

SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW

TRANSNATIONAL MOBILITY, THE INTERNATIONAL LAW OF ALIENS, AND THE ORIGINS OF GLOBAL MIGRATION LAW

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To speak of a “global migration law” is challenging, perhaps even quite provocative, in an era in which walls are being continuously erected at borders and seas transformed into mass graves. The ambition of international law often seems to be to rescue what can still be saved: the refugee regime for example, or minimally decent treatment of migrants once under the jurisdiction of a third country. A global law of migration, then, might be as much if not more the law of obstacles to human mobility than a body of law premised on a more fundamental commitment to freedom of movement.

It may be tempting in this context to turn towards international human rights law as a source of progressive development of global migration law. On questions of freedom of movement, however, the mainstream of international human rights law is very much part of the status quo. One premise that is typically uncontested is the state’s prerogative to deny entry to its territory (except perhaps in cases of family reunification), including on bases such as religion or ethnic origin that would be considered flagrantly arbitrary if they were invoked domestically.

If a field of global migration law is to exist, I would suggest that there is a very real risk of being insufficiently ambitious in conceiving it, and merely providing an apology for the law as a central technology to control people’s movement. Political and ethical theorists have for some time pointed to the limitations of the current regime of relative normative global immobility, but their work is often not particularly connected to historical and legal developments. In searching for ways to imagine global migration law as the repository of a greater normative ambition, I want to look at how the *past* of international law, notably its nineteenth and early twentieth century past, might provide some keys to imagining an international legal order that puts at the heart of its interrogation not the coercive management of mobility but the very possibility of a right to migrate.

In this I am inspired by the work of [Vincent Chetail](#) on the question,¹ albeit with more of an emphasis on the rise of modern, late nineteenth century international law coinciding with a high point of international legal liberalism, than on earlier canonical texts. Specifically, I want to examine the way in which the “international law of aliens,” as it once thrived, may paradoxically and within certain limits have allowed for much greater mobility than is typically understood as being possible under even a human-rights oriented version of global migration law. At the same time, I want to stress how what was an extremely liberal regime from one angle, was also rooted in imperialism and racism in ways that make it a problematic blueprint for reimagining global mobility.

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¹ See Vincent Chetail, *The Architecture of International Migration Law: A Deconstructivist Design of Complexity and Contradiction*, 111 AJIL UNBOUND 18 (2017). Also, 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 (2016).

To begin, it is worth situating the notion that states have unfettered discretion over access to their territory in a broader historical context. As has been [periodically rediscovered](#),² such a power was not always seen as [flowing logically from sovereignty](#); or, to be precise, that prerogative had to be weighed against the fact that “humanity and justice require states to exercise that right whilst respecting, in ways that are compatible with their own security, the rights and liberties of aliens who seek to enter their territory, or who already find themselves there.”³ In fact, the absolute and unfettered power to exclude foreigners, if it ever existed, would have appeared as a historical anomaly to international lawyers writing before the twentieth century. As late as the second half of the nineteenth century and the first half of the twentieth, a number of international lawyers, notably those operating through the Institut de droit international (IDI), advocated vigorously for a presumptive right to migrate.

International legal statements at least up to the First World War reflected a subtle and multilayered approach quite at odds with modern kneejerk apologies for absolute sovereign control. Although the right to forbid access to one’s territory was seen as flowing from the state’s sovereignty, that right could not be applied “absolutely” and had to be reconciled with “the idea of an international community which means that nations, as members of humanity, are bound to respect the links that unite them.”⁴ In an era when the West was admittedly a significant exporter of persons, it was willing, at least in theory, to back quite strong corresponding obligations to welcome aliens. [The IDI even accepted](#), at its 1897 session, a right to both emigrate and immigrate.⁵ Later on, the question would at least attract controversy, for example between the U.S.’ insistence that immigration was a purely domestic question that could not be the object of international negotiations, and states that situated their perceived obligation to welcome migrants within a framework of cosmopolitan duties.

Crucially, even as the power of the state to exclude persons from its territory became increasingly the dominant element in the equation, there was at least a significant transitional period in which the a priori obligation to accept almost anyone gave way to an obligation to not deny anyone access *arbitrarily*. Already in the late nineteenth century, [William Edward Hall](#) had insisted that the right to deny access to one’s territory was “necessarily tempered by the facts of modern civilisation.”⁶ Ernst Nissay, in his Hague Course of 1924 also made that connection between freedom of movement and civilization, emphasizing that:

It is contrary to the law of nations that a state belonging to the international community build a great wall of China. China and Japan, as long as they remained systematically closed to foreigners, were not part of this

² See, in particular, the landmark James AR Nafziger, [The general admission of aliens under international law](#), 77 AJIL 804 (1983).

³ Institut de droit international, [Règles internationales sur l’admission et l’expulsion des étrangers](#) (1892): “l’humanité et la justice obligent les Etats à n’exercer ce droit qu’en respectant, dans la mesure compatible avec leur propre sécurité, le droit et la liberté des étrangers qui veulent pénétrer sur ledit territoire, ou qui s’y trouvent déjà.”

⁴ [Chronique des faits internationaux](#), 1 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 555 (1894): “l’idée de communauté internationale qui fait que les nations, en tant que membres de l’humanité, sont tenues de respecter les liens qui les unissent.” The same author went as far as to suggest that “the rule of the equality of states is an obstacle to states distinguishing between the foreigners that they intend to keep at bay: one cannot push back the subjects of one nation and at the same time accept two from another” (“la règle de l’égalité des Etats fait obstacle à ce qu’un gouvernement distingue entre les étrangers qu’il entend éloigner de son territoire: il ne saurait repousser les sujets d’une nation et en même temps admettre deux d’une autre”).

⁵ Institut de droit international, [Principes recommandés par l’Institut, en vue d’un projet de convention en matière d’émigration](#) art. 1 (1897): “Contracting states recognize the freedom to emigrate and immigrate to individuals in isolation or en masse, without distinction of nationality. This liberty shall only be restrained by a duly published decision by the governments and within the rigorous limits of the necessities of social order and politics” (“Les Etats contractants reconnaissent la liberté d’émigrer et d’immigrer aux individus isolés ou en masse, sans distinction de nationalité. Cette liberté ne pourra être restreinte que par décision dûment publiée des gouvernements et dans les limites rigoureuses des nécessités d’ordre social et politique.”)

⁶ WILLIAM EDWARD HALL, [A TREATISE ON INTERNATIONAL LAW](#) 211 (1890).

community. A state would still act contrary to the law of nations by denying entry to its territory no longer to all foreigners, but to the nationals of this or that state. It would thus violate the fundamental rights of the states in question to equality of treatment: a right that flows from the law of nations.⁷

As [Alfred Verdross](#) put it as late as 1931, the right for states to deny access to their territory was hardly unlimited:

[N]o State within the international community claims to have the right to arbitrarily close its frontiers to foreigners. All have, in fact, followed the rule that every denial of admission, to be legitimate from the point of view of the law of nations, must be based on a reasonable title.⁸

The obligation not to deny access arbitrarily clearly [coexisted with](#) the generally recognized sovereignty of states to control immigration, but it leaned towards a “right of admission freely accorded, subject to specific exceptions fully announced in advance and recognized as reasonable by international public opinion.”⁹ An IDI resolution adopted in that vein in 1892 stipulated that: “The free entry of aliens to the territory of a civilized state can be prohibited in a general and permanent manner only for reasons of public interest and extremely serious motives.”¹⁰

Interestingly, even as the United States increasingly jealously guarded its borders, it [protested discrimination](#) by other states in denying entry to certain U.S. citizens based on their race or religion (for example, the Russian refusal to accept American Jews, admittedly pursuant to an 1832 treaty that granted nationals of both nations a right of sojourn, travel, and protection).¹¹ As Hall put it, providing the widely accepted rationale for such protests, “to exclude any (alien) without reasonable or at least plausible cause is regarded as so vexatious and oppressive, that a government is thought to have the right of interfering in favour of its subjects in cases where sufficient cause does not in its judgment exist.”¹²

It is true that absent a treaty specifically granting mobility rights, the protests were of a [political rather than legal character](#), and sometimes distinctly underwhelming.¹³ What is remarkable nonetheless is that the international law of aliens was widely understood not only as applying to actual aliens already on the territory of another state, but also to putative ones, those who aspired to move into another state and had not yet been either granted or denied

⁷ ERNST ISAY, 5 DE LA NATIONALITÉ 451 (1924): “Il est contraire au droit des gens qu’un État qui fait partie de la communauté internationale, s’entoure d’une muraille de Chine. La Chine et le Japon, aussi longtemps qu’ils se tinrent fermés systématiquement aux étrangers, ne faisaient pas partie de cette communauté. Un État agirait encore contre le droit des gens en refusant l’entrée de son territoire non plus aux étrangers en bloc, mais aux ressortissants d’un ou de plusieurs États particuliers. Car il violerait le droit fondamental des États en question à une égalité de traitement: droit qui découle du droit des gens.”

⁸ Alfred Verdross, [Règles concernant le traitement des étrangers](#), 37 RECUEIL DES COURS 327, 343–344 (emphasis added): “nul Etat de la communauté internationale ne prétend avoir le droit de fermer arbitrairement ses frontières aux étrangers. Tous ont, en fait, suivi la norme que chaque refus d’admission, pour être légitime du point de vue du droit des gens, doit se baser sur un titre raisonnable.”

⁹ EDWIN MONTEFIORE BORCHARD, [THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD; OR, THE LAW OF INTERNATIONAL CLAIMS](#) 46 (1915).

¹⁰ Institut de droit international, [supra note 3](#): “L’entrée libre des étrangers sur le territoire d’un État civilisé ne peut être prohibée d’une manière générale et permanente qu’à raison de l’intérêt public et de motifs extrêmement graves.”

¹¹ Interestingly for our purposes, the United States considered that Russia asking U.S. citizens about their religion amounted to an “assumption of a religious inquisitorial function within our own borders, by a foreign agency, in a manner ... repugnant to the national sense.” As William Wharton, Acting Secretary of the Department of State put it in a letter dated February 28, 1893: “It is not within the power of this Government, or of any of its authorities, to apply a religious test in qualification of the equal rights of all citizens of the United States.” [PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES](#) 536 (1894).

¹² HALL, [supra note 56](#), at 211.

¹³ [HAITIAN TRADE IN PERIL; Exclusion of Syrians Will Give Business to Europe, Merchants Say](#), N.Y. TIMES (Jan. 27, 1912).

entry. Such aliens were, in theory at least, to be treated in nondiscriminatory fashion on the basis of a sort of “most favorable treatment clause” in access.

There is, however, a considerable caveat to this early story of global mobility, already evident in the conspicuous references to civilization. The idea of nonarbitrary immigration restrictions, such as it was, was intimately linked to the “network of commercial treaties by which the states, *of the white race at least*, are bound together.”¹⁴ Among the “extremely serious motives” suggested by the IDI in 1892 to justify restrictions to mobility were “a fundamental difference of morals or civilization or . . . a dangerous organization or accumulation of aliens who would come en masse.”¹⁵

Among the groups that one early twentieth-century American scholar cited for legitimate exclusion from the territory were “alien races considered inferior or not capable of assimilation” such as “Chinese and Japanese laborers in the United States and many of the British colonies, the gypsies in many European countries, and Turks in Panama.”¹⁶ To which one might add the (now rather neglected but once *fameux*) case of the [exclusion of Syrians from Haiti](#).¹⁷ As can be seen, Western states were particularly keen on restricting movement from the semiperiphery (perhaps because this was where most of the movement came from), in ways that would in due course powerfully motivate Japan to militate for the racial-equality clause at the Paris Peace Conference in 1919.

Although there could be said to exist a general international law of aliens, therefore, in practice that law was mediated by a strong emphasis on “friendship, commerce and navigation” treaties which arose within quite narrow civilizational confines. The Western entitlement to human mobility was part and parcel of logics of imperialism, an obligation imposed on non-Western countries to keep their borders open, which had been evident as early as Vitoria’s musings on the Spaniards’ right to travel Indian lands, and which was unlikely to be reciprocated. It was often based on an ability to effectively exclude or severely control the migration of nonwhites.

In other words, the global regime of migration in the late nineteenth century was for all its superficial embrace of mobility, *in effect* not that different from ours, combining hypermobility within and from the industrialized North, with significantly reduced South-North mobility. Today, for example, the European Union is typically understood as both an area of hypermobility within, and a fortress for those without. In that respect, the perception of a commitment to global mobility of classical international lawyers may be based on a misunderstanding: it was a commitment framed in general terms only because a significant part of humanity was excluded from it. If anything, South-North mobility belonged to a quite different regime of *imperial* law that operated separately yet reproduced some of the racist biases of international law, with even less of a nominal commitment to mobility.

At any rate, whatever these origins, the early global law of migration was subsequently normalized along much more conventional sovereign-territorial lines, even if this happened through a process that was often remarkably selective, partial, and arbitrary.¹⁸ The question thus arises as to whether the original commitment to a much more liberal regime of global human mobility is rescuable from its exclusionary undertones? The point is obviously not to resurrect these earlier pronouncements as if they still applied, pretending that the pendulum has not swerved significantly towards state sovereignty and border control in the meantime; nor obviously to risk white-washing their racism, in a context where we have reason to believe that this racism was not accidental but inherent to the global regime of mobility.

¹⁴ BORCHARD, [supra note 9](#), at 46.

¹⁵ Institut de droit international, [supra note 3](#): “une différence fondamentale de mœurs ou de civilisation ou à raison d’une organisation ou accumulation dangereuse d’étrangers qui se présenteraient en masse”.

¹⁶ BORCHARD, [supra note 9](#), at 46.

¹⁷ Brenda Gayle Plummer, [Between privilege and opprobrium: the Arabs and Jews in Haiti](#), 16 IMMIGRANTS & MINORITIES 80 (1998).

¹⁸ Nafziger, [supra note 2](#).

Yet these earlier pronouncements are also unmistakably part of the history of international law. What to make of this earlier openness to free movement is at least an intriguing question. There is something to the fact that international law once candidly affirmed a principle of nonarbitrariness in immigration, even as it was blind to its underlying exclusions. In its general utterances and because the Western world conceived of itself as the world at large, the international law of aliens of the time *did set out the conditions for a global regime of mobility that was on its face and in its own unmistakably white-centric way, surprisingly more liberal than anything that has been witnessed since* (except, of course, within regional arrangements), including contemporary international human rights law.

Perhaps what is recoverable from that earlier era, or at least worthy of study, are some of the deeper justifications for the mobility branch of the equation. In emphasizing the equal right of all to travel and settle abroad, international law made clear that such a right resulted from the equality of *states* rather than human beings. A *state* had the right to its citizens being treated as well by other states as the citizens of other nations. This meant that the willingness of a sovereign to exercise diplomatic protection over the rights of some of its citizens arbitrarily denied entry into another state might provide the backbone of a strong regime of transnational mobility. Although perhaps less cosmopolitan and appealing to our contemporary sensitivities than human rights, such a foundation of global mobility may also have been more effective. It suggested the continued relevance of one's state of citizenship as a source of protection for aliens, something particularly relevant in a context where one may not yet have rights as an immigrant, but where one's "bare" rights as a human count for little in the no-man's lands of the Mediterranean and the Rio Grande.

Moreover, in defending this presumptive right to global mobility, earlier international lawyers outlined a series of rationales such as the fact that, under conditions of global interdependence, one could only expect one's nationals to be given entry to other states to the extent that one was willing to reciprocate. It is hard not to see the relevance of such an idea in a post-Brexit era, as previously liberal regimes of mobility are being torn apart at the seams.

It may therefore be tempting, by way of a thought experiment, to take earlier international law at its word and seek ways in which that broad liberal commitment to freedom of movement could be updated through a contemporary commitment to antiracism. At any rate, international law should be haunted by this earlier good conscience. A historical contextualization of the global law of migration might at least help us question the absoluteness of the equation of sovereignty and the sort of capricious, arbitrary, and racist attitude to the entry of foreigners that has come to define it, even though there is no doubt that this earlier regime of freedom of movement was inherently discriminatory in its own way.