The geopolitics of knowledge production in international migration law

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Introduction

This chapter addresses the involvement of academic research on international migration law in the political project of the global North to impose its view concerning international migration law on the global South. The purportedly well-established principle of international law that states have the right exclude foreigners has its origins in the US Supreme Court's Chinese Exclusion case law. The doctrine holding that the right of exclusion is inherent in state sovereignty developed there has been adopted and transformed by the European Court of Human Rights. In order to show the continuing relevance of the Chinese Exclusion doctrine, I will analyse a rather everyday judgment of the European Court about boat people (*J.R. et autres v Grèce* 2018). This will be contrasted with a judgment about boat people from the global South, issued by the Papua New Guinea (PNG) Supreme Court of Justice (*Namah v Pato* 2016). I will then show how the PNG judgment, and law from the global South more generally, is sidelined in academic work, while Strasbourg judgments are treated as embodying the state of international law (even when they are being criticised). I will analyse this as an act of power erasing sources of international migration law from the global South. I will close by showing that this erasure can be, and actually is being resisted within the discipline of international law.

The Chinese Exclusion doctrine as international law

The international court with the most extensive migration case law is the European Court of Human Rights. In all cases except those concerning migration, the Court follows the structure of the provisions it applies: people have particular rights (to life, to liberty) and under particular conditions, the state may limit these. Humans are thus entitled to the enjoyment of fundamental rights, but in some situations the state can interfere with these rights in order to protect the rights of others, or for the public good. The burden of justification for such infringements rests with the state. Therefore, the Court begins a legal analysis by asking the question whether the situation is covered by the right that is being invoked (for example: is there family life between the relevant persons?), then proceeds to enquire whether there is an interference; if so the Court looks whether the interference has a legal basis and a legitimate aim; and finally asks whether the interference is proportionate in light of its aim. However, in migration cases the Court does the opposite. It starts out with the right of states: "as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory".[2] It then looks whether the migrant has such a strong claim under a Convention provision that they can trump the right of the state to control migration. The burden of justification (why is the interference not justified?) rests with the individual. Dembour (2015) has called this the Strasbourg reversal, which in cases relating to migration "relegates Convention rights to the status of exceptions which (most often) merely serve to limit the principle of state sovereignty, the latter being the default position" [119]; cp. *Schotel* 2012). In addition, because of the Strasbourg reversal the usual proportionality test cannot be applied. The state does not have to

argue why, in light of the legitimate aim it pursues with the removal of this particular person, it is proportional to infringe on the right to family life. Instead, it can rely on its own right, and wait for the arguments of the migrant why their case is so compelling that removal is disproportionate (*Hilbrink* 2017). Instead of the state having to justify that the interference is proportional, the migrant has to convince the Court that there are compelling compassionate grounds to block removal. One might even say that migrants are expected to argue that their interference in the right of the state to control migration is proportionate.

The European Court of Human Rights has never indicated what is the source for the claim that well-established international law holds that states have the right to control migration. This is understandable, because its origins are openly racist. The idea that the right to exclude aliens is inherent in state sovereignty has its origins in the case law of the US Supreme Court about the Chinese Exclusion Act. In 1889, it ruled (*Chae Chan Ping v United States* 1889; cp. *Nishimura Ekiu v United States* 1892; *Fong Yue v United States* 1893):

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power. (…) The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations. (…) If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. (…) The power of the government to exclude foreigners from the country whenever in its judgment the public interests require such exclusion has been asserted in repeated instances, and never denied by the executive or legislative departments. (…) The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone.

The US Supreme Court here positively asserts the right of states to exclude foreigners of a different race because they are considered non-assimilating and dangerous to peace and security. Holding this, it reversed the legal doctrine dominant until the mid-19th century, which emphasised the right of people to enter the territory of other states for peaceful commerce (*McKeown* 2008, [22-28]). This doctrine had legitimised colonisation (*Anghie* 2004, [21-22]).

This Chinese Exclusion doctrine was criticised for its discriminatory character, by, among others, European international law academics in the early 20th century (*McKeown* 2008, [299-307]; *Rygiel* 2015]). Cleansed of explicit racial discrimination, the idea that state sovereignty entails the

right to exclude foreigners at will became the new normal in international law (*Ghezelbash* 2017; *McKeown* 2008, [318-348]; *Rygiel* 2015). Thus, the doctrine's core became normalised. Although the explicit reference to race disappeared, the application of international law in the field of migration follows a racial pattern that is hard to deny even if it is barely mentioned. Whereas citizens of countries in the global North can travel quickly, safely, and cheaply across the world, the mobility of citizens from the global South is seriously restricted. The equal right of sovereign states to exclude foreigners is used to justify this outcome (*Van Houtum* 2010, [957-976]; *Spijkerboer* 2018, [452-469]). When European states began to restrict the movement of people from former colonies, this was challenged before the Strasbourg institutions (*Dembour* 2015, [62-129]). In response to this, the sanitised version of the Chinese Exclusion doctrine was incorporated into Strasbourg case law.

Contested international migration law

The point I want to make in this contribution is that the Chinese Exclusion doctrine, while evidently shared by states, courts, and academics in the global North, is not necessarily shared by states, courts, and academics in the global South. In other words: the self-evident nature of the Chinese Exclusion doctrine does not reflect international law as such, but reflects a particular position. This position is not only an intellectual position (it expresses a particular view), but also a geographical and geopolitical position (it is the dominant position in and of the global North). In order to establish this difference in position between actors in the global North and the global South, I will now leave aside the Chinese Exclusion doctrine for a bit, and contrast two judgments on the detention of boat people. I will devote more space to the judgment of the PNG Supreme Court of Justice because, as I will show, in contrast to Strasbourg case law its contribution to international law has been minimised.

The Strasbourg judgment about Chios

On March 20, 2016, the agreement between the EU and Turkey aimed at the immediate return to Turkey of migrants arriving on the Greek islands entered into force (*Council of the EU* 2016). The implementation of this so-called EU-Turkey deal by Greece included turning the existing reception camps for migrants into detention centres, as well as ending the transfer of migrants from the Greek islands to the Greek mainland. In addition, non-governmental organizations and international organizations such as United Nations High Commissioner for Refugees (UNHCR) ended their work in the reception centres because they were turned into detention centres. They were willing to assist the Greek authorities in sheltering migrants, not running detention centres. This combination (closing the gates, no transfers to the mainland, and the withdrawal of humanitarian organisations) predictably resulted in an immediate deterioration of the situation in the camps.

On March 21, 2016, an Afghan couple and three minors (the woman's 17 year-old brother and the couple's children aged four and seven) arrived on the Greek island of Chios and were detained in an abandoned factory. Detention orders were issued the same day, and a return decision was taken on March 24. On April 4, the three Afghans were allowed to apply for asylum. On April 15, they were registered in the detention centre and given an order limiting their free movement. These decisions were, as the Greek authorities admit, not issued to the

Afghan nationals because the authorities were unable to locate them in the detention centre. On April 21, the detention centre was transformed into be a semi-open centre; the inmates were free to leave the centre, provided they returned there during the night. On May 7, 2016, decisions were taken to suspend the expulsion of the Afghans. Their freedom of movement was limited to the island of Chios, and they were required to reside in the centre. These decisions were issued to them on May 16.

The Afghans complained to the European Court of Human Rights about violation of Article 5 (*J.R. c Grèce 2018*) (their detention) as well as about violation of Article 3 (the detention conditions constitute inhuman treatment). On the legality of the detention, in line with its standard case law the Court found that the aim of preventing migrants from entering a country in an irregular manner justifies detention [para. 112]. It is not required that the detention is necessary to realise that aim (This is consistent with *Saadi v United Kingdom* 2008). However, Greek domestic law does require that immigration detention is necessary; the Court does not test the conformity of the detention with Greek domestic law, which is at variance with its case law (*Ruiz Ramos* 2019). Therefore, the Court found the detention itself was not a violation of Article 5(1) of the European Convention on Human Rights (ECHR). As the applicants had not been informed of the grounds of their detention, the Court does conclude there was a violation of Article 5(2) ECHR.

The main interest of the judgment however is in the Court's assessment as to whether the detention conditions constituted inhuman treatment. Had the Court applied its usual standards for assessing whether detention conditions comply with Article 3 (*Harris et al.* 2009, [93-101]; *European Court of Human Rights* 2020), it would have found a violation without any doubt. The Greek Commission for Human Rights had judged the conditions inadequate (*J.R. c Grèce 2018,* [44]); the Greek Refuge Council reported that people had to sleep of the floor [48]. Food distribution was so chaotic that some detainees succeeded in getting double rations, leaving weaker inmates with none, resulting in malnutrition [50]. The Committee for the Prevention of Torture, which had visited the detention centre while the applicants were being detained there, reported overpopulation, problems with drinking water quality, nutrition, basic health care and assistance for vulnerable persons [54]. Characteristic of the loss of control of the authorities over the situation in the detention centre is that they were unable to issue one of the relevant decisions to the applicants because they were unable to locate them in the centre [12]. Previously, the Court held that serious socio-economic problems cannot justify detention conditions that fall below the threshold of Article 3 ECHR (*Poltoratskiy v Ukraine* 2003, [148]. However, it treated the case about the Afghans on Chios as a clone case of *Khlaifia* (*Khlaifia v Italy* (GC) [*Khlaifia*] 2016). In this Grand Chamber judgment concerning migrant detention conditions on Lampedusa in 2011 (during yet another crisis), the Court held that "(w)hile the constraints inherent in such a crisis cannot, in themselves, be used to justify a breach of Article 3, the Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose. In its assessment, the Court will thus bear in mind, together with other factors, that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time" [185].[3] Referring to this judgment, the Court in *J.R. c Grèce* refers to the "exceptional and sudden increase of migratory flows", the "massive arrival of migrants which have resulted in organisational, logistical and structural problems for the Greek authorities" and finds the situation "exceptional" [138]. In light of this alleviated standard the

Court held (as it did in *Khlaifia*) that the situation did not exceed the level of severity required to fall within Article 3 ECHR [146].

The judgment about Chios is thus representative of the ongoing application of the Chinese Exclusion doctrine. The fact that the case is about migration suffices to find acceptable what would not be acceptable otherwise. The Chinese Exclusion doctrine has been present in Strasbourg case law from its beginnings, and has been given an even stronger emphasis on state sovereignty in the series of judgments that begins with *Khlaifia*.[4]

The Papua New Guinea Supreme Court judgment on Manus Island

As part of its offshoring of asylum procedures, Australia concluded two Memoranda of Understanding with PNG in 2012 and 2013 (See i.a. *Hirsch* 2017). As a consequence, people seeking asylum in Australia were transferred to PNG and detained on Manus Island. Transferees were permitted to reside in PNG for this purpose. In 2014, the PNG Constitution was amended so as to allow for the detention of foreign nationals "under arrangements made by PNG with another country". In a case before the PNG Supreme Court of Justice, the leader of the opposition brought a case against the PNG government, seeking declaratory orders to the effect that the transfer and detention of asylum seekers were unconstitutional, and that the 2014 amendment was unconstitutional and invalid (*Namah v Pato* 2016). The Supreme Court ruled for the applicant. The judgment has three main elements, two of which are remarkable and deserve detailed attention.

The first, routine element of the judgment concerns the legal basis of the detention before the 2014 constitutional amendment. Like many other fundamental rights instruments, the PNG Constitution allowed for the detention of people for the purpose of preventing their unlawful entry, for effecting their removal, or for procedures related to these purposes (*Constitution of the Independent State of Papua New Guinea*, art. 42(1)(g)). The transferees had no desire to enter PNG, were brought there by force, and had been granted permission to reside in PNG for the purpose of the Australian offshore detention programme. The Constitution does not allow for the detention of people who do not try or wish to enter PNG, and whose presence on PNG territory is not irregular. Therefore, the detention on Manus Island was unconstitutional under the unamended text of the Constitution.

As a result, the central question was whether the constitutional amendment was constitutional – the second main element of the judgment. Article 38 of the PNG Constitution provides that any law (and this includes a law amending the Constitution) restricting the exercise of a right or freedom is reasonably justifiable in a democratic society; and that such a law explicitly expresses to be such a law, and specifies the right or freedom it regulates or restricts. Whether such a law is reasonably necessary is to be determined in accordance with the PNG Constitution, as well as a number of international human rights documents and institutions, domestic and foreign precedent, declarations by the International Commission of Jurists and other similar organizations, and any other relevant material (*Constitution of the Independent State of Papua New Guinea*, art. 39). In its judgment, the Supreme Court emphasises the importance of the requirements that restrictions of rights and freedoms are reasonably justifiable.

> Although all human beings are born with all of their rights and freedoms, some suppressive regime and or governments deny the people of their rights or freedoms over the years, until they got restored as nations evolved from their stone ages to more modern democracies. Some of the rights and freedoms came through a lot of sacrifices made by many people, such as Martin Luther King in the United States in the past and many more. Hence, the imperative is there to protect the rights and freedoms of persons under the various international law conventions and protocols and many domestic laws, such as the PNG Constitution.
>
> (*Namah v Pato* 2016, [52])

Therefore, the obligation of the legislature to ensure that restrictions of fundamental rights and freedoms are "necessary and justified" is a matter for the Court to adjudicate. The Court finds the amendment to be unconstitutional. It was more or less hidden in a broader amendment, and did not specify the rights or freedoms it restricted and also fails to argue that the restriction was reasonably justifiable [53-54]. Without explicitly ruling on this, the Supreme Court signals that it thinks the required justification cannot be given for persons who are in the country lawfully, and in this context refers to the UNHCR Guidelines on Detention [65-66]. In addition, the Court points out that even if the amendment were lawful, implementing legislation would be needed to provide for a legal basis of detention, which had not been adopted.

Even though it seems obvious that, because no justification is given, the amendment did not comply with Article 38 of the PNG Constitution, two aspects of the Court's reasoning on the constitutional amendment deserve attention. First, the Supreme Court emphasises the unity of human rights protection in the PNG Constitution and in international law. This is different from the argumentative structure common in legal doctrine in Europe and the US, where compatibility with domestic and international protection norms are separated even when they are held to be compatible (e.g. *Sale v Haitian Centers Council* 1993). A second aspect that deserves attention is the contrast between the stone ages where rights and freedoms are denied, and modern democracies where they are guaranteed. In an inversion of a standard trope on the Third World in general and PNG in particular, the next sentence associates the United States with the stone ages, and the PNG Constitution with modern democracy.

The third main element of the judgment is that it orders "(b)oth the Australian and the Papua New Guinea governments" to end the detention on Manus Island. This is remarkable because Australia is not a party to the procedure, and because the applicant has not asked for an injunction against Australia. Without assuming much about PNG procedural law, one would expect it to be unusual that a court decision goes beyond what has been asked for, and involves a subject that has not been a party to the proceedings. What is even more is that the Supreme Court ignores the international law doctrine of state immunity, which holds that states cannot be sued in the courts of other states unless they have explicitly agreed to that (see e.g. *Germany v Italy*; *United Nations Convention on Jurisdictional Immunities of States and Their Property* 2004). While the Court does not as much as mention what at first sight seems to be an evident violation of basic procedural law norms and of the doctrine of state immunity, in substance it emphasises throughout the judgment that the PNG government has allowed itself to become an Australian puppet. In the first substantive paragraph of its judgment, the Court states that Australia decided to relocate its asylum processing centres outside Australia, and that the PNG government

"decided in favour of accommodating Australia's wish in exchange for certain monetary and other considerations." Asylum seekers were "forcefully brought into PNG (…) under Federal Police escort (…) All costs are paid by the Australian government." (*Namah v Pato*, [20]). The permission for transferees to be in PNG was given "(f)or the purpose of the arrangement between the two governments" [21]. They are forcefully transferred and detained "by the PNG and Australian governments" as a result of "the joint efforts of the Australian and PNG governments"[39]. When these arrangements turned out to be outside the legal and Constitutional framework of PNG, "(t)he governments of PNG and Australia therefore took steps to regularise the forceful transfer and detention of asylum seekers" [39]. Therefore, the PNG government "with the assistance of the Australian government" is held to be responsible for the transfer and detention of the asylum seekers [73]. In substance, it is very hard and even impossible to deny that Australia is the driving force behind the detention on Manus Island, and it is quite plausible to hold Australia responsible for aiding or assisting, or even directing the PNG government in the commission of a violation of international human rights law (being detention without a legal basis, as well as detention which is not justifiable in light of its aim; cp. Article 16 and 17 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts). In a concurring opinion, Higgins J points out that under Australian constitutional law detention is only lawful if it is reasonably necessary, and finds this principle to be "equally applicable to determining the rights conferred upon asylum seekers transferred to Manus Island by virtue of an agreement with the Australian Government" [81, 89]. The Supreme Court effectively says that Australia is a de facto party to the proceedings because the PNG government is merely its puppet, and that it has given up its state immunity by controlling and directing the PNG government on this policy issue. If Australia chooses to offshore its detention to PNG, it becomes subject to PNG courts via its strawman, the PNG government.

The Northern bias in "international" migration law

The *Khlaifia* judgment (of which the case on Chios discussed above is a clone judgment) has been analysed as to its consequences for international law. Wuerth and Goldenziel (2018) observe with appreciation that the Court gives states more leeway to manage mass influxes of migrants, while others evaluate that differently (*Mauro* 2016; *Sinha* 2019). Whether it is endorsed or criticised, the *Khlaifia* judgment is considered to be an authoritative source of law.
Apart from a brief case law summary by Michelle Foster (2016), only Lili Song's (2016) case comment focuses on *Namah v Pato* and extensively analyses the Supreme Court's judgment, and criticises it for violating the doctrine of state immunity. Other articles refer to the judgment as a news item without analysing its legal argumentation or its contribution to international legal doctrine (*Fraenkel* 2016; *Juss* 2017). Some authors favourably contrast the outcome of the PNG Court's judgment with that of Australian courts (*Dastyari & O'Sullivan* 2016). The focus of those articles is on the judgment's consequences for Australian policy, not on its doctrinal relevance. To the extent that the PNG Supreme Court's judgment is analysed at all, it is considered as an expansive application of human rights scrutiny by a domestic supreme court. Song's (2016) case note is an honourable exception and addresses the legal reasoning of the Supreme Court instead of treating it as a *fait divers*. It recognises the Court's departure from the normal notion of state immunity, finds it to be incorrect and as a consequence argues that the judgment is not binding for Australia. It judges the PNG Supreme Court of Justice. Song does not consider the judgment as potentially contributing to, hence modifying international law. This attitude is different from

academic responses to controversial judgments of the US Supreme Court or the European Court of Human Rights, which are at times criticised severely but precisely because they are seen potentially impacting international law.

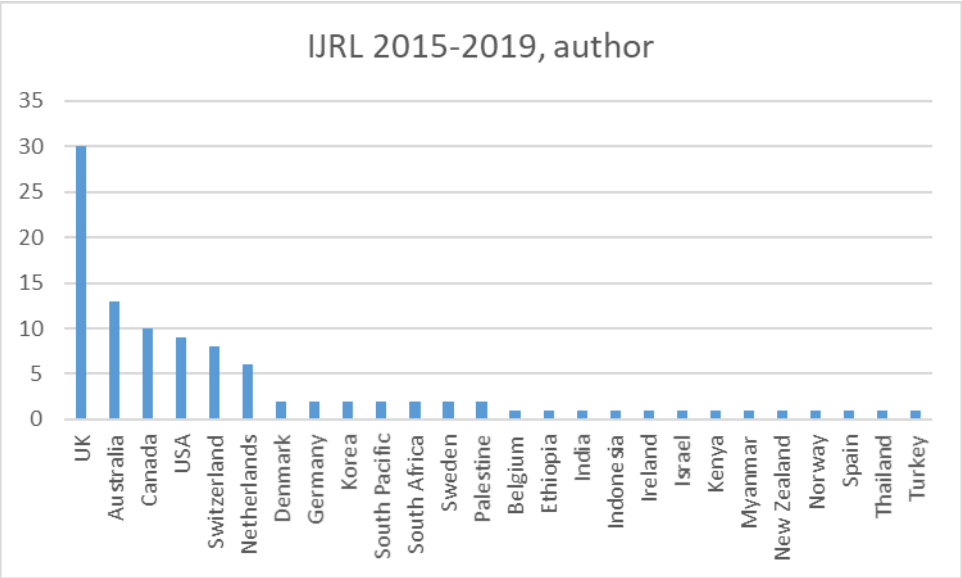
This situation, where legal practice from the global North is taken to represent international law, and legal practice from the global South is judged as to its conformity with "international" law thus conceived, is not an incident. The Chinese Exclusion doctrine is normalised across the board by leading international legal academics, who consider it to be representative for the state of international law. Chetail (2019) does point out in quite some detail how the right of states to control the entry of aliens developed in the US, the UK and continental Europe around 1900 [46-51], but in the positivist part of his book assumes that it reflects international law by equating state sovereignty with the right to control migration (*Chetail* 2019, [76, 92-93, 95]). Perruchoud (2012) equally adopts the Chinese Exclusion doctrine by declaring that "the principles of State sovereignty and territorial integrity have led to the logical conclusion that international migration (…) is subject to State control" [124]. Even while legal doctrine is aware that the right of states to control migration was defined around 1900 in opposition to earlier legal doctrine (see *Opeskin, Perruchoud & Redpath-Cross* 2012, [1-16]) it is treated as self-evident and inherent in international law.

The normalisation of the Chinese Exclusion doctrine is made possible by the politics and related economics of knowledge production in international law. As international legal academics, we do not merely study international migration law, but also take part in is reproduction. Because of our institutional position (and the funding that comes with it) as well as a natural tendency to relate to political developments in our own context, we are part of global North-South relations as much as we study them. We interact with a particular group of students, colleagues, policy makers, and we also have an investment in global mobility ourselves. Like other human beings, academics are situated and our work reflects the issues and concerns that we understand and find important – how could it be different?

However, academic knowledge production takes place almost exclusively in the global North. To the extent that academics from the global South get to publish in "international" journals at all, they get to address specific issues concerning their country or region, as local experts. Academics from the global North can address both our own national and regional peculiarities, and we can make assertions about what international law amounts to, just like our courts can declare what international law is. In addition, we feel free to address issues relating to the global South. Academic knowledge production on international migration law is thus situated in a global Northern perspective which silences and sidelines perspectives from the global South. This situation is beginning to be addressed in migration studies (*Vargas-Silva* 2019; *McNally & Rahim* 2020; cp.).[5]

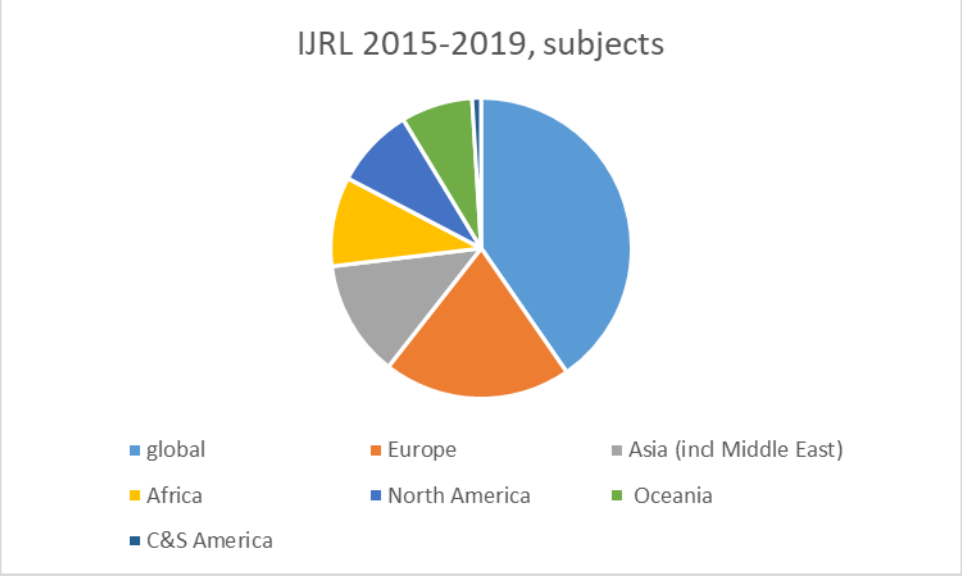
In the field of "international" migration and refugee law (the parenthesis have become inevitable) the situation is not different. In the years 2015-2019, the *International Journal of Refugee Law* published 104 articles (I have included the short texts on the Global Compact for Refugees). The country where the first author works is visualised in Figure 1.

Figure 13.1: *International Journal of Refugee Law* authors per country of residence



One might think that, because refugee law is truly international, the subject matter is less biased than the origin of the authors is. Indeed, the subject matter of the largest single segment of the articles in global (42 articles) – mainly because they are about the Global Compact for Refugees. After that, Europe forms the second largest segment (21 articles). After this follow Asia (including the Middle East; I have combined these so as to follow the UN major regions in UNHCR's 2020 Global Report) and Africa with 12 and 10 articles.

Figure 13.2: *International Journal of Refugee Law* Subjects



If we calculate the number of academic articles per refugee (on the basis of the UNHCR Global Report 2020), we see that in those five years, there was precisely one article for all 14 million refugees in Central and South America. On the other end, there are 9 articles about Oceania

(Australia and the Pacific) where UNHCR reports only 168.000 refugees. This means one article was published per 18.000 refugees.

Table 13.1: Number of refugees per article

subject matter	articles	persons of concern (2020)	persons/article
C&S America	1	14.138.901	14.138.901
Africa	10	34.281.743	3.428.174
Asia (incl Middle East)	13	29.254.720	2.250.363
Europe	21	7.176.326	341.730
North America	9	1.511.481	167.942
Oceania	8	168.498	21.062
global	42		
total	104		

What about the articles that are about global issues (i.e. about the 1951 Geneva Convention or about the Global Compacts)? In the *International Journal of Refugee Law* 2018 special issue on the Global Compacts, a recognisable effort to include academics from the global South has been made. However, with two notable exceptions (being Chimni and Muntarbhorn), these authors write about the Compacts in their own geographical context, as local experts. More generally, of the 42 articles that have been coded as global, only three were written by authors located in the global South (namely Chimni, Muntarbhorn, and Nishimura, who at the relevant moment was working in Myanmar). This shows that "the global" is, generally speaking, subject matter for academics in the global North, while authors from the global South address their own geographical context. This phenomenon is even more blatant in the 2019 special issue of *International Migration* on the global compacts. It contains twelve general articles, *all* of which have been written by academics in the global North. Academics from the global South contribute three articles on Turkey, Africa, and Asia.

These bibliometrics illustrate that Australia, North America and Europe are heavily over-represented both in subject matter (Table 1 gives the crassest indicator, with a disbalance of 1:671) and in where the authors are located. It also shows that our academic practice is that authors from the global North write about 'general' issues, while authors from the global South write about their own particularities. This is even evident from seeming trivialities. Articles about specificities in the global South *always* mention the relevant location (Lebanon, Africa) or group (Palestinians), while titles of articles about at times highly specific issues in the global North often fail to specify that they are about the UK or Canada. Such issues are treated as general issues of international refugee law, without acknowledging that the analysis concerns international refugee law in a particular local context.

Such association of things Northern with the general, the universal and the abstract and things Southern with the specific, the local and the concrete has been criticised in social science (*Tlostanova & Mignolo* 2012; *de Sousa Santos* 2014), in migration studies (*Grosfoguel, Oso & Christou* 2015), as well as in law (especially in Third World Approaches to International Law, i.a. *Anghie* 2005; *Chimni* 2017). The aim of this contribution is to specify this critique for migration and refugee law.[6] The aim is not criticize the particular authors or journals mentioned

above. The Northern bias is not an error on their part, but is a manifestation of the politics and economics of the field. I mean to critique not individuals, but the field of which I am part.

Contestation

It is this equation of things Northern with the international, which is produced and reproduced by courts and academics from the global North, at which the PNG Supreme Court of Justice takes aim. It does so in two ways. The first is through its emphasis on the universality of human rights law. Although it applies the PNG Constitution, it conceptualises the Constitution as continuous with international human rights law and the American civil rights movement. In his concurring opinion, Higgins J extensively cites an Australian High Court judgment on migrant detention, in which the High Court emphasises that detention can only be applied for the purposes specified by law. Higgins J then continues: "Those statements of principle are equally applicable to determining the rights conferred upon asylum seekers to Manus Island by virtue of an agreement with the Australian Government", and applies the PNG Constitution (*Namah v Pato* 2016, [89]). Whereas the European Court of Human Rights and the US Supreme Court construe international law as a potential limitation to state sovereignty, the PNG Supreme Court construes its constitution and international human rights law as continuous and mutually constitutive. It contrasts state oppression ("the stone ages") with modern democracy. Through the reference to Martin Luther King it points out that in the US the stone ages are not that far in the past, while through its own judgment positioning PNG as a modern democracy. While the Supreme Court does not refer to the Australian case law refusing to intervene in the offshore detention on Nauru and Manus Island (*Plaintiff M68/2015 v Minister for Immigration and Border Protection* 2016 about Nauru, and the subsequent *Plaintiff S196/2016 v Minister for Immigration and Border Protection* 2017, addressing the legal consequences of *Namah v Pato*), Higgins J's reference to an Australian migrant detention case signals that the PNG Supreme Court applies to Australia's offshore detention the principles it does apply to its inland detention.

Even more subversive is the fact that the Supreme Court gives an injunction against Australia. As noted above, Song (2016) argues that this goes against the principle of state immunity. However, the Court does not even mention this principle. Unless one would assume that it is not aware of this doctrine (a suggestion I decline as implausible), it seems the Court finds it altogether irrelevant. And this is indeed how the Court describes the situation. The detention takes place on Manus Island at the request of the Australian government. Migrants are transferred there by Australian Federal Police, guarded by an Australian private company paid by Australia, and the constitutional amendment was drafted by Australia. This is an Australian operation in every sense of the term, which the Court finds to be a straightforward violation of the PNG Constitution. From this perspective, it is obvious that an injunction has to be given against Australia as well as against the PNG government. The doctrine of state immunity would be a formalist screen in an effort "to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory" which the UN Human Rights Committee found to be "unconscionable" (*Delia Saldias de Lopez v Uruguay* 1981, [12.3]).

The PNG Supreme Court judgment can be seen as one of the ways in which some Third World courts contest the idea that countries from the global North cannot be held legally responsible for the external implementation of their policies.[7] Such an approach may also affect the

responsibility of the US, Australia, and European countries for their remote control migration policies in Central America, the Pacific, and Africa respectively, if it were to be adopted by courts in for example Libya, Niger, Indonesia, Nauru or Mexico, or by human rights courts in Africa and the Americas. More broadly, courts in the global South may not share the Chinese Exclusion doctrine. This is suggested by the migration case law of the Inter-American Court of Human Rights, which does not start from the rights of states but from the rights of humans (*Dembour* 2015). This has led the Court to construct non-discrimination and equality as *jus cogens* in an advisory opinion on the rights of undocumented migrants (*Advisory Opinion OC-18/03* 2003); a strict proportionality test for migrant detention (*Vélez Loor v Panama* 2010); and extraterritorial obligations to refugees (*Advisory Opinion OC-25/18* 2018). The African Commission of Human and People's Rights has similarly prioritised the human rights of migrants, while not denying the right of states to take action against illegal immigrants (*Rencontre v Zambia* 1996*; Union Inter-Aficaine des Droits de l'Homme v Angola* 1997) – but in that order. Domestic courts also take approaches which do not square with the Chinese Exclusion doctrine, as exemplified by the robust protection of refoulement by the Kenyan High Court (*Kenya National Commission on Human Rights v Attorney General* 2017) or case law of the Colombian Constitutional Court expanding the human rights protection of undocumented migrants so as to compensate for the vulnerability resulting from their status as undocumented migrants (*Tiresias v el Hospital Estigia* 2017*; Sanguino Ruiz v el Instituto Departamental de Salud & Rodríguez López v Clínica Puente Barco Los Leones* 2018*)*. In addition, academics from the global South do not necessarily share the Chinese Exclusion doctrine. One example would be that a number of African legal academics give voice to an altogether different doctrinal position on migration and international law. They refer to mobility as a fundamental human right; they see it as based on natural law; free movement of persons is considered a return to the normal situation before colonisation. They characterise European policies as a violation of the human right to free movement, of natural law, and of African state sovereignty (*Awad* 2008; *Hamadou* 2018; *Odhiambo-Abuya* 2006).They argue that core concepts in international migration law (such as irregular migration and transit migration) are an effect of the exclusion of migrants from human rights protection (*Awad* 2008; *Wani* 2008). African social scientists relate this perspective to the specific character of African state borders and a tradition of mobility on the continent (*Abebe* 2017; *Dicko* 2018; *El Qadim* 2018; *Eyebiyi & Medny* 2019; *Mounkaila & Maga* 2008; *Ramcbaran* 2000).

The disproportionate attention that academics from the global North give to legal sources and perspectives from the global North leads to the idea that international migration law takes the Chinese Exclusion doctrine as its starting point. However, what we know so far is only that regional law in the global North does so. It remains to be seen how legal systems and academics in the global South approach the issue. This matters, as most migrants and refugees are in the global South. Therefore, legal sources from the global South are vital to any statement in international legal doctrine in the field.[8] The equation of legal doctrine reflecting Northern perspectives should be taken for what it is: a power grab. For reasons of legal methodology and for reasons of global justice, this is something we as academics should stop taking part in.

This has consequences for what we teach and what we write. The above can easily be understood as a plea to "truly" internationalise academic work on international law. That would be a misunderstanding. Our work will always be situated, and this is not a shortcoming. But to equal our situatedness with the general,[9] and the situatedness of our colleagues on the global South as

embodying something specific, should be taken for what it is, namely conscious or unconscious participation in a political project of the global North. What we should begin to work on is to make situatedness a conscious element of our work. There is nothing wrong with, for example, European academics following the European courts closely. However, there is a problem if we do not take into account that we are European academics studying European courts, working in the legal and socio-political context in Europe. What they declare to be international law may well be international law for the benefit of Europe. To claim that this constitutes international law across the world is not only methodologically flawed, but also (especially in the current academic publication context that is entirely dominated by the global North) an act of power. The European view of international law reflects European interests and perspectives, and may be at odds with perspectives from other geopolitical regions. The contrast of the judgments about Chios and Manus Island shows that these different perspectives translate into different visions of international law. Institutions (including academic institutions) laying claim to represent the international treat sources of international migration law from the global South as non-existent, or as local phenomena to be judged as to their compatibility with "international" law – i.e. the regional international norms held in the global North.

As academics from the global North we are well placed to observe and analyse this process of representing the specific as the general, which takes place in the institutions we are so familiar with. In addition, nothing prevents us from taking our colleagues from the global South seriously as academics who have as much right as we do to make assertions about international law, and nothing prevents us from incorporating legal sources from the global South into our analysis. There are compelling methodological reasons to do so. This would limit our involvement in the political project of states in the global North to impose their view of international migration law on countries in the global South. As academics we may choose to be part of the political project of the global North by continuing to pretend that our particularities embody the international, while other particularities can be ignored or – when noticed at all – be judged according to "international" standards. But we can also choose to take the methodology we pretend to use more seriously, and as a matter of professional ethics to advocate a pluralist approach over a partisan one.

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[2] See the foundational judgments on Article 8 ECHR (family reuinion), *Abdulaziz, Cabales and Balkandali v United Kingdom* 1985; on Article 3 ECHR (asylum), *Vilvarajah and others v United Kingdom* 1991; and on Article 5 ECHR (immigration detention), *Saadi v United Kingdom* 2008.
[3] See on balancing as part of Article 3 ECHR, Battjes (2009).
[4] Recently see, *Ilias and Ahmed v Hungary* (GC) 2019, on border detention; *N.D. and N.T. v Spain* (GC) 2020, on collective expulsion; and *M.N. v Belgium* (GC) 2020, on humanitarian visa
[5] On the close ties between academic work and policy making in international refugee law Byrne and Gammeltoft-Hansen (2020)
[6] See for other authors doing this in the field of migration law: Achiume (2019), Chimni (1998), Chimni (2009), Chimni (2019), Thomas (2017)
[7] Cp. the Inter-American Court of Human Rights on extraterritorial responsibility in the context of the environment (*Advisory Opinion OC-23/17* 2017); and asylum, (*Advisory Opinion OC-25/18* 2018; *De Leo & Ruiz Ramos* 2020)
[8] Cp. on the marginalization of such sources, see Chimni (2018)
[9] In the words of Mbembe: "to make generalisations from idioms of provincialism" (*Mbembe* 2001, [11]).