

Martti Koskenniemi's *From Apology to Utopia*,¹ an especially sophisticated account of the structure of the international legal argument, illustrates this failure at transcendence of the tension. In the same breath that Koskenniemi declares "sovereignty" to be a "general maxim" that is "irrelevant," he proposes a commitment that "positively excludes imperialism." He thus reaffirms a debate structured around the opposition of sovereignty/no sovereignty, for how can one ever begin to understand the concept of imperialism without some sovereignty? The absence of alternatives and the incessant need for immediate action are again the two impediments to a radical transformation of the polarity of the sovereignty debate. As we try to join Koskenniemi in his quest for "reimagin[ing] the game and reconstruct[ing] its rules," we are constantly reminded that that is easier said than done and if we were to try, we would risk being excluded from the game currently being played.

The ray of hope in all of this is that in our "negotiation" of this "dilemma" (I borrow the terms, respectively, from William Connolly and Martha Minow) we may, one day, discover new utopian politics. Or perhaps we will come to appreciate, quite anticlimactically, that the new politics are not in some distant future, but here and now, in our self-conscious recognition and negotiation of the dilemmas of immigration, sovereignty and all other dilemmas of our contemporary condition. Either choice appears plausible. I am almost certain, however, that they both involve, at a minimum, the recognition that the transformed sovereignty is not the holy grail, that neither the old sovereignty nor the utopia of no sovereignty should be easily dismissed and, last but not least, that the nonassimilating immigrant and the xenophobic native are not the demons immigration law and policy has made them out to be.

WHO ARE THE ARCHETYPAL "GOOD" ALIENS?

*By Harold Hongju Koh**

The distinction this panel draws between good and bad aliens reminds me of a sign in George Orwell's *Animal Farm*: "All animals are equal, but some animals are more equal than others." The premise of this panel is that the immigration field is similarly Orwellian: "All aliens are aliens, but some aliens ('good aliens') are less alien than others."

To understand why "bad aliens" are treated the way they are, we must return to first principles. If some aliens are "bad," who are the "good" aliens, and what do they look like? In her opening remarks, Professor Engle suggested at least one characteristic of "good" aliens: that they have entered or reside here legally. Let me add to this characteristic—legal entry—several others that emerge from the text and legislative history of the Immigration and Nationality Act, the case law construing it, and empirical, statistical and historical evidence regarding refugee inflows into the United States. Those sources suggest that the U.S. immigration system has traditionally favored aliens who, aside from being legal entrants, have the following characteristics.

(1) U.S. immigration law has traditionally favored aliens who are white, preferably European, and certainly not black Africans. (2) It has favored aliens who

¹ See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989).

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are economically self-sufficient, preferably highly skilled and educated. The 1990 Immigration Act, for example, says that an alien is excludable when applying for a visa, if it is likely at any time that he or she will become a "public charge." On the other hand, our law accords visa preferences to qualified immigrants who are members of the professions or who, because of their exceptional ability in science or the arts, will substantially benefit the cultural or economic interests of the United States. In other words, the law favors Baryshnikov, not boat people. (3) The law favors aliens who are healthy, or at least not afflicted with diseases that the Secretary of Health and Human Services deems to be a "communicable disease of public health significance." (4) Good aliens are those who flee from totalitarian governments. (5) Good aliens tend to be heterosexual or, in the former words of the statute, not afflicted with a "psychopathic personality, sexual deviation, or mental defect," a description the Supreme Court has read to embrace homosexuals. (6) Good aliens are law-abiding, have not engaged in criminal conduct, and do not arrive here through criminal activity or alien-smuggling. (7) They arrive separately, not in large numbers. (8) Good aliens are refugees, in the sense that they are unable to return to their country because of well-founded fears of persecution on political, religious or racial grounds. (9) Finally, as Professor Brustin will tell us, male aliens have traditionally been viewed as "better" than female aliens.

Many will resist such broad generalizations. But accepting them for the sake of argument, you might surmise that the archetypal "good" alien, the favorite of U.S. immigration law, is a white, healthy, law-abiding, self-sufficient, anti-communist, heterosexual, male political refugee, who arrives by himself at the U.S. Embassy in Moscow and seeks political asylum; Rostropovich and Baryshnikov are two obvious examples. It follows that the archetypal "bad" aliens are poor, black, economic migrants, not fleeing communism, who arrive in large numbers, seeking illegal entry and afflicted with a disease often associated with homosexuals, namely the HIV virus. In other words, if the Haitian boat people didn't exist, we would have to invent them, as the paradigm group uniquely disfavored under U.S. immigration law.

Note that an alien need not possess all these characteristics to be deemed "bad." The paradigm also suggests, for example, why the Marielito Cubans, many of whom had criminal records, who arrived by boat in large numbers, seeking illegal entry with high incidence of homosexuality and disease, were viewed as quintessentially "bad" aliens, even though they were fleeing communism. It also explains why our immigration law sometimes imposes disparate treatment, even within the same country. Poor Chinese boat people arriving on Long Island through an apparently illegal smuggling scheme on the *Golden Venture*, for example, have been treated as far less desirable than, say, Fang Lizhi, a single highly educated Chinese refugee holed up in the U.S. Embassy in Beijing.

What follows from characterizing certain alien groups as "bad" aliens? First, these aliens are the classic "discrete and insular minority," in the sense that members of Congress gain little political advantage from supporting or protecting them. They have few advocates in the legislative process, but powerful enemies, particularly in California and Florida—states that receive disproportionate immigrant inflows. As Professor Bosniak points out, in bad economic times, aliens are prime targets for scapegoating by both federal and state legislation, as we see now in California. Secondly, these are groups whom the Executive Branch can mistreat or ignore, knowing full well that the political price will be minimal. Thirdly, they are groups to whom John Hart Ely's process-protecting theory of judicial review in *Democracy and Distrust* does not apply. Ordinarily, as you know, under the

Supreme Court's famous fourth footnote in *Carolene Products*,¹ "discrete and insular minorities" are groups to whom judges may extend special protection, because they cannot speak for themselves, and have no one to speak for them, in the political process. But as we know, even Justice Blackmun's opinion in *Graham v. Richardson*,² which identifies permanent resident aliens as a discrete and insular minority, would not be accepted by a majority of the Court today. Nor, after this Term, will Justice Blackmun himself be there to defend this position. Fourthly, the most vulnerable "bad" aliens are those found in an illegal entry posture. The Supreme Court has expressed nearly complete deference to Congress when it deals with such aliens, saying, "Whatever the process authorized by Congress, it is due process as far as the alien denied entry is concerned."³ The upshot is that Executive Branch officials can regularly mistreat such "bad" aliens with impunity, confident that neither Congress nor the Court will intercede; indeed, the Court will stay its hand whenever the Executive Branch invokes arguments about foreign policy, national emergency and sovereignty. Indeed, the sovereignty argument as a basis for federal immigration power originated in *The Chinese Exclusion Case*,⁴ a classic case involving a group of putatively bad aliens.

From these four premises, one could predict that if the President, in a case that can be characterized as involving illegal entry, chose to play the cards of presidential power, sovereignty and foreign policy, in a situation of supposed national emergency to the detriment of bad aliens, he would win, particularly if not one, but two presidents, pursued the same policy. That prediction was fully borne out in the *Haitian Centers Council* case, about which Justice Blackmun spoke last night,* in which the Supreme Court upheld the Bush-Clinton policy of extraterritorial interception and return of Haitian refugees.⁵

One can also extrapolate beyond the Haitian situation to explain why the Justice Department has had such success against the Marielito Cubans over more than a decade of litigation, despite an extended practice of arbitrary detention; why the class action brought by the Chinese refugees in the *Golden Venture* case is unlikely to succeed before the Third Circuit⁶; and why the Bush Administration so quickly abandoned its support for Vietnamese boat people after starting to interdict the Haitians near our own waters. Moving beyond the U.S. context, we can see that mistreatment of "bad" aliens quickly becomes contagious. The Bahamas have started to take aggressively hostile action toward fleeing Haitians; the Italians have pushed back Albanians; and Vietnamese boats have been intercepted by the ASEAN nations in the name of national sovereignty.

Although this reasoning may explain why some alien groups are badly treated, it does not explain why an individual alien is treated as "bad." In my view, the key factor is *assimilation*. Good aliens are aliens who can assimilate. Shortly after arriving, such aliens can make a quick adjustment of status to permanent residency and ultimately to citizenship, receiving interim work authorizations, and through executive discretion whatever other waivers may be deemed necessary to promote their assimilation. Soon such aliens pose no threat to our sovereignty, because

¹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

² 403 U.S. 365 (1971).

³ *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

⁴ 130 U.S. 581 (1889).

* See Address by Justice Blackmun at the ASIL Annual Dinner, p. 383.

⁵ *Sale v. Haitian Centers Council*, 113 S.Ct. 2549 (1993) (discussed in Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 1994 ASIL Proceedings at 385).

⁶ *Yang v. Maugans*, No. 94-7060 (3d Cir. argued Mar. 24, 1994).

indeed they have become *part* of our sovereignty; they are then “the kind of immigrants of whom we can be proud.” Bad aliens, by contrast, are what Professor Manas calls “nonassimilating”: much like an undigestible mass traveling through a rattlesnake’s stomach. If our nation cannot assimilate such aliens, it may respond in one of three other ways: through expulsion, exclusion or the latest strategy—buffer zones. The “buffer zone” approach prevents aliens even from getting to exclusion hearings on U.S. territory by, for example, intercepting them on the high seas and bringing them to offshore sites, like the U.S. Naval Base at Guantanamo Bay, where they can remain as an undigested mass until the underlying political crisis is over.

What is the significance for us, as international lawyers, of this “bad aliens” reasoning? Let me suggest four consequences. First, this reasoning privileges claims of sovereignty over the internationally protected human rights of bona fide refugees. When refugee status is asserted by someone in a “bad alien” group, our government tends to treat the claim as presumptively fraudulent. This presumption then justifies burdening their asylum claims by various tactics: asking them to pay filing fees; substituting “credible fear” screening for the “well-founded” fear screening; or even more drastic measures, such as intercepting the Haitians and returning them *en bloc*, effectively pre-empting the process of inquiring about individual refugee status. If the United States can get away with this “extraterritorial *nonrefoulement*” strategy as a way of dealing with “bad aliens,” what is to prevent Germany from using such a strategy to deal with, say, Bosnian Muslims—or Thailand from dealing this way with Muslims fleeing from Burma/Myanmar? The first conclusion, then, is that the “bad aliens” strategy tends to devalue and denigrate refugee status itself.

Secondly, as Professor Gerry Neuman has pointed out, large refugee outflows serve an important signaling function.⁷ They focus the world’s attention on severe human rights violations in countries that generate refugees and create incentives for states to deal with the underlying violations by governments, rather than with the refugee epiphenomenon. Buffer zone and offshore detention strategies cut off refugee flows artificially, obstructing the signaling function and creating in the intercepting country (the United States) a false sense that it need not actually deal with the underlying problem causing the refugee outflow; for example, the ongoing human rights abuses in Haiti, Cuba or wherever. In the case of Haiti, U.S. interdiction strategy has given the country a false sense that it has unlimited time to help restore the ousted democratic regime; thus, the government sits on its hands although human rights abuses have long since exceeded acceptable levels.

A third international law problem is that the preferred international law strategy for dealing with outflows of bad aliens is multilateralism, namely, a regional burden-sharing strategy. But the start-up cost of such multilateral efforts creates a collective action problem—as we have seen in Bosnia, for example—that far exceeds the cost of unilateral action. When faced with a choice between gearing up to take multilateral action or simply rebuffing the bad aliens unilaterally, the United States is tempted to choose the unilateral interception strategy as the path of least resistance. This course, however, impinges upon aliens’ ability to assert valid refugee claims.

Fourthly and finally, connecting to the broad themes of this conference, it seems to me that the “bad aliens” rubric fosters phony claims of sovereignty on the

⁷ Gerald Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT’L L. 503 (1993).

part of both refugee-sending and refugee-receiving states. Again using Haiti as an example, General Raoul Cedras recently made public statements charging that U.S. intervention in Haitian internal affairs violates Haitian sovereignty, even though his own government is illegitimate and has been committing large-scale abuses against its own people. Nevertheless, the U.S. Government has been surprisingly timid about disputing this bogus sovereignty claim, in part because it has had to deny the reality of the ongoing human rights abuses in order to justify keeping out the Haitian aliens, whom it has come to view as "bad." Consequently, the U.S. Government is now asserting its *own* false sovereignty claim as its justification for intercepting and returning the fleeing Haitians.

In a parallel way, the Chinese Government is invoking both sovereignty and cultural relativism—the two last bastions of human rights abusers—to claim "overall significant progress" in human rights as a reason to maintain most-favored-nation status in its trading relations with the United States after July 1994. Our fear should be that the U.S. Government will actually accept these claims, motivated not by its belief that they are true, but by its desire to prevent the inevitable outflows of "bad aliens" from the largest country in the world, should it continue to crack down on Chinese human rights abusers.

The crucial point is that the international human rights movement worked a fundamental transformation of sovereignty, piercing the veil of sovereignty in the face of human rights violations by a government against its own people. Whether in Nazi Germany, Haiti or China, it would doubly undo that historical transformation of sovereignty, if our own government—driven by a fear of bad aliens—chose not only to defer to false claims of sovereignty by the human rights violators, but also to invoke specious claims of Haiti's sovereignty as a reason to aid and abet human rights violations, by returning human rights victims to their persecutors.

IMAGES OF WOMEN IN U.S. IMMIGRATION POLICY—THE PARADOX OF DOMESTIC VIOLENCE

*By Stacy Brustin**

In February 1991, immigrant women from various parts of Central and South America formed the Hermanas Unidas Project (Sisters United) at Ayuda Inc. Ayuda Inc. is a legal services center in Washington, D.C. The group, comprised largely of survivors of domestic violence, provides moral support and leadership to women in the District of Columbia. During the past three years, these women have changed the landscape of their community in significant ways, including educating immigrants and nonimmigrants about the realities of domestic violence. Yet these strong, independent, activist women are not the immigrants portrayed in immigration policy.

Women, as a group, are relatively invisible in immigration policy and there is little written on their migration patterns and life experiences. Immigration policies that profoundly impact women, such as spouse-based immigration laws, foster images of immigrant women as dependents of men, perpetrators of fraud and public burdens. The anti-immigrant furor in this country reinforces and perpetuates the negative images.

Immigrant rights advocates have had to operate against restrictive immigration policy and virulently anti-immigrant public opinion to develop strategies that will help immigrant women acquire status. Recently, experience with efforts to include

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