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From protection of the migrant to the rights of the migrant person: Free the migrant from his legal exile . . . .[1]

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Exile is the negation of the rule of law[2], wrote Victor Hugo in 1875. An exiled man is *''so ruined that he has nothing but his honor, so emasculated that he has no more than his conscience, so isolated that he has nothing but equity, so disavowed that he has nothing but the truth, so thrown into darkness that there remains to him only the sun, here are what it is that a proscribe''*[3]. The migrants of yesterday and today share in common with Victor Hugo this distress. Whether their exile is forced or voluntary, many of them experience the drama not only of social and cultural exclusion but of legal uprooting. Their situation differs however in one respect: there are at present legal means to compensate for this *''vacuum of rights''*. The development of human rights in national and international law has come to recognize the person based only on his humanity. Without adopting a Manichean position which would glorify the current state of law, means of action unimaginable yesterday are now open to the *''sans-Etats''*, independently of borders and nationality.

But in practice, it appears that this ideal laboratory for human rights which is the field of migration, does not serve the function of protecting the person who migrates. This opinion is borne out by research, the day-to-day experience of lawyers, and the analysis of key decisions regarding human rights in the field of immigration. At first view, these decisions follow a classic and rational scheme of reasoning. But something appears awry in their motivation. The human rights of aliens are systematically considered an exception, a form of tolerance or privilege, but never as a fundamental legal principle, although they are embodied in legal and constraining instruments, they attain the rank of principles.

This paper reviews some legal approaches, first, to ''free'' the migrant from his ''legal exile'', and secondly, to pass from the protection of the migrant to the rights of the

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1 This text is a summary of the PhD of this author : SAROLEA, S., *Droits de l'homme et migrations. De la protection du migrant aux droits de la personne migrante*, Bruxelles, Bruylant, 2006.

2 « L'exil est la nudité du droit ».

3 HUGO, V., *Actes et paroles II: pendant l'exil*, 1852-1870, Paris, J. Hetzel & A. Quantin, 1883, p. 4 (free translation).

http://groupugo.div.jussieu.fr/Groupugo/Textes_accessibles.htm).

migrant person. What is the difference between these two concepts? Far from being a simple play on words - ''migrant'' - ''migrant person'' - this formulation opens the way to a real change of paradigm in the fields of human rights and migration.

To clearly understand the case law which influences this area, it is necessary to specify which human rights are at stake.

Neither national nor international law recognizes or guarantees the right to migrate in itself. Construed more broadly, the right to migrate should mean the right to leave legally one country and to enter another for a short period (right to travel) or for a longer period if installation in the host country is the final objective. But even the simple right to travel, to cross borders is not guaranteed by any legal instruments, except in particular cases in which it is embodied in specific regional agreements as in the European Union. International law only recognizes and protects the right to leave a country, including one's own[4]. Since there exists no right to enter another country, the first right remains theoretical.

However, the migrant regardless of whether he moves or travels is a person and for this reason enjoys personal rights guaranteed and protected by international and domestic human rights laws. Among these are the right not to be subjected to torture or degrading treatment, the right to respect for private and family life, and the right to a fair trial.

Case law deduced from these human rights influences general rights for the migrant in particular in differing degrees depending on the relevant legal order (family reunification, protection against expulsion). These general rights of the person are interpreted by the case law, namely by the European Court of Human Rights in Strasbourg or by the Committee of Human Rights of the United Nations, so as to build up protection for the person who is in a situation of migration. This is the case not only when the person is trying to enter a country but also when he seeks to avoid expulsion or if his administrative status in a host country is subject to legal controversy.

Thus, for example, the case law of the European Court of Human Rights deduces from the right of respect for family life the recognition of certain forms of right to family reunion. This right covers on one hand the right to be joined in the country of installation by members of the family, and on the other hand, the right not to be expelled if that could lead to a separation with the family. For instance, in the *Moustaquim*

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4 International Covenant on Civil and Political Rights, *U.N.T.S.*, vol. 999, p. 171, article 12, § 2; Convention for the Protection of Human Rights and Fundamental Freedoms, *U.N.T.S.*, vol. 213, p. 222; Protocol n° 4, article 2, 2°; American Convention on Human Rights, *U.N.T.S.*, vol. 1144, p. 123, article 22, 2°.

case[5], the European Court condemned Belgian authorities under Article 8 of the European Convention of Human Rights. The government sought to return a foreigner living in the country since childhood to Morocco because he had been convicted of several offenses. This decision to expel was judged disproportionate with regards to the control of proportionality imposed by Article 8.2.

The right not to suffer inhuman and degrading treatment protected by Article 3 of the European Convention was interpreted as prohibiting the removal to a country which posed the risk of suffering such treatment. In the *Soering* case[6], the European Court of Human Rights considered that the removal of a murderer to the United States would be a violation of Article 3 because the person concerned would be subjected to the death row syndrome. The applicant was a West German national who had fled to the United Kingdom having been accused of murdering his girl friend's parents in the State of Virginia in the United States. Authorities in the United Kingdom wished to extradite him to Virginia in accordance with their extradition treaty with the United States. The Court held in a unanimous judgment that it would be contrary to Article 3 because it was established that the death penalty would be imposed if the applicant were extradited. It was not the death penalty which was considered as inhuman and degrading treatment but rather the ''death row phenomenon'', the fact that a person convicted could stay in death row for several years without knowing the date of execution. Thus the United Kingdom was condemned because of its decision to extradite Soering to the United States.

The Court ruled in the same way not only in the case of extradition but also where asylum seekers or even ailing persons were subjected to removal to their country of origin if there were risks of inadequate health treatment in that country (violation of the human right[7] to availability of medical treatment[8])[9].

In the *Singh* case, the Supreme Court of Canada stressed that *''the Convention* (Geneva) *refugee has the right under s. 55 of the Act not to . . . be removed from Canada to a country where his life or freedom would be threatened. . . . the denial of such a right must amount to a deprivation of security of the*

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5 E.C.H.R., *Moustaquim v. Belgium*, 18 of February 1991, *A,* n° 193.

6 E.C.H.R., *Soering v. United Kingdom,* 7 of July 1989, A n° 161.

7 E.C.H.R., *Chahal v. United Kingdom*, 15 of November 1996, 1996-V.

8 E.C.H.R., *D. v.. United Kingdom*, 2 of May 1997, 1997-III.

9 The Human Rights Committee rules in the same way in several cases of extradition towards countries where the death penalty is applied. Without condemning the death penalty in itself, the Committee examines if the treatment imposed to the alien extradited is if the imposed treatment respects article 7 of the International Covenant on Civil and Political Rights which prohibits the torture and the cruel, inhuman and degrading treatments (*Kindler c. Canada,* communication n° 470/1991, decision of 18 of November 1993, UN Doc. CPR/C/48/D/470/1991).

person within the meaning of s. 7''[10]. Article 7 is a central provision in the Canadian Charter of Rights and Freedoms. It states that *''Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice''*. It is applicable to any person, without distinction of nationality who is in Canada and is thus subjected to Canadian law.

All these decisions are grounded on rights which are not specific rights of the migrant but are well recognized human rights. The generic definition of the protected group - the person - should be permitted to be an advantage while it strengthens the legal situation of migrants in that it leads to a non-discriminatory protection independent of the context in which it is called upon, the subject of guarantee being the human person and not the migrant. However, case law indicates that the migratory context disadvantages the foreigner when he calls upon the respect of human rights when he migrates. The act of migration operates as a negative factor motivating less protection of the migrant than of the non-migrant person. Even if domestic and international human rights texts begin to give a sort of protection to the migrant, it remains reduced by the migratory profile of the person concerned.

This leads to inquiry into (1) how and (2) why this legal paradox exists. This paper seeks to examine two central questions:

1) Is this marginalization over time and compared to other sectors of the law real? Several examples illustrate protection which can be considered as too limited.

2) What are the bases of this reduced protection? On what does it rest?

1. The limited protection of the migrant

The restricted protection of migrants has been observed in decisions taken by three judicial bodies: the European Court of Human Rights and the Supreme Courts of the United States and Canada. Common to the case law analyzed are constant references to the concept of national sovereignty. These references are given semantic priority: they appear systematically in the opening sentences of the decisions, like *prima faciae* affirmations not subject to dispute.

In Strasbourg, each decision of the European Court of Human Rights affirms as a premise the sovereignty of the State, indicating that *''the Court observes that Contracting States have the right, as a matter of well-established international law and subject to the treaty obligations including Article 3*

10 S.C. Canada, *Singh c. Canada (M.E.I.)*, 4 of April 1985, [1985] 1. R.C.S. 177, p. 207.

to control the entry, residence and expulsion of aliens''[11]. This principle is described as 'well-established''. It is at the same time a limit of the judicial control which will be exercised and a standard presented as higher than the human rights whose protection is required. Protection of the sovereignty of the State is presented on the formal level but also on the grounds as a rule. The Court sometimes uses the expression *''at the outset''*[12] to underline the principle of sovereignty. The protection of the migrant is reduced to the rank of an exception to sovereignty.

The Supreme Court of the United States affirms that *''It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe''.* The Court deduces from this that the Bill of Rights protects foreigners present in the United States, but not migrants, traditionally excluded from constitutional protection. The judicial power shows that in this field it largely defers to Congress*. ''Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens''.* The law of the United States remains moored to the case law of the 19th and middle 20th centuries, authorizing it to refuse any constitutional protection for migrants because of the absolute and undeniable right to the self-preservation of the State and its self-definition. These prerogatives would make it possible for the nation to prohibit the entry on its territory and to order the expulsion of aliens. The migratory context excludes the recognition of substantive rights, or rather their implementation by the courts. Immigration is described as being a political question which belongs to the legislative powers and the executive. This results, in addition, in the inadmissibility of any objection in terms of procedure, it being considered that due process of law is respected since the case is related to immigration. And even if the case law in the second half of the 20th century begins to accept control, it remains marginal and restricted.

In a less radical way, the Supreme Court of Canada recognizes the supreme capacity of the State with regard to any foreigner, even friendly. This capacity is presented as a fundamental standard of the common law, with the result that the courts are compelled to show an extreme reserve with regard to decisions taken in the field of immigration. Expulsion does not lead to a threat of a right, but only to the loss of an advantage. When the removal involves a risk to the life or the physical integrity of the alien, this risk is taken into account, but it cannot take precedence over the collective interests of the Canadian people.

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11 E.C.H.R., *Cruz Varas v. Sweden*, 20 of March 1991, A n° 201, § 70; *Ahmed v. Austria*, 17 of December 1996, 1996-VI, § 38.

12 E.C.H.R., *Said v. Netherlands*, 4 of July 2005, req nº 2345/028.

The consequences of this approach are multiple. It works as a ''sickness'' which ''contaminates'' the definition of the content of human rights, the qualification of measures taken with regards to migrants and the examination of proportionality prescribed by some rights.

Whereas the Supreme Court of the United States qualifies family life as of fundamental value to American society protected by the Bill of Rights, it draws aside this argument within the framework of a request for family reunification made by the children of a Mexican worker living legally in the United States. In the same period, the Court ruled very differently in and outside of the context of migration, on the same issue, the right to family life. Outside of the migratory context the Court said it is unconstitutional to forbid grandparents to live with their children in a Sun City because family is one of the fundamental values in the United States which is protected by the Bill of Rights. . .[13] But a Mexican father was not allowed to invoke this fundamental value, his family ties, to get the authorization to be joined in the United States by his children who previously remained in Mexico with their mother who died. Even before examining the legal arguments presented before it, the Court said there were no human rights at issue[14].

Some principles recognized as rights are disqualified in privilege when they are invoked by a migrant. Case law refuses to recognize the removal from the territory grounded on the dangerosity of the alien like a sanction, etc., whereas it is indeed a measure taken following the commission of an offense. Case law considers that it is the act of a simple administrative measure[15]. Without going into highly technical details, jurisprudence systematically abandons the scheme of reasoning usually followed as regards to immigration, as if it concerned a field ''outside the law''.

As regards to family life, the usual method of the European Court of Human Rights consists in examining first, if there is family life, secondly if there is interference, i.e. if the measure taken undermines the family life, and thirdly, if this attack is proportional to the aim in view. The European Convention of Human Rights draws up a restrictive list of the reasons likely to justify interference. For instance, on the issue of the legality of placing children outside of the family because of relational problems between them and their parents, the Court rules as follows: First of all, is there a family life? Secondly, does the measure taken interfere in the family life? The answer is positive if it leads to a separation of the family. Thirdly, is this interference justified by one of the motives listed in Article 8.2? If

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13 C.S. U.S., *Moore v. City of East Cleveland* (1977).

14 C.S. U.S., *Fiallo v. Bell,* 430 U.S. 787 (1977).

15 C.S. U.S., *Bugajewitz v. Adams* (1913), 591; *Harisiades v. Shaughnessy* (1952), 532; C.S. Can., *Chiarelli c. Canada (M.E.I.)*, [1992], p. 735.

this is the case, are the means used proportional to the objective?

As regards family reunification, the European Court of Human Rights avoids the examination of proportionality. It stops at the second stage of the reasoning and judges that the recognition of the existence of an interference in the right to the respect of family life is conditioned by the migratory context in which its respect is asserted. The Court says that the Contracting States have a broad margin of appreciation in the sector of immigration to find a balance between the interests of the State and those of the individual. In several cases, the Court considers that the State did not exceed its power to rule within this margin and that there is consequently no interference in the right to the respect of family life which is to be denounced. It follows from this that the State is exempted from proving that it acted in a proportional way to one of the objectives restrictively enumerated by Article 8.2. However, the analysis of the proportionality is central in the control of the respect of the human rights. It is framed by a method of specific analysis which requires that the interests of the State and the rights of the person be balanced within a well defined framework, in which the only legitimate grounds are enumerated and there can be no others.)

2. The justifications

To the question of how, follows that of why. Why is the protection of the person who migrates more restricted than that of the resident, even if the right invoked is the same? Two possible answers appear in the case law. The first is based on sovereignty: sovereignty is the principle and the human rights of the migrant the exception. This explanation invites examination of the definition of sovereignty and its relevance in justifying the restricted protection of the migrant. The second answer lies in the natural presence in the migratory debate of international elements such as foreign nationality, residence abroad, etc.

- The sovereignty of the State

Is sovereignty synonymous with absolute power, even with regard to the human rights of the migrant?

Historically, sovereignty is a concept used to affirm the independence of the State in relation to the political authority of the Church. It represents the whole and absolute capacity of the nation-State in the domestic legal order and its independence in the international sphere. This absolute capacity had at once to be relativized. In domestic law, the capacity of the authorities is based on rules, in particular

of a constitutional nature. In the international legal order, the equality and the independence of the States have as counterparts their interdependence and the respect of the standards which they create for purposes of preserving and organizing the former. The sovereignty-capacity is more a sovereignty-duty. It involves rather more a competence than a prerogative. It is the capacity of the rights rather than that of the State[16]. Sovereignty never means total power of the State and exemption from any control.

The evolution of international and domestic law concerning human rights confirms the functional character of sovereignty; those of rights which are not the state-owned property[17]. Human rights are not subject to the principle of reciprocity in international law. A supranational control is organized, encompassing an increasingly direct access of the person to the authorities of control. Human rights belong to the "nation" or to the "people" in the constitutional domestic system, so that the State cannot restrict them freely. The State is at the same time the author and the guarantor of human rights[186].

There exist, on the one hand, absolute rights and on the other, rights which can be restrained only in a limited way and proportionally to the aim in view. A mechanism of "domestication" of the reason of State is installed. Moreover, the pluralism of the sources and the sanctions in the field of the protection of human rights allows them to escape from the monopoly of the State.

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16 KELSEN, H., "Les rapports de système entre le droit interne et le droit international public", *R.C.A.D.I.*, t. 14, 1926-IV, p. 227 ; *Théorie générale du droit et de l'État*, Paris-Bruxelles, Bruylant-L.G.D.J. trad., 1945, p. 428; RIGAUX, F., "Hans Kelsen on International Law", *E.J.I.L.*, 1998, p. 325; LEBEN, C., "Hans Kelsen and the Advancement of International Law", *E.J.I.L.*, 1998, p. 287.

17 BROWNLIE, I., *Principles of Public International Law*, 2ème éd., 1973, p. 462-3 ; LAUTERPACHT, H., *International Law and Human Rights*, New York, 1950 ; CHRESTIA, P., "L'influence des droits de l'homme sur l'évolution du droit international contemporain", *R.T.D.H.*, 1999, p. 715 et s. ; KRULIC, J., "La revendication de la souveraineté", *Pouvoirs*, 1993, n° 67, *La souveraineté*, p. 21 ; MALANCZUK, P., *Modern Introduction to International Law*, 7ème éd., Akehurst's, 1997, p. 17-18 ; COMBACAU, J., "Pas une puissance, une liberté: la souveraineté internationale de l'État", *Pouvoirs*, n° 67, *La souveraineté*, 1993, p. 47 ; MORIN, J.Y., "L'état de droit: émergence d'un principe du droit international", *R.C.A.D.I.*, t. 254, 1995-IV. ; REISMAN, M., "Sovereignty and Human Rights in Contemporary International Law", *American Journ. Int'* Law, 1990, p. 876.

16 RIGAUX, F., "Le pluralisme juridique face au principe de réalité", *in Homenaje al professor Miaja de La Muela*, Madrid, 1979, p. 291; "Les situations juridiques individuelles dans un système de relativité générale. Cours de droit international privé", *R.C.A.D.I.*, t. 213, 1989, p. 13-407, n° 23-58; CREPEAU, F., "Mondialisation, pluralisme et souveraineté — L'Etat démocratique redéployé ou l'exigence de légitimation de l'action collective", in: LABOUZ, Marie-Françoise, *Le partenariat de l'Union européenne avec les pays tiers: Étude comparée*, Bruxelles, Bruylant, 2000, p. 15 ; CARLIER, J.Y., "La garantie des droits fondamentaux en Europe: pour le respect des compétences concurrentes de Luxembourg et de Strasbourg", *R.Q.D.I.*, 2000, p. 58.

If one can thus still refer to sovereignty, one has to agree on the direction given to this term. One should not confuse competence and restricted discretionary capacity within this competence. The States exert certain competences while being in some cases subjected to limits in the way in which they exert them; in other cases, these competences include precisely the protection of human rights. The texts relating to human rights are characterized in particular by the development of a supranational control embodying an increasingly direct access of the person to the authorities of control. These texts thus bode well for an inversion of priority between the possibly competitive values defended by human rights and those of the State. The European Convention of Human Rights is presented as a guarantor of the rights vis-a-vis the "reason of State"[19]. The American and the Canadian Supreme Courts indicate that due process of law can serve as a guarantee against the arbitrary exercise of this power.

Can one escape from this evolution of the concept of sovereignty in the field of immigration? Should this sector be apart? The answer is again negative. The historical context shows on the contrary that limits to the capacities of the States always existed. The authors and the case law defend, to differing degrees, recognition of the rights of migrants. The first internationalists in the 16th, 17th and 18th centuries (Grotius, Vittoria, Kant) called upon the existence of an *ius societatis*, an *ius communicationis* and the duty of humanity to allow the aliens to freely circulate. At the end of the 19th century, the Institute of International Law discussed these questions and tried to compile a catalogue of universally recognized rules which would remedy the arbitrary characterization of the decisions taken in this fields. Even if the legal consequence of these standards is limited to that of a largely divided doctrinal opinion, they reflect the spirit of the time. It is clear from this effort that the Institute considered the question of immigration to be subject to international law and not confined to the internal spheres of the Sovereign states, and in addition, that material as well as procedural limits should be assigned to the right of the States to decide admission and removal of aliens. Thus, the entry into the territory could not be prohibited in a general way and without right reasons. As for expulsion, it was allowed only in certain enumerated cases. In the same spirit, in the 20th century the doctrine underlined the necessary internationality of the right of nationality and immigration and deduced certain limits to the capacities of the States. These rise from the *abus de droit* and the requirement of a legitimate ground to each decision taken with regard to a migrant. Decisions of the international bodies and of the domestic courts underline the international character of these questions and confirm the requirements of justification which result from this. Arbitration case law has

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19 TEITGEN, P.-H., Séance du 19 août 1949, C.R. p. 216, quoted by M. OREJA, "Souveraineté des États et respect des droits de l'homme", *in Protection des droits de l'homme: la dimension européenne. Mélanges en l'honneur de G. J. WIARDA*, Carl Heymanns Verlag, 1988, p. 9 et s.

begun to impose a right motivation and has proceeded in several cases to an examination of proportionality.

Even if this protection was in the past subordinated to official initiatives, it reflects the grounds for the recognition of the rights of migrants. That does not mean that the States are deprived of the right to make decisions as regards immigration, but nevertheless if within the framework of this exercise, they undermine human rights, they can only do so insofar as this interference is legitimate. The field of immigration was never in the past and is no more today, an area where the power of the State is exerted without any limit[18]. Moreover, from a more technical point of view, a reading of a provision like Article 8.2. of the European Convention of Human Rights indicates that immigration as such or the requirements related to its management is not one of the legitimate reasons able to justify an interference in the right to the respect of the family life. It is possible that certain aims in view of the authorities in charge of immigration are justified by the defence of national safety or health for example, but it is not reasonable to assume the principle that that would be always and systematically the case. On the other hand, it is certain that many decisions taken as regards immigration affect human rights. Sovereignty in itself does not appear to be the adequate justification. No more than any other interest of the State, sovereignty cannot be placed above human rights.

- The externality

It is also necessary to inquire about the incidence of external elements on the limited protection of the migrant. This raises the need to analyze the scope of application of human rights concepts and the principles of equality and non-discrimination.

International human rights law is characterized by the affirmation of the existence of human rights protecting any person whatever his or her nationality or administrative status. The same applies in national law, even if American case law uses fictions of extraterritoriality in the field of immigration. But the general characteristic of human rights is a form of universality, at the very least with regards to the persons protected.

The principles of equality and non-discrimination guarantee to aliens the same rights as to nationals. In *Gaygusuz and Koua Poirrez,* the European Court of Human Rights concluded that "*very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the*

Convention"[19]. The Supreme Court of the United States uses a standard of very strict scrutiny vis-à-vis the classifications based on race or nationality[200]. The same applies to the Supreme Court of Canada, which grants a specific protection to aliens who are identified as a weak group, in particular because they do not profit from any political representation[21].

This severity is relaxed as soon as the foreigner disputes the capacity of being treated differently because of his nationality in a situation of immigration. Foreign nationality is then presented as being an objective factor of differentiation, justifying a distinct protection. Case law then uses the factors of migration and of externality to limit the guarantee or to deny protection to the aliens. However, in many cases, the rights called upon by the migrant foreigners are not rights relevant to migration, so that a distinct treatment is not explainable. The rights demanded do not depart from the material field of application of human rights. The distinct treatment runs contrary to rights of which any person can demand respect. The rights examined in the second section of this paper are the right not to suffer torture or inhuman or degrading treatment, the right to the respect of social and family ties, and the right to a fair trial.

However, the rights in question, even if they are called upon in a migratory context, remain human rights. This leads to a circular reasoning where the criterion of differentiation is not nationality but rather the migratory context and again the sovereignty of the State whose illegitimate exercise of power is used to justify a restricted protection of the migrant.

To grant aliens regularly installed as residents rights often equivalent to those of nationals shows that the criterion of differentiation is neither nationality nor immigration. The migratory context constitutes the basis of this difference in treatment which is marked as well in the definition of the rights protected as in the reasons recognized as likely to legitimate an interference in their respect. If the migratory context naturally intervenes as a factual element, any other consequence which would be drawn from it would be discriminatory. Other alternatives to the dichotomy ''national-foreigner'', such as the distinction between the foreigners of the first and the second generations, are not more acceptable in that they prolong a difference in treatment which does nothing to attenuate the discriminatory character.

One can object that it is natural that these criteria intervene when it is a question of migration. Case law is the expression of this objection. Its relevance is contestable since the protected rights are precisely not the rights of the

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18 GOODWIN-GILL, G.S., *International Law and the Movement of Persons Between States*, Oxford Clarenton Press, 1978?

19 E.C.H.R., *Gaygusuz v. Austria*, 16 of September 1996, 1996-IV; *Koua Poirrez v. France*, 30 of September 2003, req. n° 40892/98.

20 C.S. U.S., *Graham v. Richardson*, 403 U.S. 365 (1971).12; C.S. Canada, *Andrews c. Law society of British Columbia*, 2 of February 1989, [1989] 1 R.C.S. 143

migrant, but the many rights of the person. The question is then to know if the fact of being a migrant, rather than having a foreign nationality, justifies a distinct treatment in respect to definite rights which benefit everyone. The answer to this question is negative. The migratory fact does not take part in the reasons legitimately able to be called upon to support a difference in treatment. The context of immigration in which the claim of the rights is expressed is not in itself sufficient to explain a restricted protection. Deciding differently would revert to restoring the sovereignty of the State as a cause for sufficient justification, whereas it appears that the object of the human rights is precisely to exclude this argument.

In conclusion

To leave this vicious circle, it is necessary to abandon an obsolete reading of the concept of sovereignty which establishes it as an opposition to the control of human rights. Sovereignty and the protection of the human rights of migrants are not antagonistic. Human rights are a principle to which sovereignty, in certain circumstances, can be subordinated. To reverse this contested reasoning comes nowhere near to supporting the idea that human rights are absolute, but rather to assuming the legitimacy of the limits to them. The sequence of reasoning is important, not only on the semantic level, but also in what it has to say about fundamental principles. The result would be that when the State, ruling in the area of migration, threatens the human rights of a migrant - refusing for instance an application for family reunification - the legitimacy of the decision taken will no more be presumed. The principle will be the rights of the person concerned to be joined by his close family. But the State remains authorised to prove that, for instance, for reasons of national security, it may desire to refuse entry to and residence on its territory. The burden of proof is reversed.

In this way, the right of the migrant is the principle and the sovereignty of the State an exception. The inversion of reasoning makes it possible to allow the migrant his legal "exile" through a non-discriminatory reading of his or her rights. One passes thus from the protection of the migrant to the rights of the person who happens to be migrating.