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Thinking about migration law and national borders: An aspirational benchmark?

1.1 A framework for evaluating migration law and policy

> An ideal world would be one in which all people would find roughly equal levels of resources in the places where they are born but where everybody would enjoy the right to search for better opportunities elsewhere without being impeded by the circumstances of his or her origins.[1]

Migration and refugee law is inherently controversial. That is an underlying theme in the textbook, *Migration and Refugee Law: Principles and Practice in Australia*, which accompanies this case and commentary book. In the textbook, we advanced a new theoretical framework for refugee law and set out an alternative definition for a 'refugee'.

As you read through the cases and materials in this book, you should do so with a critical and analytical mind regarding the rationale for Australian migration law and policy as a whole.

Migration law is complex and technical. Given this, most practitioners and students in this area fail to get beyond the minutiae contained in the hundreds of visa categories and the criteria within these categories. The technical nature of migration law dissuades a search for an overarching rationale for Australia's approach to immigration issues.

In this book, we discuss a large number of visa classes. Most of them do not have an obvious link with each other. Yet, given the importance of immigration to

1 R Baubock, 'Ethical problems of Immigration and Control and Citizenship' in R Cohen (ed), *The Cambridge Survey Of World Migration* (1995), p. 551.

the well-being of potential immigrants and the Australian community, it would be striking if there was not an underlying unity (or at least an attempt to ground an underlying coherency) to this area of the law. This unity, if in fact it does exist, is not expressly promulgated by the Australian government.

In considering the law outlined in this book, you should do so with a critical and inquiring mind regarding the objective of migration law. Is there a coherent justification for Australia's approach to letting in foreigners? Moreover, is there a principled justification for who we do not allow within our borders?

In thinking about these issues, you should do so against the background of the following discussion, which urges for a far less restrictive approach to global border controls.

The commentary in this chapter is derived from a paper by Mirko Bagaric and John Morss titled: 'State Sovereignty and Migration Control: The Ultimate Act of Discrimination?' from *Journal of Migration and Refugee Issues* (2005).

1.2 Overview of argument in favour of less restrictive migration policy

A defining aspect of national sovereignty is that nation–states have the right to determine which people are permitted to enter within their geographical borders. Many states exercise this power by placing restrictions on who can enter and remain within their borders. As a result, many people in the world are forced to live in states not of their choice. This often diminishes their opportunities and level of flourishing. In some cases, it is the difference between life and death. In many cases, the stakes are not that high, but nevertheless the stakes are high enough to force people to leave their place of origin and ultimately become 'displaced persons': people that nobody wants, at least not enough. At any point in time over the past decade or so there have been somewhere between roughly 12 to 18 million displaced people worldwide.[2]

This problem could be almost *eradicated* if countries abandoned migration controls. Arguably, some controls remain necessary in the interests of national security, but the problem would still be *significantly alleviated* if countries greatly increased immigration numbers. Problems of worldwide hunger and millions of people dying from readily preventable causes would also abate – one assumes that people in such desperate straits would go in search of greener pastures. Not all would have the energy and resources to succeed, but no doubt many would.

2 Figures from the United States Committee for Refugees show that the number of refugees and asylum seekers from 1992 to 2003 is as follows: 1992: 17,600,000; 1993: 16,300,000; 1994: 16,300,00; 1995: 15,300,000; 1996: 14,500,000; 1997: 13,600,000; 1998: 13,500,000; 1999: 14,100,000; 2000: 14,500,000; 2001: 14,900,000; 2002: 13,000,000; 2003: 11,900,000. US Committee for Refugees, *World Refugee Survey 2004* (2004) p. 4. It is important to note that the main reason for the reduction in refugee numbers is not due to increasing generosity on behalf of receiving countries. Rather, it is due to an unprecedented level of voluntary repatriation over the past two years, with some 3.5 million refugees going home, most of them Afghans from Pakistan and Iran: UN High Commissioner for Refugees UNHCR, *Sharp decline in refugees, others of concern in 20 UN High Commissioner for Refugees*, 17 June 2004.

This chapter challenges existing immigration policies. It contends that unless we radically loosen migration controls, we must accept that we are endorsing a racist policy. This diminishes the force of criticism levelled by states that implement such policies at other states that have internal laws which discriminate against their citizens.

At the international level, there is little momentum for reducing migration controls. The European Union 'experiment' aside, many states are tightening migration controls. Even in Europe, increased freedom of movement is limited to the already privileged – Western Europeans. Tighter migration controls will exacerbate the problems relating to 'forced state confinement'. This reality of states imposing strict migration controls is undeniable and is likely to continue into the foreseeable future. But it is not one that we should accept without question, or at least reflection.

This issue has received scant philosophical or social commentary. As noted by Rainer Baubock:

> Until recently, with a few significant exceptions, political and moral philosophers had little to say about migration. It was mostly taken for granted that state sovereignty implied the right to control movements of persons across borders (and quite often within borders). Free internal movement and choice of residence within a state and the freedom to leave any state have become accepted only since the Second World War (see article 13 of the 1948 Declaration of Human Rights). That there is, or ought to be, an equivalent right of free immigration is generally denied by scholars of international law but has become a controversial issue in . . . normative political theory.[3]

In the end, the practice of imposing migration controls is discriminatory. It is the ultimate form of discrimination: 'super-discrimination'. We urge that there is no logical or moral reason why non-nationals of a state should not have the same opportunities and freedoms as nationals in that state. The decision to confer opportunities and privileges only on citizens represents an unjustified preference for those like oneself – the paradigm of discrimination. The result of this is, of course, a tragic irony given the considerable efforts that many Western states make to stamp out discrimination at the domestic level and the vast array of international anti-discrimination instruments, sponsored and loudly trumpeted by Western nations. For it is these very states that typically impose the strictest controls on immigration. We argue that the substratum upon which international law is built, with sovereign states at the cornerstone, is inherently discriminatory and is probably responsible for more harm caused by discrimination than the cumulative effect of all the domestic discrimination practices with which so many states are preoccupied.

It may be that in the absence of strict migration controls, people would spontaneously migrate so that there would eventuate a loose equilibrium between resources, such as food and water, and human need. We would at least correct

3 Baubock, supra n. 1, p. 551.

the current, obscene situation in which much of the Western World is gorging itself to ill health on super-size meals, while much of Africa continues to starve.

Critics will argue that there are sound pragmatic reasons for tight border controls. Appeals will be made to 'national security'. To this it may be pointed out that most states are far more liberal with admitting tourists (whose dollars they happily extract) than new permanent residents (who might be a drain on community resources at some future point), even though security concerns would apply equally if not more to tourists. Indeed if the sense of 'security' is widened to include crime in general, it is the tourist who often poses the greatest threat to the host community, particularly in relation to sexual exploitation. While security considerations undoubtedly justify some vetting of immigrants, they do not justify the scale of current migration controls.

The most persuasive argument in favour of strict migration controls is expressed by the view that 'we made it and own it and don't want it ruined by others'. The absence of migration controls, arguably, could diminish the willingness of people to work collectively to create common amenities and resources. This is similar to the argument advanced in favour of the right to own private property – that people will not work if they cannot keep the fruits of their labour. This argument, while not trivial, ultimately does not justify the current strict levels of migration control.

In the next two sections, we briefly detail the nature of sovereignty and the history of migration controls. Surprisingly, strict migration controls are a recent advent in the course of human history. We argue that open borders do not present a risk to state sovereignty. In section five, we set out the advantages of liberalising immigration policy. In the process, we speculate on the likely effects. It seems that it would not be that drastic after all. Economic prosperity is only one of the many reasons that drive 'people-movement'. Africa will not empty overnight if border controls in the Western World are lifted (although the argument could be made that this would not necessarily be undesirable). In section six, we analyse the arguments in favour of the status quo. After concluding that they are unsound we propose an alternative migration control model in section seven.

1.3 Sovereignty and the history of migration controls

1.3.1 The emergence of the state

The interrelated notions of 'territory' and 'sovereignty' underpin migration controls that restrict the movement of people. We provide a brief account and explanation of each to better understand the options for migration reform and to emphasise the point that reduced migration controls do not necessarily present a threat to national sovereignty.

International law as currently constituted depends crucially on the so-called 'Westphalian' unit of the sovereign state.[4] To this end, the sovereignty norm now affirms the territorial integrity of the state and the rule of non-intervention.[5] Although the state constitutes the principal entity that is the subject of international law, the state system has a surprisingly short history. In the middle ages there was no concept of sovereignty.

> Humanity found its 'oneness' not in human rulers or the geographic reaches of their power but rather in the Respublica Christianity, the pervasive unity of God . . . Sovereignty in the sense of an ultimate territorial organ which knows no superior, was to the middle ages an unthinkable thing.[6]

The notion of a singular Respublica Christianity was destroyed by the Reformation and replaced by the notion of state supremacy. In time, the sovereignty of the king came to be thought of as absolute, and this sovereignty became equated with the sovereignty of the state.[7]

The state system commenced in Europe in the seventeenth century and was originally confined to European states, 'the badge of entry being that the putative state satisfied the 'standard of civilisation', essentially that it was a Christian state'.[8] The expansion of the state system began in the nineteenth century and gained considerable momentum with the process of colonial self-determination during the period 1945 to 1990 when the number of states worldwide more than doubled.[9]

1.3.2 The definition of a 'state'

Statehood as the basis for sovereignty is defined by international law. An essential criterion is a defined territory. The boundaries of state territory are the 'imaginary lines on the surface of the earth which separate the territory of one state from that of another, or from unappropriated territory, or from the open sea'.[10] International law does not require the structure of a state to follow any particular pattern.[11] Historically there have been several well established means of acquisition of territory. The first is occupation, which is the exercise of sovereignty over previously unclaimed territory (*terra nullius*).[12] The second is prescription,

4 According to Hans Morgenthau, the 1648 Treaty of Westphalia made the territorial State the cornerstone of the modern state system. H J Morgenthau, *Politics Among Nations: The Struggle For Power and Peace* (6th edn), (1985), p. 294.
5 W Aceves, 'Relative Normativity: Challenging the Sovereign Norm through Human Rights Litigation', *25 Hastings International Comparative International Law Review*, (2002), p. 261.
6 R A Brand, 'Sovereignty: The States, the Individual, and the First International Legal System In the Twenty-first Century' in *25 Hastings International and Comparative Law Review*, (2002), pp. 279, 281.
7 ibid., pp. 281–282.
8 C Warbrick, 'States and Recognition in International Law', in M E Evans (ed), *International Law*, (2003), pp. 205, 205.
9 ibid.
10 R Jennings and A Watts, *Oppenheim's International Law* (9th edn), (1992), p. 661.
11 *Western Sahara Opinion* ICJ Rep 1975, 12, 43–44, ICJ.
12 See *Western Sahara Opinion*, ibid., where it was held that the Western Sahara at the time of colonisation by Spain was not a territory belonging to no one.

which is the peaceful exercise of sovereignty for a reasonable period without objection, and normally by invitation, by the state.[13] Cession is the transfer of territory from one sovereign state to another. This is usually effected by means of treaty. The fourth means of territorial acquisition is accretion, which refers to the geographical addition of new property. The fifth means is conquest, which involves using force to acquire territory – now an obsolete method. Nowadays, the most common method for acquisition of territory is effective occupation, which involves continuous and peaceful display of sovereignty.[14]

It is now extremely difficult to establish a new state. A new state must be formed without disrupting the larger pattern of territorial boundaries: Czechoslovakia chose to separate into two, and may in time decide to reconstitute a single state out of Slovakia and the Czech Republic. The use of force cannot provide the basis for a new state, except in narrowly defined colonial situations. Of course, many of the pre-existing states came into being through force and the threat of force – a war of independence by settled colonials gave birth to the USA. But once accepted into the community of legitimate states, their boundaries are preserved against force used by others (including the fifth column of would-be secessionists from inside those boundaries). Even though the technical doctrine of *terra nullius* is strictly circumscribed,[15] and is no longer held to be applicable for the colonisation of inhabited lands, a kind of de facto *terra nullius* doctrine prevails in a historical sense. Broadly speaking, whichever state first defined a section of the earth's surface and maintained some occupation of it, came to be identified as its proper sovereign unless a stronger state displaced its claim. Pre-existing state boundaries, including those established by military conquest, almost invariably take precedence over other considerations within international law.[16]

Apart from the need for a defined boundary, there are several other aspects that are essential for the existence of a state. Article 1 of the Montevideo Convention on the Rights and Duties of States 1933 sets out the most widely accepted formulation of the criteria of statehood. It provides that the state as an international 'person' should possess the following four criteria: (i) a permanent population;[17] (ii) a

13 M Dixon and R McCorquodale, *International Law* 236 (4th edn), (2003), p. 236.
14 ibid., pp. 243–250.
15 *Western Sahara Opinion* ICJ Rep 1975 12 at para 79; cf *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (High Court of Australia).
16 The conservative state-centredness of international law is nowhere better illustrated than in the role of the doctrine of *uti possidetis*. As applied and explained in *Burkina Faso v Republic of Mali (Frontier Dispute Case)* at the International Court of Justice [ICJ] (ICJ Rep 1986 554 at paras 20–26), this doctrine ensures the transformation of administrative colonial boundaries (such as within French Africa or Spanish South America) into post-colonial state boundaries. The needs of newly emerging post-colonial nations must adhere to these reminders of their oppressed past, unless new borders can be agreed to with their newly enfranchised neighbours. Trumping collective human rights aspirations as hallowed as self-determination, this doctrine consolidates the boundaries devised for the administrative convenience of functionaries in Europe. The new nations' 'deliberate choice' of *uti possidetis* was described by the International Court of Justice as 'the wisest course', in the interests of 'stability [of African States] . . . to survive, to develop and gradually to consolidate their independence in all fields'.
17 There is no requirement for a minimum number of inhabitants. This is demonstrated by States such as Nauru and Tuvalu: see M N Shaw, *International Law 140* (4th edn), (1997).

defined territory;[18] (iii) government;[19] and (iv) capacity to enter into relations with other states.[20] The last criterion requires that the state is capable of entering into quasi-contractual arrangements with similar entities. The varieties of such quasi-contracts are many, but the paradigm form is the bilateral treaty.

The right to self-determination is also central to statehood, either as an aspect of the need for government or an independent requirement. This requires the existence of a relatively stable and effective form of government.[21] Self-determination is thought of as legitimating and empowering groups of people to implement norms and rules that reflect and are adapted to their distinctive expectations and desires. This supposedly facilitates global human flourishing. This position, however, relies on there being distinct sets of political needs, correlated with ethnicity: a formula that in its manifestations in previous centuries has been labelled racism.[22] Recognition by other states, though not a formal requirement, is pragmatically essential for statehood. This is especially the case in relation to marginal situations.

> The more overwhelming the scale of international recognition . . . the less may be demanded in terms of the objective demonstration of adherence to the criteria [of Statehood], Conversely, the more sparse the international recognition is, the more attention will be focused upon proof of actual adherence to the criteria concerned.[23]

According to Joan Fitzpatrick, three basic principles can be derived from the UN Charter version of the post-Westphalian form of sovereignty:

> (i) exclusive authority within a defined territory; (ii) non-interference by states in the domestic jurisdiction of other states; and (iii) equality among states.[24,25]

1.3.3 Jurisdictional sovereignty

'Sovereignty' refers to the ultimate legal authority within a national legal system (internal sovereignty) and the power to conduct relations with other states.[26] Another name for internal sovereignty is 'jurisdictional sovereignty'. This means

18 There is no requirement that the boundaries must be defined and settled, so long as there is a consistent core of territory, which is undeniably controlled by the government of the entity: Shaw, supra n. 17, p. 141.
19 This is defined very loosely. The relatively new States of Croatia and Bosnia-Herzegovina were recognised as independent States and admitted to membership of the United Nations (which is limited to States) during a period when non-governmental forces controlled substantial areas of the territories in question: Shaw, supra n. 17 , p. 142.
20 In this regard, the critical issue is not the degree of influence that the State can assert over other States, but the competence of the entity to enter into legal relations with other States. The essence of such capacity is independence, the key measure of which is the fact that the entity is not subject to any other sovereign: Shaw, supra n. 17, pp. 142–143.
21 Shaw, supra n. 17, pp. 144–146.
22 J R Morss, 'Heteronomy as the Challenge to Nation: A Critique of Collective and of Individual Rights', *8 Law Text Culture*, (2004), p. 167.
23 Shaw, supra n. 17, pp. 146–147.
24 'Sovereignty, Territoriality and the Rule of Law', *25 Hastings International and Comparative Law Review*, (2002), pp. 303, 311.
25 ibid., pp. 281–282, 310.
26 C Warbrick, 'States and Recognition in International Law', in M E Evans (ed), *International Law*, (2003), pp. 205, 207.

that states may legislate as they choose on any matter whatsoever.[27] A basal aspect of state sovereignty is that states can pass laws of any nature, subject to the constitution of the state (which itself can be changed, albeit with varying degrees of procedural difficulty). Thus in the Australian context, for example, it is widely agreed that a law prescribing that blue-eyed babies must be killed would be a valid, if deplorable, exercise of law-making power.[28] Jurisdictional sovereignty allows states to pass immigration laws. In fact, migration control is the quintessential act of the sovereign state. 'Since the development of the modern State from the fifteenth century onward, governments have regarded control over their borders as the core of sovereignty. It is axiomatic that states decide which people to admit, how many, and from where'.[29]

1.3.4 Is the concept of sovereignty being eroded?

The notion of sovereignty is being challenged. For over fifty years, it has been internationally accepted that certain basic human aspirations in the political arena are held in common, irrespective of ethnicity or culture. An argument can therefore be articulated according to which people's political needs are uniform, irrespective of cultural superstructure. The conditions for national representative democracy, including the role of the political party and of suffrage, are coming increasingly into question in the 'runaway' late modern world.[30] Personal identity is increasingly supra-national and increasingly detached from tradition.[31] Alongside these trends, security concerns are increasingly focused on non-state organisations which treat national boundaries with contempt.

At the same time, humanitarian concerns seem to legitimise unprecedented violations of the sovereignty of states. The international community is beginning to recognise other norms that compete with the sovereignty norm for primacy. These include the existence of so-called fundamental human rights and the emergence of national courts and international tribunals that challenge the sovereignty norm.[32] The House of Lords' ruling in the case concerning extradition proceedings for the former Chilean President Augusto Pinochet Ugarte confirms that government officials, including heads of state, cannot claim immunity from prosecution in relation to international crimes, such as torture, which are considered to transgress a peremptory norm. Conduct of such kind was held to be antithetic to the state function. Lord Brown-Wilkinson noted:

27 V Lowe, 'Jurisdiction', in M D Evans (ed), *International Law*, (2003), p. 329.
28 AV Dicey, *Introduction to the Study Of the Law Of The Constitution*, (1885), p. 80. See also *British Rail Board v Pickin* [1974] AC 765, where the House of Lords stated that 'in the courts there may be argument as to the correct interpretation of the enactment; there must be none as to whether it should be on the statute books at all . . . The courts have no power to declare enacted law to be invalid'.
29 M Weiner, 'The Global Migration Crisis', in W Gungwu (ed), *Global History and Migrations*, (1997), pp. 95, 103.
30 U Beck, 'Living your Own Life in a Runaway World: Individualisation, Globalisation, and Politics', in W Hutton and A Giddens (eds), *On the Edge: Living With Global Capitalism*, (2001), pp. 164, 172.
31 ibid., 168–169.
32 Aceves, supra n. 5, pp. 262–263.

> Can it be said that the commission of a crime which is an international crime against humanity and *jus cogens* is an act done in an official capacity on behalf of the State? I believe there to be strong grounds for saying that the implementation of torture . . . cannot be a State function.[33]

It is now being asserted by some commentators that it is legitimate for a third state to intervene to restore the power of a democratically elected government or to restore respect for basic human rights in another state.[34]

Thus, sovereignty can no longer can be relied upon to provide absolute immunity to states or state officials who commit egregious breaches of human rights.[35] According to Ivan Simonovic, the notion of state sovereignty has changed, to an extent, to one of 'popular' sovereignty – that is, to a supremacy of people above states.[36]

> The principle of non-interference in the internal affairs of a state, the historical corollary of state sovereignty, is being challenged by the international community's belief in its responsibility to protect.[37]

Moreover, sovereignty has also arguably been eroded by globalisation and the fact that the world's economy, trade and financial flows are becoming more integrated. As noted by Matthew Schaefer, during the US governmental consideration of the Uruguay Round agreements creating the World Trade Organization, claims of lost sovereignty (however misguided) were used as 'rhetorical devices' by some groups opposed to the WTO.[38] Thus, the stage is set for the re-thinking of national sovereignty, which for so long has been of central importance in international affairs.

1.3.5 States will continue to exist in foreseeable future: Reform must accommodate this

However, as accepted by Simonovic, the change is slow. States are in no hurry to relinquish their sovereignty. Small, less powerful states fear a type of 'neo-colonialism' by bigger, richer states, and powerful states are keen to retain their power.[39] Furthermore, the commitment to elevating human rights above state

33 *Regina v Bow Street Metropolitan Stipendiary Magistrate* (No 2) 1 ALL ER 577 (HL 1998), 113.
34 Ivan Simonovic, 'Relative Sovereignty of the Twenty-first Century' in *25 Hastings International and Comparative Law Review*, (2002), pp. 371, 373; M Bagaric and J Morss, *Brooklyn Journal Of International Law*, (2005).
35 In *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*) 2002 ICJ, the Court held that while a sitting foreign minister enjoys full immunity from prosecution, once he leaves offices he may be subject to liability for human rights abuses, including crimes against humanity and war crimes.
36 Simonovic, supra n. 34, pp. 33, 376.
37 ibid., 372–373.
38 M Schaeffer, 'Sovereignty, Influence, Realpolitik and the World Trade Organisation', in *25 Hastings International and Comparative Law Review*, (2002), p. 341. Schaeffer correctly points out that claims of lost sovereignty relating to the WTO are easily refuted in legalistic terms; what was really being complained about was loss of influence.
39 ibid. At 379, Simonovic also speaks of the 'ambition of the US . . . to remain the sole sovereign state in the international system of limited state sovereignty.'

sovereignty is at best slow and piecemeal and at worst, expedient and opportunistic. While the world ultimately acted to stop the atrocities that were occurring in the former Yugoslavia late last century, it is seemingly uninterested in curtailing armed conflicts that are currently devastating millions of lives in regions such as Congo, Sudan and Uganda.

Thus, while problems caused by migration controls could of course be eliminated at a stroke by abolishing nation–states, a viable immigration reform proposal must accommodate the notion of national sovereignty given the likely ongoing existence of states. Clearly a more nuanced approach is needed.

1.4 Migration controls

Thus, despite our reservations regarding the validity of state sovereignty, we accept that it is a phenomenon which is likely to continue in the near and foreseeable future. As noted above, jurisdiction sovereignty enables states to make migration laws of whatever nature they wish. This includes a total prohibition on entry into the state, however short the intended visit and for whatever reason. The opposite also applies: states may adopt an open border policy, enabling any person to come and live within their borders.

1.4.1 The advent of migration controls

Mass migration is not a new phenomenon.[40] It was a notable feature of the ancient world. However, it is has only been relatively well documented since the start of the sixteenth century. Three distinct phases of mass migration since that time have been identified. The first relates to the European colonial regimes, which from the sixteenth century developed expansionist programs and colonial ventures. This resulted in large numbers of Europeans been transferred to administer colonies in order to create new markets and to 'spread civilisation'. The main routes for migration were between Western Europe, the west coast of Africa and the Americas. This formed the infamous transnational triangle: the transfer of Western goods to Africa, of African slaves to the Americas and the produce from the Americas back to Europe. During the period of colonisation, migration was mainly coercive, driven by economic and social imperatives of Western Europe. Between 1500 and 1850, approximately 10 million slaves were transported from Africa to the Americas.

The second phase of migration involved millions of Europeans electing to leave their homeland to settle in the New World. This is referred to as the 'classical period' of migration. From 1825 to 1925, over 25 million people left Britain, mainly for the colonies or ex-colonies, such as Australia, South Africa, Canada

40 The brief summary of migration is derived from N Papastergiadis, *The Turbulence of Migration*, (2000), ch 1.