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SYMPOSIUM ON UNSETTLING THE SOVEREIGN "RIGHT TO EXCLUDE"

DEMYSTIFYING SOVEREIGNTY: TOTEM AND TABOO OF MIGRATION CONTROL IN INTERNATIONAL LAW

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"We all think about immigration . . . as the state asks us to think about it and, ultimately, as it thinks about it itself." This aphorism of the sociologist Abdelmalek Sayad seems to speak to lawyers and, in particular, international lawyers who are accustomed to thinking of immigration as a mere question of sovereignty. I contend that this internalization of sovereignty by the legal profession is a pure mystification. I call for acknowledging the duality of sovereignty as a Janus with two faces. This metaphor illuminates the ontological ambivalence of the border that can be viewed as either a passage or a wall depending on the viewpoint.

There is no room for change as long as we continue to think of migration control as inherent to sovereignty and we confuse this equation with international law. This dogmatic vision has long been a mental prison for both positivist and critical lawyers, whether to acknowledge or to denounce it. When assessed for itself without any preconceived projections, international law helps us to depart from the narrative of border control to highlight the relativity of sovereignty and the normality of migration as a longstanding phenomenon of humanity.

The Mystification of Sovereignty: A Very Short History

When I started to explore this vast field three decades ago, the very idea of studying the role of international law on migration raised skepticism, if not condescendence, among international lawyers. Colleagues were used to opining that there is no room for international law, because the discretionary power of a state to refuse immigrants is an incident of sovereignty. Still today, most textbooks of international law ritually profess that immigration is "in principle, a matter of domestic jurisdiction: a state may choose not to admit aliens or may impose conditions on their admission."[1] According to the positivist orthodoxy of international law, states are the paradigmatic units of the Westphalian order. The totem of this interstate society is territorial sovereignty. In a world saturated by states, immigration is a taboo: the arrival of newcomers disrupts the purity of the national order structured by the ontological separation between "them" and "us."

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[1] James Crawford, Brownlie's Principles of International Law 592–93 (9th ed. 2019); *see also* Carlo Focarelli, International Law 393 (2019); Robert Jennings & Arthur Watts, Oppenheim's International Law 897–98 (9th ed. 2008); Malcolm N. Shaw, International Law 826 (6th ed. 2008); Anthony Aust, Handbook of International Law 194 (2005); Nguyen Quoc Dinh, Patrick Daillier & Alain Pellet, Droit international public 476 (7th ed. 2002).

Following the path of James Nafzinger,[2] I have demonstrated that this absolutist conception of sovereignty has no grounding in international law.[3] The discretionary power of states to deny admission of non-nationals, as inherent in its sovereignty, represents an enduring myth of international law. I am referring here to the general definition of a myth given by the philosopher Roland Barthes, which can be transposed *mutatis mutandis* to this particular issue:

> myth has the task of giving an historical intention a natural justification, and making contingency appear eternal. . . . Myth does not deny things, on the contrary, its function is to talk about them; simply, it purifies them, it makes them innocent, . . . it gives them a clarity which is not that of an explanation but that of a statement of fact. . . . [Myth] abolishes the complexity of human acts . . ., it organizes a world which is without contradictions because it is without depth . . ., it establishes a blissful clarity: things appear to mean something by themselves.[4]

Following this stance, territorial sovereignty has been associated with the power to exclude foreigners as a self-evident truth consecrated by a time-honored tradition. The best illustration of this mystification is provided by the oft-quoted *Nishimura Ekiu* case of 1892. While inaugurating the age of immigration control, the U.S. Supreme Court asserted such a discretionary power as "an accepted maxim of international law" inherent in sovereignty and endorsed by Vattel.[5] Although based on a biased and distorted reading of Vattel, this judicial endorsement has become the mantra for thinking about sovereignty and immigration. Like many other legal scholars of the twentieth century,[6] Hans Kelsen referred to this judgment by concluding: "under general international law no state is obliged to admit aliens into its territory."[7]

This narrative of immigration control as an attribute of sovereignty is not only a myth; it is also a falsification of history. Contrary to common belief, the free movement of people had long been the rule in both the doctrine and practice of international law. From the sixteenth to the nineteenth century, the rise of the nation state and its corollary—territorial sovereignty—did not coincide with the introduction of border controls. As I detailed elsewhere,[8] immigration control is a recent invention of Western states: with a few exceptions, it emerged at the end of the nineteenth century in some countries and for specific categories of aliens. It was first introduced for racial reasons by Anglo-American states, then generalized as wartime legislation during World War I and further reinforced by the economic crisis of the inter-war period.

This counter-narrative obviously calls for several caveats. The most important one relates to the very nature of international law at the time. International law was fundamentally a European product through which non-Western cultures were dismissed and their lands considered *terra nullius* that could be the object of territorial conquest and systematic pillage. By extension, freedom of movement was the privilege of white men, excluding the rest of humanity. Nonetheless, conceiving free movement as a mere creature of the colonial order is anachronistic. When Vitoria conceptualized his *jus communicationis*, colonization was already an established practice and, during

[2] James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AJIL 804 (1983).

[3] Vincent Chetail, International Migration Law (2019); Vincent Chetail, *Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel*, 27 Eur. J. Int'l L. 901 (2017).

[4] Roland Barthes, *Myth Today*, in R. Barthes, Mythologies 142–43 (1972).

[5] Nishimura Ekiu v. United States, 142 U.S. 651 (1892).

[6] Philip C. Jessup, A Modern Law of Nations: An Introduction 80 (1948); Charles Rousseau, Droit international public 15 (1977); R.C. Hingorani, Modern International Law: Afro-Asian Viewpoints 132 (1979).

[7] Hans Kelsen, Principles of International Law 366 (2d ed. 1966).

[8] *See* note 3 *supra*. See also the contribution of Mongia and Paz in this symposium.

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the following centuries, the colonial powers invoked many other reasons, such as the spread of Christianity and the so-called "civilizing mission."

However, the racial bias of immigration control is incontestable, both historically and politically.[9] On the legal plane, the plasticity of sovereignty provides an easy camouflage to justify a radical shift from the past and to ensure its perpetuation since the last century. Territorial sovereignty gives the appearance of an objective and natural justification for a practice which otherwise should be considered an archetype of racial discrimination.[10] The veil of sovereignty makes the violence at the border a course of action that is normalized and inevitable as if there is no alternative. History teaches us that there is nothing inexorable in this.

The Duality of Sovereignty: A Janus with Two Faces

Sovereignty means different things for different people. Its polysemy explains both its ambiguity and resilience. Beyond the broad variety of connotations, sovereignty is a Janus with two different faces: its core meaning refers to a power or competence. In Roman mythology, Janus was the god of doors, gates, and transitions. He was often depicted with a key in one hand and a staff in the other, representing his ability to open and close doors, literally and metaphorically. This allegory of Janus captures the duality of sovereignty as a power or a competence. It also highlights the ambivalence of the border, which can be either a site of exclusion or a locus of passage.

From a political angle, sovereignty equates with power and, by extension, the ultimate authority in a state (internal sovereignty) and its independence from any other powers (external sovereignty). After the decolonization process, the spatial organization of our world into discrete territorial units has universalized the separation between insiders and outsiders, while reproducing the Western ethos of the nation state. As a result of this geopolitical evolution, the birth lottery of nationality represents the structural determinant of global inequality.[11] Meanwhile, the mobility of the richest and the sedentarity of the poorest have become the hallmark of our globalized world.

As a vessel of power, state sovereignty is as much an instrument of domination over individuals as an instrument of the emancipation of peoples. Although it has been more frequently the former than the latter, the language of sovereignty as an absolute power has gained considerable resonance today. It is no longer confined to populism and racist ideologies, but permeates every corner of the political debates and the public imagination.

This obsession with immigration control is an attempt for the state to recapture the power it has lost on many other fronts. The economic, political, technological, and cultural transformations prompted by globalization transcend the nation state, limit its autonomy and capacity of action to eventually challenge its very legitimacy as the ultimate source of power. As non-voters, migrants represent the perfect excuse to mask the failure of the governing elite in addressing the socioeconomic difficulties and anxieties of their national population. In the meantime, borders play a symbolic function to reassure their citizens and bolster a national sense of belonging. This tactic is further crystalized by the rhetoric of migration crisis to create a theatrical sense of perils and urgency.

[9] *See generally* Adam McKeown, Melancholy Order: Asian Migration and the Globalization of Borders (2008); Gérard Noiriel, La tyrannie du national. Le droit d'asile en Europe (1793–1993) (1991); John Torpey, The Invention of the Passport: Surveillance, Citizenship and the State (1999); Charles A. Price, The Great White Walls are Built: Restrictive Immigration to North America and Australasia, 1836–1888 (1974); Marilyn Lake & Henry Reynolds, Drawing the Global Colour Line: White Men's Countries and the International Challenge of Racial Equality (2008).

[10] *See especially* Tendayi Achiume, *Racial Borders*, 110 Geo. L.J. 445 (2021); Lauri Kai, *Embracing the Chinese Exclusion Case: An International Law Approach to Racial Exclusions*, 59 WM. & Mary L. Rev. 2617 (2018); Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty*, 14 Melb. J. Int'l L. 392 (2013).

[11] Ayelet Shachar, The Birthright Lottery: Citizenship and Global Inequality (2009).

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When the notion of sovereignty is assessed from a legal angle, the perspective becomes very different: sovereignty as an absolute power is a pure fiction. Rather, it is a competence within a legal system and, as such, it shall be exercised in due accordance with the rules of the given system. In our politically toxic environment, rediscovering the legal sense of sovereignty as a relative notion is more needed than ever. Under international law, as reaffirmed by the Permanent Court of International Justice, far from being an abandonment of sovereignty, "the right of entering into international engagements is an attribute of State sovereignty."[12] Sovereignty is, therefore, relative by essence; its content depends on the development of international law and the legally binding duties enshrined therein.[13] Looking at the very substance of international law, instead of its superstructure, helps us to change our vision and to see migration beyond the dogma of state sovereignty.

The Theory of Relativity: A Vision of International Migration Law

Once sovereignty is relativized, the role of international law on migration becomes clearer. Territorial sovereignty is both a competence and a responsibility: the competence of states to regulate migration at the domestic level shall be exercised with due respect to the binding rules of international law. Denying sovereignty will not make it disappear and, inversely, international law cannot be reduced to a mere endorsement of sovereignty.

International law has a more open texture than many lawyers presume. Nonetheless, assessing its potential with respect to migration presupposes several prerequisites: it is critically important to distinguish international law from national law, absolute sovereignty from relative sovereignty, and the rhetoric of invasion from the reality of migration. Indeed, when one watches the news, it is tempting to infer that "in the present era of globalisation, control over the movement of people has become the last bastion of sovereignty."[14] Migration is everywhere in the media and political discourse. The mass hysteria at the borders is forcing us to see migration as an anomaly and a threat; this misperception is reinforced by a traditional and territorially bound vision of sovereignty.

When approached from a distance, international law provides a much more nuanced picture: immigration is not the last bastion of the state; it is governed by a significant—albeit eclectic—body of legally binding norms. The central argument in my *International Migration Law* monograph is to shift the focus from the state to the migrant. In doing so, the human rights of migrants provide an authoritative normative framework to apprehend the role of international law and constrain the state. As a starting point, every human being has the right to leave any country, be it a state of origin, transit, or stay. This right is an essential attribute of personal freedom. It is the premise of international migration law for, without such freedom, there is no room for international rules governing the movement of persons across borders.

Yet the absence of a general right to enter another state does not mean that access to the territory is left to the discretion of states. The right to seek asylum and to be protected against *refoulement*, the right of long-term residents to enter their own country, the right to family reunification, and the best interests of the child represent some of the most substantive encroachments at the universal plane. Immigration control is further constrained by several key procedural guarantees, including the prohibition of collective expulsion, the right to an individual and objective assessment, the prohibition of arbitrary detention and the correlative duty to prioritize non-custodial alternatives, the right to an effective remedy and to access consular protection. All these core rights at the border are minimum standards of humanity. They are not negotiable because they are legally binding for all states and they do apply to any persons on the move without consideration of status and origin.

[12] Case of the S.S. Wimbledon, Judgment, 1923 PCIJ (ser. A) No. 1, at 25.

[13] Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 PCIJ (ser. B) No. 4, at 24.

[14] Catherine Dauvergne, *Sovereignty, Migration and the Rule of Law in Global Times*, 67 Mod. L. Rev. 588 (2004).

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International law has a vital role to play in domesticating border control and instilling the rule of law and accountability. However, it would be naïve and irresponsible to conclude that due respect for international law is necessary and sufficient to stop the violence of the state at the borders. As any other legal system, it is not politically neutral; international law is an imperfect law that mirrors the contradictions of our world. Despite its drawbacks, it can still be an instrument for change provided that it is not equated with immigration control.

Focusing on the substance of international law is critical to exploit its full potential but also to identify what is missing. One of its most important lacunae relates to the admission of migrant workers. In this area, sovereignty is visible and domestic law reproduces the typical bias of immigration control where its racist instinct reinforces the bigotry of the social class. Highly skilled workers are welcomed and labeled "expats," whereas unskilled workers are banned and called "economic migrants." By enforcing this double standard, migration control is orchestrating an organized hypocrisy: while being the political scapegoat of globalization, undocumented workers can be exploited at will by filling the gaps in the labor market.

The status quo is not ineluctable. The overall picture becomes much more nuanced and opens new perspectives, when migration control is decoupled from sovereignty as a basic tenet of international law. Sovereignty must be taken for what it is, namely, a relative notion and not an absolute power. This understanding is not peculiar to migration; it mirrors a broader transformation of the international legal order, which has evolved from a law of coexistence into a law of interdependence. Migration is international by nature and widely acknowledged today as a matter of common interest that cannot be managed on an unilateral basis. As notably reaffirmed by the New York Declaration for Refugees and Migration, the movements of persons across borders "are global phenomena that call for global approaches and global solutions."[15] International law is not the problem and could be a part of theses global solutions, if grounded on a principled approach based on the rule of law, cooperation, and solidarity.

In pith and substance, immigration is not a taboo and sovereignty is not a totem. They are not mutually exclusive and, in fact, they have long coexisted. Migration control is not a mere incident of sovereignty; it is a political construction with a recent lineage in the history of humanity. Likewise, the very idea of sovereignty is not incompatible with hospitality. As political theorist Joseph Carens recalls, "there is nothing in the nature of sovereignty that prevents a democratic state from recognizing that outsiders are morally entitled to enter and settle on its territory and that it has an obligation to permit them to do so, at least under normal circumstances."[16] Although the dual nature of sovereignty as a Janus with two faces might justify either closed borders or open ones, international migration law gives a more subtle picture and enlarges the discussion. It calls us to go beyond this dialectic through a theory of relativity grounded on the rule of law and accountability for migrant's rights.

[15] GA Res. 71/1, para. 7 (2016).

[16] Joseph H. Carens, The Ethics of Immigration 271 (2013).

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