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Human Rights Without Borders

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HUMAN RIGHTS WITHOUT BORDERS

Christian Gonzalez Chacon

Today the universalism of human rights is put to the test by the pressure on our borders from hordes of hungry peoples, in such a way that being a person is no longer a sufficient condition to possess these rights. These have become citizenship rights... citizenship has ceased to be the foundation of equality... it functions as a privilege and a source of exclusion and discrimination with respect to non-citizens.

Luigi Ferrajoli¹

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¹ Luigi Ferrajoli, *Más allá de la soberanía y la ciudadanía: un constitucionalismo global*, 9 ISONOMÍA 173, 176 (1998).

INTRODUCTION

In the current global context, millions of people are forced to migrate yearly for reasons ranging from persecution and violence, internal armed conflicts, and forced displacement, to lack of employment and climate change. In the Americas, we recently witnessed the phenomenon of the “migrant caravans,” where thousands of people, mostly from the Northern Triangle of Central America—El Salvador, Honduras, and Guatemala—were willing to walk hundreds of miles to enter the U.S.-Mexico border to escape poverty and violence in their countries.² Another caravan of close to 10,000 migrants from the Northern Triangle of Central America including Guatemala, El Salvador and Honduras, as well as Venezuela, Haiti, and other countries, formed in Mexico in 2022 with the goal of entering the United States.³ The deteriorating political and economic situation in Venezuela over the past few decades has produced a humanitarian crisis in migration. There are currently at least six million Venezuelan migrants and refugees globally.⁴

Further, thousands of people risk their lives to cross the Mediterranean to Europe on boats. According to the United Nations High Commissioner for Refugees (UNHCR), the most common countries of origin of people attempting to enter Europe via the Mediterranean are those impacted by conflict and displacement, especially in the East and Horn of Africa Regions.⁵ In 2014, more than 200,000 refugees and migrants moved from East and West Africa to North Africa and from there to Europe. This number peaked in 2015, when more than one million refugees and migrants reached Europe.⁶ The UNHCR documented more than 3,231 dead or missing at sea in 2021, a situation that the UNHCR qualified as a “widespread, longstanding and largely overlooked tragedy.”⁷

In mid-2021, thousands of Afghan nationals fled the country after the Taliban takeover, and several European Union member States agreed to

² Eduard Fabregata, Sara Vinyals-Mirabent & Marian Meyers, “*They Are Our Brothers*”: *The Migrant Caravan in the Diasporic Press*, 31 *HOW. J. COMM’N.*, 204 (2020).

³ Zach Schonfeld, *New migrant caravan headed for US timed for Summit of the Americas*, *THE HILL* (June 7, 2022), <https://thehill.com/latino/3514264-new-migrant-caravan-headed-for-us-timed-for-summit-of-the-americas/>; see also *Migrants set out from southern Mexico in 1st caravan of 2023*, *LAPRENSALATINA* (Feb. 28, 2023), <https://www.laprensalatina.com/migrants-set-out-from-southern-mexico-in-1st-caravan-of-2023/>.

⁴ U.S. AGENCY OF INT’L DEV., *FACT SHEET #3, VENEZUELA REGIONAL CRISIS - COMPLEX EMERGENCY* (2023).

⁵ *Mediterranean Sea journeys for migrants have grown more deadly: UNHCR*, *U.N. NEWS* (June 10, 2022), <https://news.un.org/en/story/2022/06/1120132>.

⁶ *Id.*

⁷ *Id.*

provide safe journey as well as resettlement to around 40,000 Afghan refugees.⁸ Moreover, the Russian invasion of Ukraine in February 2022 set off a massive migration wave, mostly made up of women and children, heading for neighboring countries.⁹ As of July 2023, more than 6.3 million individuals fled Ukraine.¹⁰ While many migrants manage to obtain the approval of their asylum or refugee applications in host countries, others are forced to stay in tragically insecure and unstable situations. In fact, more than forty million individuals worldwide are migrants with an “irregular” status.¹¹ Many others face the dehumanizing migration governance that includes expedited return procedures with limited access to asylum or human rights protections, lack of humanitarian assistance, and criminalization for their irregular arrivals.¹² For instance, in 2021, the Dominican Republic returned more than 44,000 migrants to Haiti, including hundreds of pregnant women and new mothers, based on a decision by the National Migration Council, who argued that no person representing an “unreasonable financial burden” should be allowed entry.¹³ In addition, at least 330,000 children are detained every year for migration-related purposes, and more than seventy states still detain children for migration reasons.¹⁴

The extent and inhumanity of irregular migration is the symbol—and consequence—of the failure of the human rights project as a mechanism to guarantee global justice. There is an abyssal line that divides communities

⁸ Felipe Gonzalez Morales (Special Rapporteur on the Human Rights of Migrants), *Human rights violations at international borders: trends, prevention and accountability*, ¶ 22, U.N. Doc. A/HRC/50/31 (Apr. 26, 2022).

⁹ Patrick Kingsley, *Ukraine War Sets Off Europe’s Fastest Migration in Decades*, N.Y. TIMES (Mar. 1, 2022), (nytimes.com).

¹⁰ *Operational Data Portal, Ukraine Refugee Situation*, UNHCR (last visited Sep. 7, 2023), <https://data2.unhcr.org/en/situations/ukraine>.

¹¹ See generally *Migrants with Irregular Status in Europe, Evolving Conceptual and Policy Challenges* (Anna Triandafyllidou & Sarah Spencer eds., Springer Open 2020) (referring to migrants with irregular status as those individuals who, for various reasons, do not have a stay permit in the country where they are located, and as a result, they may be expelled from the country, including people who crossed a border unlawfully, visa over-stayers, children born to undocumented parents, migrants who lost their regular status, rejected asylum seekers, and so on).

¹² Felipe Gonzalez Morales (Special Rapporteur on the Human Rights of Migrants), *Human rights violations at international borders: trends, prevention and accountability*, ¶ 24, U.N. Doc. A/HRC/50/31 (April 26, 2022).

¹³ *Id.* ¶ 29.

¹⁴ Felipe Gonzalez Morales (Special Rapporteur on the Human Rights of Migrants), *Ending immigration detention of children and providing adequate care and reception for them*, ¶ 12, U.N. Doc. A/75/183 (July 20, 2020); IACHR, *Inter-American Principles on the human rights of all migrants, refugees, stateless persons and victims of human trafficking*, Resolution 04/19 (Dec. 7, 2019), Katja Hujo, *A global social contract: New steps towards a rights-based approach to migration governance?*, 19 GLOB. SOC. POL’Y 1-2 (2019).

of rights and systems of oppression when it is not possible for migrants to move freely from one place to another.¹⁵

International experts and scholars have suggested that the solution to dehumanization at the borders is a human rights-based approach to migration and border governance that ensures respect for migrants' rights.¹⁶ This, however, sorely lacks the backing of hard law. Hence, in the context of migration, we hear repeatedly of "humanitarianism," suggesting that our treatment of the other at the border is oriented by kindness and humanity, not legal mandate or duty.

I shall argue in this paper that the humanitarian discourse hides the fact that the core of the migration problem is that rights are linked to nationality and not to humanity. Rights are "trump cards held by individuals"¹⁷ that should be respected by the nation state of which one is a citizen or to which one belongs. Human rights fails to realize the ideal of universal justice because they naturalize the border, the Nation State, and sovereignty. In brief, we live in a context of human rights that seek to guarantee peace through the division and separation that sovereignty bestows, rather than through the construction of a global community of rights.¹⁸ I shall argue that we need to revitalize human rights as a project of global justice without borders. To do this, the community of human rights scholars must rethink the relationship of rights to the Nation State and move beyond its imagined and confined community.

As I have discussed in a prior paper,¹⁹ the current foundation of human rights is based on the triad of rationality, autonomy, and freedom, a formulation that goes back to the Enlightenment thinking of Descartes, Kant, and Rousseau.

Descartes positioned the human being as the center of creation when justifying his *ego cogito*. By affirming in his famous *Discourse on Method* that "I think, therefore I am" and that we are "a substance the whole essence or nature of which is simply to think and which, in order to exist, has no need of any place nor depends on any material thing"²⁰ he ended up

¹⁵ BOAVENTURA DE SOUSA SANTOS, *THE END OF THE COGNITIVE EMPIRE* 6 (2018).

¹⁶ Gonzalez, *supra* note 12, ¶ 77.

¹⁷ Ronald Dworkin, *Is there a right to pornography?*, 1 OXFORD J. LEGAL STUD., 200 (1981).

¹⁸ JUDITH BUTLER ET AL., *THE POWER OF RELIGION IN THE COMMON SPHERE* 15 (Eduardo Mendieta & Jonathan Vanantwerpen eds., Columbia Univ. Press 2011) (statement of Jurgen Habermas) ("Today, under conditions of globalized capitalism, the political capacities for protecting social integration are becoming dangerously restricted.").

¹⁹ Christian González Chacón, *A Non-Human Theory of Rights from Latin America*, ICL JOURNAL, 2023.

²⁰ RENÉ DESCARTES, *DISCOURSE ON METHOD AND MEDITATIONS ON FIRST PHILOSOPHY* 18-19 (Donald A. Cress trans., Hackett Publishing Company 4th ed. 1998).

defining human nature based on rationality—on a very disembodied rationality in fact. With our reason and knowledge, we can make ourselves the masters and possessors of nature.²¹ Decolonial thinking from Latin America has shown that the cartesian “I think” was equivalent to “I conquer.” Behind the *ego cogito* “there is a hidden logocentrism through which the Enlightenment subject is deified and made into a sort of demiurge capable of constructing and dominating the world of objects.”²²

Kant, in turn, invented the idea of autonomy. Today, autonomy constitutes the bedrock of international human rights law. In “What Is Enlightenment?” Kant underscores that the main point of the movement is “man’s emergence from his self-imposed nonage” (the inability to use one’s own understanding without another’s guidance). Dare to know! (*Sapere Aude*) is the motto of the enlightenment.²³ In his view, the individual gives himself the moral law using his reason.²⁴ For Kant, a “man who stands in dependence on another is no longer a man, he has lost his standing, he is nothing but the possession of another man.”²⁵ From there on, the autonomous individual entering a social contract with other individuals would be the only possible foundation of political authority.²⁶

While Kant is the creator of a new “cosmopolitan right” so that a foreigner would not be treated as an enemy, he makes a sharp distinction between the right of individuals to visit other countries and the right to reside permanently. Kant concedes only the former, not the latter. A foreigner can visit, but he can never become a resident, which would require a “benevolent contract” such as to allow him to be a housemate for a permanent period of time.²⁷ Further, he “excludes and stigmatizes *a priori* any migratory movement and any nomadism.”²⁸ Mignolo suggests that Kant’s cosmopolitanism was still an imperial project. It was “cast under the implicit assumptions that beyond the heart of Europe was the land of those who had to be brought into civilization . . .”²⁹

²¹ DAVID LUBAN, *LEGAL MODERNISM* 26 (The University of Michigan Press 1994).

²² See Santiago Castro-Gómez, *Critique of Latin American Reason*, COLUMBIA UNIVERSITY PRESS 23 (2021); See also ENRIQUE DUSSEL, *FILOSOFÍA DE LA LIBERACIÓN* 19 (2013).

²³ Immanuel Kant, Essay, *What Is Enlightenment?* <http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html>.

²⁴ MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* 24-25 (2018).

²⁵ ERNST CASSIRER, *ROUSSEAU, KANT, AND GOETHE* 18 (Harper Torchbooks 1963) (1945).

²⁶ LYNN HUNT, *INVENTING HUMAN RIGHTS*, 60 (2008).

²⁷ DONATELLA DI CESARE, *RESIDENT FOREIGNERS: A PHILOSOPHY OF MIGRATION* 77 (2020).

²⁸ *Id.* at 18.

²⁹ WALTER D. MIGNOLO, *THE DARKER SIDE OF WESTERN MODERNITY: GLOBAL FUTURES, DECOLONIAL OPTIONS* 199, 281 (2011).

Rousseau created the definitive anthropocentric revolution of law. In his *Social Contract*, he developed the idea that the basis of authority is the social contract and laws are the conditions of these civil associations. The purpose of this contract is the preservation of the contracting parties. Religion is no longer the source of law, and it gets confined to the private sphere where it becomes a private morality.³⁰ In his words, “each man, while uniting with all, nevertheless obeys only himself and remains as free as before.”³¹

This foundational triad eventually kept human rights anchored in the Nation State. With Descartes, we close the community of rights to rational beings. Animals and nature are excluded. In the context of migration, States deny rights to migrants by leaning on the sub-humanity they assign to them, people on the move are animalized and depicted as parasites, swarms, criminals or bringers of disease and cultural pathologies.³² They are less rational, they are the danger, they are not prepared for the civilized way of living in the country they are trying to enter. Rousseau insisted that “neither *the nègres* nor the Laplanders have the intellect of Europeans”³³ or that there are prodigious differences between the individual with the flattened nose, large lips, and differently shaped ears with other species of men.³⁴ Contemporary human rights law bears the traces of this sad Rousseauian legacy. Furthermore, with Rousseauian freedom as the basis of rights, how can an individual demand that her rights be respected if she is not part of the social contract of the community she is trying to enter? And yet another detail on Rousseau: because he sees intersubjectivity as a problem, his thinking does not set up the conditions for cohabiting the earth peacefully and in harmony.³⁵ Rousseau rejects the Aristotelian idea of the social nature of man and instead considers that, by nature, man has a single

³⁰ JEAN JACQUES-ROUSSEAU, *THE SOCIAL CONTRACT* 11, 16 (Susan Dunn ed., Yale University Press 2002) (1762).

³¹ Annelien de Dijn, *Rousseau and Republicanism*, 46 *Political Theory* 62 (2018).

³² GRACIE MAE BRADLEY & LUKE DE NORONHA, *AGAINST BORDERS: THE CASE FOR ABOLITION* 15 (2022); Further, Étienne Balibar explains that “. . . [T]hose who have been excluded from citizenship (and there are always old or new categories that are) are represented, and so to speak “produced,” by all sorts of disciplinary or institutional mechanisms, as imperfect human beings, as “abnormals” or monsters on the margins of humanity”. See ÉTIENNE BALIBAR, *CITIZENSHIP* 16 (2015).

³³ ANDREW S. CURRAN, *THE ANATOMY OF BLACKNESS: SCIENCE AND SLAVERY IN THE AGE OF ENLIGHTENMENT* 219 (2013).

³⁴ See VOLTAIRE, 11 *ŒUVRES COMPLÈTES DE VOLTAIRE*, 3-156 (1879), see also Gianamar Giovannetti-Singh, *Racial Capitalism in Voltaire’s Enlightenment*, 94 *HIST. WORKSHOP J.* 36 (2022).

³⁵ According to Honneth, Rousseau sees intersubjectivity as a problem, rather than as an opportunity for individual subjects. Our encounter with the other creates uncertainty about one’s own self and can mean seeking recognition entails subjecting ourselves to the dictatorial authority of public opinion. See AXEL HONNETH, *RECOGNITION: A CHAPTER IN THE HISTORY OF EUROPEAN IDEAS* 45-47, 52, 67 (2020).

instinct: self-preservation, a quality he must renounce as soon as he enters society.³⁶ As later said by Sartre, heir to the philosophical tradition of the French Enlightenment—“hell is other people.”³⁷

Following Kant, human rights scholarship and law has tethered itself to the liberal autonomism that generates the separation of individuals, making it all the more difficult to build communities of rights. Autonomy is to the individual what sovereignty is to the Nation State.³⁸ It neutralizes the claims of unity and building common projects of humanity.³⁹

For both Kant and Rousseau, men self-legislate with their reason, but through a social contract by autonomous choice, they appoint a super-legislator (the sovereign) that represents the popular will. Rights emanate from this sovereign power of the people.⁴⁰ Thus, rights and state sovereignty become mutually dependent.⁴¹ As explained by Donatella Di Cesare, in the context of migration, “thanks to liberalism’s fiction of the voluntarily stipulated contract, the idea has spread that one can decide who to admit or who to exclude with a similar autonomy.”⁴²

During the French Revolution, the French Revolutionaries secured the marriage between human rights and state sovereignty. As Arendt explains:

. . . [T]he French revolution combined the declaration of the Rights of Man with the demand for national sovereignty. The same essential rights were at once claimed as the inalienable heritage of all human beings *and* as the specific heritage of specific nations, the same notion was at once declared to be subject to laws, which supposedly would flow from the Rights of Man, *and*

³⁶ Ernst Cassier, *supra* note 25 at 28.

³⁷ Jean Paul Sartre, *No Exit*, <https://ia800700.us.archive.org/11/items/NoExit/NoExit.pdf> (last visited Sept. 8, 2023).

³⁸ Hobbes for instance, anthropomorphized the State and argued that it was like a person. In his words “a city therefore (that we may define it) is one Person, whose will, by the compact of many men, is to be received for the will of them all; so, as he may use all the power and faculties of each particular person, to the maintenance of peace, and for common defense”. See THOMAS HOBBS, *DE CIVE* 9 (1962).

³⁹ Fukuyama notes that the current understanding of personal autonomy has expanded relentlessly and tends to trump all other vision of the good life. In his view the belief in the sovereignty of the individual deepens liberalism’s tendency to weaken other forms of communal engagement and turns people away from virtues like public-spiritedness that are needed to sustain a liberal polity overall. Additionally, the type of liberalism that seeks to be neutral with regard to values, will eventually turn on itself by questioning the value of liberalism itself. See FRANCIS FUKUYAMA, *LIBERALISM AND ITS DISCONTENTEDS* viii-xi (2022) (eBook).

⁴⁰ *Id.* at 38.

⁴¹ See for instance MARTHA C. NUSSBAUM, *THE COSMOPOLITAN TRADITION, A NOBLE BUT FLAWED IDEAL* 102 (2019).

⁴² Di Cesare, *supra* note 27 at 212.

sovereign, that is, bound by no universal law and acknowledging nothing superior to itself.⁴³

According to Patrick J. Deneen, in the liberal worldview there are only individuals and the sovereign state—“the former creating and giving legitimacy to the latter, the latter ensuring a safe and secure life for the individuals who brought it into being.”⁴⁴ The liberal self, both the individual and the State, is mostly concerned with maintaining his sovereignty.⁴⁵

If human rights seek to be a true project of global justice without borders, it needs to rethink the foundation of rights and head toward a foundation linked more to capabilities, harmony, and sustainability. Rights should be conferred on individuals not based on their nationality, but on their capabilities to flourish. Further, rights are not dependent merely on autonomy or sovereignty, they have a basis in a global community that seeks to restore peace and harmony between living beings. Rights serve the dual purpose of protecting us from the State while also fostering positive connections with other individuals.

This paper is structured as follows: Section I will highlight the relationship between the Nation State and human rights and the problems that arise when the mediator of rights is always the Nation State. Section II will advance four strategies to unsettle the relationship between human rights and the Nation State: a) recover the Universal Declaration as a Global Constitution, b) promote that rights in Nation States are detached from nationality or citizenship, c) recognize a human right to migration, and d) create or strengthen international institutions. The overall purpose of the article is to decouple human rights from the Nation State so that we can truly build a project that protects the dignity of living beings, regardless of which side of the border they are born on.

I. THE NATION STATE AND HUMAN RIGHTS

No nation imagines itself coterminous with mankind. The most messianic nationalists do not dream of a day when all the members of the human race

⁴³ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 230 (2nd ed. 1962).

⁴⁴ PATRICK J. DENEEN, *WHY LIBERALISM FAILED* 57 (Yale University Press, 2018).

⁴⁵ Di Cesare, *supra* note 27 at 188. Further, Charles Beitz explains the analogy of States as persons with some sort of autonomy that insulates them from external moral criticism and political interference, is the prevailing understanding in international relations. He contends that a more satisfactory normative theory of international politics should include a notion of state autonomy but connected with considerations of domestic social justice, and principles of international distributive justice. See Charles R. Beitz, *Political Theory and International Relations* (PRINCETON UNIVERSITY PRESS 8, 70, 179).

will join their nation in the way that it was possible, in certain epochs, for say, Christians to dream of a wholly Christian Planet.

*Benedict Anderson*⁴⁶

Rights are traditionally justified in modern liberalism by reference to rationality, autonomy, and freedom. The human rights movement, as a project of global justice, should rely instead on capabilities, harmony, and sustainability, if the goal is a community of rights throughout the globe. I call this proposal a post-liberal tradition of human rights. Autonomy tends to link human rights to the Nation State. Rights typically empower individuals to resist the invasion of their space by either the Nation State or other individuals. In this sense, they are correlated to a centralized state.⁴⁷ Autonomy in these traditions defines the relationships between individuals in a way that parallels the relationship of sovereignty to citizens. In both relations, individuals and nations are inherently separate and different from each other.⁴⁸ For thinkers such as Locke, the State exists primarily to secure rights such as private property. Thus, if we ask ourselves who should respect our rights, the answer is still the Nation State.⁴⁹ The project of migration as a human right is not complete if we do not, at the very least, unsettle the relationship between human rights and the Nation State, which I intend to show next.

The official narrative of philosophical liberalism is that the nation state emerged to put an end to the wars of religion that took place in Europe and to keep the peace between religious factions from there on.⁵⁰ However, the creation of the nation state gave rise to new forms of violence, expanding and consolidating borders.⁵¹ The wars of religion were a series of wars that erupted in Germany and then spread through Europe between the 16th, 17th, and early 18th centuries.⁵² They all sought to disrupt the

⁴⁶ BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 7 (Verso, 2016).

⁴⁷ John Milbank, *Against Human Rights: Liberty in the Western Tradition*, 1 OXFORD J.L. & RELIGION 203, 204 (2012).

⁴⁸ LEAH COWAN, *BORDER NATION: A STORY OF MIGRATION*, 141 (Pluto Press, 2021).

⁴⁹ See Milbank, *supra* note 47 at 221.

⁵⁰ WILLIAM T. CAVANAUGH, *THEOPOLITICAL IMAGINATION: DISCOVERING THE LITURGY AS A POLITICAL ACT IN AN AGE OF GLOBAL CONSUMERISM* 20 (T&T Clark, 2005).

⁵¹ In words of Mignolo “the modern nation-state became the imperial tool for the control of authority in the colonies during the process of building (during the nineteenth century and twentieth centuries) modern/colonial nation-states. Nation-states (in their modern European or modern/colonial American, Asian and African versions) are not “outside the colonial matrix”. See WALTER D. MIGNOLO, *THE DARKER SIDE OF WESTERN MODERNITY: GLOBAL FUTURES, DECOLONIAL OPTIONS* 162 (Duke University Press, 2011).

⁵² MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 78 (University of California Press, 2008).

religious and political order in the Catholic countries of Europe, after the Protestant Reformation. Luther had advanced the proposal of separation between church and state, while Locke demanded an individual's, rather than the state's, right to select a religion.⁵³ According to some accounts, as much as one-third of central Europe's population died during the thirty-year wars of religion, either from violence or from famine and disease.⁵⁴

The whole point of these wars was to invert the dominance of the ecclesial over the civil authorities through the creation of the modern state.⁵⁵ The Treaties of Westphalia achieved this in 1648.⁵⁶ The Treaties recognized freedom of conscience for Catholics living in protestant areas and vice versa,⁵⁷ but also marked the beginning of a system of sovereign states and territorial integrity⁵⁸ that extended the nation state across the entire globe.⁵⁹

Although the Treaties of Westphalia brought an end to the wars on religion, they also activated new wars to expand and consolidate borders. In the words of William Cavanaugh:

The new sixteenth-century doctrine of the state's absolute sovereignty within a defined territory carried with it an increase in the use of war to expand and consolidate borders . . . only with the emergence of nation states . . . are states circumscribed by borders, known lines demarcating the exclusive domain of sovereign power, especially its monopoly over the means of violence. Attempts to consolidate territory and assert sovereign control often brought about violent conflict.⁶⁰

In sum, border formation and the building of the nation state were justifications for imperial and colonial expansion. Just to name a few examples, in 1845 the United States invaded Mexico and forced the annexation of half of the country through the imposition of the Treaty of Guadalupe Hidalgo in 1848. Indigenous lands were seized, and sovereign nations were forcibly assimilated into the Nation State.⁶¹ The United States

⁵³ *Id.*

⁵⁴ FRANCIS FUKUYAMA, *LIBERALISM AND ITS DISCONTENTS* 5 (Farrar, Straus and Giroux, 2022).

⁵⁵ Cavanaugh, *supra* note 50 at 20.

⁵⁶ ANUSCHKA TISCHER, *PEACE OF WESTPHALIA (1648)* (2012).

⁵⁷ Stéphane Beaulac, *The Westphalian Model in Defining International Law: Challenging the Myth*, 8 *AUSTL. J. LEGAL HIST.* 181, 200 (2004).

⁵⁸ DANIEL PHILPOTT, *REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS*, 255 (Princeton University Press, 2001).

⁵⁹ *Id.*

⁶⁰ Cavanaugh, *supra* note 50 at 43. *See also* Anthony Giddens, *The Nation-State and Violence*, 84-90, (University of California Press, 1987).

⁶¹ HARSHA WALIA, *BORDER & RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM* 26 (Haymarket Books, 2021).

did this under the banner of border delimitation. President Jackson first tried to purchase Texas, then supported the flow of white Anglo-American settlers into the region to organize a revolt. Finally, he declared the independence of the Republic of Texas and violently forced the annexation of more than 525,000 square miles of territory.⁶² In another example, the partition of India and Pakistan along religious and ethnic lines in 1947 amounted to mass slaughter, ethnic cleansing, and the death of half a million people.⁶³

The connection between the violent consolidation of the Nation State and the current flux of migration partly explains why the people dispossessed by the colonization processes, and later simply assimilated into the liberal national State, are most often those seeking to migrate—”[w]e are here because you were there.”⁶⁴ Most Central American migrants are indigenous people who were first colonized by the Spanish, then incorporated into Mexico and Central American nation states and subsumed into a pan-latino and mestizo identity. In Guatemala, seventy-four percent of indigenous people are impoverished, compared to fifty-six percent of the general population.⁶⁵

Additionally, the profound impacts of forcibly removing 12.5 million people from Africa to North America, the Caribbean, and South America—with only 10.7 million surviving the harrowing journey—remain intrinsically linked to the ongoing economic status of these regions.⁶⁶

Border walls and barriers have an impact on both human beings and wildlife migration, causing harm to the natural environment. The climate change crisis is greatly fueled by extractive capitalism.⁶⁷ For instance, the 2010 World People’s Conference on Climate Change and the Rights of Mother Earth in Cochabamba, Bolivia, called upon Northern states to “assume responsibility for the hundreds of millions of people that will be forced to migrate due to the climate change caused by these countries, and eliminate their restrictive immigration policies, offering migrants a decent life with full human rights guarantees in their countries.”⁶⁸

The idea of the Nation State and its borders is based on an ill-conceived notion of peace. To achieve world peace, their solution is

⁶² *Id.*

⁶³ YASMIN KHAN, *THE GREAT PARTITION: THE MAKING OF INDIA AND PAKISTAN* 22 (Yale University Press, 2017).

⁶⁴ Cowan, *supra* note 48, at 42 (quoting A. Sivanandan, Director of the Institute of Race Relations).

⁶⁵ Walia, *supra* note 61, at 27.

⁶⁶ Cowan, *supra* note 48, at 47.

⁶⁷ *Id.* at 146.

⁶⁸ Carmen G. Gonzalez, *Climate Change, Race, and Migration*, 1 U.C. Davis J.L. & Pol.Econ. 128 (2020).

separation,⁶⁹ and global justice is not even on the agenda. Instead of building a community and promoting integration, Westphalian sovereignty proposes an atomized, individualistic world, in which a State does not have to show concern or solidarity with people who do not belong to its political community. In this imagined community,⁷⁰ the border is mobile⁷¹ because in general, even after crossing it, undocumented people cannot access welfare, healthcare, or education.⁷²

This account of borders of the Nation State assumes formal and substantive equality among states and ignores the impact of colonialism and ongoing relations of economic domination. As Gracie Bradley and Luke Noronha note, citizens of Sweden, New Zealand, or the United States have substantially better life chances and greater freedom of movement than citizens of Bangladesh, the Democratic Republic of Congo, or Kyrgyzstan. In their view, immigration controls “enforce fixed legal and spatial distinctions between highly unequal nationalized populations.”⁷³ International human rights law must transcend the Nation State. Its closed vision of community and its idea of peace is incompatible with a project that should seek global justice. To do so, however, would be a massive shift. The “rights of man” as they were known during the Enlightenment, or “human rights,” as they are known today, have been mediated through the nation state. Thus, for Rousseau, “we relate to each other through the State by the formal mechanism of contract.”⁷⁴

There has been some flux in conceptions of human rights. As many scholars note, human rights are in some ways a different project than the “rights of men” of the French Revolution, because while the former implied a politics of citizenship at home, modern human rights are a politics of suffering and justice that transcends the State.⁷⁵ However modern human rights still presuppose and reinforce the idea of the Nation State in at least two senses. First, international institutions can only be activated when national jurisdictions do not work. Second, and more fundamentally, all international bodies are based on the twinned notions of

⁶⁹ As William T. Cavanaugh argues, from a theological stance, the effect of sin is the very creation of individuals as such, the creation of an ontological distinction between individual and the group. *See* Cavanaugh, *supra* note 50, at 13.

⁷⁰ *See* BENEDICT ANDERSON, *IMAGINED COMMUNITIES, REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6 (Verso 2016).

⁷¹ As Balibar argues, it is in that sense “amphibological” because the two sides of the border never cease to interfere with each other. *See* ÉTIENNE BALIBAR, *CITIZENSHIP* 69 (Polity Press, 2015).

⁷² Walia, *supra* note 61, at 79-87.

⁷³ Bradley et al., *supra* note 32, at 4.

⁷⁴ Cavanaugh, *supra* note 50, at 45.

⁷⁵ SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 12 (2010).

complementarity and subsidiarity.⁷⁶ In other words, we may aspire to global rights, but the human rights we have still can only be guaranteed by the Nation State of which an individual or community is part. Human rights will continue to be contingent upon borders and nations until we establish rights aimed not at safeguarding the interests of nation states, but at upholding the rights of humanity as a whole.

For this to happen, it is necessary that we unsettle the relationship between human rights and the Nation State. We must leave behind the foundation of rights based on rationality-autonomy/sovereignty-freedom and head toward a tradition of capabilities-harmony-sustainability. In the next sections, I show how human rights can sever its dependency on the Nation State and retain its force as a project of global justice.

II. UNSETTLING THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND THE NATION STATE

Borders are set up to define the places that are safe and unsafe, to distinguish us from *them*. A border is a dividing line, a narrow strip along a steep edge. A borderland is a vague and undetermined place created by the emotional residue of an unnatural boundary . . . *Los atravesados* live here: the squint-eyed, the perverse, the queer, the troublesome, the mongrel, the mulato, the half-breed, the half dead; in short, those who cross over, pass over, or go through the confines of the “normal” . . . Do not enter, trespassers will be raped, maimed, strangled, gassed, shot. The only “legitimate” inhabitants are those in power, the whites and those who align themselves with whites.

*Gloria Anzaldúa*⁷⁷

A. Recover the Universal Declaration as a Global Constitution

Sovereign Nation States and their liberal constitutions have been unable to respond effectively to global challenges such as migration, climate change, environmental depredation, wars, and extreme poverty. Since their vision of peace is based on a commitment to the value of separation, they do not respond readily to transnational phenomena, which exceed the limits and borders of their political community.⁷⁸

⁷⁶ See generally Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 38-45 (2003).

⁷⁷ GLORIA ANZALDÚA, *BORDERLANDS, LA FRONTERA: THE NEW MESTIZA* 25 (25th Anniversary ed., Aunt Lute Books 2012).

⁷⁸ Think for example of the environmental depredation caused by Canadian mining companies operating abroad, in countries like Guatemala, and the almost complete failure by their government to make them accountable. See Abram Lutes, *Canadian Mining Companies are Destroying Guatemala*, THE MAPLE (Sept. 28, 2021), <https://perma.cc/E5CP-UWMH>.

Nation States coexist almost amicably with the depredation of the planet. Many advanced States are based on constitutional models that consecrate fundamental rights of individualistic logic, anchored in liberal conceptions of autonomy, with the State acting solely as an arbitrator that should not interfere with individuals in their private sphere. These models promote only thin social goods.⁷⁹

Further, borders even enable states and corporations to irresponsibly continue the pollution of the planet because they can outsource it to the Global South, to “sacrifice zones.”⁸⁰ Tendayi Achiume, the United Nations Special Rapporteur on racial discrimination, points out that high-income States persist in irresponsibly exporting hazardous materials, along with the associated health and environmental risks, to low- and middle-income countries.⁸¹ She argues that there are even “green sacrifice zones” that promote energy transitions in the Global North but rely on tremendous destructive extraction from the Global South.⁸²

On the other hand, those constitutional models based on an expression of the identity and will of people, as Carl Schmitt proposed, close the idea of community even more. They explicitly exclude those who do not share the identity traits that the constitution embodies. Some restrictions on migration are based on this model, which end up accusing the migrant of not adjusting to the culture of the host country. In this sense, they are contrary to the principle of universal morality and peace that international human rights law should promote.⁸³

⁷⁹ LUIGI FERRAJOLI, *POR UNA CONSTITUCIÓN DE LA TIERRA: LA HUMANIDAD EN LA ENCRUCIJADA* 104 (Perfecto Andrés Ibáñez trans., 2022).

⁸⁰ E. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on Ecological Crisis Climate Justice and Racial Justice) *Contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, ¶ 1, U.N. Doc. A/77/549 (Oct. 25, 2022).

⁸¹ *Id.* at 1-2.

⁸² *Id.* ¶ 62. Tendayi Achiume also argues that borders are a kind of racial technology. In her view, liberal borders are territorial and political regimes that disparately curtail movement and political incorporation on a racial basis and sustain international migration and mobility as racial privileges. See E. Tendayi Achiume, *Race, Borders and Jurisdiction*, 82 *ZaoRV* 471 (2022).

⁸³ Luigi Ferrajoli, *Por una Constitución de la Tierra: La Humanidad en la Encrucijada*, 52 (Perfecto Andrés Ibáñez trans., 2022). Habermas for instance proposes to move towards a “nation of citizens” that affirms universal citizenship without recurring to substantive characteristics or pre-political belonging. In his words, “the nation of citizens does not derive its identity from some common ethnic and cultural properties, but rather from the praxis of citizens who actively exercise their civil rights. At this juncture, the republican strand of “citizenship” completely parts company with the idea of belonging to a pre-political community integrated on the basis of descent, a shared tradition, and a common language. Cited in R Andrés Guzmán, *Universal Citizenship: Latina/o Studies at the Limits of Identity* 42 (University of Texas Press, 2019).

International human rights law needs to move beyond the concept of closed sovereign political communities and embrace a universal morality. This morality should ensure the well-being of both humans and non-humans through integration mechanisms that foster a genuine global community. The goal is to create a harmonious and sustainable world where everyone can thrive. As Judith Butler argues, “to cohabit the earth is prior to any possible community or nation or neighborhood. We might choose where to live, and who to live by, but we cannot choose with whom to cohabit the earth.”⁸⁴

To this end, I propose a strategy that consists of reconceptualizing the Universal Declaration of Human Rights as a Global Constitution—the Constitution of the Federation of Peoples, or of the Federation of the Earth, as Luigi Ferrajoli calls a similar project.⁸⁵ This would facilitate the integration of thousands of heterogeneous peoples based on a common consensus on minimum guarantees for a dignified life. Such a consensus has in large part already been obtained with the approval of the Universal Declaration of Human Rights. The Declaration, notably, is understood today as customary international law and universally binding.⁸⁶

Although the Universal Declaration is the principal model for all current human rights treaties, the legitimacy of its implementation is questionable. In theory, the catalog of rights it proposes, structured in the form of principles, allows for pluralistic interpretations of human rights, so that “many different kinds of music could be played on the document’s thirty strings (articles);”⁸⁷ in practice the culture of enlightened liberalism is codified in its understanding and application of rights. It consists of a lengthy catalog of individual rights, very few social rights, and even fewer rights that promote harmony or sustainability, such as those pertaining to nature. For example, even though the 1948 Declaration contains a

⁸⁴ JUDITH BUTLER, IS JUDAISM ZIONISM?: THE POWER OF RELIGION IN THE PUBLIC SPHERE 84 (Eduardo Mendieta and Jonathan Vanantwerpen eds., 2011).

⁸⁵ According to Luigi Ferrajoli, both national constitutionalism and the human rights project have proven inadequate in addressing global crises like epidemics, pandemics, global warming, and environmental degradation, which pose a threat to the future of humanity. This is due to an excessive emphasis on nation-states and their sovereignty, coupled with a lack of coordination and solidarity to effectively tackle such challenges. The division caused by borders hampers humanity, and the existing supranational institutions fall short in guaranteeing the rights of individuals and the well-being of the planet. In light of this, Ferrajoli proposes a revival of Kant’s vision by considering the concept of a planetary constitution. Under this framework, countries become integral parts of a federation of peoples. Ferrajoli suggests a preliminary constitution for the Earth, built upon the rights enshrined in the Universal Declaration of Human Rights. See Luigi Ferrajoli, *supra* note 79, at 72.

⁸⁶ Ionel Zamfir, *The Universal Declaration of Human Rights and its relevance for the European Union*, EPRS (Nov. 2018), <https://perma.cc/4HUD-VER2>.

⁸⁷ Mary Ann Glendon, *A World Made New, Eleanor Roosevelt and the Universal Declaration of Human Rights* 222, 230 (Random House 2002).

progressive catalog of social rights, the United Nations (UN) only started enforcing social rights via the Covenant on Economic, Social and Cultural Rights around 2015—almost 70 years after the Declaration was approved, and more than forty years after the 1966 Covenant on Economic, Social and Cultural Rights.⁸⁸ In the case of the Inter-American System of Human Rights, the American Convention only devotes one article to social rights⁸⁹ and its implementation started as late as 2017.⁹⁰

In this sense, the current model of implementation of human rights leads us to liberal homogeneity. I propose recovering the Universal Declaration as a Global Constitution but recasting the purpose of rights. During the 19th century, human rights were strongly linked to classical liberalism and deployed as slogans for defenders of free contracts and inviolable property. In “the mid-20th century age of national welfare, human rights were reformed in the spirit of egalitarian hopes within discrete and exclusionary communities.”⁹¹ Now, in an era in which we might be facing risks of extinction, rights must be reinterpreted as tools for life in harmony with other human beings and nature. Social goods can no longer be limited to autonomy and liberty, nor can they only amount to equality and non-subordination within discrete communities.⁹²

A number of human rights scholars now argue that we must somehow escape the liberal paradigm of rights. Rainer Forst, for example, proposes a contextual understanding of universality⁹³ in which the universal principles will be filled out concretely “by ethical persons on the basis of their identities, by legal persons in mutual respect for personal autonomy, by citizen in political self-determination, and by moral persons in reciprocal

⁸⁸ The first decision adopted by the CESCR was the case of *I.D.G v Spain* issued in 2015. See *The Jurisprudence of the Committee on Economic, Social and Cultural Rights*, GI-ESCR (Apr. 2021), <https://giescr.org/en/cescr/cescr-jurisprudence#database>.

⁸⁹ According to Article 26 the States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires. See American Convention of Human Rights art. 26, Nov. 22, 1969, <https://perma.cc/BM2B-MUM3>.

⁹⁰ *Case of Lagos del Campo v. Peru*. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 340 (Aug. 31, 2017).

⁹¹ SAMUEL MOYN, *NOT ENOUGH HUMAN RIGHTS IN AN UNEQUAL WORLD* 175 (Harvard University Press 2018).

⁹² As Morton J. argues “the most promising way to ensure that rights may be used on behalf of the socially weak is to ground rights theory in a substantive conception of the good society”. Morton J. Horwitz, *Rights*, 23 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 393, 406 (1988).

⁹³ Or maybe we can call it “Cosmopolitan localism” or pluriversality as Walter D. Mignolo suggests. See WALTER D. MIGNOLO, *THE DARKER SIDE OF WESTERN MODERNITY, GLOBAL FUTURES, DECOLONIAL OPTIONS* 209 (Duke University Press 2011).

recognition.”⁹⁴ Forst adds that a contextual universalism imposes two moral restrictions on social contexts. One is the restriction called “internal,” which means that for a community to be considered legitimate and deserving of respect, its “common life”⁹⁵ must be recognized and justified by its members. This means that all participants should be able to identify with shared values and principles. Secondly, a political or ethical community must not only have the support of its members but also uphold fundamental moral codes that acknowledge the intrinsic humanity and moral worth of all individuals.⁹⁶ This contextual perspective makes it possible to eliminate the homogenizing risk of rights and adopt other more sustainable models of interpretation.

Notably, such a contextual and sustainability-focused approach is not unheard of. The Constitutions of Ecuador and Bolivia recognize the rights of nature. For example, the Constitution of Ecuador establishes that,

Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.⁹⁷

Further, the preamble to the 2009 Constitution of Bolivia states that they found:

[a] State based on respect and equality for all, on principles of sovereignty, dignity, interdependence, solidarity, harmony, and equity in the distribution and redistribution of the social wealth, where the search for a good life predominates; based on respect for the economic, social, juridical, political and cultural pluralism of the inhabitants of this land; and on collective coexistence with access to water, work, education, health and housing for all.

We have left the colonial, republican and neo-liberal State in the past. We take on the historic challenge of collectively constructing a Unified Social State of Pluri-National Communitarian law, which includes and articulates the goal of advancing toward a democratic, productive, peace-loving, and peaceful

⁹⁴ RAINER FORST, *CONTEXT OF JUSTICE: POLITICAL PHILOSOPHY BEYOND LIBERALISM AND COMMUNITARIANISM* 159 (University of California Press 2002).

⁹⁵ *Id.* at 171.

⁹⁶ *Id.* at 171-72.

⁹⁷ *See* *Constitucion* Oct. 20, 2008, art. 71 (Ecuador).

Bolivia, committed to the full development and free determination of the peoples.⁹⁸

Beyond reconceptualizing the Universal Declaration of Human Rights as a Global Constitution, there must also be a body that enforces compliance. Here again, other scholars concur. More than a decade ago, Scheinin, Nowak, and Kozma put forward a proposal for the creation of a World Court of Human Rights.⁹⁹ Among the reasons they put forward is that the authoritative bodies specified by the UN treaties that would decide on petitions do not adopt legally binding judgments.¹⁰⁰ In their view, the UN should learn from regional organizations that have established courts, such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court of Human Rights, and courts that hand down binding judgments on individual complaints.¹⁰¹

According to the Draft Statute, the Court would be given jurisdiction to decide complaints from persons, non-governmental organizations, or groups of individuals regarding the violation of any of the UN treaties. What is still more interesting, is that it requires each State party to establish, at the latest one year after entry into force of the Statute or of its ratification or accession, a national court of human rights. This national court would be competent to decide on claims regarding violations of UN treaties, and in case justice is not served, the jurisdiction of the World Court could be activated.¹⁰²

This proposal is compatible with the idea I endorse on contextual universalism, which allows human rights to be implemented according to cultural customs and identities if a minimum core is respected. Furthermore, it contributes to breaking the abyssal line that divides communities of rights from oppressive systems. International human rights have direct applications at the domestic level. Through dialogue between national human rights courts, it will be possible to create a community of rights that transcends the Nation State.

⁹⁸ Constitution of the Plurinational State of Bolivia, 2009, https://www.constituteproject.org/constitution/Bolivia_2009.pdf?lang=en.

⁹⁹ See Manfred Nowak & Julia Kozma, *A World Court of Human Rights*, in Draft Statute of the World Court of Human Rights, <https://www.eui.eu/Documents/DepartmentsCentres/AcademyofEuropeanLaw/CourseMaterialsHR/HR2009/Scheinin/ScheininClassReading2.pdf>; See also Julia Kozma et al., *A World Court of Human Rights: Consolidated statute and commentary*, Neuer Wissenschaftlicher Verlag (2010).

¹⁰⁰ Julia Kozma et al., *A World Court of Human Rights: Consolidated statute and commentary*, Neuer Wissenschaftlicher Verlag 29 (2010).

¹⁰¹ Manfred Nowak, *The Right of Victims of Human Rights Violations to a Remedy: The Need for a World Court of Human Rights*, 32 NOJ. HUM. RTS. 3, 10 (2014).

¹⁰² See Manfred Nowak & Julia Kozma, *A World Court of Human Rights*.

The reconceptualization of the Universal Declaration of Human Rights, and of the UN international treaties that it has inspired, as a Global Constitution, that is a body of law for humanity combined with the creation of a mechanism, would constitute positive steps away from the dependency of human rights to Nation States; such as a World Court of Human Rights and National Courts of Human Rights to directly enforce international human rights law.

B. Promote Rights in Nation States that are not Connected to Nationality

For the human rights project to realize its ideal of justice and dignity without borders, it must promote rights in Nation States that are not granted based on nationality. In liberal theory, as a corollary of the enlightened state, rights are granted to participants in a negotiation in the state of nature that leads to the establishment of a social contract.

The “negotiation,” however, is widely acknowledged as mythical. For instance, John Rawls, the most important philosopher of the 20th century and the strongest advocate of liberal philosophy, developed a “conception of justice as ‘fairness’ in which the principles of justice are those that can be the object of mutual agreement by persons under fair conditions.”¹⁰³ To reach that agreement he argued that “we must specify a point of view from which a fair agreement between free and equal persons can be reached; but this point of view must be removed from and not distorted by the particular features of the existing basic structure.”¹⁰⁴ That lead him to the central feature of his theory “the original position.”¹⁰⁵ An idealized experiment in which dialogue is conducted under the perspective of individuals that “are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent. They also do not know person’s race and ethnic group, sex, or various native endowments such as strength and intelligence, all within the normal range.”¹⁰⁶ That is, parties are behind a “veil of ignorance.”¹⁰⁷

One issue with the Rawlsian experiment is that it only involves abstract individuals, which tends to overlook the fact that our initial position in the world is one of material and substantive inequality. Consequently, it primarily promotes a formal notion of equality. Furthermore, rights are exclusively granted to the participants in the

¹⁰³ JOHN RAWLS, JUSTICE AS FAIRNESS, A RESTATEMENT (Harvard University Press 2001).

¹⁰⁴ *Id.* at 15.

¹⁰⁵ *Id.* at 14.

¹⁰⁶ *Id.* at 15.

¹⁰⁷ *Id.*

experiment.¹⁰⁸ Ultimately, it is important to note that one cannot demand rights derived from a contract unless they are one of the contracting parties.

For this reason, from an empirical perspective, it is not pertinent to think of human rights as emanating from supposed social contracts or from the original Rawlsian position, which itself has a vision of a closed community. For Rawls, a liberal society should be able to establish conditions of access to protect political culture and constitutional principles.¹⁰⁹

If the “right to have rights” means anything at all,¹¹⁰ it is a right against any distribution of rights based on nationality, or more broadly, against a conception of rights premised on closed communities that assign rights based on a supposed essentialized identity. It means at least “the active ability to assert rights in a public space.”¹¹¹ But international human rights remain trapped in the lottery of rights. Rights are obtained via citizenship, based on transmission at birth through parentage or territorial location at time of birth.¹¹²

Human rights must oppose the very idea of the border as parameter of rights, or that of conferring rights based on nationality or citizenship. The border functions as more than just a physical demarcation between territories—it represents the conceptual boundary that segregates individuals into those with recognized rights and those deemed insufficiently human,¹¹³ who must get used to living between misery and the humanitarianism of the Nation State. Even if an outsider manages to

¹⁰⁸ See MARTHA C. NUSSBAUM, *THE COSMOPOLITAN TRADITION: A NOBLE BUT FLAWED IDEAL* 243 (Belknap Harv. Univ. Press 2019). See also, MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 6 (Oxford Univ. Press 1999).

¹⁰⁹ Seyla Benhabib, *The Law of Peoples, Distributive Justice, and Migrations*, 72 *FORDHAM L. REV.* 1761, 1771 (2004).

¹¹⁰ According to Melissa Stewart, there are at least three interpretations of the right to have rights advanced by Hannah Arendt: one is a moral Kantian right to belong to a political community, the second is the right to citizenship of a sovereign state, and she pushes a third alternative: an enforceable right to access human rights separate and apart from the right of citizens. I have no dispute with such approach, but in my view the “gateway” right is migration, the enforceable right to access a community of rights in which human rights are not granted based on nationality or citizenship but on humanity. See Melissa Stewart, ‘A new Law on Earth’ Hannah Arendt and the Vision for a Positive Legal Framework to Guarantee the Right to Have Rights, 62 *VA. J. INT’L L.* 115, 179 (2021), <https://ssrn.com/abstract=3791785> or <http://dx.doi.org/10.2139/ssrn.3791785>.

¹¹¹ As well as not being excluded from the right to fight for one’s rights. See ÉTIENNE BALIBAR, *CITIZENSHIP* 66 (Polity Press 2015).

¹¹² Both the *ius Soli* (law of the soil) and *ius sanguinis* (the law of blood) as principles to define membership in a community, or to assign rights are arbitrary. As Schachar explains, one is based on the accident of birth within particular geographical borders while the other, like an inheritance of property, is based on sheer luck of descent. See AYELET SCHACHAR, *THE BIRTHRIGHT LOTTERY, CITIZENSHIP AND GLOBAL INEQUALITY* 4-7 (Harv. Univ. Press 2009).

¹¹³ Walia, *supra* note 61 at 79-87.

penetrate the community, she will face restrictions for accessing welfare, healthcare, education, childcare, or even a driver's license, therefore the border is elastic.¹¹⁴ She will enter the community but remain without rights.¹¹⁵

Different States have made progress in granting human rights to migrants, serving as models to spark thought about what it means to get out of the distribution of rights based on nationality.

Below I discuss the models of recognition of human rights for migrants in Argentina, Ecuador, and Chile. On the one hand, the cases of Argentina and Ecuador are paradigmatic because they are exceptional in modern liberal constitutionalism. In Latin America, for example, there are no other legal texts that make the effort to detach human rights from nationality or citizenship and connect them directly with humanity. Conversely, I discuss Chile, which recently proposed a new constitution that ultimately did not receive enough popular support. This example is interesting because, although it was a progressive text (perhaps one of the most progressive on the planet), it once again falls victim to the liberal error of assigning rights based on nationality.

1. The Right to Migrate in Argentina

In 2004, lawmakers in Argentina overwhelmingly approved the immigration law, a very progressive bill advancing the claim that migrants and nationals have nearly the same rights.¹¹⁶ David Baluarte provides a succinct explanation of the content of the law:

[T]o advance immigrant rights, the 2004 Law established robust substantive and procedural protections for migrants seeking lawful status to remain in Argentina. First, it includes a bill of rights that reinforces the notion of equal rights between non-citizens and citizens established under the 1994 Constitution, provides expansive social and economic rights guarantees, and promotes family unity through a variety of provisions. The bill of rights further includes the novel concept of a right to migrate, puts the burden on the State to provide irregular migrants with public assistance to regularize their situation, and mandates the development of regularization programs. Second,

¹¹⁴ *Id.* at 84.

¹¹⁵ As Gloria Anzaldúa reminds us of when discussing discrimination against Chicanos in the United States “those who make it past the checking points of the Border Patrol find themselves in the midst of 150 years of racism in Chicano barrios in the Southwest and in big northern cities. Living in a no-man’s-borderland, caught between being treated as criminals and being able to eat, between resistance and deportation, the illegal refugees are some of the poorest and the most exploited of any people in the U.S.” See GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* 34, (Aunt Lute Books, 25th Anniversary ed. 2012).

¹¹⁶ See Ley de Migraciones No. 25871, Decreto 616/2010, http://www.migraciones.gov.ar/pdf_varios/campana_grafica/pdf/Libro_Ley_25.871.pdf.

the law codified robust procedural guarantees, which included multiple levels of appeal of adverse decisions, free legal assistance for immigrants in expulsion proceedings at the expense of the State, and a presumption against detention during those proceedings.¹¹⁷

The law ensures that immigrants and their families have equal access to the same protections, support, and rights as citizens, with a specific focus on social services, public goods, education, health, justice, labor, employment, and social security. Moreover, the law grants migrants the right to vote in municipal elections.¹¹⁸ Pursuant to Article 11, the State will facilitate the participation of foreigners in decisions related to public life and the administration of local communities where they reside.¹¹⁹ This, interestingly, goes beyond the traditional approach of restricting the enjoyment of political rights to nationals of a state. This law has been supplemented with other initiatives, such as the Patria Grande program, which regularized the legal status of more than 200,000 migrants.¹²⁰

The law has suffered setbacks. For instance, in early 2017, President Mauricio Macri of Argentina issued a Decree to toughen immigration policies in response to what his administration described as rising criminality among migrants.¹²¹ The Decree recalled that according to the Inter-American Court of Human Rights, the state has the sovereign prerogative to establish criteria for the admission and expulsion of non-citizens.¹²² It then expanded the types of criminal activity that result in the denial of admission or cancellation of residency as well as a summary expulsion procedure for persons with criminal history.¹²³

However, in 2021, President Alberto Fernandez repealed the Macri Decree after considering that different aspects of the bill were contrary to international human rights law. These aspects include, for instance, the violation of the principle of due process, the right to assistance and legal defense, the restriction to a broad and sufficient control of the judiciary over the acts of the administrative authority, the scope with which the preventative detention of the migrant is foreseen without defining the

¹¹⁷ David C. Baluarte, *The Right to Migrate: A Human Rights Response to Immigration Restrictionism in Argentina*, 18 WASH. U. GLOBAL STUD. L. REV., 293 (2019).

¹¹⁸ Elias Kier Joffe, *Immigration Law Argentina: Argentina at the forefront of immigration policy*, KIERJOFFE (Sept. 8, 2011) <https://www.kierjoffe.com/news/lawyer-argentina-attorney-buenos-aires-law-firm/immigration-law-argentina/>.

¹¹⁹ See Ley de Migraciones No. 25871, Decreto 616/2010, http://www.migraciones.gov.ar/pdf_varios/campana_grafica/pdf/Libro_Ley_25.871.pdf.

¹²⁰ Kier Joffe, *supra* note 118.

¹²¹ Baluarte, *supra* note 117, at 296.

¹²² *Id.*

¹²³ *Id.* at 322.

causes that enable it, and the restriction of the right to family reunification and dispensation for humanitarian reasons.¹²⁴

The Law did not blatantly open the borders, and although it recognizes the right to migrate as an “essential and inalienable right,” it reflects an important tension between this right to migrate and state sovereignty, insofar as its provisions stipulate that the Immigration Board may deny admission or cancel residency based on generic reasons such as non-compliance with the requirements set forth in the law.¹²⁵ This tension could be resolved by recognizing the right to migrate whilst stipulating that it can only be limited on rational grounds, taking into account the principle of proportionality of restrictions, as I will explain in the next section. However, I want to emphasize that even though the law is not perfect, it serves an important role in decoupling human rights from nationality and connecting them with humanity.¹²⁶

2. *The Universal Citizenship in Ecuador*

Ecuador has additionally progressed in recognizing the human rights of migrants by placing them on equal footing with nationals. Its Constitution, approved in 2008, can be described as “post-liberal” to the extent that it recognizes individual and social rights, but it retains the logic of philosophical liberalism that only promotes thin social goods. In its preamble, the text of the Constitution indicates that the country will promote,

A new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living, the *sumak kawsay*;

A society that respects, in all its dimensions, the dignity of individuals and community groups;

¹²⁴ See Decreto 138/2021, DECNU-2021-138-APN-PTE – Decreto N° 70/2017. Derogación, <https://www.argentina.gob.ar/123xternali/nacional/decreto-138-2021-347595/texto>.

¹²⁵ Lila Garcia, *Argentina’s Migration Law: Changes Challenging the Human Right to Migrate*, OXFORD: FACULTY LAW BLOGS (Sept. 11, 2007), <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/09/argentinas>.

¹²⁶ Further, also in Argentina in 2014 the government launched the “Programa Siria,” which grants humanitarian visas to people affected by the conflict in Syria if there is a sponsor in the country willing to help finance their living expenses during the first year. Any individual or non-government organization can become a sponsor and receive a refugee or migrant. So far, more than 300 Syrian refugees have settled in the country. See *Syrian refugees reap benefits of Argentina’s new visa rules*, UNHCR (Nov. 10, 2017), <https://www.unhcr.org/en-us/news/stories/2017/11/5a0586774/123xtern-refugees-reap-benefits-argentinas-new-visa-rules.html>.

A democratic country, committed to Latin American integration-the dream of Simon Bolivar and Eloy Alfaro-peace and solidarity with all peoples of the Earth¹²⁷

According to Article 9 of the Constitution, “foreign persons in Ecuadorian territory shall have the same rights and duties as those of Ecuadorians, in accordance with the Constitution.”¹²⁸ Further, pursuant to Article 40, individuals have the right to migrate and “no human being shall be identified or considered as illegal because of his/her migratory status.”¹²⁹

The law on human mobility in Ecuador establishes the principle of “universal citizenship” that works as a recognition of the right of individuals to circulate freely around the planet and “the portability of their human rights regardless of their immigration status, nationality and place of origin.”¹³⁰ It signals that it will eliminate unnecessary distinctions based on nationality or immigration status.¹³¹ The law has a broad catalog of rights for foreigners, establishing among them, the right to form social organizations for the protection of their rights, the right of access to justice under equal conditions, the right to social inclusion integration of children and adolescents, the right to political participation, to vote and to be elected to public office (provided they have resided legally in the country for at least five years), the right to have qualifications obtained abroad officially recognized, the right to work, social security, and the right to access health in accordance with the law and international instruments.¹³²

Like the Argentine law, the Ecuadorian law has also faced obstacles with implementation.¹³³ For instance, in 2016, despite the principle of universal citizenship mentioned in the human mobility law, the Ecuadorian State deported 126 Cubans who were in Ecuador after they were detained for protesting outside the Embassy in Mexico. They protested for the implementation of a humanitarian corridor that would allow them to move from Mexico to the United States and benefit from the so-called “wet foot,

¹²⁷ See CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, https://www.constituteproject.org/constitution/Ecuador_2021?lang=en.

¹²⁸ See *id.* at art. 9.

¹²⁹ See Constitution of Ecuador, *supra* note 127, at art. 40.

¹³⁰ See Ley Organica de movilidad humana, Art. 2 (May 14, 2021).

¹³¹ *Id.*

¹³² See generally Constitution of Ecuador, *supra* note 127, at art. 42-52.

¹³³ For Soledad Álvarez Velasco, or this, “the subtle presence of the U.S. 124 externalized border in Ecuador, together with national political inconsistencies and politics of exclusion, has a double repressive and a productive effect, utterly functional for the reproduction of a systemic form of control. Thence, the practices of the Ecuadorean state, in the long run, end up enhancing the efficiency of that neoliberal systemic form to selectively control mobility”. See Soledad Álvarez Velasco, *Trespassing the Visible The Production of Ecuador as a Global Space of Transit for Irregularized Migrants Moving Towards the Mexico-U.S. Corridor*, 338 (Doctoral thesis, Kings College, London, 2019).

dry foot” law, which was in force at that time. This law allowed any Cuban who made it to U.S. soil to stay and become a legal resident. Among the deported people were individuals with valid visas to stay in Ecuador.¹³⁴

Despite the fact that in July 2019 President Moreno signed a decree providing visas for Venezuelans for humanitarian reasons for a fee of only fifty dollars. However, during the period when this type of visa was in effect, less than half of Venezuelan citizens obtained visas to stay in Ecuador.¹³⁵ Even though Ecuador has more progressive legislation, countries like Colombia and Peru have shown more results in the regularization of Venezuelans in their territories.¹³⁶

The Ecuadorian laws are another example of how to guarantee human rights without linking them to nationality, or how to build, at least in theory, a human rights project without borders. However, it also shows that it is difficult for this project to become a reality without a global migration pact. In the case of Ecuador, the border policy of the United States is exported. To the extent that many migrants are in transit to the United States, there are surveillance and control mechanisms that are implemented by the United States in Ecuador.

3. *Rights for the Other in the Draft Constitution of Chile?*

The last example is somewhat paradoxical. This is the constitutional project discussed in Chile in 2022, which had the widest catalog of human rights in the world. However, it did not clearly extend these rights to the other, to the foreigner, or to the migrant.

In Chile, mass mobilizations and uprisings against the current political arrangements since 2019 have led the political forces to sign an “Agreement for Social Peace and a New Constitution,” which was to be drafted by a democratically elected convention.¹³⁷ Members of the Convention, including scientist, teachers, students, and indigenous

¹³⁴ See *Deportación masiva de cubanos en Ecuador*, LA BARRA ESPACIADORA (July 14, 2016), <https://www.labarraespaciadora.com/ddhh/11383/#:~:text=Deportaci%C3%B3n%20masiva%20de%20cubanos%20en%20Ecuador%20Contrario%20a,Humanos%20y%20dem%C3%A1s%20activistas%20han%20levantado%20sus%20voces>.

¹³⁵ Jefferson Díaz, *Ecuador: migrar es un derecho, no una herramienta política*, WASHINGTON POST (Apr. 6, 2021), <https://www.washingtonpost.com/es/post-opinion/2021/04/06/ecuador-elecciones-2021-migracion-venezuela-segunda-vuelta/>.

¹³⁶ *Id.*

¹³⁷ Gabriel L. Negretto, *Deepening Democracy? Promises and Challenges of Chile’s Road to a New Constitution*, 13 HAGUE J. RULE L. 335, 358 (2021).

representatives presented their new draft constitution in July 2022. However, this was not approved in the September 2022 plebiscite.¹³⁸

Like the constitutions of Ecuador and Bolivia, the potential revision to the Chilean Constitution also established substantive values for the State to promote. According to Article 1, Chile will promote solidarity, inclusiveness, dignity, substantive equality, and the indissoluble relationship of human beings with nature.¹³⁹ Further, Article 8 again promotes “good living” as the harmonious balance between humans, nature, and communities because nature is inseparable from persons and peoples.¹⁴⁰ In line with the idea of plurinationality¹⁴¹ the draft recognizes the Mapuche, Aymara, Rapanui, Lickanantay, Quechua, Colla, Diaguita, Chango, Kawésqar, Yagán, and Selk’nam as preexisting nations.¹⁴²

The revised Constitution had the most detailed regulations on the planet in terms of individual rights and non-human rights or the rights of nature and animals. It incorporated virtually every right that has been recognized by international human rights law and beyond. This includes more than forty rights, such as the right to life, the right to digital connectivity, the right to sports, and the right to leisure.¹⁴³ However, unlike the constitutions of Argentina and Ecuador, the protections for the rights of

¹³⁸ See Catherine Osborn, *How Chile’s Constitution Revolution missed the mark*, FOREIGN POLICY (Sept. 9, 2022), <https://foreignpolicy.com/2022/09/09/chile-constitution-referendum-results-reject-boric/>.

¹³⁹ DAMARIS ABARCA GONZÁLEZ ET AL., PROPUESTA DE CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE, art. 1 (2022) [hereinafter *Propuesta de Constitución Política de la República de Chile*].

¹⁴⁰ *Id.*, at art. 8.

¹⁴¹ The plurinationality is a demand for the recognition of peoples that were inhabiting the territory before the foundation of the nation-state whose existence was invisibilized by colonization. It implies at least their right to self-government and self-determination. See Oscar Vega Camacho, *Decolonization and Plurinationality*, in *LATIN AMERICA SINCE THE LEFT TURN* 313 (Tulia G. Falletti, Emilio A. Parrado, eds., 2018).

¹⁴² *Propuesta de Constitución Política de la República de Chile*, art. 5.

¹⁴³ Including among others, the following rights: 1) right to life, 2) right to personal integrity, 3) right to truth, 4) right to equality, 5) rights of the children, 6) right to be free from gender violence, 7) rights of persons with disabilities, 8) rights of persons deprived of liberty, 9) rights of elderly persons, 10) rights of indigenous peoples, 11) right to education, 12) right to health, 13) right to social security, 14) right to work, 15) right to care, 16) right to housing, 17) right to the city, 18) right to be free from violence, 19) right to food, 20) right to water, 21) right to energy, 22) right to sports, 23) right to reproductive health, 24) right to personal autonomy; 25) right to personal identity; 26) right to freedom of expression; 27) right to a humane death; 28) right to freedom of movement; 29) right to privacy; 30) right to seek asylum; 31) right to freedom of association; 32) right of assembly; 33) right to property, including collective property of indigenous peoples; 34) right to digital connectivity and privacy; 35) right to rest and leisure; 36) right to scientific knowledge; 37) right to communicate in their language; 38) right to a healthy environment; 39) rights of nature; 40) right to clean air; 41) right to mountains, riverbanks, sea, beaches, lagoons and wetlands; 42) right to justice; right to due process; 43) right to nationality. See *Propuesta de Constitución Política de la República de Chile*.

migrants were not robust and the text is limited to prohibit discrimination based on immigration status.¹⁴⁴

On several occasions, the Constitutional Principles Commission discussed the possibility of incorporating the right to migrate into the constitutional text.¹⁴⁵ A proposal was submitted to the Constitutional Principles Commission to include migration as a human right in the following terms:

Every person has the right to migrate to and from Chile subject to the Constitution and international treaties ratified by Chile and that are in force. No person will be identified or considered illegal because of their immigration status. 2. The State, through its organs and migration policies, must respect, guarantee, and promote the human rights of people in the context of human mobility based on the principles of equality, universality, gender perspective, differentiated approach, inclusion and family unity.¹⁴⁶

However, in the end, they were only able to approve the right to seek and receive asylum and refuge.¹⁴⁷ This situation is paradoxical because although the Constitutional Convention made strong efforts to constitutionalize international law and the text mentions that international human rights law is part of the Constitution and enjoys constitutional status,¹⁴⁸ it fails to fulfill the dream of the human rights project as I have framed it in this article. It falls short of a movement without borders that believes in the universality of rights based on humanity and not on citizenship or nationality.

If we grant hundreds of rights, but only to “accredited” members of our political communities, we end up strengthening a world in which humanity is conferred by the nation state in which we find ourselves situated, and precisely the effort that must be carried out is to eliminate the dependence of human rights on the nation state and borders.

In addition to these examples, there are other constitutions that guarantee certain rights to migrants on equal terms with nationals. According to a 2014 study that examined 193 constitutions around the world, under a quarter of these protect some aspect of equality and non-

¹⁴⁴ *Id.*, at art. 25.4.

¹⁴⁵ Rodrigo Cordova, *Pleno 40: El derecho a la migración sigue quedando fuera de la propuesta constitucional*, VOTAMOS TODOS, (May 2, 2022), <https://votamos.todos.com/>.

¹⁴⁶ Iniciativa de norma constitucional sobre “derecho a migrar”, January 27, 2021, available at: 515-4-Iniciativa-Convencional-Constituyente-de-la-cc-Giovanna-Grandon-sobre-Derecho-a-Migrar-1245-01-02.pdf (chileconvencion.cl).

¹⁴⁷ Convención Constitucional, *¿Qué hicimos esta semana en la Convención Constitucional?* April 10, 2022, available at: Convención Constitucional - ¿Qué hicimos esta semana en la Convención Constitucional? (chileconvencion.cl).

¹⁴⁸ Propuesta de Constitución Política de la República de Chile, art. 15.

discrimination for foreign citizens.¹⁴⁹ However, what is problematic and concerning is that currently most countries grant, and guarantee rights based on nationality or citizenship. The fact is that treaties, such as the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights, establish that the rights contained in said treaties should be respected without distinction of any kind based on “color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁵⁰

If rights are, as explained in the next section in greater detail, “essential human capabilities to function”¹⁵¹ and the minimum standard for ensuring a life that respects human dignity, then¹⁵² then there is no reason to deny them based on nationality or immigration status. Rights should be granted not due to a person’s participation in the social compact, but because of their humanity.

Of course, when discussing social rights, their guarantee depends on the availability of resources. Hence, international jurisprudence has developed the criteria of minimum core obligations and obligation of progressive realization. Minimum core obligations¹⁵³ refer to that minimum content of social rights above indigence, such as access to health facilities on a non-discriminatory basis, to a minimum of essential food, to basic shelter, housing and sanitation, to essential drugs, to the equitable distribution of all health facilities and the implementation of a national public health strategy.¹⁵⁴ For its part, the obligations of progressive realization refer to the gradual fulfillment of social rights and to the extent of available resources. International organizations have already defined a test to evaluate whether states have taken adequate steps to guarantee social rights.¹⁵⁵ This approach to social rights is not enough to combat structural

¹⁴⁹ Adèle Cassola, Amy Raub & Jody Heymann, *Constitutional Protections in an Era of Increased Migration: Evidence from 193 Countries*, 20 INT’L J. HUM. RTS. 298 (Sept. 25, 2015), https://www.worldpolicycenter.org/sites/default/files/Constitutional_Protections_in_an_Era_of_Increased_Migration.pdf.

¹⁵⁰ International Covenant on Civil and Political Rights art. 2.1, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368; International Covenant on Economic, Social and Cultural Rights art. 2.2, Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360.

¹⁵¹ MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT, THE CAPABILITIES APPROACH* 5 (Cambridge U. Press 2000).

¹⁵² *Id.*

¹⁵³ International Covenant on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations art. 2, ¶1, Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360.

¹⁵⁴ *Id.*

¹⁵⁵ See Committee on Economic, Social and Cultural Rights, *An evaluation of the obligation to take steps to the “maximum of available resources” under an optional protocol to the covenant* (2007), <https://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf>.

inequalities, there is no reason to consider that even the minimum core obligation of rights does not apply to migrants. Until human rights succeed in dismantling this dogma of linking rights to nationality or citizenship, it will not be able to succeed as a project of global justice.

C. Recognize a human right to migrate

A final mechanism to build a human rights movement without borders is to recognize a right to migration, to the extent that this guarantees access to a community of rights where the dignity of individuals is respected. To this end, I present a moral justification for migration as a right, and I also raise the problem of the incomplete regulation of the right to migrate in international human rights law. In certain cases, mobility becomes the sole means to attain human rights, as rights ought to be sought from humanity as a whole rather than exclusively from a particular society. Therefore, the act of migration should be permitted. In the next section, following the capabilities-based philosophy developed by Martha Nussbaum, I argue that migration is a human right, and therefore international human rights law should recognize it as such.¹⁵⁶

1. Martha Nussbaum and the Capabilities-Based Philosophy

As I said earlier, the Enlightenment-liberal philosophy justified human rights based on the triad rationality-autonomy-freedom. However, Martha Nussbaum, an American moral philosopher influenced by Amartya Sen, recovers a tradition of capabilities that goes back to Aristotle, and presents a political justification of human rights that revitalizes the Rawlsian liberal tradition.¹⁵⁷ For Nussbaum, human rights are essential human capabilities to function that “should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires.”¹⁵⁸ In her view,

Capabilities as I conceive them have a very close relationship to human rights, as understood in contemporary international discussions. In effect they cover the terrain covered by both the so-called first-generation rights (political and civil liberties) and the so-called second-generation rights (economic and social rights). And they play a similar role, providing the philosophical underpinning for basic constitutional principles . . . ¹⁵⁹ I would argue that the best way of thinking about rights is to see them as *combined capabilities*. The right to

¹⁵⁶ I understand that rights, as Amartya Sen argues, are “strong ethical pronouncements as to what should be done”. See AMARTYA SEN, *THE IDEA OF JUSTICE* 357 (Belknap Harvard 2009).

¹⁵⁷ See Martha C. Nussbaum, *Aristotle, Politics and Human Capabilities: A response to Antony, Arneson, Charlesworth and Mulgan*, 111(1) U. CHI. PRESS 102, 119 (2000).

¹⁵⁸ Nussbaum, *supra* note 151.

¹⁵⁹ *Id.* at 97.

political participation, the right to religious free exercise, the right of free speech – these and others are all best thought of as capacities to function . . . By defining rights in terms of combined capabilities, we make it clear that a people in country C do not really have the right to political participation just because such language exists on paper: they really have this right only if there are effective measures to make people truly capable of political exercise.¹⁶⁰

According to Nussbaum, the deprivation of opportunities for living creatures to exercise their innate or basic capabilities for important and valuable functions results in waste and tragedy.¹⁶¹ For instance, she contends that failure to educate women, inadequate healthcare, and limitations on freedom of speech and conscience for all citizens lead to a premature death of a form of flourishing that is considered worthy of respect and admiration.¹⁶² Nussbaum’s list of capabilities is not exhaustive, but includes at least ten capabilities:

- 1) *Life*. Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.
- 2) *Bodily Health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
- 3) *Bodily Integrity*. Being able to move freely from place to place; having one’s bodily boundaries treated as sovereign, i.e., being able to be secure against assault, including sexual assault, child sexual abuse, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
- 4) *Senses, Imagination and Thought*. Being able to use the senses, to imagine, think, and reason-and to do these things in a “truly human” way
- 5) *Emotions*. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger.
- 6) *Practical Reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life.
- 7) *Affiliation*. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction.
- 8) *Other Species*. Being able to live with concern for and in relation to animals, plants, and the world of nature.

¹⁶⁰ *Id.* at 98.

¹⁶¹ *Id.* at 81.

9) *Play*. Being able to laugh, to play, to enjoy recreational activities.

10) *Control over One's Environment*. (A) Political: Being able to participate effectively in political choices that govern one's life, having the right of political participation, protections of free speech and association. (B) Material: Being able to hold property (both land and movable goods), not just formally but in terms of real opportunity; and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure.¹⁶³

The capabilities approach to human rights has several advantages. Firstly, it goes beyond the idea of founding rights on rationality. The rational approach meant creating the category of sub-humans with less rights and non-humans with no rights. Women still struggle for equal rights, and this is in part because the Enlightenment thinkers did not consider women capable of being as rational and autonomous as men.¹⁶⁴ This was the case with black people as well. For centuries they have been deemed inferior for reasons as futile as their coming from temperate climates.¹⁶⁵ People with mental disabilities did not have rights either, because it was presumed that they lacked reason and this in turn meant they were legally and morally dead.¹⁶⁶ Thus, rationality was essentially a way to naturalize the dominance of the white male individual of the Global North.¹⁶⁷

Nussbaum takes us away from the liberal tradition of rights based on rationality-autonomy-freedom and toward an alternative liberal tradition based on capabilities-autonomy-freedom. This means that rights will no longer be granted based on rationality but on the faculties that agents can develop throughout their existence for flourishing and happiness. In the context of migration, it is important to move away from the paradigm of rights based on rationality because even today, the rights of migrants are limited by their supposed sub-humanity. Just recently, during his presidency, Donald Trump contended that the country is “full”¹⁶⁸ and migrants were characterized as “invaders,” a threat to the survival of the

¹⁶³ Nussbaum, *supra* note 151, at 78-80.

¹⁶⁴ Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 210 (2000).

¹⁶⁵ CHARLES DE SECONDAT & BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 265 (Thomas Nugent trans., Batoche Books 2001).

¹⁶⁶ TIM STANTON, *THE ROUTLEDGE HISTORY OF DISABILITY* 24 (Roy Hanes, Ivan Brown and Nancy Hansen 2008).

¹⁶⁷ BOAVENTURA DE SOUSA SANTOS, *THE END OF THE COGNITIVE EMPIRE* 4 (2018).

¹⁶⁸ ABHIJIT V. BANERJEE & ESTHER DUFLO, *GOOD ECONOMICS FOR HARD TIMES* 12 (Christine Marra ed., 1st ed. 2021).

nation.¹⁶⁹ He even went on to say that Mexican immigrants are “rapists” and that Americans should fight against them because “they’re killing us at the border and they’re killing us on jobs and trade.”¹⁷⁰ Other people have compared immigrants to cockroaches or plagues.¹⁷¹

Furthermore, Nussbaum also goes beyond the idea of thin social goods of philosophical liberalism, or the list of primary goods proposed by Rawls.¹⁷² For Rawls, not even the human rights recognized in the Universal Declaration of Human Rights could be justified, much less all the new rights recognized today, let alone non-human rights. On this point, in *Laws of Peoples*, Rawls argues that basic human rights express a minimum standard of “well-ordered political institutions for all peoples who belong, as members in good standing, to a just political society of peoples.”¹⁷³ Since his aim was to propose rights that would be acceptable by all people, he relies on a sort of minimalism that leads him to consider human rights only as a very restricted class of urgent rights that would be acceptable to non-liberal peoples. Such examples are the right to subsistence and to security, the right to liberty, the right to personal property and liberty of conscience.¹⁷⁴ To avoid the charge of ethnocentrism, not even the central rights included in the Universal Declaration of Human Rights would count as human rights for Rawls.¹⁷⁵

It is noteworthy that there are efforts to justify migration as a human right based on mainstream philosophical liberalism. One is by Joseph Carens who uses Rawls’s experiment on the original position to derive a right to migration. He argues that:

If situated behind a veil of ignorance, without knowing the place that each one will have to live on this planet, the representatives of the parties must reach an agreement on the principles of justice, then freedom of movement would be recognized as a universal right. It would be, without a doubt, the most reasonable way to tame chance and make sure to not fall into the worst

¹⁶⁹ Sherally Munshi, *Unsettling the Border*, 67 UCLA L. Rev. 1720, 1722 (2021).

¹⁷⁰ Katie Reilly, *Here are all the times Donald Trump insulted Mexico*, TIME (Aug. 31, 2016).

¹⁷¹ See for instance Jon Stone, *Katie Hopkins’ migrant ‘cockroaches’ column resembles pro-genocide propaganda, says the UN*, INDEPENDENT (Apr. 24, 2015), <https://www.independent.co.uk/news/uk/politics/katie-hopkins-migrant-cockroaches-column-resembles-progenocide-propaganda-says-the-un-10201959.html>.

¹⁷² Nussbaum, *supra* note 151, at 228.

¹⁷³ JOHN RAWLS, *THE LAW OF PEOPLES*, IN *THE POLITICS OF HUMAN RIGHTS* 32 (Obrad Savić 1999).

¹⁷⁴ JEFFREY FLYNN, *REFRAMING THE INTERCULTURAL DIALOGUE ON HUMAN RIGHTS*, 47 (2014).

¹⁷⁵ RAINER FORST, *THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE*, 232 (2012).

possible scenario: to be born in a country without resources and lack the rights to access to another.¹⁷⁶

Although the application of the Rawlsian experiment might be a magnificent way to understand the unfairness of restricting migration in the broader context of global justice, the problem is that it is an interpretation incompatible with Rawls's intentions. Rawls claims in *Political Liberalism* that a democratic society should perceive itself as a complete and closed social system. Furthermore, he argues that individuals can only enter this system through birth and can only leave it through death.¹⁷⁷ For Rawls, migratory movements are episodic, and the conditions of entry and exit into liberal democratic societies are not central for evaluating the nature of these societies. A liberal society should be able to establish conditions of access to protect political culture and constitutional principles.¹⁷⁸ According to Charles Beitz, "the original sin of Rawl's reasoning lies precisely in the fact that he circumscribed justice within the borders of the Nation State."¹⁷⁹

After all, for Rawls, a country's wealth is determined by its political culture, its religious, philosophical, and moral traditions, and the moral qualities of its people.¹⁸⁰ In the words of Seyla Benhabib, in Rawls's account "cosmopolitan right is sacrificed on the altar of states' security and self-interest."¹⁸¹ In addition, nowhere in his catalog of human rights does Rawls recognize migration as a human right.¹⁸²

However, it is a mistake to use "social contracts" to justify the right to migrate. Precisely as noted earlier, it is the social contracts from Rousseau to Rawls that close down human communities because the benefits of such contracts apply only to contracting parties, where one of the objectives is precisely to protect individuals from external threats to their individual rights and shared identity. Thus, social contracts, also create the "noncontractual subject."¹⁸³ Thinking about a new contract in the context of migration simplifies this phenomenon, as if the arriving migrant had the

¹⁷⁶ Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, *the Review of Politics*, 49 REV. POL. 251, 251-273 (1987); See also Joseph H. Carens, *The Case for Amnesty*, BOSTON REVIEW (May 1, 2009), <https://www.bostonreview.net/forum/case-amnesty-joseph-carens/> (a debate on the right to migration as proposed by Carens).

¹⁷⁷ JOHN RAWLS, *POLITICAL LIBERALISM* 40 (2005).

¹⁷⁸ Seyla Benhabib, *The Law of Peoples, Distributive Justice, and Migrations*, 72 FORDHAM L. REV. 1761, 1771 (2004).

¹⁷⁹ Cited in Di Cesare, *supra* note 27.

¹⁸⁰ Benhabib, *supra* note 178.

¹⁸¹ *Id* at 1774.

¹⁸² Flynn, *supra* note 174.

¹⁸³ SAIDIYA V. HARTMAN, SCENES OF SUBJECTION, TERROR, SLAVERY AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 192 (1997).

chance to negotiate her entry on equal terms.¹⁸⁴ It completely overlooks the problem of reception¹⁸⁵ in the name of abstract equality.¹⁸⁶

In contrast, with the capabilities approach, we can justify civil and political rights, economic, social, cultural, and environmental rights, non-human rights,¹⁸⁷ and even the right to migration. If human rights are capabilities, this requires a corresponding political system to enforce them. What happens when people are born and must live in a failed state? For instance, authoritarian regimes are less likely to respect the right to life, personal integrity, freedom of expression, or freedom of association. Further, material capabilities (social rights) are more likely to be respected in welfare states.

To be exact, people leave their countries of origin to flee from violence and natural catastrophes, or to seek job opportunities that allow them to meet their basic needs.¹⁸⁸ The migrant caravan from Central America to the U.S-Mexico border, for instance, was a movement for survival undertaken mostly by indigenous peoples, who have, for centuries, been uprooted by genocide, land dispossession, and environmental disruption.¹⁸⁹

Given that the right to have rights is conditional upon a political community, in cases in which the community is unable or unwilling to guarantee basic capabilities, the first right to derive from the right to have rights is the right to migrate. If human rights are a project of global justice, we cannot simply say that whether you have rights or not will depend on the luck of being born into a political community that is able to respect your basic capabilities. In other words, we must get rid of the imaginary line that assumes that in the Global North life will be guided by regulation and emancipation and in the Global South by violence and exclusion. The

¹⁸⁴ Di Cesare, *supra* note 27 at 61.

¹⁸⁵ *Id.*

¹⁸⁶ When explain enslaved people in North America, Hartman explains that “it is not simply that rights are inseparable from the entitlements of whiteness or that blacks should be recognized as legitimate rights bearers; rather, the issue at hand is the way in which the stipulation of abstract equality produces white entitlement and black subjection in its promulgation of formal equality. The fragile “as if equal” of liberal discourse inadequately contends with the history of racial subjection and enslavement, since the texture of freedom is laden with the vestiges of slavery, and abstract equality is utterly enmeshed in the narrative of black subjection”. See Hartman, *supra* note 183 at 317.

¹⁸⁷ See generally Cass R. Sustein & Martha C. Nussbaum, Animal rights: current debate and new directions (2004) (Beyond “Compassion and Humanity”, Justice for Nonhuman animals).

¹⁸⁸ See Inter-Am. Comm’n H.R., Human Mobility Inter-American Standards, ¶ 17, OEA/Ser.L/V/II. Doc. 46/15 (Dec. 31, 2015).

¹⁸⁹ Sherally Munshi, *Unsettling the Border*, 67 UCLA L.REV. 1720, 1757 (2021).

humans on one side and the sub-humans on the other; rights in the north, wrongs in the south.¹⁹⁰

With the capabilities approach, we can argue that migration is a human right because in some instances, it is essential to guarantee the right to life, personal integrity, and other civil and political liberties (such the cases of refugees and asylum). One should not refuse to receive a person if this refusal will cause his destruction.¹⁹¹ Moreover, by linking human rights to basic capabilities, one can also make the case that migration might also be essential to guarantee economic, social, cultural, and environmental rights. Major trends causing migration include unemployment as well as barriers to accessing basic public services such as education and health. Inasmuch as these services are fundamental to uphold the “bare minimum of what respect for human dignity requires”¹⁹² their lack provides strong moral reasons to recognize the right to migrate.¹⁹³

It is worth noting at least one problem with the application of the capabilities approach to migratory movements. Nowhere does Nussbaum recognize migration as a human right. And precisely because the great flaw in her theory is its over-emphasis on the notion of autonomy,¹⁹⁴ she also has a strong idea of sovereignty and attaches little importance to international law, which, in her opinion, simply serves to create solidarity.¹⁹⁵ In her words, “national sovereignty and individual autonomy are kindred and mutually reinforcing ideas.”¹⁹⁶ She warns that “one should always beware of leaching away national sovereignty, particularly in favor of an international realm that is not decently accountable to people in each nation through their own political choices and self-given laws.”¹⁹⁷

¹⁹⁰ BOAVENTURA DE SOUSA SANTOS, *THE END OF THE COGNITIVE EMPIRE* 19 (2018); *See also*, Carmen G. Gonzalez, *Climate Change, Race, and Migration*, 1 U.C. Davis J. L. Pol. Econ. 109, 114 (2020).

¹⁹¹ IMMANUEL KANT, *PERCEPTUAL PEACE: A PHILOSOPHICAL ESSAY, THIRD DEFINITIVE ARTICLE FOR A PERPETUAL PEACE*, “THE LAW OF WORLD CITIZENSHIP SHALL BE LIMITED TO CONDITIONS OF UNIVERSAL HOSPITALITY” (Mary C. Smith trans., George Allen & Unwin Ltd. Ruskin House 3d ed. 1917).

¹⁹² Nussbaum, *supra* note 151.

¹⁹³ *See* DARON ACEMOGLU & JAMES A. ROBINSON, *THE NARROW CORRIDOR: STATES, SOCIETIES, AND THE FATE OF LIBERTY*, at xv, 467 (Penguin Press, 2019). Acemoglu and Robinson argue that “a strong state is needed to control violence, enforce laws and provide public services that are critical for a life in which people are empowered to make and pursue their choices.” For them the State needs to play a role in “redistribution, creating a social safety net and regulating the increasingly complex economy.”

¹⁹⁴ ROBIN WEST, *NORMATIVE JURISPRUDENCE, AN INTRODUCTION*, *CAMBRIDGE INTRODUCTIONS TO PHILOSOPHY AND LAW* 35 (Cambridge University Press 2011).

¹⁹⁵ Martha C. Nussbaum, *The Cosmopolitan Tradition, A Noble but Flawed Ideal* 243 (Belknap Harv. U Press 2019)

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 218.

For this reason, she fails to promote a project for global justice and ends up simply correcting the old cosmopolitan tradition of the Stoics, which basically considers our obligations to others in concentric circles, first to those closest to us, our immediate family, and then to neighbors or fellow citizens and eventually, and only, if possible, to foreigners, with the difference of attributing importance to the institutional arrangements in which human beings find themselves. This can be a source of injustice in society, to the extent that they do not allow the exercise or development of basic capabilities.¹⁹⁸ However, beyond the limited scope that Nussbaum confers on her theory, it is a contribution to thinking about human mobility in terms of human rights, and the capabilities approach has the potential to justify a human right to migration.

There are, of course, other efforts to justify the human right to migration, but in my opinion, they fail to make convincing arguments. For example, immigration scholars and activists from the ancients to the moderns have argued that the world is “common property” and the occupation of a determined territory by a human group cannot separate the most basic right of every individual to interact with other human beings or withdraw the obligation to host individuals from other places.¹⁹⁹

One problem is in the past, the common property claim gave support to the colonial project. Locke supported European colonization in the Americas in the 17th century and defended the claim with the argument that the appropriation of lands was appropriate if it benefited the majority of people.²⁰⁰ In his view, God gave the world to men in common but “it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational, not to the fancy or covetousness of the quarrelsome and contentious.”²⁰¹ Locke defined indigenous people as creatures of nature, bound by no social contract that therefore are unable to own property nor exercise sovereignty over land or people.²⁰² They only shared the earth in common.²⁰³ As Lisa Ford explains,

¹⁹⁸ *Id.* at 77.

¹⁹⁹ See for instance, Michael Reder, *Globalization and Philosophy* (Globalización y filosofía), Herder. 2012, Introduction; Francisco de Vitoria, *Relecciones on the Indians and the law of war* (Reflections on Indians and the right of war.). Buenos Aires / Mexico: Espasa Calpe Argentina, S.A., 1947, p. 105; Juan Carlos Velasco, *Open Frontiers, Human Rights and Global Justice* (Fronteras Abiertas, Derechos Humanos y Justicia Global), ARBOR Science, Thought and Cultural (Ciencia, Pensamiento y Cultural), 2012, p. 458.

²⁰⁰ SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS* 31 (Cambridge Univ. Press 2004).

²⁰¹ John Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, Dover Thrift Editions, 2002, p.15.

²⁰² LISA FORD, *SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA, 1788-1836* 15

America was vacant land free for the taking.²⁰⁴ After his arrival in Australia, British “Explorer” James Cook described it as “terra nullius,” no one’s land, even though it was inhabited. By the 1920s, ninety percent of the indigenous population in Australia had been killed.²⁰⁵ In any case, the world is not a property that we possess, it is what we build throughout history either by fair or unfair means.

Another less convincing argument in favor of a right to migration is the so-called natural society and communication argument. According to this argument, it is human nature to communicate and relate to other individuals, and borders cannot erase this existential human need. The most important author of the natural society and communication argument is Francisco de Vitoria, who, in his speeches at the University of Salamanca in 1539, indicated that at the dawn of civilization it was lawful for anyone to go to the region he wanted and to travel.²⁰⁶ For him, it does not seem that this has been abolished by the division of things, because it could never have been the intention of borders to preclude or deter communication between men.²⁰⁷ According to Vitoria, because the human is a social being, he should be ensured of a right to communication and sociality articulated in a subset of rights that included: the possibility of commercial exchanges, the right to preach and herald the gospel, the right to travel and to reside or to make one’s home, and finally, the right to migrate to the New World.²⁰⁸

Modern scholars have pointed out, however, that similarly to the world as common property argument, this idea has been used in the past to justify colonization and conquest.²⁰⁹ Vitoria’s argument easily turns into a theological-political legitimation of colonization because, while it recognizes the sovereignty and dignity of indigenous peoples, it obliges them to accept the Spanish presence, as they have the right to travel to communicate and preach the gospel.²¹⁰ However, this is an outdated argument. In the current context of globalization and social media, it is possible to communicate without traveling or migrating. Furthermore, most people migrate to survive and relocate to places in which they can make a decent living, not to communicate with each other.

(Harv. Univ. Press, 2010) .

²⁰³ *Id.*

²⁰⁴ *See Id.*

²⁰⁵ Leah Cowan, *supra* note 48.

²⁰⁶ LUIGI FERRAJOLI, RIGHTS AND GUARANTEES, THE LAW OF THE WEAKEST 127 (1999).

²⁰⁷ *Id at 129.*

²⁰⁸ Di Cesare, *supra* note 27 at 73.

²⁰⁹ Ferrajoli, *supra* note 206 at 130.

²¹⁰ *See supra* note 193 and accompanying text.

The capabilities approach provides the strongest case for a human right to migration. The right to have rights is nothing other than having a global community that guarantees universal human rights. Hence, the individual has the human right to migrate if a political community, given their institutional arrangements or political system, cannot guarantee their basic capabilities to flourish. The capabilities-based approach to migration is compatible with a concept of granting the status of refugee due to the traditional five causes: persecution for “reasons of race, religion, nationality, membership to a particular social group or political opinion”,²¹¹ but also due to nontraditional causes such as “violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”²¹² It is important that international law recognizes the status of refugees not solely in cases of massive or gross violations of human rights, but also to persons whose social rights cannot be guaranteed in the country in which they are coming from. Right-seeking migration should not be reduced to the short list of human rights advanced by Rawls, but ought to include the list of human rights of the Universal Declaration of Human Rights.

2. *Right to Migration in International Human Rights Law*

In the previous section, I showed that there are reasons to consider that migration is a human right. I consider whether the main international treaties should recognize the human right to migration. The problem is that generally, different instruments recognize the freedom of movement and to leave one country, but not the right to enter a second country.

For instance, Article 13 of the Universal Declaration of Human Rights establishes that “everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and to return to his country.”²¹³ Moreover, Article 14 establishes that “everyone has the right to seek and to enjoy in other countries asylum from persecution.”²¹⁴ The Declaration does not mention the right to enter another country, to “immigrate.” It also refers to

²¹¹ See Convention: Relating to the Status of Refugees, in letter dated July 28, 1951, at art. 1 from United Nations High Commissioner for Refugees. <https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees>.

²¹² See Cartagena Declaration on Refugees: Adopted by the Colloquium on International Protection of Refugees in Central America, Mexico and Panama, conclusion 3, Nov. 22, 1984. <https://www.unhcr.org/media/cartagena-declaration-refugees-adopted-colloquium-international-protection-refugees-central>.

²¹³ Universal Declaration of Human Rights, (Dec. 10, 1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights..>

²¹⁴ *Id.*

the institution of asylum but only recognizes the procedural right to seek asylum.

The International Covenant on Civil and Political Rights establishes in Article 12 that everyone lawfully residing within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence and shall be free to leave any country, including his own.²¹⁵ The Covenant does not mention immigration either.²¹⁶

Within the European System for the Protection of Human Rights, the most important instrument is the European Convention on Human Rights. Pursuant to Article 2, everyone who lawfully resides within the territory of a State shall have the right to liberty of movement and freedom to choose his residence and shall be free to leave any country, including his own. The European Convention does not expressly refer to the right to immigrate or the freedom of a person to move from one State to another, but only to the right of a person to leave any country, including his own.²¹⁷ In multiple decisions, the European Court has highlighted that the Convention does not recognize a human right to enter, reside in, and/or not be expelled from a country.²¹⁸

With respect to the African system, Article 12 of the African Charter on Human and Peoples' Rights establishes that every individual shall have the right to freedom of movement and residence within the borders of a State, provided he abides by the law, and that every individual shall have the right to leave any country including his own, and to return to his country.²¹⁹ As in the case of other treaty instruments already mentioned, the African Charter expressly recognizes the right to emigrate but not the right to immigrate.

In the case of the Inter-American Human Rights System, the American Convention on Human Rights establishes in Article 22 (freedom of movement and residence) that every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law. Every person has the right to leave any country

²¹⁵ International Covenant on Civil and Political Rights, (Dec. 16, 1966), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

²¹⁶ *Id.*

²¹⁷ European Convention on Human Rights, (Aug. 1, 2021), https://www.echr.coe.int/documents/d/echr/Convention_ENG.

²¹⁸ See *Abdulaziz v. the United Kingdom*, 15/1983/71/107-109, Council of Europe: European Court of Human Rights, (April 24, 1985); *Boujlifa v. France*, 122/1996/741/940, Judgment, (October 21, 1997).

²¹⁹ African Charter on Human and Peoples' Rights, (June 01, 1981), http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

freely, including his own.²²⁰ As can be seen, the American Convention, like other international instruments, expressly regulates only the right to freely leave any country and not the right to enter a country other than one's own.

Thus, despite the supposedly cross-border character of rights, international human rights law instruments uphold the sovereignty of individual states to control its borders, and at most, argue that states should design migration policies with a human rights approach. As explained before, this is not enough. There is an internal contradiction between universal human rights and territorial sovereignty built into the logic of the most comprehensive international law documents in the world.²²¹

Macri's decree to toughen immigration policies in Argentina exemplifies this tension. The decree was grounded in human rights principles, which also drove its eventual repeal. For instance, when issuing the decree, they invoked the Inter-American Court's assertion that States possess the sovereign authority to regulate the entry, exit, or residency of both national and foreign populations within their borders.²²² Likewise, when repealing it, the Inter-American Court considered that states must ensure the human rights of migrants without any discrimination and must implement their migration policies with strict adherence to the guarantees of due process and respect for human dignity.²²³

Both positions have a certain legal basis in the jurisprudence of international courts and organizations on human rights. For instance, the Special Rapporteur on the human rights of migrants has stated in the past that States have the sovereign right to safeguard their borders and regulate their migration policies, as long as they ensure respect for the human rights of migrants.²²⁴ Likewise, the Inter-American Court has indicated that granting asylum to a person who requests it is an expression of the sovereignty of the State²²⁵ and underscored that in exercising their

²²⁰ American Convention on Human Rights, (Nov. 22, 1969), <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm#:~:text=Article%2022.&text=Every%20person%20lawfully%20in%20the,country%20freely%2C%20including%20his%20own>.

²²¹ SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS* 11 (Cambridge University Press 2004).

²²² Migrations, (Jan. 27, 2017), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/270000-274999/271245/norma.htm>.

²²³ See Migration Law, repeal, 138/2021, DECNU-2021-138-APN-PTE - Decreto N° 70/2017. (Arg.).

²²⁴ Jorge Bustamante, Report of the Special Rapporteur on the human rights of migrants, ¶14, UN Doc. A/HRC/20/24, (Feb. 25, 2008).

²²⁵ The Institution of asylum and its recognition as a human right in the inter-american system of protection, Advisory Opinion OC-25/18, Inter-Am. Ct. H.R., ¶163 (May 30, 2018).

sovereignty, states must respect the human rights of the persons subject to their jurisdiction.²²⁶

International courts in general have not gone beyond requiring that states' migration policies comply with human rights. The courts have failed to see, however, that the original challenge for the human rights project is the border itself, which positions the State as the only mediator of rights and demands belonging to a nation as a prerequisite to be treated with humanity. In this case, nationality becomes the only path to a flourishing life.

International human rights bodies should fully recognize the right to migration, encompassing both the right to leave and to enter another territory in which all their individual and social rights are respected. Recognizing migration as a human right does not mean that this right is absolute, but instead that it should be respected unless there are justified reasons to limit the right. It also does not mean fully endorsing the abolition of borders, or the opposite, the resurrection and fortification of borders. The problem with the former is that border abolition usually remains abstract and does not provide answers to questions such as institutional arrangements for global citizenship, or how to manage massive migration of people into a country with limited resources, while the latter ignores that we live in a world of interdependence and is usually fueled by racism, xenophobia, and so on.²²⁷ It implies, on the one hand, conferring rights to migrants who are already in the territory of a country because their human rights cannot be provided by the territory in which they were born, nor can they come from their filial or blood ties. On the other hand, the conditions of access to a given territory should be reasonable and comply with the principle of equality and non-discrimination.

In this sense, the validity of limitations to the right to migrate may be evaluated in considering the principle of proportionality. Balancing requires that "the greater the degree of non-satisfaction or restriction of one of the principles, the greater the degree of the importance of satisfaction of the other."²²⁸ For instance, one might argue that there are reasons to restrict migration where a large number of people try to enter the territory of a small state, such as Lichtenstein.²²⁹ In this case, the state might want to restrict migration to protect the quality of life in its territory given available resources, job opportunities, and so on. Nonetheless, it is worth considering

²²⁶ Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion OC-21/14, ¶62 (Aug. 19, 2014).

²²⁷ Ayelet Schachar, Op.Cit, p.48.

²²⁸ ROBERT ALEXY, *The Weight Formula*, in LAW'S IDEAL DIMENSION 155 (2021).

²²⁹ David Miller, *Is there a human right to immigrate?*, CSSJ WORKING PAPERS SERIES 11 (2015).

that, as Banerjee and Duflo demonstrate, the classic supply-demand theory does not neatly apply to immigration.²³⁰ The newcomers spend money, and this creates jobs, mostly for unskilled laborers. This tends to increase their wages and may compensate for the shift in the labor supply. Low-skilled migration might also push up the demand for labor because it slows down the process of mechanization. A reliable supply of low-wage workers makes it less attractive to adopt labor-saving technologies. Additionally, employers may want to reorganize production to make effective use of new workers, thus creating new roles for the native low-skilled population. Finally, since migrants are usually willing to perform tasks that natives are reluctant perform, the price of those services tend to go down, which helps the native workers and frees them to take on other jobs. An influx of migrants both increases the demand for labor as well as the supply of laborers.²³¹

Limiting the right to migrate based solely on religion or sexual orientation is not reasonable. In the 19th century, people described the immigration of Catholics and Jews as a threat to American society, just as today, some view Muslim immigrants as a potential threat to liberal democracy in Europe and the United States.²³² Likewise, for many years, countries deemed homosexuality a sufficient basis to deny entry to immigrants into the United States.²³³ These restrictions would not be able to pass a modern proportionality test. Take, for instance, a complete ban to all Muslims from entering the United States to protect the United States from terrorist attacks, such as the legislation proposed by Trump when he was a candidate and the one he passed as president.²³⁴ The measure, despite having the legitimate aim of protecting national security and preventing terrorist attacks, was not suitable for the aim it sought. It erroneously associated the Muslim religion with terrorism and appeared to presume that every Muslim was prone to violence. It imposed a severe restriction on the right to migrate without benefiting other important principles.

Although some courts and international organizations already use the principle of proportionality to assess restrictions in the context of

²³⁰ ABHIJIT V. BANERJEE & ESTHER DUFLO, *GOOD ECONOMICS FOR HARD TIMES* 24-26 (Public Affairs Hachette Book Group, 2021).

²³¹ *Id.*

²³² Joseph H. Carens, *Immigration and Justice: Who Do We Let Through?*, 26 *ISEGORÍA* 5, 11 (2002).

²³³ *Id.*

²³⁴ Jeremy Diamond, *Donald Trump: Ban all Muslim travel to U.S.*, CNN POLITICS (Dec. 8, 2015, 4:18 AM), <http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/>; *See also* Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

migration, they tend to give too much deference to the principle of state sovereignty or indicate that the State has the right to regulate the conditions of access and entry to their countries, and they only make a strong case for migration in situations such as refuge and asylum.

For example, in the case *C. vs. Belgium*, the European Court indicated that it falls to the Contracting States to maintain public order by exercising their rights to control the entry and residence of foreigners and specifically to order the expulsion of convicted foreigners for serious crimes. However, their decisions in this field must be necessary in a democratic society, which is justified by a pressing social need and proportional to the legitimate objective pursued.²³⁵ The Court has indicated that when analyzing the “necessity” of a restriction to migration, the legitimate purpose of the restriction must be weighed against the seriousness of the interference in the private life of the alleged victim.²³⁶

Moreover, the Inter-American Commission on Human Rights (IACHR) in the case of *Wayne Smith and Hugo Armendariz v. United States*, considered that a “balancing test” should be carried out on migration, in which the legitimate interest of the State to protect and promote the general welfare is assessed vis-à-vis the fundamental rights of non-citizen residents, such as the right to family life.²³⁷ The Rapporteur on migrant workers and their families of the IACHR has considered that,

While the state undoubtedly has the right and duty to maintain public order through the control of entry, residence and expulsion of removable aliens, that right must be balanced against the harm that may result to the rights of the individuals concerned in the particular case. . . . [W]here decision making involves the potential separation of a family, the resulting interference with family life may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end. The application of these criteria by various human rights supervisory bodies indicates that this balancing must be made on a case by case basis, and that the reasons justifying interference with family life must be very serious.²³⁸

On the one hand, international treaties must recognize the human right to migration and restrict it only in cases where it is reasonable to do so based on the principle of proportionality. On the other hand, in cases where

²³⁵ *C. v. Belgium*, No. 21794/93, ¶ 31 (June 24, 1996), <https://hudoc.echr.coe.int/?i=001-57992> [<https://perma.cc/WP7Y-KRHZ>].

²³⁶ *Berrehab v. The Netherlands*, No. 10730/84, ¶ 29 (June 21, 1988), <https://hudoc.echr.coe.int/?i=001-57438> [<https://perma.cc/85MT-KPKW>].

²³⁷ *Wayne Smith and Hugo Armendariz v. United States*, Case 12.562, Inter-Am. Comm’n H.R., Report No. 81/10, ¶ 51 (2010).

²³⁸ IACHR, 1999 Annual Report, Chapter VI Special Studies, ¶ 21.

restrictions are reasonable, there must be alternatives. Given that a person has the right to have rights and to live in a community that respects his rights, if it is not possible for their capabilities to be respected in their community of origin, the individual must have access to another political community. For this reason, it is essential to think of the right to have rights as the right to access a community that respects human rights. In the context of migration, the right to have rights requires a global pact or global governance of migration that can guarantee the right of the individual to access a community of rights.²³⁹

D. Create or Strengthen International Institutions

The last measure that I propose to advance toward a world of human rights without borders is to strengthen or create more institutions of an international nature that can guarantee human rights, such as the right to health, food, and education in cases of failed or inoperative States.

As Ferrajoli reminds us, during the pandemic we witnessed the tremendous limitations of institutions such as the World Health Organization due to its budget—4.8 billion dollars every two years—to provide the necessary medical aid, including equipment and vaccines to poor countries lacking health services to respond to the pandemic.²⁴⁰ In his view, had there been an effective global institution protecting the right to health, we would not be mourning the death of millions of people today.²⁴¹

In the first place, this proposal is based on recognizing the extreme inequalities, the abyssal line in access to rights, such as health, which divides the countries with rights and the countries in which individuals do not have any guarantees for the protection of threats to their health, a basic capability as indicated above. For example, a child born in sub-Saharan Africa is almost eighteen times more likely to die in her first five years of life or nearly 100 times more likely to die in labor than a kid born in Europe, North America, or another developed region, and she can expect to die twenty-four years earlier than the child born in a developed region.²⁴²

The human rights project must not assume that each state will take charge of its own problems and that it can provide humanitarian aid it needs to push for a system that works for all. This requires, as I argued in the previous sections, a system in which even foreigners can protect their rights in the communities in which they do not have strong ties, but it also

²³⁹ U.N. Secretary-General, Report of the Special Rapporteur on the human rights of migrants, ¶ 91, U.N. Doc. A/68/283 (Aug. 5, 2013).

²⁴⁰ Ferrajoli, *supra* note 83 at 26.

²⁴¹ *Id.*

²⁴² LAWRENCE O. GOSTIN, GLOBAL HEALTH LAW 13 (Harvard University Press 2014).

requires building or strengthening a global system of protection. In this case, that would be a system of global governance²⁴³ for health that allows a rapid response to both local and global challenges in health.

For example, as the pandemic also showed, the globe is interconnected by the movement of persons, goods, and services, and pathogens know no borders.²⁴⁴ Thus, we need a global response both because it is in our self-interest to combat viruses that may affect us and because the human rights project is based on universal solidarity.

Guaranteeing the right to health globally would require strengthening the World Health Organization, the global health leader, to overcome its challenges. For example, Gostin mentions several challenges that are relevant for the purposes of this article: 1) Empower the World Health Organization to be an effective leader in global health; 2) ensure predictable, sustainable, and scalable funding; 3) prioritize essential health needs, including clean water, nutrition, sanitation, tobacco control, vector abatement, and health systems.²⁴⁵ The World Health Organization is not the only entity involved in guaranteeing the right to health globally. Today, there are more than 200 international health organizations or agencies, such as the World Bank, the Global Fund, UNAIDS, the GAVI Alliance, and philanthropic organizations like the Gates Foundation.²⁴⁶ For this reason, it would also be important to think of mechanisms to strengthen the organizations that participate in the universalization of the right to health. It is also necessary to think about strengthening other international institutions that can help guarantee basic rights, like the right to food, such as the Food and Agriculture Organization (FAO) of the UN that leads international efforts to defeat hunger.²⁴⁷ According to the FAO, the world is moving backward in its efforts to defeat hunger. Between 702 and 828 million people in the world faced hunger in 2021. Further, nearly one in three people in the world, around 2.31 billion people, were moderately or severely food insecure in 2021. This is around 350 million more people than in 2019, the year before the COVID-19 pandemic took place.²⁴⁸

²⁴³ See Gostin, *supra* note 242, at 72 (defining the global governance of health as “the collection of rules, norms, institutions and processes that shape the health of the world’s population.”)

²⁴⁴ See *id.* at 11.

²⁴⁵ See *id.* at 77.

²⁴⁶ See *id.* at 130.

²⁴⁷ See *About FAO*, FAO, <https://www.fao.org/about/en/> [<https://perma.cc/YXH8-8ZZX>] (last visited Sept. 3, 2023).

²⁴⁸ According to FAO, “[t]he lingering effects of the COVID-19 pandemic and their consequences continue to impede progress towards the achievement of SDG 2 by 2030 [end hunger]. The unequal pattern of economic recovery in 2021 among countries and the unrecovered income losses among those most affected by the pandemic have exacerbated existing inequalities and have worsened the food security situation for the populations already struggling the most to feed their families.” Furthermore,

The FAO will not be able to meet the goal of reducing hunger or get back on track to do so if efforts are not doubled. A 2020 joint study, cooperated among the Center for Development Research at Cornell University, the FAO, the International Food Policy Research Institute, and the International Institute for Sustainable Development, determined that to achieve the second Sustainable Development Goal of eradicating hunger by 2030, an extra \$39 billion to \$50 billion per year is required. In order to fulfill the commitment made by G-7 countries in Elmau in 2015 to lift 500 million people out of hunger, donors need to allocate an additional \$11 billion to \$14 billion annually, which is roughly twice the amount they currently spend on food security aid. Of course, these are not the only possible institutions that can guarantee global human rights. My proposal would be consistent with strengthening the existing institutions that guarantee human rights, such as the World Health Organization and the FAO, and introduce others that may be effective in issues such as the environment and education.²⁴⁹

In line with the proposal, I mentioned earlier to create a World Court of Human Rights and national courts of human rights with competence to decide on claims regarding violations of UN treaties or the Universal Declaration of Human Rights. One could consider the development of alternative institutions to ensure human rights on a global or local scale, linked to both the World Court and national courts, which possess the capability to both make legal judgments and actively safeguard violated human rights. The purpose of creating or strengthening national and international guarantee institutions is to deconstruct the myth that the only mediator between human rights and the individual or communities is the nation state, the legal formula of the omnipotent state.²⁵⁰ This is important because, otherwise, we reach the conclusion that without a state, or with a failed state, there are no rights, and this conclusion is completely incompatible with the universalism of international human rights law.

the war in Ukraine, involving two of the biggest producers in agriculture and staple cereals globally, is disrupting supply chains and further affecting global grain, fertilizer and energy prices, leading to shortages and fueling even higher food price inflation. On top of this, the growing frequency and intensity of extreme climate events are proving to be a major disrupter of supply chains, especially in low-income countries (LICs). See *The State of Food Security and Nutrition in the World 2022, Chapter 1 Introduction*, FAO, <https://www.fao.org/3/cc0639en/online/sofi-2022/introduction.html> [https://perma.cc/5TM2-RWCA]; *The State of Food Security and Nutrition in the World 2022, Chapter 5 Conclusion*, FAO, <https://www.fao.org/3/cc0639en/online/sofi-2022/conclusions.html> [https://perma.cc/2JKT-8YA5].

²⁴⁹ Ferrajoli, *supra* note 226 at 77.

²⁵⁰ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 42 (George Schwab trans., University of Chicago Press 2007).

III. CONCLUSION: HUMAN RIGHTS AND GLOBAL JUSTICE WITHOUT BORDERS

Some authors suggest that the universalist claim of human rights can be reconciled with the division of the world into Nation States.²⁵¹ However, the international human rights law movement was born with the idea of being a project of global justice. It seeks to achieve a bare minimum of rights or principles that should be respected and guaranteed to individuals and communities in every corner of the earth based on the dignity and worth of the person. The idea of the nation state as the only mediator of rights is incompatible with the idea of global justice, since rights are assigned based on nationality, citizenship, territory, or the side of the border on which one is located. The Nation State reduces the human rights project to a national frame of reference and forecloses the dream of global peace and planetary freedom.²⁵²

The human rights project is currently failing because the distribution of rights across the world is extremely unequal, as is demonstrated by the thousands and millions of people living in oppressive systems, suffering from hunger, who try to cross the border to find a community of rights without being able to do so. Still, as I have described throughout this article, we have abyssal lines that divide oppressive systems from communities of rights without it being possible to move from one to the other. The response of international law is simply to require that we humanize the border or adopt migration policies with a rights approach, but in this article, I have argued that this is not enough. Firstly, I believe that international human rights law should stop naturalizing the border or the Nation State. This naturalization is a consequence of the mainstream liberal theory that justifies contemporary human rights with the triad rationality-autonomy-freedom.

Since the Enlightenment, the concept of rationality has been used instrumentally to create distinctions between humans and sub-humans. This led to assigning fewer rights to those considered to have less agency, such as women or people of African descent. Today, we still use this categorization to exclude migrants from our political communities. Furthermore, the idea of strong autonomy advocated by the Enlightenment has resulted in individualistic societies that disconnect rights from the broader community. Consequently, these societies can grant numerous

²⁵¹ Fukuyama, on the contrary, argues that there is no necessary contradiction between liberal universalism and the need for nations. In his view, while human rights may be a universal normative value, enforcement power is not; it is a scarce resource that is necessarily applied in a territorially delimited way. See Fukuyama, *supra* note 38, at 131.

²⁵² Bradley, *supra* note 32, at 100.

rights to their political community while simultaneously excluding those who were not part of the social contract. For this reason, I propose to reconceptualize rights with a different triad made up of capabilities-harmony-sustainability. The purpose of rights is to guarantee the capabilities of individuals to flourish, and rights are not dependent merely on autonomy or sovereignty, but they have a basis in a global community that seeks to restore peace and harmony between living beings. Rights serve a dual purpose by providing protection against the state while fostering positive connections with fellow individuals.

In this article, I proposed, as a basic condition to promote human rights without borders, to challenge the relationship between human rights and the Nation State. Firstly, acknowledging that the Universal Declaration of Human Rights has universal application (which is different from homogeneous enforcement) that allows different nations to be united as federations of the same planet, and that rights can be enforced by an international court or local human rights courts with sufficient mechanisms to guarantee them. I further proposed that international human rights law ensure that states, in their constitutional texts, do not link rights to nationality, citizenship, or any other condition that is not humanity or the ability to flourish, in the case of animals or nature. To do this, I provided some examples of attempts to realize this ideal of universality in Argentina and Ecuador. I also argued that the right to migrate must be recognized by international human rights law and only subject to limitations that are proportional. This right would come to guarantee access to a political community of rights. Only in this way can we get out of that Arendtian dilemma in which, when an individual loses his nationality, he also loses all legal protections and, in the end, his humanity. Statelessness can no longer mean rightlessness. We need to denationalize rights. Finally, I considered that we must move forward in the creation and strengthening of national and international human rights guarantee institutions as a mechanism that allows decentralizing the nation state as the only guarantor of the rights of individuals. We must imagine a new political community that is more interconnected and less atomized, in which there is a better distribution of rights. Otherwise, human rights will continue to be an unrealized utopia, a privilege of the few who were lucky enough to be born on the right side of the planet.