



International Journal of Migration and Border Studies

ISSN online: 1755-2427 - ISSN print: 1755-2419

<https://www.inderscience.com/ijmbs>

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DOI: [10.1504/IJMB.2026.10080258](https://doi.org/10.1504/IJMB.2026.10080258)

Article History:

Received:	01 July 2025
Last revised:	27 March 2026
Accepted:	27 March 2026
Published online:	16 September 2026

An international human rights law of migration? Reflections on the place of a right to immigrate

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Abstract: This article argues that there is such a thing as an international human rights law of migration, but that it is essentially truncated. Human rights have been conceived as accompanying the trajectory of migrants as humans but have historically had little to say about migration itself. This has left international human rights law strangely disarmed and quiescent when faced with assertions of a broad ‘right to exclude’ by states. By contrast, the article contends that placing the idea of a right to immigrate at the centre of an international human rights law of migration makes better sense of the predicament of mobile persons. Such a right may not currently be recognised in positive international law, but it is coherent within the overall economy of human rights as a universal project whose vocation is to compensate for some of the constraints imposed on liberties by the international legal system itself. Encompassing a right to immigrate within international human rights law maximises the fundamental aspiration to self-determine through human mobility, aligns the regimes of domestic and cross-border freedom of movement, and makes it possible to conceptualise legally permissible limitations to immigration.

Keywords: human rights; international law; sovereignty; right to exclude; right to immigrate; right to emigrate; mobility rights; rights limitations; borders.

Reference to this paper should be made as follows: Mégret, F. (2026) ‘An international human rights law of migration? Reflections on the place of a right to immigrate’, *Int. J. Migration and Border Studies*, Vol. 9, No. 6, pp.132–150.

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1 Introduction: understanding migration through human rights

This article critically assesses the relationship of international human rights law to migration. Although there has been considerable interest in the ethics (Carens, 2013) and philosophy (Brock, 2020; Cesare, 2020) of migration including in terms of the liberal tradition (Farer, 2020; Ferracioli, 2022), relatively few connections have been made to

positive international human rights law. This is despite the fact that international law clearly not only constrains the possibility of migration but constitutes forms of specifically inter-state migration through its articulation of legal/illegal mobility. The aim of the article is to examine whether there is at present a normatively coherent international human rights law of migration and discuss under what conditions it might be perfected to be consistent with its own premises. More specifically, the article will seek to build an ethically informed but specifically *legal* case for the necessary centrality of a right to immigrate to the international human rights law edifice.

The starting point is that although there can ultimately be such a thing as an international human rights law of migration, that law as it stands remains essentially truncated and in the making. In order to make that point, the article conceptualises how international human rights law relates to the phenomenon of migration, and how migration relates to the paradigm of international human rights law. Although international human rights law is not primarily about migrants and migration is typically outsourced to a separate domestic and international migration law, it makes sense to think of migration as at least constituted by international human rights norms. A fully-fledged international human rights law of immigration would normalise its status and entrench a culture of rights that has become *de rigueur* elsewhere. The article will claim, however, that international human rights law is much more concerned with protecting migrants' human rights through their migratory journey than it is in taking a stance on migration per se, in the process fundamentally debilitating what human rights might have to say about human mobility.

The article's purpose is not a merely doctrinal interest in mapping how a body of law regulates a phenomenon, but a more theoretical interest in how international human rights law constructs/constitutes migration as a normative phenomenon. It might seem at first as if international human rights law has little to say on migration and indeed the argument has long been made that international human rights law should steer clear of the issue lest human rights guarantees be weakened and taken out of their natural habitat (Gavison, 2010). If anything, migration questions are taken up by various domestic laws and, at best, by a burgeoning international law of migration. At the same time, international human rights law, as the repository of some of the most exigent aspirations of the international community, would seem a natural corpus to turn to in order to problematise and challenge some of the limitations of international migration. This may be particularly the case at a moment when migrants have never been more under threat and when international human rights law is being insistently pressed to not oppose states' efforts to suppress immigration (*The Guardian*, 2025).

As it turns out, however, international human rights law has not been particularly sympathetic to the demands of migration as such or, at best, agnostic. Even the literature that seems otherwise highly supportive of migrants from a human rights perspective considers a right to immigrate as unrealistic (Trindade, 2008). To the extent that international human rights law captures migration, it captures it tangentially because migrants 'are humans too', and not as such. International human rights law, then, is concerned with migrants' human rights rather than humans' right to migrate. It constructs migration as much by what it says about it than what it does not say about it. In effect, international human rights law doubles down on general international law's deference to states as the authoritarian guardians of their borders. As such, it condemns itself to perennially beat around the bush of the migrant condition.

In this brief effort at conceptualising the two, a contrast is drawn between two ways in which one might understand and imagine that relationship. The most common and dominant is that individuals have human rights ‘whilst migrating’ by virtue of being human, but that they do not have any specific right to immigrate. Positive international human rights law does not contest states’ prerogative to exclude from their territory and merely ‘accompanies’ migrants as human rights holders, essentially trivialising the fundamental condition of migrants. In the second section, attention turns to how international human rights law might be thought of as entailing a right to immigrate. Taking a cue from work in political theory on the right to immigrate (Carens, 2013; Oberman, 2016), this paper explores some of the ways such a right might be inserted into the administration of positive international human rights law.

2 Human rights in but against migration?

The migration process engenders specific forms of vulnerability to human rights violations. Migrants are notoriously fragile, having left the shores of their sovereign and not having necessarily reached the destination state or being in a liminal state there. Countless migrants have died attempting to reach their destination. Migrants are often preyed upon and exploited by traffickers. They suffer from constant discrimination even when they have secured a foothold in the host state. They are often deprived of political rights there since they do not have citizenship. They may not have access to a number of welfare rights. They can be deported even when they have long taken root. As a result, the fight for migrants’ rights has become a sort of front line of human rights, one of its most visible manifestations in relation to populations who often fall through the cracks of traditional constitutional protections. That fight emphasises the vulnerability of migrants, particularly asylum seekers or those fleeing abject destitution, and criticises the extent to which ‘inhuman’ migration policies have entrenched that vulnerability. It responds by insisting on their right to have rights, based on their bare humanity.

2.1 Limitations of the human rights approach to migration

This is what is habitually considered to fall under the ‘human rights approach to migration’ (HRBA). The HRBA has accomplished great strides in the last years and is in a sense the least one can ask of the migratory trajectory, namely that it not become an opportunity for a redoubling of rights violations. For example, the Global Compact on Migration has put at its heart international human rights law, affirming the need to ‘ensure effective respect for and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle.’ A human rights approach is particularly useful as a way of remedying situations of vulnerability, including discrimination, that result from migration. It is part of an effort at the global governance of migration patterns that focuses on the idea that human mobility is a prime site for particular abuses. It has led to an increasing entanglement between human rights norms and evolving conception of migration both supranationally and domestically (Gammeltoft-Hansen and Madsen, 2021). It focuses quite centrally on the right to family life, freedom from inhuman or degrading treatment and limitations to deportation. The human rights approach to migration is often presented as its best hope (Taran, 2009).

Not having one's rights violated whilst migrating might be seen to objectively concur to the facilitation of migration. The prospect of grave violations may have a deterrent effect on migratory trajectories. Human rights law is particularly relevant for those would-be immigrants who already find themselves on the territory of another state and thus under its full human rights jurisdiction. At the same time, a right to have rights whilst migrating merely retells the general story of human rights through the particular category of the migrant. Migrants are humans too and therefore have rights. The 'human rights of immigrants' route, then, does not particularly take into account the defining condition of immigrants *as* persons aspiring to immigrate: it only sees them as vulnerable humans, as it happens as a result of migrating whose deportation might frustrate their right to family life or result in inhuman or degrading treatment. The protection of their abstract humanity only seems to arise as a result of the suppression of their actual agency as expressed in their willingness to migrate.

Clearly then, accompanying migrants *qua* humans is not the same thing as claiming that there is any right to immigrate as such. Rather, it merely points to the reality that migration creates conditions of intense vulnerability associated from the point of view of human rights. In fact, proponents of the human rights in immigration approach are emphatic that the latter is:

“anchored in applicable international human rights law, and is therefore not inconsistent with the concept of State sovereignty based on which sovereign States have adopted, and ratified, relevant international law. (...) In other words, a strong stance towards treating migrants on the basis of existing international human rights law cannot translate into an endorsement of a world that would be based on free mobility, i.e. open borders. A rights-based approach to migration does not constitute an endorsement of the concept of ‘free movement’” (Jenny, 2004)

This, however, inevitably raises questions about whether a rights approach that merely seeks to soothe the edges of migration trajectories but ignores the central question in migrants' predicament can succeed and is defensible on its own terms.

The idea that human rights are *against* migration may at first glance seem excessive given the lack of explicit international prohibition of immigration (states are certainly not *required* to prohibit immigration). But is worth emphasising that international human rights law is also rich with what it *does* not say. In a world of sovereign states where the default principle is state freedom (the Lotus position), states can do whatever is not specifically prohibited. To not say that there is a presumptive right to immigrate is to ensure, internationally, that this right effectively does not exist as a right (even though states may well, for their own reasons and on their own, decide to let in this or that migrant). In other words, rights agnosticism about immigration (neither good nor bad and therefore seemingly unconnected to the rights project) is as good as condoning exclusion of immigrants.

This may remain hidden most of the time because of an otherwise intense stance in favor of immigration in at least some cases. As is well known, there is quite a deep human rights assumption in favor, specifically, of a right of asylum (Edwards, 2005). In addition, there is a right to *emigrate* (ECHR protocol 4, article 2), which has proved non negligible historically (Guggenheim, 1975). Moreover, international human rights law may have a range of other effects on the possibilities of immigration, if only laterally. For example, there is a quite limited right to immigrate (or at least not to be deported) based on the extent to which this potentially affects the right to family life and reunification

(Milios, 2018). It may also be that international human rights law guards against some particularly egregious forms of discriminatory bars to immigration, notably on a racial or gendered basis, and that more generally it posits the applicability of basic norms of procedural and even substantive fairness when it comes to the possibility of immigrating and, particularly, the treatment of deportation (Feddersen et al., 2022).

But these rights protections, such as they may be, all operate on the margins of the migratory experience. They either select a very small proportion of humans for immigration based on their special status (asylum); create specious rights as a result of uncoupling the right to leave and the right to arrive; arbitrarily reward chance or even illegality by recognising rights to those who have secured a territorial foothold in a foreign state as opposed to mere candidates for migration (Paz, 2017); or lead to distortions by seeing mobility rights only through the weird prism of the right to family life and reunion. All in all, the dominant human rights approach to migration reinforces the territorialist, sovereignist and sedentary biases of international law. Territorialist in that the heart of the action when it comes to international human rights law is what happens on any given state's territory, not the territory of another state, let alone in between states; sovereignist, because for all its apparent sanctification of the dignity of human beings, international human rights law remains deeply embedded in a project of reification of the sovereign and its prerogatives; and sedentary, because international human rights law imagines populations as static, subject to only one sovereign at any one time, and 'residing' somewhere rather than on the move.

2.2 *The Taboo of the Right to Immigrate*

The key to the invisibility of migrants' plight qua migrants is that there is emphatically, when it comes to international human rights law, no right to immigrate to any particular country¹. As the ECtHR frequently puts it, "a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. [...] The Convention does not guarantee the right of an alien to enter or to reside in a particular country [...]"². In addition to the right not featuring in any standard catalogue of human rights, applicants for immigration (be it for asylum purposes) are not technically considered to fall within the jurisdiction of the state they aspire to immigrate into so long as they are not on its territory³. It is only to the extent that migrants have secured a territorial presence that they fall under the jurisdiction of the host state, something that says more about the limitations of the international law of jurisdiction than the aspirations of human rights. As a result, international human rights law is, paradoxically, deeply complicit in the problems it simultaneously purports to tackle and part of the production of governance over migrants' bodies (Dembour and Kelly, 2011).

In short, international human rights law, even as it seeks to promulgate human rights for all, has long quite simply deferred to the statist substratum of international law, which acknowledges the fundamental prerogative of states to deny entry on their territory. As the Executive Director of the Global Commission on International Migration puts it, "we (...) consider that there exists no 'right to immigrate': People have a fundamental right to leave their country, and to return to it. They can also choose to enter any another country, *but States have no obligation to extend right of entry*" (Jenny, 2004). Although diffusely, this presumption of a statist privilege to exclude is sometimes given further credence by its framing in the language of human rights itself, for example the principle

of self-determination or the idea of democracy. It reinforces long-standing distinctions between the rights of citizens and aliens. And it further draws on the idea that how states police their borders is fundamentally an area that implicates wholesale discretion, reinforcing a sense of migrants as an exceptional category when it comes to rights.

Note, however, that there is no evident moral reason, from the perspective of human rights, why such a denial, frustrating as it does many human aspirations, should go without saying. Several problematic implicit operations are involved in the denial of a right to immigrate: first, a reification of the state's will and discretion when it comes to immigrants along with a certain univocal reading of what sovereignty over territory entails; second, a taking-for-granted of the international legal system and the idea that human rights are to fit within its existing categories rather than act as a catalyst to problematise the international system; and third, a prioritisation of citizens as opposed to distant others (since the former have the right to enter whereas the latter, *prima facie*, do not) that is in tension with the universalist premises of the contemporary international human rights movement.

Importantly, in almost every respect other than the mobility question, the promise of human rights has been to consider that the difference between citizens and aliens should be irrelevant. Even if partiality to nationals may make sense from a separate constitutional perspective, it is very unclear how it is justifiable from a broad international rights one. Indeed, what is galling about international human rights law's reproduction of the right to exclude is, as Marie Benedicte Dembour has pointed out, that it is at odds with the fundamental structure of human rights which does not require adjudicators to make state sovereignty their starting point (Dembour, 2021). The global regime of human rights sanctioned limited mobility and arbitrary bordering does craft a fundamental exception to what is normally standard human rights limitation analysis, i.e., that limitations to rights cannot be presumed but must be justified as, for example, 'necessary in a democratic society', 'proportional', etc. It does so by denying, at the first stage as it were, that there is any right to be interfered with to begin with. As such, it creates a situation of potentially pure arbitrariness, disconnects rights violations from the fundamental condition of migrants, and paradoxically may even make it harder to understand why one might want to deny entry to foreigners on human rights or democratic grounds.

In short, to say that international human rights accompanies migrants but expresses a fundamental reticence to migration (a non-right to immigrate rather than necessarily a prohibition from doing so), then, is correct. The international legal impulse and in particular the deference to pre-conceived conceptions of sovereignty is ultimately more salient than what might be a bottom-up conception of the right to immigrate based on fundamental human needs and aspirations. In a sense, it may seem like international human rights law has conceded the main point of those who consider that attention to migrants is excessive and that they are, at best, usurpers of rights in a land that is not theirs to enter. Worse: that considerable concession has historically never been argued for, it simply seems to flow naturally from the structure of the international legal system which human rights law espoused.

2.3 A human right to immigration?

In the previous section the argument was made that the international human rights law of migration remains on the periphery of the migratory phenomenon because it cannot

problematise the essence of migration as an issue of rights. Its approach is comparable to that of international humanitarian law in relation to armed conflict: seeking to moderate war, but incapable of producing a judgment on whether certain wars are problematic from a human rights perspective. In that vein, international human rights law defers to international migration law as a sort of *lex specialis* of human rights whose fundamental logic is not itself reviewable under human rights. The problem is that the absence of a human right to immigrate is the very source of the pathologies of immigration. For what can it mean to have human rights in the process of doing something one does not have a right to do in the first place, except to convey one's fundamental vulnerability to repression for doing so? Under that view, migrants have the right to have rights despite being rather than because they are migrants. The failure to see immigration's fundamental dignity lays the groundwork for some of the subsequent violations. Since there is never anything particularly defensible from a human rights perspective about immigration, the status of migrants is inherently vulnerable to arbitrariness, discrimination and even violence.

By contrast, there has been a growing interest in political and moral theory in the justifiability of a right to immigrate (Higgins, 2008; Miller, 2016a; Oberman, 2016) or to mobility (Wihtol de Wenden, 2007) against the background of broader debates about open borders (Sager, 2020). Not all of the resulting literature is favorable to such a right (Kershnar, 2000), but its merit is to problematise migration and non-migration as problems of international justice. As with the laws of war where Just War theorists have long pushed unorthodox arguments far beyond anything that can be contemplated in law, the philosophy of migration has shown the way normatively for what it might mean to think of migration in the terms of at least moral rights. Some of the arguments envisaged by migration theorists will be examined here to explore the translatability of political theoretic conceptions into legal arguments *de lege ferenda*. However, the primary focus is not on these points *qua* philosophical arguments. Instead, the idea methodologically is to extrapolate from the law's own resources, assumptions and trends, a methodology particularly adapted to the status of human rights as a 'living instrument'. The contention is that the international human rights law of migration, such as it could be, needs ultimately to be reconstructed entirely from the perspective of a right to immigrate.

A first argument is known as the cantilever argument which stipulates that if a human right to freedom of movement exists within a state, then there are no defensible arguments to claim that this right should not extend beyond the state [Carens, (2013), p.239]. The strength of that argument is that it suggests the perplexity of the right to movement stopping in mid-course. If freedom of movement is a good thing domestically, why would it not be, perhaps *a fortiori*, a good thing internationally as well? International human rights law betrays its limitation in making precisely this move. If there is a commitment to movement, it should be consistent. Although there is not a right to be 'free' generally, many internationally guaranteed rights are indeed freedom rights that suggest a very strong base assumption in favor of freedom. On a very abstract level, stopping short of allowing freedom across borders might even be seen as a form of arbitrary detention writ-large.

Whatever the merits of the argument as a philosophical argument, it does not fare particularly well as a legal argument. From a legal perspective, the fact that freedom of movement within one's state's territory is mentioned specifically as a right in international human rights instruments militates against the cantilever notion since it implies a *contrario* that there is no general, transnational right of freedom of movement.

This cannot be compensated through an extensive, teleological argument for which there is no obvious semantic or logical justification. International human rights law is in that respect less vulnerable to the argument of moral inconsistency than moral theorising about rights because most international lawyers still understand international treaties as expressing, to a very large degree, states' will (including as it manifests in less than ideally consistent ways). In other words, international human rights law is still primarily international law rather than driven by an autonomous human rights agenda.

A second argument is that it is implicit in the very existence of a right to emigrate that there must be a right to immigrate since there must be a place to immigrate *to*. This means that at least a sort of inchoate right to immigrate somewhere is implicated in the right to emigrate. This argument may be too smart for its own good even as a philosophical argument but, at any rate, legally the right to immigrate cannot exist by mere implication from a right to emigrate. Both have different addressees whose obligations are incommensurable. The obligation to allow persons to emigrate is a self-contained obligation of the nationality state wherein the aspiring émigré finds themselves. The obligation to allow persons to immigrate, such as it might be, would be an obligation of the *destination* state. True, the right to emigrate amounts to little if there is nowhere one can emigrate to, leading to an absurd situation but such paradoxes abound in international law and do not as such provide license to read beyond the plain and ordinary meaning of words.

A third argument is that the distinction between citizens and aliens or between different aliens of diverse provenances when it comes to immigration is in and of itself a form of discrimination (Mégre, 2024). This is not the same thing as faulting particular forms of prohibited discrimination in the administration of immigration (e.g., on the basis of race) but amounts to faulting the ultimate, structural and constitutive discrimination that lies in even operating a distinction between citizens and aliens. Whilst such a distinction may be more defensible in terms of political rights (which are traditionally reserved to citizens), it is relatively weaker in the mobility realm, at least as a default and automatic position that does not need to justify itself from the perspective of human rights. A cosmopolitan take on immigration would strive to keep distinctions between citizens and aliens when it comes to access to the state's territory, to the strict minimum necessary. Such an argument is potentially powerful, but also question-begging legally as the whole point is that some citizen/alien distinction may be justifiable from international human rights law itself (as it certainly is in positive law).

2.4 Reconstructing a right to immigrate from fundamental human rights premises

What these interpretations have in common is they try to sneak a right to immigrate through the back door of international human rights law as the corollary of some existing right of movement or to equality. Rather than deriving a right to immigrate from the existing structure of deliberately truncated movement rights in human rights law, a second and potentially more promising seeks to derive the right from a theory of fundamental human needs, and then to evaluate dominant conceptions of positive human rights from that standpoint. In political theory, this is the path followed by Huemer (2010), for example, and it come close to what might be an ambitious legal analysis of the matter (Chacon, 2022). It has been suggested that the European Court of Human Rights would be well inspired, in that regard, to take heed of the more 'pro homine'

reading of human rights pioneered by the Inter-American Court of Human Rights (Dembour, 2021). This will not necessarily magically cure human rights law of its reticence towards a right to immigrate, but it can highlight the costs a contrario of not even contemplating immigration as a human right, including the extent to which the law of human rights weirdly concurs in its own undermining. It can also help better assess how historically anomalous the denial of entry on their territory even by sovereign states has been (Shachar, 2024) and its fundamental awkwardness from the perspective of a theory of rights (Chetail, 2024).

Rediscovering a sense of the primary needs that movement responds to is an obvious route and the one that has been most frequently travelled in both political theory and in legal jurisprudence. The aspiration to move is a fundamental one, in itself a central part of the human condition, satisfying a fundamental yearn for discovery, encounter and access to ‘life options’ (Oberman, 2016). It is also, crucially, a form of realisation of the right of personal self-determination understood as “the right either to accept or (...) to reject the political jurisdiction under which one happens to live” (Dowty, 1989). As such, it is a considerable factor in the realisation of human rights when those rights are denied in the first state beyond even conditions of persecution that might lead to an asylum claim. The ability not just to leave in theory but to leave to go *somewhere* – to go anywhere one chooses, in fact – is a remarkable way of improving one’s fortunes generally, and from a human rights perspective specifically. Historically, emigration has been a considerable variable of adjustment to dangerous, iniquitous or otherwise less-than-ideal circumstances. It is, in short, a way of maximising one’s opportunities to live the good life. This includes labour opportunities, the ability to satisfy one’s basic needs, as well as more identitarian and lifestyle preferences. It is not a strong objection to such an argument that individuals may sometimes find sufficient opportunities on the territory of their state; no one better than them can judge of the value of such opportunities elsewhere.

The identification of movement and resettlement as a fundamental aspiration of humans at least posits a strong *prima facie* case, all other things being equal, for allowing such movement. In legal human rights analysis, this is what is typically considered the first leg, namely that certain rights are ‘implicated’ by a certain measure to restrict them. Crucially, at this stage of the analysis, the scope of the presumptive right can be opened very broadly given the possibility of limiting it subsequently. The current structure of international human rights law, in largely failing to even take stock critically of how its very structure undermines that which ought to follow from its basic commitment to human liberty, is clearly wanting. It offers no presumptive reason why limitations to immigration might be justifiable under international human rights law itself, as opposed to imported wholesale from the tradition of general international law. In the process of purporting to create an emancipatory project within states, international human rights law simultaneously locked human aspirations in the iron cage of states’ territory. It is guilty of not sufficiently problematising its own normative embeddedness in prior ideas about sovereignty, an irony given human rights’ historical ambition to problematise the use of sovereignty.

But from a legal perspective, one cannot simply derive an ‘is’ from an ‘ought’. The limitation of a purely moral critique of the law is that it assumes that the law necessarily seeks to embody the best possible moral theory of human rights, when much of the evidence points to the reality that *actual* international human rights law is in fact a complex compromise formula that seeks to uphold a range of values simultaneously

(Mégret, 2013). If a critique of international human rights law is to be developed that is not merely an external moral critique but a specifically legal (albeit quite jurisprudential) one, then it is one that must proceed from the thickness of actual international human rights law. Such an immanent or intermediary critique is also the preferred route for philosophers such as Carens working from basic liberal commitments (Moan, 2008), and is one that seeks to point out why international human rights law fails *on its own account* to achieve the best possible version of itself. Methodologically, this may require turning the tools of human rights analysis on international human rights law itself to understand what remain its blind spots. The exercise is, however, buttressed by the degree to which international human rights law is nonetheless adjacent to ideas about human rights and susceptible to the pull of dynamic interpretation.

2.5 *Mobility rights: a sketch*

International human rights law emerged late in the day, in a world in which the international legal system had arguably already long solidified. Hence, international human rights law's very internist focus, and its traditional lack of criticism of the ways in which *the international legal system itself* impacts the enjoyment of rights through the reification of the world's division into territorial states. This then inevitably leads to leaving entire swaths of the actual experience of humans outside the remit of international human rights law scrutiny, whether it is individuals' persistent vulnerability to extra-territorial violations (Milanovic, 2013), a certain tendency to treat international humanitarian law as an entirely separate *lex specialis* (Mégret, 2023), the extent to which the right of self-determination is conditioned by the arbitrariness of borders (Macklem, 2008), or little attention to how the structure of the international economy impacts the ability to enjoy economic and social rights (Macklem, 2007).

But consider the following thought experiment. Imagine a world in which the human rights project did not always unfold into an already ready-made Westphalian structure that it took for granted, but where it took it upon itself to challenge that very structure if and to the extent it could not be reconciled with human rights ambitions. What would it mean to not only think in terms of human rights about a world in which immigration itself is not a right, but to deploy human rights to problematise the very denial of a right to immigration? And how would one assess the human rights costs of there being an international system of states at all (rather than just isolated sovereigns) for the very ambition of realising human rights through law?

What, in turn, makes this relatively easy is that we have such an image readily available: even as sovereigns rose in modernity, the question of freedom of movement across borders was hardly definitely settled for a long time. If anything, the very robust assumption until the 20th Century was that there was presumptive freedom of movement, even outside any register of rights, let alone human rights, in the name of liberalism but also of imperial relations (Mégret, 2021). This suggests at the very least that lack of a right to immigrate is hardly a necessary feature of an international system of states but one that was historically riddled with racist assumptions (Achieme, 2021). Rather than thinking from border control, the vocation of international human rights law ought to be to problematise such control from the position of human mobility that has largely prevailed historically, and which more clearly embodied a default assumption in favor of human movement.

In the ‘beginning’, then, was freedom of movement and the almost unchecked ability to move around. People roamed the planet freely, as they had done for millennia until late into modernity. Francisco de Vitoria had already justified the natural right to travel in the 15th Century as resulting from the holding in common of the world (“in the beginning of the world, when all things were held in common, everyone was allowed to visit and travel through every land he wished”) [de Vitoria, (1991), p.279]. The rise of immigration denial policies came, and only very late, to contradict this age-old trend; it separated people from other people and people from territories that had never been separated before; it inflicted huge policing, surveillance and violence costs to those who would cross borders; it frustrated not just theoretical aspirations (the way one might think from the present of open borders as a theoretical and even improbable aspiration) but very real and inherited ones that had an ancient and sometimes mystical pedigree (Mégret, 2026). This must surely, then, count as a net cost in terms of human rights perhaps the single greatest annulment of liberty ever propounded globally.

An alternative view of international human rights law is one that would see its specific vocation as to correct some of the very limitations of the international system within which it is embedded, a general argument most notably developed by Macklem (2015). Specifically, international human rights law should not achieve some of its aims only at the cost of making people worse off in terms of their fundamental liberties. As Vitoria had intuited, the right to travel “was clearly not taken away by the division of property; it was never the intention of nations to prevent men’s free mutual intercourse with one another by this division” [de Vitoria, (1991), p.279] Whatever benefits may accrue from a human rights abiding sovereignty, then, must be weighed against the costs of the division of the world into sovereigns, including in terms of the overall loss of mobility. If the long-term cost of securing a right to move freely within one’s country, for example, is that one cannot move freely around the world, then it would seem that international human rights law has not, in fact, enhanced rights; that is, that it merely moderated one consequence of there being states by insisting that such states could not deny a certain mobility within their borders, even as it acknowledged their unlimited right to control their external borders. The result is that freedom of movement is reframed as a purely domestic right, a net loss compared to the default position under any account.

3 Subjecting the international system of mobility to human rights limitations analysis

International law, then, must *itself* be understood as a limitation on rights that ought to be justified. What is proposed, in other words, is to turn limitation-analysis *on* international law through human rights, essentially requiring that international human rights law be justified by its own standards. The problem is not only, from an international human rights perspective, whether humans should have the right to immigrate as against an assumed prerogative to close borders, but whether states had/have the right to close their borders as a function of the operation of the international system in the first place. That fundamental, original closure is at least vulnerable to the very critique that international human rights law itself has historically and paradigmatically produced (even if it has not always lived up to it), namely that the creation of the state risks negatively affecting ‘natural’ rights (i.e., rights that can be posited to exist in the absence of the state system). If this assertion is correct regarding the core of the issue, then the very technology of the

border needs to be justified both in principle and in particular cases as against a presumptive right to cross-border mobility, what Anna Stilz has described as a “duty to allow harmless migration” [Stilz, (2019), p.211].

At the same time, note that the existence of a presumptive right to cross borders and immigrate simultaneously grounds the prerogative of the state to *limit* such a right in appropriate circumstances. A human right to migrate is not an argument for entirely open borders, but an argument for borders that are only *justifiably* closed. Just as there are limitations to rights within states, including of course the right of freedom of movement, one can speculate that there ought to be limitations to rights between states, including the right of freedom of movement. The point, though, is that rights can only be limited by law, for good cause and on a basis that is proportionate. This sets a relatively high bar for states. Deferring to the very structure of the international legal system, in particular, is not in itself a good justification, either generally or specifically, especially if, as has already been established, that system *ex hypothesi* frustrates some very fundamental human aspirations (Orakhelashvili, 2003).

More crucially, limitations of the right to immigrate under international human rights law (as opposed to general political theory) could not be based on general and undifferentiated claims about the need to protect sovereignty or self-determination or culture without convincing evidence as to why such values should override peoples’ legitimate aspiration to immigrate. Compared to some of the more sweeping political theoretic treatments of the issue (Miller, 2016b), then, this suggests that legal limitations should be particularised, justified and based on a number of enumerated grounds commonly thought to justify limitations to rights, themselves subsumable within a culture of rights. This is typically distinct from a very broad-brush philosophical argument to the effect that, for example, states have a right to protect a sense of community or the economic welfare of residents.

There have been attempts to ground a privilege to close borders in the right of self-determination or, more dubiously, on the rights of majorities and their interest in maintaining ethnic homogeneity (Kauffmann, 2017; Orgad, 2015). From an international human rights law standpoint, however, these things do not go without saying. It will not do, for example, to simply invoke the host peoples’ right to self-determination as a ground to invariably exclude immigrants (Lepoutre, 2016), just as domestically majoritarian rule is not a good reason to curtail rights of the minority without more. Self-determination does not proceed unproblematically from an assumed ‘people’ but must itself be problematised as the assertion of a particular demos that must be justified to both hypothetical citizens and foreigners (Abizadeh, 2012). It is not clear, more importantly, that the assertion of a right to self-determination directly connects to a right to exclude from one’s territory given how unclear the link is between the ability to self-determine and immigration.

3.1 The relative costs of immigration

One preliminary point is worth underscoring. It may be that limitations to the right to immigrate ought to be interpreted generously given the specificity of immigration. In ordinary human rights practice, limitations relate to persons over which one already presumptively exercises jurisdiction and over which the exercise of that jurisdiction may make a considerable difference. In putative immigration scenarios, the dilemma relates to persons over whom one does not *a priori* exercise jurisdiction and over whom it is

proposed that one should exercise such jurisdiction. It may be that sovereigns have and ought to have more control of that gate-keeping function, especially as human rights have otherwise eroded the distinction between citizen rights and human rights and thus potentially saddle them with onerous obligations towards all would-be immigrants. In other words, and this is crucial, to allow people on one's territory is not only to allow them to physically enter a space, it is also to accept legal human rights responsibility for them. Indeed, it is in that sense that strenuous and highly problematic efforts to offshore immigration processing can be understood, namely as a way of making sure that would-be immigrants never even come under the state's jurisdiction and therefore responsibility in the first place.

At the same time, allowing new entrants may be less onerous an ask than it appears, at least from a strict rights perspective. In conditions where a state is already committed to respecting human rights of all within its jurisdiction, to do so at the margin for even a statistically not insignificant quantum of new residents does not impose paradigmatically new burdens. For example, if a state already has the infrastructure in place to not torture persons within its jurisdiction, then having marginally more individuals under one's jurisdiction is unlikely to add significantly to the burden of ensuring that torture is not committed on one's territory. By and large, creating conditions 'free from torture' is a non-exclusive positive externality which, once in place, stands to benefit all at little extra cost. The same may not be true of economic rights which may impose positive obligations subject to a means and progressive realisation analysis that might justify not allowing immigrants in, lest they compromise the ability of the state to acquit itself of its obligations in that realm. This assumes, however, that the reasoning that more immigrants will compromise the realisation of economic rights for those already within one's jurisdiction is grounded in solid evidence and not simply some irrational assumption that immigrants are net takers rather than net contributors.

3.2 *Grounds and modalities of limitations to the right to immigrate*

In short, the marginal cost of extra entrants is highly unlikely to change the broad equation of human rights compliance and to provide, on its own, grounds for denying entry. This leaves actual, existing grounds for limiting rights. Again, these are distinct from broader limitations envisaged by political theorists to constrain the right to immigrate, useful as such arguments may be (Oberman, 2016). Rather, grounds for limiting rights are typically specific and strictly enumerated. As it happens, Article 12 of the ICCPR which anticipates freedom of movement within a state's territory and the right to emigrate (i.e., the full gamut of mobility rights *except* for the right to immigrate) provides a good first analogy. It stipulates that such rights can be "subject to any restrictions (...) provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others".

There are thus two ways, under actual international human rights law, of conceiving limitations to rights: namely, that they are necessary in the pursuit of a collective good or to protect the freedoms of others. As to societal grounds to limit the right to immigrate, clearly the protection of national security and public order would be strong contenders in some cases. It is one thing for persons already within one's jurisdiction to commit crimes for example, and even aliens may benefit from a certain indulgence given existing ties to the territory; it is another for a state to accept an individual on its territory, knowing that they have a propensity to commit crime. The same goes for public health, e.g., as relates

to immigrants carrying contagious diseases that one excludes from entry as opposed to persons already within one's jurisdiction in relation to whom right to health obligations are triggered. It is unclear how immigrants might impact public morals but let us assume that this is a pressing concern of some kind at least sometimes, again to be interpreted strictly. Just as such limitations stand to limit ordinary rights within the state they might, perhaps a fortiori, stand to limit rights of those claiming to enter it.

What is interesting about these various grounds, however, is what they do not include and, in particular, the fact that they provide no evident pathways for some of the more capricious grounds that are typically invoked to oppose immigration. Protecting national solidarity or even identity, for example, is not in and of itself a ground to limit rights generally and so it is unclear, on the basis of this article's assumptions, why it should be as a motive to restrict immigration. Nor do existing grounds to limit rights under positive international human rights law include any of the more sophisticated communitarian defences of the state's right to exclude (Miller, 2013). Although the ability to control for democratic participation may well continue to require states to distinguish between citizens and non-citizens in their territory (as is amply recognised by international human rights law when it comes to political rights), it is not as such an argument to exclude immigration. It is unclear at any rate, even if it was a self-standing ground for limitations, how the exclusion of immigration is 'necessary in a democratic society', to use the standard yardstick of limitations in the European human rights context. Now, it may be that if international human rights law did more specifically have a theory of the right to immigrate, different grounds would be stipulated to restrict immigration than are anticipated for ordinary state governance. In the absence of any such indication, however, it is fair to assume that the right to immigrate ought only to be restricted on the basis of the sort of grounds that are otherwise considered necessary in purely domestic situations.

As to the protection of rights of others, one would have to be very careful that this did not endow the imagined wishes of resident populations with an excessive decision power over the entry of would-be immigrants. In what way might it be said that the rights of residents are affected by the immigration of outsiders? In international human rights law, cases where the rights of others are affected are typically quite narrow. There has been a very contested tendency before the ECtHR to endow the idea of 'living together' with the power to limit rights in the limited case of face bans (Tsevas, 2018), but it is unclear how the case could be made that immigration would compromise 'living together' without falling into xenophobic rationales. International human rights law could not countenance racist arguments to the effect that only immigrants of certain backgrounds could be allowed because only they could integrate.

At any rate, any limitation to a presumptive right to migrate must itself be necessary and proportional. To be sure, what such measures are will be typically subject to a considerable margin of appreciation. However, it will not do, for example to decide that all migration must be stopped because of the possibility that some migrants might commit crimes. This is clearly a disproportionate reaction to a problem of public order which, in practice, will require significant particularisation (e.g., measures to screen criminals from the ability to immigrate, rather than the rejecting of immigration from entire nations on the basis of racist criteria). The stipulation of a right to immigrate, then, does immediately imply the possibility to limit that right, but it also puts considerable pressure on the public and rational justification of such limitations.

4 Conclusions: international human rights law *of* and *for* migration

This article has sought to offer a stylised representation of the complex relationship that international human rights law entertains with migratory phenomena. It has argued that, whilst international human rights law seeks to alleviate some of the more problematic vulnerabilities arising from immigration, it does not, in its dominant legal form, particularly condone migration and may even consign it to the margins. Notably, it certainly does not provide for a right to immigrate having sided very crudely with states' presumptive and largely discretionary right to exclude. At best, then, international human rights law has sought to temper some of the excesses of a right to exclude but on the basis of the morally arbitrary reality that certain individuals happen to already be under the jurisdiction of another state. This has cast the problem as less one of a presumptive right to immigrate than as the management down the road of the consequences of some individuals having already effectively migrated.

By contrast, the article suggested that a mere rights accompaniment of migrants does not do justice to their defining condition and thus fails the human rights ambition to honour individuals' self-determination. Worse: the failure to problematise the denial of a right to immigrate from the perspective of human rights condemns the project to endlessly tackle abuses at the margin without taking cognisance of the extent to which the predicament of migrants is rooted in its own shortcomings. From a cosmopolitan human rights perspective, then, the denial of a right to immigrate fundamentally frustrates legitimate and cardinal human aspirations in ways that then need to be justified on the basis of international human rights law itself, beyond a reflexive deferral to the structure of the international legal system as-it-is. The takeaway is that the international human rights law project will be a truncated one so long as it does not envisage the possibility of a right to immigrate and that a revisionist take on both international human rights law and international migration law is long overdue.

The intuition, then, is that immigration should be thoroughly *normalised*; i.e., that freedom of movement across borders is not a special case, but ought to be very much part of the mainstream of human rights. On cosmopolitan groundings, the right to move within one's state and across borders should be seen as fundamentally co-extensive, even if susceptible to different kinds of limitations. The irony is that it is the very structure of positive international human rights law that has long concurred to making this a blind spot. An international human rights law fully consistent with its universalist premises, by contrast, is one that would tackle the artefactual problems created by the very existence of the international system within which it is embedded.

To be clear, this is an entirely *lex lata* argument since there is nothing in either international treaties or in the practice of states that might lead to a finding that a customary international law basis for a right to immigrate actually exists as of now. Exactly the opposite is true. The notion of a right to immigrate was not so long ago contemplated in the mainstream of international law (Fauchille, 1924) even though it is rarely contemplated today in positive international law. There are nonetheless reasons to think that allowing for a right to immigrate is both a very tall order and something that would be perfectly achievable. On one level, allowing a right to immigrate in a world of states that have typically not considered this to be a feature of the system means that one is tackling a profoundly structural feature of the system, not a bug. The human rights project has typically been thought of as an effort to correct the excesses of the state system, primarily as they express themselves domestically, not to tackle the system as

such. On the other hand, a hypothetical right to immigrate is mostly a negative right: whilst there may be a tangential case for materially supporting the basic movement needs of persons, for the most part it involves little more than *not preventing them* from crossing borders (and conversely preventing people from crossing borders is a flagrant case of simply denying them a liberty). In that respect at least, it cannot be said to impose onerous demands on states.

Note also that the entire arc of this article is less radical than it might seem: although falling strongly on the side of the recognition of a basic right to immigrate, the inevitable corollary of legitimate limitations to such a right brings us into familiar ‘limitations’ terrain which can, by some accounts, in turn shrink the actual exercisable core of a right considerably. However, it is suggested that a right-with-limitations approach is still morally and, especially, legally superior to a no-right-at-all approach. The latter is simply callous about the full consequences of some of its assumptions and, as such, forfeits much of its claim to a certain axiological superiority. From a legal perspective, this article’s single greatest incidence is that it would quite simply normalise immigration as a category of human rights, subject to all the strengths and weaknesses of human rights analysis.

Acknowledgements

Research was funded by the Danish National Research Foundation Grant no. DNRFF169 and conducted under the auspices of the Danish National Research Foundation’s Centre of Excellence for Global Mobility Law.

Declarations

The author declare that they have no conflicts of interest.

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Notes

- 1 See *Vilvarajah and others v United Kingdom* App nos 13163/87, 13164/87, 13165/87, 13447/87, and 13448/87 (ECtHR, 30 October 1991), para 102. Also, Çalı et al. (2021)
- 2 *Üner v the Netherlands* App no 47410/99, GC judgment of 18 October 2006, para 54.
- 3 See, e.g., *M.N. and Others v. Belgium* [GC] (dec.), 2020.