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Challenges to sovereignty: migration laws for the 21st century

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Introduction

Stories of migration law phenomena are everywhere. Tracking news around the world in the first few months of this year yielded more than one story per day, somewhere in the world, involving legal talk about migration. On February 23, 2003, for example, the Guardian reported that women trafficked into Britain to work as sex slaves are to be promised safe houses and medical care to encourage them to escape and testify against their pimps;¹ The New York Times reported (yet again) on increased border security preventing travel between adjacent towns on the US-Mexican border;² the Boston Globe told of ships from Spain, France, Italy, Portugal and Britain patrolling the Mediterranean to fight illegal migration.³

In late January this year, the Times of India, as well as various international press outlets reported on a dispute between India and Bangladesh about a group of illegal migrants caught between the two states.⁴ Contemporaneously, opposition parties in Botswana urged their president to take immediate action against an “invasion” of illegal migrants from Zimbabwe;⁵ police in Moscow threatened deportation against those who did not possess recently introduced “migration cards;”⁶ the Greek government announced that it had regularized the status of 650,000 illegal migrants;⁷ and the ABC broadcast (yet again) programming critical of Australia’s “Pacific Solution.”

That’s the news for only three days. Migration has captured the attention of the world’s press, and at each instance it is not only migration, but the intertwining of migration and legal controls which attract attention. Whether the story is of people smuggling, trafficking for the sex trade, asylum seeking, border-crossing terror suspects, or plans to attract sought-after IT professionals, the law is involved. At the cusp of the 21st century, migration has become an international moral panic. My remarks today are directed to why this is so, and what the consequences are for the present and the future of laws regulating migration.⁸ At the centre of my explanation is an understanding of how national sovereignty is challenged by contemporary globalizing forces and of how sovereignty and the rule of law are intertwined.

I begin this story by explaining the relationship between national sovereignty and migration laws over their reasonably brief history. I then talk about three intersecting phenomena which are emblematic of the relationship between migration law and sovereignty at this point in time: refugee law, illegal migration, and the pursuit of the best and the brightest. Finally, I finish by speculating about how the challenges to

¹ G. Hinsliff, ‘Campaign to free smuggled sex slaves’ *The Observer*, Sunday 23 February 2003.

² C. LeDuff, ‘Border towns are close enough to touch but worlds apart’ *The New York Times*, Sunday February 23, 2003.

³ P. Prada, ‘Spain moves on immigrant beachhead: Securing of border gets EU allies’ aid’ *Boston Globe*, 23 February 2003, A13.

⁴ P. Kanth, ‘Police stop eviction of Bangladeshi migrants’, *The Times of India*, 1 February 2003; ‘India halts drive to evict illegal Bangladeshi migrants’ *The Star* (Malaysia) 1 February 2003 (AP); ‘Illegal immigration serious problem, India to Bangladesh’ *Keralanext.com*, 29 January 2003.

⁵ P. Malema, ‘Opposition demands action on illegal immigrants’ *Mmegi Online*, 31 January 2003.

⁶ ‘Illegal migrants to fund police’ *Gazeta.Ru* 31 January 2003.

⁷ ‘Permits for 650,000 migrants’ *Kathimerini* 31 January 2003.

⁸ This paper was presented at the 13th Commonwealth Law Conference in Melbourne, Australia, April 2003. I extend my thanks to the conference organizers, and most particularly to Rapporteur Kim Rubenstein, for this opportunity to share my views.

sovereignty presented by these phenomena lead to particular types of migration law responses. I consider what it might take to view these challenges differently, and how doing so would contribute to different understandings of sovereignty, and of the sovereignty and rule of law intertwining.

Migration laws and national sovereignty

Migration laws are a twentieth century invention. Although it is certainly the case that passports and border controls emerged at an earlier point in time,⁹ it was not until the beginning of the twentieth century that the world was firmly and fully divided up by borders, and the requirement of passports and visas to cross them.¹⁰ What this means is that nation states and the system of international law and sovereignty that developed along with them and helped sustain them, got along for a good three centuries without migration law. Despite this, these relatively new laws have been strongly associated with sovereignty from the outset. In countries that share the British legal heritage, migration controls originated as an outgrowth of the Royal Prerogative. But this seems to be simply a way in which the power over migration was expressed in this context. In the United States, despite its revolutionary rejection of the Royal Prerogative and all it stood for, and its mythological embrace of immigration, sovereign power and migration control have also been closely linked.¹¹

Control over migration is interpreted, therefore, as being somehow intrinsic to what it is to be a nation, to 'stateness' and to the core of membership and national identity. Images which convey this run from the Statue of Liberty to crack SAS troops boarding the MV Tampa. In the law, the strong links between migration provisions and the notion of sovereignty have led to courts showing remarkable deference to executives in areas of immigration rule making¹² and to an international definition of a state which includes a defined population as an essential element.¹³

The advent – or perhaps onslaught – of globalisation¹⁴ challenges the relationship between migration control and national sovereignty. This occurs because globalisation's aggregated effects are often read as a challenge to sovereignty. Two features of our understanding of globalisation are important to migration law in its

⁹ This point is well argued by John Torpey in *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000).

¹⁰ A. Dummett and A. Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (London: Weisenfeld and Nicolson, 1990).

¹¹ See Stephen Legomsky's extensive argument in *Immigration and the Judiciary: Law and Politics in Britain and America* (Oxford: Clarendon Press, 1997). See also, T. A. Aleinikoff, *Semblances of Sovereignty: The Constitution, The State and American Citizenship*, (Cambridge, Massachusetts and London, England: Harvard University Press, 2002).

¹² This is a strong theme of both Legomsky's argument and of Aleinikoff's, *ibid.*

¹³ Montevideo Convention on the Rights and Duties of States 1933.

¹⁴ Defining globalization is an increasingly vexing task. I have considered this in some detail in C. Dauvergne, "Illegal Migration and Sovereignty" in C. Dauvergne (ed.) *Jurisprudence for an Interconnected Globe* (Aldershot: Ashgate Press, 2003). Some globalization theorists argue the trends which make up the idea of globalization are not new, but have been developing over a period of time, even for some analysts, a millennium. In my view, the present era is remarkable at least for the way that the use of the word globalization has proliferated. While globalizing trends are discernable over a longer period of time the past two decades show a marked intensification of connections of various sorts around the globe.

contemporary setting: the challenge to nation states and the way migration laws are narrated in stories of globalisation.

The first of these is highly contested. Full legions of scholars have tackled the question of whether the relevance and capacity of the nation state is being eroded by globalisation. The debate covers the spectrum from those who assert that the nation state has already been eclipsed,¹⁵ to those claiming it 'is anything but irrelevant,'¹⁶ to others who claim it is gaining in importance.¹⁷ Sovereignty is at the core of this debate: does the nation still have the capacity to act independently or are its actions and policy choices determined by developments within the international economic system? Most analysts agree, regardless of their assessment of the health of the nation state, that the nature of sovereignty is changing. The territorially based sovereignty that accompanied the rise of the nation state is being replaced by a sovereignty with a different logic.¹⁸ While there are many attempts at articulating this new logic, for some it is can be straightforwardly equated with people.¹⁹

This brings us directly to the second vital aspect of the globalisation story: how migration laws fit in to its narrative. That people are less mobile than money or ideas is often a factor in assessments of the resilience of the nation state. For Hirst and Thompson the fact that people remain 'nationalized' is the crucial element ensuring the continued importance of the nation.²⁰ Their analysis focuses on the elements of migration law – passports, visas, employment authorizations – and highlights the role of the nation state as the legitimator of law. Their conclusion that the nation remains robust is grounded in the minutiae of migration law and in the ideology of the rule of law.

All of this is vital to interpreting the strains of migration law at the present moment in time: migration control has been strongly associated with national sovereignty, sovereignty is under threat in a variety of ways, the strongest counters to those threats are elements of migration law. The current era therefore re-emphasizes the pairing of sovereignty and migration, and in the process brings questions of migration closer to the core of rule of law ideology.

All of this is easier to see, of course, with some examples. Refugee law, illegal migration, and the pursuit of the best and the brightest provide contrasting illustrations.

¹⁵ The best example is K. Ohmae, *End of the Nation State* (London: Harper Collins 1995).

¹⁶ J.G. Ruggie, 'Territoriality and Beyond: problematizing modernity in international relations' (1993) 47 *International Organization* 139, 142.

¹⁷ L. Weiss, *The Myth of the Powerless State: Governing the Economy in a Global Era*, (Cambridge: Polity Press, 1998).

¹⁸ This is discussed by a range of authors. Two example which pay particular attention to the law are K. Jayasuriya, 'Globalization, Law and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance' (1999) 6 *Indiana Journal of Global Legal Studies* 425 and D. Held, 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 *Legal Theory* 1.

¹⁹ K. Rubenstein and D. Adler, 'International Citizenship: The Future of Nationality in a Globalised World' (2000) 7 *Indiana Journal of Global Legal Studies* 519. See also P. Hirst and G. Thompson, *Globalization in Question* (Cambridge: Polity Press, 1996), who I would argue approach this position in their discussion.

²⁰ Hirst and Thompson, *ibid* ch 8.

Refugees, refugee law and sovereignty

The extent to which refugee law can be understood as a constraint on national sovereignty is exaggerated by the fact that there are no other international legal constraints in the migration law realm. Nations are free to open or close their borders as they choose, save to their own nationals, and they have concomitant independent control over who those nationals will be. Calls to reframe the Refugee Convention or announcements of upcoming derogations reflect the importance of migration control to perceptions of national sovereignty. On consideration, it is apparent that the Refugee Convention is a minimal constraint which has taken on mythic proportions in the present political climate, precisely because of the re-interpretation of sovereignty ushered in by globalizing forces.

The Refugee Convention was drafted in the aftermath of World War II and came into effect in 1954.²¹ It was modified in 1967 to remove its explicit focus on the events of the war in Europe.²² For the most part, the Convention reads like a human rights document, setting out standards of treatment for refugees by the states that host them. These aspects of the Convention receive scant attention, and the Refugee Convention is not even listed by the UN in its compilation of major human rights documents.²³ The aspects which do get attention are the refugee definition and the article protecting refugees from refoulement. Refugees are people fleeing persecution on the basis of one of five grounds (race, religion, nationality, particular social group or political opinion).²⁴

The refoulement provision translates into an effective right to remain in a host state because signatory nations undertake not to return refugees to those places where they face, in the words of the Australian High Court, a ‘real chance’ of persecution.²⁵ Because the twinning of sovereignty and migration control means that nations are not obligated to admit those who are not their nationals, there is usually no where a refugee can go, and thus protection from refoulement translates into permission to remain.

The relationship of the Refugee Convention and national sovereignty has several twists. But let’s begin at the beginning. When a nation commits itself to the Convention, it does so as a sovereign act. It chooses, voluntarily, to respect its provision, including where necessary the implication that some refugees will have

²¹ Convention relating to the Status of Refugees 1951, 189 UNTS 150.

²² Protocol relating to the Status of Refugees 1967, 606 UNTS 267, entered into force 4 October 1967.

²³ Office of the United Nations High Commissioner for Human Rights, “Status of Ratifications of the Principle International Human Rights Treaties as of 09 December 2002.”

²⁴ The complete definition in Article 1A defines a refugee as any person who: ...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

This definition is widely regarded as compromise ensuring relatively narrow eligibility for refugee status.

²⁵ Protection against refoulement is set out in Article 33. The real chance test was stated in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

permission to remain. This commitment does not redefine or challenge sovereignty as traditionally understood and is a commonplace of international law.²⁶

A second reason why refugee law does not present a significant challenge to sovereignty is that nations make efforts, legally and publicly and politically, to limit the number of refugees who will be protected by this Convention. These efforts are evinced in the widespread use of target or quota numbers for domestic refugee determinations, in safe third country policies, and in all variety of efforts to prevent and deter refugees from entering in the first place.

A third reason why the Refugee Convention is not a major challenge to sovereignty is that the non-refoulement provision – the only one which affects the nation’s sovereign capacity to admit or expel anyone save nationals – constrains the nations with the most sovereignty the least. That is, of the approximately 20 million potential candidates for refugee status currently in the world, a comparatively small number are in prosperous Western nations.²⁷ It is primarily in relation to these nations that refugee status is regarded as a somehow unfair advantage, akin to immigration status. It is for these nations that the formally equal notion of national sovereignty is most powerfully deployed in a globalised world.²⁸ For poor nations situated in places where refugees flow over their borders, the notion of sovereignty is so severely constrained by the North’s bankers and arrangers that the additional constraint the Convention might represent is a trifle.²⁹

Finally, the Refugee Convention is a scant constraint on sovereignty because prosperous nations like Australia and Canada which have been strongly associated internationally with the Refugee Convention, have begun backing away from some of its provisions without consequence. Examples of this include Australia’s so called ‘pacific’ solution under which people seeking to make claims were delivered by the state to non-signatory nations; and Canada’s *Immigration and Refugee Protection Act* which includes more stringent exclusions on the basis of criminality³⁰ than the exclusions or reasons for expulsion in the Refugee Convention.³¹ Each chips away at the scope of what will be considered state practice for signatory nations, and there is presently no forum for legal, as opposed to political, opposition to this to be heard.³²

The Refugee Convention also lacks the power to upset the migration law - sovereignty pairing because it is fundamentally not about immigration. I cannot fully address this

²⁶ There is some argument now that some aspects of refugee protection may be acquiring the status of customary international law or even *jus cogens*, which would alter this principle, but it is my view that many nations will resist this argument and thus defeat these assertions.

²⁷ Of the nearly 20 million people of concern to the UNHCR in 2002, approximately 15 million are in Asia, Africa, Latin America and the Caribbean; <http://www.unhcr.org/cgi-bin/texis/vtx/basics>.

²⁸ Peter Fitzpatrick discusses this hierarchy in *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001).

²⁹ It is also significant the both South American states and African states have committed themselves to more expansive refugee protection than that agreed to by the prosperous nations.

³⁰ *Immigration and Refugee Protection Act* S.C. 2001, c.27, ss.101(1)(f), 101(2).

³¹ As set out in Article 1F and in Article 33(2).

³² There is no international mechanism specifically for oversight of the Refugee Convention at this time. Some impetus is growing behind proposals to implement one. See J.C. Hathaway, ‘Who Should Watch Over Refugee Law?’ (2002) FMR 23.

argument here,³³ but would note that the pernicious blurring of the line between immigration control and refugee protection impedes humanitarian refugee objectives. I will talk further about this when considering illegal migration.

All these factors add up to a strong case that the Refugee Convention impinges very little on sovereignty. What accounts therefore for the role that refugee matters play in the growing moral panic about migration? The answer has two parts. One is that in the absence of any other constraints on sovereignty in the migration realm, potential protection against refoulement stands as a beacon to any destitute or desperate individuals around the world who might seek to better their life chances. In an era of where global inequities are increasingly stark, desperation is on the increase.

The second is that as sovereignty is increasingly being defined as control over population movements, the movement of refugees is much closer to the core of nations' understandings of their own essence and power than ever before. With the vast body of human rights norms now articulated and accepted internationally and arguably shaping or even constraining the actions that nations may take, the requirement not to refoule refugees still triggers a 'red-flag-to-a-bull' type response: it strikes at the core.

Two recent cases require some attention in this regard because of their engagement with refugees, sovereignty and the rule of law. In early 2003, both the Australian High Court and the English Court of Appeal have required the executive to meet a higher standard of procedural fairness in issues concerning refugee claimants.³⁴

In each case, the respective Court set a standard which left the government with ways of pursuing its objectives in accordance with the ruling, and thus the victories are narrow ones. However, both decisions focus on the fundamental procedural rights associated with the rule of law (as bolstered a federal constitution and the European Convention on Human Rights respectively) and represent a counter to the general trend of leaving the executive a wide discretion in migration matters. This could signal a separation of refugee and migration matters or alternatively a potential new willingness to reign in executive power in this area. Either would be welcome. Both decisions are important because the circumstances they address are situated at the confluence of refugee law and illegal migration.

Illegal migration

Illegal migration is an affront to sovereignty because it is evidence that a nation is not in control of its borders. Globalisation fuels illegal migration in several ways and the present response is a worldwide 'crack down' on illegal migration. Contempt for illegal migration also affects refugee law and public and political discussions of

³³ I do so in 'Beyond Justice: The Consequences of Liberalism for Immigration Law' (1997) 10 *Canadian Journal of Law and Jurisprudence* 323 and 'Amorality and Humanitarianism in Immigration Law' (1999) *Osgoode Hall Law Journal* 597.

³⁴ *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2 concerning the interpretation of an expansive privative clause introduced into the Australian *Migration Act* in 2002 and *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 346 concerning a provision making most asylum seekers who do not make their claims at the border ineligible for the National Asylum Support Service. A similar argument can be made regarding the 2002 Supreme Court of Canada ruling in *Suresh v Canada* (Minister of Citizenship & Immigration) [2002] 1 SCR 3.SCC 1.

refugees. These are the aspects of illegal migration that engage the migration law – sovereignty intertwining.

An important threshold issue for talking about illegal migration is attempting to define it.³⁵ Technically, anyone who is present in a nation state without either nationality or authorization under law is an illegal migrant. Most people around the world who have no legal migration status have overstayed tourist, student or work visas. Still, the image conjured by the term ‘illegals’ is of people suffocating in the backs of lorries, of unseaworthy vessels in the Adriatic, Mediterranean or Timor seas, of those from the South attempting to evade capture along the US-Mexico border. The term ‘illegal’ has escaped its legal, and even grammatical, moorings and now stands alone as a noun. It does not conjure British backpackers overstaying on Australia’s Gold Coast, or Kiwis working in London’s pubs. It conjures sweatshops and sexshops, poverty, and race. The face of the imaginary illegal is poor and brown and destitute. This imagery works against careful attempts to define illegal migrants as those who transgress migration laws; it complicates attempts to respond appropriately to the phenomenon and to understand how and why it challenges sovereignty.

It is difficult to be certain, of course, that illegal migration is on the increase. In Australia one can observe that since mid-1999 the number of unauthorized boat arrivals (approximately 9,500) has exceeded those of the previous decade (approximately 4,000).³⁶ While these numbers represent a small fraction of the total number of migration law transgressors in Australia (an estimated at 60,000 overstayers at the end of June 2002),³⁷ this is the number which captures public attention. These are the arrivals which threaten the nation by their very existence; that the army and navy are deployed to meet, and that the government has reframed Australian sovereignty to thwart.³⁸ The national panic triggered in Australia by the 9,500 who have arrived since 1999 is a microcosm of the international politics of illegal migration.

It is a very ‘micro’-cosm indeed. Worldwide, the number of ‘illegals’ of any sort might plausibly be estimated as at least 20 million. In the United States, estimates of the size of the illegal population range from five million to 15 million.³⁹ The International Organization for Migration estimated the number of unauthorized migrants in Europe at three million in 1998.⁴⁰ In 1994, one estimate suggested there were 500,000 illegal migrants in the Philippines.⁴¹ Reports of the size of the illegal population of Nigeria have ranged from 300,000 to 2.5 million over the past two

³⁵ A thorough discussion of the dilemmas this presents is given in B. Ghosh, *Huddled Masses and Uncertain Shores: Insights Into Irregular Migration* (The Hague, Boston, London: Martinus Nijhoff Publishers, 1998) at ch 1.

³⁶ Department of Immigration, Multicultural and Indigenous Affairs Fact Sheet 47, ‘Unauthorized Arrivals by Air and Sea’ available at www.immi.gov.au/facts/74unauthorised.htm.

³⁷ Department of Immigration, Multicultural and Indigenous Affairs Fact Sheet 86, ‘Overstayers and People in Breach of Visa Conditions’ available at [ww.immi.gov.au/facts/86overstayers_1.htm](http://www.immi.gov.au/facts/86overstayers_1.htm).

³⁸ Migration Amendment Act (Excision from Migration Zone) Act 2001.

³⁹ The Immigration and Naturalization Service provides one well regarded set of statistics. The overall range is discussed by Ghosh, n 34 above, 10.

⁴⁰ IOM, World Migration Report 2000. This report will soon be reissued as World Migration Report 2002.

⁴¹ As reported by the *Manila Chronicle* and discussed in Ghosh, n 35 above, 16.

decades.⁴² The best available information suggests that these numbers are on the increase, although not each year in each region.

What is certain is that concern about illegal migration is increasing even more rapidly than the phenomenon itself. Illegal migration feeds on the communication and transportation technologies of globalisation. People smuggling and human trafficking operations which are part of illegal migration use these technologies to, for example, present people in China's Fujian province or in a Pakistani refugee camp, with destination options - 'delivering' them to the borders of the United States, Australia or Fortress Europe.

In response to the perceived or real growth of illegal migration, and to the evident increase in smuggling and trafficking that is intertwined with it, the nations of the prosperous world are cracking down. In 1996 the United States introduced its *Illegal Immigration Reform and Immigrant Responsibility Act* focusing on measures such as entry and exit controls, document fraud, people smuggling, and a ratcheting up of employers' sanctions for those who employ extra-legal workers. The United States has also poured millions of dollars into 'Operation Gatekeeper' to bolster security along its border with Mexico. The 1999 British *Immigration and Asylum Act* targeted unfounded asylum applications, fast tracking 'out' of the asylum system but not into it, reducing rights for asylum seekers and introducing new identity controls. More recently, Britain has stringently curtailed the provision of welfare state benefits for asylum seekers.⁴³

Germany changed the form of its constitutional right to seek asylum in 1993 and in 1998 it introduced new laws reducing benefits for asylum seekers. France has reduced asylum seeker benefits within the past decade. Since 1999 Australia has removed the possibility of permanent status from some refugees, has declared some of its own territory to 'beyond its borders' for the purpose of asylum claims, and introduced a comprehensive privative clause into its legislation.⁴⁴ Canada has introduced a mandatory requirement that its refugee decision-makers take into account whether a claimant has adequate documentation.⁴⁵ The EU is currently working on developing a common policy on illegal immigration to give effect to the Treaty of Amsterdam commitments in this direction. Illegal migration – impossible by definition at the outset of the twentieth century – is at the top of the legal agenda for the twenty-first.

There are two things about this phenomenon which are essential to the story I am relating of national sovereignty and migration law. The first is that the legal crack down needs to be understood in the context of the threats globalization presents to nation states. In the face of diminished sovereignty in economic policy and trade realms, in military matters and corporate management, cracking down on illegal migration represents a strong assertion of sovereign control. This may be one reason why EU cooperation has been slow to develop in this area, because the capacity to crack down is related to the new last bastion of sovereignty, and is therefore the

⁴² Ghosh, n 35 above, 17.

⁴³ Under Section 55 of the *Nationality, Immigration and Asylum Act 2002*, which came into effect on 8 January 2003.

⁴⁴ *Migration Legislation Amendment Act (No.1) Cth 2001*.

⁴⁵ *Immigration and Refugee Protection Act S.C. 2001, c 27, s 106*.

hardest to surrender. Nations assert their ‘nationness’ by cracking down on illegal migration.

In addition, a rhetorical focus on ‘illegals’ shifts the boundaries of exclusion. When a part of the population is acknowledged to be ‘illegal’, they are excluded and erased from within. Even when sovereignty at the border is breached, labelling people within one’s territory ‘illegal’ imprints sovereignty. It effectively shifts argument about membership and entitlement. When people are identified as ‘illegal’ it is hard to argue their membership claim on the basis of their contribution to the economy or their long term residence. These contributions are instead counted as evidence of their transgression. Sovereignty in this picture is again seen to be about people rather than territory, as the label ‘illegal’ allows us to shift the US-THEM line from the border of the nation to within the nation, wherever it is required.

The second aspect of the crack down on illegal migration to consider is its relationship with refugee law and refugees. The Refugee Convention provides no right to enter for those who seek to claim refugee status. This means that some people seeking refugee status enter illegally.⁴⁶ The Convention does require that refugees not be penalized for illegal entry,⁴⁷ but this provision cannot protect refugees from the effects of a moral panic about illegal migration. It cannot protect them from public and political disapproval, nor from detention until their status is determined. It cannot protect them from the erroneous notion that there is a ‘queue’ to be joined to enter prosperous nations and the accompanying fiction that ‘waiting it out’ in a refugee camp, or worse, would eventually achieve a similar outcome while ensuring moral superiority.

Refugees are caught up in the moral panic about illegal migration because some refugee claimants enter illegally. As well, refugees and illegal migrants occupy much of the same space in our collective imagination. They are envisioned as have nots, hoping to gain from our beneficence. They are foreign, other, desperate, brown-skinned. They are not us. Thus the current crack down on illegal migration cracks down on refugees as well.

The problem for refugees is also heightened by the fact that cracking down on illegal migration increases the incentive for those who are not refugees to attempt to attain this status. That is, there is an incentive to lie. The incentive can be a sophisticated one, organized with the support of smugglers or agents. It can also be an unsophisticated one, encouraged by the knowledge that such status is available for some who are vulnerable and desperate, and the certainty that one fits into those categories.

The picture is further complicated by the fact that we know that refugees tell lies – some because of their illegal entry, some because of their experiences with governmental authorities, some because of the increasingly stringent requirements (for example in regard to identity) which are brought in by crackdown measures. Telling a lie does not mean one is not a refugee, but it is troubling and confusing to refugee decision-makers. In an atmosphere where the incentives to lie are being

⁴⁶ This is not true of all refugee claimants because they can also enter on visa and then seek refugee status, or in some countries can enter without a visa.

⁴⁷ Article 31(1).

increased for non-refugees, credibility is ever harder to establish and suspicion abounds.

Increased international concern about illegal migration brings increased problems for refugees. These in turn contribute to the blurring of immigration and refugee concerns which are themselves at the root of much of the present hostility towards refugees.

The best and the brightest

But there are some migrants who are sought after. The worldwide stakes to recruit the most highly qualified migrants are heating up. The competition for the world's best and brightest also contains a challenge to sovereignty, and reflects a bounded view of national aspirations. This area of migration regulation is also poised to shift at the outset of the twenty-first century.

Canada and Australia have been, with their points systems for identifying and categorizing economic 'skilled' migrants, at the forefront of attempting to recruit migrants to fuel the national economies. Both countries have, in the past decade, made economic category migrants the largest category of annual intake, moving family migration to second place. This trend is reflected, though not yet so dramatically, in other popular destination nations. Even the United States, where annual migration intake is presently overwhelmingly weighted in favour of family reunification migration,⁴⁸ is considering moves in this direction. This in spite of the fact that the size of the United States economy is such a significant draw that such measures are arguably unnecessary. Nations are increasingly casting themselves as being in a competition for the world's most desirable migrants.

This trend means that migration laws at this point in time reflect one of the paradoxes at the centre of globalization: for those with more, globalization makes more available, for those with less, there is less. Inequalities are increased, exclusions are underscored.

The recruitment of economic migrants is premised on a nationalized view of economies and a dated understanding of migration categories. Even those most sceptical about the effects of globalization consider that economic priorities are increasingly influenced on a global level. When the nation sets out to bolster its economy by shifting the location of particular workers and entrepreneurs, it is attempting to counter this trend. When a nation awards membership on the basis of investment, it is seeking to influence what would otherwise be the global distribution of capital. Furthermore, competitive recruitment for economic migrants points up the fact that the current categories of migration are no longer appropriate.

Many 'permanent' migrants stay for several years and then move on. If they were recruited by one prosperous nation on the basis of their economic value, they are likely to find themselves admissible to others as well. Indeed, they may well return 'home' permanently or temporarily. While it is true that nations such as Canada and Australia are also ratcheting up their capacity to accommodate temporary workers, it

⁴⁸ In 2001 the United States admitted approximately 675,000 family reunification migrants and 280,000 migrants whose admission was based either on economic skills or the green card lottery.

remains the case that very little effort is made at analyzing whether categories of permanent and temporary migration are meaningful. Rules in this category, therefore, reflect a backward looking view of both economies and migration trends.

Best and brightest migration, which makes for good politics in receiving states, is a direct cause of brain drain in less prosperous nations. When the competition for skilled and wealthy migrants increases, so does the drain away from sending states. One important example of this are the parallel policy shifts in Australia and Canada which make it easier for those who have entered as tertiary students to remain as workers. This represents superior economic rationalization for the host state – the possibility of capturing the elevated foreign student tuition without the downside of losing someone whose education the state has subsidized and supported. In addition, those who have lived in the country as students will necessarily encounter fewer transition issues than migrants arriving for the first time.

For the receiving state, this makes good sense and is an easy sell. It ignores the global implications of migration, and thus, again, merges migration and sovereignty. There is no forum for considering issues of global equity in migration policy because sovereign control over the question is settled. The challenge that the recruitment of skilled migrants poses to sovereignty lies in the structure of the internationalized economy to which they are recruited and the impermanence with which they remain.

This recruitment of economic migrants also signals a shift in the meaning of migration for nations. Prior to the advent of migration laws, and through much of the twentieth century, migration was twinned with national economic goals. Hardworking people in search of a better life travelled to the ends of the earth and made those places their homes. They came with little or nothing and they made new lives for themselves. This is no longer possible. People with little or nothing, who want a better life for themselves and who are prepared to risk all and work hard to get it are now ‘mere economic migrants’ and ‘bogus refugees.’ The very qualities which make up the mythology of ‘immigrant nations’ are now migration *disqualifiers*. In this way, the logic of immigration and refugee laws are overlapping.

Those who are now known for arriving in prosperous nations and turning their family’s fortunes around within a generation have arrived as refugees. The Indochinese refugee crisis of the late 1970s and early 1980s sent individuals around the world who now, a generation later, are being heralded for their adaptation and achievements, just as earlier migrants have been. This makes it even harder to keep refugee efforts separate from immigration issues in political and public minds.

Conclusions

Given contemporary globalizing forces, illegal migration, economic migration and refugee flows overlap and each challenges sovereign control over population. The challenges to sovereignty represented here are more important than ever before because sovereignty is being re-invented with an increasing focus on the elements of migration law: borders and passports, visas and work permits. The increasing importance of migration law to ‘nationness’ helps explain public, political and legal approaches to these issues. But these factors, at the same time, make it harder to envision how migration law provisions might realistically be shaped to deal with the

challenges of the twenty-first century. Neil MacCormick's assurances notwithstanding, most nations, and especially their leaders, are not enthralled by diminutions of sovereignty.⁴⁹

What might move migration law forward at this juncture? As migration is such a politicized issue, a key element in altering law and policy in the area has to be an increased understanding, at a broad public level, of the changing nature of migration. While governments have shifted their policies in recognition of shifting trends, they have not altered their rhetoric. The migration mythology which grounds many new world nations is still engaged at an exhortatory level, without recognition that its logic no longer applies: there is not a queue, those willing to do backbreaking labour in service of the nation are no longer welcome, or at least not officially.

An increased understanding of refugee law is equally important to ensure support for this important international human rights norm. The Refugee Convention does not create illegal migration, nor does it draw people to prosperous nations. The 'draw' such that it is, is created by intense global inequalities. Prosperous countries such as the United States, Canada, Australia, New Zealand, the United Kingdom and indeed most European nations present themselves internationally as good, rights respecting, prosperous places to live. They host the Olympics. They are symbols worth attacking. The technologies of globalization mean that these images are easier to access, the invitation to a better life is extended to more and more people. That there is no access to this better life for most of the people in the world is the truth of our current structure of international relations. It is too much to drop this on the doorstep of the Refugee Convention. The Refugee Convention contains its own narrowing mechanisms ensuring that through proper and consistent interpretation it can alleviate some of the most serious kinds of suffering in the world. It is important to keep alive the compromise between sovereignty and human rights that it represents.

Citizenship in a prosperous nation is an immense privilege, but not a naturally occurring one. This privilege is a legal construction, protected and defended by a strong and evolving version of sovereignty. Those of us who can assert this badge of membership must do so with a rich understanding of the pure good fortune – a simple accident of birth – by which we possess it. The legal rights it carries should not be accompanied by claims of moral superiority. They come from a history of conquest and colony, and from the power of those who controlled the early international law system.

Strong assertions of sovereignty in migration law are a logical response for nations facing increasing erosions of capacity in other areas. But sovereignty also contorts decision-making in this area when considered from a global perspective because the key migration law issues at this juncture in history are, by definition, beyond the borders of any one nation. While there are considerable incentives for similarly situated nations to cooperate (and the European Union is the principal example here), the sharpest need for cooperation is between nations which are not similarly situated. This is almost impossible without an appreciation of the fiction of formal sovereign equality. If policy debates about migration law continue to be framed solely or

⁴⁹ N. MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1. MacCormick argues that sovereignty can be lost to the benefit of all.

primarily in terms of national interest, these debates will have diminishing capacity to address the principle tensions facing migration at this moment.

One way forward may be by reference to the rule of law.⁵⁰ That is, while recognizing that the rule of law has strong traditional affinities with sovereignty as a framing and limiting concept, it also has a traditional content of principles which can stand apart from a sovereign body such as the state. Recent decisions of some courts may be evidence that the traditional deference of the courts towards executive decision-makers in this area is diminishing at precisely the same point where migration and sovereignty are being drawn even more closely together. This suggests an understanding of sovereignty which goes beyond 'mere' power, and is instead power appropriately used. The content of that 'appropriateness' may be defined by the rule of law. The rule of law has a long history of extending its reach to meet its grasp. This may yet happen in the migration realm too. And it would be a good thing.

⁵⁰ This argument draws some inspiration from David Held's idea of cosmopolitan sovereignty. While Held does not consider the case of migration laws, I believe they could fit within his argument and would add an important dimension to it. I agree with Held that 'The limits of liberal international order may have been reached.' See D. Held, "Law of States, Law of Peoples: Three Models of Sovereignty" above n 18.