCE* 301, 308 (2010).

65. International Organization for Migration, *About IOM*, <https://www.iom.int/about-iom>.

66. See Pécoud, *supra* note 61, at 12, 14.

67. *Id.* at 8.

68. *Id.*

69. See Francesca Fauri, *European migrants after the Second World War*, in *THE HISTORY OF MIGRATION IN EUROPE: PERSPECTIVES FROM ECONOMICS, POLITICS, AND SOCIOLOGY* 120 (Fauri ed. 2014); Betts & Kainz, *supra* note 4, at 2 (demonstrating increasing attention to humanitarian crises in the IOM's predecessors). On the largely emergency character of IOM activity today see SUSAN MARTIN, *INTERNATIONAL MIGRATION: EVOLVING TRENDS FROM THE EARLY TWENTIETH CENTURY TO THE PRESENT* 143 (2014) (noting that, in 2011, well over half of the IOM budget was devoted to

migrant rights is also not a formal mandate.⁷⁰ Unlike UNHCR, the IOM has historically been cut off from the UN system and its human rights mechanisms and guarantees. This division has led to tensions between the IOM and other multilateral bodies that have claimed responsibilities for migration—such as the UN and ILO—that focus more on such rights.⁷¹ Such tensions have included, for example, the UN’s Special Rapporteur for Migrant Rights expressing concern about the extent to which the IOM’s operations do not conform with IHRL and human rights norms.⁷²

One important reason for such concern is that the organization has sometimes served as a sort of “subcontractor” for its most financially influential member States’ border and migration control activities, and even stands accused of doing their “dirty work” involving forced deportation and detention.⁷³ As Jan Klabbers has summarized, the organization provides “tailor made solutions” for members, rather than holding a “regulatory mandate” over them.⁷⁴ In other words, where it is most efficacious at managing migration—at least from the perspective of many individual States—the IOM has not only demonstrated a lack of concern for migrant rights, but also even stood in the way of the best or most just distribution of migrants. To this problem could be added the IOM’s concern, when focused on regular migration rather than emergencies, with providing migrants in the service of labor needs over its concern with their rights.⁷⁵ These issues call into question the IOM’s capability to balance core concerns of global migration governance that are at the heart of the “migration crisis.”

Regional associations or supranational entities are often taken as models for what can be achieved at the larger international institutional level, or as means to provide a local form of international governance instead. Yet as the fate of the EU

emergency assistance, with funds for activities conceivably related to migration management being at most, one-third of the emergency budget, or one-sixth of the IOM budget as a whole). MEGAN BRADLEY, *THE INTERNATIONAL ORGANIZATION FOR MIGRATION: CHALLENGES, COMMITMENTS, COMPLEXITIES* 6, 9 (2020) (noting that many of the priorities the IOM adopted in 2007 related to “forced migration,” specifically, that emergence assistance has grown “dramatically” since 2010, and that humanitarian work comprises the majority of its activity).

70. *Id.* at 2.

71. For more see Part II(B), *infra*.

72. See François Crépeau, *Rep. of the Special Rapporteur on the human rights of migrants* 18, U.N. Doc. A/68/283, (Aug. 5, 2013).

73. Kristy Siegfried, *How will joining the UN change IOM?* NEW HUMANITARIAN (Aug. 12, 2016), <https://www.thenewhumanitarian.org/analysis/2016/08/12/how-will-joining-un-change-iom>; on IOM border management see Rutvica Andrijasevic & William Walters, *The International Organization for Migration and the International Government of Borders*, 28 *SOC’Y & SPACE* 977 (2010); on “subcontracting” see Sandra Lavenex, *Multilevelling EU external governance: the role of international organizations in the diffusion of EU migration policies*, 42 *J. ETHNIC & MIGRATION STUD.* 554 (2016).

74. Jan Klabbers, *Notes on the ideology of international organizations law: The International Organization for Migration, state-making, and the market for migration*, 32 *LEIDEN J. INT’L L.* 383, 384 (2019).

75. Pécoud, *supra* note 61, at 11.

system illustrates all too well, these regional associations have had what scholars characterize as “ambiguous” success at best.⁷⁶ While it has relatively successfully implemented internal freedom of movement, the EU has remained riven with tensions over the distribution of migrants arriving from outside the bloc since the 2015 breakdown of the Dublin Regulation. Non-frontline States have viewed the EU’s “burden-sharing” requirements to accept migrants as an affront to their sovereignty—a division borne out in legal disputes that erupted over the Dublin requirements.⁷⁷ These divisions have persisted in debates over the reform of the Dublin system more recently.⁷⁸

The European Commission’s September 2020 proposal for a new “EU Migration Pact” allowed States to avoid mandatory “burden-sharing” by participating only in shared migrant *removal* efforts.⁷⁹ This compromise proved dissatisfactory for lawmakers on either side of the “burden-sharing” debate and humanitarians alike.⁸⁰ The proposal also demonstrates that the EU plans to sidestep the debate over distribution by continuing to induce outside States to help it restrict migrants’ arrival extraterritorially (as the next Section describes in more detail).⁸¹ In effect, the EU reproduces many of the problems with the form of migration governance practiced by the IOM—with its deference to reluctant States on distribution and limited concern for migrant’s rights—and thus hardly serves as an effective replacement for it even within its own region.

76. See, e.g., Sandra Lavenex, Terri E. Givens, Flavia Jurje & Ross Buchanan, *Regional Migration Governance*, in THE OXFORD HANDBOOK OF COMPARATIVE REGIONALISM (Tanja A. Börzel & Thomas Risse eds. 2016). On the EU as “most comprehensive regime” see *id.* at 461.

77. See Jason Mitchell, *The Dublin Regulation and its Systemic Flaws*, 18 SAN DIEGO L. J. 295 (2017).

78. See, e.g., Bernardo de Miguel & María Martín, *Spain rejects EU migration plan for not including relocation quotas*, EL PAÍS (June 23, 2020), https://english.elpais.com/international/2020-06-23/spain-rejects-eu-migration-plan-for-not-including-relocation-quotas.html?ssm=TW_CC (discussing Spain helping to forge a bloc of southern European States to push for more “burden-sharing” of migrant hosting within the EU).

79. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, at 5-6, COM (2020) 609 (Sept. 23, 2020) [hereinafter ‘EU Migration Pact proposal’].

80. Christopher Pitchers, *EU’s new migration pact comes under the spotlight with ministers amid internal divisions*, EURONEWS (Oct. 8, 2020), <https://www.euronews.com/2020/10/08/eu-s-new-migration-pact-comes-under-the-spotlight-with-ministers-amid-internal-divisions>; Ana Lazaro, *European Union’s proposed new migration pact generates dissatisfaction on all sides*, EURONEWS (Sept. 26, 2020), <https://www.euronews.com/2020/09/26/eu-migration-pact-will-institutionalise-xenophobia-claims-mediterranean-rescue-group>; *Member states to clash over the EU’s new migration pact*, EURACTIV (Sept. 24, 2020), <https://www.euractiv.com/section/politics/news/member-states-to-clash-over-the-eus-new-migration-pact/>.

81. EU Migration Pact proposal, *supra* note 79, at 17–24. In addition to funding and training to third States that host migrants, the EU also plans to grant visas to their nationals as a “positive incentive” for cooperation. *Id.* at 23–24.

Beyond Europe, many regional initiatives hardly extend beyond paper commitments.⁸² The Economic Community of West African States (ECOWAS) has been among the most acclaimed for successfully promoting free movement.⁸³ But its successes in influencing national-level legislation have mainly been in promoting short-term border crossings, rather than the rights of longer-term migrants.⁸⁴ Nor is it always clear how regional efforts would scale to tackle global problems. While regional agreements in Africa and Latin America had already pioneered expansive definitions of “refugee” in the 1970s and 80s, such definitions hardly spread outside of such initiatives, let alone be adopted in the Global North.⁸⁵

It is also not always clear, moreover, how regional initiatives would function together to address transregional migration. The interregional dynamics of Africa-Europe migration, for example, have often been managed via *international* bodies, such as the IOM, with all the attendant problems described above.⁸⁶ Given European influence within the IOM, and the power dynamic between the EU and regional organizations in the Global South, cooperation often takes the form of representing Northern interests.⁸⁷ The EU has tended, for example, to prioritize its desire to restrict migration to the North and “securi[ng]” itself from migrants over promoting inter-regional cooperation to help further African attempts at integration through intra-continental migration.⁸⁸ The friction between these approaches has helped lead the EU to move away from partnerships with other

82. Lavenex et al., *supra* note 76, at 473.

83. Eva Dick & Benjamin Schraven, *Regional Cooperation on Migration and Mobility: Insights from two African regions*, in 2 PROCEEDINGS OF THE AFRICAN FUTURES CONFERENCE 102, 112 (2019).

84. *Id.* at 112, 115. See also ALEXANDRE DEVILLARD, ALESSIA BACCHI & MARION NOACK, A SURVEY ON MIGRATION POLICIES IN WEST AFRICA (2015), <https://publications.iom.int/books/survey-migration-policies-west-africa>.

85. See, e.g., Cartagena Declaration on Refugees Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, Art. 3, ¶ 3, Nov. 22, 1984 (including “aggression,” “general violence,” “internal conflicts,” and “massive violations of human rights,” as valid rationales for flight available to claim refugee status); Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Art. 1, ¶ 2, Sept. 10, 1969, 1001 U.N.T.S. 45 (including “external aggression” and “events disturbing public order” as valid rationales).

86. Lavenex et al., *supra* note 76, at 468.

87. On power dynamics see, e.g., Amanda Bisong, *Trans-regional institutional cooperation as multilevel governance: ECOWAS migration policy and the EU*, 45 J. ETHNIC & MIGRATION STUD. 1294 (2019); Dick & Schraven, *supra* note 83, at 110, 114 (noting the EU created Horn of Africa migration management initiatives “from scratch” and “pressure[d]” ECOWAS to adopt its policies).

88. These clashes have been the focus of numerous recent studies. See, e.g., Franziska Zanker, *Managing or restricting movement? Diverging approaches of African and European migration governance*, 7 COMP. MIGRATION STUD. 1 (2019); Luca Barana, *EU Migration Policy and Regional Integration in Africa: A New Challenge for European Policy Coherence*, 18 ISTITUTO AFFARI INTERNAZIONALI COMMENTARIES 1 (2018); Clare Castillejo, *The Influence of EU Migration Policy on Regional Free Movement in the IGAD and ECOWAS Regions* (German Development Institute Discussion Paper 11/2019, 2019), https://www.die-gdi.de/uploads/media/DP_11.2019.pdf.

regional associations toward direct engagement with States.⁸⁹ Regional organizations, in other words, have not, and likely cannot, address an issue that is fundamentally global in nature, especially in the absence of truly representative or effective international institutions.

C. *Bilateral Managerialism and Increasing Externalization*

The limitations of international or regional solutions have meant that difficult questions of migrant rights and distribution have fallen more on individual States. The displacement of these questions onto domestic politics has meant that individual States' concerns about their compromised sovereignties have become further inflamed by debates about the number of migrants and refugees each State should individually accept and the standards of treatment they must individually adopt.

In addition to issues described above, this pressure has resulted in alternative, bilateral solutions between States, or between regional blocs and States, that Peter Spiro characterizes as part of a "management" approach.⁹⁰ In contrast to approaches emphasizing migrants' equal or fair distribution, or their rights, managerialism often seeks to use international agreements to buttress State defenses against undesired movement.⁹¹ In this respect, the approach often not only resembles the IOM's, but has involved the IOM's assistance with its implementation—in a demonstration of that organization's subordination to member States.⁹²

"Managerial" solutions often include provisions meant to "externalize" the hosting of migrants and refugees.⁹³ Examples extend not just between States, but between regional organizations and States as well. They include such developments as the heavily critiqued 2016 EU-Turkey "deal." In this scheme, the European bloc funds Turkey's ability to maintain, or prevent from departure, asylum-seekers on its territory, with some provision for their processing and limited admission to Europe.⁹⁴ Similar cooperation now exists between the EU and Libya, although it is much more straightforwardly focused on preventing, rather than facilitating, migration.⁹⁵ Such cooperation has extended much more deeply into Africa, prompting one European ambassador in 2018 to declare,

89. See Castillejo, *supra* note 88, at 8.

90. See Peter J. Spiro, *The Possibilities of Global Migration Law*, 111 AJIL UNBOUND 3, 4–5 (2017).

91. *Id.*

92. See, e.g., Klabbers, *supra* note 74, at 387–88.

93. See, e.g., Spiro, *supra* note 90, at 4.

94. See Roman Lehner, *The EU-Turkey-'deal': Legal Challenges and Pitfalls*, 57 INT'L MIGRATION 176–77 (2018).

95. For an overview of EU-Libya migration cooperation see Müller & Slominski, *supra* note 42.

infamously, that “Niger is now the southern border of Europe.”⁹⁶ Similar agreements now reach to sub-Saharan African States as far south as Rwanda.⁹⁷ Under the Trump Administration’s “migrant protection protocol,” the United States revived externalization precedents in implementing a version of such interdiction agreements with Mexico, and also pioneered them with Central American States.⁹⁸ Similarly, Australia has continued to operate detention centers for migrants arriving by boat in offshore islands of foreign States as part of its “Pacific Solution.”⁹⁹

From an international legal perspective, externalization is often justified on the basis that the obligation of *non-refoulement* does not impede the hosting of potential asylum-seeker populations in “safe third countries,” particularly countries of first asylum.¹⁰⁰ The EU-Turkey deal is premised on the theories that Turkey is a “safe” refuge for potential asylum-seekers, that those populations need not immediately reach Europe to escape persecution, and that they could, and should, be returned to Turkey if they attempt to enter the EU, and only be accepted into the EU on a limited basis after a determination of their status as statutory refugees.¹⁰¹ Yet in practice, such agreements often ignore or fail to take into account abundant evidence of human rights and other violations committed against migrants in the third country. Critics have noted that Turkey is not committed to the Refugee Convention’s protection guarantees in a way that would protect most current migrants there.¹⁰² In Libya, returns of migrants have led to abusive detention and disappearances.¹⁰³ Even the status of the United States as

96. Daniel Howden & Giacomo Zandonini, *Niger: Europe’s Migration Laboratory*, REFUGEES DEEPLY (May 22, 2018), <https://www.newsdeeply.com/refugees/articles/2018/05/22/niger-europes-migration-laboratory>.

97. Matina Stevis-Gridneff, *Europe Keeps Asylum Seekers at a Distance, This Time in Rwanda*, N.Y. TIMES (Sept. 8, 2019), <https://www.nytimes.com/2019/09/08/world/europe/migrants-africa-rwanda.html>.

98. See Geoffrey Heeren, *Distancing Refugees*, 97 DENVER L. REV. 761, 765, 779-81 (2020).

99. For a general overview of attempts by the EU, US, and Australia to pursue these strategies of “externalization” to third countries see, e.g., *id.* (generally, and noting EU and Australian comparisons at 774-77); Bill Frelick, Ian M. Kysel & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. ON MIGRATION & HUM. SEC. 190 (2016).

100. See Maria-Teresa Gil-Bazo, *The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice*, 33 NETH. Q. HUM. RTS. 42 (2015).

101. These factors are evident from the statement establishing the deal. See European Council Press Release, EU-Turkey Statement (Mar. 18, 2016). See also Lehner, *supra* note 94, at 176-78.

102. Turkey retains a geographical limitation on the application of the Refugee Convention. See *id.* at 177. This limitation can be read as limiting the rights it provides to refugees—let alone recognized asylum-seekers—from outside Europe. See Arzu Güler, *Turkey’s Geographical Limitation: The Legal Implications of an Eventual Lifting*, 58 INT’L MIGRATION 3 (2020).

103. See, e.g., *No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya*, HUM. RTS. WATCH (Jan. 21, 2019), <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>; Mat Nashed, *What happens to migrants forcibly returned in Libya?* NEW HUMANITARIAN (Aug. 5, 2020), <https://www.thenewhumanitarian.org/news-feature/2020/08/05/missing-migrants-Libya-forced-returns-Mediterranean>.

a “safe third country” to which refugees can be returned from Canada has been highly controversial.¹⁰⁴

Despite often being justified on the basis of preventing smuggling or dangerous movement, such agreements also ignore the increasingly dangerous routes migrants have taken to avoid formally entering, or seeking asylum in, third countries in which they would be required to remain.¹⁰⁵ The implementation of the EU-Turkey deal, for example, changed only the means by which, but not the fact that, migrants engaged with smugglers on irregular routes.¹⁰⁶ It also resulted in an increase in migrant sea-crossings to Italy, which have proven more deadly than the journeys across the Aegean to Greece that the EU-Turkey deal principally aimed to prevent.¹⁰⁷ Given that these journeys in the Central Mediterranean spurred further EU-Libya cooperation and thus will likely see migrants develop more forms of precarious circumvention, externalization has effectively been producing problems it was meant to solve.¹⁰⁸

II.

THE SEARCH FOR SOLUTIONS: PLANS AND PROPOSALS FOR MIGRATION GOVERNANCE REFORM

The weaknesses of the extant system of migration governance as a whole have been evident to policymakers, as well as scholars, for some time. Yet with the exception of brief discussions around the turn of the millennium, the evident difficulties with the system of *global* migration governance only prompted considerable rethinking and broader international action in the wake of heightened consciousness of the “migration crisis” in 2015.¹⁰⁹ The next year, President Obama led the effort to commit the UN to a rethinking of the architecture of

104. See Annie Hylton, *Canada Questions the Safety of Asylum Seekers in the U.S.*, NEW YORKER (May 1, 2019), <https://www.newyorker.com/news/news-desk/canada-questions-the-safety-of-asylum-seekers-in-the-us>.

105. For the focus on smuggling see EU-Turkey statement, *supra* note 101. On ignoring ways these agreements can promote dangerous migrant pathways see, e.g., *Q&A: Why the EU-Turkey Deal is No Blueprint*, HUM. RTS. WATCH (Nov. 14, 2016), <https://www.hrw.org/news/2016/11/14/qa-why-eu-turkey-migration-deal-no-blueprint>.

106. See generally Ayselin Yıldız, *Impact of the EU–Turkey Statement on Smugglers’ Operations in the Aegean and Migrants’ Decisions to Engage with Smugglers*, INT’L MIGRATION (published online, 2020).

107. See, e.g., Philip Connor, *The most common Mediterranean migration paths into Europe have changed since 2009*, PEW RSCH. CTR. (Sept. 18, 2018), <https://www.pewresearch.org/fact-tank/2018/09/18/the-most-common-mediterranean-migration-paths-into-europe-have-changed-since-2009>.

108. A key document establishing the EU-Libya cooperation was the Malta Declaration, which was premised on stopping smuggling. See European Council Press Release, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route* (Feb. 3, 2017), ¶ 4.

109. Some of these turn-of-the-millennium discussions will be referenced further in Part IV, *infra*.

migration's international oversight, culminating in the 2016 New York Declaration for Refugees and Migrants: a pledge to forge new "Compacts" on refugee and migration governance.¹¹⁰ States worldwide agreed to the two new "Global Compacts" in 2018. The Migration Compact was meant to help promote safer pathways for movement, enhance migrant rights, and more closely coordinate between nonprofits and international organizations and governments, among other goals.¹¹¹ At the same time, the IOM drew closer to the UN, recognizing a need to take advantage of the latter's broader scope and legitimacy. The UN, in turn, recognized the need for a dedicated institution that would oversee migrants who were beyond the mandate of UNHCR.

These initiatives have prompted debate over, and critique of, the potential efficacy of the new frameworks, alongside scholars' and activists' proposals for more expansive reforms. This Part reviews such reforms and other proposals. It concludes that critiques of the new Compacts are well-founded. Yet it also contends that many of the proposals to go beyond them are also insufficient because they lack bases in material and political reality to serve as foundations for the current and future needs of global migration governance.

A. The Global Compacts: A New Dawn for Global Migration Governance?

Of the two new instruments, the Migration Compact was particularly ambitious in seeking "enhanced cooperation on international migration in all its dimensions" through "recognition" of need for a "comprehensive approach."¹¹² The Compact sought, in particular, to use such cooperation to address many of the protection problems that have plagued migration governance, as reviewed above. For example, it pledged to seek multilateral approaches to ensure migrants had safe pathways and consider the difficulties of forced migrants whose plight resembled that of refugees through the creation of "reception" arrangements for those whose flight occurred as a consequence of an emergency.¹¹³ It also represented a step beyond the legal academics' restatement approach to migration law in its enumerating and reconciling of migrant rights, incorporating a canonical list of these into the document.¹¹⁴ In doing so, it was, quite possibly, the most significant international commitment to attempt to address the governance of all migrants beyond the remit of refugee institutions in decades.

110. New York Declaration for Refugees and Migrants, G.A. Res. 71/1, ¶¶ 21, 63 (Oct. 3, 2016). Annexes I-II provided that "Global Compacts" on Refugee and Migration Governance be decided by 2018.

111. See, e.g., Global Compact for Safe, Orderly and Regular Migration, G.A. Res. 73/195, Annex, ¶ 16 (Dec. 19, 2018) [hereinafter Global Migration Compact] (list of objectives).

112. *Id.*, at 2: introduction to Annex and ¶ 11.

113. *Id.* at Annex, ¶¶ 5, 18(j).

114. *Id.* at Annex, Preamble ¶ 2.

Both Compacts were adopted only as non-binding soft law. Yet by taking the form, if not the formal nature, of a treaty, their recommendations still proved highly objectionable for States that were sensitive about guarding their sovereign right to govern migration. Australia, the Czech Republic, Hungary, Israel, Poland, and the United States were among those that voted against the Migration Compact.¹¹⁵ Several other EU States abstained.¹¹⁶ Brazil withdrew later.¹¹⁷ By contrast, only the United States and Hungary voted against the Refugee Compact, underscoring how much more sensitive of an issue migration governance is than refugee governance alone.¹¹⁸ Yet movements against *both* Compacts were also strong even in States that acceded to them.¹¹⁹ Such opposition even led to the collapse of Belgium's coalition government.¹²⁰

The Compacts also faced critiques from migrant advocates. Even champions conceded that that the instruments were really only a starting point for addressing the most serious challenges that the world confronts in overseeing global migration.¹²¹ Many of the documents' laudable objectives still face enormous hurdles in implementation. Migrant advocates have also critiqued the dual Compact approach, because in attempting to preserve the distinctions that have made international refugee law more effective, the Compacts continue to reify the distinction between statutory refugees and migrants. These critics argue that such a distinction leaves migrants with fewer protections and the global migration governance system, as a whole, with a less comprehensive solution to the common problems of both populations, while retaining the problems inherent in the

115. See United Nations, General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants (Dec. 19, 2018), <https://www.un.org/press/en/2018/ga12113.doc.htm>.

116. Georgi Gotev, *Nine EU members stay away from UN migration pact*, EURACTIV (Dec. 20, 2018), <https://www.euractiv.com/section/global-europe/news/nine-eu-members-stay-away-from-un-migration-pact/>.

117. Ernesto Londoño, *Bolsonaro Pulls Brazil From U.N. Migration Accord*, N.Y. TIMES (Jan. 9, 2019), <https://www.nytimes.com/2019/01/09/world/americas/bolsonaro-brazil-migration-accord.html>.

118. Edith M. Lederer, *UN approves compact to support world's refugees; US objects*, ASSOCIATED PRESS (Dec. 18, 2018), <https://apnews.com/article/4fd4c127e8da4801b6bb3f8d5f184404>.

119. See, e.g., Emily Schultheis & Krishnadev Calamur, *A Nonbinding Migration Pact Is Roiling Politics in Europe*, ATLANTIC (Dec. 11, 2018), <https://www.theatlantic.com/international/archive/2018/12/un-global-migration-compact-germany-europe/577840>.

120. *Belgian PM reshuffles cabinet after right-wing party quits over UN migration pact*, DEUTSCHE WELLE (Dec. 9, 2018), <https://www.dw.com/en/belgian-pm-reshuffles-cabinet-after-right-wing-party-quits-over-un-migration-pact/a-46653730>.

121. See, e.g., Linda Bishai, *It's a Start – Why the Global Compacts on Refugees and Migration Matter*, JUST SEC. (Sept. 12, 2018), <https://www.justsecurity.org/60649/its-start-global-compacts-refugees-migration-matter>.

confusion between them.¹²² Mirroring concerns about potential dilution that could take place if the Refugee Convention were to be reformed, moreover, some critics have been concerned that the Global Migration Compact's provisions are weaker or less specific than existing norms. While *broader* than previous tools, these critics argue that the Compact's "softness" actually undermines the applicability of the existing norms that it includes as a consequence.¹²³

The Migration Compact, moreover, focuses relatively little on distribution, let alone on how to address political opposition to it.¹²⁴ Instead, the Compact places nearly equal emphasis on preventing migration and on returning migrants to their countries of origin.¹²⁵ The instrument's affirmation of sovereign rights over migration only diminishes its capacity to address migrant movement as well.¹²⁶ The Compact's provisions focusing on protection may even reproduce many current distribution problems. For example, the instrument's emphasis on improving "reception" in countries near to disasters could not only be criticized as a form of externalization; its calls for enhancements of rights have already been criticized by anti-immigrant voices as further inducements to migrant entry of their countries.¹²⁷

B. Institutional Reform: The IOM and the UN Join Forces

Since public consciousness of the "global migration crisis" arose, actors in international organizations have acknowledged an increased need for *institutional* oversight of migration at an international level as well. Their concerns have

122. For one critique of the division between the Compacts see, e.g., Cathryn Costello, *Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?* 30 INT'L J. REFUGEE L. 643 (2018).

123. See Alessandro Bufalini, *The Global Compact for Safe, Orderly and Regular Migration: What is its contribution to International Migration Law?* 58 QUESTIONS OF INT'L L. 5, 11–18 (2019).

124. Few of the Compact's 23 Objectives appear to have potential to address distribution rather than protection. Exceptions may be Objective 5, in which safe "pathways for regular migration" are linked to "facilitat[ing] labour mobility," which ties protection to "skills-matching" and other distribution mechanisms. Global Migration Compact, *supra* note 111, at Annex, ¶ 21. Objective 18 likewise promotes "[i]nvest[ing] in skills development" in a way that would induce States to accept migrants. *Id.* at Annex, ¶ 16. Objective 19 urges the creation of "conditions for migrants and diasporas to fully contribute to sustainable development in all countries." *Id.* Objective 11 calls for the need to "[m]anage borders in an integrated, secure and coordinated manner," which may or may not address distribution as opposed to exclusion depending on implementation. *Id.*

125. See, e.g., Objective 2 to "[m]inimize the adverse drivers and structural factors that compel people to leave their country of origin." *Id.* Yet not only is this objective an attempt to *reduce* migration rather than oversee the phenomenon as it exists, but it also falls afoul of objections on the basis of migration's complexity and even inevitability. See Part II(C), *infra*. Objective 21 urges "cooperation in facilitating safe and dignified return and readmission." Global Migration Compact, *supra* note 111, at Annex ¶ 16.

126. *Id.* at ¶ 15.

127. On the latter concern see, e.g., Ben Knight, *German parliament rows over UN Migration Compact*, DEUTSCHE WELLE (Nov. 8, 2018), <https://www.dw.com/en/german-parliament-rows-over-un-migration-compact/a-46213002>.

resulted in attempts to more fully integrate the IOM into the UN system. In 2016, the UN formally rechristened the IOM as a “UN related agency,” included it in several cooperative initiatives with other UN bodies, and permitted its rebranding as “IOM/UN Migration,” or even “UN Migration” in some instances.¹²⁸ This has led some scholars to argue that the IOM “joined the UN,” while others claim that it has at least become part of the “UN system.”¹²⁹

Yet the IOM has deliberately remained highly autonomous of the UN, despite its new label.¹³⁰ This is the very structural issue feeding much of the criticism that the IOM’s border management work has overlooked migrant rights.¹³¹ Previous efforts to coordinate between the IOM and UN agencies have also proven contentious at times, making it far from clear whether the current incremental adjustments to their relationship will bear any fruit.¹³² Even scholars who argue that inclusion within a “UN system” has taken place cannot say with certainty that it will improve interoperability or compatibility between the IOM and UN organs, and it may even provide a means to defend existing IOM practices that do not comport with UN standards.¹³³ In 2018, the organization chose a non-US leader—a rarity in its history—when the United States’ proposed candidate was revealed to be an anti-immigration hardliner.¹³⁴ Yet the debate over this choice exposed the extent to which the IOM in its current institutional form remains vulnerable to capture by forces more interested in applying its resources even further for managerial border policing.

Some voices propose, consequently, that the IOM needs to be further integrated into the UN in order to improve the latter’s oversight of it and its respect for migrant rights. The UN’s former Secretary General, Ban Ki-Moon, is among them.¹³⁵ Yet such an attempt at integration alone will still not exempt the IOM from the political stresses that threaten the reach and effectiveness of the Global

128. For the agreement on IOM association with the UN *see* Agreement Concerning the Relationship between the United Nations and the International Organization for Migration, G.A. Res. 79/296 (Aug. 5, 2016). On new cooperative initiatives and the organization’s ongoing “relative autonomy” *see* Colleen Thouez, *Strengthening migration governance: the UN as ‘wingman’*, 45 J. ETHNIC & MIGRATION STUD. 1242, 1249 (2019). On the IOM’s inclusion in the new UN Network on Migration *see* Terms of Reference for the UN Network on Migration (Nov. 13, 2018), https://www.un.org/en/conf/migration/assets/pdf/UN-Network-on-Migration_TOR.pdf. An example of the “UN Migration” branding without inclusion of the term “IOM” is the organization’s Twitter handle, which is now simply “@UNMigration.”

129. Pécoud, *supra* note 4, at 3; BRADLEY, *supra* note 69, at 99-100.

130. Martin Geiger, *supra* note 61, at 293.

131. Crépeau, *supra* note 72, at 22 ¶ 60.

132. On earlier fractiousness between IOM and UN agencies *see* Betts & Kainz, *supra* note 4, at 7; Pécoud, *supra* note 61, at 6. Even scholars who emphasize harmony in UN-IOM relations acknowledge their breakdown at points. *See* BRADLEY, *supra* note 69, at 100, 104-09.

133. *Id.* at 120.

134. Zachary Cohen & Elise Labott, *Trump’s controversial pick for top UN migration job voted down in Geneva*, CNN (June 29, 2018), <https://www.cnn.com/2018/06/29/politics/ken-isaacs-migration-united-nations/index.html>.

135. Thouez, *supra* note 128, at 1249.

Compacts. It may, in fact, weaken the reach of the IOM or leave it even more vulnerable to a defensive takeover by States concerned that it is abandoning its concern with managing borders and migration in favor of one of promoting migrant rights. Given these difficulties, the ability of the IOM, as it is currently constituted, to engage the full spectrum of difficulties facing global migration comprehensively appears anything but resolved—without a change in the current political climate.

C. Beyond the Borders of the Possible? New Proposals for Global Migration Governance

Reactions of insufficiency, skepticism, and political tension to each of these reform projects has fostered continued debate over the future of global migration governance. Alternative proposals made either before or after the governance shifts in migration since 2015 have either explicitly or implicitly addressed limitations with each of the reform efforts or gone beyond the limited nature of the existing reforms in their scope. Yet many of these ideas either share the features that have prompted opposition to the Global Compacts and IOM reform, or appear likely to have little impact on the problems targeted by the reforms in the first place.

Many notable scholars' proposals for reforms related to migration governance have focused on refugees alone. These include James C. Hathaway and Alexander Neve's proposal for collaborative burden-sharing of refugee hosting, Joseph Blocher and Mitu Gulati's advocacy for charging refugee-generating States "debt;" and Peter Schuck's proposal for States to be able to sell parts of their refugee "burden."¹³⁶ Such proposals contain elements that may appear to offer solutions for migration governance as a whole, but are not necessarily models for it. There is a focus on the potentially short-term nature of refugee flows or refugees' flight from "persecution" in the first two plans, respectively—with the attendant limitations of a concentration on that term as discussed above.¹³⁷ While expanding the remit of refugee governance, therefore, they tend not to address directly broader humanitarian problems that have prompted other migrations, let alone difficulties with regular migration. The stresses placed by contemporary politics on migration governance reform are not absent from debate over refugee governance institutions, either. Neither these proposals, nor more recent variants have addressed directly these difficulties of

136. See, e.g., Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 COLUM. HUM. RTS. L. REV. 53 (2016); James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997); Peter Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243 (1997).

137. See *supra* Part I(A).

enforcement and political will, and their authors are sometimes even resigned to the vicissitudes of this will.¹³⁸

The same is true for the more limited number of scholarly proposals centered on migrants beyond refugees. These tend to include proposals for new treaties, which seem unlikely to succeed in light of the difficulties faced by the Global Migration Compact and pushback against attempts to reform the Refugee Convention. One proposal for an “International Bill of Rights for Migrants”—meant to clarify existing provisions in migrants’ favor—admits political difficulties in creating a new instrument of law and sees the project leading to more of a “rallying point” akin to the UDHR.¹³⁹ Attempts to create new law to fill the gaps between existing provisions, such as the recent effort to frame a broad “Model International Mobility Convention” that goes beyond even migration in addressing all “people on the move,” face similar questions about the extent to which States will accept what could be seen as merely a clearer and more comprehensive imposition on their sovereignty.¹⁴⁰

Another set of proposals has focused on ways *unilateral* migration governance could better prioritize migrants’ rights. A move in this direction has been to promote attempts to extend States’ protections to their emigrants. The Migrant Workers and Overseas Filipino Act of 1995, for example, was designed to increase the Philippines’ capacity to protect its emigrants abroad.¹⁴¹ The International Law Commission’s Special Rapporteur on Diplomatic Protection, John Dugard, has even advocated for an international convention that would *require* States to use their consular authority to protect their citizens abroad in cases when they are not necessarily inclined to do so. In theory, this would increase the likelihood of migrants enjoying the protection of their countries of citizenship. Yet UN bodies have been unable to move this suggestion beyond a recommendation, and State practice does not suggest a willingness among countries to conform with it.¹⁴²

A greater difficulty for many migrants is not their States’ lack of willingness to assist them, but those States’ incapacity to engage in protection on the

138. For a more recent example resigned to lack of changes in political will see, e.g., T. ALEXANDER ALEINIKOFF & LEAH ZAMORE, *THE ARC OF PROTECTION: REFORMING THE INTERNATIONAL REFUGEE REGIME* 105–40 (2019) (proposing collaborative burden-sharing but resigned to a lack of political will for anything but changes at lower and less powerful levels of government).

139. See Aleinikoff, *supra* note 6, at 478.

140. See Model International Mobility Commission, *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*, 56 COLUM. J. TRANSNAT’L L. 342.

141. An Act to Institute the Policies of Overseas Employment and Establish a Higher Standard of Protection and Promotion of the Welfare of Migrant Workers, their Families and Overseas Filipinos in Distress, and for Other Purposes, Rep. Act No. 8042, 91 O.G. 4994 (June 7, 1995) (Phil.).

142. Elizabeth Prochaska, *Testing the Limits of Diplomatic Protection: Khadr v The Prime Minister of Canada*, EJIL TALK! (Oct. 7, 2009), <https://www.ejiltalk.org/testing-the-limits-of-diplomatic-protection-khadr-v-the-prime-minister-of-canada>.

territories of other States. Consular access to detainees worldwide, for example, eroded after the September 11 terror attacks on the basis of detention on “security” grounds, although this is “in plain violation” of the Vienna Convention on Consular Relations.¹⁴³ U.S. courts have even cast doubt on the extent to which they acknowledge that the Vienna Convention allows the protection of foreign nationals from prosecution without timely notification of their consulate.¹⁴⁴

A more efficacious form of unilateral protection may be regulating or restricting emigration. Yet regulatory bodies focused on emigration, such as India’s or Bangladesh’s, have failed to curb abuses.¹⁴⁵ One proposal to reform such regulations admits that even enhanced unilateral efforts would not be fully sufficient, and require broader international cooperation.¹⁴⁶ Even in instances when States attempt to restrict organized emigration to only rights-respecting States—such as the Philippines formally did with amendments to its Overseas Filipino Act in 2010—they must contend, in practice, with the fact that applying such criteria strictly might deprive their emigrants of important opportunities for earnings.¹⁴⁷ For example, Filipino migration to the Gulf continues despite the region’s record of poor treatment of migrant workers, reflecting both difficulties with extraterritorial enforcement and the ongoing demand among prospective emigrants for employment abroad.¹⁴⁸ Unilaterally restricting emigration can also contribute to irregular migration that is even less protected, just as bilateral EU attempts to manage migration extraterritorially have. Nepali attempts to restrict emigration in order to protect rights are a recent illustration; they have contributed to risky migration channels via third countries.¹⁴⁹

143. See Mark Warren, *Rendered Meaningless? Security Detentions and The Erosion of Consular Access Rights*, 38 S. ILL. U. L. J. 27 (2013).

144. For example, evidence despite lack of consular notification was admissible in the United States. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). U.S. courts also famously disagreed with the ICJ with regard to the scope of the applicability of the Vienna Convention. This was the context in which the Supreme Court decided that ICJ decisions themselves were not binding on the U.S. *Medellin v. Texas*, 552 U.S. 491 (2008).

145. See Stephen Castles, *International migration at the beginning of the twenty-first century: global trends and issues*, 68 INT’L SOC. SCI. J. 151, 157–58 (2018).

146. Bassina Farbenblum, *Governance of Migrant Worker Recruitment: A Rights-Based Framework for Countries of Origin*, 7 ASIAN J. INT’L L. 152, 155 (2017) (conceding that “there are geopolitical and market-based structural forces that currently drive non-compliance and impede enforcement of protective laws, and that these require transnational reforms to transform migrant worker recruitment and employment business models in partnership with destination countries”).

147. See An Act Amending Republic Act No. 8042, Otherwise Known as the Migrant Workers and Overseas Filipino Act of 1995, as Amended, Further Improving the Standard of Protection and Promotion of the Welfare of Migrant Workers, their Families and Overseas Filipinos in Distress, and for Other Purposes, Rep. Act No. 10022, §3, 106 O.G. 2729, 2731 (Mar. 8, 2010) (Phil.); Castles, *supra* note 145, at 158.

148. Siyu (Molly) Liu, *Exploitation of Overseas Migrant Labor: Analysis of Migration Policy in Nepal and the Philippines*, Social Impact Research Experience 9–13, 18–21 (on treatment), 26 (on the ongoing presence of Filipino workers in the Gulf States.), 36 (2015).

149. *Id.* at 15.

The increasingly restrictionist tone of domestic debates has led some activists and academics to counter with reinvigorated proposals to open borders partially or entirely.¹⁵⁰ Advocates of this idea have marshaled an array of ethical and economic arguments for more open borders.¹⁵¹ Ethical arguments include the idea that migrant destinations in the Global North often owe “imperial debts” to countries that have been victims of their exploitation, and that migrants and their origin States in the Global South, alike, could benefit from increased access to wealthier labor markets.¹⁵² According to related arguments, the sovereignty of settler colonial countries, like the United States or Australia, may be as “illegal” in some respects as today’s “unauthorized” migrants, undermining their claims to authority over border control.¹⁵³ Economists in favor of similar proposals argue that fully open immigration could increase the net wages of all workers and even boost global GDP by 60 percent.¹⁵⁴ These assertions may function well as a strategy to move the parameters of debate on the desirability of migration in general. But ethical proposals for open borders appear unlikely to gain political traction any time soon.¹⁵⁵ Even fact-based appeals to the blessings of limited immigration have not resulted in a cessation of anti-immigration restrictionism.¹⁵⁶

A final alternative approach has been an attempt to *avoid* questions of migrant protection and distribution by discouraging migration. One solution in this vein that has long been mooted is increasing development aid. This policy

150. For one scholar, this can be seen as a “philosophy of migration governance” itself, “the free (non-)governance of migration.” Pécoud, *supra* note 4, at 8.

151. For a summary of some of these arguments see John Washington, *What Would an Open Borders World Actually Look Like?* NATION (Apr. 24, 2019), <https://www.thenation.com/article/open-borders-immigration-asylum-refugees>.

152. See Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019).

153. One analysis in this vein demonstrates ways that indigenous communities themselves have used such arguments to protest restrictive immigration. See Monika Batra Kashyap, *Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System*, 46 FORDHAM URB. L. J. 548, especially 569–74 (2019).

154. Washington, *supra* note 151.

155. Even proponents of ethical arguments realize they will have limited traction. The author of one recent book arguing for relatively open borders admits that he does not expect his readers to agree with all his arguments and that they merely “help [them] think more clearly about...immigration.” JOSEPH CARENS, *THE ETHICS OF IMMIGRATION* 4 (2013). He even stated that his intended audience was limited to “Democrats,” and that his arguments were not intended to have immediate impact on law or policy. Dylan Matthews, *What gives us a right to deport people? Joseph Carens on the ethics of immigration*, WASH. POST (Nov. 29, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/11/29/what-gives-us-a-right-to-deport-people-joseph-carens-on-the-ethics-of-immigration/>.

156. See, e.g., NATALIA BONULESCU-BOGDAN, *WHEN FACTS DON’T MATTER: HOW TO COMMUNICATE MORE EFFECTIVELY ABOUT IMMIGRATION’S COSTS AND BENEFITS* (2018), https://www.migrationpolicy.org/sites/default/files/publications/TCM-WhenFactsDontMatter_Final.pdf. Even the prescriptions for more effective communication in the report demonstrate the difficulty of overcoming resistance to proposals for increased migration because of identitarian and personal sensitivities. See *id.* at 17–18.

has, in fact, been promoted by the Global Migration Compact.¹⁵⁷ Yet further efforts in this direction continue to be pushed both at the international level and as an element of States' unilateral foreign policies. In contrast to the externalization policies discussed above, aid in these cases would not be linked to the hosting of foreign migrants or destined to improve transit States' border controls, but would seek to *prevent* migration by ameliorating what is, in theory, one of its root causes: poverty.¹⁵⁸

Whether poverty has been a cause of migration has been fiercely debated by scholars, however; many have long claimed that migration tends to follow economic opportunities (being “pulled” toward them) rather than escape them (being “pushed” away).¹⁵⁹ In other words, emigration from aid-targeted countries might continue so long as opportunities were greater *anywhere*. Empirical research has hardly found such aid likely to prevent migration; on the contrary, it has often fueled it by providing beneficiaries with more funds to travel.¹⁶⁰ Scholars have also found that migration is not as driven by economic causes—whether poverty or opportunity—as many assume.¹⁶¹ Motivations can revolve around such variables as environmental quality and the increasing availability of mass communication, or be mixed.¹⁶² Likewise, development aid cannot prevent the many large-scale flows of refugees or forced migrants stemming from humanitarian challenges, such as wars or natural disasters.

Even if migration prevention through development aid were to succeed, moreover, this would hardly address challenges for which developed States *need* migrants—for example, those with aging populations and with shrinking

157. Global Migration Compact, *supra* note 111, ¶ 18, Objective 2.

158. For an overview of such efforts taken by the US and EU see Michael A. Clemens & Hannah M. Postel, *Deterring Emigration with Foreign Aid: An Overview of Evidence from Low-Income Countries* (Center for Global Development Policy Paper 119, 2018), <https://www.cgdev.org/sites/default/files/deterring-emigration-foreign-aid-overview-evidence-low-income-countries.pdf>, 2-3. The EU pledges development aid to tackle the “root causes” of migration, with the European Commissioner for International Cooperation and Development having stated explicitly that this policy is premised on the notion that poverty is a “root cause.” See Lili Bayer, *Brussels defends development aid link to migration*, POLITICO (July 24, 2018), <https://www.politico.eu/article/neven-mimica-migration-budget-commissioner-defends-development-aid-link/>. The Trump Administration earmarked aid for Central America explicitly to “deter migration.” See CONG. RSCH. SERV., IF10371, U.S. STRATEGY FOR ENGAGEMENT IN CENTRAL AMERICA: AN OVERVIEW 2 (2020), <https://fas.org/sgp/crs/row/IF10371.pdf>.

159. This debate is briefly summarized in Fernando Devoto, *A History of Spanish and Italian Migration to the South Atlantic Regions of the Americas*, in MASS MIGRATION TO MODERN LATIN AMERICA 30 (Samuel L. Baily & Eduardo José Míguez eds. 2003).

160. Hein de Haas, *Turning the Tide? Why Development Will Not Stop Migration*, 38 DEV. & CHANGE 819 (2007).

161. See, e.g., Castles, *supra* note 145, at 154.

162. See, e.g., Francesco Castelli, *Drivers of migration: why do people move?* 25 J. TRAVEL MED. 1 (2018).

workforces that cannot support their social welfare systems alone.¹⁶³ States seeking to forestall migrant influxes have their own preferred alternatives to address such problems—attempting to preempt labor shortages through natalist policies or promoting automated labor.¹⁶⁴ Still, birth rates remain low in many of these States, and technology has not proven capable of replacing care workers needed in aging societies over the next decade.¹⁶⁵ Migration will need to continue, and ideas that cope with this fact—and that cope with the material and political realities that currently stand in the way of migrant rights and distribution—need to be found.

III.

A PRECEDENT FOR REIMAGINATION: THE RISE AND FALL OF GLOBAL MIGRATION GOVERNANCE

The chaotic state of international migration law, and the limited and ineffective scope of international migration institutions has not, in fact, been a historical constant. With a view toward attempting to propose a more effective reimagination of global migration governance, this Part reviews its history from the Nineteenth Century forward. Space in this Article would not allow for an exhaustive history of global migration governance with all its nuances or relative to broader contextual developments—for that, I have attempted a more comprehensive narrative elsewhere.¹⁶⁶ Yet the sketch below hopefully helps demonstrate some conditions in which more concerted and effective efforts at improving migrant rights and distribution were able to succeed. This abbreviated history will also show why these efforts have diminished in recent decades and how they led to the quandaries of the present day.

163. See Sarah Harper, *The Important Role of Migration for an Ageing Nation*, 9 J. POPULATION AGEING 183 (2016).

164. On natalism see Menno Fenger, *The social policy agendas of populist radical right parties in comparative perspective*, 34 J. INT'L & COMP. SOC. POL'Y 188, 198 (2018); on automation see Philip Oltermann, *Can Europe's new xenophobes reshape the continent?* GUARDIAN (Feb. 3, 2018), <https://www.theguardian.com/world/2018/feb/03/europe-xenophobes-continent-poland-hungary-austria-nationalism-migrants> (quoting Mária Schmidt, Hungary's "intellectual in chief," on the question).

165. MCKINSEY GLOB. INST., *Jobs Lost, Jobs Gained: Workforce Transitions in a Time of Automation* 6 (Nov. 28, 2017), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/Future%20of%20Organizations/What%20the%20future%20of%20work%20will%20mean%20for%20jobs%20skills%20and%20wages/MGI-Jobs-Lost-Jobs-Gained-Report-December-6-2017.ashx>.

166. See generally Christopher Szabla, *Governing Global Migration: Internationalism, Colonialism, and Mass Mobility, 1850-1980* (2020) (Ph.D. dissertation, Cornell University).

A. *From the Nineteenth Century to the Second World War: Early Plans and Motivations*

During the Nineteenth Century, societies faced difficulties guaranteeing the rights of migrants that would be familiar in the present. They were often concerned, in particular, with protecting migrants from the misrepresentations of recruiters who were often considered to be poorly-disguised smugglers or traffickers. At the same time, European societies faced demographic fears about overpopulation sparked by the Industrial Revolution and thinkers such as Thomas Robert Malthus.¹⁶⁷ Such worries prompted concerns about the need for emigration—concerns, effectively, over how populations were distributed.¹⁶⁸

While the notion of some international mechanism to facilitate migrant distribution was not yet on the table during this period, the failure of private and municipal regulation of the inherently public, transnational problem of the rights of migrants was evident. In the absence of effective regulation, many States attempted to curb emigration to protect their citizens from dangers abroad—just as many have proposed today.¹⁶⁹ This led the most influential society of Nineteenth Century international lawyers, the Institute of International Law, to resolve in favor of a model universal migrant rights treaty as early as 1897.¹⁷⁰ But more comprehensive attempts to construct an international system for the governance of migration occurred only after the First World War provided the opportunity to reshape global order.

By the end of that war, concerns about both migrant rights and distribution had been exacerbated by the intensification of border controls, trapping crowded populations in some countries where they faced mass unemployment and excluding their entry into others.¹⁷¹ These issues were compounded in many already “overcrowded” countries by the shock of arriving refugees and the return of mass-mobilized soldiers.¹⁷² Migration problems could hardly escape attention during the negotiations that led to the Treaty of Versailles. Today, the treaty is primarily remembered for the harsh terms it imposed on Germany, which some

167. See, e.g., TARA ZAHRA, *THE GREAT DEPARTURE: MASS MIGRATION FROM EASTERN EUROPE AND THE MAKING OF THE FREE WORLD* 10 (2016); JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP, AND THE STATE* 83–84 (2000).

168. *Id.* at 10.

169. *Quatrième commission d'études – De l'émigration au point de vue juridique international*, 16 *ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL* 242, 243 (1897).

170. See *Emigration from the Point of View of International Law*, in *RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW DEALING WITH THE LAW OF NATIONS: WITH AN HISTORICAL INTRODUCTION AND EXPLANATORY NOTES* 137 (James Brown Scott ed., 1916).

171. On populations trapped between borders see, e.g., CHRISTIANE REINECKE, *GRENZEN DER FREIZÜGIGKEIT: MIGRATIONSKONTROLLE IN GROSSBRITANNIEN UND DEUTSCHLAND, 1880-1930* 260 (2010).

172. On the problems associated with refugees see ANNEMARIE SAMMARTINO, *THE IMPOSSIBLE BORDER: GERMANY AND THE EAST, 1914–1922* 96–194 (2010); on demobilized soldiers see ADAM SEIPP, *THE ORDEAL OF PEACE: DEMOBILIZATION AND THE URBAN EXPERIENCE IN BRITAIN AND GERMANY, 1917–1921* 165–201, 233–60 (2009).

historians have interpreted as having set the stage for future conflict. Yet facing an influx of Germans from annexed territories and refugees from revolutionary Russia, as well as an oversupply of veterans seeking jobs during a transition to a peacetime economy, Germany was as eager as any of the other States negotiating the peace for an international solution to its population and unemployment problems.¹⁷³

All parties, therefore, eagerly supported the creation of the ILO, anointed in the treaty with a mandate to fight unemployment and protect workers “in countries other than their own.”¹⁷⁴ In the newly-formed Permanent Court of International Justice (PCIJ), the organization gained powers to intervene in States’ affairs, successfully arguing that its treaty authority to seek “peace through social justice” granted it a broad jurisdiction and competences.¹⁷⁵ The more famous League of Nations led negotiations to make borders as open as they had been before the war. Yet the solutions that it was actually able to implement—attempting to standardize passport regulations, for example, and providing the famous “Nansen passports” to stateless refugees in order than they might rove in search of work—proved insufficient to the needs at hand.¹⁷⁶ Many refugees lacked the means to emigrate beyond Europe in order to find work, and many other prospective emigrants remained trapped in their own States where employment was often scarce.

During this period, the ILO began to think about employing its expansive powers to “seek...social justice” by regulating migratory rights and movement. The most ambitious proposals would have given the ILO full control over States’ immigration policies. In 1927, for example, the organization’s director, Albert Thomas, mooted the creation of a “supreme migration tribunal,” a kind of international court to broker the movement of migrants to places needing their labor or settlement potential.¹⁷⁷ Such notions were bolstered by rising contemporary sentiment that sovereignty should be conferred on the party most likely to make effective use of territory.¹⁷⁸ Yet the powers that the ILO did possess rested on its assurances to the PCIJ that, in Thomas’ words, the

173. See, e.g., Ewald Kuttig, *Central Powers and the Labor Proposals*, in *THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION*, VOL. 1: HISTORY 229–31 (James T. Shotwell ed. 1934).

174. Treaty of Peace Between the Allied and Associated Powers and Germany, Part XIII (Labour), Preamble, June 28, 1919, 225 Consol. T.S. 188.

175. See *Competence of the Int’l Labour Org. in regard to Int’l Regulation of Conditions of Labour of Persons Employed in Agriculture*, Advisory Opinion, 1922 P.C.I.J. (ser. B) No. 2 (Aug. 12); on the use of “peace through social justice” to expand the organization’s activities see GUY FITI SINCLAIR, *TO REFORM THE WORLD: INTERNATIONAL ORGANIZATIONS AND THE MAKING OF MODERN STATES* 29–74 (2017).

176. BRUNO CABANES, *THE GREAT WAR AND THE ORIGINS OF HUMANITARIANISM, 1918-1924* 167 (2014).

177. *Albert Thomas on the International Control of Migration*, 9 *POPULATION & DEV. REV.* 703, 704, 708, 711 (1983) (reprinting Thomas’ 1927 address).

178. See, e.g., ALISON BASHFORD, *GLOBAL POPULATION: HISTORY, GEOPOLITICS, AND LIFE ON EARTH* 133–56 (2014).

organization was “not a super-state.”¹⁷⁹ It would have to pursue the centralization of migration governance while keeping State sovereignty over border control intact.

Still, even more modest proposals for an international institution to coordinate and oversee movement between States represented breakthroughs, in and of themselves. They attracted widespread support largely because there was a community of interest between States in Europe hoping to promote emigration, on the one hand, and States desirous of immigrants, on the other. In the wake of the United States’ disengagement from the League of Nations and the broader international community of institutions in Geneva (including the ILO), as well as the harsh immigration quotas the country enacted between 1921 and 1924, the most immigrant-hungry States were those in Latin America.¹⁸⁰

Receiving States had various motivations for their desire to accept immigrants. Undoubtedly, the cultural advantage that these States perceived in accepting Europeans played a part; in Latin America, this coincided with notions of improving racial balance.¹⁸¹ But, a considerable portion of the interest in European immigration was the perception that these immigrants would contribute to economic development through superior drive and skills Europeans were assumed to possess.¹⁸² This belief itself dovetailed with extant racial hierarchies both in Latin America and the wider world, but it was also a product of the notion that Europe was one of the developed centers of the world economy and that its migrants brought with them desirable productivity. This focus on migrant groups’ economic contributions could even overcome racial biases in some instances. For example, Brazil threw open its doors during most of the interwar period to trained and subsidized Japanese immigrants, viewed as highly-productive, with numerous voices in the country comparing their economic usefulness to Europeans, or seeing them even more favorably, even at a time when the world’s borders were increasingly closed to them for racial reasons.¹⁸³

So eager were States in that region to increase their European populations that some, like Venezuela, were willing to accept ILO-overseen domestic legal

179. See Edward Phelan, *The Memoirs of Edward Phelan: The birth of the ILO*, in EDWARD PHELAN AND THE ILO: THE LIFE AND VIEWS OF AN INTERNATIONAL SOCIAL ACTOR 209 (2009).

180. TORPEY, *supra* note 167, at 145, 148.

181. See, e.g., TANYA KATERÍ HERNÁNDEZ, RACIAL SUBORDINATION IN LATIN AMERICA: THE ROLE OF THE STATE, CUSTOMARY LAW, AND THE NEW CIVIL RIGHTS RESPONSE 24-34 (2013).

182. A good example of the contempt of elites in these States for locals as development agents by comparison can be seen in the writing of Enrique Siewers, an Argentine ILO functionary, who spoke disparagingly about the local rural population in Venezuela. See, e.g., Enrique Siewers, *The Organisation of Immigration and Land Settlement in Venezuela: I*, 39 INT’L LAB. REV. 764, 770-71 (1939).

183. On training and subsidization see, e.g., Daniel M. Masterson & Sayaka Funada, *The Japanese in Peru and Brazil: A Comparative Perspective*, in MASS MIGRATION TO MODERN LATIN AMERICA, *supra* note 159; on cultural openness to the Japanese see HERNÁNDEZ, *supra* note 181, at 54-55, 210.

reforms designed to protect immigrant welfare.¹⁸⁴ Having taken over the effort from the League of Nations, the ILO also managed a small service resettling refugees, and sought to use it as a model for arranging the transit of other migrants on the same basis.¹⁸⁵ Even States more reluctant to participate in ILO distribution mechanisms welcomed its efforts to combat the fraud and misrepresentation of migration agents through new treaty arrangements, including what became the 1939 Convention on Migration for Employment.¹⁸⁶ Disagreements over what a larger service for all migrants would look like delayed implementation on a larger scale. Still, these disagreements were over details, rather than the question of whether an international institution could or should play a larger role governing migration. Even fascist Italy joined the debate rather than opting out of it.¹⁸⁷

B. The Postwar Instantiation of Global Migration Governance: From ICEM to the IOM

The Second World War disrupted the movement toward consolidating migration governance under the ILO, but the notion that a single international infrastructure was necessary to oversee migration endured. Not only had the ILO, as a migration organization, been able to address material aid to refugees and their distribution in a way that the League of Nations could not, but later organizations that focused on refugee resettlement alone—like the Intergovernmental Committee on Refugees created at the 1938 Evian Conference on Refugees from Nazi Germany—also failed to implement resettlement successfully.¹⁸⁸ Post-Second World War institutions like the International Refugee Organization, however, successfully managed the movement of larger groups of “displaced persons.”¹⁸⁹ The changed circumstances of the postwar world were one reason for this success. But a focus on economic migration in a way that assisted refugees in finding long-term “durable solutions” also appears to have been a factor.¹⁹⁰

The events of the subsequent decade, however, sundered the connection between refugee and migration governance. By 1951, the UNHCR and Refugee

184. See Siewers, *supra* note 182, at 764.

185. CLAUDENA SKRAN, *REFUGEES IN INTER-WAR EUROPE: THE EMERGENCE OF A REGIME* 190 (1995).

186. ILO Convention CO66, *Convention Concerning the Recruitment, Placing, and Conditions of Labour of Migrants for Employment*, Jun. 28, 1939, https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:8752535302170::NO::P12100_SHOW_TEXT:Y: (the convention was never ratified).

187. MARTIN, *supra* note 69, at 43.

188. ZAHRA, *supra* note 167, at 154–71.

189. See generally MARK WYMAN, *DP: EUROPE'S DISPLACED PERSONS, 1945-1951* (1989).

190. See Katy Long, *When refugees stopped being migrants: Movement, labour and humanitarian protection*, 1 *MIGRATION STUD.* 4 (2013).

Convention emerged as fully-fledged components of the UN system.¹⁹¹ At the same time, the ILO proposed to revive a version of its large-scale interwar plans. Yet only the United States was able to provide the necessary funding, and its fear of Soviet involvement in a large-scale international migration governance scheme helped prevent the ILO plans from being realized.¹⁹² Instead, an Intergovernmental Committee for European Migration (ICEM) was established as a largely Western club to handle not just lingering postwar displacement, but the ongoing belief that Europe suffered from “overpopulation.”¹⁹³ Over the next decade, ICEM successfully moved over a million emigrants out of Europe and primarily to Australia and Latin America, while avoiding middlemen who often presented financial, and other, risks to emigrants.¹⁹⁴ Latin American States, especially, continued to welcome Europeans and still viewed them as contributing to their “development.”¹⁹⁵ Even as notions that Europeans inherently brought with them heightened developmental benefits waned, ICEM provided them with large-scale skills training to make them attractive immigrants.¹⁹⁶

Despite their divergence, the parallel refugee and migration regimes at first remained similar in their focal areas. The Refugee Convention’s original limitation to problems that existed prior to 1951—which the Convention explicitly permitted parties to interpret as meaning “in Europe”—and UNHCR’s limitation, in practice, to activities in Europe meant that they both focused on populations from that continent.¹⁹⁷ Yet the growing UN membership of postcolonial States opened the Refugee Convention (through its 1967 Protocol) and UNHCR practice to the whole world by the 1960s.¹⁹⁸

ICEM member States, meanwhile, resisted non-Europeans. Despite urging from some United States politicians that it should become more inclusive, the organization refused even Japanese participation.¹⁹⁹ In subsequent decades,

191. On UNHCR’s emergence and functioning together with the Refugee Convention see PETER GATTRELL, *THE MAKING OF THE MODERN REFUGEE* 6 (2013); on UNHCR as part of the UN system see Leon Gordenker, *The United Nations and Refugees*, in *POLITICS IN THE UNITED NATIONS SYSTEM* 275 (Lawrence S. Finkelstein ed., 1988).

192. See Rieko Karatani, *How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins*, 17 *INT’L J. REFUGEE L.* 517 (2005).

193. MARIANNE DUCASSE-ROGIER, *THE INTERNATIONAL ORGANIZATION FOR MIGRATION, 1951-2001* 15 (2001).

194. *See id.* at 54.

195. *Id.* at 47.

196. *Id.* at 29–31.

197. Refugee Convention, *supra* note 21, Art. 1(B)(1)(a).

198. On the operation of the 1967 Protocol see Stefanie Schmahl, *Article I 1967 Protocol*, in *THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* 619–20 (Andreas Zimmerman, Jonas Dörschner & Felix Machts eds., 2011). On the expansion of UNHCR operations see GIL LOESCHER, *THE UNHCR AND WORLD POLITICS: A PERILOUS PATH* 9–10 (2001).

199. See Christopher Szabla, *Contingent Movements? The Differential Decolonizations of Refugee and Migration Law and Governance*, in *CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES* (Kevin Jon Heller & Ingo Venzke eds., 2021), 209–10.

interest in European emigration continued to wane, and ICEM (in search of a purpose) increasingly utilized provisions of its constitution that at least allowed it to assist non-European migrants in emergency situations.²⁰⁰ By the 1990s, ICEM had become the IOM—no longer formally limited to European migrants, but path-dependent in concentrating on narrower, “emergency” missions, rather than the larger-scale, regular migration streams on which it had once focused.²⁰¹

A second problem with ICEM also managed to afflict the IOM, and it continues to do so to this day. ICEM, a creature of its Western members and funders, lacked the international authority to take on the role ILO had in seriously monitoring and promoting States’ observance of migrant rights, or that UNHCR continues to have as a sponsor of refugee rights. In 1949, the ILO had successfully updated its Convention on Migration for Employment, expanded the number of signatories to it, and succeeded in having it ratified.²⁰² Yet no migrant-focused institution existed thereafter to authoritatively negotiate the increasingly complex and fragmented world of international rights on migrants’ behalf.

At first, this lack of focus on rights posed relatively few problems given States’ eagerness for European emigrants. Yet Northern States’ interest in migrant rights also stalled over the second half of the Twentieth Century. This shift was a product of demographic trends as much as institutional arrangements. European States became destinations for migrants from the Global South, who were increasingly unwelcome as a product both of cultural differences and economic competition.²⁰³ Negotiations over the new UN-sponsored Migrant Workers Convention subsequently dragged on for over a decade due to the reluctance of Northern States.²⁰⁴ UNHCR, however, was able to promote broader interpretations of refugee law even as more claimants trickled North.²⁰⁵

In effect, as this Part shows, international institutions strove throughout much of the Twentieth Century toward more integrated regimes of global migration governance than today, born in the visions of the ILO and borne out in

200. DUCASSE-ROGIER, *supra* note 193, at 45–69.

201. Richard Perruchoud, *From the Intergovernmental Committee for European Migration to the International Organization for Migration*, 1 INT’L J. REFUGEE L. 501, 512 (1989).

202. See ILO Convention CO97 – Convention Concerning Migration for Employment (Revised), Jul 1., 1949, 120 U.N.T.S. 71, with ratifications at https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242.

203. On shifts in migrant demographics see, e.g., STEPHEN SMITH, *THE SCRAMBLE FOR EUROPE: YOUNG AFRICA ON ITS WAY TO THE OLD CONTINENT* 97–98 (2019). Scholars debate how early widespread anti-immigrant sentiment arose in Europe depending on their country of focus but tend to agree that it had begun before, and spread across different States by, the early 1970s. See, e.g., KLAUS BASE, *MIGRATION IN EUROPEAN HISTORY* 224–25 (2008); ANTHONY MESSINA, *THE LOGICS AND POLITICS OF POST-WWII MIGRATION TO WESTERN EUROPE* 56 (2007).

204. Juhani Lonroth, *The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*, 25 INT’L MIGRATION REV. 710, 718 (1991).

205. See VENZKE, *supra* note 63, at 117–22.

part in the large-scale distribution system managed by ICEM in the immediate postwar era. The shortcomings of the current system of international migration law and institutions, however, stem from a process of institutional fragmentation that began during the early Cold War, when they partly fragmented from the UN system. Without pressure from UN members, ICEM's distribution functions broke down because of an unwillingness to extend them to non-Europeans, who composed an increasing number of global migrants. The lack of a migrant-focused institution within the UN system led migrant rights to become deprioritized. ICEM, and later the IOM, shifted focus from facilitating regular migration to emergency services and border management, as the IOM continues to focus on today.²⁰⁶

IV.

A NEW WAY FORWARD? TOWARD A SOUTH-SOUTH ORIENTED GLOBAL MIGRATION GOVERNANCE

Some scholars who have proposed reforming global migration governance offer hints of directions that transcend the deficiencies of the plans offered so far. Spiro suggests the possibility that “managerial” forms of migration control could be seized by reformers more interested in the rights of migrants than in buttressing State defenses to them.²⁰⁷ For Antoine Pécoud, a different managerial system would be the only means to break through the political difficulties with reform, achieving a “triple win” for migrant-sending States, migrant-receiving States, and migrants themselves—although he does not set out a road map for how to achieve such an objective.²⁰⁸ Pécoud also suggests that balancing migrant rights and distribution in a managerial format would make such a system more “confusing...heterogeneous and less robust” than one with either sovereignty or rights as singular objectives.²⁰⁹ But these problems hardly make encompassing these goals together in a single framework less of a worthwhile aim than allowing them to contradict one another in the disorganized model that persists today.²¹⁰ As the philosopher Étienne Balibar has written, furthermore, even an open borders world would require *global* governance institutions that stretched beyond previous borders to ensure that its benefits were not squandered by a lack of oversight.²¹¹

Yet the first question that a proposal encompassing these suggestions must answer is how to avoid what Spiro terms the “improbability” of a new or renewed

206. See *supra* Parts I(B); II(B).

207. Spiro, *supra* note 90, at 6–7.

208. Pécoud, *supra* note 4, at 109–10.

209. *Id.* at 112

210. For such a critique see *id.*

211. ÉTIENNE BALIBAR, WE, THE PEOPLE OF EUROPE? REFLECTIONS ON TRANSNATIONAL CITIZENSHIP 117 (2009).

international migration organization.²¹² This improbability has been illustrated by the silence attending the many proposals made at the turn of the millennium to create a “World Migration Organization.”²¹³ This Part offers one potential solution that synthesizes these scholars’ suggestions with ideas emanating from the precedents described in the previous Part, efforts being undertaken in the contemporary Global South, and the bedrock of existing reforms.

The Part proposes a system of global migration governance that would use the direction of migrant movement as a tool to improve observance of migrants’ rights and, eventually, their equitable distribution. This system would promote movement between materially disadvantaged States in the Global South, paralleling the means by which ICEM effectuated the movements of Europeans to parts of the world eager to receive them for bolstered development. This Part argues there is reason to believe this system could be welcomed by those parts of the South because of States’ potential perception of similar economic benefits. This redistribution of migration could also be a means to induce current migrant destination States to increase their acceptance of migrants’ rights and mobility.

This proposal has the potential to address political opposition to migration and migration governance, but is far from radical. It would not impede migrants’ existing mobility options—merely enhance them along South-South pathways, with the aim of eventually improving conditions for migrants worldwide. It would also not be as significant a departure from existing reforms as it may seem at first. Although it takes inspiration from distinctive examples of the past, much of it could be achieved by focusing on the implementation of existing objectives of the Migration Compact to better achieve the aims of others. It would require an enhanced IOM, but not one too divorced from its current functions. These ideas, and further counterarguments, are addressed in more detail below.

A. *The Uses of History: Applying the Lessons of Global Migration Governance’s Past*

Historical examples can help illuminate both the potential of roads not taken and the reasons why they were not, allowing scholars to pinpoint the reasons for the failure of earlier systems and the necessary conditions for reviving them.²¹⁴ As Part III made clear, the idea of a more comprehensive “World Migration

212. Spiro, *supra* note 90, at 4.

213. For various proposals *see, e.g.*, Jagdish Bhagwati, *Borders Beyond Control*, 82 FOREIGN AFFS. 98 (2003); MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME? (Bimal Ghosh ed. 2000); Arthur C. Helton, *Unpleasant Surprises Await*, 58 BULL. ATOMIC SCIENTISTS 94 (2002). Within the UN, the option of creating a new migration organization was offered by the 2002 “Doyle Report,” but it was turned down by Secretary General Kofi Annan in favor of an expert committee that simply recommended further regional and global “consultation and discussion.” Betts & Kainz, *supra* note 4, at 5.

214. The role of historical context, rather than pure contingency in international legal history has recently received increased attention. *See, e.g.*, Susan Marks, *False Contingency*, 62 CURRENT LEGAL PROBS. 1 (2009).

Organization” seemed significantly less far-fetched in the early-to-mid Twentieth Century. Reimagining global migration governance could benefit greatly from thinking through what rendered such expansive planning possible earlier in history, and what undermined its possibility later on.

One historical lesson is that reform does not necessarily require an international “crisis” akin to the geopolitical shocks of the Twentieth Century. As Part III showed, the First World War triggered a great burst of activity in imagining a global migration governance and the Second put the United States in the important position of a financial hegemon that could influence its instantiation.²¹⁵ Yet reform also began in the Nineteenth Century absent the aftermath of conflict.²¹⁶ Moreover, the current migration “crisis” has already provided an impetus for reform, and the discourse of such a “crisis” persisting, reappearing, or even worsening has continued since 2016.²¹⁷

The previous Part also demonstrated that efforts to build a more comprehensive global migration governance were not *held back* by crises of international systems, either. These efforts transcended even the recalcitrance of States, such as Weimar Germany and fascist Italy, that were inclined to act out against the Versailles System that they believed had disfavored them.²¹⁸ Other recent international legal histories have similarly shown how internationalist projects managed to survive and thrive in rocky periods more than has been

215. See *supra* Part III(A) & (C).

216. See *supra* Part III(A).

217. Analyses and commentaries continue to reference the “migration crisis” as an ongoing or even worsening phenomenon. See, e.g., Shada Islam, *Europe’s migration ‘crisis’ isn’t about numbers. It’s about prejudice*, GUARDIAN (Oct. 8, 2020) (noting “the number of asylum seekers is now down, but for many EU governments the migration ‘crisis’ will never be over”); Emma Reynolds, *Europe’s migrant crisis is worsening during the pandemic. The reaction has been brutal*, CNN (Sept. 1, 2020), <https://edition.cnn.com/2020/08/28/europe/europe-migrants-coronavirus-intl/index.html>; *US migrant crisis: Trump seeks to curb Central America asylum claims*, BBC NEWS (July 25, 2019), <https://www.bbc.com/news/world-latin-america-48991301>. Even analyses that regard the “crisis” as having past note that underlying factors mean it will likely reappear. See, e.g., *Global Migration is Not Abating. Neither is the Backlash Against It*, WORLD POL. REV. (Nov. 4, 2020), <https://www.worldpoliticsreview.com/insights/28008/to-ease-the-migration-crisis-europe-and-the-world-must-address-root-causes>; Gareth Evans, *Europe’s Migrant Crisis: The year that changed a continent*, BBC NEWS (Aug. 30, 2020), <https://www.bbc.com/news/world-europe-53925209> (noting that “[t]he impact of this mass migration is still being felt today”); Demetrios G. Papademetriou, *The Migration Crisis Is Over: Long Live the Migration Crisis*, MIGRATION POL’Y INST. (Mar. 2017), <https://www.migrationpolicy.org/news/migration-crisis-over-long-live-migration-crisis> (referring to the “crisis” as “unresolved”); Stefan Lehne, *The EU Remains Unprepared for the Next Migration Crisis*, CARNEGIE EUROPE (Apr. 3, 2018), <https://carnegieeurope.eu/2018/04/03/eu-remains-unprepared-for-next-migration-crisis-pub-75965>. The 2020 EU Migration Pact efforts referenced in Part I(B), *supra*, demonstrate the ongoing seriousness with which the issue is taken at the level of cross-border governance.

218. On Italian participation see *supra* Part III and MARTIN, *supra* note 69, at 183; Weimar German participation has not been well chronicled outside of my own research. See Szabla, *supra* note 166, at ch. 5.

assumed by the “realist” school of international relations theory.²¹⁹ The willingness of States during these periods of supposed international discord to come together to agree to a more substantial migration governance demonstrates that, for all the challenges that international cooperation on any subject faces today, the opportunity to build a more comprehensive system yet again is at least theoretically present.

Migration governance gained force even in periods of “crisis,” in part, because it proceeded incrementally, building off existing structures and practices. For Albert Thomas, both precedents developed in the British Empire and intra-European “labor exchanges” were stepping stones toward a comprehensive oversight of migrant rights and distribution.²²⁰ As Guy Fiti Sinclair shows, using the ILO’s history, the growth of international organizations’ power on the basis of accretions of existing competencies has proven possible to the same, or even greater, extent as by means of new or amended treaty instruments.²²¹ Present-day institutional reform, therefore, need not reach far to see benefits. As Thomas argued, international institutions facilitating migration hardly need to become “super-state[s]” with the power to violate State sovereignty.²²²

Such institutions could function because of another key to past successes: a relative consensus between States that produced and received migrants. This consensus existed contrary to present-day assumptions that interests of migrant sending and receiving States tend to be irreconcilable.²²³ This consensus, Part III showed, arose because receiving States proved welcoming toward migrants if they believed that those migrants would enhance their development and, increasingly, many migrants were trained in ways that contributed to the impression that they would do so.²²⁴ Of course, migrants’ economic value will not improve migrant treatment or acceptance on its own. If it did, many States with declining populations would be more eager for immigration. But historical acceptance of immigrants that contribute to *development* indicates greater potential for

219. Such works are usually reacting to such “realist” accounts of international crisis in the interwar era as the classic E.H. CARR, *THE TWENTY YEARS CRISIS 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* (1939). “Realist” accounts emphasize the concern of States for their own individual interests rather than their respect for international law, among other rules, ideas, or forces. For examples of the pushback see, e.g., OONA HATHAWAY & SCOTT SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017) (on the Kellogg-Briand Pact outlawing war as a successful example of international cooperation); SUSAN PEDERSEN, *THE GUARDIANS: THE LEAGUE OF NATIONS AND THE CRISIS OF EMPIRE* (2015) (on how the League of Nations regulated “mandate” territories, and how these were not entirely left to imperial whims).

220. *Albert Thomas on the International Control of Migration*, *supra* note 177, at 704, 706.

221. See generally SINCLAIR, *supra* note 175.

222. Phelan, *supra* note 179, at 209.

223. Betts & Kainz, *supra* note 4, at 3, observe that such seeming irreconcilability was an obstacle to the creation of a new migration regime in the 1990s.

224. See Part III, *supra*; DUCASSE-ROGIER, *supra* notes 193-194.

immigration among a different category of States than the wealthy, “developed” economies that primarily receive them today.²²⁵

Circumstances have also changed since the *decline* of previous instantiations of global migration governance in the mid to late Twentieth Century. Part III demonstrated that the current state of this system is a consequence of factors—including Cold War geopolitics and a much higher level of open ethnic and racial prejudice than exist today. These do not—or ought not, as many more actors would agree—guide international legal and institutional architectures in the present. Institutional arrangements that did not survive earlier conditions may therefore prove more capable of surviving today than when those conditions held weight. Historical precedent, therefore, can be reimagined for the benefit of those who did not benefit previously.

B. Rethinking “Migration as Development” Through a South-South Lens

Today, an unfulfilled need for organized and aided migration that appears to contribute to “development” may reside amid materially disadvantaged States in the Global South. Organization for Economic Cooperation and Development (OECD) research has shown South-South movement to be “an increasingly significant factor in the economic development ... of many developing countries.”²²⁶ Organizations including the African, Caribbean, and Pacific (ACP) Group of States, the African Union, the ILO, and the OECD have recently released studies demonstrating its positive economic impacts on numerous States.²²⁷ Existing South-South migrants’ contributions range as high as 19 percent of Côte d’Ivoire’s GDP, averaging 7 percent over a range of ten Southern countries surveyed, outpacing immigrants’ share of the population in half those countries.²²⁸

225. See *supra* Part III(B).

226. OECD, “South-South migration,” <http://www.oecd.org/dev/migration-development/south-south-migration.htm>.

227. See, e.g., ACP OBSERVATORY ON MIGRATION, *MIGRATION AND DEVELOPMENT WITHIN THE SOUTH: NEW EVIDENCE FROM AFRICAN, CARIBBEAN, AND PACIFIC COUNTRIES* 16 (2013), https://publications.iom.int/system/files/pdf/within_the_south.pdf (focusing on Angola, Cameroon, the Democratic Republic of the Congo, Haiti, Kenya, Lesotho, Nigeria, Papua New Guinea, Senegal, Timor-Leste, Trinidad and Tobago, and Tanzania); on development potential, see *id.* at 5; OECD & ILO, *HOW IMMIGRANTS CONTRIBUTE TO DEVELOPING COUNTRIES’ ECONOMIES* 3 (2018) (chronicling the impact of such migrations in Argentina, Costa Rica, Côte d’Ivoire, the Dominican Republic, Ghana, Kyrgyzstan, Nepal, Rwanda, South Africa, and Thailand); AFRICAN UNION COMMISSION & IOM, *STUDY ON THE BENEFITS OF AND CHALLENGES OF FREE MOVEMENT IN AFRICA* 31–54 (2018), https://ethiopia.iom.int/sites/default/files/IOM%20free%20movement%20africa%20WEB_FINAL.pdf.

228. OECD & ILO, *supra* note 227, at 15.

Per the OECD, South-South migration currently comprises 36-50 percent of human movement.²²⁹ Yet owing to slippages in categorization, much of the movement factored into upper-end estimates of South-South migration totals takes place toward more “developed” economies that are sometimes considered part of the South, such as those in the Gulf.²³⁰ With only around a third of such movement taking place toward materially-disadvantaged States, migration appears to have a considerable capability to contribute further to those States’ economies.²³¹ It has even greater potential considering that existing South-South migration takes place amid a larger area and population than the North, spreading its benefits thin.²³²

Such findings have, nonetheless, not yet led to advocacy for increased South-South migration as a development tool on a worldwide basis. Discussion has instead linked migration and development in other ways.²³³ This activity has included discourse about developmental aid payments, detailed in Part II, that some policymakers hope will *prevent* migratory movement.²³⁴ Studies and proposals in this area have also largely focused on the developmental impacts on Southern States of migration toward the Global North. These include the “brain drain” from the South, the sending of remittances by migrants who arrived in the North to the South, or the impact of return migration from the North to the South

229. See OECD, *supra* note 226 (noting South-South migration composed 36 percent of the world total); Jason Gagnon & David Khoudour-Castéras, *South-South Migration in West Africa: Addressing the Challenge of Immigrant Integration*, (OECD Dev. Ctr. Working Paper No. 312, 2012), <http://www.oecd.org/dev/50251899.pdf>, 5.

230. See World Bank Migration and Remittances Team, *supra* note 19, at 4–5 (defining “South-South migration” as between non-high-income countries and calculating that 14 percent of world migration, including refugees, encompasses non-OECD member high-income countries, which comprise “notably the G[ulf Cooperation Council] countries”).

231. *Id.* at 4 (defining “South-South migration” as between lower-income countries and placing it at 34 percent of the total).

232. See Castles, *supra* note 145, at 156–57.

233. In fact, one attempt to categorize a means by which States in the Global South manage migration characterizes “the developmental migration state” as including only the forms listed in this paragraph. See Fiona B. Adamson & Gerasimos Tsourapas, *The Migration State in the Global South: Nationalizing, Developmental, and Neoliberal Modes of Migration Management*, 54 INT’L MIGRATION REV. 853, 866 (2020).

234. On the recent history of migration and development initiatives see Betts & Kainz, *supra* note 4, at 6-10.

through the bringing of skill or investment.²³⁵ Critiques of “migration and development” have also focused on these issues.²³⁶

In contrast to the North-South focus of these schemes, regional migration-development initiatives in the South have focused increasingly on facilitating South-South movement. Organizations in Africa, Central Asia, Latin America, and Southeast Asia have pursued free movement initiatives as means to move toward local economic integration and development.²³⁷ ECOWAS’ Common Approach to Migration is one example of a development strategy focused on intra-regional movement.²³⁸ It has included funding to promote skills training as well as attempts to harmonize migrant rights, including promoting the ratification of, and monitoring compliance with, the Migrant Workers’ Convention.²³⁹ As noted above, many regional initiatives in the South, including ECOWAS’, have suffered from poor implementation at the level of long-term migration, as opposed to short-term movement.²⁴⁰ They are also geographically fragmented, suffering from poor inter-regional cooperation, particularly with Northern organizations, such as the EU, that have a deeper interest in preventing or restricting migration than facilitating it within the South.²⁴¹

A *global* architecture designed to facilitate further migration within the materially disadvantaged South could improve on existing regional South-South initiatives that seek to use migration as a means to facilitate those States’ growth. A wider international initiative stands less risk of being sidelined by power asymmetries between regional organizations, as Southern groups have been by the EU.²⁴² At the same time, an international effort would help overcome such obstacles to regional initiatives as, for example, critiques that African States acting by themselves lack sufficient material “enablers” to “create” intra-regional

235. For a very recent overview of links between migration and development (the so-called “migration-development nexus”) being actively discussed in the policy community *see* Marta Latek, *Interlinks between migration and development*, EUROPEAN PARLIAMENTARY RSCH. SERV. 7–8 (2019), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/630351/EPRS_BRI\(2019\)630351_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/630351/EPRS_BRI(2019)630351_EN.pdf). The World Bank has pushed migrant remittances as a development tool, specifically. *See* Immanuel Ness, *Forging a Migration Policy for Capital: Labor Shortages and Guest Workers*, 29 NEW POL. SCI. 429, 440 (2007).

236. *See, e.g.*, Hein de Haas, *Migration and Development: A Theoretical Perspective*, 44 INT’L MIGRATION REV. 227 (2010); de Haas, *The Migration and Development Pendulum: A Critical View on Research and Policy*, 50 INT’L MIGRATION 8 (2012).

237. *See* Zanker, *supra* note 88, at 1–2; Castillejo, *supra* note 88, at 3, 6 (initiatives have taken place at the African Union level and at the level of regional bodies in East and West Africa); OECD & ILO, *supra* note 227, at 35, 70 (noting Association of Southeast Asian Nations [ASEAN], Eurasian Economic Union [Central Asian] and MERCOSUR [Latin American] initiatives).

238. *See ECOWAS Common Approach on Migration*, ECOWAS Commission, 33rd Ordinary Session of the Head of State and Government (Jan. 18, 2008), at II.

239. On training *see id.* at II(2.2)(2). On the approach to the Migrant Workers Convention *see id.* at 2.1(1) and 2.5(1).

240. *See* Part I(B), *supra*.

241. *Id.*

242. *Id.*

movement.²⁴³ Following the recommendations of the ILO and OECD on how to improve the contributions of South-South migrants, an improved international architecture could match migrants to labor market needs, build integration programs, and provide skills training and the monitoring of migrant rights—the latter of which, research from both organizations argues, helps improve productivity, among *sui generis* benefits.²⁴⁴ In doing so, it could revive many of the powers the ILO once sought and that ICEM possessed, helping make immigration attractive for destination States as it had been made in the interwar and immediate post-Second World War periods.

Just as much as the current system of international migration law impacts distribution by inducing or deterring movement, patterns and geographies of distribution can impact law's observance. Improved observance can be achieved both by attaching conditions to the facilitated distribution of migrants where they are desired and through the changed material contexts that a redistribution of migrants can induce. By rendering South-South migration more attractive, such a system could lead Southern societies to welcome, and even compete for, migrants in ways that include greater adhesion to migrant rights. Northern States and other traditional migrant destinations in need of migrant labor, meanwhile, would need to rethink their priorities as Southern States transition into more attractive destinations for migrants and the relative number of individuals inclined toward migration to the North decreases, as the next Section argues.

C. *Materially Remaking Global Governance: The Impact on Existing Migrant Destinations*

Relatively wealthy current migrant destination States would likely need to agree to a system promoting South-South migration for it to be linked to other fully international initiatives and for it to receive sufficient funding. Yet a migration governance newly focused on South-South movement would, like Twentieth Century precedents, provide advantages for multiple groups of States—in this case, Northern States as well as Southern ones. Like approaches discussed in Parts II and III, this system would appear capable of deterring some movement to Northern countries by incentivizing migrants to remain in the South instead.²⁴⁵ Northern lawmakers, therefore, would be able to point to arguments that they were controlling immigration into their own States as well as benefitting both migrants and Southern development. In doing so, they would help either satisfy or quiet populist reaction and sentiment against participation in global migration governance initiatives. Indeed, EU officials initially appeared willing to facilitate African intra-regional migration initiatives to this end but became focused on restriction instead.²⁴⁶ Yet it is now clear that these restrictive policies

243. AFRICAN UNITY COMMISSION & IOM, *supra* note 227, at 70 ¶ 197.

244. See OECD & ILO, *supra* note 227, at 16, 37.

245. See Parts I(C) and II(C), *supra*.

246. See Castillejo, *supra* note 88, at 4–5.

have not, as noted above, prevented migration toward Europe so much as driven it underground or expensively and controversially externalized its management, reopening the case for Northern States to embrace boosting South-South movement.²⁴⁷

Embracing such a system could, however, have a longer-term impact: depriving Northern and other existing migrant destinations of a critical labor supply which, as Part II argued, cannot be easily replaced through such alternatives as automation or increased birthrates.²⁴⁸ It may seem as if destination States would hardly agree to such a system knowing this potential result. Yet the avowed aim of restrictionism that many of these destinations embrace already effectively seeks the same end. To summarize the argument below, the often culturalist politics of migration hardly exist in perfect congruence with an economy's perceived labor requirements, which helps to produce existing shortages.²⁴⁹ Cognitive biases may be likely to incline such politics toward short-term solutions, as well.²⁵⁰ Yet even culturalist opposition may be forced to yield to the material consequences when such shortages grow more acute.²⁵¹

Promoting migration within the South would increase the number of destinations available to migrants, and thus, force migrant destinations to compete. Their doing so could enhance migrants' bargaining power by increasing their destination options in a world in which they are in demand. It could also enhance the bargaining power of the international institution with the power to channel migrant movement and to condition the provision of labor on respect for rights.²⁵² Eventually, Northern States and other existing migrant destinations would likely need to compromise any recalcitrance toward migrant entry and rights, both to retain their popularity and even their viability as draws for immigrants. Their potential use of the services of the international institution involved in promoting migration within the South to direct migration back to them could further be conditioned on improved treatment.

Enhanced migrant treatment, meanwhile, might not only become a competitive advantage for States in the Global South seeking migrants to fuel their development, but become widespread as a consequence of the advantages those migrants appear to bring, and through wider adoption, grow into a customary norm among immigrant societies. Southern States are already serving as, what

247. See Parts I(A) and (C), *supra*.

248. See Part II(C) *supra*.

249. See Part IV(E)(2), *infra*.

250. See *id*.

251. See *id*.

252. Various scholars have argued that labor supply available to destination countries is a chief obstacle to them signing onto migrant protection and free movement regimes. For a summary of their arguments, see Koslowski, *supra* note 27, at 108.

scholars call, “norm entrepreneurs” for the rest of the world.²⁵³ Their innovations are extending to migration. Brazil, for example, has been active in broadening migrant rights; its 2017 legal reform effectively expanded the category of refugee well beyond international legal requirements and decriminalized the status of undocumented migrants.²⁵⁴ With only minor modifications, the law remains in force, despite the anti-migrant tone set by President Jair Bolsonaro. UNHCR’s head has viewed Colombia’s similar, recent regularization of the legal status of Venezuelan exiles as a model for the treatment of mixed exoduses of “displaced persons” worldwide.²⁵⁵

Of course, there are hardly any guarantees that such a norm diffusion would take place as a consequence of widespread acceptance in the South. The enhancement of migrant-respecting norms in the South might hardly be more persuasive than the earlier Southern initiatives that had sought to expand the international legal definition of refugee.²⁵⁶ Yet such norm diffusion would only be one potential means by which norms shift under this proposal. Establishing migration governance on a firmer *material* basis—grounding protection in incentives that emerge from distribution—plays a greater role. The role of enhanced international institutional oversight also augments both these norms and the effects of distribution, avoiding the fate of trained migrants in 1990s South Korea, whose relative abundance, but lack of advocates, allowed them to fall into undocumented and exploited status.²⁵⁷ In that case, not only more careful distribution, but enhanced oversight were required.

D. Retrofitting, Not Replacing, the Tools of Global Migration Governance

The above program requires an international architecture to oversee the promotion of South-South movement, as well as to serve as this additional guarantor of migrant rights. As another scholar recognizes, the IOM has “the strongest capabilities to take on the range of activities needed if an international

253. See, e.g., Adriana Erthal Abdenur & Carlos Frederico Pereira da Silva Gama, *Triggering the norms cascade: Brazil’s initiatives for curbing electronic espionage*, 21 GLOB. GOVERNANCE 455 (2015); Oliver Stuenkel, *Brazil and Responsibility to Protect: a case of agency and norm entrepreneurship in the Global South*, 30 INT’L REL. 375 (2016); Laura Allison-Reumann, *The Norm-Diffusion Capacity of ASEAN: Evidence and Challenges*, 32 PAC. FOCUS 5 (2017).

254. For an overview see Jayesh Rathod & Carolina de Abreu Batista Claro, *It’s the law in Brazil – immigrants welcomed*, MIAMI HERALD (Jun. 8, 2017), <https://www.miamiherald.com/opinion/oped/article155217949.html>. On the law’s approach to decriminalizing undocumented migrants see Rathod, *Criminalization and the Politics of Migration in Brazil*, 16 OHIO ST. J. CRIM. L. 147 (2018).

255. Filippo Grandi, *Colombia’s treatment of Venezuelan refugees is a global model*, FIN. TIMES (Feb. 22, 2021), <https://www.ft.com/content/3989e253-7d5b-41cc-bfd7-1d27c0178d7b>. Although the headline of the article refers to “refugees,” Grandi uses more inclusive terminology of “displaced persons” and “refugees and migrants” to recognize the potential that not all Venezuelans in flight may qualify for statutory refugee status.

256. See Part I(B), *supra*.

257. See Hye-Kyung Lee, *The Employment of Foreign Workers in Korea: Issues and Policy Suggestion*, 12 INT’L SOCIO. 353, 365–66 (1997).

migration regime were to be adopted.”²⁵⁸ In connection with the arguments above, the IOM could, as its predecessors the ILO and ICEM once did for European emigrants, place far greater focus than it does today on planning migratory movements, offering training, conditioning services on migrant-rights recognition, and directly overseeing migrants’ safe transportation to destinations that would prove more welcoming to them, rendering migrants less likely to make dangerous journeys to circumvent controls.

Given its origins, retrofitting the IOM to carry out new distribution functions in particular would require a relatively small departure from its current activities, and could be viewed in part as a rebalancing. As the above history demonstrated, relatively *sub rosa* expansions of international institutions can achieve a great deal, while rendering the difficulties of relitigating debates among States less necessary.²⁵⁹ Retrofitting, rather than replacing the IOM, would help avoid any political opposition to founding a global migration organization anew or to risking the renegotiation of existing institutions’ responsibilities. As critics of any potential renegotiation of the Refugee Convention have pointed out, renegotiation could result in the diminution, rather than the enhancement, of international instruments’ capabilities.²⁶⁰

Elaborating on existing tools presents a less risky option. Many strategies advocated above could find some basis in the Global Migration Compact. In particular, the Compact makes provision for “skills matching” to “facilitate labour mobility.”²⁶¹ Migrant “skills development” and promoting migration as a development tool are already components.²⁶² As part of “enhancing...pathways for regular migration” the Compact also advocates for “facilitat[ing] regional and cross-regional labour mobility.”²⁶³ The now partially UN-integrated IOM already has some responsibility for implementing the Compact by serving as “coordinator” for a UN “network on migration.”²⁶⁴ But prioritizing these specific aspects of the Compact and giving them a South-South orientation could be a means to help bring about distributional changes that could help overcome political objections and eventually help achieve better recognition of the Compact’s other objectives and, among reluctant States, the Compact itself.

Other IOM mechanisms could also be subordinated to the general direction of a South-South orientation. These include its Regional Consultative Processes— fora where States and regional organizations discuss common migration issues,

258. MARTIN, *supra* note 69, at 124.

259. As argued in Part IV(A), *supra*.

260. See Ferracioli, *supra* note 26.

261. Global Migration Compact, *supra* note 111, at Annex, ¶ 21, Objective 5.

262. *Id.* at Annex ¶¶ 34-35, Objectives 18-19.

263. *Id.* at Annex ¶ 21(b).

264. *Id.* at Annex ¶ 45(a).

such as those between the EU and ECOWAS.²⁶⁵ They also include its Department of Migration Management, which exists for “the development of policy guidance in the field” and “the development of global strategies,” including migrant training and protective oversight.²⁶⁶ The organization could also influence processes now being undertaken by non-IOM bodies to the end of a South-South strategy. These include the Global Forum on Migration and Development and the International Migration Review Forum that has been created to “follow up and review” the Global Migration Compact.²⁶⁷

This is not to say that more formal changes to the IOM would not be helpful to carry out the agenda sketched above. As Balibar observes, a formal link to international *political* structures, with their representative function, is essential for the legitimacy of any form of migration governance.²⁶⁸ Another lesson from global migration governance’s past, moreover, is that integration between migration institutions and representative international bodies can ensure that those migration institutions are in touch with the most critical global needs. As Part III showed, UNHCR owes its greater responsiveness to the Global South to this integration, thanks to the advocacy of newly-independent States within the UN.²⁶⁹

More formal integration with the UN would allow IOM funding and activities to be removed from the direct, project-to-project control of wealthy member States that drives its participation in their controversial border management practices, while permitting the UN to exercise more globally representative supervision of IOM actions. Per the UN Special Rapporteur for Migrant Rights, formal integration to this extent is, in fact, essential for ensuring that a more powerful IOM would not let any focus on merely managing migration occlude a respect for migrant treatment.²⁷⁰ The IOM’s recent partnership with the UN demonstrates that these institutions do have the ability to move closer, despite previous misgivings. This increased closeness was made possible by fears that other organizations could otherwise encroach on IOM “turf,” the fact that IOM membership had become congruent with UN membership, and by guarantees that

265. See INT’L ORG. FOR MIGRATION, *IOM Regional Consultative Processes*, <https://www.iom.int/regional-consultative-processes-migration>.

266. Text from IOM Department of Migration Management, <https://www.iom.int/migration-management>.

267. Global Migration Compact, *supra* note 111, at Annex, ¶ 49. Scholars have previously suggested that each of these programs are conducive to being scaled into a larger effort. See *The Global Forum on Migration and Development as a venue of state socialisation: a stepping stone for multi-level migration governance?* 45 J. ETHNIC & MIGRATION STUD. 1258 (2019); Marion Panizzon & Daniella Vitiello, *Governance and the UN Global Compact on Migration: Just another Soft Law Cooperation Framework or a New Legal Regime governing International Migration?* EJIL: TALK! (Mar. 4, 2019), <https://www.ejiltalk.org/governance-and-the-un-global-compact-on-migration-just-another-soft-law-cooperation-framework-or-a-new-legal-regime-governing-international-migration>.

268. BALIBAR, *supra* note 211, at 117.

269. See *supra* Part III(C) and Szabla, *supra* note 199, Part III(1).

270. Crépeau, *supra* note 72, at 21–22.

the IOM would retain features treasured by States.²⁷¹ Northern destination States with control over IOM activities could be persuaded to part with this control to the extent that it seemed that the IOM would help deliver them the initial benefits of the South-South system discussed above.

With firmer UN direction in place, a new IOM could be delegated a mandate similar to UNHCR's, enabling it to become a formal arbiter and monitor of migrant rights.²⁷² In doing so, the IOM could give formal institutional backing to the coherence that the restatement approach has striven to give to the complex and contradictory body of international migration law. Without need for the acrimony that negotiating a new treaty would generate, and without the risk of competing approaches, a single restatement with the backing of a truly official UN agency could create a much more likely basis for its uniform interpretation and observance. A reformed IOM could also provide the oversight power that the restatement movement lacks. It could, moreover, serve as an advocate for important migrant rights instruments, such as the Migrant Workers Convention—the previous lack of enforcement of which one scholar has blamed on the lack of a “supranational agency,” and which could benefit from an advocate for ratification, as well.²⁷³ Finally, it could gradually nudge States toward compliance even with nonbinding soft law provisions such as the rights and treatment objectives of the Global Migration Compact.²⁷⁴ Distributional powers could allow it both to incentivize observance of rights and good treatment, as well as withhold necessary labor from noncompliant States. The IOM could therefore work as a backstop for violations of migrant rights that occur despite measures that enhance migrants' attractiveness.

E. Addressing Objections to Governance as Promotion of South-South Migration

The above proposal both carries risks and is likely to encounter a considerable number of objections. The Article addresses a number of potential counterarguments below.

1. Likelihood of Acceptance and Success in the Global South

Despite the evident interest in Southern regional organizations in South-South migration, there are, first, grounds for skepticism about Southern interest in such a project. One might ask, for example, why materially-disadvantaged

271. BRADLEY, *supra* note 69, at 113-16.

272. See Koser, *supra* note 64; International Organization for Migration, *supra* note 65.

273. See Nicola Piper, *Rights of Foreign Workers and the Politics of Migration in South-East and East Asia*, 42 INT'L MIGRATION 71, 81 (2004).

274. For a case that the IOM could carry out these goals, specifically, see Steffen Angenendt and Anne Koch, *Global Migration Governance and Mixed Flows: Implications for Development-centred Policies* (Stiftung Wissenschaft und Politik Research Paper 2017/RP 08 27, 2017).

Southern States would prefer de facto development aid in the form of migration, rather than direct financial assistance.²⁷⁵ Yet such a question assumes that “migration or aid” is an either-or proposition, the existence of direct aid as an option, and Southern States’ ability to decide between these options entirely on their own, despite Northern influence in international systems. Southern countries of emigration may also find migration aid beneficial as a source of remittances or returnee skills compared with aid focused entirely on their non-emigrant populations. There is research that even provides grounds to believe that driven migrants are more entrepreneurial than settled populations and may prove a unique economic boon for both sending and receiving States if aided.²⁷⁶

Second, there is a risk that furthering migration within the materially-deprived South could disrupt existing aspects of the migration-development nexus that benefit Southern States. Increasing South-South migration could theoretically reduce the transfer of skills and remittances from the Global North to the South at a time when these transfers have begun contributing to even more significant cash inflows to developing countries than foreign direct investment.²⁷⁷ Yet remittances *between* Southern States have potential of their own. Remittances between sub-Saharan African States already “increasingly” make up a considerable share of their cashflow.²⁷⁸ South-South skills transfers already prove beneficial as well, with greater potential arising from easier return migration.²⁷⁹ Increased skills-matching of such migrations and training of migrants could help reduce differentials between South-South and North-South transfers.²⁸⁰ And to the extent that the system helped open more of the Global North and other major destinations to more migrants in the future, it also represents a means for Global South States to tap into further skill or remittance flows.²⁸¹

Third, it may seem misleading to draw an analogy between today’s Global South and earlier migrant-receiving States. The former face their own “overpopulation” pressures so are arguably more like historical sending States in this respect than receiving ones.²⁸² Historical receiving States were also

275. Such questions may emanate especially from critics of the notion of migrants as “agents of development.” See, e.g., de Haas, *supra* note 236 (condemning the use of migrant transfers as “neoliberal”).

276. See, e.g., OECD & ILO, *supra* note 227, at 155 (noting that “in the most [studied] countries, immigrants are either equally or more entrepreneurial than native-born individuals”).

277. See Federica Cocco et al., *Remittances: the hidden engine of globalization*, FIN. TIMES (Aug. 28, 2019), <https://ig.ft.com/remittances-capital-flow-emerging-markets>.

278. *Id.* See also ACP OBSERVATORY ON MIGRATION, *supra* note 227, at 39–40, 45–47.

279. ACP OBSERVATORY ON MIGRATION, *supra* note 227, at 27–28, 30, 33–44.

280. *Id.* at 34 suggests there is a possibility that North-South transfers could be more beneficial.

281. As emphasized in the existing migration-development framework discussed in Latek, *supra* note 235.

282. See Adamson & Tsourapas, *supra* note 233, at 862, 867. On the seeming “emptiness” of much of the global periphery to which European migrants could be sent see BASHFORD, *supra* note 178.

motivated by specific ethnic, racial, and cultural ideologies. “Development,” for them, meant identitarian, and not just economic, improvement.²⁸³ However, it oversimplifies reality to characterize the entire materially deprived South as “overcrowded”. The outlook for the future is especially varied: fertility rates are dropping worldwide at different rates, with Africa likely to contribute to greater amount of future global population growth than other regions.²⁸⁴

Arguments about potential culturalist opposition to further migration within the materially-disadvantaged South require a more complicated response. Undoubtedly, xenophobia or ethnoreligious, other identitarian, or material animosity will be a challenge for any program promoting South-South migration as it is for South-North movement. After all, such antagonism has sprung up in existing major migrant destinations that have or had been included in the “South,” such as South Africa.²⁸⁵ Southern governments have also shown their own tendencies toward restrictionism (although these may, in part, reflect Northern-led trends and Northern assistance for externalized migration management purposes).²⁸⁶

Yet both historical and present-day evidence about how newcomers are perceived is more nuanced. Support for immigration has waxed and waned in countries of the South, and it varies between them.²⁸⁷ There is a complex and often context-specific relationship between the material advantages of immigration and cultural opposition to it. The history of the Japanese in Brazil, for example, indicates that the perception of migrants’ favorable economic contributions can help *overcome* prejudices against them.²⁸⁸ Culturalist opposition to immigration may be more contested than narratives presuming widespread xenophobia assume, may compete with favorable economic assessments of immigrants, and may even exist alongside support for migrant

283. See *supra* Part III(B) on Latin American States’ desire for European immigrants being part of a desire for racial and cultural “improvement.”

284. For an indication of these trends see, e.g., U.N. DEP’T OF ECON. AND SOC. AFFS, WORLD FERTILITY REP. 2015 HIGHLIGHTS, 2, 4 (2017), https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/files/documents/2020/Feb/un_2015_worldfertilityreport_highlights.pdf.

285. See, e.g., Theresa Alfaro-Velcamp & Mark Shaw, *‘Please GO HOME and BUILD Africa’: Criminalising Immigrants in South Africa*, 42 J. SO. AFR. STUD. 983 (2016).

286. See Castillejo, *supra* note 88, at 7; for more on intra-South restrictionism see Hanno Brankamp & Patricia Daley, *Laborers, Migrants, Refugees: Managing Belonging, Bodies, and Mobility in (Post)Colonial Kenya and Tanzania*, 3 MIGRATION & SOC’Y 113, 116-23 (2020).

287. See, e.g., ILO & OECD DEVELOPMENT CENTRE, HOW IMMIGRANTS CONTRIBUTE TO GHANA’S ECONOMY 43-45 (2018), https://www.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—migrant/documents/publication/wcms_634506.pdf, (noting historical fluctuations in Ghana’s relationship with immigrants but majority support for free movement into the country, and more support compared to the rest of Africa); Brankamp & Daley, *supra* note 286, at 114 (noting onetime “open door policies” in East Africa).

288. See *supra* Part III(B).

rights, as polling in Southeast Asia indicates.²⁸⁹ Southern regional organizations' advocacy for increased movement does not lack for any popular support.

The cultural landscapes of States in the Global South do not, furthermore, always resemble those in the North. Migration is a longstanding feature of societies in places like West Africa, where precolonial patterns became international movements only after the imposition of colonial borders.²⁹⁰ In East Africa, populations and especially borderland regions can be characterized by "conviviality" between precolonial ethnic and kinship groups that make migrants difficult to differentiate.²⁹¹ Postcolonial borders leaving diverse patchworks of ethnic groups have also produced conditions in many Southern States in which multiethnicity is a preexisting norm.²⁹² Preexisting multiethnicity can render international migration no more objectionable than intra-national rural-urban migration, and can often render them indistinguishable.²⁹³ While such multiethnicity has hardly precluded intercommunal tensions in Southern States, it can also provide an easier basis on which to argue for foreign migrant inclusion than in more homogeneous national communities.

An international organization implementing a South-South migration strategy would need to proceed carefully on the basis of the complex distinctions between Southern States and societies recounted above. They may not find every State as receptive to migrants or may need to carefully evaluate where different migrants would adapt best. ILO and ICEM did the same, in fact, in the Twentieth Century. Yet even where States appear less well-adapted to immigration, international assistance may be able to play a role. OCED researchers have identified a lack of programs to aid or assist immigrants, including matching them to jobs or enhancing their rights, as factors more significant for migrants' marginalization than culturalist opposition.²⁹⁴ Implementing these would be an improvement that enhanced international involvement could help support.

289. For example, while majorities in Thailand and Malaysia exhibited culturalist opposition to migrants, these figures were neither overwhelming nor constant across both countries. See ILO & UN WOMEN, PUBLIC ATTITUDES TOWARDS MIGRANT WORKERS IN JAPAN, MALAYSIA, SINGAPORE, AND THAILAND XI (2019), https://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms_732443.pdf. They competed with more favorable assessments of migrants from an economic perspective. *Id.* These responses were further colored by discussion of migrants as "low-skilled" and with a demonstrated perception that they did not contribute to the economy—issues a training program could address. Finally, majorities in both countries nonetheless supported improved migrant economic rights in some circumstances. *Id.* at XII-XIII.

290. DEVILLARD, BACCHI & NOACK, *supra* note 84, at 24.

291. Brankamp & Daley, *supra* note 286, at 123-25.

292. JASON GAGNON & DAVID KHOUDOUR-CASTÉRAS, TACKLING THE POLICY CHALLENGES OF MIGRATION: REGULATION, INTEGRATION, DEVELOPMENT 59–79 (2011); Gagnon & Khoudour-Castéras, *supra* note 229.

293. Brankamp & Daley, *supra* note 286, at 119.

294. See, e.g., GAGNON & DAVID KHOUDOUR-CASTÉRAS, *supra* note 292; Gagnon & Khoudour-Castéras, *supra* note 229, at 29–31.

2. *Likelihood of Acceptance in Northern and Other Migrant Destinations*

Another set of objections to the above proposal concerns the likelihood of interest in this proposal in the Global North, of producing labor shortages in migrant destinations, and the likelihood of those shortages promoting political change. Would States in the North really sign onto a plan that would lead to future labor shortages within their own borders? Research demonstrating that popular opposition to immigration tends more to culturalism and can sideline special interests in democratic States indicates that these shortages may not be their greatest concern.²⁹⁵ “Present bias” may also incline populations toward short-term solutions to migrant influxes without deep consideration for long-term consequences.²⁹⁶

A second potential contention about destination State behavior is that the number of migrants is not necessarily constant.²⁹⁷ Incentivizing migration pathways within the South, or even facilitating development in the South, might merely induce more migration, reducing the scarcity effects that might lead to improved migrant treatment by Northern States in the future.²⁹⁸ Yet new movement induced by incentives to migrate within the South—and planned and managed from above by the IOM—is not likely to stray to the North or other migrant destinations until those States can offer comparable draws.

It does not automatically follow, moreover, that material incentives produce more or less migration, as discussed above.²⁹⁹ Research has demonstrated a relative stability in the total number of global migrants since the Second World War; despite changes in immigration law and policy over that period, only

295. More open democratic institutions will even tend States toward restriction as compared to States where special interests advocating in need of labor have more clout. See David Bearce & Andrew Hart, *International Labor Mobility and the Variety of Democratic Political Institutions*, 71 INT’L ORG. 1 (2016). One reason why is that cultural fears, especially, have played a larger role in determining support for right-wing populist anti-immigration parties in Europe than fears over wages, for example. David Oesch, *Explaining Workers’ Support for Right-Wing Populist Parties in Western Europe: Evidence from Austria, Belgium, France, Norway, and Switzerland*, 29 INT’L POL. SCI. REV. 349, 369–70 (2008).

296. See, e.g., David J. Hardisty, Kirsten C. Appel & Elke U. Weber, *Good or Bad, We Want it Now: Fixed-cost Present Bias for Gains and Losses Explains Magnitude Asymmetries in Intertemporal Choice* 26 J. BEHAV. DECISION MAKING 348, 348 (2012) (explaining the desire for immediate gains despite future consequences); Matthew O. Jackson & Leeat Yariv, *Present Bias and Collective Dynamic Choice in the Lab*, 104 AM. ECON. REV. 4184 (2014) (demonstrating the high percentage of individuals with present bias).

297. Such an argument could theoretically draw strength from the long debate over “push” and “pull” factors as contributors to the total number of migrants. See Devoto, *supra* note 159. It could also potentially cite large shifts in global migrant populations over long historical periods as a result of policy, economic, and other forces. See, e.g., Adam McKeown, *Global Migration, 1846-1940*, 15 J. WORLD HIST. 155, 164–67 (2004).

298. See, e.g., de Haas, *supra* note 160.

299. See Part II(C); Castelli, *supra* note 162.

changes in migration's direction have resulted.³⁰⁰ Not only have attempts to *stem* migration using development aid failed or proven counterproductive, but evidence from Latin America and Africa demonstrate that policy initiatives have not *stimulated* higher migration numbers in those regions either.³⁰¹

Another likely objection is that States can and have pursued immigration restrictions *despite* potential, or even existing, labor shortages.³⁰² This is, in fact, the basis for believing that political conditions in many migrant destination States will support promoting South-South migration. At the same time, the seeds of States' *eventual* likelihood of accepting more migrants are also clear: some of these societies have already begun facing labor supply crises and have needed to retreat, or at least consider retreating, from their recalcitrance—demonstrating their vulnerability to serious supply shocks. Japan's experience with extreme restriction in the context of declining birthrates and the failures of both natalism and automation illustrates the consequences of diminished labor abundance. The country “paid the costs in terms of sociodemographic, economic, and political challenges.”³⁰³ It has consequently been forced to admit an increasing number of immigrants against its policy preferences.³⁰⁴ Similarly, in South Korea, pride in ethnic homogeneity, in theory, has to contend with the material reality of low birthrates, few potential marriage partners, and labor needs—this has opened the country to greater multiculturalism in practice.³⁰⁵

It could nonetheless be argued that discouragement of migration there might hand a political victory to those who would prefer to keep migrants away from their countries. Such a victory could have long-term consequences that might militate against improved migrant treatment or inclusion. Yet there are indications that fears over labor shortages would extend even to populist governments known for their stances against immigration. Polish employment agents already fear competition for the workers they need from the Global South.³⁰⁶ A Polish

300. See Hein de Haas et al., *International Migration: Trends, Determinants, and Policy Effects*, 45 *POPULATION & DEV. REV.* 885 (2019).

301. Lavenex et al., *supra* note 76, at 473.

302. See, e.g., Stephen Castle, *U.K.'s New Immigration Rules Will Restrict Low-Skilled Workers*, *N.Y. TIMES* (Feb. 19, 2020) (noting business opposition on the basis of potential “labor shortages”), <https://www.nytimes.com/2020/02/19/world/europe/uk-immigration-low-skilled-workers.html>; Monika Pronczuk, *Poland's immigrant stance at odds with need for workers*, *FIN. TIMES* (Aug. 5, 2019), <https://www.ft.com/content/2dd225a8-a498-11e9-974c-ad1c6ab5efd1>. See also Bearce & Hart, *supra* note 295; Oesch, *supra* note 295, both demonstrating the influence of popular culturalist resistance to immigration.

303. James F. Hollifield & Michael Orlando Sharpe, *Japan as an 'Emerging Migration State'*, 17 *INT'L REL. ASIA-PAC.* 371, 371 (2017).

304. See, e.g., Motoko Rich, *Bucking a Global Trend, Japan Seeks More Immigrants. Ambivalently.*, *N.Y. TIMES* (Dec. 7, 2018), <https://www.nytimes.com/2018/12/07/world/asia/japan-parliament-foreign-workers.html>.

305. See Andrew Eungi Kim, *Global migration and South Korea: foreign workers, foreign brides and the making of a multicultural society*, 32 *ETHNIC & RACIAL STUD.* (2009).

306. Pronczuk, *supra* note 302.

official recently raised the alarm that the number of immigrants it has admitted is insufficient for the country's economic requirements, even while it has quietly begun admitting more.³⁰⁷ Hungary, facing a labor crunch, has done the same.³⁰⁸ Elsewhere, policymakers in immigration-hostile political contexts feared that a restricted immigrant labor supply was on track to produce an economic crunch. The Trump Administration's restrictions also led to labor shortages.³⁰⁹ "We are desperate—desperate—for more people," acting Trump White House Chief of Staff Mick Mulvaney consequently admitted. "We are running out of people to fuel the economic growth that we've had in our nation...We need more immigrants."³¹⁰

Labor shortages more recently posed by the closed borders resulting from the COVID-19 pandemic further increased awareness of the importance of immigrant labor.³¹¹ Italy debated regularizing the status of undocumented workers, suggesting a recognition of the need to maintain a critical workforce by means that touch on their treatment as well as their presence.³¹² Its Agriculture Minister has noted that their critical place in the food supply chain has meant that the country could no longer act "as if migrants are our enemies."³¹³ The pandemic thus illustrates how Northern and other current migrant destinations forced to compete for immigrant workers with a newly attractive South may need to offer even more concessions.

Altering the material dynamics of global migration may be even more likely to shift political attitudes, given that much current resistance facing migrants is highly contested and vulnerable to changed circumstances. In many Northern democracies, only small shifts may be required to reduce hostility to migrant

307. *Poland is cocking up migration in a very European way*, *ECONOMIST* (Feb. 22, 2020), <https://www.economist.com/europe/2020/02/22/poland-is-cocking-up-migration-in-a-very-european-way>; Makana Eyre & Martin Goillandeau, *Poland's two-faced immigration strategy*, *POLITICO* (Jun. 13, 2019), <https://www.politico.eu/article/poland-two-faced-immigration-strategy-ukraine-migrants>.

308. Bojan Pancevski & Adam Bihari, *Hungary, Loudly Opposed to Immigration, Opens Doors to More Foreign Workers*, *WALL ST. J.* (Sept. 8, 2019), <https://www.wsj.com/articles/hungary-loudly-opposed-to-immigration-opens-doors-to-more-foreign-workers-11567944008>.

309. *See, e.g.*, Alfredo Corchado, *Even as Trump tightens immigration, the U.S. labor shortage is becoming a crisis*, *DALL. MORNING NEWS* (May 17, 2018), <https://www.dallasnews.com/news/immigration/2018/05/17/even-as-trump-tightens-immigration-the-u-s-labor-shortage-is-becoming-a-crisis>.

310. Nick Miroff & Josh Dawsey, *Mick Mulvaney says U.S. is 'desperate' for more legal immigrants*, *WASH. POST* (Feb. 20, 2020), https://www.washingtonpost.com/politics/mulvaney-says-us-is-desperate-for-more-legal-immigrants/2020/02/20/946292b2-5401-11ea-87b2-101dc5477dd7_story.html.

311. *See, e.g.*, Jen Skerritt & Millie Munshi, *Global Food Output Runs Into Migrant Worker Woes*, *BLOOMBERG* (Aug. 7, 2020), <https://www.bloomberg.com/news/newsletters/2020-08-07/supply-chains-latest-migrant-worker-shortages-hit-food-output>.

312. *See* Sylvia Poggioli, *Italy Considers Permits For Undocumented Migrants To Fill A Big Farmworker Gap*, *NPR* (Apr. 29, 2020), <https://www.npr.org/2020/04/29/847483140/italy-considers-permits-for-undocumented-migrants-to-fill-a-big-farmworker-gap>.

313. *Id.*

treatment and inclusion, and the material incentives the proposal brings about may tip the balance. Worldwide polling averages even in the pivotal year of the “migration crisis” of 2015, for example, demonstrated relatively close levels of support for increased (21 percent), status quo (22 percent), and decreased (34 percent) immigration.³¹⁴ Even in Europe, where attitudes are among the most hostile, demands to decrease immigration only comprise a majority of 52 percent.³¹⁵ Such bare majorities are vulnerable to pressures. Japan’s 2018 policy shift on immigration came even after polls indicated similar levels of disapproval for opening its borders any further, demonstrating the power of material incentives.³¹⁶ In other important parts of the North, like the United States, anti-immigration sentiment is more limited and less of an obstacle.³¹⁷ While in many Northern societies, support for immigration has not concretized enough to fear the future consequences of increased South-South migration, such reticence is pliable in the face of material adversity and would likely be impacted by migration’s shift South.

3. *The Justness of Focusing on Materialism and Southern Migration*

A final set of objections concern a program promoting South-South migration’s justness as a means to help improve global migration governance. Promoting South-South migration could be viewed as an attempt to forcibly “offshore” migration to the South, as current development aid or externalization deals do.³¹⁸ This criticism holds particular weight at a time when some Southern countries serve as the chief hosts of refugees and other migrants fleeing from humanitarian emergencies, giving rise to potential arguments that a proposal that does not immediately require Global North countries to “burden-share” with them is fundamentally unjust.³¹⁹

Promoting migration within the South does not mean migrants would be “trapped” in South-South movements, however; migratory pathways to the North and other existing destinations would continue to be available. The difference

314. NELI ESIPOVA, JULIE RAY, ANITA PUGLIESE & DATO TSABUTASHVILI, *HOW THE WORLD VIEWS MIGRATION 2* (2015), https://publications.iom.int/system/files/how_the_world_gallup.pdf.

315. *Id.*

316. BRUCE STOKES & KAT DEVLIN, *DESPITE RISING ECONOMIC CONFIDENCE, JAPANESE SEE BEST DAYS BEHIND THEM AND SAY CHILDREN FACE A BLEAK FUTURE 5* (Nov. 12, 2018), https://www.pewresearch.org/global/wp-content/uploads/sites/2/2018/11/Pew-Research-Center-Despite-Rising-Economic-Confidence-Japanese-See-Best-Days-Behind-Them-and-Say-Children-Face-Bleak-Future_2018-11-121.pdf.

317. Niraj Chokshi, *75 Percent of Americans Say Immigration Is Good for Country, Poll Finds*, N.Y. TIMES (June 23, 2018), <https://www.nytimes.com/2018/06/23/us/immigration-polls-donald-trump.html> (noting hostility to the Trump Administration’s family separation policy forced its abandonment).

318. See *supra* Parts I(C) and II(C) for examples of these approaches.

319. See, e.g., Stephanie Nebehay, *Poor nations hosting most refugees worldwide, need more Western help: U.N.*, REUTERS (June 19, 2019), <https://www.reuters.com/article/us-un-refugees/poor-nations-hosting-most-refugees-worldwide-need-more-western-help-u-n-idUSKCN1TK0CE>.

would instead be that *additional* pathways to different parts of the Global South are opened to migrants with incentives provided for taking them. Moreover, characterizing the South as a zone simply overburdened by existing refugee hosting requirements misconstrues a vast and diverse part of the world and wrongfully assumes that it lacks the ability to employ migration to its advantage in the same way as destinations in the North. As the above and other evidence makes clear, immigrants are already exhibiting great potential in many of those States, to those States' benefit.³²⁰

The proposal could also be further critiqued for idealizing the potential of South-South migration relative to harsh realities of societies in which it is already taking place. Such societies could conceivably include those of the Gulf— notorious for harsh working conditions including death from overwork in hot weather and the confiscation of passports.³²¹ Yet the experiences of migrants traveling to these States do not necessarily imply similar treatment in other parts of the South under the proposed schema. Existing migration within the South also takes place without the benefit of governance designed to improve, implement, and monitor migrant rights. Linking international oversight to such functions, conditioning migrant placement on respect for rights, and increasing migrant bargaining power relative to existing migrant destinations can achieve beneficial impacts for the status of migrants in existing destinations everywhere.

The proposal's focus on North-South relations and on the Global South also means it could not address and could exacerbate some migration-related tensions *within* the Global North. For example, it would not dissipate discontent in the United Kingdom over the presence of Eastern European migrants that helped contribute to that country's vote to leave the EU.³²² That said, the EU could consider its own similar measures to promote more migration *between* eastern member States that might produce the same material benefits within the bloc and Europe more broadly.

Finally, the proposal's considerable focus on economic impacts could be criticized for its material orientation, the very element that sets its approach apart from other proposals for migration governance reform. This proposal may demonstrate what Arjun Appadurai, among others, has lamented as thinking about

320. See, e.g., ILO & OECD DEVELOPMENT CENTRE, *supra* note 287.

321. See, e.g., Janae C. Cummings, *The Price is Rights: Getting the United Arab Emirates up to International Speed in the Labor Law Department*, 44 BROOK. J. INT'L. L. J. 410, 410, 437 (2018). Hélène Thiollet, furthermore, writes of a "hypothesis of a global convergence in illiberal migration governance" based on the similarities of the Gulf and OECD countries. See Thiollet, *Immigrants, Markets, Brokers, and States: The Politics of Illiberal Migration Governance in the Arab Gulf* (International Migration Institute Working Papers No. 155, 2019), <https://hal.archives-ouvertes.fr/hal-02362910v2/document>.

322. Immigration was a key driver of the Brexit vote. See, e.g., Joppke, *supra* note 1. Although at times Brexit was vaguely associated with all immigration, it was the rapid increase in EU migration, specifically, that was linked to the vote, and its rapid increase that helped drive it. See *id.* and Matthew Goodwin & Caitlin Milazzo, *Taking back control? Investigating the role of immigration in the 2016 vote for Brexit*, 19 BRIT. J. POL. & INT'L. REL. 450 (2017).

migrants like interchangeable widgets in global labor markets.³²³ *Recognition* of the economic logic sometimes driving migration and exclusion does not constitute *reduction* to it, however. This Article—and its proposal—have focused on material factors that include economic ones, but also account for political realities grounded in concerns about identity. They have also accounted for migrants’ potential aspirations to move to places regardless of economic benefit, ensuring that migrant pathways are safe, and that migrant rights are respected. While they argue for using material factors to incentivize improved treatment of migrants, these material factors are hardly ends in and of themselves.

There is also another, non-economic sense in which such a proposal can be supported. It would be a historical *justice* to reengineer the machinery once enjoyed largely by European emigrants to the advantage both of materially disadvantaged States in the South and people from Southern regions who wish to improve their lives through mobility. Southern migrants were not just deprived access to the system that existed for the benefit of European migrants well into the postwar era. That system’s breakdown, rather than its expansion, was responsible for global migration governance’s current insufficiencies. Reconstituting that governance for the benefit of Southern migrants could help fulfill the “imperial debts” owed to them by societies that benefitted from the exploitation of the South.³²⁴ Granting Southern migrants access to such a system would also help fulfill an understanding of justly-distributed opportunities in which no potential migrant must face a world in which benefits of such a program are not available to them.³²⁵

CONCLUSION

This Article has argued that global migration governance requires further reform, and that current efforts and plans to do so lack a sufficient accounting for political reality. It is necessary to embrace an approach which would address political barriers to its effectiveness at promoting the better acceptance, distribution, and treatment of migrants. The need to address political barriers should be considered in its own right. A global migration governance oriented around the promotion of South-South movement is one potential means to address this need to confront political obstacles. Yet promoting South-South movement need not be the approach to driving material changes that can break through the impasse of “political will” inhibiting the reimagination of global migration governance. It is merely one possible means to do so.

One scholar suggests that a migration governance that pays better attention to the needs of the South could ultimately emerge from shifts in international

323. See Arjun Appadurai, *Aspirational maps: On migrant narratives and imagined future citizenship*, EUROZINE (Feb. 19, 2016), <https://www.eurozine.com/aspirational-maps>.

324. See Achiume, *supra* note 152.

325. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

power relations, and in particular, greater Chinese influence in international institutions.³²⁶ That said, the ends of this influence with respect to migration are not yet clear. China has recently used UN fora to critique existing approaches to migration, including both externalization and, in discussing the Global Refugee Compact, the use of international law toward “intervention [in] internal affairs.”³²⁷ It has instead stressed the role of development projects in stabilizing refugee movements.³²⁸ China’s Belt and Road Initiative has also promoted some movement between China and other “developing” States.³²⁹ China’s representative to the UN, in this vein, characterized migrants as “bridges and belts” between States and economies.³³⁰ These moves suggest an interest in facilitating some planned economic migration and disincentivizing unplanned mobility. Yet China’s interactions with the IOM have mostly focused on migration in and out of its territory.³³¹ Efforts to increase organized South-South movement generally could actually appeal to Chinese concerns, while serving as a basis for cooperation between China and other States. Scholars already suggest that movements within the Belt and Road are ripe for IOM involvement, while China’s existing attempts to address refugees through development can be seen as forms of “South-South” assistance.³³²

Whatever form it takes, any proposal to reform migration governance to the end of overcoming political obstacles should, however, bear in mind the appeal of promoting a more positive and desirable image of migration as an engine of prosperity. This image would stand in contrast to migration’s reputation as a “burden” to be “shared,” a terminology that both proponents and detractors of migration often employ. The latter characterization has helped lead to sclerosis and discrimination. Fundamentally, migration governance will become less of a difficult question in any way that migration can become thought of less as a problem, and more as an opportunity, for destinations and migrants alike.

326. See Geiger, *supra* note 61, at 295, 300-01.

327. *China tells UN Australia’s offshore detention centres violate human rights, don’t have adequate conditions*, ABC NEWS AUSTRALIA (Mar. 13, 2021), <https://www.abc.net.au/news/2021-03-13/china-urges-australia-to-close-offshore-detention-centres/13245174>; Lili Song, *Strengthening Responsibility Sharing with South–South Cooperation: China’s Role in the Global Compact on Refugees*, 30 INT’L J. REFUGEE L. 687, 688 (2018).

328. Song, *supra* note 327, at 689.

329. Yadi Zhang & Matin Geiger, *The IOM in Building and Supporting Migration Management in China*, in INTERNATIONAL ORGANIZATION FOR MIGRATION, *supra* note 61, at 162

330. *Id.*

331. *Id.* at 150-55

332. *Id.* at 162; Song, *supra* note 327, at 688.