

MIGRATION RESEARCH LEADERS SYNDICATE
IN SUPPORT OF THE GLOBAL COMPACT ON MIGRATION

Border Security, Migration Governance and Sovereignty



International Organization for Migration (IOM)

The UN Migration Agency

The opinions expressed in the report are those of the authors and do not necessarily reflect the views of the International Organization for Migration (IOM). The designations employed and the presentation of material throughout the report do not imply the expression of any opinion whatsoever on the part of IOM concerning the legal status of any country, territory, city or area, or of its authorities, or concerning its frontiers or boundaries.

IOM is committed to the principle that humane and orderly migration benefits migrants and society. As an intergovernmental organization, IOM acts with its partners in the international community to: assist in meeting the operational challenges of migration; advance understanding of migration issues; encourage social and economic development through migration; and uphold the human dignity and well-being of migrants.

This publication has been issued without formal editing by IOM. Any errors or oversights in this publication are the sole responsibility of the authors.

Suggested citation: Martin, S. and E. Ferris (2017) 'Border Security, Migration Governance and Sovereignty', in McAuliffe, M. and M. Klein Solomon (Conveners) (2017) *Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration*, IOM: Geneva.

Publisher: International Organization for Migration
17 route des Morillons
P.O. Box 17
1211 Geneva 19
Switzerland
Tel: + 41 22 717 91 11
Fax: + 41 22 798 61 50
E-mail: hq@iom.int
Internet: www.iom.int

© 2017 International Organization for Migration (IOM)

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise without the prior written permission of the publisher.



Border Security, Migration Governance and Sovereignty

Susan Martin and Elizabeth Ferris

A time of paradoxes

We live in an increasingly borderless world where funds can be transferred across borders with a swipe on a smartphone, where automobiles and computers are made up of parts produced in many countries, and where music can be streamed and cyberattacks launched with no impediments from national borders. At the same time – and herein lies the paradox – governments are increasingly trying to exert ever greater control over the movement of people across borders. Walls and fences have gone up where only a few years ago, people freely crossed into other countries. Would-be asylum-seekers are prevented from entering territories by interdiction, by outsourcing control of maritime borders, and by offshore processing. Populist politicians promise to impose more draconian measures to keep people out of their countries. At a time when borders are becoming less restrictive in terms of movement of goods, services and communication, they are becoming more important politically.

Sovereignty is the bedrock of today's international system. While there are different definitions of sovereignty, sovereignty is generally understood as the authority of a polity to govern itself, recognition of the autonomy of all states and the principle of non-intervention in the affairs of other states.¹ Within this context, national security—whether defined as political, economic, social, or cultural—underlies the decisions of sovereign states with regard to border control.²

In practice, of course, there are limits on the sovereignty of states – limits which states have collectively imposed on themselves because the benefits of multilateral cooperation were perceived as being more beneficial than the costs of limiting sovereignty.

Why do States accept limits on sovereignty?

There are many examples in which state sovereignty has given way to more collaborative approaches in addressing important transnational issues. In the 1920s, states accepted the Nansen Passport, issued by the League of Nations office of the High Commissioner for Refugees, thereby allowing an international organization to assume one of the functions of a state in identifying and vouching for refugees who had no state protection. Article 33(1) of the 1951 Refugee Convention expanded the notion, stating that: 'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life

1 The classic work on sovereignty, Stephen Krasner's *Sovereignty: Organized Hypocrisy*, (Princeton University Press, 1999) adds a third understanding of sovereignty – legal sovereignty manifest when a state is recognized by others, is able to join international organizations and has the right to represent itself.

2 See for example, Myron Wiener, ed., *International Migration and Security* (Boulder, Co: Westview Press, 1993) and Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization*. (NY: Columbia University Press, 1996) on the connections between sovereignty, security and migration. For a more recent review of the literature, see Fiona B .Adamson, "Crossing Borders: International Migration and National Security," *International Security*, vol. 31, no. 1 (Summer) 2006): 165-199. Also see Donald Kerwin, "The Use and Misuse of 'National Security' Rationale in Crafting U.S. Refugee and Immigration Policies," *International Journal of Refugee Law*, 2006. www.researchgate.net/profile/Donald_Kerwin/publication/31038440_The_Use_and_Misuse_of_'National_Security'_Rationale_in_Crafting_US_Refugee_and_Immigration_Policies/links/556e018908aacc2268308c08f.pdf

or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’ These prohibitions on refoulement have acquired the status of customary international law. Other human rights instruments – from the Universal Declaration on Human Rights to the International Covenants on Political and Civil Rights and on Economic, Social and Cultural Rights— have committed signatory governments to respecting human rights of people within their territories. The endorsement of the ‘responsibility to protect’ concept at the World Summit in 2005 was another example of classical notions of sovereignty giving way to more expansive ones that emphasized that international actors can step in, without violating the UN Charter, when sovereign states engage in genocide, war crimes and crimes against humanity.³ In other words, there was a recognition that the benefits of living in a world in which human rights are widely respected outweighs the limitations to the freedom of action of governments to abuse the rights of those living within the borders of their countries.

These are all cases where states have voluntarily and collectively accepted limitations on their sovereign authority to act within the borders of their own countries because there was a perceived greater good of having a multilateral system that contributed to order and security. To some extent, this willingness to restrict sovereignty, particularly through ratification of binding international law, reflects growing recognition that sovereignty requires a robust framework of human rights that apply not only to one’s own citizens but others who seek to enter the country. As Don Kerwin has argued, “sovereignty is not only about national defense, border control, or homeland security. Sovereign states also exist to safeguard rights and (more broadly) to provide the conditions that allow their residents to thrive, which invariably requires that they maintain a level of social order, peace and cohesion.”⁴ In other words, sovereignty is responsibility, not merely control over the territory of the state.⁵

The limits to sovereignty are also derived from changes in the nation-state system that conveys sovereignty. Some of these changes are directly related to migration. As Adamson observes: “Ever larger flows of people across borders; increasingly multicultural populations; and the emergence of informal, migration-based, transnational networks that circulate capital, goods and ideas – all challenge notions of the territorial state as a bounded entity with a clearly demarcated territory and population.”⁶ States limit their sovereignty when doing so allows them to engage with other states and actors, including civil society, the private sector and migrants themselves, to manage more effectively complex movements of people across borders. Policies adopted unilaterally are often impossible to implement as they do not take into account the interests of other key stakeholders. Instead, states turn to bilateral, regional and sometimes global agreements that spell out the responsibilities of all parties.

This is increasingly the case with regard to border control, which is seen as a quintessential exercise of sovereignty. State control over borders has several purposes: maintaining control of populations, limiting access to labor markets and maintaining internal security. Even as governments are devoting more resources to policing of borders and to enhanced use of technology in border control, strengthening border controls also challenges sovereignty in that close inter-state collaboration is necessary for effective border management. International migration “does create incentives for states to selectively relinquish dimensions of their autonomy so as to increase their capacity to control their borders. International cooperation on migration and border control can be seen as essential to maintaining a state’s capacity to regulate population flows, and is therefore a vital component of a state’s national security policy.”⁷ By giving up some sovereign authority (for example, by relying on information collected by other states), states are able to strengthen their ability to control borders and hence their security.

3 Francis Deng, Sadikiel Kimaro, Terence Lyons, Donald Rothchild, and I. William Zartman, *Sovereignty as Responsibility: Conflict Management in Africa*, Washington, DC: Brookings Institution Press, 1996 (2nd ed., 2010).

4 Don Kerwin, “International Migration, Human Dignity, and the Challenge of Sovereignty,” 2014. <http://cmsny.org/publications/kerwin-migrationdignitysovereignty/>

5 See Deng et al. for a fuller discussion of this evolving notion of sovereignty as responsibility.

6 Adamson, p. 175.

7 Adamson, p. 180.

Even as states voluntarily enter into international agreements, they retain the right to renege on these commitments if observance would threaten national security. For example, the 1951 Refugee Convention explicitly excludes from the refugee definition those who have committed a crime against peace, a war crime, or a crime against humanity; those who have committed a serious non-political crime; and those who have been guilty of acts contrary to the purposes and principles of the United Nations (Article 1f). Article 32 permits states to expel a refugee lawfully in their territory on grounds of national security or public order. The bar on refoulement (Article 33) does not apply to a refugee who is “a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. The 1990 Migrant Workers Convention includes numerous rights which cannot be abridged “unless compelling reasons of national security require otherwise.”⁸ States also make reservations when they ratify conventions if they believe that certain clauses are not in their national interest or limit their sovereignty. For example, several parties to the Migrant Workers Convention indicated they would not be bound by article 92, paragraph 1 which provides that disputes between state parties about the interpretation of the Convention could be submitted to arbitration or to the International Court of Justice at the request of either party. In effect, restricting one’s sovereignty is not as significant a move when governments negotiate escape clauses that respect their national security interests.

States are also willing to restrict their sovereignty when they have flexibility in interpreting the provisions that they ratify. Non-refoulement is a case in point. The non-refoulement bar in the Convention against Torture (CAT) is broader than it is in the Refugee Convention. Article 3(1) states: No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.⁹ There are no security exemptions to non-return of those who demonstrate they would face torture if returned.⁹ Yet, States have found ways around the bar on non-refoulement. For example, states have sought diplomatic assurances from governments receiving back those covered by CAT that they will not torture in this particular case.¹⁰

Finally, states are willing to cooperate with others because they expect certain benefits to accrue from a better managed immigration system. The research is clear that immigration leads to economic growth which is definitely in a country’s interest.¹¹ For example, the postwar economic boom in Germany would have been impossible without migration and economic growth in the US owes much to labor migration flows of all kinds. Migration also creates diasporic relationships between people in source and destination countries that can accrue to the benefit of both.

Why do states resist loss of sovereignty with regards to migration?

Despite these benefits of migration and cooperative action, the phenomenon presents challenges for states, particularly to traditional notions of citizenship and state boundaries. Not everyone in either source or destination countries believe that they are the beneficiaries of migration. Rather, many believe that migrants undermine cultural, national and religious identity and compete for jobs and wages.

An inability to control migration—whether perception or reality—can have political consequences. Perhaps the starkest example of the relationship between control of borders and political collapse was the experience

8 See, for example, Articles 8 (exit), Article 22 (expulsion), Article 26 (trade unions), Article 39 (liberty of movement), and Article 40 (association).

9 See David Weissbrodt and Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 *Buff. Hum. Rts. L. Rev.* 1 (1999), available at http://scholarship.law.umn.edu/faculty_articles/362.

10 Human Rights Watch, *Torture and Non-Refoulement Briefing to the 60th Session of the UN Commission on Human Rights*, January 2004, available at www.hrw.org/news/2004/01/28/torture-and-non-refoulement. See also Department of Homeland Security Inspector General, *DHS Detainee Removals and Reliance on Assurances*, November 2011 available at www.oig.dhs.gov/assets/Mgmt/OIG_11-100_Nov11.pdf.

11 See, for example, OECD, ‘Is migration good for the economy?’ *Migration Policy Debates*, May 2014. www.oecd.org/migration/OECD%20Migration%20Policy%20Debates%20Numero%202.pdf and *Economic Implications of Remittances and Migration*, Global Economic Prospects 2006, Washington: World Bank, 2006.

in former Eastern Europe in 1989 when the collapse of borders between East Germany, Hungary and Austria led in November to opening the border between East and West Germany and a process of political change that led to the demise of communism in Eastern Europe. Perceptions that governments have ceded control over their borders to other states can lead to rising nationalism and, when coupled with xenophobia, can exacerbate political instability. The Brexit vote in the United Kingdom and President Trump's call for a border wall with Mexico and renegotiation of the North American Free Trade Agreement (NAFTA) demonstrate how concerns about immigration, trade and regional agreements conflate and lead to calls for re-enforcement of sovereignty.

What does this mean for the Global Compact on Safe, Orderly and Regular Migration?

The case should be made that strengthening global governance of migration – and in particular, promoting more pathways for safe, orderly and regular migration is in the collective interests of all states. The current system is a patchwork of unilateral, bilateral and regional policies which sometimes work at cross-purposes. Steps to regularize migration would create a more orderly and predictable system. States don't like surprises; they are much more likely to respond positively to migration – even to greater numbers of migrants – that is regular and managed. The benefits of such a system would outweigh any restrictions on a particular state's sovereignty.

The Global Compact offers a relatively non-threatening way to move in the direction of global governance as its provisions will likely be non-binding – offering an easy opt-out for states with particular concerns. The Global Compact is also likely to endorse further work on mini-multilateral initiatives, in which 'coalitions of the willing' work together to devise principles and share good practices on specific groups of migrants (such as the disaster-displaced and migrants in countries in crises--MICIC¹²). Again, these do not threaten sovereignty because governments can choose whether or not to participate.

While it seems unlikely that the Global Compact will be able to obtain full consensus on a wide range of multilateral policies related to irregular migrants – in part because of its obvious relationship to sovereignty – small steps could be taken by developing guidance on responding to migrants in vulnerable situations. This was a recommendation of the *New York Declaration* and agreement on principles relating to a particular subset of migrants in vulnerable situations – perhaps unaccompanied children, or survivors of sexual and gender-based violence encountered on route – could serve as confidence-building measures for future agreements on other, more politically-sensitive issues. In particular, clear guidance on return to home countries or relocation elsewhere for this population could help states to formulate agreements on irregular migrants in general. The success of the MICIC initiative in promulgating principles, guidelines and effective practices for protecting one set of vulnerable migrants shows the promise of this approach. Relevant to this examination of sovereignty, it is worth mentioning that many of the effective MICIC practices called for collaboration among source, transit and destination countries.

Finally, if progress is to be made on global governance generally and on the Global Compact on Migration in particular, the language adopted in 2018 must go beyond rhetoric to include practicable steps to balance security and migrant rights issues. Two particular areas will need to be addressed – both of which relate directly to sovereignty and both of which are difficult for both governments and migrants' rights advocates. First, destination and transit countries need assurance that their security concerns about border control will be taken seriously by other states and by migrant advocates. At the same time, source countries and migrant rights advocates need assurance that those attempting irregular entry will be treated humanely and in accordance with international law. The thorny issue of returns will also need to be addressed when migrants are interdicted at sea or are found inadmissible after entry into a country. Identifying effective practices that

12 See Susan Martin, "New Models of International Agreement for Refugee Protection," *Journal of Migration and Human Security*, 4:3 (2016): 60-75. Also Elizabeth Ferris and Jonas Bergmann, "Soft law, migration, and climate change governance," *Journal of Human Rights and the Environment*, March 2017. www.elgaronline.com/view/journals/jhre/8-1/jhre.2017.01.01.xml

balance these two important components of public policy—security and rights—is essential to overcoming concerns about sovereignty in the context of international cooperative efforts to management movements of people.

The second issue to be addressed is the toxic narrative around migration and the conflation between regular and irregular migration that is fueling growth in nationalism. It will be difficult to find common ground between those advocating for tighter border control and for expanded pathways to safe, orderly and regular migration if public opinion is negative and political leadership is absent or, still worse, willing to engage in anti-immigrant rhetoric. Public education about the realities of immigration must accompany adoption and implementation of a sound Global Compact. Information about immigration is woefully lacking in most countries. When armed with better information, however, publics are much less likely to be opposed to migration.¹³ Presumably, they would also be more supportive of international cooperation in pursuit of more manageable global migration.

13 The Transatlantic Trends survey on immigration found that respondents in most European and North American countries overestimated the proportion of the population in their countries that were immigrants by double and sometimes triple the actual numbers. An experiment that informed half of respondents about official statistics on migration found that the informed respondents were much less likely to say there were too many immigrants in the country than was true of the non-informed. See http://trends.gmfus.org/files/2014/09/Trends_Immigration_2014_web.pdf and



Susan Martin is the Donald G. Herzberg Professor Emerita of International Migration. She was the founder of the Institute for the Study of International Migration in the School of Foreign Service at Georgetown University. She is currently serving as Chair of the Thematic Working Group on Environmental Change and Migration in the Knowledge Partnership on Migration and Development in the World Bank. Previously Dr. Martin served as the Executive Director of the U.S. Commission on Immigration Reform, established by legislation to advise Congress and the President on U.S. immigration and refugee policy. Prior to joining the Commission's staff, Professor Martin was the Director of Research and Programs

at the Refugee Policy Group, a Washington-based center for analysis of U.S. and international refugee policy and programs. She was Assistant Professor at the American Studies Department of Brandeis University and Lecturer in the History of American Civilization Department at the University of Pennsylvania. Her recent publications include *International Migration: Evolving Trends from the Early 20th Century to the Present*; *Humanitarian Crises and Migration: Causes, Consequences and Responses* (ed.); *A Nation of Immigrants*; *The Migration-Displacement Nexus: Patterns, Processes and Policies* (ed.); *Managing Migration: The Promise of Cooperation*; *Mexico-U.S. Migration Management: A Binational Approach* (ed.); and *Refugee Women*. Dr. Martin earned her MA and Ph.D. from the University of Pennsylvania and her BA from Douglass College, Rutgers University.



Elizabeth Ferris is research professor with the Institute for the Study of International Migration at Georgetown University's School of Foreign Service and also serves as a nonresident senior fellow in Foreign Policy at the Brookings Institution. From January to September 2016, she also served as senior advisor to the U.N. General Assembly's Summit for Refugees and Migrants in New York. From 2006 to 2015, she was a senior fellow and co-director of the Brookings-LSE Project on Internal Displacement where she worked to support understanding and protection of internally displaced persons. Prior to joining Brookings, she spent 20 years working in the field of humanitarian assistance, most recently in Geneva, Switzerland at the World Council of Churches. She has also served as the

director of the Church World Service's Immigration and Refugee Program; as research director for the Life & Peace Institute in Uppsala, Sweden; and as a Fulbright professor at the Universidad Autónoma de México. Her teaching experience has included positions at Lafayette College, Miami University, and Pembroke State University. She has written extensively on refugee, migration, and humanitarian issues, including "The Politics of Protection: The Limits of Humanitarian Action" (Brookings Institution Press, 2011) and most recently, "Consequences of Chaos: Syria's Humanitarian Crisis and the Failure to Protect," with Kemal Kirsici (Brookings Institution Press, 2016). She received her bachelor's degree from Duke University and her master's and doctorate from the University of Florida.