Symposium on Reconceptualizing IEL for Migration: The Elephant in the Room

By:

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> There is a notion gaining credence that the free market breaks down national barriers and that corporate globalization's ultimate destination is a hippie paradise where the heart is the only passport, and we all live together happily inside a John Lennon song (Imagine there's no coun-try...). This is a canard.
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> — Arundhati Roy

Migrants and migrant workers from the Global South carried the economies of the Global North on their backs during the Covid-19 pandemic. On the one hand, millions of migrant workers in agriculture, transportation, care, food processing, construction, and other essential sectors continued working while the world shut down. On the other hand, migrant workers faced some of the harshest and most punitive treatment due to their status or lack thereof; many

migrant workers were detained, deported or subjected to severe and inhumane treatment coupled with the physical, emotional and psychological impact of the pandemic. The pandemic unveiled high levels of nationalism, racism and xenophobia that impacted mi-grants globally and states have used the momentum to justify heavy handed measures and increased migration restrictions and the monitoring of migrants.

Before the pandemic, migration was already a highly politicized issue, impossible to disentangle from the exclusivity of borders and national sovereignty, domestic politics and xenophobia, the dichotomies between citizens and non-citizens and the 'war against terrorism'. This is the reason why many states take a restrictive and negative approach towards the movement of people, even though research has shown that a liberalization of migration, like the liberalization of trade has the capacity to improve global welfare and migration has a positive impact on global trade. For example, even though the EU has hyped the liberalization of trade and investment with many African countries as its commitment to greater eco-nomic equality, it has taken an expansively restrictive approach towards the movement of people by se-verely limiting legal pathways to migration, and keeping migrants in precarity while focusing exclusively on return and readmission even though implementation creates conflicts with international human rights law obligations. No amount of economic agreement partnerships or investment stocks have shaken the desire to keep African migrants out of Europe.

The EU has focused a large number of resources and time coercing African countries to accept return and readmission agreements even though Africans make a minority of the asylum claims in the EU. Additionally, African states were not included in any of the drafting processes of the EU's migration exter-nalization plans. African states also have a positive view of migration, shaped by historical and contem-porary migration norms within regions. The EU has also been accused of promoting the destabilization of African countries with migration funds focused on stopping African migration to Europe. The EU's approach towards the mobility of Africans versus its trade and investments commitments is very clear, and though it is wrapped in a rhetoric of addressing the 'root causes' of migration in Africa, it is really economic imperialism in disguise. A scholar points to the hidden hand of Europe in creating and recreating the exploitation of in the Global South, including historical and

contemporary unequal trade relations, and EPAs that promote the dumping of cheap European goods. Another impact of this ‘hidden hand’ is the laxity of international economic law in the face of abusive multinational companies involved in extracting resources and their patronage of dictators and authoritarians. The exploitation of Global South also results in the uneven impact of climate change on developing countries who have not contributed to global warming.

These events lead to inequalities that impact migration. The liberalization of trade and investment appears to be widely embraced in the international system even when it is reproducing damage and vio-lence because capitalism thrives on the maintenance of severe economic inequalities between people and societies and the continuous exploitation of labor for the purpose of accumulating capital.

If increasing trade and investment is good for global welfare, what about migration? Scholars have argued that transnational mobility is the greatest tool of development because it encourages the spread of skill and experience across borders, as well as remittances that benefit all the countries involved. When limitations on migration are lifted, human rights abuses that happen due to human trafficking, forced labor, and irregular migration will be reduced. Other scholars have contended that the welfare dividends of liberalizing migration can help balance out the economic inequalities between rich and poor countries. International economic law is supposed to be the framework through which states can negotiate with and influence each other to participate in both the economic and political processes that lead towards global welfare. However, it has not yet been able to provide this framework for the negotiation of international migration and mobility of human beings. Rather, in IEL, migration remains an unaddressed issue be-cause it is seen as a gateway to immigration and as a result, even though Mode 4, which is one of the modes of supply under the General Agreement on Trade in Services (GATS) is about the migration of natural persons (i.e. services traded by individuals of one WTO member through their presence in the territory of another), it is quite muted. Instead, the Global North takes a rigid approach to the commit-ments stemming from Mode 4 in their FTAs with countries that might be considered countries of origin of migrants. Some regional approaches (for example, the ASEAN Economic Community) to subvert this rigidity has been to limit Mode 4

to skilled workers only, in order to temper resistance. Suggestions to improve FTAs between developed and developing countries are expansive with solutions including Aid-for-Trade to help LDCs integrate into the global economy, using targeted reforms and investments to integrate countries into GVCs but never seem to include migration and mobility.

The pandemic has cleared all doubt that 'low' or 'semi-skilled' migrants are essential globally, so why is there a hesitation to open legal pathways for them? The pandemic has shown among many other lessons, that when migration is not available, many sectors collapse (for example agriculture in Australia and care, construction, hospitality and agriculture in the UK). States in the Global North are happy to exploit migrants through unsustainable temporary visa schemes and maintain a total disregard for migrants from poor countries. This shows the fundamental flaw of the international economic system that it is focused on extracting resources and accumulating capital from the Global South, the push for international development that is uneven, while sustaining the asymmetries of power between different migratory corridors. Maintaining these power imbalances reinforces the differences between the developed and the developing on the one hand, and on the other hand, economic inequalities drive up the need for migration. Meanwhile, powerful countries are fuelling and restricting migration at the same time and using the plight of migrants to achieve economic imperialism.

IEL is rooted in the liberalization of international trade and investment with the idea that free markets will save the day by transcending national barriers, integrating markets, and equalizing the distribution of resources and development globally. The WTO (and other international financial institutions such as the World Bank) have been pursuing these ideals by promoting agreements to push for liberalization such as the Technical Barriers to Trade (TBT) and the Trade-related Aspects of Intellectual Property Rights (TRIPS) agreements. However, the gap between rich and poor countries continues to widen and new challenges including the pandemic, worsening climate change, pandemic nationalism and the rising popularity of authoritarianism have shown that the current style of international economic governance is still not fit for purpose.

There have been suggestions of specific ways migration can take a larger space in agreements under IEL, which would require states to play a role. Some scholars have suggested linking immigration rules to Mode 4 commitments and Movement of Natural Persons Agreements (MNP). MNPs are agreements created to remove the restrictions to trade specifically in relation to migration. These agreements set out the categories for entry and stay, streamline the procedures for the stay of migrants, and protect domestic labour forces. This would involve the promotion of the legal harmonization of mutual recognition and immigration rules in MNP agreements as well as linking FTAs with human rights protections stemming from international labor law and principles. Additionally, this would also include eschewing the focus of Mode 4 on 'highly-skilled' professionals and including 'low-skilled' labor. This is because of the reality and dilemma that even though developed countries are averse to 'low-skilled' migrants, they are facing great labor shortages. According to this point of view, these steps would expand SDG implementation beyond economic benefits to the protection of the labor rights and mobility.

Another opinion is for states in the Global North who have benefited from colonialism and imperialism to adequately address the issue of migration by taking steps to stop exploitation. These steps include terminating the predatory debt arrangements they have with developing countries, allowing the developing countries to be centered in decision- and law-making processes of international financial and trade organizations, practicing fairer regulation of the flow of money by ending capital flight, and by paying reparations to countries that suffered colonialism and/ or slavery.

The above suggestions place the onus on developed countries to do what is right or to recognize that international migration is as good as trade and investment for the improvement of global welfare.

However, these states are the ones hindering the path towards a fairer distribution of resources and wealth globally. Capitalism benefits from this exploitation and so it is unlikely that capitalistic states will emphasize laws or policies promoting welfare through migration. As Arcuri argues, states are unable to espouse equality and sustainability because sovereignty is selfish. It is this selfishness that stands in the path of global welfare and blocks international law from achieving its emancipatory potential. As a result, when

we look towards states for the solutions to global problems, we encourage an IEL that does not trouble itself with the duty to redistribute global wealth, to promote social justice or to protect the environment. Because states are not trustworthy, Arcuri leaves this important task of protection and re-distribution to international economic lawyers who are charged with the responsibility of bringing wealth redistribution to the center of international economic law. In the context of migration, this would mean international economic lawyers need to pay attention to international migration, the ways in which mi-gration can contribute to the redistribution of wealth and global welfare, and how international economic law can make that possible. This conceptualization sees international economic lawyers as agents of change who through smaller acts like climate change litigations can contribute to a sea change.

For a reimagination of international economic law for migration to be possible, both opinions have merit. Because we still live in a state-centric international system, states must participate in the economic and political liberalization of migration. At the same time, international lawyers and international and domes-tic civil society must put up the resistance needed to make international economic laws and practices become more people/ human rights centric. At the academic level, there is work to be done between mi-gration and international economic law scholars about the intersection of both fields. Free markets are not enough; migration is a big part of the move towards the redistribution of global wealth and should not be divorced from international economic law. Will we tackle the elephant in the room or keep avoid-ing it?

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