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SYMPOSIUM ON UNDOING DISCRIMINATORY BORDERS

WHEN IS IMMIGRATION SELECTION DISCRIMINATORY?

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Managing global migration is one of the most pressing issues of our time. Traditionally, international law has not generally regulated immigration[1] and citizenship law; it defers to state authority in setting up rules and procedures for entry into the territory and citizenry.[2] The lack of clear regulation—and a commonly accepted methodology on how to evaluate discriminatory borders—creates acute problems in terms of protecting human rights, promoting state interests, and setting up international cooperation. Against this background, this essay offers a legal framework to examine when borders are discriminatory. It includes a three-step process that examines the goals, criteria, and means of immigration and citizenship selection. With almost 300 million international immigrants worldwide living outside their country of origin in 2020, developing such a framework has become an urgent need.

Racial Discrimination

Developments in human rights law in the past decades have imposed restrictions on states in regulating entry into the territory and citizenry. One of the most fundamental restrictions imposed by international human rights law is the general prohibition on discrimination of "particular nationality."[3] Article 1(1) of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) provides that:

> '[R]acial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

CERD defines race broadly to include "colour, descent, or national or ethnic origin," although not religion or country of birth; it forbids any "distinction, exclusion, restriction or preference" based on race; it outlaws any policy that has racial "purpose or effect"; and it prohibits the use of racial criteria that impair "the recognition, enjoyment, or exercise" of fundamental freedoms. Despite this broad prohibition, the principle of non-

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[1] I use the term "immigration" to mean both entry *and* post-entry policies concerning residency and access to citizenship.

[2] Nottebohm Case (Liech. v. Guat.), 1955 ICJ REP. 23 (Apr. 6). *See also* Peter J. Spiro, *A New International Law of Citizenship*, 105 AJIL 694, 746 (2011).

[3] International Convention on the Elimination of All Forms of Racial Discrimination art. 1(3), Dec. 21, 1965, 60 UNTS 195 [hereinafter CERD].

discrimination based on race does not apply to legal distinctions between "citizens and non-citizens"[4] and issues of "nationality" and "citizenship," as long as these distinctions "do not discriminate against any particular nationality."[5] Such discrimination occurs, as the UN Committee on the Elimination of Racial Discrimination noted, only when immigration criteria "are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."[6] This means that even discrimination against a particular nationality may be permissible if the policy has a legitimate aim and the immigration restriction is "proportional to the achievement of this aim."

While the use of *racial* immigration classifications is generally impermissible, *nationality*-based categories may be permissible in some cases. In 1984, the Inter-American Court of Human Rights ruled that naturalization preferences issued by Costa Rica for nationals of Central American countries, Spaniards and Ibero-Americans are compatible with the American Convention on Human Rights. The Court ruled that "no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things."[7] The Court justified the preferential treatment to Central American nationals by saying that there are "closer historical, cultural and spiritual bonds with the people of Costa Rica. . . . [Central American nationals will] identify more readily with the traditional beliefs, values and institutions of Costa Rica, which the state has the right and duty to preserve."[8] Similarly, the European Court of Human Rights has upheld nationality-based distinctions when there is "an objective and reasonable justification."[9] Even the recent ICJ decision on the entry restrictions imposed by the United Arab Emirates on non-citizens of Qatar seems to permit distinctions based on nationality rather than national origin.[10] Nationality-based classifications seem to be legally prohibited when they are disproportionate, applied arbitrarily for granting citizenship (i.e., "without using reasonable and objective criteria"[11]), or result in statelessness.

In general, international law largely leaves admission decisions to state discretion. There are no clear-cut rules[12] on when border regimes are discriminatory and—except for racial and ethnic criteria—under which circumstances selection based upon merits, skills, education, and occupation is discriminatory.

How to Talk About Discriminatory Borders

A core reason for the lack of clear regulation on discriminatory borders relates to the disagreement about terminology and methodology. There is a fundamental controversy as to the prerogative of states to discriminate in

[4] *Id.* art. 1(2).

[5] *Id.* art. 1(3) ("Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality").

[6] Comm. on the Elimination of Racial Discrimination, General Recommendation 30 on Discrimination Against Non-Citizens, UN Doc. CERD/C/64/Misc.II/rev.3, at 2 (2004).

[7] Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, paras. 57–60 (Jan. 19, 1984).

[8] *Id.*

[9] *See, e.g.*, C. v. Belgium, App. No. 21794/93 (Eur. Ct. H.R., 1996).

[10] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Judgment 57 (ICJ, Feb. 4, 2021).

[11] *See, e.g.*, Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, paras 125-139, 142, 166 (Sept. 8, 2005). *See also* Inter-Am. Comm'n on Human Rights, Situation of Human Rights in the Dominican Republic, OEA/Ser.L/V/II., Doc. 45/15 (Dec. 31, 2015).

[12] The 2018 Global Compact on Migration similarly includes generic statements against discrimination but without concrete legal guidance. G.A. Res. 71/1, Global Compact for Safe, Orderly and Regular Migration objective 17, art. 33 (Dec. 19, 2018).

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immigration selection, the test to identify "discrimination," and the meaning of "borders." Thus, three conceptual points must be kept in mind. First, my starting point is the premise that a sovereign state has a "qualified right to limit immigration" and thereby set some criteria for exclusion and inclusion.[13] This means that addressing discriminatory borders is not exclusively a matter for human rights law but one must also take into account competing considerations stemming from state interests, sovereignty, and self-determination. It is possible to challenge this premise, but the still widely accepted proposition in international law is that states can provide some qualifications for admission.[14]

Second, not every differentiation is discrimination, an essential distinction that is often neglected. In her contribution, Tendayi Achiume writes that "[i]t is the core and intended function of borders to discriminate."[15] Yet, the core function of borders is to differentiate the "here" from "there." True, this often leads to discrimination, but borders may also prevent forms of discrimination from migrating from one country to another and protect human rights, not always undermine them. A policy that unjustly differentiates may become discriminatory, but this should be the conclusion rather than the hypothesis.

Third, talking about discriminatory borders should not be generic or abstract but must be nuanced and consider a wide set of factors. What do we mean by "borders"—physical (e.g., barriers for entry), legal (requirements for residence and citizenship), or sociological (obstacles for being socially accepted, even when one is a citizen)? Is the focus migration across state borders, or also mobility within state borders? Should the motivation matter—family ties, labor interests, humanitarian needs, or ethnocultural attachments? Can discrimination derive from inclusion policies (i.e., preferences) and not only from exclusionary policies (i.e., restrictions)? Is discrimination analyzed only from the perspective of the interests of aliens or also from the rights of citizens (e.g., family reunification)? The methodological choices on these questions will impact the legal assessment on whether borders are discriminatory.

The Urgent Need for International Migration Law

The ambiguity of international law on the topic of discriminatory borders creates three difficulties. From the human rights perspective, an international legal regime should prevent the mistreatment of migrants and abuse of power in entry allocation. From the state perspective, the question of who to admit into the territory and citizenry, according to what criteria, and under which procedures is a global dilemma. With the growing number of migrants, it is sometimes in the interest of states to have guidance on the legitimate goals and means to restrict migration in a way that is compatible with international human rights law. And finally, as with other transnational issues, the movement of people requires some level of international coordination and a normative framework for the allocation of visa permits to people states perceive as "undesirable" (i.e., burden-sharing) and highly-desirable (benefit-sharing).

These difficulties point to the urgent need to clarify three core issues. First, international law should define permissible and impermissible goals, criteria, and means to restrict immigration. Second, international law should

[13] JOHN RAWLS, THE LAW OF PEOPLES 39 (1999).

[14] Liav Orgad & Theodore Ruthizer, *Race, Religion and Nationality in Immigration Selection: 120 Years After the Chinese Exclusion Case*, 26 CONST. COMMENT. 237 (2010); R (BAPIO Action Ltd and anor) v. Secretary of State for the Home Department [2008] 1 A.C. 1003, 1007 ("It is one of the oldest powers of a sovereign state to decide whether any, and if so which, non-nationals shall be permitted to enter its territory, and to regulate and enforce the terms on which they may do so"); Kiyemba v. Obama 555 F. 3d 1022, 1025 (D.C. Cir. 2009) ("a nation-state has the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions for their exclusion or admission").

[15] *See* E. Tendayi Achiume, *Digital Racial Borders*, 115 AJIL UNBOUND 333 (2021).

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clarify the scope of states' prerogative to maintain their distinctive cultural identity by setting immigration rules. What type of conditions may or should a state require from a person seeking admission? One puzzle relates to culture-based immigration selection. On the one hand, international law generally allows states to select immigrants by means of "universal" criteria, such as education, skills, and family ties. On the other hand, racial criteria are mostly impermissible, especially when they discriminate against a particular nationality. The criterion of culture is not explicitly included in either category, and the legality of cultural selection is unclear. Third, international law should also regulate interstate relations—how to allocate the burden and share the benefit of immigration globally.

A Conceptual Legal Framework

In order to evaluate when borders are discriminatory, I offer a three-step process. Each of the steps can lead to the conclusion of unlawful discrimination. The first step is related to the policy goal. Some goals for immigration restrictions or preferences seem legitimate, while others are not. The aim of protecting the society from external risks to democratic values, public health, or national security is often seen as legitimate, while maintaining the ethnic composition of society is mostly considered an illegitimate aim. A policy that does not serve a legitimate aim is not automatically "discriminatory"—an illegitimate aim may render the policy unlawful yet not necessarily for reasons of discrimination—the same as a differentiation policy can sometimes be justified provided that it has a legitimate justification or excuse.

A policy goal may constitute unlawful discrimination if it fulfills two tests. The first step requires some differentiation. A policy can differentiate between individuals or groups either by intent or effect. Some policies are designed to exclude certain groups; others have no dubious motivation yet are exclusionary by impact. To prove discrimination, there should be some evidence for differentiation by intent or effect. Next, the differentiation should be based on arbitrary factors. In the Aristotelian definition, equality means equal treatment of equals and differential treatment of those who are different; it further demands that the difference be relevant to the goal sought.[16] For example, the preferential immigration treatment by European states of people from former colonies —Algerians in France; Indonesians and Surinamés in the Netherlands; and Sub-Saharan Africans in the United Kingdom[17]—or the German welcoming treatment of Jewish immigrants from the states of the former Soviet Union in the 1990s differentiate among non-citizens based on ethnic origin and nationality, yet for a legitimate aim (a redress for past wrongs) and based on a relevant differentiation for identifying the members of the victimized groups.

The second step relates to criteria. A policy that differentiates among individuals or groups based on impermissible selection criteria may be regarded as unlawful discrimination. Some criteria seem facially-neutral—for instance, achieved characteristics such as education, occupation, or talent—while other criteria are considered more suspect, such as ascribed characteristics like race, ethnic origin, and gender. A policy can be discriminatory even if it serves a legitimate aim (say, protecting democratic values) when the criteria are suspect (say, using immigrants' ethnic origin as a proxy for their commitment to democratic values). States cannot pick and choose whatever criteria they want even when the aim is legitimate. While this binary approach is well-known,[18] except for racial criteria, international law does not clearly specify factors that distinguish permissible and impermissible criteria.

[16] Aristotle, Nicomachean Ethics, II3IAI5-25 (W. D. Ross trans., 1925); Aristotle, Politics, 3.1280a8-15, I282bI8-23 (Ernest Barker trans., 1946).

[17] Christian Joppke, Selecting by Origin: Ethnic Migration in the Liberal State 93–111, 144–56 (2005).

[18] *See, e.g.*, Joseph H. Carens, *Who Should Get In? The Ethics of Immigration Admissions*, 17(1) Ethics & Int'l Aff. 95 (2003).

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The third step relates to means. Even if the aim pursued by immigration control may be legitimate (say, protecting democratic values) and the criteria employed may be permissible (say, stricter checks for people arriving from authoritarian regimes), the selection means can be discriminatory. A "means" here is the method by which states verify whether the aim of immigration control has been achieved. For example, states can implement a "citizenship test" to examine whether an immigrant has acquired the essential civic knowledge and democratic commitment; ask immigrants to sign an "integration contract" to declare a commitment to democratic essentials; or require immigrants to take a "loyalty oath" in which they pledge to fulfil democratic responsibilities. The justification of these means depends not only on their legitimacy—some means, such as citizenship tests, may be discriminatory per se given their content or procedure—but also on their relation to the goal and criterion for immigration control.

Conclusion

International law provides little guidance to help states distinguish between permissible and impermissible goals, criteria, and means for immigrant selection. This situation makes it difficult even for international law scholars to have a common ground for a legal debate on these questions. I share the sentiment of some of the authors of this symposium that citizenship regimes are often arbitrary. But given the current structure of world politics and the existence of the nation-state as the leading player in international law, some distinctions must be made, and not all should constitute unlawful discrimination. Such an argument is possible, but one should first clarify what turns legal differentiation into unlawful discrimination, under what legal tests and moral principles, and in which circumstances.

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