SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW – PART II

SOUTHERN URBANISM, LEGALIZATION, AND THE LIMITS OF MIGRATION LAW

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As a relatively well-defined subset of global migration law, refugee law and policy present important sites for contestation, agenda setting, normative pronouncements, and symbolic action. They are also an effective test of whether formal state obligations—in this case those outlined in the 1951 UN Refugee Convention—translate to protection in the weakly legalized environments in which most of the world's refugees reside.[1] This essay asserts that they do not. Building on research and public engagement across African cities,[2] this short contribution makes a three-part argument to that end. First, it considers *categories* by highlighting the narrow practical and analytical value of focusing on legal reforms and formal "refugee" policy as determinants of protection; given that legal status and documentation have only limited practical protection effects. Moreover, it points to the potential dangers and dysfunctions of a protection regime premised on people "performing" or "representing" refugeeness. Second, in considering areas for intervention in improving the protection of migrants, it calls for *rescaling* the legal approaches to migrant and refugee protection. Given the micro and translocal (often transnational or diasporic) processes informing refugees' experiences, approaches need to be both more and less geographically targeted. Lastly, it calls for an *intersectional* approach to law and advocacy that more holistically and politically situates refugees and migrants within their social and regulatory environments. If nothing else, it asks analysts and advocates to take more seriously subnational political formations—formal and informal—as sites of policy formation and practice. In doing so it suggests that the most effective tools for addressing migrant and refugee vulnerability are often more political than legal. Moreover, within the realm of international and domestic law, jurisprudence in fields other than migration and asylum (e.g. environment, labor, or trade) may offer the most effective inroads into processes producing displacement or imperiling people on the move or on arrival. Given the confines of space, data is sparingly used for illustrative purposes.

Law and Categories in Context

As shorthand, I use "Southern urbanism" to describe the deeply fluid, often sociopolitically fragmented, and economically precarious spaces in which many migrants and refugees seek profit, protection, or passage elsewhere. Whereas refugees camps are exceptional spaces, they are shaped (albeit imperfectly) by humanitarian law and practice. Within the Global South's cities and smaller towns, national, municipal, regional, or international law confronts myriad formal and informal regulatory regimes. UNHCR partially acknowledged this in 2009 in

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[1] *See* UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015 (2016).

[2] The research took place in Johannesburg, Nairobi, Maputo, Kampala, and Lubumbashi.

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revisiting its policy on urban areas, but seven years later it still struggles to realize effective protection for millions of displaced people in urban areas.[3]

Despite the need to work in weakly legalized spaces, studies of refugee and migration law generally remain formalistic, migrant-centric, and shaped by epistemological nationalism.[4] They concentrate on the text of and adherence to international treaties or laws; the concordance of global rules and national policy; and rights exercised (or violated) with reference to global or national policies and laws. Such approaches confirm the modernism underlying Hannah Arendt's observation that sovereignty is nowhere more absolute than in matters of "emigration, naturalization, nationality, and expulsion."[5] Undergirding this approach are presumptions that states hold de facto sovereignty and their policies largely define refugees' (and other migrants') well-being. However, in environments in which the displaced often live, national and global policies are often far removed from refugees' daily realities. In many cases, they have little direct positive or negative effect on rights protection. Some may respond to such "brown areas"[6] with calls for more law or better enforcement. Such appeals are warranted but understanding the relationships among law and protection means more critically considering the sociolegal spaces refugees and migrants occupy and in which they access, evade, or subvert the law. It also means recognizing how law potentially works against protection goals.

Moving forward towards more effective legal intervention amidst Southern urbanism, it is worth considering two primary research findings:[7]

First, legal status and documentation are unreliable predictors of effective protection: state-recognized refugee status is a poor indicator of someone's substantive experience and has limited effects on welfare or security. Indeed, the primary determinants of substantive protection—whether someone is doing well in terms of income, housing, and physical security—correspond less with direct assistance and legal status than individual choices, skills, and social relations. Very few of those captured in surveys across African cities,[8] including recognized refugees, asylum seekers, or displaced persons, received any form of humanitarian aid or assistance. Instead, the most significant factor in explaining "success" (i.e. accessing food, jobs, housing, and physical security) was social networks. Although they are clearly important in exchanging information on housing and work, advising people on evading the police (or escaping from custody), and providing moderate (usually once off) material assistance, additional work is needed on the roles these networks play. Where vulnerability is widespread and humanitarian resources are limited—as they are in most Southern cities—it is these relationships, not legal status or aid, that become protection's de facto lynchpins.

Second, on aggregate, displaced people—domestic and international—are not the most vulnerable among urban residents. Indeed, despite encountering a range of formal and informal restrictions on their activities (e.g. prohibitions on employment, education, access to rental housing, challenges in accessing services), international migrants (including forced migrants) regularly negotiate de facto protection more effectively than domestic

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[3] *See* Anne Davies & Karen Jacobsen, *Profiling Urban IDPs*, 34 FORCED MIGRATION REV. 13 (2010); S. Pavanello et al., *Hidden and Exposed: Urban Refugees in Nairobi, Kenya*, HUMANITARIAN POLICY GROUP WORKING PAPER (2010); Roger Zetter & George Deikun, *Meeting Humanitarian Challenges in Urban Areas*, 34 FORCED MIGRATION REV. 5 (2010).

[4] Andreas Wimmer & Nina Glick Schiller, *Methodological Nationalism, the Social Sciences, and the Study of Migration: An Essay in Historical Epistemology*, 37 INT'L MIGRATION REV. 576 (2003).

[5] H. ARENDT, THE ORIGINS OF TOTALITARIANISM (1951).

[6] Guillermo O'Donnell, *Why the Rule of Law Matters*, 1 J. DEMOCRACY 32 (2004).

[7] These findings were first described in Loren B. Landau & Marguerite Duponchel, *Laws, Policies, or Social Position? Capabilities and the Determinants of Effective Protection in Four African Cities*, 24 J. REFUGEE STUDIES 1 (2011). *See also,* Sangeeta Madhavan and Loren B. Landau, *Bridges to Nowhere: Hosts, Migrants and the Chimera of Social Capital in Three African Cities*, 37 POPULATION & DEV. REV. 473 (2011).

[8] For details on the survey data, see Landau & Duponchel, *supra* note 7.

migrants. As noted above, it is not legal status that enables such success but previous urban experience and diasporic networks. Noncitizens remain vulnerable, but they operate in contexts in which few residents—refugees or others—have the kind of access outlined in international humanitarian standards.[9] Precarity is the norm for refugees, migrants, and "hosts" alike. This not only has important implications regarding presumptions of vulnerability, but also raises three other critical (if potentially obvious) points:

1. It challenges reformers who may confuse law and policy with practice and protection. Where rule of law is weak, legal status means little. It is not legal content that matters, but legalization: the degree to which state law shapes interactions among people, institutions, and organizations.[10]

2. It questions the practicality and political viability of refugee-centric programming in spaces where vulnerability may be more acute among nonmigrants. Inasmuch as legal interventions shape such offering, they are potentially part of the problem. Where these programs demand rights or services are claimed based on refugee status or performing particular forms of vulnerability, they can foster popular resentment and social fragmentation.[11] This hinders the kinds of solidarities with local populations and autonomy that are often necessary for displaced populations to access effective economic and physical protection while avoiding scapegoating and varied forms of precarity.[12]

3. Most importantly, where policies effectively facilitate protection, they may be more closely related to issues around access to housing, labor markets, health care, or education than migration. Rather than vertically identifying refugee or migration policies, there is a need to look horizontally at other policy frameworks and practices that are most likely to make a difference. I return to these latter two points in discussing "intersections" below.

Scale

There is need to rethink the scale of legal advocacy and interventions on behalf of refugees and migrants. This requires simultaneously drilling down to neighborhood or municipal regulatory spaces while analytically incorporating the translocal and transnational processes shaping migrants' lives and trajectories. As noted below, a rescaled challenge to the "methodological nationalism" informing global migrant/refugee advocacy and law demands (and enables) engagements along new legal frontiers.

One of the foremost challenges in protecting displaced populations beyond camps is the difficulty of improving protection without building expensive and politically problematic parallel systems of service delivery and legal protection. In times of decentralization and political fragmentation across the Global South, providing sustainable protection for displaced people in urban areas means politically engaging with municipal authorities and integrating migrants into the urban governance systems that de facto determine rights. This is not the place for a thorough review of the "urban condition" in Africa or elsewhere; a short piece cannot accurately reflect the diversity of

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[9] *See The Sphere Project in Brief*, THE SPHERE PROJECT.

[10] Philip Selznick, *Legal Cultures and the Rule of Law*, *in* THE RULE OF LAW AFTER COMMUNISM: PROBLEMS AND PROSPECTS IN EAST-CENTRAL EUROPE (Martin Krygier & Adam Czarnota eds. 1999).

[11] *See* MIRIAM I. TICKTIN, CASUALTIES OF CARE: IMMIGRATION AND THE POLITICS OF HUMANITARIANISM IN FRANCE (2011); Roxanne Krystalli, *Deconstructing the 2012 Human Security Report: Examining Narratives on Wartime Sexual Violence*, 69 INT'L J.: CAN. J. GLOBAL POLICY ANALYSIS 574 (2014).

[12] JEAN PIERRE MISAGO ET AL., PROTECTION FROM XENOPHOBIA: AN EVALUATION OF UNHCR'S REGIONAL OFFICE FOR SOUTHERN AFRICA'S XENOPHOBIA RELATED PROGRAMMES (2015).

opportunities and obstacles present within even a single city or neighborhood.[13] Rather, it calls on advocates (including publicly engaged academics) to better understand the intentions and conditions of people seeking possibilities for security and protection amidst the economic insecurity and other forms of precarity that characterize cities of the South.[14]

Navigating the uncertainty of Southern urbanism often means confronting, subverting, or evading institutions or bending them to one's needs. Take the street level organizations (SLOs)—formal and informal—that Evelyn Brodkin analyzes as "mediat[ing] politics by structuring the possibilities for advancing claims on the state, asserting rights, and pursuing redress," serving as "sites within which individuals indirectly negotiate socio-political status."[15] SLOs' significant effects make them critical to understanding how law influences practice. In South Africa—where I have done my most detailed work—this approach entails recognizing how bureaucratic autonomy among national administrations generates enormous variation in practice across the country. This background disparity intersects with municipalities which are relatively free to determine their commitments to assist and protect vulnerable populations. Below this are a range of informal (if often deeply institutionalized) governance regimes determining access to space and opportunities.[16] As Holston and Appadurai noted years ago:

> [E]ven as [migrants'] translocation to the city generates new legal regimes, it also propagates new and diverse forms of illegality. This unstable mix of the legal and the illegal, and of various forms of each, turns the city into a honeycomb of jurisdictions in which there are in effect as many kinds of citizens as there are kinds of law. Such multiplicity delegitimizes the national justice system and its framework of uniform law, both hallmarks of national citizenship . . . this urban multiplicity can spawn new and more democratic forms of citizenship, it also suggests the emergence of an almost medieval body of overlapping, heterogeneous, non-uniform, and increasingly private memberships.[17]

In spaces like these,[18] there is value in socializing, spatializing, and nuancing understandings of laws' practical and political function. Indeed, pulling legal levers in such Rube Goldbergian sites may have little impact or potentially deleterious consequences for those we seek to protect (as noted above). We should also recognize that amidst the evolving "honeycombs," legal recognition may be both hard to achieve and dangerous.

Respatialization also means recognizing that the overlapping memberships through which people claim protection extend beyond neighborhoods, cities, and national boundaries. For many, urban sites are "places of flows"[19] or "nowherevilles"[20] where rooting and local representation—legal and otherwise—offer little appeal. Moreover,

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[13] For such approaches, see FILIP DE BOECK, KINSHASA: TALES OF THE INVISIBLE CITY (2004); GARTH MYERS, AFRICAN CITIES: ALTERNATIVE VISIONS OF URBAN THEORY AND PRACTICE (2011).

[14] While my use of "precarity" is influenced by the work of Guy Standing and others, I am not speaking of the economic uncertainty associated with declining industrial production, the weakening welfare state, or crumbling unionization. These processes are largely foreign to African cities outside the relatively industrialised Southern cone. Instead, precarity refers to a generalized condition of economic uncertainty and unpredictability. See GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS (2011).

[15] Evelyn Z. Brodkin, *Street-level Organisations and the Welfare State*, in WORK AND THE WELFARE STATE: STREET-LEVEL ORGANISATIONS AND WORKFARE POLITICS 32 (Evelyn Z. Brodkin & Gregory Marston eds., 2013).

[16] *See* Loren B. Landau and Roni Amit, *Wither Policy? Southern African Perspectives on Understanding Law, "Refugee" Policy and Protection*, 27 J. REFUGEE STUD. 534 (2014); *see also,* JEAN PIERRE MISAGO, MIGRATION, GOVERNANCE AND VIOLENT EXCLUSION: EXPLORING THE POLITICS OF XENOPHOBIC VIOLENCE IN POST-APARTHEID SOUTH AFRICA (2016).

[17] James Holston & Arjun Appadurai, *Cities and Citizenship*, 8 PUB. CULTURE 199 (1996).

[18] *See* ABDOUMALIQ SIMONE, CITY LIFE FROM JAKARTA TO DAKAR: MOVEMENTS AT THE CROSSROADS (2010).

[19] Manuel Castells, *The Space of Flows*, in THE CASTELLS READER ON CITIES AND SOCIAL THEORY 314 (Ida Susser ed., 1996).

[20] ZYGMUNT BAUMAN, GLOBALIZATION: THE HUMAN CONSEQUENCES (2000).

the burdens and binding that come from engaging in formal legal regimes are to be avoided.[21] Given the insecurity of land tenure, the possibility of violence, and ongoing economic deprivation, refugees are well aware that workable durable solutions mean actively maintaining feet in multiple sites without firmly rooting themselves in any.[22] As such, migrants—including refugees and other displaced persons—are turning cities (or parts of them) into stations, rather than destinations. This helps generate a kind of permanent temporariness in which people actively resist incorporation into space-bound social and regulatory regimes by maintaining lives that span multiple sites, countries, and world regions.[23] Inasmuch as law is premised on a place-bound sociolegal community, it potentially counters migrants and refugees' agency, trajectories, and imaginations.

In the kinds of environments alluded to above, legal rights may have value for some (normative if not practical), but with only limited enforcement capacity and a minimal reliance on state provided services—schools, clinics, jobs—it is safe to say that documentation and legal status often do little. Even in South Africa, arguably Africa's "strongest" state, these processes are negotiated on the ground through a panoply of rationalities and calculations, sometimes involving laws and state actors but not always in predictable ways.[24] Rather than integrating into space-bound social or legal communities, the forms of solidarity and recognition people seek are increasingly fluid, syncretic, and translocal. Even churches—often seen as instruments of local integration, community formation, or stable transnational mobilization[25]—are now sites for "tactical cosmopolitanism" and other means of gaining recognition.[26] Within them and similar bodies, people find ways to maintain the levels of social engagement and recognition necessary to negotiate everyday life, but without the kind of place-based fixity often associated with durable solutions or locally enforceable legal rights. The forms of solidarity forged through these bodies are often inherently transient, translocal, post-territorial and, in the case of millenarian religious configurations, potentially post-terrestrial. In almost all cases, they speak to systems of rights beyond the legal and national order.[27]

Intersections and Conclusions

It is not clear where the emergence of fragmented polities, economic precarity, and translocal socialities leave efforts to ensure migrants' legal protection. Legal fundamentalists will undoubtedly work for more sophisticated legal tools and compliance mechanisms. Such an agenda may have normative and practical appeal but a rule of law imperative means overturning the fundamental political and economic character of "Southern" sites. That may

[21] Kankonde Bukasa Peter, *Transnational Family Ties, Remittance Motives, and Social Death among Congolese Migrants: A Socio-Anthropological Analysis*, 41 J. COMP. FAM. STUD. 225 (2010); Morten Lynge Madsen, *Living for Home: Policing Immorality among Undocumented Migrants in Johannesburg*, 63 AFR. STUD. 173 (2004).

[22] *See* Loren B. Landau & Iriann Freemantle, *Beggaring Belonging in Africa's No-Man's Lands: Diversity, Usufruct and the Ethics of Accommodation*, 42 J. ETHNIC & MIGRATION STUD. 933 (2016); *see also,* Achille Mbembe & Sarah Nuttall, *Writing the World from an African Metropolis*, 16 PUB. CULTURE 347 (2004).

[23] CAROLINE WANJIKU KIHATO, MIGRANT WOMEN OF JOHANNESBURG: EVERYDAY LIFE IN AN IN-BETWEEN CITY (2013); Loren B. Landau, *Conviviality, Rights and Conflict in Africa's Urban Estuaries*, 14 POL. & SOC. 359 (2015); Denise Malauene, *The Impact of the Congolese Forced Migrants' "Permanent Transit" Condition on their Relations with Mozambique and its People* (2004).

[24] STATES OF IMAGINATION: ETHNOGRAPHIC EXPLORATIONS OF THE POSTCOLONIAL STATE (Thomas Blum Hansen & Finn Stepputat eds., 2010).

[25] Wendy Cadge & Elaine Howard Ecklund, *Immigration and Religion*, 33 ANNUAL REVIEW OF SOCIOLOGY 359 (2007).

[26] *See* Landau & Freemantle, *supra* note 22; *see also,* David Garbin, *Marching for God in the Global City: Public Space, Religion and Diasporic Identities in a Transnational African Church*, 13 CULTURE & RELIGION 425 (2012); Nina Glick Schiller et al., *Beyond the Ethnic Lens: Locality, Globality, and Born-again Incorporation*, 33 AM. ETHNOLOGIST 612 (2006).

[27] *See* PETER KANKONDE, TAKING ROOTS IN THE NAME OF GOD?: SUPER DIVERSITY AND MIGRANT PENTECOSTAL CHURCHES' LEGITIMATION AND SOCIAL INTEGRATION IN POST-APARTHEID SOUTH AFRICA (2016).

take a while. Moreover, legal rights and assistance programs specifically targeting refugees and asylum in urban areas often draw the ire of the equally impoverished citizens amongst whom they live. Legal frameworks distinguishing international migrants (including refugees) from hosts may create a devil's bargain forcing individuals to choose between the services they can access as refugees and the precarity that comes from publicly identifying themselves to hostile governments and "locals."

In these environments then what do we do with a language of rights and law? I follow Jack Donnelly in treating human rights (and refugee law) as a constellation of discourses, practices, and institutions shaped to achieve a kind of platonic ideal of justice.[28] As they are a set of artificial, aspirational standards and tools the question ceases to be ontological—do rights exist—but epistemological and strategic. In this one might remember Arendt's conclusion that "human rights were not a problem of moral speculation nor legal philosophy so much as a problem of *politics*, a matter of mobilizing new and effective forms of solidarity and concern."[29]

This draws us to yet another of Arendt's critical and basic observations—that one is able to claim rights only when recognized as a member of a political community, the famous "right to have rights." Or in the words of Richard Thompson Ford, "[r]ights require a relationship of mutual respect and obligation."[30] The question then becomes how best to create the kind of localized solidarities that can help to enable access to rights without constraining refugees or placing targets on their backs. Law may have a role to play, but not always or everywhere.

Recognizing this, I suggest working towards a kind of a complementary politics and law informed by a spatial and social understanding of rights violations and potential for empowerment. In terms of the humanitarian and legal enterprise three principles can guide the effort. The first is *stealth humanitarianism*. Given the vulnerability that may be associated with visibilizing and fixing refugees within contentious spaces, there is a need to shroud interventions in a language that is both more flexible and in solidarity with nonmigrant populations; to find "back routes to rights" and social solidarity with locally legitimate actors who have the power to bring about immediate positive change.

One of the first steps in realizing a form of stealth humanitarianism is developing interventional and legal strategies that *shift from people to place*. As Yasemin Soysal notes, "the nation state as a territorial entity is no longer the source of legitimacy for individual rights."[31] Recognizing the diversity of scales, solidarities, threats, and opportunities within sites refugees occupy, analysis and interventions should begin by improving life within these sites. This means taking advantage of opportunities for "bureaucratic incorporation" in which refugees gain access to service based less on legally defined rights than by appeals to bureaucrats' professional ethos as teachers, nurses, or urban planners.[32] Indeed, appealing to more generalized interests, around housing, crime, or other concerns—not rights—can help appeal to local political incentives that do not draw lines or make references to discourses which are seen as foreign, threatening or unwelcome. In all cases, this demands high levels of *local literacy* in which one's language—even if informed by legal or rights based principles—must be in the vernacular and appeal to interests that make them locally legitimate. Engaging within the legal regulation of space through housing and labor markets or policing can open space for refugees to build lives (i.e. achieve de facto protection and human security) that

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[28] JACK DONNELLY, UNIVERSAL HUMAN RIGHTS: IN THEORY & PRACTICE (2d ed., 2003).

[29] Jeffrey C. Isaac, *A New Guarantee on Earth: Hannah Arendt on Human Dignity and the Politics of Human Rights*, 90 AM. POL. SCI. REV. 61 (1996); *see also*, ARENDT, *supra* note 5.

[30] RICHARD THOMPSON FORD, UNIVERSAL RIGHTS DOWN TO EARTH 68 (2011).

[31] Yasemin Soysal, *Changing Citizenship in Europe: Remarks on Postnational Membership and the National State*, *in* CITIZENSHIP, NATIONALITY, AND MIGRATION IN EUROPE 17–29 (David Cesarani & Mary Fulbrook eds., 1996).

[32] *See* Helen B. Marrow, *Immigrant Bureaucratic Incorporation: The Dual Roles of Professional Missions and Government Policies*, 74 AM. SOC. REV. 758 (2009).

neither bind them to space nor alienate them from those surrounding them. Interventions, legal or otherwise, that improve conditions in refugee affected areas may also help build political support for their presence.

All this demands different approaches to teaching about rights, studying them, and working for them. In this regard, I propose a pedagogy of the commons: learning from those who are finding ways of claiming rights amidst precarity and diversity by adopting a pedagogy of the commons in which scholars and activists learn first what offers opportunities and risks before we intervene. This will require an approach that is much more social, much more political, and much more spatial. Lawyers still have a role, especially where public institutions remain stable and strong. Where law makes little difference to people's lives, people able to maneuver effectively politically at the most local level may make the most immediate and positive difference. Such effectiveness, however, requires deep, almost anthropological knowledge, legitimacy, and humility.

As hinted at above, the approach I describe may in many cases mean all but abandoning the language of rights and protection. This will not be easy. As Didier Fassin[33] so trenchantly notes in discussing reforms to the humanitarian systems, there are great institutional and personal interests invested in preserving both the universal language and mechanisms mobilized for rights. People with almost religious faith in law and rights may be deeply unsettled when confronted with pragmatic shades of grey. Organizations built around a rights discourse may fear for their relevance and funding. But there is a place for all these strategies in the complementary politics I have described. The diversity of spaces in which we push for social justice demands as many strategies and appeals.

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[33] Didier Fassin, *Heart of Humanness: The Moral Economy of Humanitarian Intervention*, *in* CONTEMPORARY STATES OF EMERGENCY 269 (Didier Fassin & Mariella Pandolfi eds., 2010).