

# (Ab)normality of international migration law: normative and structural asymmetries and contradictions

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**Blogpost by a member of our Interest Group**

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International migration law (hereinafter: IML) is a multi-layered body of law. It is composed of an ever-growing number of norms relating to various branches of international law such as human rights law, international refugee law, international labour law, international trade law, law of the sea, nationality law, diplomatic and consular protection, and international humanitarian law. Despite this rich normative content, these norms and principles do not constitute a logically structured, coherent and integrated system. That is why some refer to IML as “substance without architecture” (A.T. Aleinkoff, ‘International Legal Norms on Migration: Substance without Architecture’ in R. Cholewinski – R. Perruchoud – E. MacDonald (eds.), *International Migration Law. Developing paradigms and Key Challenges*, The Hague, T.M.C. Asser Press, 2007, 467-480) or describe it as a “giant unassembled juridical jigsaw puzzle, [in which] the number of pieces is still uncertain and the grand design is still emerging” (R. Lillich, *The Human Rights of Aliens in Contemporary International Law*, Manchester, MUP, 1984, 122). It is thus not surprising that there exists no worldwide codification regulating all legal aspects of migration. The only universal instrument is [UNGA Declaration No 40/144 of 1985 on the human rights of individuals who are not nationals of the country in which they live](#), but this is a non-binding soft law instrument. Neither does the definition of the term “migrant” exist under general international law.

Against this backdrop, this blog entry endeavours to give the readers a comprehensive insight into the most striking normative as well as structural asymmetries and contradictions *in IML*.

As per the production of IML, this rapidly growing, abundant set of norms still contains significant gaps leaving a considerable margin of manoeuvre for States to act freely, without internationally accepted legal constraints. Putting it in a different perspective, States as masters and creators of IML have not been eager yet to limit their traditional sovereign prerogatives beyond a certain extent. This explains the first and basic structural contradiction in IML. On the one hand, one can witness an ever-increasing, complex web of legal norms, with new treaties and soft law instruments emerging constantly as well as expanding migration-related

international jurisprudence. On the other hand, however, States have still reserved for themselves certain untouchable domains, without international law-making (*e.g.* admission conditions of foreigners or the domestic legal status granted to them), thus they enjoy some leeway to pursue their own national policy goals. This is formally lawful and legitimate, but often at least ethically reproachable.

If we take a look at the basic principles in the field of IML, two general principles of international law seem to clash with each other. One claims that States are not entitled to completely refrain from interactions with other States and their nationals, consequently not allowed to apply the ‘closed borders’ or the ‘splendid isolation’ policy. This very rule stems from the membership of the international community, and it is in close connection with one of the [Montevideo criteria of statehood](#) (entering into relations with the other States). The other principle expresses States’ traditional right to regulate the admission of foreigners into their territories, since controlling movements of people crossing the borders is an attribute of State sovereignty. The question then arises: how to reconcile these two seemingly opposing principles? My answer is the following: they are to be conceived not as contradictory, but complementary maxims, meaning that the first represents the general rule and the second serves as the exception. In other words, one may assume the concept of a “moderate and limited freedom of movement” across the world, and not the other way around, *i.e.* the complete closure of borders with some narrow exceptions or derogations. Conceptually speaking, wearing these lenses makes a big difference regarding how to conceive and interpret the “freedom of movement vs. immigration control” relationship. Nowadays, though, still quite a few States opt for the second narrative.

Moving towards more concrete normative asymmetries, the most flagrant relates to the “magic triangle” of the right to leave any country, including someone’s own, the right to enter into another country and the right to return. The right to leave as a universally recognized human right (enshrined *e.g.* in the [1948 Universal Declaration of Human Rights](#) and the [1966 International Covenant on Civil and Political Rights](#)) is not coupled with the other side of the coin, *i.e.* one’s right to enter into another country. If someone is found already abroad, he/she also enjoys the right to return as a basic human right (see the above instruments). The result of this asymmetry is that the migrant is allowed to leave his/her own country and then to return there, without guaranteeing in-between the individual right to enter into a State other than that of his/her nationality (V. Chetail, ‘Droit international des migrations: fondements et limites du multilatéralisme’ in Habib Gherari – Rostane Mehdi (éds.), *La société*

*internationale face aux défis migratoires*, Paris, Editions A. Pédone, 2012, 38). From the triangle of leaving, entering and returning, the right to enter into a foreign country is not recognized as a general human right under international law, making this pillar extremely weak in this logical architecture. Again, one can find State sovereignty behind this asymmetry. States continue to keep the “right to refuse entry” within their sovereign powers and currently are not willing to change this prerogative to decide/select who is let in, which is now a customary international norm. The customary law character of this rule is echoed in ECtHR case-law (e.g. *Case of Hirsi Jamaa v. Italy* (Application no. 27765/09), Judgment of 23 February 2012 (GC)) and also argued in the doctrine (e.g. Hélène Lambert, *The position of aliens in relation to the European Convention of Human Rights* (Human rights files, No. 8 (revised)), Strasbourg, Council of Europe Publishing, 2001, 11 and footnote 32).

Nevertheless, when examining the freedom of movement and the right to enter in historical perspective, restrictions on them and States’ power to control entry do not date back to ancient times; it is a recent “invention” of States. Up until the 19th century, the right of individuals to freely travel to and reside in foreign countries was well-accepted in State practice, and recognized by many of the eminent international lawyers in the post-Westphalian era alike (Grotius, Vitoria, Wolff, Pufendorf). So even the birth of the system of nation-States did not *per se* trigger the erosion and/or restrictions on the freedom of movement of people across the borders. Border control and passport policies are relatively new means in States’ toolbox, having become general practice since the beginning of the 20th century.

Furthermore, migration, which is an international phenomenon and process by nature, involves at least three major actors in different positions and with different power and weight. These are the migrant as a human being with human rights, the State of origin and the State of destination (to which in some cases may be added the transit countries) as subjects of international law. Leaving a given country and moving somewhere else lies at the intersection of at least two sovereigns, which are equal, independent and cannot exercise jurisdiction over each other (*par in parem non habet imperium*). However, the subject of the whole phenomenon, the migrant, who is in the very heart of the process (active player) is in the weakest position compared to sovereign, powerful States (passive players). That person, in addition, falls under the jurisdiction of both States. The personal jurisdiction of the country of origin and the territorial jurisdiction of the country of destination equally extends to him/her. This may give rise to collisions of norms and regimes, in the State-individual relationship (internally) and between the sovereigns, on the inter-State

level (internationally) as well. As a result, the individual, whose role is increasing in modern international law (with Judge Cançado Trindade's words, in the [“international law for humankind”](#)), “can easily find himself/herself in ‘sandwich with two sovereign States’, and thus cannot avoid a much more marginal, and subordinated, standing”.

Finally, the institutional veil of IML shows signs of asymmetries as well: in spite of the enhanced and intensifying multilateralism in matters relating to international migration (see e.g. the UN's more serious involvement and coordination role), the institutional structure is quite fragmented, with overlapping mandates, blurred lines and lacking of really sharp teeth. The three main intergovernmental organisations of universal character dealing with international migration, the [Office of the UN High Commissioner for Refugees](#) (UNHCR), the [International Organization for Migration](#) (IOM) and the [International Labour Organisation](#) (ILO) follow a too narrow and compartmental, sectorial approach, which also leads to the unnecessary competition and in the meantime to the dilution of responsibility and insufficient coordination between the actors concerned (the [Global Migration Group](#) as an umbrella is a good initiative but has not reached its full potential yet). IOM does not deal with forced migrants and is too practical and operational, concentrating on fieldwork, without standard-setting activities. UNHCR's mandate was enlarged in the last two decades, nevertheless its personal and material scope remains by necessity limited (the refugees and other “persons of concern” like stateless people, IDPs or victims of trafficking represent just one facet of the diverse group of international migrants). Although ILO has a world-wide reputation for international norm-creation, its activities do not go beyond the world of labour. There is thus no universal international organisation primarily responsible for global migration governance. Here the contradiction lies, on the one hand, in the great number of institutional actors (besides the aforementioned ones, several other intergovernmental organisations and so-called regional consultative processes are involved in international migration governance), and, on the other hand, in their limited outreach and competences, in conjunction with functional deficiencies (e.g. IOM is not amongst the UN specialized agencies and the UN itself has only recently started showing some ownership about the issue). A truly global international organisation, following a holistic approach, with an all-encompassing mandate in the field of migration and a clear leading role (comparable with the International Committee of the Red Cross in the field of international humanitarian law), having genuine standard-setting competence, would be the way forward in this regard.

This blog entry aimed at providing a tour d’horizon when mapping and highlighting the main normative asymmetries and structural contradictions in IML. By way of conclusion, I would recall Professor Opeskin’s words in his paper entitled [The Influence of International Law on the International Movement of Persons](#): “international law is an imperfect framework for regulating the international movement of persons because it has developed in a piecemeal fashion over a long time to deal with issues of concern at particular points in human history. Yet, despite its shortfalls, international law and its associated institutions unquestionably play a most important role in constraining and channelling state authority over the international movement of persons.”

I also see the glass half full. As an optimist, I firmly believe that it is human rights law which is arguably the most protective layer of international migration law, with further potential to mitigate or gradually eradicate those asymmetries, inequalities and contradictions in the normative framework and to slowly but surely serve as the ‘gentle civilizer’ of IML in the longer run.