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SYMPOSIUM ON UNSETTLING THE SOVEREIGN "RIGHT TO EXCLUDE"

THE ILLUSION OF PROGRESS: RETHINKING HUMAN RIGHTS AND THE LEGAL REGULATION OF MOBILITY

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The development of human rights law is generally presented as a story of progress. This progress is an evolution from an "old" legal regime that did not recognize individual rights to a "new" law (starting with the 1948 Universal Declaration of Human Rights (UDHR)) that anointed all individuals as possessors of internationally recognized rights against their states. Further, the definition of these rights has supposedly expanded over time, adding elements of complementary protection and extraterritorial application.

However, at least as it concerns border-crossing, this standard genealogy is wrong. The story of human rights is, in fact, one of retreat—a contraction of individual rights to mobility. This retreat is most evident when analyzing through the prism of *state duties* rather than *individual rights*. Through this lens, the regime has evolved from an "old" law that imposed upon states a duty to admit certain migrants and prevented them from excluding aliens to a "new" law that assumes a state's fundamental right to exclude and to expel *all* aliens, even if they are peaceful and needy foreigners.

Importantly, despite this change in normative frameworks, the outcomes on the ground remained constant: elites, generally white Westerners, maintained mobility privileges and therefore access to legal rights, while other groups continued to be excluded from movement and hence also from legal visibility.

To tell this story of contraction, I briefly compare the international legal regulation of mobility in two eras: the late nineteenth century (the period commonly associated with the birth of modern "professional" public international law),[1] and the current post-1948 legal era.

The law at the close of the nineteenth century, as now, has consolidated sovereign control and jurisdiction over borders as well as the state's prerogative in definition of associated populations.[2] At the same time, international law also limited this state control by invoking the notion of a common "civilization," defined along European cultural, historical, and racial dimensions.

According to the 1892 Resolution of the Institut de Droit International (IDI), "for each State, the right of admitting or not admitting aliens to its territory, or of admitting them only conditionally, or of expelling them, is a logical and necessary consequence of its sovereignty."[3] But, the Resolution continued, the "[f]ree entrance of aliens to the territory of a civilized state may not be generally and permanently forbidden."[4]

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[1] Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law: 1870–1960 (2009).

[2] The process of solidifying such sovereign control is explored in the essays by Chetail, Mongia, and Shachar in this symposium.

[3] 1892 Resolution of the Institut de Droit International Concerning International Rules on the Admission and Expulsion of Aliens, pmbl.

[4] *Id.*

A state could refuse to take in any and all migrants. However "a government that would seek . . . to take advantage of its right to exclude all aliens," wrote Edwin Borchard (1884–1951), an American law professor, would pay a price in terms of its status: it "would violate the spirit of international law and endanger its membership in the international community."[5] Similarly, William Hall (1835–1894), the author of perhaps the most influential English-language textbook on international law of the period, insisted that "(f)or a State to exclude all foreigners would be to withdraw from the brotherhood of civilized peoples."[6]

This duty not to expel derived its normative force from the notion of a Pan-European morality external to the state. The Swiss jurist Johann Caspar Bluntschli (1829–1881) insisted that the "laws and customs" of states were qualified "in the interests of humanity and civilization."[7] He grounded state obligation not to "prohibit in an absolute way the entry of foreigners onto its territory"[8] in "civilized international law."[9] Other jurists echoed this sentiment.[10]

State duty was broad, encompassing both "exit" and "entry." Article 1 of a draft convention on immigration adopted by the IDI in 1897 declared that: "Contracting states recognize the freedom to emigrate and immigrate to individuals in isolation or en masse, without distinction of nationality."[11] Some considered that the duty also included providing citizenship to immigrants. For example, the Italian jurist Pasquale Fiore (1837–1914) explained that: "Every person legally capable of exercising civil rights may freely choose the state to which he wishes to belong and . . . he may demand recognition of his citizenship and the enjoyment of all the rights and privileges granted by law to citizens."[12]

Although state duty to take in was wide, its application—the establishment of jurisdiction—remained narrow, differentiating for the purpose of entry based on race and membership in the Pan-European cultural fabric. The 1892 IDI Resolution did not extend to the "colonies where European civilisation is not yet dominant."[13] Indeed, one of the "rigorous limit[s]" within which migration could be prohibited was "a fundamental difference of morals or civilization."[14]

This configuration left Westerners—"peoples of European blood"[15]—enjoying ongoing mobility. And it construed non-Westerners, those who "belonged to an absolutely different civilization,"[16] who were "considered inferior or not capable of assimilation,"[17] permanently excluded from this same expansive mobility. Indeed, in his comprehensive analysis of state practice, Vincent Chetail concludes that "immigration controls were primarily introduced for racial reasons."[18]

[5] Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad, or the Law of International Claims 46–47 (1915).

[6] William Edward Hall, A Treatise on International Law 211 (2d ed. 1884).

[7] Johann Caspar Bluntschli, Roumania and the Legal Status of the Jews in Roumania: An Exposition of Public Law (Anglo-Jewish Assoc. trans., 1879).

[8] Johann Caspar Bluntschli, Le droit international *codifié*, 228, para. 381 (MC Lardy trans., 1895) (author's translation).

[9] *Id.*

[10] *E.g.*, Georg Friedrich von Martens, The Law of Nations 83 (4th ed. 1829); Pasquale Fiore, Droit international public suivant les besoins de la civilisation moderne 284–86 (trad par P. Pradier-Fodéré, 1868).

[11] Institut de Droit International, Session de Copenhague – 1897, Principes recommandés par l'Institut, en vue d'un projet de convention en matière d'émigration, Art. 1 (Rapporteurs: MM. Ludovico Olivi et C.F. Heimburger).

[12] Pasquale Fiore, International Law Codified and its Legal Sanction 298 (Edwin M. Borchard trans., 5th ed. 1918).

[13] 1892 Resolution, *supra* note 3, Arts. 5–6.

[14] *Id.*

[15] John Westlake, International Law 40 (1904).

[16] *Paul Fauchille on the Rights of Emigration and Immigration*, 31 Population & Dev. R. 765, 767 (2005).

[17] *Id.*

[18] Vincent Chetail, International Migration Law 48 (2019); *see also*, E. Tendayi Achiume, *Racial Borders*, 110 Geo. L.J. 445 (2022).

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These patterns of mobility and immobility constituted more than physical movement across space; they played a formative role in the law. To begin with, they were constitutive of sovereign definition. A moral value, "civilization," offered a legitimate basis for some form of political admission in the state. Mobility, therefore, remained bound up with the creation of state borders (who should enter) and the definition of the associated population (who should form its political community and on what terms).

In addition, mobility formed, and sustained, the legal privilege of Western whites. Writing in 1883, the Scottish jurist James Lorimer (1818–1890) differentiated between two ways in which individuals operated within the law of nations. First, all persons—Europeans and non-Europeans alike—were cognizable by the law as members of the state, with their officially designated nationality dictating their international legal position: "[i]nternationally the jural existence of the citizen is . . . wholly sunk in the jural existence of the State."[19] The benefits of this belonging were equality inside the state and diplomatic protection outside the state. These rights were associated with the status of the state itself, implying a tie to territory.

However, there was a second set of benefits, effectively available only to European white persons. They enjoyed free (subjective) choice in mobility, with their "nature" taking precedence over nationality in shaping their legal status: "individual or personal subjects are not recognised as citizens of a State,"[20] wrote Lorimer, "but as citizens of the world; and it is from a cosmopolitan point of view alone that the law of nations exercises jurisdiction over them."[21] The associated protective outcomes entailed individual discretion over the person's "own sphere of existence" and "own sphere of action"[22] outside state dispensation. This belonging transcended the temporal and spatial constraints of the nation-state and enabled free border-crossing.

A man enjoying these rights was considered a "citizen of the world," "free," and "as little bound to the state as to the soil."[23] He belonged "to himself."[24] It was "not worthy of the state to hold him as if he was a serf, if he wished to leave his home and hopes to find in another state better conditions for his advancement."[25] This man could "come and go as seems good to him, in order to seek, in a community which he considers more favourable, greater facilities for achieving his end, that is to say, material and moral perfection."[26] And, further, he could develop himself "independently . . . not according to the will of the sovereign State, but according to his own."[27]

Finally, white mobility played a pivotal role in shaping the broader concept of the "society of civilization" external to the state. The collective actions of "free" individuals who shared the same European race and culture as they traversed borders, and the exclusion of those in the colonies, reinforced the notion of a distinct realm of "civilization" that preceded the state.

In sum, at the end of the nineteenth century, membership and status in the international community of "civilized" nations was conditional upon a wide *state duty* to admit migrants. However, the application of this duty remained restricted to those who belonged within European morality alone. Jurisdiction was tied to an individual's "nature," not his or her territorial presence or personal connection with the state.

[19] James Lorimer, The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities, Vol. 2, 131 (1883). For a discussion of Lorimer, see Karen Knop, *Lorimer's Private Citizens of the World*, 4 Eur. J. Int'l L. 447 (2016).

[20] *Id.*

[21] *Id.*

[22] *Id.* at 438.

[23] John Lalor, Cyclopaedia of Political Science, Political Economy, and of the Political History of the United States by the Best American and European Writers, Vol. II, 281, 282–83 (1883).

[24] Lorimer, *supra* note 19, at 18, 72.

[25] J. C. Bluntschli, *Freedom, and Rights of Freedom*, *in* Lalor, *supra* note 23, at 22.

[26] *Paul Fauchille on the Rights of Emigration and Immigration*, *supra* note 16.

[27] Johann Caspar Bluntschli, The Theory of the State 58–59 (2000).

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Individuals had no human rights within the state or against their state, but those meeting the race/culture requirements could respond to a state that was either unable or unwilling to meet their needs and interests by *exiting* it,[28] selecting a different jurisdiction, and assuming the identity of a new location. At the same time, those outside the privileged race/culture criteria were barred from mobility and remained excluded from membership in the law.

The shift to universally applicable human rights would seem to promise an end within international law to the racist trappings of the colonial era.

For example, one might have expected the expansion of the freedom to relocate across borders—previously afforded only to white persons—to *all* individuals. Such an expansion could have been derived from the notion that the laws of states can be qualified "in the interests of humanity" (recall, Bluntschli). This would have enacted the commitment to universal dignity expressed in the Universal Declaration of Human Rights and multiple later legal instruments,[29] providing all individuals with self-determination over where they want to be. Of course, it would have also resulted in a regime of complete admission or open borders.

One can also imagine a narrower application of duty, requiring states to admit only migrants who qualify within certain non-discriminatory classifications, defined perhaps by the nature of their need, and who comply with specific status determination processes and evidential requirements.

In either imaginary case, the international legal system would be imposing on states a duty to admit migrants from outside their own political system.

However, this was not the direction adopted by the legal actors (statesmen, jurists, and judges) who crafted human rights law. Instead, they replaced the *state duty to take in* with a set of *individual rights regarding the return of a person to his or her "own" state*. These rights were applied on the basis of territorial borders, not individual "nature" or "need."

According to the so-called human right to freedom of movement, any individual exercises a right to "leave any country, including his own, and to return to his country."[30] Exit is universal; entry is not. Because of the asymmetry between the universal exit function and the limited entry function, the freedom of movement right is really only a freedom to return home.

Refugee law—a subset of human rights[31]—safeguards the right of individuals against forced return to their "own" state when it is the source of the harm they are fleeing. It operates as a remedy only after the state of origin has failed to fulfill its duty of protection toward its own citizens, either because it is unable or unwilling to remedy their harm.[32] In essence, a claim for mobility under the Refugee Convention arises when the ability to realize human rights disappears due to the failure of the individual's "own state."[33] This failure is significant because it results in the loss of fundamental human rights which otherwise the individual would have been able to enjoy against his or her "own country."[34]

But neither the positive return right of human rights law nor the negative return right of refugee law provide a lawful path for entry into destination states that are not one's "own states," as had been provided to those

[28] Albert O. Hirschman, Exit, Voice, and Loyalty (1970).

[29] *See, e.g.*, UN Charter, pmbl.; GA Res. 217A(III), Universal Declaration of Human Rights, pmbl., Art. 1 (1948) [hereinafter UDHR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3, pmbl, Art. 13; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, pmbl., Art. 10 [hereinafter ICCPR].

[30] This right is enshrined in almost all human rights instruments. *E.g.*, UDHR, *supra* note 29, Art. 13; ICCPR, *supra* note 29, Art. 12.

[31] It is now "virtually impossible to separate" human rights form refugee law, see Chetail, *supra* note 18, at 19, 23–24, 39–40, 68.

[32] James Hathaway, The Rights of Refugees Under International Law 4, 5, 73 (2004).

[33] Horvath v. Secretary of State for the Home Department [2001] 1 AC 489, 497 (UK).

[34] The Geneva Convention, Preamble, illustrates this notion.

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associated with "civilizations"—effectively, whites—in the earlier version of the law. Indeed, states continuously insist upon their plenary power to control migration, leaving judicial oversight marginal.[35]

The nature of the human right to return is legal, and derives its normative power from the "special relationship"[36] that individuals form with a state that is "their own," rather than from morality exterior to the state.

Much like at the end of the nineteenth century, the application of the return right today is predicated on jurisdiction.[37] But now the jurisdictional provisions in human rights treaties associate protection with the territory of the state, *not culture*, and can be exercised extraterritorially only exceptionally.[38]

This scheme no longer construes mobility as fundamental to international law. First, mobility does not speak to sovereign status. In fact, sovereignty assumes precisely the opposite: that a state enjoys the power to exclude and expel aliens.

Second, individuals are not imagined as permanently mobile, "free" and "as little bound to the state as to the soil." Instead, they are a legal entity, or subjects of the law, qua their membership in humanity under universal natural law. But the jurisdictional provisions in human rights treaties associate their mobility as universal humans within the world system of states, localizing the return obligations owed to them to the territorial boundaries of the state to which they belong.[39]

Third, mobility does not constitute a moral sphere outside the state. Rather, since mobility is activated through political belonging in the state, every time a person exercises their return rights, they effectively reinforce the state, its culture, and its institutions.

And so, human rights law creates the notion of a *universal* person who is not differentiated according to color, race, or culture. But it simultaneously drops the obligation of entry toward non-nationals that prevailed at the end of the nineteenth century. Instead, all individuals can enjoy only a narrow mobility right that pertains to their country. They can respond to a state unable or unwilling to meet their needs from within. Jurisdiction maps territorial or ongoing personal connection to the state, not to the individual's race and culture.

But those individuals who are caught in the spaces between states—in practice, mainly non-white persons—are deprived of both substantive and procedural human rights protections. And they are even barred from presenting their claims before enforcement bodies, as human rights courts and quasi-judicial bodies can only adjudicate when there is a state duty holder and jurisdiction requires either presence inside a state or at its borders.[40] For such people, little has changed—under the new articulation of the law, they remain not only excluded from meaningful mobility but also legally effaced de facto.

Going back to where I began: the accepted narrative in human rights regarding the legal regulation of mobility is one of progress. Alas, this is just a story. When viewed through the lens of *state duties* rather than *individual rights*, mobility appears to contract rather than progress, motivated more by racial exclusions than by the emancipation of the universal human.

[35] See, among many examples, the United States (from the Chinese exclusionary cases to Kleindienst v. Mandel, 408 U.S. 753 (1972)); Canada (Kindler v. Canada; Mitchell v. M.N.R.; Attorney General v. Cain); or the UK (Poll v. Lord Advocate).

[36] Hum. Rts. Comm., CCPR General Comment No. 27: Article 12 (Freedom of Movement), para. 19, UN Doc. CCPR/C/21/Rev.1/Add.9 (1999).

[37] European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1, *opened for signature* Nov. 4, 1950, ETS No. 5, 213 UNTS 221 [hereinafter ECHR].

[38] *E.g.*, Marko Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy (2011); Samantha Besson, *The Extra-territoriality of the European Convention on Human Rights. Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25 Leiden J. Int'l L. 857 (2012).

[39] ECHR, *supra* note 37.

[40] Ayelet Shachar, The Shifting Border: Legal Cartographies of Migration and Mobility (2020).

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