

SYMPOSIUM ON THE BIDEN ADMINISTRATION AND THE INTERNATIONAL LEGAL ORDER

CULTIVATING NORMATIVE AUTHORITY: THE BIDEN ADMINISTRATION, MIGRATION, AND THE INTERNATIONAL LEGAL ORDER

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President Biden faces many hurdles to constructing an effective international legal order on migration, not least of which is the absence of any such structure even prior to the dual challenges of the nationalist fallout of the Trump administration's rhetoric and policies and the COVID-19 pandemic. Yet the excesses of cruelty under Trump and the social instability resulting from the pandemic may have created political space for the Biden administration to lay the groundwork for a more comprehensive international structure that governs migration of all kinds. To that end, President Biden should cultivate normative authority in the migration arena by shifting the national discourse, shoring up international agreements and institutions, and building regional cooperation.

The Challenges Ahead

Across several fronts, President Biden faces serious challenges with respect to migration and the international legal order. On the international front, nearly eighty million people are displaced worldwide, 26 million of whom are refugees, amounting to the highest forced migration figures on record.¹ Attempts by these migrants, from Salvadorans to Syrians, to find protection in other nations have served as fodder for nationalists to mobilize an anti-migrant politics across the globe, posing substantial challenges to the international legal order around migration. As borders shut in the face of the COVID-19 pandemic, opportunities for the displaced to secure safety vanished. International refugee law was widely suspended as states reasserted sovereign power at the border.

On the domestic front, perhaps the most pressing challenge is the humanitarian response that the administration will have to devise for the thousands of migrants living in precarious situations in Mexican border cities, where they are targeted by gangs and cartels. The Trump administration "pushed back"² these asylum seekers under the "Remain in Mexico" policy that was designed to evade U.S. protection obligations under the 1951 Convention Relating to the Status of Refugees (Refugee Convention). In normal times, a substantial and well-designed logistical effort would be necessary to bring these asylum seekers to safety and to grant them the hearing that

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¹ UN High Comm'r for Refugees, [Global Trends: Forced Displacement in 2019](#).

² "Pushback" is a term of art in the field of refugee law that denotes "refusals of entry and expulsions without any individual assessment of protection needs." [Pushback Policies and Practice in Council of Europe Member States](#), Parliamentary Assembly, Council of Europe, Res. 2299 (2019).

international refugee law requires. But these are not normal times. The Trump administration decimated the refugee resettlement infrastructure that would be the most obvious choice to process and care for these migrants. The COVID-19 pandemic creates additional public health challenges in keeping asylum seekers and those working with them safe. And the economic fallout from the coronavirus means that resources allocated to the asylum and refugee systems are even more limited than usual.

Though the Trump administration's border policies were particularly harsh and upended baseline international legal norms in an extreme way, borders had been steadily tightening in recent years as part of a broader set of migration deterrence policies that took root in Australia and Europe as well as the United States. Yet even in this climate, the swiftness with which the COVID-19 pandemic demonstrated the absolute nature of sovereign power over borders was breathtaking. Assertions that sovereignty had eroded in the face of globalization became quaint overnight as migrant-destination nations in the Global North locked down their borders not only to migrants from the Global South attempting to avail themselves of protections provided by international law, but also to each other's citizens. Though public health experts suggested that selective border closures lacked a strong scientific foundation,³ the United States denied admission to asylum seekers at southern land borders while permitting entry by other non-citizens.

To make matters worse, the international legal order around migration has always been fragmented and incomplete. The non-refoulement principle established in the Refugee Convention and expanded through the Convention Against Torture and other treaty law has taken center stage.⁴ But while its many achievements are to be lauded, this narrow principle does not extend to most human movement, which often occurs ungoverned by international law.⁵ The refugee law regime offers a crisis-response framework; the dominance of the non-refoulement principle means that international law around migration is a law of crisis rather than coordination and proactive, evidence-based governance.⁶ A new international legal order should start from the premise that migration is a reality of a modern globalized world, and that more effective international legal coordination and regulation of human movement would benefit both migrants and destination states.

Winning Hearts and Minds at Home

In order to create the necessary political will to build a more effective international legal order around migration, the Biden administration must first shift the national discourse. President Biden can start by emphasizing that previous administrations' excessive focus on the national security risks posed by migration led them to underprepare for more severe threats including the public health threat of the pandemic.⁷ His message should normalize the phenomenon of migration, explaining that migration is a permanent feature of our globalized world and emphasizing the benefits that migrants bring to their host states. Biden's discourse should foreground the concept of human mobility, which encompasses not only the ability to migrate but also the ability to remain in one's country

³ [Letter to HHS Secretary Azar and CDC Director Redfield Signed by Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions](#) (May 18, 2020).

⁴ [Convention Relating to the Status of Refugees](#) art. 33, July 28, 1951, 19 U.S.T. 6259; [Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) art. 3, June 26, 1987, 1465 UNTS 85.

⁵ The International Covenant on Civil and Political Rights addresses freedom of movement and residence within a territory as well as fair process in immigration proceedings, but applies only to migrants lawfully present. [International Covenant on Civil and Political Rights](#) arts. 12–13, Dec. 10, 1984, 999 UNTS 171.

⁶ Jaya Ramji-Nogales, [Migration Emergencies](#), 68 HASTINGS L.J. 609 (2017)

⁷ Oona Hathaway, [How the U.S. Got National Security Wrong](#), JUST SECURITY (Apr. 7, 2020).

of origin in dignified conditions.⁸ A human mobility approach emphasizes the importance of improved conditions in countries of origin to ensure that the decision to move is a real choice.

At the domestic level, the Biden administration should reframe the migration conversation around American values, which will resonate more effectively with American voters than a human rights framework.⁹ President Biden's campaign platform took this approach, reminding citizens that "[u]nless your ancestors were native to these shores, or forcibly enslaved and brought here as part of our original sin as a nation, most Americans can trace their family history back to a choice—a choice to leave behind everything that was familiar in search of new opportunities and a new life."¹⁰ Given his Irish roots and Catholic faith and Vice President Harris's immigrant parents from India and Jamaica, they are well positioned personally to present this vision of migration. Also easing their way is the fact that 70 percent of the U.S. electorate views immigrants as an important component of our identity as Americans¹¹ and 80 percent think immigration is good for the country.¹² President Biden should build on these sentiments to remind Americans and the world of the role that migrants play as essential workers, as caregivers, and as part of the fabric of our nation. This message is essential in preempting and combating the xenophobia upon which irresponsible politicians could play in the current economic climate to further their own interests.

The Biden administration should ground its foray into the international legal arena on migration with a strategy to win hearts and minds; cultivating normative authority is the necessary first step to rebuilding a global framework. President Biden must initiate a shift in discourse around migrants, presenting a vision that depicts migration as a reality rather than a problem and emphasizes the important coordination function that international law can and should play in addressing migration. The challenges are plentiful, from public fears of contagion to vastly diminished state resources to skyrocketing unemployment rates. Moreover, this vision will certainly inspire attacks by nationalist politicians and media, but that is not a reason to concede ground to their perspective—rather, it is a call to be more strategic and effective in presenting a different path forward. Polling data suggest that the cruelties of xenophobic politics may have pushed Americans too far, and that this may be an opportune moment to present a compelling alternative vision of an effective international legal order around migration.

Shoring up Existing International Treaties

At the multilateral level, there is likely to be little progress around migration law over the next four years. Nevertheless, the Biden administration has plenty of important work to do, starting with the restoration of U.S. commitments to the Refugee Convention.¹³ As the Biden campaign platform promised, the administration should reverse as quickly as it can the Trump administration's policies that violate the terms of the treaty, from the Muslim ban to family separations. It should also rely on public health as a guide to reopen the border, developing a policy that will enable the United States to protect asylum seekers without increasing the spread of COVID-19. These actions are unilateral, but they will play an important role on the global stage in reestablishing U.S. commitment to and leadership on refugee protection.

⁸ Jaya Ramji-Nogales & Peter Spiro, *Introduction to Symposium on Framing Global Migration Law*, 111 AJIL UNBOUND 1, 1 (2017).

⁹ See Irene Bloemraad et al., *Rights, Economics, or Family? Frame Resonance, Political Ideology, and the Immigrant Rights Movement*, 94 SOC. FORCES 1647 (2016).

¹⁰ [The Biden Plan for Securing Our Values as a Nation of Immigrants](#).

¹¹ Joel Rose, *Americans Back Trump on Immigration—But Only to Stop COVID-19, Poll Finds*, NPR (Aug. 5, 2020).

¹² Mohamed Younis, *Americans Want More, Not Less, Immigration for First Time*, GALLUP (July 1, 2020).

¹³ ANDREW I. SCHOENHOLTZ ET AL., [THE END OF ASYLUM](#) (forthcoming 2021).

Another key step that President Biden has promised to take to bring U.S. practices in line with international legal standards is to end pushbacks of asylum seekers at the border by terminating the “Remain in Mexico” policy that sends migrants into Mexico to await their U.S. immigration hearing. In addition to fulfilling that promise, Biden should end the “metering” policy that limits the number of people who can request asylum on any given day and thus requires migrants to wait for months before they can even seek asylum at the border, in violation of international law. The reopening of the border must entail a carefully planned humanitarian response that meets asylum seekers’ basic needs, including medical care, food, and shelter. This challenge presents the Biden administration with an opportunity to demonstrate that it is feasible to protect migrants’ rights at the border, and to send an international message that the border should not be a site of violations of international law. The Biden team could work with the UN High Commissioner for Refugees (UNHCR) to ensure that its border processes comply with soft law standards and best practices, and to further develop international standards around reception at the border.

Also at the multilateral level, the treaty executives are in need of funding and logistical support. Prior to the Trump administration, the United States resettled the largest number of refugees and was the largest single donor to UNHCR. Interestingly, despite Trump’s anti-refugee rhetoric, U.S. contributions to UNHCR increased from US\$1.5 billion in 2016 to US\$1.9 billion in 2020.¹⁴ Given worldwide levels of displacement, the Biden administration should assess whether that funding is sufficient to meet current levels of need. In addition, Trump cut funding to the UN agency that provides services to 5.6 million Palestinian refugees; President Biden should restore that funding, which has historically come from the Migration and Refugee Assistance Appropriation administered by the State Department.

In terms of refugee resettlement, President Biden’s campaign platform promised to increase refugee admissions to 125,000, over eight times the current cap of 15,000.¹⁵ This is an important step, but the administration faces a serious logistical challenge to ramp up U.S. resettlement capacity in time to welcome these refugees. Again, this situation presents an opportunity for the Biden administration to rethink the refugee admissions program. One avenue it might consider is private refugee sponsorship, an approach that Canada has taken for forty years, through which groups of private citizens can provide funding and support for resettled refugees.¹⁶ At the same time that this system enables the government to resettle more refugees at lower cost, it creates an important connection between citizens and refugees that fosters integration and positive public perceptions of refugees.

The most recent multilateral agreements on migration—the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration—demonstrate the challenges of drafting new treaties on migration in the current political environment.¹⁷ Both instruments seek to build consensus, the former around increased responsibility sharing for refugees and the latter around migration management and migrants’ rights. The Compacts, both of which are non-binding, have been criticized because neither makes substantial changes to existing international law, because they perpetuate the historical bifurcation between refugees and migrants, and because they are excessively deferential to national sovereignty.¹⁸ Despite those flaws, given the power of the United States in the migration sphere, a decision by the Biden administration to take these agreements seriously could lead to improved state cooperation and progress towards the eventual goal of greater international legal coordination of all types of migration.

¹⁴ UN High Comm’r for Refugees, [Donor Profiles: United States of America](#).

¹⁵ [Presidential Determination on Refugee Admissions for Fiscal Year 2021](#).

¹⁶ Audrey Macklin et al., *A Preliminary Investigation into Private Refugee Sponsors*, 50 CANADIAN ETHNIC STUD. 35 (2018).

¹⁷ [Global Compact on Refugees](#), UN Doc. A/73/12 (Part II) (Aug. 2, 2018); [Global Compact for Safe, Orderly and Regular Migration](#), UN Doc. A/RES/73/195 (Dec. 19, 2018).

¹⁸ Catherine Dauvergne, [Revisiting The New Politics of Immigration](#), 58 INT’L MIGRATION 96 (2020).

The Future is Regional

Given the challenges of international cooperation and the geography of migration flows, and as President Biden has long recognized, an effective approach to human mobility requires serious regional engagement with Central America, Mexico, and Canada. As Vice President, Biden frequently visited Central American nations; his expertise will provide an important foundation for effective regional efforts. The Biden campaign platform indicated the importance of Central America in its foreign policy goals, promising a US\$4 billion plan to help these nations develop infrastructure, including legal and educational systems.¹⁹ The Biden plan for the region prioritizes rebuilding anti-corruption efforts with international and regional partners, restoring important programs that withered under the Trump administration. Though certainly rife with challenges, not least of which is the economic recession, robust regional engagement has the potential to decrease violence and poverty in the region, which could in turn significantly reduce inbound migration to the United States.

In addition to creating improved conditions for those who would prefer to remain in their home country, the Biden administration should work with regional partners to develop a comprehensive plan that coordinates all types of migration and enables migrants to travel safely to the United States. President Biden's vision for migration in the region includes expanding opportunities for refugee processing in Central America, a tantalizing option that has not yet been operationalized effectively. A successful regional refugee processing program would require a substantial financial investment and serious logistical knowledge to ensure that asylum seekers can safely access the system and that adjudicators can decide their cases quickly enough to protect them from imminent violence. The necessary expertise could be drawn from the UNHCR and its partner agencies and organizations, but funding may pose an insurmountable challenge. An effective regional refugee processing system should be a key priority for the Biden administration because it could enable these migrants to travel safely to the United States by plane, without being subject to the violence and extortion they risk during the dangerous journey north by land, while at the same time preempting nationalist politicians who capitalize on images of migrants at the southwest border to support anti-immigrant platforms. The Biden platform also promised to create expanded entry opportunities for migrants who may not meet the refugee definition but who merit protection against violence, meet labor market needs, or seek to reunify with family in the United States. This important step, which may require congressional action to implement fully, will relieve pressure on the asylum system and should ensure migrants' access to safe transit to the United States.

Finally, the Biden administration should engage with the inter-American human rights system to develop a regional dialogue and potentially an institution that could coordinate all types of migration. The regional consultative process on migration run by the International Organization on Migration, the Puebla Process, has been critiqued as ineffectual.²⁰ Regional processes more generally run the risk of capture by the regional hegemon as a containment mechanism. In contrast, the inter-American system has foregrounded interpretations of human rights law that take seriously the protection needs of all migrants, including a ground-breaking set of principles issued last year.²¹ At the same time, President Biden should work to reframe Americans' conception of our obligations to the region by emphasizing the role that the U.S. demand for drugs plays in creating instability and violence in U.S. neighbors to the south.²² By cultivating normative authority, the Biden administration could begin

¹⁹ [The Biden Plan to Build Security and Prosperity in Partnership with the People of Central America](#).

²⁰ Chantal Thomas, *Transnational Migration, Globalization and Governance: Theorizing a Crisis*, in *HANDBOOK ON INTERNATIONAL LEGAL THEORY* (Martin Clark et al. eds., 2016).

²¹ Inter-American Commission on Human Rights, [Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking](#), Res. 04/19 (Dec. 7, 2019).

²² For an interesting exploration of new approaches to international drug regulation, see Ely Aaronson & Gregory Shaffer, [Introduction to the Symposium on Drug Decriminalization, Legalization, and International Law](#), 114 *AJIL UNBOUND* 275 (2020).

to shift the international legal order around migration away from the crisis focus of refugee law to an approach that recognizes migration as a regular phenomenon that can and should be coordinated and regulated by regional and eventually international law.