

# ROAMING RIGHTS AS GLOBAL MOBILITY: REIMAGINING MOVEMENT FOR A NOMADIC AGE

FRÉDÉRIC MÉGRET\*

## ABSTRACT

*Global mobility is marked by deep inequities that hinge on the central role of the state in controlling access to its territory. It has become difficult to think of mobility, then, as anything but the exception to a regime devoted to controlled immobility. What kind of legal legacies and imaginaries, by contrast, might help us rethink global mobilities in a pluralistic way? This paper draws on the domestic tradition of “roaming rights” as a metaphor for what might be a presumptive right to at least pass through foreign territory, focusing particularly on non-migratory mobility (i.e.: travel). Roaming rights emerge in the Nordic countries (“every man’s right”) and, more recently, the UK, against the background of a relentless centuries-long drive to enclosure. They can be understood as a customary residue that carried over and was folded into legal modernity. There is a distance, of course, between a domestic/private and international law/public regime, but property and sovereignty have histories that are in many ways conjoined. Moreover, international law already knows of notions of free passage and transit (for example, in territorial waters or international straits) as well as ideas about vested rights. More radically, roaming rights, although they may not always have been described as such, have deeper origins, often extending to this day, in indigenous traditions and the colonial encounter, the Medieval circulation of pilgrims and traders, or traditional pastoral mobilities. The article inquires about the conditions under which these pre-modern but parallel legacies might be reclaimed as part of a pluralistic understanding of international law, emphasizing the radical potentialities of reimagining global mobility as operating through a basic right to roam.*

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\* Professor and Hans & Tamar Oppenheimer Chair in Public International Law, Faculty of Law, McGill University, James S. Carpentier Professor, Columbia Law School (2024-2025), Visiting Professor, Sciences Po Paris (2025-2026), Permanent Visiting Professor, University of Copenhagen. This paper provided the basis for a lecture given on the occasion of the award of an honorary doctorate by the University of Copenhagen to the author on the 29th of October 2022. Research was funded by the Danish National Research Foundation Grant no. DNRF169 and conducted under the auspices of the Danish National Research Foundation’s Centre of Excellence for Global Mobility Law. It also received funding from the Hans & Tamar Oppenheimer Chair in Public International Law. I would like to thank Thomas Gammeltoft-Hansen for his feedback and encouragements. © 2026, Frédéric Mégret.

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## I. INTRODUCTION: THE NOMOS OF NOMADISM

Before 1914 the earth belonged to the entire human race. Everyone could go where he wanted and stay there as long as he liked. No permits or visas were necessary, and I am always enchanted by the amazement of young people when I tell them that before 1914, I travelled to India and America without a passport. Indeed, I had never set eyes on a passport. You boarded your means of transport and got off it again, without asking or being asked any questions; you didn't have to fill in a single one of the hundred forms required today. No permits, no visas, nothing to give you trouble; the borders that today, thanks to the pathological distrust felt by

everyone for everyone else, are a tangled fence of red tape were then nothing but symbolic lines on the map, and you crossed them as unthinkingly as you can cross the meridian in Greenwich.<sup>1</sup>

As the COVID pandemic wound down in 2022, airports were flooded by travel-starved populations. Predictably, the infrastructure could not handle the upsurge, leading to thousands of cancellations, endless amounts of lost luggage, and general frustration expressed in rampant aggressiveness. Travelers bemoaned a Golden age of seamless mobility, when moving across borders was the simple and carefree activity that it should always be. Like Stefan Zweig above, they regretted the passing of a seemingly simpler world, one unencumbered by constant obstacles, one in which movement was not even meaningfully “across borders” because borders did not have the hold on imaginations that they have come to have.

In truth, however, global mobility had long ceased to be a simple and carefree activity for most of the world if it ever was. The pandemic itself was a site of experimentation with unprecedented levels of ‘travel bans,’<sup>2</sup> temporarily bringing to the Global North what had been the ordinary experience of the Global South. Indeed, moving across borders is often, a highly challenging activity at the mercy of the full discretion of border officials, irrational policies, and structural racism.<sup>3</sup> It involves humiliating administrative hurdles that would never be tolerated domestically. Most importantly, it is deeply woven into the unequal structure of the world, down to rankings of which passports are “the best” in terms of traveling,<sup>4</sup> perennially targeting the geographically and geopolitically marginalized as well as the vast global under-class of the mobility-poor<sup>5</sup> whose passports do not entitle them to carefree travel.<sup>6</sup> It is also caught up in and constitutive of some of the most crying inequalities of the world today.<sup>7</sup> Rather than merely delimiting territories, as international lawyers would have it, borders are effectively technologies of population control that are extremely porous for some and hermetically sealed for others.<sup>8</sup>

Consider, for example, the fact that those with “strong passports” in the Global North can travel almost the world over without onerous visa requirements, whilst most inhabitants of the Global South (and certainly those not belonging

1. STEFAN ZWEIG, *THE WORLD OF YESTERDAY: AN AUTOBIOGRAPHY* 410 (1964).

2. Fernando Dias Simoes, *COVID-19 and International Freedom of Movement: A Stranded Human Right?*, 20 *YALE J. HEALTH POL* 362 (2022).

3. Frédéric Mégret, *The Travel Visa as the Ubiquitous Legal Infrastructure of Everyday Global Mobility Arbitrariness*, 25 *GERMAN L. J.* 1265 (2024).

4. *The Official Passport Index Ranking*, HENLEY & PARTNERS, <https://www.henleyglobal.com/passport-index/ranking> [<https://perma.cc/PH6Z-YWW8>] (last visited Nov. 22, 2025).

5. WILLIAM WALTERS, CHARLES HELLER & LORENZO PEZZANI, *VIAPOLITICS: BORDERS, MIGRATION, AND THE POWER OF LOCOMOTION* (2021).

6. A. K. M. Ahsan Ullah, Diotima Chatteraj & Arju Afrin Kathy, *Mobility in a Globalised World: How Countries Regulate Mobility with Passports and Visas*, 24 *J. PUB. AFFS.* e2932 (2024).

7. William Hamilton Byrne & Thomas Gammeltoft-Hansen, *Redefining the Mobility Paradigm in International Law*, 21 *INT’L J. L. CONTEXT* 231 (2025).

8. Bryan S. Turner, *Enclosures, Enclaves, and Entrapment\**, 80 *SOCIO. INQUIRY* 241 (2010).

to a transnational elite) can rarely even aspire to access most of the rest of the world, effectively consigned to their state's territory, their right to leave not matched by a right to arrive<sup>9</sup> with sometimes dramatic consequences.<sup>10</sup> Whether missing an important family occasion (e.g., being unable to attend a wedding or a funeral) or a key professional commitment (e.g., having to cancel attendance of an international conference) or simply missing out on the joys of discovery, ordinary, non-migratory mobility is truly the hidden part of a colossal iceberg of frustrated mobility aspirations. What it limits is not just *travel* but encounters, opportunities and exchanges between both "guests" and "hosts" on either side of countless borders. Whilst globalization is sometimes presented as involving a world 'without borders' that promise rings remarkably hollow.<sup>11</sup>

Beyond the denial of the travel opportunities as such, regrettable as they may be, it is the unique role that these denials serve as a vector of arbitrary administrative power that constitutes them as a singular erosion of human rights and the dignity of those 'others' affected by them.<sup>12</sup> In short, the global mobility regime has long been at an impasse in terms of its ability to honor the deep demands of vast populations for cross-border movement, a theme underscored by the broader migratory crisis – or at least its representation as such.<sup>13</sup> It has long remained a notable exception to the liberal international order's otherwise central emphasis on mobility as a form of freedom.<sup>14</sup> This is even more so in a populist moment that has broadly denounced migrants, foreigners, and even merely visitors as a threat. At the same time, the single-minded focus on migration and refugee law as branches of international law has also tended to obscure the extent to which it is also "banal" mobility that is deeply compromised for all but a few. This article will focus on that everyday (non) mobility - the claim to cross borders in its most fundamental sense, outside any intention to stay or settle in the territory of another state - as a fundamental test case for global mobility.

It must be pointed out that although international law, in its typical "gentle civilizing" mode,<sup>15</sup> has sought to attenuate the harsh consequences of this denial of mobility at the margin through family reunification or asylum, it has also, by and large, contributed to entrenching it. This is evident in international human

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9. Joy M. Purcell, *A Right to Leave, but Nowhere to Go: Reconciling an Emigrant's Right to Leave with the Sovereign's Right to Exclude*, 39 U. MIAMI INTER-AM. L. REV. 177 (2007).

10. Richard Black & Michael Collyer, "Trapped" Populations: Limits on Mobility at Times of Crisis, in HUMANITARIAN CRISES AND MIGRATION (2014).

11. Ronen Shamir, *Without Borders? Notes on Globalization as a Mobility Regime*, 23 SOCIO. THEORY 197 (2005).

12. Christiane Fröhlich, *A Critical View on Human Mobility in Times of Crisis*, 8 GLOB. POL'Y 5 (2017).

13. Céline Cantat, Antoine Pécoud & Hélène Thiollet, *Migration as Crisis*, 69 AM. BEHAV. SCIENTIST 627 (2025).

14. Jeannette Money, *Globalization, International Mobility and the Liberal International Order*, 97 INT'L AFFS. 1559 (2021).

15. The expression is famously associated with Martti Koskenniemi who presented it as an enduring characteristic of international law since the 19<sup>th</sup> Century, emphasizing its humanitarian and civilizational credentials. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 14 (2001).

rights law, in some regards the most progressist and non-Westphalian branch of international law, yet one which, when it comes to mobility, has tended to reconduct, defer to, and entrench core claims about the sovereign “right to exclude.”<sup>16</sup> As such, it has essentially reproduced the basic structure of international law as a normative system still by-and-large bowing to the power of borders.<sup>17</sup> International human rights law has steered away from what might be a radical and emancipatory conception of transnational mobility based on a right to immigrate or even a general right to mobility.

The roots of global, partial, and asymmetric mobility lie in systemic exclusions and discriminations, notably framed by race and the post-imperial moment.<sup>18</sup> But they also lie, more fundamentally, in a state-centered mindset that is deeply immersed in a particular conception of territory and humans’ relation to it. The Westphalian system is rooted in a sedentary nomos, which Carl Schmitt understood as an underlying legal order of the world, that of land-appropriating populations settled on clearly demarcated territories and, by and large, consigned to such territories.<sup>19</sup> It is from this telluric demarcation that all law, including international law, emerges.<sup>20</sup> Although that system may be, from the Mediterranean to the Rio Grande, experiencing a series of major convulsions as a result of populist and xenophobic forces, it is, in a sense, always simultaneously reproducing its own basic underlying grammar.<sup>21</sup> One of its long-term effects has been the continued alienation and marginalization of peoples specifically identified as nomadic,<sup>22</sup> but its incidence is also in the way in which it more generally stands to neuter universal aspirations to some degree of mobility.

This confronts international lawyers interested in the conditions of global mobility with a conundrum, namely that their discipline is already and always deeply immersed in maintaining conditions of immobility for most of the world’s peoples. This is an (im)mobility that the discipline can never hope to do more than manage at the margin because it is itself one of its fundamental causes.<sup>23</sup> By contrast, this article acts a call to radical legal reimagination. It

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16. CHRISTOPHER BERTRAM, DO STATES HAVE THE RIGHT TO EXCLUDE IMMIGRANTS? (2018); Michael Blake, *The Right to Exclude*, 17 CRITICAL REV. INT’L SOC. & POL. PHIL. 521 (2014); Sune Lægaard, *What Is the Right to Exclude Immigrants?*, 16 RES PUBLICA 245 (2010).

17. Frédéric Mégret, *The Apology of Utopia: Reflections on Some Koskenniemi Themes with Particular Emphasis on Massively Institutionalized Human Rights Law*, 27 TEMP. INT’L AND COMPAR. L. J. 455 (2013).

18. Frédéric Mégret, *The Contingency of International Migration Law: “Freedom of Movement,” Race, and Imperial Legacies*, in CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES (Ingo Venzke & Kevin Jon Heller eds., 2021).

19. CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM (2006).

20. Mika Ojakangas, *Carl Schmitt and the Sacred Origins of Law*, 147 TELOS 34, 37–38 (2009).

21. Mitchell Dean, *A Political Mythology of World Order: Carl Schmitt’s Nomos*, 23 THEORY, CULTURE & SOC. 1 (2006).

22. Sarah Prout Quicke & Charmaine Green, “*Mobile (Nomadic) Cultures*” and the Politics of Mobility: Insights from Indigenous Australia, 43 TRANSACTIONS INST. BRITISH GEOGRAPHERS 646 (2018).

23. Frédéric Mégret, *Is International Law Addressing Problems of Its Own Making?*, in PHILOSOPHY AND INTERNATIONAL LAW: CONTESTATIONS AND EXTENSIONS (Andreas Follesdal & David Lefkowitz eds.) (forthcoming 2026).

seeks to challenge the prevailing orthodoxy of asymmetric and arbitrary mobility, not incrementally but fundamentally, by building on legacies barely buried below the surface of the law.<sup>24</sup> Its intuition is that in times of deep crisis, doubling down on the status quo is bound to reinscribe the underlying problem and fall short of the challenge of the times. What is needed is a surfeit of utopia, not apology for the remains of the international legal order.

As such, the article is part of a tradition that considers that tinkering with unjust legal regimes at the margins risks merely prolonging their injustice, a feature I have criticized elsewhere in relation to both international human rights law,<sup>25</sup> the laws of war,<sup>26</sup> or international environmental law.<sup>27</sup> It is that tendency that has also been criticized in the immigration realm and prompted vigorous calls for reimagining,<sup>28</sup> at least as a normative guide to policy,<sup>29</sup> but perhaps also as an attempt to constitute the legal world in the process of reinventing it. This requires us to rethink not just what the international law of mobility *does*, but what it *is*. By contrast to the functionally limited formalism of the legal episteme, the article will draw on a range of influences including critical geography,<sup>30</sup> border theory,<sup>31</sup> borderland studies,<sup>32</sup> as well as the broader “turn to mobility” in the social sciences<sup>33</sup> and its own reassessment of territorial paradigms.<sup>34</sup> Perhaps most importantly, the article will seek to think not just about mobility, but with and through *practices* of mobility on the understanding that the latter are a fundamental challenge to the law’s own fixity. This call to reimagine is not gratuitous in at least three ways.

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24. For a recent exercise in trying to reimagine international law, see Michael Wood, *Reimagining International Law: What Might Have Been, What Might Be*, in REIMAGINING THE INTERNATIONAL LEGAL ORDER (2023).

25. Mégret, *supra* note 17.

26. Frédéric Mégret, *What Might a Human-Rights-Harmonious International Regime on the Use of Force Look Like?*, 14 TRANSNAT’L LEGAL THEORY 211 (2023).

27. Frédéric Mégret, *The Anthropocentrism of Human Rights*, in THE ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW AND ANTHROPOCENTRISM (Usha Natarajan, Frédéric Mégret & Vincent Chapaux eds., 2023).

28. Kevin R. Johnson, *Open Borders*, 51 UCLA L. REV. 193 (2003).

29. See generally Drew Heckman, *Open Borders: A Progressive Immigration Guide Star*, 31 HARV. J. HISP. POL’Y 65 (2019).

30. See generally CRITICAL GEOGRAPHIES: A COLLECTION OF READINGS (Harald Bauder & Salvatore Engel-Di Mauro eds., 2008).

31. See generally Emmanuel Brunet-Jailly, *Theorizing Borders: An Interdisciplinary Perspective*, 10 GEOPOLITICS 633 (2005); Beth A. Simmons, *Border Rules*, 21 INT’L STUD. REV. 256 (2019).

32. Emmanuel Brunet-Jailly, *Special Section: Borders, Borderlands and Theory: An Introduction*, 16 GEOPOLITICS 1 (2011); Eeva-Kaisa Prokkola, *Unfixing Borderland Identity: Border Performances and Narratives in the Construction of Self*, 24 J. BORDERLANDS STUD. 21 (2009); Jochen Roose & Ulrike Kaden, *Three Perspectives in Borderland Research. How Borderland Studies Could Exploit Its Potential*, 7 ADVANCES EURO. BORDERLANDS STUD. 35 (2017); Michiel Baud & Willem Van Schendel, *Toward a Comparative History of Borderlands*, 8 J. WORLD HIST. 211 (1997).

33. See generally Mimi Sheller & John Urry, *The New Mobilities Paradigm*, 38 ENV’T AND PLAN. A 207 (2006); Tim Cresswell, *Towards a Politics of Mobility*, 28 ENV’T AND PLAN. D: SOC’Y AND SPACE 17 (2010).

34. BENOÎT ANTHEAUME & FRÉDÉRIC GIRAUT, LE TERRITOIRE EST MORT, VIVE LES TERRITOIRES! : UNE (RE)FABRICATION AU NOM DU DÉVELOPPEMENT [THE TERRITORY IS DEAD, LONG LIVE THE TERRITORIES! : A (RE)FACTORY IN THE NAME OF DEVELOPMENT] (2005).

First, the point of *re*-imagining is to acknowledge that the world was imagined in the first place. Our ideas about the world always already constitute it, even if our later rational activity, oblivious to its own prior foundational role, stumbles upon its shadow. A world of relative immobility or at least very unequal mobility is the long-term consequence of developments that have consecrated the state's full control of who enters its territory, a notion that did not go without saying for most of the history of international law<sup>35</sup> and would have clashed with a more liberal, or simply more borderless conception of space.<sup>36</sup> Second, it is not a call to hallucination freed from the pull of the real, but to imagine *from* what could have been because of what already always was, on the understanding that the world, including the legal world, emerges from paths not taken as much as the more well-trodden. Third, it is a call to imagine *beyond* prevailing legal imaginaries, in the sense that our contemporary international legal reality is also the chronic manifestation of only *certain* rationalities, legalities, and *topoi* always heralded as the normal foundations of the legal world.<sup>37</sup>

To be clear, the glaring inequities of enforced immobility have long given rise to a tradition of rejecting these exclusions from both the political right and from the political left.<sup>38</sup> Some of these traditions have been amplified of late in the scholarly field as the never-ending migratory crisis creates the need for fresh thinking. The model of "open borders" draws deeply on a libertarian strand of liberal thought to develop a case for the illegitimacy of border control. One version of this is a largely economic emphasis on the sub-optimal nature of impediments to mobility and how removing such obstacles could help alleviate the problem of global poverty.<sup>39</sup> At the other end of the political spectrum, the role of borders as structures of political oppression - of capitalism, but also of colonialism and racialism - has been emphasized.<sup>40</sup> Such an approach rehabilitates the idea that the world's problem is not immobility in general but the fact that the hypermobility of some seems to come at the cost of the under-mobility of the great many. Somewhere in the middle, a range of theoretical endeavors in a more classic liberal vein seek to problematize borders and to uphold an at least presumptive "right to (im)migrate" as against states' "right to exclude."<sup>41</sup>

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35. Vincent Chetail, *Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel*, 27 EUR. J. INT'L L. 901 (2016).

36. Vincent Chetail, *Demystifying Sovereignty: Totem and Taboo of Migration Control in International Law*, 118 AJIL UNBOUND 193 (2024).

37. Frédéric Mégret, *What Would a (Truly) Pluralist International Law Look Like?*, in DIVERSITY IN INTERNATIONAL LAW (Maja Goff & Sergey Vasiliev eds.) (forthcoming 2026).

38. Nick Gill, *Whose "No Borders"? Achieving Border Liberalization for the Right Reasons*, 26 REFUGEE 107 (2009).

39. Terrie L. Walmsley & L. Alan Winters, *Relaxing the Restrictions on the Temporary Movement of Natural Persons: A Simulation Analysis*, 20 J. ECON. INTEGRATION 688 (2005).

40. JUSTIN DESAUTELS-STEIN, *THE RIGHT TO EXCLUDE: A CRITICAL RACE APPROACH TO SOVEREIGNTY, BORDERS, AND INTERNATIONAL LAW* (2023).

41. See Chaim Gans, *The Rights Discourse and the Obligation of States to Admit Immigrants*, 43 ISR. L. REV. 164 (2010); David Miller, *Is There a Human Right to Migrate?*, in MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP 11 (Sarah Fine & Lea Ypi eds., 2016); Kieran

These efforts highlight the vulnerability of the immobility paradigm on the basis of the very liberal tradition they seek to invoke, caught up as it is between the human aspiration to movement and the human aspiration to territorial identity, community, and stability.<sup>42</sup> Nonetheless, enmeshed as they are in a modernist liberal script, they still tend to reify borders as legal artifacts whose implication is the necessary exclusion of whoever the sovereign deems unworthy. Rather than challenging borders altogether (*no borders*) or at least how we think of them (*different borders*), they are an invitation to regulate them differently (more or less *open borders* or *humane borders*).<sup>43</sup> Moreover, they come to the issue from the perspective of an outside rather than an immanent critique of the law, one that treats the law as itself inert, a slave to either a normative theory (liberalism) or a substructure (colonialism, racial capitalist exploitation) or an economic project (realizing a market utopia). They notably do not, for my purposes, take advantage of resources that are embedded in the law to upset the law from within. As such, they offer only a partial of a critique of legal immobility, one that too easily gives up on a legal pluralist heritage that has long, as I will argue, contained the seeds of a radical<sup>44</sup> and performative critique of borders.<sup>45</sup>

By contrast, then, this article seeks to think *from within the law* by drawing on legal genealogies that have been historically conducive to certain forms of mobility, amplifying their faint signal and extrapolating from them to think about how they might constitute the bases of something as yet unexplored in law globally.<sup>46</sup> It does so by heeding the radical call to proceed from the lived experience of notably subaltern mobility when attempting to normatively theorize about it,<sup>47</sup> instead of merely from a theory of what sovereign categories a renewed commitment to mobility might upset. The latter move, it is intuited, is virtually guaranteed to reproduce the world's structures because it already takes them for granted. The former, by contrast, draws on what was in

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Oberman, *Immigration as a Human Right*, in *MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP* 32 (Sarah Fine & Lea Ypi eds., 2016); Michael Huemer, *Is There a Right to Immigrate?*, 36 *SOC. THEORY AND PRAC.* 429 (2010).

42. Massimo La Torre, *Justice for Foxes: Desiring to Migrate, Seeking Citizenship*, 7 *RECHTSPHILOSOPHIE* 19 (2021).

43. *But see* Dylan Miner, *Gaagegoo Dabakaan Miiniwaa Debenjigejig (No Borders, Indigenous Sovereignty)*, *DECOLONIZATION: INDIGENITY, EDUC. & SOC.* (Oct. 1, 2015).

44. As I have argued elsewhere, all cross-border movement is inherently political in that it makes an implicit claim about the legitimacy of such movement. *See* Frédéric Mégret, *Migrant Protests as a Form of Civil Disobedience: Which Cosmopolitanism?*, in *MIGRATION, PROTEST MOVEMENTS AND THE POLITICS OF RESISTANCE: A RADICAL POLITICAL PHILOSOPHY OF COSMOPOLITANISM* 29 (Tamara Caraus & Elena Paris eds., 2018).

45. In that respect, mobility is itself intrinsic to legal pluralism and vice versa. *See, e.g.*, Sulistyowati Irianto, Titiek Kartika Hendrastiti & Tirtawening Tirtawening, *Mobile People in Global Migration and the Working of Law: A Reflection on the Role of Legal Pluralism*, 53 *J. LEGAL PLURALISM & UNOFFICIAL L.*, 367 (2021).

46. For an instance of such an approach focused on citizenship across borders, see Nina Glick Schiller, *Transborder Citizenship: An Outcome of Legal Pluralism within Transnational Social Fields*, in *MOBILE PEOPLE, MOBILE LAW* (2005).

47. Frédéric Mégret, *The Border Within: Mobility, Stereotypes, and the Case of Asylum Seekers as Migrants*, in *LAWLESS ZONES, RIGHTLESS SUBJECTS: MIGRATION, ASYLUM, AND SHIFTING BORDERS* (Seyla Benhabib & Ayelet Shachar eds., 2024).

a sense always already there and as such takes seriously the inherent normative dimensions of actual mobility: the silent, millenarian, movement of persons everywhere and all the time, often despite borders; the traces they have left inscribed on lands and in the law; and the jurisgenerative practices associated with this perpetual movement.<sup>48</sup>

Indeed, what if the law conserved traces of an earlier commitment to nomadism? How might one reimagine the world in ways that took seriously nomadic legacies and, notably, their legal imprint? I propose to do so here through an analogy with a marginal but very real and pregnant tradition in some jurisdictions: that of roaming rights. Oddly, roaming is typically and vulgarly associated in modern times with the charges incurred by global travelers via their phone providers - the object of regular annoyance but, essentially, a “First World problem.” By contrast, the roaming rights tradition this article conjures is that perhaps most evident, in its codified form, in Northern Europe<sup>49</sup> (but as we will see, amply present in customary form the world over) and that has long recognized the right of the broader public to walk forests and meadows freely, even when passing through private property. That right often has deep customary origins, is rooted in once influential theories of the commons, and constitutes a persistent reminder, in the public realm, of the non-absolute character of property.<sup>50</sup>

What would it mean, then, to speak of a global roaming right by analogy with this somewhat idiosyncratic and largely neglected Nordic legal institution? To be clear, the article will be less interested in spelling out the particulars of what a global roaming regime might mean – a goal that, under current political conditions, seems far-fetched – than it is in engaging in a preliminary exercise of theorizing about the possible foundations of such a vision. One way of understanding what it means to “re-imagine” methodologically and theoretically is that it is not simply a utopian pipedream, but a form of counter-punctual critique: by imaging what ought to be and perhaps more importantly could have been or could be, one takes the full measure of the violence of the system as it currently is. In that respect, utopian thinking is an end in itself and contains the seeds of a potent critique of the status quo of its own, independent of the possibilities of its concretization, precisely because it is rooted in what have been, at various junctions, the system’s potentialities.

At a minimum, then, this article is devoted to exploring what it might mean to think of global roaming rights as entailing a right to traverse lands, understood here as the territory of “foreign” states. This is roaming at its

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48. Max Pensky, *Jewishness and Jurisgenesis: On Seyla Benhabib’s Exile, Statelessness and Migration*, 46 PHIL. & SOC. CRITICISM 10 (2020); Ama Ruth Francis, *Migrants Can Make International Law*, 45 HARV. ENV’T L. REV. 99 (2021); Peter Rees, *The Nomos of Citizenship: Migrant Rights, Law and the Possibility of Justice*, 23 CONTEMP. POL. THEORY 529 (2024).

49. Asta Ervola, Erkki Mäntymaa & Jussi Uusivuori, *Public Right of Access to Private Land: Examples and Considerations*, 39 SCANDINAVIAN J. FOREST RSCH. 287 (2024); Matti La Mela, *Property Rights in Conflict: Wild Berry-Picking and the Nordic Tradition of Allemansrätt*, 62 SCANDINAVIAN ECON. HIST. REV. 266 (2014).

50. See KEN ILGUNAS, *THIS LAND IS OUR LAND: HOW WE LOST THE RIGHT TO ROAM AND HOW TO TAKE IT BACK* (2018).

simplest, a form of “passing through” that does not perturb the condition of the land. Of course, passing through a meadow or a forest is not the same thing as passing through a state, and so the idea will need to be adapted. What is envisaged is a presumptive right of innocent passage through foreign lands: a right to travel to and through rather than a right to immigrate or seek asylum, let alone lay claim to the land. It does not matter to this argument exactly what eventually qualifies as roaming rights, and there may be a range of opinions on the issue. The definition excludes living off the land or, a fortiori, living on the land. At the very least, though, a roaming right entails a strong presumptive right to passage that cannot be denied arbitrarily. That experience is transient but not necessarily rushed or fleeting. It could be exercised for the purposes of visiting relatives, discovering a country, or simply accessing the territory of another state. Like roaming through forests or meadows, it is defined not by its goal but by the relative lack of it.

In part 1, the article lays the foundation for the rest of the argument by exploring the tradition of roaming rights, especially in Scandinavia and the British Isles. As will become apparent eventually, its survival at the heart of legal systems otherwise marked by the gradual enclosure of land and the exclusionary effects of property provides a particularly vivid testimony of the ability of that tradition to survive even in a Western-legal environment that is otherwise deeply inauspicious to it. Part 2 is devoted to thinking about how one might draw on that tradition to think about the international system, exploring analogies between private law property exclusions and the sovereign’s own ability to exclude entry on its territory, and how the “unbundling” of the rights of property to make way for passage has historically and legally proceeded and might be replicated internationally. Part 3 argues that roaming regimes already exist latently in the international system and that only Westphalian-blinders have prevented international lawyers from seeing such regimes for what they are. Although international law has very consistently repressed and marginalized these regimes, reappraising them in the shadow of formal legal orders provides the impetus for renewed thinking about the conditions of fluid and universal mobility.

## II. WANDERING AS WONDERING: IN SEARCH OF ROAMING RIGHTS

Roaming - before one even gets to roaming *rights* - speaks to a certain *quality* of traversing the land. It has no particular or necessary purpose. It could be and is often exploratory, for leisure, and expresses a deep human aspiration to mobility. There is a deep association between the banal act of roaming (“wandering”) and processes of thought, questioning, and claim-making (“wondering”). To roam, it has been claimed, is to “be.”<sup>51</sup> Roaming

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51. See FRÉDÉRIC GROS, MARCHER, UNE PHILOSOPHIE [WALKING, A PHILOSOPHY] (2019); ROGER-POL DROIT & YVES AGID, JE MARCHE DONC JE PENSE: LE PHILOSOPHE ET LE NEUROLOGUE [I WALK, THEREFORE I THINK: THE PHILOSOPHER AND THE NEUROLOGIST] (2022).

has been associated with “walking” as a philosophy.<sup>52</sup> I will not make much of this lack of purpose or direction here (there may be more or less of a purpose or direction), except to suggest that parsing down mobility that way (the very fact and act of moving) evokes a fundamental freedom to access lands without having to show reason for it that, as we will see, is relevant for some laws and could be relevant for international law. It connects to a certain centrality of movement to the experience of freedom: to be free is to not have one’s movement hindered by arbitrary barriers.

This sets roaming rights quite apart from the dominant international legal framework devoted to migration law. Roaming describes a quality of mobility that is fundamentally distinct from the migratory experience whose finality is settlement. In fact, where migration is defined by its goal (to enter and settle in a host country) roaming’s essence is much more evanescent: to wander, to “go from place to place without purpose or direction,” to travel “through” rather than “to.” To roam is and will remain in this article a merely minimal claim to pass over land, not to settle there permanently (although it may separately lead to this). Thus “roaming” is the constitutive feature of nomadism as the deep-seated practice of at least some humans, and as such quite distinct from migration as a concept that is a byproduct of a world of states.<sup>53</sup> At the same time, roaming is a universal experience and aspiration not reducible to the experience of particular nomadic peoples.

Nothing in this article should be construed as making an argument that is inimical to migration understood as settling in another state and the right, such as it may be, to do so. In fact, a right of transient passage can be part of a philosophical tradition that is very supportive of global mobility in general and that could have positive ramifications for the case for immigration. Yet the article’s starting point is that there is both principled and strategic value in separating those two lines of inquiry. Roaming rights, such as they may be, exist in the shadow of debates about immigration that obscure what is at stake in claiming a more primitive form of mobility. Engaging roaming rights in their own terms can help clear the air by locating them within broader debates about transnational mobility and not simply migration.<sup>54</sup>

By dissociating mobility from debates about entry and integration, the article hopes to foreground the pure fact of mobility in all its experiential and existential specificity. Roaming is, in other words, an almost pre-political freedom not justified by its utility (roaming need not serve any particular purpose to be worthy of recognition) but merely by how it constitutes human freedom. That freedom is, in a very basic way, the freedom to decide where

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52. See REBECCA SOLNIT, *WANDERLUST: A HISTORY OF WALKING* (2001).

53. On the difference between the two, see generally Thomas Acton, *Theorising Mobility: Migration, Nomadism, and the Social Reconstruction of Ethnicity*, in *ROMANI MOBILITIES IN EUROPE: MULTIDISCIPLINARY PERSPECTIVES*: INT’L CONF. 5, 6–8 (2010).

54. Nina Glick Schiller & Noel B. Salazar, *Regimes of Mobility Across the Globe*, 39 J. ETHNIC AND MIGRATION STUD. 1, 3–5 (2012).

one wants to go on the planet (and not just, as currently understood, mostly within one's state). By deliberately not focusing on the question of asylum or immigration, the aim is to touch on something like a phenomenology of mobility. And by focusing on "everyday" mobilities (linked to, for example, family reunion, professional occupation or discovery), the section seeks to refocus attention on the ordinary, sensory and primal experience of movement across the earth, interrupted only by the obstacles put in its way by states and borders.

What is exactly the tradition of "roaming rights" and how can it be minimally made sense of in a global context? In this section, I first highlight the extent to which the idea of roaming rights is already implicitly derived from ideas about land grabbing – there is no need to think specifically in terms of roaming rights in a culture that does not know of private property rights in the land. I then show how even in such a context, relatively vigorous if fragile cultures of roaming rights have survived that act as a definite counterpoint to the exclusivism of the ideology of property rights. The question, then, is what it takes to unpack the bundle of rights that is property to allow for roaming.

#### A. *"An English Man's House is His Castle": Property as the Right to Exclude*

Roaming rights only emerge against the background of ideas about property and are thus already a kind of derived legal artifact. They exist against something that denies them. In a world in which property is unknown, there cannot be roaming rights in any meaningful legal sense because roaming cannot be distinguished from a condition of non-roaming. There is merely the actual passage of human beings on land, unrecorded and uncontentious as it must have been throughout most history.<sup>55</sup> The realization that one is roaming, then, is a subtle claim that one should be allowed to roam, *despite* the rise of barriers to that very activity and the increasing dissonance created by assertions of property in land. It is fair to assume that, far from the sedentary bases of state systems, the default position in human history has been one if not of nomadism at least of substantial mobility.<sup>56</sup> Although the slow rise of agriculture from around 12,000 years ago gradually displaced this nomadism and state building sought to defeat it,<sup>57</sup> the traditional hunter-gatherer model was the original mode of adaptation to the natural world for human beings. It notoriously led to highly egalitarian societies based on subsistence and gift exchange that did not produce strong conceptions of property.<sup>58</sup>

It was, by contrast, largely agriculture and the competition over arable land that led to legal innovations designed to protect property that would

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55. Jacqueline Bhabha, *Human Mobility and the Longue Durée: The Prehistory of Global Migration Law*, 111 AJIL UNBOUND 136 (2017).

56. HANS BARNARD & WILLEKE WENDRICH, *THE ARCHAEOLOGY OF MOBILITY: OLD WORLD AND NEW WORLD NOMADISM* (2008).

57. Mohammed H. S. Ebrahim, *Nomadism, Settlement and Development*, 8 HABITAT INT'L. 125 (1984).

58. See Mauricio Cortina, *Our Prehistory as Egalitarian Nomadic Foragers with Antiauthoritarian Leadership: What These Nomads Can Teach Us Today*, 41 PSYCHOANALYTIC INQUIRY 456 (2021).

eventually clash with a variety of human mobilities accustomed to crossing land freely. These evolutions, culminating in the enclosure movement, oriented property towards an exclusive and absolute right that gradually foregrounded private individual interests at the expense of the collective as illustrated by the rise of “hedges.”<sup>59</sup> “No trespassing” thus became a widely accepted corollary of the right of property. The enclosure movement was resisted at every step in the eighteenth century by “commoners” and small farmers who often found that their customary title to land was difficult to prove and that the loss of rights to cut wood or pasture significantly impoverished them.<sup>60</sup> In the US, the rise of a conception of property excluding trespass is a relatively late development, one tied to the needs of fencing cattle and the rise of ranch interests – what Ilgunas has described as “the closing down of America.”<sup>61</sup>

But it was perhaps in settler colonial societies that the full force of the private displacement of mobility through assertions of property and the intervention of the state in forcefully clearing land to make way for such property reached its zenith,<sup>62</sup> assuming a strong inter-civilizational tone, and a particularly violent form as well. There, the closing-off of territory was intimately tied to colonization and the gradual exclusion of the land’s traditional inhabitants as well as, crucially, their mobilities. In North America, for as long as the fur trade predominated as the dominant economic activity, passage had been the predominant ethos.<sup>63</sup> But the move to settler colonialism substituted conceptions of land as “private” to what had until then been a conception of land as a “commons.”<sup>64</sup>

Ultimately, enclosure and the ability to exploit and exclude from land were specifically associated with civilization,<sup>65</sup> where mobile indigenous practices did not confer any title on land and were, in fact, a ground for dispossession of property and, ultimately, sovereignty.<sup>66</sup> By the time this movement was in full swing, it tied together land appropriation, capitalism and imperialism.<sup>67</sup> For example, governmental promises of “free” land that displaced the indigenous and metis populations of Canada were a key part of populating the Western

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59. Nicholas Blomley, *Making Private Property: Enclosure, Common Right and the Work of Hedges*, 18 *RURAL HIST.* 1, 6–9 (2007).

60. Ruth Livesey, *Right to Roam? Nineteenth-Century Commons and Caroline Lesjak’s The Afterlives of Enclosure*, 51 *VICTORIAN LITERATURE & CULTURE* 327, 327–28 (2023).

61. ILGUNAS, *supra* note 50.

62. Allan Greer, *Commons and Enclosure in the Colonization of North America*, 117 *AM. HIST. REV.* 365 (2012).

63. See Henry Jones, *Property, Territory, and Colonialism: An International Legal History of Enclosure*, 39 *LEGAL STUD.* 187 (2019).

64. Randal Joy Thompson, *Evolution of the Idea of the Commons and the First Enclosure Movement*, in *PROLEPTIC LEADERSHIP ON THE COMMONS: USHERING IN A NEW GLOBAL ORDER* (2020).

65. Robert P. Marzec, *Enclosures, Colonization, and the Robinson Crusoe Syndrome: A Genealogy of Land in a Global Context*, 29 *BOUNDARY* 129, 129 (2002).

66. Cole Harris, *How Did Colonialism Dispospossess? Comments from an Edge of Empire*, 94 *ANNALS ASS’N AM. GEOGRAPHERS* 165 (2004).

67. PATRICK BRANTLINGER, *BARBED WIRE: CAPITALISM AND THE ENCLOSURE OF THE COMMONS* (2017).

frontier.<sup>68</sup> In New Zealand, the prosecution of vagrants was specifically connected to an effort to displace the Maori (and whites who consorted with them) from certain lands and thus deeply tied to the colonial project.<sup>69</sup> To this day, the connection between enclosures and colonial violence continues to manifest itself, as in the killing of Colten Boushie, a young Cree man murdered by a Saskatchewan farmer for trespassing on his land, a story that can be connected to much older legacies of dispossession, erasure of indigenous bodies and glorification of farm land as “one’s castle.”<sup>70</sup>

Privatization of land, colonization, and the consolidation of borders, thus, can be seen as different facets of the same phenomenon that excluded or at least severely controlled practices of movement.<sup>71</sup> They durably entrenched modes of appropriation and privatization of land and territory, with the full and sometimes violent backing of the state apparatus. Whatever preexisting freedoms may have existed, states gradually “monopolize[d] the legitimate means of movement,” an authority that had until then been largely private.<sup>72</sup> Attempts to deconstruct the no-trespassing mindset in North America have run against fears about and the reality of armed violence, and expose the degree to which the property as absolute right to exclude mindset is in tension with alternative cosmogonies.

#### B. *The Genesis of Roaming Rights: From Nordic Countries to Indigenous Traditions in the Americas*

The idea of roaming rights first takes hold on a very local, practical plane. Roaming rights are not so much deduced from some fundamental universal idea of the “human” as they emerge historically and gradually from the traces left by ramblers across time, romantic aspirations to traverse nature,<sup>73</sup> the gradual negotiation of rights of passage, attempts to minimize frictions between different interests in the land,<sup>74</sup> the (arguably problematic) replacement of rights of ownership by rights of usage,<sup>75</sup>

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68. DANIEL HEATH JUSTICE & JEAN M. O'BRIEN, *ALLOTMENT STORIES: INDIGENOUS LAND RELATIONS UNDER SETTLER SIEGE* (2022).

69. CATHARINE COLEBORNE, *CONSORTING WITH 'OTHERS': VAGRANCY LAWS AND UNAUTHORISED MOBILITY ACROSS COLONIAL BORDERS IN NEW ZEALAND FROM 1877 TO 1900* (2020).

70. Gina Starblanket & Dallas Hunt, *How Colten Boushie's Death Became Recast as Story of a Knight Protecting His Castle*, *GLOBE & MAIL* (Feb. 13, 2018), <https://www.theglobeandmail.com/opinion/how-the-death-of-coltan-boushie-became-recast-as-the-story-of-a-knight-protecting-his-castle/article37958746/> [<https://perma.cc/U4CQ-UFM9>].

71. See Hilary Cunningham & Josiah Heyman, *Introduction: Mobilities and Enclosures at Borders*, 11 *IDENTITIES* 289 (2004).

72. *Coming and Going: On the State Monopolization of the Legitimate "Means of Movement"*, in *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE* 4–8 (John C. Torpey ed., 2nd ed. 2018).

73. Mary Jacobus, *Rambling and Romanticism: The Right to Roam*, in *FROM QUEEN ANNE TO QUEEN VICTORIA. BODY & MIND. VOLUME 8*, at 17, 18–19 (2025).

74. MARION SHOARD, *A RIGHT TO ROAM* (1999).

75. Mats Morell, *Alternative Uses of Land and Re-Negotiation of Property Rights: Scandinavian Examples, 1750–2000*, in *PROPERTY RIGHTS IN LAND* (2016); Hannah Taub, *The Paradox of Freedom to Roma: Non-Recognition of Indigenous Peoples' Land Rights in Sweden and the United States* 19-21 (March 2018) (Ph.D. dissertation, University of Oregon).

contestations over sovereignty,<sup>76</sup> nationalism<sup>77</sup> and, increasingly, forms of trespass action.<sup>78</sup> The right of passage through uncultivated land in the countryside is the object of relatively recent codifications in Nordic Europe.<sup>79</sup> It was formalized in Norway in 1957 by the Outdoor Recreation Act.<sup>80</sup> The Swedish Constitution of 1974 states that, “Everyone shall have access to the natural environment in accordance with the right of public access.”<sup>81</sup> Norway<sup>82</sup> and Iceland<sup>83</sup> have similar legislative provisions.

Although not without its critiques and challenges especially when it has been exploited for lucrative ends,<sup>84</sup> the right appears to be very broadly accepted in Nordic countries, including by property owners. Its uptake has also spread beyond Nordic countries. In 2000, Britain enacted a “right to roam” in the countryside.<sup>85</sup> This opens up land classified as “mountain, moor, heath, or down” to the public for hiking purposes. The English walking rights movement saw Parliament pass the Countryside and Rights of Way Act that opened up 3.4 million acres of privately owned English and Welsh land to walkers.<sup>86</sup> In turn, the Scottish Parliament passed the Land Reform (Scotland) Act, opening up virtually all of Scotland to all types of non-motorized outdoor recreation.<sup>87</sup> Austrian,<sup>88</sup> German<sup>89</sup> or Swiss<sup>90</sup> law have similar provisions.

Although roaming rights have sometimes been presented as a Scandinavian idiosyncrasy rooted in a long history, this has been described as a “myth,”<sup>91</sup> suggesting a much larger potential for adoption. Some roaming rights can be seen as a late-day conquest based on specific forms of militancy oriented towards

76. Christopher Steinke, *The “Free Road”: Indigenous Travel and Rights of Passage on the Missouri River* (Jun. 26, 2015) (Ph.D. dissertation, The University of New Mexico).

77. Gudrun Dahl, *Wildflowers, Nationalism and the Swedish Law of Commons*, 2 *WORLDVIEWS: ENV'T, CULTURE, RELIGION* 21 (1998); Dagný Bryndís Sigurjónsdóttir, *The Swedish Allemansrätt: An Embodiment of Swedishness* 18 (2021) (Bachelor's dissertation, Lund University).

78. Alexandra Imberh, *Trespassing for the Right to Roam: Challenging Private Property Relations through Place-Making and Commoning in England* (2024) (Master's thesis, Lund University).

79. Precisely locating the moment when the right emerges in positive law in the Nordic countries remains a difficult exercise, perhaps because the right had always been there in customary form. Matti Oula Juhana La Mela, *Tracing the Emergence of Nordic Allemansrätten through Digitised Parliamentary Sources*, in *DIGITAL HISTORIES: EMERGENT APPROACHES WITHIN THE NEW DIGITAL HISTORY* 181 (2020).

80. LOV OM FRILUFTSLIVET [FRILUFTSLOVEN] [OUTDOOR RECREATION ACT] June 28, 1957, no. 16, ch. 1 § 1 (Nor.).

81. REGERINGSFORMEN [RF] [CONSTITUTION] 2:15 (Swed.).

82. Friluftslöven, *supra* note 80, at ch.1 § 2.

83. LÖG UM NÁTTÚRUVERNND [NATURE CONSERVATION ACT] Mar. 22, 1999, no. 44 (Ice.).

84. Anna Sténs & Camilla Sandström, *Allemansrätten in Sweden: A Resistant Custom*, 15 *LANDSCAPES* 106 (2014).

85. Countryside and Rights of Way Act 2000, c. 1 § 1 (Eng. & Wales).

86. Benjamin John William Mayfield, *The Emergence of the Countryside and Rights of Way Act 2000* (2012) (Ph.D. dissertation, Lancaster University).

87. Land Reform (Scotland) Act 2003, art. 1. (Scot.).

88. FORSTGESETZ AUS DEM JAHRE 1975 [FORESTRY ACT OF 1975], BGBl. No. 440/1975, as amended by BGBl. No. 231/1977, § 3 art. 33 (Austria).

89. BUNDES NATURSCHUTZGESETZ [BNATSCHG] [FEDERAL NATURE CONSERVATION ACT], July 29, 2009, BGBl. I at 2542, § 59(1) (Ger.).

90. Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code], Dec. 10, 1907, SR 210, RS 210, art. 699 (Switz.).

91. Marianne Reusch & Susanne Jäggi, *Das Recht auf Erholung in der Natur in Skandinavien*, 34 *NATURSCHUTZ UND RECHT (NuR)* 830 (2012) (Ger.).

modern concepts of sports and outdoor activity or, in an earlier era, hunting. The best-known modern origin of the right-to-roam movement is in the UK, where, on April 24, 1932, 500 young workers of the Young Communist League climbed to the top of Kinder Scout, in England's Peak District, as part of a mass trespass to protest the fact that walkers were denied access.<sup>92</sup> Gamekeepers had been hired by landowners, armed with clubs. Five were arrested. An early act of civil disobedience, it was prolonged by the advocacy of rambling associations<sup>93</sup> and is thought to have led to the adoption of the National Parks legislation in 1949 and the creation of long-distance footpaths,<sup>94</sup> a tribute to the jurisgenerative potential of transgressions.

The idea of roaming rights is often inseparable from a longing for what are understood to be pre-modern practices of mobility. In England, such rights were reclaimed at least initially not on a general basis, but one by one after the enclosure movement had closed off the British countryside, as a series of traditional "rights of way."<sup>95</sup> A more general basis for a right to roam is visible in the Nordic countries, where claims about the right capitalize on what are perceived as age-old traditions. For example, whereas the *allemansrätt* was codified in 1994 in Sweden, its specificity is that it builds on customary law.<sup>96</sup> Although the origin of such rights is unclear, it is generally justified on the basis of a practice going back to time immemorial. Roaming practices antedated property rights by centuries if not millennia and have arisen against the background of notions of property in Scandinavia that were themselves not as exclusive as in the Anglo-American world.<sup>97</sup>

Although subsequently enacted and legislated, then, there is a strong sense in the Nordic countries that modern roaming statutes are merely a recognition of what had, in a sense, always been there and could never be entirely overruled by the rise of property, especially in the case of indigenous peoples such as the Sámi.<sup>98</sup> Even in the British context, where the basis for the right is more explicitly statutory, the right to roam has been presented as "simply a step toward restoring to the public what it lost during enclosure."<sup>99</sup> The legislation or codification of a right to roam, then, is the recognition of an old

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92. Ben Harker, *'The Manchester Rambler': Ewan MacColl and the 1932 Mass Trespass*, 59 HIST. WORKSHOP J. 219 (2005).

93. David Hey, *Kinder Scout and the Legend of the Mass Trespass*, 59 AGRIC. HIST. REV. 199 (2011).

94. Geoffrey Glasby D.Sc., *Mass Trespass on Kinder Scout in 1932: And the Founding of Our National Parks* (2012).

95. Joe Thorogood, Alex Hastie & Charley Hill-Butler, *Public Access, Private Land, and Spatial Politics: The Geographical Importance of the Right of Way in Coventry, England*, 47 TRANSACTIONS INST. BRIT. GEOGRAPHERS 484 (2022).

96. Sténs & Sandström, *supra* note 84.

97. Filippo Valguarnera, *Property Meeting the Challenge of the Commons in Sweden*, in PROPERTY MEETING THE CHALLENGE OF THE COMMONS 451, 471–472 (Ugo Mattei et al. eds., 2023).

98. Kjell A. Modeer, *Legal Autonomy versus Regulatory Law: Customary Law in East Nordic Countries*, 48 TEX. INT'L L. J. 393, 401–402 (2013).

99. Jerry L. Anderson, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 GEO. INT'L ENV'T L. REV. 375, 390 (2007).

consuetudinary right that gives effect to long-held if vague community standards. The significance of custom in this context “is not merely that it is law from a time before legal memory, but that it is law ‘from below’: its origins and legitimacy derive from the praxis of the community.”<sup>100</sup> The common law has long recognized such custom, “both as praxis and as law,”<sup>101</sup> to the extent that it is “ancient, continuous, certain and reasonable.”<sup>102</sup> Contra a modernist distinction that neatly delineates modern-state-formal and primitive-customary-informal law, therefore, this suggests a strong lingering presence of the customary despite and in the shadow of the statutory.<sup>103</sup>

The recognition of such rights in many European countries is, superficially at least, in stark contrast to the practice in North America, where the enclosing of space was crucial to the fetishization of private land property. Today, the US “public access” movement struggles to make gains amidst a jurisprudence almost entirely oriented towards the “right to exclude.” If anything, wild horses and burros straying from public land into private land have more protections than roaming hikers.<sup>104</sup> Even in Europe, the right has sometimes been on the defensive, most notably in Norway, where roaming in fjords is under pressure from holiday homeowners who have sought to restrict public passage through their property, although at the risk of heavy fines if they erect barriers.<sup>105</sup> Famously, Madonna and Guy Richie contested the ability of ramblers to cross their 54-hectare British country estate.<sup>106</sup>

Nevertheless, the right has also reemerged strongly, notably in Canada, as a result of indigenous contestations that have a long history in North America (and in Scandinavia in relation to the Sámi)<sup>107</sup> and that have crystalized in the form of claims for “aboriginal rights,” notably to certain forms of mobility.<sup>108</sup> Aboriginal rights are rights that exist as a result of indigenous peoples continued use and occupation of certain areas, long before European contact. They may include the right to land and self-government but, failing that and notably

100. Andrea C. Loux, *Persistence of the Ancient Regime: Custom Utility and the Common Law in the Nineteenth Century*, 79 CORNELL L. REV. 183 (1993).

101. E. P. THOMPSON, *CUSTOMS IN COMMON: STUDIES IN TRADITIONAL POPULAR CULTURE* (2015).

102. Loux, *supra* note 100, at 184.

103. See generally Alan Blackshaw, *Implied Permission and the Traditions of Customary Access*, 3 EDINBURGH L. REV. 368 (1999) (explaining how customary access practices persisted alongside and in the shadow of formal statutory property law).

104. Alfred W. Buckley & William R. Buckley, *Straying Wild Horses and the Range Landowner: The Search for Peaceful Coexistence*, 4 PUB. LAND L. REV. 29 (1983).

105. *Freedom to Roam in Scandinavia*, DAILY SCANDINAVIAN (Jun. 16, 2016), <https://www.daily-scandinavian.com/freedom-to-roam-in-scandinavia/> [<https://perma.cc/3ZHM-7LG8>].

106. The couple lost their case when a ruling was rendered that the public should be allowed access on a significant portion of their land, but not within sight of their house. Patrick Barkham, *Madonna Loses Fight to Bar Ramblers*, THE GUARDIAN (Jun. 19, 2004), <https://www.theguardian.com/uk/2004/jun/19/ruralaffairs.arts> [<https://perma.cc/7JPX-B68C>].

107. Inge Sirum v. Esslan Reindeer Pasturing District [2001], No. 4B/2001, at 769 et seq. (Nor.)

108. See generally John Borrows, *Physical Philosophy: Mobility and the Future of Indigenous Rights*, in *INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE CRITICAL PERSPECTIVES* 403 (Shin Imai, Benjamin J. Richardson & Kent McNeil eds., 2009) (linking Indigenous mobility to the recognition of aboriginal rights in contemporary legal systems).

when nomadism is considered to invalidate a claim to occupation,<sup>109</sup> at least rights to certain resources (for example through hunting and fishing) as well as to certain forms of mobility. They are typically taken cognizance of, qua rights, through the legal systems of settler societies, although they, of course, continue to have a parallel and irreducible existence in indigenous legal traditions. They may have been protected in treaties or subsequently been recognized in positive law (for example via Section 35 of the Canadian Constitution and Section 25 of the Canadian Charter of Rights and Freedoms)<sup>110</sup> and Western legal systems have developed criteria to recognize them that emphasize their precolonial origin as well as their continuity.<sup>111</sup>

In other words, aboriginal rights to access and therefore mobility are, if anything, rights that inhere in the precolonial practices of a people. Aboriginal title becomes, in the words of the Canadian Supreme Court, “a burden on the Crown’s underlying title.”<sup>112</sup> The point is also, however, that such rights exist on their own terms as part of distinctive indigenous legal traditions, notwithstanding, as the case may be, their recognition or non-recognition by modern Western legal systems. First Nations have consistently affirmed the perennity of such rights, even in the face of striking neglect. They have argued that the treaties they signed never fully extinguished them. And they have emphasized that they exist regardless of whether they are recognized by the state. In Canada, Australia and the US, this means that their authority is often understood by indigenous groups as being distinct from that of the common law. Seeking to compulsively obtain their recognition within such law may even be problematic,<sup>113</sup> opening them up to the external scrutiny of a legal system fundamentally inimical to indigenous normative existence.<sup>114</sup>

The resulting case law speaks to various access rights beyond indigenous reservations, in ways that nonetheless begin to normalize otherwise exceptional claims to mobility.<sup>115</sup> In Canada, for example, it relates to the ability of indigenous band members to harvest or build on Crown (public) land on the basis that they had done so long before the arrival of Europeans in North

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109. Karen Drake & Adam Gaudry, “*The Lands Belonged to Them, Once by the Indian Title, Twice for Having Defended Them, and Thrice for Having Built and Lived on Them*”: *The Law and Politics of Métis Title*, 54 OSGOODE HALL L. J. 1 (2016).

110. Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. B. REV. 727 (1987).

111. See generally Øyvind Ravna & Nigel Bankes, *Recognition of Indigenous Land Rights in Norway and Canada*, 24 INT’L J. ON MINORITY AND GRP. RTS. 70 (2017) (examining comparative legal frameworks that identify Indigenous land rights by reference to precolonial occupation and ongoing, continuous use).

112. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶ 145 (Can.).

113. Taiiaki Alfred, PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO 176 (Oxford U. Press, 2nd ed. 1999); see generally John Borrows, *With or Without You: First Nations Law (in Canada)*, 41 MCGILL L. J. 629 (1995) (arguing that First Nations law exists independently of state recognition and need not rely on common-law validation).

114. See generally Kent McNeil, *The Vulnerability of Indigenous Land Rights in Australia and Canada*, 42 OSGOODE HALL L. J. 271 (2004) (highlighting the vulnerability of Indigenous rights under state judicial review).

115. Bradley I. Nye, *Where Do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest*, 67 WASH. L. REV. 175 (1992).

America.<sup>116</sup> The Inuvialuit Final Agreement, for instance, anticipates that the Inuvialuit's right to harvest game includes the right to travel and establish camps to exercise that right.<sup>117</sup> The position when it comes to private property is stricter, even when private property is located in "unceded land," but still recognizes indigenous rights in certain lands short of property.<sup>118</sup> The claim has sometimes been made that a residual right to hunt for food exists on private land that was previously surrendered by Treaty. That claim is accepted where land is not being "visibly used;" if used, then not even access is permissible.<sup>119</sup> Aboriginal rights to access certain land can be grounded in an "actual pattern of exercise" of the relevant activity "prior to contact," even when such practice was not recognized by colonial government so long as it was "an integral part of the distinctive aboriginal society of the aboriginal people in question" and the practice has been "continuous" (although not necessarily an "unbroken chain").<sup>120</sup> The result of efforts to obtain access is nothing less than a fundamental demand for settlers to change their approach to land.<sup>121</sup>

Roaming rights, then, point to pre-modern *and* pre-colonial legacies not just in Scandinavia. These rights are reclaimed and, in some cases, repackaged in a context of historical ascendancy of the right to property. They often accrue only to certain groups, but at times to the general public. Campaigns for the right have brought together a motley coalition of middle-class hikers and recreational walkers, indigenous peoples, and conservationists. Interestingly, the right is referred to in Sweden and Norway as "allemansrätt," anchoring the notion in an almost visceral plebeian appeal to the "ordinary man," contra land hoarding and monopolization, with strong class undertones and egalitarian aspirations.<sup>122</sup> The Kinder Scout trespass episode, for example, has been described as an example of "working class struggle for the right to roam versus the rights of the wealthy to have exclusive use of moorlands for grouse shooting."<sup>123</sup>

At the same time, the right evokes a kind of quasi-libertarian basis for which what is not prohibited or criminal is implicitly allowed. It is also indissociable from certain social struggles in favor of reclaiming the

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116. Michelle Daigle, *Tracing the Terrain of Indigenous Food Sovereignities*, 46 J. PEASANT STUD. 297, 307 (2019); see generally Andrea Cervera Quintana, "The Right to Harvest": Inuit Contested Accountability on Re-Source Development in Nunavut, 1970-2020 (2021) (B.A. research project, Blanquerna-Ramon Lull University) (noting that Inuit assertions of harvesting rights beyond reserves rest on pre-contact practices challenged by modern resource development).

117. Inuvialuit Final Agreement, § 12(37) (1984) (Can.).

118. *Have Hunting Rights, Will Travel?*, NELLIGAN LAW (May 5, 2017), <https://nelliganlaw.ca/hunting-rights-will-travel/> [<https://perma.cc/EF5Q-7R2U>].

119. *R. v. Badger*, [1996] 1 S.C.R. 771, 774 (Can.).

120. *R. v. Van Der Peet*, [1996] 2 S.C.R. 507 (Can.).

121. Lauren Kepkiewicz, *Whose Land? Complicating Settler Understandings of Land in Canada*, 19 ACME: INT'L J. CRITICAL GEOGRAPHIES 245 (2020).

122. Matthias Brinkmann, *Freedom to Roam*, 21 J. ETHICS & SOC. PHIL. 209 (2022).

123. KAREN BELL, WORKING-CLASS ENVIRONMENTALISM: AN AGENDA FOR A JUST AND FAIR TRANSITION TO SUSTAINABILITY 146 (2019).

commons and a sense of the publicness of the countryside.<sup>124</sup> Where it applies, the right structures the *rapport* to territory and is the object of considerable and durable popular affection. There is a parallel between Western movements to reclaim the commons (such the Kinder Scout episode) and the reality in Canada where for example “there also existed [...] a population that freely hunted, fished and traversed territory they considered a ‘commons’.”<sup>125</sup> It was arguably the same phenomenon of enclosures in the United Kingdom or North America which gradually prevented both indigenous groups and the working class from the enjoyment of such commons, and triggered their parallel struggles to reclaim them.

Finally, the right is not consigned to the West. It may have come into stronger focus there because the powerful ascendancy of territorialized claims over property and their connection to sovereignty made a dedicated countervailing push necessary. Elsewhere, what is not particularly threatened by the prevailing order of property need not particularly be specified. A degree of usufruct emerges naturally simply because it is not denied by dominant conceptions of property. Roaming rights exist, then, in an inchoate state because they do not clash with some supervening historical constitution of enclosed spaces and normative sedentarism. An interesting example is provided by Mongolia as a sovereign state that was nonetheless constituted on the basis of ancestral nomadic practices.<sup>126</sup> Although there is no right to roam as such in the Mongolian constitution, the considerable Mongolian livestock has a right to graze on any pasture, which as a result cannot be privatized.<sup>127</sup> In effect, this means that 80% of the land is and can only be owned by the state, for the benefit of herders. Even in Mongolia, however, that legacy is threatened as the government plans to privatize more and more land.<sup>128</sup>

### C. *Disaggregating the Bundle, One Stick at a Time?*

Roaming rights are a frontal challenge to absolute conceptions of the right of property that require serious consideration of that right’s theoretical grounding. One traditional view of property in the common law that is traceable to Blackstone is that property manifests an integral dominion by the owner over a thing (property as a right “in rem”).<sup>129</sup> Property is therefore “the

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124. Jonathan Mitchell, *What Public Presence? Access, Commons and Property Rights*, 17 SOC. & LEGAL STUD. 351 (2008).

125. Matthew Robert Anderson, *Reconciliation and the ‘Right to Roam,’* THE TYEE (Aug. 2, 2018), <https://thetyee.ca/Opinion/2018/08/02/Reconciliation-Right-Roam/> [https://perma.cc/2RAV-V98T].

126. Note that the extent to which Mongolia is still properly described as a nomadic country is disputed. See Orhon Myadar, *Imaginary Nomads: Deconstructing the Representation of Mongolia as a Land of Nomads*, 13 INNER ASIA 335 (2011).

127. James L. Taylor, *Negotiating the Grassland: The Policy of Pasture Enclosures and Contested Resource Use in Inner Mongolia*, 65 HUM. ORG. 374 (2006).

128. Jillian Lloyd, *Mongolians Ask: Why Own When You Can Roam?*, CHRISTIAN SCIENCE MONITOR, <https://www.csmonitor.com/2003/0903/p01s04-woap.html> [https://perma.cc/DQN7-GBBT] (last visited Nov. 16, 2025); Taylor, *supra* note 127.

129. Robert P. Burns, *Blackstone’s Theory of the Absolute Rights of Property*, 54 U. CIN. L. REV. 67 (1985).

law of things” and offers a rather totalizing take on what an owner can do with such things.<sup>130</sup> By contrast, a widely influential and more modern view is that property can, in fact, and ought to be disaggregated into a series of rights and obligations between persons.<sup>131</sup> Under that view, the emphasis is primarily on *others* respecting the dominion of the property-owning subject, rather than on duties or rights of that owner. The tendency, then, is to disaggregate a number of rights and corresponding obligations that were previously typically combined under a singular property heading. This is what is known as the property as a “bundle of rights” theory, a particularly influential metaphor in the 20<sup>th</sup> Century to describe the complexity and divisibility of property rights.<sup>132</sup>

Regardless of what view one takes dogmatically on whether property is better understood as an ownership in a thing or as a bundle of rights, a conception of property as a “bundle of rights” hardly negates, on its own, most aspects of the traditional view of property. Roaming rights traditions do not challenge such fundamentals of the right to property as the right of possession, enjoyment or disposition. They do, however, take issue specifically with the notion of the right to exclude passage as an absolute, central, necessary or wholly justifiable dimension of property rights. Notoriously, the US Supreme Court found that the right to exclude was an “essential” stick in the bundle of property.<sup>133</sup> The right to exclude as a form of “gatekeeping right” is sometimes considered as the most important, even the defining one in circumscribing property claims to the point that property is inconceivable without it.<sup>134</sup> It is particularly relevant in relation to land property where the enclosure movement has long made it cardinal to a particular understanding of what it means to own. In public discourse, the right to exclude is part of the romantic appeal of the right to property as an obligation to “stay off”.<sup>135</sup>

It is against this background that thinking in terms of a bundle can nonetheless begin to open up space for tinkering with the absoluteness of property because the right to exclude is seen as only one of several rights implicit in property and not necessarily an absolute one. This can loosen the hold of the idea that certain rights and obligations necessarily flow from the thing itself, or even that any combination of rights is a definitional condition of property. As well, the view of property as an arbitrary bundle of rights and privileges immersed in human relations “focuses attention on the quality of the relationships that property constructs.”<sup>136</sup> As such, it can at least bring attention to

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130. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

131. Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247 (2007).

132. *United States v. Craft*, 535 U.S. 274, 278 (2002).

133. Anderson, *supra* note 99, at 377.

134. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 740–52 (1998).

135. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2006).

136. Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 61 (2013).

the social costs of continuing exclusions flowing from the right to property, or even collectively exercised property rights such as private zoning.<sup>137</sup> It thus arguably creates a small space for adaptation of conceptions of property on governmental or societal grounds (for example, as part of eminent domain), on the basis that common spaces next to fully private ones deliver optimal outcomes.<sup>138</sup> It can help shift the discourse towards what is known as a “social discourse of property” that sees it as “a system that structures social relationships with resources” and even “a communal institution that creates and depends on social relationships.”<sup>139</sup> And it is more likely to highlight the fundamentally evolutive and malleable character of the bundle of rights over time.<sup>140</sup>

The reality is that many regimes of property have entailed a moderation of rights to exclude, and that a particular absolutist Anglo-American model of property is neither historically dominant nor analytically unavoidable. Thinking of property only through a “libertarian vision of ownership as bulwark of individual liberty against state oppression and an efficient means of maximizing private wealth”<sup>141</sup> can blind one to both property’s own oppressive proclivities and the existence of a much broader historical variety of property regimes, including regimes that are undeniably property oriented but community-based (such as the Hutterite village or the Kibbutz) or public (the pasture in a medieval village).<sup>142</sup> These regimes were much more diverse than typically thought in the dominant contemporary discourse on property and included mixes of private and public ownership as well as a certain primacy of collective over private uses.<sup>143</sup> Resurgent interest in the European theory of property as a “tree” rather than a bundle of sticks, emphasizes the relative subservience of ownership (the “trunk”) to a plurality of welfare goals pursued by the state.<sup>144</sup> The more immaterial and collective the property, the more inapposite rigid views of the right to exclude seem to be, a point particularly relevant when it comes to communal culture for example.<sup>145</sup>

The idea of roaming rights is at the heart of such reinventions and lends itself particularly well to a relational, property-as-a-bundle understanding that thrives on carefully disaggregating rights. Roaming rights can be justified based on the non-market value that they create. The ability of individuals to roam the land, alone or with others, brings considerable benefits in social,

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137. Andrea J. Boyack, *Limiting the Collective Right to Exclude*, 44 *FORDHAM URB. L.J.* 451 (2017).

138. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 *U. CHI. L. REV.* 711 (1986).

139. David Fagundes, *Property Rhetoric and the Public Domain*, 94 *MINN. L. REV.* 652, 677 (2009).

140. Judith Perle, *The Invisible Fence: An Exploration of Potential Conflict between the Right to Roam and the Right to Exclude*, 3 *BIRKBECK L. REV.* 77 (2015).

141. Fagundes, *supra* note 139, at 657.

142. Robert C. Ellickson, *Property in Land*, 102 *YALE L.J.* 1315 (1992).

143. Elinor Ostrom & Charlotte Hess, *Private and Common Property Rights*, in *PROPERTY LAW AND ECONOMICS* (Boudewijn Bouckaert ed., 2010).

144. Anna Di Robilant, *Property: A Bundle of Sticks or a Tree*, 66 *VAND. L. REV.* 869 (2013).

145. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 *YALE L. J.* 1022 (2008).

environmental and political terms. Rather than mere easements granted to specific individuals, often on a proprietary basis, they accrue to the broader public for the realization of a vision of social welfare. To be sure, there is some evidence that even the superficial dismantling of property involved in recognizing roaming rights could be costly, especially if constitutional protections require compensation for the loss in value of owners' property.<sup>146</sup> But this sets the conversation about roaming rights properly as part of debates on distributive justice: making owners of property marginally less wealthy, although at least virtually "enriching" a mass of persons through newly recognized possibilities for roaming. In other words, the question is, through and through, a political one – notably, *who* has access? –,<sup>147</sup> rather than one that merely emerges from some dogmatic conception of what the law has to say about property.<sup>148</sup>

It should be stressed, moreover, that roaming rights are often conceived as a way of coordinating otherwise a priori incompatible interests to access and of enclosure by modulating property at the margin.<sup>149</sup> One way of conceiving the right to property in conditions of roaming rights has been to see it as involving a correspondence of rights and obligations. The landowner has the right to property, but also the obligation to allow passage and ancillary obligations (for example, in countries such as Estonia to post signs including ownership and contact numbers in an effort to avoid legal issues).<sup>150</sup> Conversely, individuals passing the land have the right to do so, but also the obligation to respect the land. This is reflected in the careful weighing of rights and obligations characteristic of actual roaming rights, in ways that are often the object of considerable acceptance in countries where roaming is recognized.<sup>151</sup>

Whilst Sweden allows for up to a couple of nights of camping, for example, a general obligation exists to not harm wildlife, litter, or damage wildlife or crops. One may or may not be allowed to pick berries, flowers, or mushrooms, but one may not cut down trees or collect wood or start fires. One may be allowed to ride horses, but not off-road vehicles. One may navigate rivers and lakes, but one may not fish without the owner's permission. Fields and plantations may not ordinarily be crossed, except in the Winter. Moreover, roamers are required to stay within a certain distance of dwellings (150 meters in Norway, 70 in Sweden), gardens or

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146. Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917 (2017).

147. Tom Breen et al., *Whose Right to Roam? Contesting Access to England's Countryside*, 44 J. TRANSP. HIST. 276 (2023).

148. Rachelle Alterman & Cygal Pellach, *Beach Access, Property Rights, and Social-Distributive Questions: A Cross-National Legal Perspective of Fifteen Countries*, 14 SUSTAINABILITY 4237 (2022).

149. Arvid Viken, *The Right to Roam – Balancing Inclusion and Enclosure*, 61 POLAR REC. 27 (2025).

150. State Forest Management Centre, RMK, <https://rmk.ee/en/> [<https://perma.cc/A3BC-J7C7>] (last visited Nov. 9, 2025).

151. Richard Campion & Janet Stephenson, *Recreation on Private Property: Landowner Attitudes Towards Allemansrätt*, 6 J. POL'Y RSCH. TOURISM, LEISURE & EVENTS 1 (2013).

cultivated lands. The right of landowners is also protected by the right to roam being conditional on the absence of excessive usage (Switzerland).<sup>152</sup>

As can be seen, roaming in Nordic countries typically involves carefully calibrated and even negotiated rights that seek to maximize enjoyment whilst minimizing disruption, and frame property as a vector of social coordination rather than merely the affirmation of individual dominance. The details of this mosaic of sometimes quirky arrangements matter less than the overall sense of an economy of rights and obligations marked by mutuality, respect and a sense of ongoing communal relations above and beyond both property and roaming rights themselves. In other words, the right to roam is a right that seems naturally suited to a relational analysis: not so much a right that roamers have in the land, but a series of rights and obligations that they have towards the owners and vice versa. Three further ideas are worth mentioning in this context that add legal thickness and depth to the notion of roaming rights.

First, the domestic right to roam is parallel to but also carefully curated around notions of nature conservancy that introduce fundamental public values and therefore mediate with notions of the collective good. In Finland, for example, amblers may not disturb breeding birds or disturb reindeer. Hunting is generally prohibited. The right, in fact, usually does not include any substantial economic exploitation, such as hunting or logging, or other disruptive activities.<sup>153</sup> In Iceland, hikers should follow existing footpaths to protect the landscape. Fires are tolerated so long as they pose no danger. Roaming rights regimes sometimes involve strong notions of collective stewardship and opposition to absolute property rights including the right to exclude.<sup>154</sup>

Second, the idea of a right to roam draws on and even rejuvenates ideas about the commons. One is granted the freedom to roam not only for one's untrammled pleasure or merely to the extent one does not disrupt private property, but also on condition that one not disturb or harm nature. In other words, there is much in roaming rights that is not only about extolling human freedom or respecting property but about underlining notions of collective stewardship of lands. This is because shared spaces may be, paradoxically, required to be able to enjoy exclusive ones. A state that theoretically guaranteed a domestic right of mobility but privatized all roads (or built none) would deeply frustrate the rights of all to go about their lives if only by

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152. Useful detailed descriptions of the right to roam are provided by the relevant countries. See, e.g., *The Right of Public Access – Swedish Freedom to Roam*, VISIT SWEDEN, <https://visitsweden.com/what-to-do/nature-outdoors/nature/sustainable-and-rural-tourism/the-right-of-public-access/> [<https://perma.cc/4Z2J-7QL3>] (last visited Nov. 11, 2025).

153. *Finnish Everyman's Rights – The Right to Roam & Enjoy Nature*, VISIT FINLAND, <https://www.visitfinland.com/en/articles/finnish-everyman-rights-the-right-to-roam/> [<https://perma.cc/AYJ6-2RUD>] (last visited Nov. 11, 2025).

154. *Ecofeminist Insights on Environmental Justice*, SAFI (June 3, 2025), <https://safi-network.org/blog/ecofeminist-insights-on-environmental-justice/> [<https://perma.cc/5Z5M-VMNL>].

accessing their property.<sup>155</sup> In fact, “fracturing” sovereignty by allowing the growth of communal spaces may be required to achieve self-determination for both indigenous peoples and migrants as groups who “share a common interest in diffusing power over land away from the Leviathan.”<sup>156</sup>

Third, beyond the language of stewardship, there is little doubt that fragmenting ownership and distributing rights and obligations therein has a profound social justice dimension.<sup>157</sup> The move to an exclusive and spatial understanding of property is also one that sacrificed the interest that the working classes or indigenous peoples had in the commons. By contrast, the right to roam is clearly a way of correcting the historical injustice and excesses of the enclosure movement by allowing the landless to take advantage of land.<sup>158</sup> It therefore has broader reparatory and redistributive undertones that are inseparable from its actual rise and were very much understood as such by social groups contesting the dominant order of exclusionary property.

### III. ROUTES WITH ROOTS: ON POSSIBLE FOUNDATIONS OF A LEGAL REGIME OF GLOBAL ROAMING RIGHTS

Could these moves, enriching as they do our understanding of fundamental property rights and relations, be replicated to deal with the much broader question of *states'* right to exclude and the recognition of what might be a cross-border right to roam? To be clear, there is no doubt that a somewhat idiosyncratic domestic public-private law quirk is not easily transferrable to the highly distinct register of international relations. At the same time, the distinction between the domestic and the international particularly as concerns freedom of movement may be less analytically and normatively odd than appears at first. It might, of course, be argued that a right to roam is something that has the air of a “general principles of law recognized by civilized nations”<sup>159</sup> and as such part of international law, but the relative exceptionality of the practice militates against too enthusiastic an import into the international realm. Transposing the baggage of roaming rights into international law is easier said than done, and much of the debate has occurred outside the boundaries of international law proper.

Political philosophers, in particular, have sought to argue that the right to exclude is not unlimited and that there should be a presumptive recognition that entry is a right unless the state can offer a plausible case that it would

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155. Cara Nine, *Do Territorial Rights Include the Right to Exclude?*, 18 POL., PHIL. & ECON. 307 (2018).

156. Anna Jurkevics, *Land Grabbing and the Perplexities of Territorial Sovereignty*, 50 POL. THEORY 32, 53 (2022).

157. See Isabella Pojuner, *The English Land Question, and How Trespassers Map Epistemic Enclosure* (2024) (Master's thesis, University of British Columbia), <https://open.library.ubc.ca/soa/cIRcle/collections/ubctheses/24/items/1.0447738> [<https://perma.cc/4KSG-MHMP>].

158. PETER LINEBAUGH, *STOP, THIEF!: THE COMMONS, ENCLOSURES, AND RESISTANCE* (Sasha Lilley & Ramsey Kanaan eds., 2014).

159. Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

cause harm.<sup>160</sup> From a historical perspective, they are in good company with those who have pointed out the recent vintage of the right to exclude as a component of sovereignty and its understanding as a capricious privilege.<sup>161</sup> They have been further joined by those who have highlighted the correlation between exclusions and the reinforcement of the global racial “color line” in the context of decolonization and emerging South-North mobility<sup>162</sup> and suggested mobility as a form of reparation for the violence of colonial borders.<sup>163</sup> Open border theorists seek to challenge the unquestioned status of the frontier in mainstream political and legal thought.<sup>164</sup>

All these scholarly efforts should in theory contend with the fact that sovereignty over territory has had the notable effect of displacing the preexisting right to roam on it of people who are, henceforth, not considered citizens with access to the new state. However, political theorists in particular have typically neglected to justify such caducity. The now voluminous literature on the “territorial rights” of states<sup>165</sup> has tended to make the key question why states - and, behind them, particular peoples- may have a right to cling to a particular territory.<sup>166</sup> It has, perhaps predictably, insisted that the ability to self-determine includes the prerogative to decide who can immigrate and a fortiori who is a citizen on a variety of self-determination related grounds, the historical contribution of particular peoples in valorizing territory, or the general optimality of the planisphere being separated into territorialized states.<sup>167</sup> It has, at any rate, been dominated by discussion of the legitimacy

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160. ANNA STILZ, TERRITORIAL SOVEREIGNTY: A PHILOSOPHICAL EXPLORATION (2019); CHRISTOPHER HEATH WELLMAN & PHILLIP COLE, DEBATING THE ETHICS OF IMMIGRATION: IS THERE A RIGHT TO EXCLUDE? (2011); CHRISTOPHER BERTRAM, DO STATES HAVE THE RIGHT TO EXCLUDE IMMIGRANTS? (2018).

161. Chetail, *supra* note 36.

162. DESAUTELS-STEIN, *supra* note 40.

163. E. Tendayi Achiume, *Racial Borders*, 110 GEO. L.J. 445 (2022); Ernesto Rosen Velásquez, *States of Violence and the Right to Exclude*, 21 J. POVERTY 310 (2017).

164. See generally REECE JONES, OPEN BORDERS: IN DEFENSE OF FREE MOVEMENT (Nik Heynen et al. eds. 2019) (arguing that legal, moral, philosophical, and economic principles support free movement across borders and making a positive case for a world with free movement at borders).

165. See generally A. John Simmons, *On the Territorial Rights of States*, 11 PHIL. ISSUES 300 (2001) (examining the moral bases of modern states’ asserted rights over subjects, aliens, and geographical territorial as components of sovereignty).

166. For literature on territorial rights, see generally Bas Van der Vossen, *Locke on Territorial Rights*, 63 POL. STUD. 713 (2015) (arguing that Locke views transfers of property rights as neither necessary nor sufficient for territorial rights and held a two-part theory of territorial rights); Anna Stilz, *Why Do States Have Territorial Rights?*, 1 INT’L THEORY 185 (2009) (contending that a Kantian account of territorial rights—that treats state territorial rights as primitive and justified when the state imposes a legitimate system of property law—better explains a state’s right to exercise jurisdiction and enforcement power over its territory); Lea Ypi, *A Permissive Theory of Territorial Rights*, 22 EUR. J. PHIL. 288 (2014) (arguing for a “permissive” theory of territorial rights under which a state may settle, exclude, and claim a particular territory only if its citizens occupy it and are committed to establishing a global authority ensuring just reciprocal relations); David Miller, *Territorial Rights: Concept and Justification*, 60 POL. STUD. 252 (2012) (arguing that a full theory of territorial rights must address jurisdiction, resources, and border control, and such rights properly belong to peoples rather than states—grounded in the material and symbolic value they confer on territory).

167. See David Miller, *Territorial Rights: Concept and Justification*, 60 POL. STUD. 252 (2012).

of statehood and reflects some of the sedentary legacies of much political theory.

Yet the claims of exclusivism against mobile peoples do not seem unassailable. It is presumptively unclear that the ability to govern people requires that one exclude passage on one's territory by others; indeed, it might be said that strictly speaking governing a people does not even require holding on to territory (although doing so may be a particularly powerful technology of doing so), as the governance of various nomadic or diasporic peoples throughout history has shown.<sup>168</sup> Leaving aside that more radical possibility here, the movement of foreigners on one's territory no more necessarily frustrates the ability to govern, than the right to property of Scandinavian landowners is frustrated by transient passage on it (it might but it might not).<sup>169</sup> This leans towards an account that is very understanding of roaming rights absent some relatively strong justification for excluding them. Not only does the presence of aliens on one's territory not a priori prevent a state from governing its population; it might frustrate the latter's interests in benefiting from the occasional presence of foreigners in their midst: friends, colleagues, relatives.<sup>170</sup>

The political theory literature on the state has gradually become more critical, if nothing else, of a comprehensive right to exclude,<sup>171</sup> even on the basis of consideration for self-determination.<sup>172</sup> The basic entitlement to political association over a form of territory, some authors argue, does not necessarily lead to a right to exclude writ large,<sup>173</sup> and needs to be fine-tuned in relation to the question of aliens' access.<sup>174</sup> For example, simply because territorial rights make property rights possible or because they manifest a collective attachment in territory or because a state happens to govern well does not mean, pro tanto, that persons previously at liberty to roam on that territory can legitimately be denied the right to do so.<sup>175</sup> In that respect, the test for the internal legitimacy of territorial jurisdiction is not necessarily the same as the external one.

Some authors in the broader migration theory field have argued that the territorial right of states still require them to accept certain kinds of migrants,<sup>176</sup> treat those who have made it within their territorial jurisdiction equally,<sup>177</sup> defer to the self-determination aspirations of

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168. See Frédéric Mégret, *Is There Ever a 'Right to One's Own Law'? An Exploration of Possible Rights Foundations for Legal Pluralism*, 45 ISRAEL L. REV. 3 (2012).

169. Nine, *supra* note 155.

170. *Id.*

171. Chandran Kukathas, *The Case for Open Immigration*, in CONTEMPORARY DEBATES IN APPLIED ETHICS 376 (2013).

172. Maxime Lepoutre, *Immigration Controls: Why the Self-Determination Argument Is Self-Defeating*, 47 J. SOC. PHIL. 1 (2016).

173. Lægaard, *supra* note 16.

174. Lea Ypi, *Territorial Rights and Exclusion*, 8 PHIL. COMPASS 241 (2013); Clara Sandelind, *Territorial Rights and Open Borders*, 18 CRITICAL REV. INT'L SOC. & POL. PHIL. 487 (2015).

175. Ypi, *supra* note 174.

176. Eszter Kollar & Ayelet Banai, *The Right to Exclude and the Duty to Include: Self-Determination, Equal Opportunity, and Immigration*, 20 J. MORAL PHIL. 483 (2023).

177. Linda S. Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389 (2008).

immigrants,<sup>178</sup> and even that there is no incompatibility in principle between sovereignty and open borders given that allowing aliens to settle in one's territory does not as such frustrate any of the defensible goals of political association.<sup>179</sup> For a practice that is so ubiquitous, then border exclusion often seems bereft of an evident normative defense in the face of basic claims to access by people shut out.<sup>180</sup> Moreover, the argument about the illegitimacy of the right to exclude will be closely correlated to how illegitimate one considers the original taking of land to be (particularly in colonization contexts).<sup>181</sup> This theoretical debate chips at some of the pillars of a right to exclude, making it appear less obvious and incontrovertible.

However, none of these arguments are specifically *legal*, except insofar as they may criticize the law indirectly for falling short of some external normative political account. How might one connect that deep sense of the border's inequity, racism, and violence with international law proper via the notion of roaming rights? The challenge, as understood in this article, is not merely to critique the law from outside, but to understand ways in which one might exploit the law's own inherent propensities to effect change – if only as a result of a better understanding of the origins of its resistance to do so. Moreover, the political theory debate is often very a-historical and even anti-anthropological. It is still largely disconnected from any strong notion of borders as excluding *existing* rights of particular peoples that had until then seen fit to travel other lands (as opposed to a general right of passage of all).

It might be argued that states' appropriation of territory is subject to a sort of Lockean proviso;<sup>182</sup> not only that it not prevent other states or peoples from similar appropriation ("enough and as good"),<sup>183</sup> but that the state's "rights to control or prohibit movement across the borders of the territory" not unjustifiably displace the preexisting mobility rights of all foreigners.<sup>184</sup> This would then require one to engage in more genealogical than merely normative work in order to understand how the Westphalian system is not only arguably unjust but, much more specifically, has traumatically displaced rights that had long been considered natural. This still requires one to see through some of the

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178. Gianfranco Pellegrino, *Immigrant Nations and the Limits of the Right to Exclude*, NATIONS & NATIONALISM 1 (2025).

179. Clara Sandelind, *Territorial Rights and Open Borders*, 18 CRITICAL REV. INT'L SOC. & POL. PHIL. 487 (2015).

180. Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POLS. 251 (1987).

181. Margaret Moore, *The Taking of Territory and the Wrongs of Colonialism*, 27 J. POL. PHIL. 87 (2019).

182. JOHN LOCKE, TWO TREATISES OF GOVERNMENT V (1821). For a reading of Locke that emphasizes his support of migration, see BRIAN SMITH, JOHN LOCKE, TERRITORY, AND TRANSMIGRATION 6 (2020).

183. For a general exploration of the proviso as it applies to the ability of other peoples to claim territory for themselves, see Cara Nine, *A Lockean Theory of Territory*, 56 POL. STUD. 148 (2008).

184. Ryan Pevnick, IMMIGRATION AND THE CONSTRAINTS OF JUSTICE: BETWEEN OPEN BORDERS AND ABSOLUTE SOVEREIGNTY 35 (2011). For a particularly ambitious application of the Lockean proviso extending beyond mobility rights, see Cara Nine, *Ecological Refugees, States Borders, and the Lockean Proviso*, 27 J. APPLIED PHILO. 359 (2010).

implications of disaggregating sovereignty in the way property arguably has, with a view to making way for roaming peoples.

In this section, I spell out that intuition by suggesting three fundamental preliminary steps to thinking through what a notion of global roaming rights might mean, based on what domestic roaming rights have been understood to be: (i) working on the analogy between property and sovereignty to highlight the conditions of possibility of such a shift; (ii) reclaiming a tradition of acquired rights in international law; and (iii) rediscovering a reservoir of practices of borderless mobility anchored specifically in international law which at least conceptually approximate human roaming rights.

#### A. *Limits and Potential of the Property/Sovereignty Analogy*

The right to roam domestically, such as it may be, is clearly inscribed within some distinctive private law genealogies. It seeks to curtail a particular conception of the right to property, at least at the margin and in some territories. It is a right already always captured *within* national borders. However, in no way do the traditions referenced in the previous section of roaming through “land” in and of themselves allow for or even anticipate *cross-border* roaming. In fact, discrete national rights to roam or even just domestic freedom of movement exist in the shadow of a simultaneous denial of entry to migrant denizens. That is, there is hardly any necessary connection between allowing roaming on private lands under one’s jurisdiction and commitment to open borders (e.g.: Denmark). In that respect, these domestic traditions of roaming are all ultimately enmeshed in some of the very limitations that they simultaneously refute, namely those that fundamentally separate the domestic and the international sphere. Roaming is allowed, but only up to a point since it is conditioned by its legality under the particular, territorially circumscribed regime of a state, itself reflexively defined as premised on opposing inbound movement.

But could the idea of a right to roam as it emerges within societies form a kind of blueprint or at least a metaphor for a broader right to roam globally? The success of that idea would seem to depend on a variant of the “cantilever” argument that has characterized many debates on global justice including, notably, those around a hypothetical global right of movement.<sup>185</sup> The essence of the cantilever argument is that if one agrees with proposition A (e.g.: there is a case for freedom of movement domestically) then one must agree with proposition B (i.e.: there is a case for freedom of movement globally). In the global mobility literature, that argument is most associated with Joseph Carens. Carens sees global freedom of movement as the “logical extension” of its domestic variant.<sup>186</sup> Adapting the argument, then, the question is whether a commitment to

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185. Borja Niño Amaiz, *Extending Freedom of Movement across State Borders: Does the Cantilever Argument for a Human Right to Migrate Succeed?*, 21 J. GLOB. ETHICS 168; Jeremias Düring & Constantin Luft, *Carens’s Cantilever Argument: Global Freedom of Movement, Logical Necessity and the Burden of Proof* 6, in JOSEPH CARENS: BETWEEN ALIENS AND CITIZENS 161 (2020).

186. JOSEPH CARENS, *THE ETHICS OF IMMIGRATION* (2013).

roaming across private property might entail a corresponding commitment to roaming across public boundaries?

Domestic lineages of a right to roam do provide a certain initial plausibility of an account of global roaming rights. Certainly, from the perspective of the roaming agent and their rights, it should make little difference that what is traversed is a property delimitation or a border. This inevitably will bring up venerable questions about the degree of similarity between the two<sup>187</sup> and whether the property/sovereignty analogy can be made sense of and to what extent, both generally and in relation to mobility.<sup>188</sup> There is a long tradition of, notably, Roman law that considers the power exercised by a landowner and a state to be fundamentally different: *dominium* is not *imperium*.<sup>189</sup>

This is, however, largely a Roman distinction that has not always been replicated across history and, even in the Western tradition, the Prince tended to treat the state as their private estate. There is in fact evidence that sovereignty itself is a concatenation of both notions over time and that private ownership and public authority are not always as inherently opposed as may seem.<sup>190</sup> Moreover, it is not immediately clear what its incidence is for the specific debate on roaming rights. To the extent that roaming rights take root in a very “public” concept of property, they already entail a conception of *dominium* largely constrained by the exigencies of *imperium* which may prefigure how the *imperium* itself might be subjected to the higher demands of the *civitas maxima*. And to the extent that roaming rights domestically take hold as a leftover from ancient times, it is worth noting that the confusion between *imperium* and *dominium* was itself a characteristic of feudalism which may have echoes to this day.

There has also long been a distinct genre of public international lawyering, moreover, going all the way back to Grotius, that is invested in the promise of private law analogies both on doctrinal and theoretical grounds, even as it is also occasionally wary of its limitations.<sup>191</sup> The analytical connection between property and sovereignty thus has a certain pedigree. State territorial jurisdiction (what Sidgwick misleadingly called “dominion”) is strongly “analogous to private ownership from an international point of view.”<sup>192</sup> H.L.A. Hart for example presented the property holder as a “small-scale sovereign.”<sup>193</sup> Jeremy Waldron has described the “sovereign ownership conception” of state

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187. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927).

188. Kim Angell, *Property and Territorial Rights in Political Philosophy*, in OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (Erin Hannah ed., 2019).

189. Jean Gaudemet, “*Dominium-imperium*”: *Les deux pouvoirs dans la Rome ancienne*, 1995 DRIOTS 3.

190. Daniel Lee, *Sources of Sovereignty: Roman Imperium and Dominium in Civilian Theories of Sovereignty*, 2012 POLITICA ANTICA 79.

191. Roger O’Keefe, *Legal Title versus Effectivités: Prescription and the Promise and Problems of Private Law Analogies*, 13 INT’L CMTY. L. REV. 147 (2011).

192. HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 252 (1897).

193. HERBERT LIONEL ADOLPHUS HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 183 (1982).

authority, which “treats the exclusion of an alien like a property-owner’s exclusion of an unwelcome guest.”<sup>194</sup>

I do not here seek to engage these debates on their own theoretical terms nor should one make too much of them here. I merely take note of the fact that the difference between property and sovereignty has not typically been held to be insurmountable to proper theorizing about both or to identifying common themes. Crucially, there is a certain fluidity between both: national lands have been traded and bought (Louisiana or Alaska), and private land configurations have provided the basis for quasi-sovereign exercises of private power (the East India Company). Sovereignty and public ownership have become more private, including in how they relate to land;<sup>195</sup> by contrast, private property has at times been endowed with quasi-public functions or power.<sup>196</sup> If sovereignty is indeed that close to property, then one can speculate that it may not be conceptually harder (although not necessarily easier either) to think of a roaming right internationally than it is domestically.

Central to both sovereignty and property has, it is true, been the right to exclude, including in the very concrete ways that we associate with the regulation of human mobility. The “property-right account of territorial rights” developed by Cara Nine, entails that “the public spaces of a territory [. . .] should be considered externally as privately owned by the state or people.” This means that “[w]ith regard to aliens and other states, a territorial right includes the same rights as private property: to control, manage and restrict access to their territory against aliens.”<sup>197</sup> As Arthur Ripstein points out, there *are* parallels between the two in at least that crucial respect: “If it is your house, you can ask me to leave; [. . .]. So, too, with sovereignty: a state gets to determine what goes on within its borders, and so, too, who is allowed across those borders [. . .].”<sup>198</sup> The idea of property rights has, in fact, been deployed to understand the curtailment of mobility and migration.<sup>199</sup> Katrina Wyman has recently made much of “the analogy between the state and the private landowner” particularly when it comes to the right to exclude, if only to better criticize it.<sup>200</sup>

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194. Jeremy Waldron, *Exclusion: Property Analogies in the Immigration Debate*, 18 THEORETICAL INQUIRIES L. 469, 469 (2017).

195. Franklyn Lisk, ‘Land Grabbing’ or Harnessing of Development Potential in Agriculture? *East Asia’s Land-Based Investments in Africa*, 26 PACIFIC REV. 563 (2013).

196. Geoffrey K. Turnbull & Velma Zahirovic-Herbert, *Private Government, Property Rights and Uncertain Neighbourhood Externalities: Evidence from Gated Communities*, 57 URB. STUD. 711 (2020); Gillad Rosen & Eran Razin, *The Rise of Gated Communities in Israel: Reflections on Changing Urban Governance in a Neo-Liberal Era*, 46 URB. STUD. 1702 (2009); Sven Bislev, *Privatization of Security as Governance Problem: Gated Communities in the San Diego Region*, 29 ALTERNATIVES 599 (2004).

197. Nine, *supra* note 155, at 307.

198. Arthur Ripstein, *Property and Sovereignty: How to Tell the Difference*, 18 THEORETICAL INQUIRIES L. 243, 244 (2017).

199. Stefan Schlegel, *A Bundle of Bundles of Rights – International Treaties Regarding Migration in the Light of the Theory of Property Rights*, 34 UTRECHT J. INT’L & EUR. L. 111 (2018).

200. Katrina M. Wyman, *Limiting the National Right to Exclude*, 72 U. MIAMI L. REV. 425, 429, 433 (2017).

The connection between property and sovereignty as modes of exclusion, at the same time, comes with its own perils. It seems to concede too much to a neo-patrimonial conception of sovereignty, as if states' *raison d'être* was to "own" their territory the way one would own a plot of land. Theories that see national ownership of territory as derived from citizens' property over land<sup>201</sup> seem largely circular.<sup>202</sup> The suspicion is one of private law reductionism that does not do justice to the complexity and qualitatively distinct nature of the ties that bind states to territory and populations, both domestic and foreign. Furthermore, the question is never as simple as whether and why there should be any territory, but which particular people ought to have the right to reside and freely circulate within any given space.<sup>203</sup> Theories of the rights of states over their territory are if anything more likely to have been shaped by nationalist ideas about the value of territory than derived from a Lockean account.<sup>204</sup>

It is increasingly understood that a purely patrimonial conception of the state and its territory is inadequate: the state does not so much own (although it may also sometimes) as it governs and exercises jurisdiction over territory. In effect, none of the central tasks of the sovereign, including those very tasks related to the maintenance of property rights, are exercised "as an owner" as much as:

part of its broad overall responsibility for the running of the society and for its legal arrangements. Sovereign responsibility certainly affects property, and it frames the property system; but [. . .] it is not in itself the exercise of property rights.<sup>205</sup>

Quite like property, however, sovereignty *is*, it turns out, based on some antecedent system of law that gives it its true nature. Or, as Lauterpacht put it, "the State rules within the territory, not over it."<sup>206</sup> A conception of sovereignty as property has thus been described by Jeremy Waldron as "too problematic to be the basis of any argument for the right to exclude."<sup>207</sup> It may be particularly inadequate when thinking internationally about the duties states owe to aliens. One might point to a tradition of thinking about the state, for example, that sees territory as merely an attribute of the state, held by it but ultimately for some defensible end other than merely the sovereign appetite to possess.<sup>208</sup>

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201. Fernando R. Tesón, *The Mystery of Territory*, 32 SOC. PHIL. & POL'Y 25 (2015).

202. Anna Stilz, *Why Do States Have Territorial Rights?*, 1 INT'L THEORY 185 (2009).

203. Margaret Moore, *Which People and What Land? Territorial Right-Holders and Attachment to Territory*, 6 INT'L THEORY 121 (2014).

204. Jan Penrose, *Nations, States and Homelands: Territory and Territoriality in Nationalist Thought*, 8 NATIONS & NATIONALISM 277 (2002).

205. Waldron, *supra* note 194, at 481.

206. Hersch Lauterpacht, *Private Law Analogies in International Law*, at 93 (1926) (Ph.D. dissertation, London School of Economics and Political Science).

207. Waldron, *supra* note 194, at 469.

208. Anna Stilz, *Nations, States, and Territory*, 121 ETHICS 572 (2011).

Furthermore, note that the foundational structures of sovereignty and property are clearly distinct. Property is itself quite dependent on sovereignty in that it is guaranteed and regulated by it and subjected to its curtailments for the public good; it is not immediately clear, by contrast, that there is an equivalent beyond the state to “backstop” sovereignty. Who will regulate the imperium? Sovereignty is therefore an a priori more self-referential and absolute concept, in ways that could, all other things being equal, dim prospects for a conception of global roaming which cannot be imposed from above if there is no “above.” On the one hand, sovereignty is more evidently public than property; on the other hand, its public finality is evidently more self-referential and it is not obvious that it is embedded in some prior, external notion of its finality.<sup>209</sup>

At the same time, when it comes to sovereignty, the arbitrariness of certain states possessing some rather than other land is particularly manifest even compared to private property (whose own inequities are, of course, well documented).<sup>210</sup> The respective endowments of states in terms of landmass and resources have long been criticized as, in principle, requiring compensatory responsibilities.<sup>211</sup> Similar reasoning can serve to criticize the way in which some humans are much better endowed in terms of mobility than others. Human mobility in this context often represents a variable of adjustment between unequally situated territories. The negotiation or recognition of some right to roam, then would stand to redistribute life opportunities amidst arbitrarily manufactured territorial entities.

Such a notion can also be reinforced by cosmopolitan theories of right that envisage, in a Kantian perspective, a sense of collective ownership of the earth beyond sovereignty<sup>212</sup> that can never have been fully displaced by the rise of the Westphalian system.<sup>213</sup> This has prompted some to emphasize the need to “theori[se] the state from a global standpoint” from the outset<sup>214</sup> rather than as simply addressing a problem of domestic authority. There is little doubt that proceeding in this way would change the nature of statehood and international cooperation, as it already has in the European Union context for example, one fundamentally characterized, as it happens, by freedom of movement. Moreover, a compelling argument can be made that some sort of statehood is, in fact, fully compatible with broad tolerance for freedom of

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209. Pevnick, *supra* note 184.

210. CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 13 (1979).

211. Tim Hayward, *Global Justice and the Distribution of Natural Resources*, 54 *POL. STUD.* 349 (2006).

212. See Jakob Huber, *Cosmopolitanism for Earth Dwellers: Kant on the Right to Be Somewhere*, 22 *KANTIAN REV.* 1 (2017).

213. Mathias Risse, *Humanity's Collective Ownership of the Earth and Immigration*, 4 *J. PRAC. ETHICS* 31 (2016); Daniel Loewe, *Common Ownership of the Earth and Immigration: Human Mobility in a Kantian Perspective*, in *CHALLENGING THE BORDERS OF JUSTICE IN THE AGE OF MIGRATIONS* 57 (Juan Carlos Velasco & MariaCaterina La Barbera eds., 2019); Kieran Oberman, *Immigration and Equal Ownership of the Earth*, 30 *RATIO JURIS* 144 (2017).

214. Jakob Huber, *No Right to Unilaterally Claim Your Territory: On the Consistency of Kantian Statism*, 20 *CRITICAL REV. INT'L SOC. & POL. PHIL.* 677, 689 (2017).

movement.<sup>215</sup> Beyond a certain point, in fact, denial of entry on one's territory to those in need risks contradicting the very foundation on which statehood rests.<sup>216</sup>

The idea that a claim to territory is never absolute opens a small vista for theoretical renewal. For example, there may be situations where the state ought not to be able to dispose of territory on the basis of its role in securing self-determination because it would necessarily do so at the expense of some of its population.<sup>217</sup> The same, to reason by the absurd, is evidently true of the population: not owned by the state in the sense that it could be disposed of at will, at least without its consent (in that sense sovereign territory, unlike private property, imposes duties on the owner because of the investment a population has in it and cannot simply be surrendered or disposed of). Moreover, although states may seek to divest themselves of the aura of sovereignty in relation to certain territories by claiming that they own them but that they are not part of their national territory (e.g.: Guantanamo, Puerto Rico<sup>218</sup>), these are exceptional arrangements, and international lawyers have been characteristically wary. Sovereignty is a privilege, but it is, also, a form of fiduciary duty that one cannot shirk from exercising.<sup>219</sup> To take a recent example, Denmark could not simply surrender Greenland to a foreign power without violating its duties to the Greenlandic population to provide them with a territory upon which they enjoy certain freedoms (including that of roaming).

If territory is governed rather than owned precisely because it is public and not private, sovereignty is already inscribed in and saturated by a network of public duties that may have implications for roaming. For international lawyers, this has long meant that sovereignty is conferred by international law rather than the basis for it.<sup>220</sup> This does not tell us what the resulting duties are or ought to be, certainly in relation to the right to travel, and it certainly still seems compatible with an absolutist vision of sovereignty as the right-to-exclude. To answer this question would require one to weigh the importance given by nationalists and communitarians to working for one's "people" as opposed to duties to a variety of "distant strangers,"<sup>221</sup> a chasm which

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215. See Luis Cabrera, *Free Movement, Sovereignty and Cosmopolitan State Responsibility*, in *THE STATE AND COSMOPOLITAN RESPONSIBILITIES* (Richard Beardsworth, Garrett Wallace Brown, & Richard Shapcott eds., 2019).

216. Alice Pinheiro Walla, *Common Possession of the Earth and Cosmopolitan Right*, 107 *KANT-STUDIEN* 160 (2016).

217. Joseph Blocher & Mitu Gulati, *Markets and Sovereignty*, 54 *OSGOODE HALL L. J.* 465 (2016); Karen Knop, *A Market for Sovereignty: The Roles of Other States in Self-Determination Special Issue: Introduction to the Law and Markets: Regulating Controversial Exchange*, 54 *OSGOODE HALL L. J.* 491 (2016); Jurkevics, *supra* note 156.

218. Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of the Territories*, 131 *YALE L. J.* 2390 (2022).

219. EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* (2016).

220. Hans Kelsen, *Sovereignty and International Law*, 48 *GEO. L. J.* 627 (1960).

221. See generally ANGELA MÜLLER, *STATES, HUMAN RIGHTS, AND DISTANT STRANGERS: THE NORMATIVE JUSTIFICATION OF EXTRATERRITORIAL OBLIGATIONS IN HUMAN RIGHTS LAW* (2023) (discussing extraterritorial human rights obligations).

roaming rights seem particularly suited to bridge but which remains evidently contentious. At a minimum, international law includes duties to welcome through asylum, for example, but also to allow entry on the territory of nationals and lawful residents. Similar duties are not necessarily to be found in private law where there is no legal obligation of refuge or hospitality in the home even in case of emergency, although individuals who do trespass or break in may invoke necessity as a defense. At any rate, the existence of at least *some* customary and conventional duties to allow some incoming mobility suggests that the claim that the right to exclude is absolute cannot be right.

Of course, those public responsibilities can still be justifiably exercised to exclude roaming rights of foreigners, for example on communitarian or security grounds. But note that, by analogy with the property as a bundle of sticks notion, ideas of sovereignty as itself a “bundle of rights” are old,<sup>222</sup> and make it possible to disentangle different facets of the exercise of public power. Along the same lines as with property, one could imagine that the “bundle of rights” that is sovereignty could be, in time, divided and limited.<sup>223</sup> This could shape the right to exclude based on the functions that international law assigns to sovereignty. For example, Katrina Wyman has argued that the right to exclude migrants, by analogy with property holders’ prerogatives, is “extreme” and should be limited particularly in a context of climate change that stands to fuel momentous migration.<sup>224</sup> The turn to a notion of sovereignty as stewardship (analogously to a similar move in property law that is connected, precisely, to the roaming tradition) inspired by political ecology has the potential to shift lines of thinking.<sup>225</sup> In part, it relies on the reinvention of indigenous modes of legal thinking,<sup>226</sup> themselves based on community dominium over land.<sup>227</sup>

In conclusion of this section, the debate on roaming rights will not be settled by attention to obscure doctrinal controversies between private and public lawyers on the validity of the property/sovereignty analogy. Still, conversations

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222. Roman Kwiecień, *Sir Hersch Lauterpacht's Idea of State Sovereignty - Is It Still Alive?*, 13 INT'L CMTY. L. REV. 23 (2011).

223. See, e.g., Christian Volk, *The Problem of Sovereignty in Globalized Times*, 18 L., CULTURE & HUMANITIES 716 (2022).

224. Wyman, *supra* note 200, at 429.

225. See Sven G. Kaufmann, *Stewardship Sovereignty, Sustainable Development and the Protection of the Arctic Marine Environment: Injecting Environmental Values in International Sovereignty Law*, in GLOBAL CHALLENGES IN THE ARCTIC REGION 107 (Elena Conde & Sara Iglesias Sánchez eds., 2016); Robyn Eckersley, *Greening the Nation-State: From Exclusive to Inclusive Sovereignty*, in THE STATE AND THE GLOBAL ECOLOGICAL CRISIS 159, 173 (2005); Emily Barritt, Afshin Akhtar-Khavari, Benjamin J. Richardson, *The Story of Stewardship and Ecological Restoration*, in ECOLOGICAL RESTORATION LAW 72–73 (2019).

226. See Jeremy Seth Geddert, *Indigenous Sovereignty and the (Enlarged) Responsibility to Protect*, 51 AM. REV. CAN. STUD. 251 (2021); Jessica Shadian, *From States to Politics: Reconceptualizing Sovereignty through Inuit Governance*, 16 EUR. J. INT'L RELS. 485 (2010).

227. See Kabir Sanjay Bavikatte & Tom Bennett, *Community Stewardship: The Foundation of Biocultural Rights*, 6 J. HUM. RTS. AND ENV'T 7 (2015); Clint Carroll, *Native Enclosures: Tribal National Parks and the Progressive Politics of Environmental Stewardship in Indian Country*, 53 GEOFORUM 31 (2014).

about the nature of property loom large in our understanding of the nature of sovereignty, particularly as the two might relate to roaming. Efforts to situate sovereignty within a broader constellation of constitutive rights and duties do at least make it possible to think outside the box of rigid territorial prerogatives, including the right to exclude. The net effect of all this theorizing for the very possibility of roaming rights qua legal rights is to keep a window open even as it remains supremely ambiguous on its own grounds: the best that can be said is that international law neither mandates nor necessarily excludes the possibility of such rights. There is still a considerable gap between the best normative theorizing about peoples' rights of cross-border mobility and any credible account under international law. A path may exist for the sort of global freedom of movement anticipated by the notion of roaming, but that path now needs to be further explored as a component of international law itself.

B. *Embedding Roaming Rights in International Law: From the Ocean to the Enclave and Back*

How, then, might one extend these normative intuitions towards a theory of actual roaming rights in international law? As it happens, international law has its own tentative heritage of special regimes of mobility, not all of which are apposite to understand the roaming of persons across borders, but which at least suggest interesting vistas to problematize sovereignty's supposed immutable commitment to territorial exclusiveness.<sup>228</sup> This sub-section will suggest that international law has historically come up with a repertoire of special mobility regimes that uphold some conception akin to roaming. Unsurprisingly, these have mainly concerned maritime spaces and include first and foremost freedom of navigation on the oceans based on the notion that the seas are part of a global commons.<sup>229</sup> Even if the point is these are exceptional regimes, they attest to the possibility of certain spaces being imagined as necessarily places of transit and mobility.

Crucially, this is based on a strong notion of the oceans as shared spaces of freedom at least when it comes to navigation, widely understood to favor trade, exploration, and exchanges and therefore deemed to be worthy of special protection under international law. Not too much should be read into this: whereas the organization of the world's oceans has long been characterized by a deep, inherent recognition of mobility, the organization of the world's land mass is, by comparison, uniquely shaped by sedentary lifestyles. It is sometimes argued, in fact, that oceanic governance fails precisely when it is contaminated by characteristic features of land regulation ("exclusivity, equality, and

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228. See Godwin E. K. Dzah, *The Law of the Sea's Fluid Anthropocentrism*, in *THE ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW AND ANTHROPOCENTRISM* 102 (Usha Natarajan, Frédéric Mégret & Vincent Chapaux eds., 2023).

229. Ruth Lapidoth, *Freedom of Navigation - Its Legal History and Its Normative Basis*, 6 *J. MAR. L. & COM.* 259 (1974).

territoriality”),<sup>230</sup> through creeping assertions of sovereignty. But ocean governance can be seen as a laboratory for what could be innovative and even radical modes of land governance,<sup>231</sup> including in terms of mobility.

The conventional narrative in international law has been to the effect that it is successive encroachments of the “terracentric” logic<sup>232</sup> on the aquatic that have shaped the oceans,<sup>233</sup> highlighting the ever-growing hegemony of sovereignty even across oceanic spaces<sup>234</sup> as well as the need to regulate mobility to safeguard the commons.<sup>235</sup> The reverse, however, may also be true. The study of maritime mobilities is increasingly inseparable from broader paradigms of mobility.<sup>236</sup> The oceans speak back, in other words, to the organization of the world’s land mass, if only marginally and through gradual encroachments, their inherent liquidity a retort to the relative stasis of the land, each co-constituting the other.<sup>237</sup> The High Seas regime, for example, has had a tendency to influence the regime of other waters as seen in the right of innocent passage in territorial waters and the entry into port for vessels in distress,<sup>238</sup> as well as the regime of international straits. This it has done almost by way of logical implication: there can be no freedom of navigation on the High Seas for at least some if one cannot access them (or segments thereof) through waterways.

This suggests at least one realm where the global imperative of mobility holds sway and trumps the relentless drive to appropriate or to command oceans from the land. In that respect, Irus Braverman’s notion of “amphibious legal geographies” leading to “land-sea regimes” is apposite in its will to challenge the “disastrous implications that (the) legal fixation on the land/sea binary has wrought on human and other-than-human lifeworlds.”<sup>239</sup> These include the lifeworlds of

230. Josh Martin, *A Transnational Law of the Sea*, 21 CHI. J. INT’L L. 419, 473 (2021).

231. Nico Schrijver, *Managing the Global Commons: Common Good or Common Sink?*, in THE UN AND THE GLOBAL SOUTH, 1945 AND 2015 (Thomas G. Weiss and Pallavi Roy eds., 2017); Frédéric Mégret, *Activists on the High Seas: Reinventing International Law from the Mare Liberum?*, 23 INT’L CMTY. L. REV. 367 (2021).

232. The idea of terracentrism is that international law gets its cue from modes of regulation prevalent on land. Dzah, *supra* note 228.

233. Po-Yi Hung & Yu-Hsiu Lien, *Maritime Borders: A Reconsideration of State Power and Territorialities over the Ocean*, 46 PROGRESS HUM. GEOGRAPHY 870 (2022); Patrick Balsano, *Law of the Sea and the Territorialisation of Maritime Spaces and Islands in the China Seas and Beyond*, GEOPOLITICS 1 (2025).

234. Elizabeth Havice, *Unsettled Sovereignty and the Sea: Mobilities and More-Than-Territorial Configurations of State Power*, 108 ANNALS AM. ASSOC. GEOGRAPHERS 1280 (2018).

235. Angel J. Rodrigo, *Between Grotius and the Pro Communitate Principle: The Limits to the Principle of Freedom of the Seas in the Age of Marine Global Commons*, 8 PAIX & SÉC. INT’L 95, 112 (2020).

236. Kimberley Peters & Rachael Squire, *Oceanic Travels*, 9 TRANSFERS 101 (2019).

237. Philip E. Steinberg, *Sovereignty, Territory, and the Mapping of Mobility: A View from the Outside*, 99 ANNALS ASSOC. AM. GEOGRAPHERS 467 (2009).

238. See generally Ruth Lapidoth, *Freedom of Navigation and the New Law of the Sea*, 10 ISRAEL L. REV. 456 (1975) (explaining that freedom of navigation is the “cornerstone of international intercourse” and a universally recognized “basic norm of international law” which necessitated the recognition of “rights of navigation in several sea spaces” other than the high seas, such as the right of innocent passage in the territorial sea to “ensure free access to and from the open sea, as well as free passage between its various parts”).

239. Irus Braverman, *Introduction: Amphibious Legal Geographies: Toward Land–Sea Regimes*, in LAWS OF THE SEA: INTERDISCIPLINARY CURRENTS 1, 3 (Irus Braverman ed., Routledge 2022).

seamless mobility between seas, between islands, and ultimately between sea and land. It also connects to long-lost maritime passageways of nomadic people that suggest a fundamental continuity between land and sea configurations, as will be explored in the final section of this article.<sup>240</sup>

Equally significant, the connection between the oceans and the landmass has occasionally been powerfully invoked to insist on a continuum of mobility between both. This is the case of landlocked states, which have long argued that they (and therefore their nationals) must have a right of passage over the territory of states that separate them from the oceans, since, failing that, freedom of the seas would be meaningless for them.<sup>241</sup> This may be via a solemnly proclaimed freedom of navigation on rivers that lead to the sea. For example, Paraguay has long benefited from the legally enforceable ability under the treaty of San José de Flores to navigate the Rio de la Plata to the Atlantic. The right to access to and from the sea is now protected in UNCLOS via “freedom of transit.”<sup>242</sup> In addition, the Suez and Panama canals, which are respectively the property of the Egyptian and Panamanian states, are also the object of a “servitude internationale” (an “international easement”) to promote “perpetual liberty” of navigation.<sup>243</sup>

This suggests a continuity of such mobility usages even across swathes of land contiguous and connected to land configurations. Rights of passage thus emerge from some special characteristics of oceans that signal them for particular collective outcomes (as, essentially, part of the global commons) and burden the otherwise absolute right of sovereignty with at least limited obligations of openness. This is also evident in that most “mixed” of configurations, namely waterways, irrespective of any connection or access to the oceans. When the newly independent USA concluded treaties with Spain and England to protect its right of navigation over the Mississippi and the St Lawrence Rivers respectively, it did so on the basis that it already had that natural right and that it should be protected going into the future.<sup>244</sup> Shared lakes have also long been the focus of efforts at collectivizing access.<sup>245</sup> Of course, freedom of navigation is, again, very different from what might be a right to roam of populations on land. But its existence does at least attest to the imperative of mobility and intercourse one finds historically at the heart of international legal concerns.

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240. Alfredo Maximiano Castillo, *From Virtual Survey to Real Prospection: Kawésqar Mobility in the Fuego-Patagonia Seascape across Terrestrial Passages*, 435 QUATERNARY INT’L 114 (2017).

241. See generally A. Mpazi Sinjela, *Freedom of Transit and the Right of Access for Land-Locked States: The Evolution of Principle and Law*, 12 GA. J. INT’L & COMP. L. 31 (1982) (discussing the right of free transit as a necessary corollary to accepted notions of freedom of high seas, thereby entitling landlocked states to free transit to exercise their equal rights within the *res communis* because the oceans are open to all nations, littoral and land-locked alike).

242. U.N. Convention on the Law of the Sea, art. 125(1), Dec. 10, 1982, 1833 U.N.T.S. 397.

243. See generally Luke T. Lee, *Legal Aspects of Internationalization of Interoceanic Canals*, 33 L. & CONTEMP. PROBS. 158 (1968) (discussing doctrine of “international servitude” as one of four premises advanced to justify rights of passage through interoceanic canals).

244. Ludwik A. Teclaff, *United States River Treaties*, 31 FORDHAM L. REV. 697 (1962).

245. Alex Devine, *The Lake Tsana and the League of Nations*, 120 FORTNIGHTLY 643 (1926).

These hybrid regimes' effect on relativizing the border might be chalked up entirely to the liquid nature of water and the difficulty of asserting sovereignty over it. But there are other ways in which the stereotypical division between an aquatic milieu of unfettered mobility and a telluric milieu devoted to border control does not do justice to the complexity of these realms. *Territorial* traditions of cross-border mobility did predate international law and, in some cases, survived its rise. In Europe, the territorial fragmentation of secular and spiritual authority during the Middle Ages, particularly the Holy Roman Empire, gave rise to a variety of *sui generis* paths of mobility. This led to, for example, transit rights under the law of nations for the troops of states seeking to reach a non-continuous part of their territory.<sup>246</sup> Beyond the West, there is every reason to think that considerable mobility structured polities, all the way to "pastoral nomadic states."<sup>247</sup> This earlier emphasis on mobility survives to this day even after centuries of rationalization aimed at creating territorial exclusivity.

For example, land easements/servitudes have consistently been recognized in public international law,<sup>248</sup> based on evident analogies with private law,<sup>249</sup> notably to deal with the problem of discontinuous territory and resulting enclaves. A host of conventional servitudes were agreed by defeated powers after the First World War with a view to ensuring freedom of access or circulation.<sup>250</sup> Portugal famously claimed the existence of a right of passage as necessary for its exercise of sovereignty from Daman to two enclaves in India. This was very much a claim to a sort of acquired right during the British colonial era, combined with a sense that the enclaves could not survive on their own. The Court at the time found that there was "constant and uniform practice allowing free passage" of private persons, albeit not armed forces.<sup>251</sup>

Similar rights have been recognized in the Franco-Spanish treaty of 26 May 1886 allowing Spanish citizens of the enclaved villages of Llívia to cross French territory in the process of reaching Spanish territory, with specific instructions for customs not to interfere with that process and through an international path.<sup>252</sup> Other, non-enclave related roaming statuses, include, as Evan Fox-Decent and Evan Criddle point in a recent book, the unusual regime of the Svalbard islands. In exchange for recognition of its sovereignty on the

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246. Treaty between Austria and Württemberg on the Passage of Austrian Troops through Württemberg Territory, Apr. 5, 1815; *see also* Final Act of the Congress of Vienna, art. XXXI, June 9, 1815, on the Passage of Prussian Troops through Hanover.

247. William Honeychurch, *Alternative Complexities: The Archaeology of Pastoral Nomadic States*, 22 J. ARCHAEOLOG. RES. 277 (2014).

248. HELEN DWIGHT REID, *INTERNATIONAL SERVITUDES IN LAW AND PRACTICE* (1932).

249. *See generally* Pierre Raton, *Les Enclaves*, 4 ANNUAIRE FRANÇ. DE DROIT INT'L 186 (1958) (identifying the right to transit for international enclaves such as "international servitude" and noting that the enclave phenomenon exists in private law).

250. Arnold D. McNair, *So-Called State Servitudes*, 6 BRIT. Y.B. INT'L L. 111 (1925).

251. Right of Passage over Indian Territory (Port. v. India), Judgment, 1960 I.C.J. Rep. 6, 38 (Apr. 12).

252. Treaty between Spain and France on Boundaries from the Valley of Andorra to the Mediterranean (with Additional Act), Fr.-Spain, May 26, 1866, 1288 U.N.T.S. 397.

archipelago, Norway granted the currently 46 parties to the governing treaty an equal right to engage in commercial activities there. This includes a non-discrimination clause allowing nationals of any party to the treaty to become residents of Svalbard and to fish or undertake a variety of commercial activities.<sup>253</sup>

These are peculiar, almost archaic instances which, from the point of view of the international legal canon, do little to challenge a massively dominant Westphalian outlook that is not sympathetic to roaming. One can nonetheless notice a certain resurgence of the notion of access to enclaves as part of an increased humanization of international law. This suggests that rights of circulation across borders may ultimately be vested in human beneficiaries rather than states. On 22<sup>nd</sup> February 2023, for example, the ICJ ordered provisional measures to “ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor” in the case brought by Armenia against Azerbaijan.<sup>254</sup> The Lachin Corridor is the narrow strip of land that connects Nagorno-Karabach, generally recognized under international law as being within the borders of Azerbaijan, but almost entirely inhabited (by then at least) by ethnic Armenians. In other words, a specific and, presumably, narrow exceptional obligation existed on Azerbaijan, as a result of a peace treaty, to guarantee cross-border mobility by at least allowing a specific population to both access the enclave from the border, and to access the border from the enclave. This extended to an obligation to allow food and supplies to circulate along the corridor.<sup>255</sup>

In reality, the idea that states have an absolute right to exclude was not always accepted in international law and can be seen as an almost capricious distortion of the high point of positivism. Beyond oceanic or humanitarian rights of passage, there was even long a steady assumption that general transit for commerce should be free. It was Grotius, proceeding from natural law premises, who argued that:

[. . .] lands, rivers, and any part of the sea that has become subject to the owners, ought to be open to those who, for legitimate reasons, have need to cross over them; as, for instance, if a people [. . .] desires to carry on commerce with a distant people [. . .] it is altogether possible that ownership was introduced with the reservation of such a use, which is of advantage to the one people, and involves no detriment to the other. Consequently, it must be held that the originators of private property had such a reservation in view.<sup>256</sup>

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253. EVAN J. CRIDDLE & EVAN FOX-DECENT, *MANDATORY COOPERATION UNDER INTERNATIONAL LAW* (Cambridge University Press, 2026).

254. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order, 2023 I.C.J Rep. 14, ¶ 62 (Feb. 22).

255. Jolanda Andela, *130 Days and Counting: A Responsibility to End the Blockade of the Lachin Corridor*, EJIL: TALK! (May 2, 2023), <https://www.ejiltalk.org/130-days-and-counting-a-responsibility-to-end-the-blockade-of-the-lachin-corridor/> [<https://perma.cc/6PU3-AVAF>].

256. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 196–97 (James Brown Scott ed., 1925).

Specifically, Grotius came to the conclusion that “to those who pass through a country, by water or by land, it ought to be permissible to sojourn for a time, for the sake of health, or for any other good reason; for this also finds place among the advantages which involve no detriment.”<sup>257</sup> And, crucially, he noted that “no one will be justified in raising the objection that he fears the numbers of those passing through. My right is not extinguished by your fear.”<sup>258</sup> That view of the sovereignty to exclude as heavily qualified by the disproportionate effects it might have on the legitimate mobility aspirations of outside peoples was the object of some agreement among an earlier generation of international lawyers, and has occasionally been revived against the background of ideas that sovereignty cannot be its own end.<sup>259</sup> To this day, the idea that peaceful transit can be denied at will is the object of skepticism.<sup>260</sup>

It is true that enclaves craft rights of mobility of (national) populations only as flowing from their respective states’ own rights. It is “by virtue of their physical juxtaposition one to another (that) *states* are not free arbitrarily to deny to each other the necessary routes of communication.”<sup>261</sup> Even freedom of waterways and the oceans is derived from some macro international communal interest that is itself a byproduct of the state system: that freedom, if anything, belongs to states, even if humans crossing water or territorial expanses stand to objectively benefit from it. And the right of transit, such as it may be, is an “imperfect” right that in practice still needs to be recognized by the transit state. This means that carefully negotiated rights of passage *inter se* are hardly a blueprint for a general right to roam of the wider public under customary international law. Still, the identification of access and crossing as, in some circumstances, conducive to the greater good has a long pedigree, one that strongly militates for not neglecting a communal assumption of mobility and the inherent perfectibility of the right to roam.

### C. *A Tradition of Acquired Rights in International Law?*

The idea that states’ assertion of rights over (their) territory displaces existing rights and must be justified as against those claims conjures up familiar ideas about acquired rights under the law. Among the most significant losers because of the rise of bordered territories are those peoples (henceforth, “foreigners”) who no longer can enter those territories and, more generally, nomadic peoples whose way of life was submerged by the rise of states.<sup>262</sup> It is

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257. *Id.* at 201.

258. *Id.* at 198.

259. Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 *Am. J.* 295 (2013).

260. VITALIY POGORETSKY, *FREEDOM OF TRANSIT AND ACCESS TO GAS PIPELINE NETWORKS UNDER WTO LAW* (2017).

261. E. Lauterpacht, *Freedom of Transit in International Law*, 44 *TRANS. GROTIUS SOC.* 313, 322 (1958) (emphasis added).

262. Thomas Barfield, *Nomads and States in Comparative Perspective*, in *NOMAD-STATE RELATIONSHIPS IN INTERNATIONAL RELATIONS: BEFORE AND AFTER BORDERS* 19 (Jamie Levin ed., 2020).

as against the diminished expectations of these peoples that the right to exclude as a function of territorialized sovereignty must be evaluated. In the literature, the impact on “foreign” people is typically minimized compared to the “good” that results from henceforth territorialized populations - a small price to pay for the greater good. But this is arguably a uniquely sedentary way of looking at the law. It assumes that the main problem of international justice and order is to arbitrate the competing claims of peoples already committed to a model of territorial appropriation and exclusivism rather than to understand who is implicitly sidelined by such commitment.

Notwithstanding, we have no reason to take for granted how the value of certain communities living on exclusive territory stacks up against the value claims of mobile peoples to continue age old practices of mobility. We have, in fact, every reason to think that the loss of certain forms of mobility was and continues to be a considerable actual cost of a world of borders. Moreover, although nomadic peoples may be the paradigmatic candidates for such loss – a sort of canary in the mine for mobility issues more broadly – other populations affected include a variety of groups such as those living close to borders or diasporas. In fact, virtually anyone who may at one point need or want to avail themselves of the need to travel across borders stands to be affected by the fact that they may be denied the ability to do so as a result of the planisphere having been, at some point in time, separated into territorialized entities. This is the great, ultimate and unacknowledged cost of territorial appropriation.

Nor can the argument be made, except perhaps exceptionally on a case-by-case basis that the persons whose right to move was displaced ever consented to it. That case might be articulated for peoples who are “happily” territorialized and for whom the price to pay for keeping foreigners at bay is that those foreigners, in their simultaneous quality as nationals of another state, themselves get to exclude them in return. But these are speculative generalities and they most likely to do not apply to relatively nomadic peoples who never fully fit within the Westphalian grammar of the world.<sup>263</sup> For them, territorialization translated into the double tragedy of being disciplined for roaming within borders and prevented from roaming across borders. In actual historic and not merely philosophical terms, moreover, it behooves one to acknowledge that these options were never clearly on the table as options. When it comes to settler colonialism, for example, history’s most conspicuous denial of roaming traditions, practices of private enclosure and sovereign bordering occurred very much through the imposition of violence and discrimination, not as part of some deliberate “grand bargain”.

As a result, we have reason to think that one of the fundamental costs of the parceling of the world into exclusive territorial units has been the

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263. Jaakko Heiskanen et al., *Nomads and International Relations: Post-Sedentarist Dialogues*, 38 *CAMB. REV. OF INT’L AFF.* 190 (2025).

complete breakdown of forms of mobility that a great many peoples have historically considered to be fundamental to their identity. Moreover, it is doubtful that these people ever relinquished their aspiration to freedom of mobility (or indeed that they were particularly aware of that freedom *as* a freedom). In some cases, their continuous claims to continue to roam the lands that they have traversed since time immemorial, as explored in more detail in the next section, arguably constitutes one of the most dramatic retorts to territorially-exclusive state building.<sup>264</sup> Rather than in the inequity of limited mobility for the masses (although that argument is certainly and ought to be made independently), then, I want to suggest a more modest path, namely that a case for global freedom of movement can be made on the basis that the rise of the modern state has fundamentally done violence to rights that were always already there and that have never been fully extinguished.

In other words, I suggest that we may be better served by an emphasis on global roaming rights, by analogy with their status domestically, as *vested* rights. As Dwight Newman points out, “legal systems routinely recognize rights arising from prior sources outside of the legal system”<sup>265</sup> (for example, the property rights of foreigners). This is not the same as an argument from natural rights or merely a philosophical or jurisprudential argument. The proposition is not that roaming rights exist in a state of nature or behind a “veil of ignorance” (they may, although I doubt that proposition makes sense, and it is not my contention) or that they are eminently justifiable on some account of human rights. Rather and much more specifically, the claim is that they existed at least virtually in the pre-Westphalian world and have, in a sense, never been superseded by it. The Westphalian episode has not had a retroactive effect or at least ought not to be seen as having had such an effect, and the residual character of some roaming rights ought therefore to be recognized for what it is.

This, it is hoped, will provide a more alluring but also more plausible and perhaps more modest route to justifying a specifically legal (and not merely normative or philosophical) right to global mobility. A crucial element in the theories of domestic roaming rights, as we saw, is a sense that claiming those rights was anchored in age-old normative practices, to which modern law merely deferred to retroactively. This suggests an at least implicit repertoire of ancient and acquired rights that has an existence independent and perhaps irreducible to modernity. What are, then, the broader precedents for this in international law and how might they help, all other things being equal, the reappraisal of such legacies?

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264. Gabriele Volpato, *Desert Entanglements: The Making of the Badiya by Sahrawi Refugees of Western Sahara* 1 (2025).

265. Dwight Newman, *Indigenous Rights and Decolonized Legal Positivism*, in *FROM MORALITY TO LAW AND BACK AGAIN: A LIBER AMICORUM FOR JOHN GARDNER* 239, 248 (Michelle Madden Dempsey & François Tanguay-Renaud eds., 2023).

The notion of vested right has played some role in early colonization which, particularly in the case of English colonization, was not understood to immediately supersede the laws and customs that governed ‘indigenous’ peoples before conquest, unless so specified. For example, when France ceded to Great Britain all rights in Canada in 1763, it did so subject to the former French subjects remaining entitled to their Catholicism. At the same time, the hunting rights of “Indians” were preserved by the Proclamation of 1763, “as if they were entrenched an immutable, existing independent of and unalterable by any legislative act or ownership of the Crown.”<sup>266</sup> Of course, the reality was that, albeit these rights may have had their source in usage immemorial by indigenous groups, they stood to be potentially superseded at any moment by the Crown, if it chose to do so. Nonetheless, presumptive recognition of such rights at least pointed to their *prima facie* legitimacy.

Another quite different area where vested rights have been largely recognized is private international law, which is based on the idea that rights that have taken root in one state must be recognized by other states. The idea of vested rights has long been intuited to provide one of the very foundations of why conflict of law rules exist.<sup>267</sup> Of course, this is not an open invitation to mobility as much as it takes note of already existing situations of mobility, with mobility itself, *stricto sensu*, beyond the law’s purview. Moreover, conflict of laws is largely framed as a sovereignty-deferring mechanism rather than something specifically for the benefit of individuals. However, it is difficult not to see that private international law’s fundamental incidence is also to smooth out the journey of those who travel across borders by not depriving them of rights they may have acquired in other jurisdictions. Law may not prescribe movement; but it at least follows it.<sup>268</sup>

What, then, of public international law? Vested rights have been recognized as part of the international law protecting aliens and their property.<sup>269</sup> Moreover, they have featured prominently in the case law of the Permanent Court of International Justice in relation to state succession. It has long been held, for example, that successor states may be bound by private law rights acquired under the previous regime by a third party’s nationals.<sup>270</sup> As the PCIJ put it in the German Interests in Polish Upper Silesia case, “the principle of respect for vested rights [ . . . ] forms part of generally accepted international law.”<sup>271</sup> This meant that Poland could not simply oust German settlers from its territory, effectively nullifying private law rights concluded under Prussian law, on the basis that it was the new sovereign and that it could reset the law (it could do the latter, but not at the expense of the former). At the same time, the new state was not entirely bound in

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266. L.C. Green, *Aboriginal Rights or Vested Rights?*, 22 CHITTY’S L.J. 219, 222 (1974).

267. Robert D. Carswell, *The Doctrine of Vested Rights in Private International Law*, 8 INT’L & COMPAR. L. Q. 268 (1959).

268. MAGDALENA KMAK, LAW, MIGRATION, AND HUMAN MOBILITY: MOBILE LAW (2024).

269. Ko Swan Sik, *The Concept of Acquired Rights in International Law: A Survey*, 24 NETH. INT’L L. REV. 120 (1977).

270. *Panevezys-Saldutiskis Railway (Est. v. Lith.)*, 1938 P.C.I.J. (ser. A/B) No. 76 (Feb. 28).

271. *German Settlers in Poland*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6 (Sept. 10), p. 66.

the future from any legislation with retroactive effects that might affect existing private rights, so long as some sort of compensation was provided.<sup>272</sup>

State succession and the rights of aliens are a relatively narrow precedent. The rights involved were typically conceived of as rights of economic value, notably in property, land and investment,<sup>273</sup> which have very little relation to mobility. They were still heavily dependent on the notion, characteristic of the international matrix, that, via diplomatic protection, it was *states'* rights that were being vindicated.<sup>274</sup> They have been recognized in scenarios of Westphalian state succession, much more than in situations where the rise of states displaced the non-sovereign practices of mobile populations. Yet it is at least telling that the doctrine exists, and it suggests fundamental limits to sovereign states' power to legislate out of existence acquired rights under a previous political and legal configuration.

One close area where rights of distant historical provenance have been recognized as giving rise to continuous claims under international law is the law of the sea. Again, the law of the sea raises quite different issues than those arising on land. However, it is worth noting that the tendency towards territorial encroachments on the oceans has been resisted notably because it threatened to interfere with "ancient" or "traditional" fishing rights.<sup>275</sup> Historical fishing rights are in fact routinely claimed by countries such as China and have been recognized in some arbitrations.<sup>276</sup> The South China Sea Arbitration, for example, has acknowledged that "Traditional fishing rights constitute a vested right" that are applicable in the territorial sea and condition the exercise of States sovereignty on there.<sup>277</sup> International law's focus on acquired rights is typically justified on the basis of the traditional openness of certain maritime areas (for example, the Red Sea and the common use of certain mid-sea islands by coastal populations)<sup>278</sup> and the idea that UNCLOS was not meant to displace such historic claims.<sup>279</sup> Moreover, in relation to the EEZ, UNCLOS itself stipulates that archipelagic states should recognize traditional fishing rights<sup>280</sup> and that, in the EEZ, they should take into account, *inter alia*, of "the need to minimize economic dislocation in States whose nationals have habitually fished in

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272. G. Kaeckenbeeck, *The Protection of Vested Rights in International Law*, 17 BRIT. Y.B. INT'L L. 1 (1936).

273. *Id.* at 8.

274. Ben Juratowitch & Natasha McNamara, *Individual Rights in Disputes between States*, 29 AFR. J. INT'L & COMP. L. 433 (2021).

275. Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116 (Dec. 18).

276. Sourabh Gupta, *Historic Fishing Rights in Foreign Exclusive Maritime Zones: Preserved or Proscribed by UNCLOS?*, 7 KOREAN J. INT'L AND COMPAR. L. 226 (2019).

277. The South China Sea Arbitration (Phil. v. China), Award, PCA Case No. 2013-19, ¶ 808 (Perm. Ct. Arb. 2016).

278. Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation) (Eritrea v. Yemen), Award, PCA Case No. 1996-04 (Perm. Ct. Arb. 1999).

279. In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Award, 301 R.I.A.A. 359 (Perm. Ct. Arb. 2015).

280. U.N. Convention on the Law of the Sea, art. 62, Dec. 10, 1982, 1833 U.N.T.S. 397.

the zone” when deciding on the allocation of the surplus allowable catch for other states.<sup>281</sup>

Historic fishing rights are therefore understood as “vested rights.”<sup>282</sup> This is arguably the closest thing in international law to an explicit recognition of customary rights (not to be confused with customary international law) based on immemorial usage and a deference to the normative claims that flow from it. And, of course, many fishing rights are fundamentally premised on a kind of cross-border mobility (where the border is that of the EEZ or territorial waters). These rights’ residual validity thus provides a powerful instance of how customary rights can come to be recognized even based on positive international law, and even as they create an overlay between a modern commitment to the prima facie exclusivity of sovereignty.

Moreover, the reality of fishing rights gestures at rights that technically belong to the state but are clearly exercised in practice by and perhaps even ultimately vested in its nationals. Indeed, it has been argued that, fundamentally, acquired fishing rights of this sort “attach [. . .] to individuals and communities that have pursued their livelihoods over an extended period in these waters,”<sup>283</sup> and are thus “not the historic rights of States [. . .] but the private rights of individuals.”<sup>284</sup> To the extent that states have or at least can defend those rights, it is merely derivatively because they have been vested in them by their own nationals’ activities. In the *Eritrea v. Yemen* arbitration, one crucial factor was that historical fishing rights were carried out without needing any authorization from or being at the discretion of public authorities.<sup>285</sup>

#### IV. RITES OF PASSAGE/RIGHTS OF PASSAGE: UNCOVERING ROAMING PRACTICES IN THE WESTPHALIAN INTERSTICE

How, then, might roaming rights be in turn understood as themselves somehow “grandfathered” into international law, in the spirit of international law’s own occasional commitment to presumptive mobility? Clearly reinterpreting a doctrine of acquired rights relevant in the context of state succession as relevant to situations of state continuity or territorializing developments in the Law of the Sea, are challenging tasks. But these legacies do underline the potency of the claim that “developments with respect to international boundaries and conceptions of sovereignty should, as much as possible, refrain from modifying individual rights.”<sup>286</sup> What sort of pre-modern mobilities could a modern conception of global roaming rights be deduced from? And how might it be read in legal legacies that are necessarily apart from

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281. *Id.* at art. 62(4).

282. The South China Sea Arbitration, PCA Case No. 2013-19, ¶ 798.

283. Gupta, *supra* note 276, at 228.

284. *Id.* at 231.

285. Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation) (*Eritrea v. Yemen*), Award, PCA Case No. 1996-04, ¶ 126 (Perm. Ct. Arb. 1999).

286. The South China Sea Arbitration, PCA Case No. 2013-19, ¶ 799.

international law yet that could stand to be incorporated within a capacious understanding of it?

This section goes further than merely speculating about the conditions in which earlier legacies of mobility might be reclaimed as part of renovated understanding of sovereignty and beyond the limitations of what residual cross-border international law might point to. Instead, it argues that roaming rights of sorts *already* exist within or at least on the periphery of the actual corpus of international law that reveal a sense of survival across time and space of alternate mobilities through continuous practice. The work of a pluralist international law is to uncover those legacies for what they are, including as part of their own traditions of inter-communal and transnational law.<sup>287</sup> This will help frame the debate less as a theoretical, historical or even positivistic legal one, and more as one of understanding the actual world(s) of mobilities that confronts us, one that is on the one hand epistemologically and ontologically impervious to mobility yet on the other hand entirely constituted and crisscrossed by it, both literally and metaphorically.

In this context, the rediscovery of non-Western or at least non-modern traditions of mobility is, as will be seen, long overdue and provides a powerful counterpoint to a univocal framing of the issue through the European lens. However, it would be simplistic to oppose indigenous “roaming” cosmogonies to Western “sedentary” conceptions. Nomadic traditions evidently existed in the West itself that would end up clashing with the rise of private property and the enclosure and, ultimately, the territorial framing of sovereignty. Whilst modern intra-European mobility is sometimes presented as a late and radical new development resulting from the creation of the European Union, it itself in many ways merely reconnected with the *longue durée* of European circulation. Roaming, arguably, has been the default mode of mobility in Europe and even long after the rise of the Westphalian state. In a way, then, “this opening up of borders is a return to the past” since “[p]rior to the start of World War I in 1914, there were virtually no border controls or restrictions to labor mobility across the continent.”<sup>288</sup> By contrast, the non-European world has itself been at times dominated by sedentary fixity.

The sense that roaming practices are not always where one expects them, then, opens up possibilities for dynamic convergence.

Roaming practices must be understood as fundamentally transcending any facile civilizational divide. There is no doubt that the rise of borders has often been experienced, including in Europe itself, as a trauma that contradicted long-held expectations about cross-border mobility (even if to some extent not clearly understood as such). British tourists of the 1920s complained of

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287. Frédéric Mégret, *International Law as a System of Legal Pluralism*, in THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM (Paul Schiff Berman ed., 2020).

288. Saara Koikkalainen, *Free Movement in Europe: Past and Present*, MIGRATION POL’Y INST. (Apr. 21, 2011), <https://www.migrationpolicy.org/article/free-movement-europe-past-and-present>, [https://perma.cc/34QT-BULY].

passports, especially attached photographs and physical descriptions, which they considered led to a “nasty dehumanization.”<sup>289</sup> The emergence of the Irish border led to similar befuddlement by locals who now stood to be separated by a political demarcation.<sup>290</sup> And, of course, as part of the colonial encounter prolonged by settler colonialism, indigenous groups that had interacted from time immemorial often found themselves on opposite ends of borders that were increasingly policed to their exclusion.<sup>291</sup>

Although the historical consolidation of particularly rigid understandings of borders has proceeded apace, it has also at many junctions piqued borderland peoples against the background of collective memories of a much more fluid relation to territory. In the ensuing mismatch between expectations and reality, States sometimes felt duty-bound to compensate municipalities that stood to lose by particular creations of borders in terms of ability to collect wood or graze animals. Local authorities also allowed seasonal workers in areas long characterized by border mobilities to produce fewer formal documents than the normally required passports.<sup>292</sup> Even then, international law has often been a poor predictor of the reality of cross-border practices that defy the simplistic vision of the border as a line and a barrier. What, then, are the forms of fundamental pre-modern mobility, including in the Western tradition itself, that might form the basis for some kind of theory of roaming?

The first was that of trade, which was inseparable from the movement of peoples and not just goods, connecting cities and rural sites in a complex network of exchange.<sup>293</sup> Trade led to the creation of a veritable infrastructure of mobility clustered around trading posts, for example the *fondacos* found around the Mediterranean basin (warehouses that doubled as inns).<sup>294</sup> The dichotomy between predominantly sedentary v. marginal nomadic peoples does not begin to do justice to a Medieval world that was profoundly structured by mobility. This trading mobility was, of course, much in evidence in most of the rest of the world as well. It includes legacies of considerable mobility within Asia, Africa or the Americas for example.<sup>295</sup> One could

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289. PAUL FUSSELL, *ABROAD: BRITISH LITERARY TRAVELING BETWEEN THE WARS* 31 (1980).

290. Catherine Nash, Lorraine Dennis & Brian Graham, *Putting the Border in Place: Customs Regulation in the Making of the Irish Border, 1921–1945*, 36 J. HIST. GEOGRAPHY 421 (2010).

291. Benjamin Hoy, *A Border without Guards: First Nations and the Enforcement of National Space*, 25 J. CAN. HIST. ASS'N 89 (2014).

292. Laura Di Fiore, *The Production of Borders in Nineteenth-Century Europe: Between Institutional Boundaries and Transnational Practices of Space*, 24 EUR. REV. OF HIST.: REVUE EUROPÉENNE D'HISTOIRE 36 (2017).

293. Eric Mielants, *The Role of Medieval Cities and the Origins of Merchant Capitalism*, in LAB. AND LAB. MKT. BETWEEN TOWN AND COUNTRYSIDE (MIDDLE AGES — 19TH CENTURY) 111 (2001).

294. OLIVIA R. CONSTABLE, *HOUSING THE STRANGER IN THE MEDITERRANEAN WORLD: LODGING, TRADE, AND TRAVEL IN LATE ANTIQUITY AND THE MIDDLE AGES* (2004).

295. XINRU LIU, *THE SILK ROAD IN WORLD HISTORY* (2010); Mark Horton, Nicole Boivin & Alison Crowther, *Eastern Africa and the Early Indian Ocean: Understanding Mobility in a Globalising World*, 13 J. EGYPTIAN HIST. 380 (2021); JASON NEELIS, *EARLY BUDDHIST TRANSMISSION AND TRADE NETWORKS: MOBILITY AND EXCHANGE WITHIN AND BEYOND THE NORTHWESTERN BORDERLANDS OF SOUTH ASIA* (2010); Robbie Robertson, *Globalization Processes as Recognized in the Americas*, in THE ROUTLEDGE HANDBOOK OF ARCHAEOLOGY AND GLOBALIZATION (2017).

add scholarly mobility as an indispensable component of the rise of early universities,<sup>296</sup> and artistic and literary mobility as a crucial vector of propagation of ideas.

In this section, however, I want to distance the argument from these limited historical vistas. I suggest that roaming rights of a kind continue to exist in at least an inchoate form, niched in particular mobility arrangements *in the shadow* of international law – in a sense there for all to see but rendered largely invisible by Westphalian blinders. Looking at mobility “anomalies,” it is hoped, will betray ways in which roaming practices are already with us in ways that largely elude the one-size-fits-all model of international law territoriality. These practices are inherently normative: roaming is not “just” roaming, it is also an implicit claim that one has the right to do so. I suggest three major actually existing modes of cross-border mobility that prefigure roaming rights, albeit in still relatively specific circumstances: (i) indigenous borderland mobility, (ii) pilgrimages, and (iii) *transhumance*. In the process, I particularly emphasize porous territories and borders where fluxes of persons have long managed, often transgressively, to sustain their mobilities despite states’ best efforts to repress them.<sup>297</sup>

#### A. *Indigenous Mobilities in the Borderland: The Jay Treaty and Cross-border Movement in the Americas*

Consider, first, the status of borderland indigenous people who straddle the US and Canada. In pre-colonial times, many circulated, traded, and exchanged freely.<sup>298</sup> Upon colonization and because of various alliances, their right to continue such movement and trade unhindered was often recognized, in particular in the Jay Treaty (28 October 1795). Article III of that treaty guaranteed that “Indians dwelling on either side of the said boundary Line freely to pass and repass by Land, or Inland Navigation, into the respective territories of the Two Parties on the Continent of America and freely to carry on trade and commerce with each other.”<sup>299</sup> The treaty has become the basis for a right, recognized in the US, for Canadian indigenous people to live and work freely in the US (Canada does not recognize a reciprocal obligation).

Nonetheless, many frictions arose over the years as a number of close-knit cross-border groups faced impediments to their mobility, which in turn triggered traditions of resistance to such impediments.<sup>300</sup> Grand Chief Mitchell

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296. Jussi Välimaa, *The Emergence of Universities in the Middle Ages*, in *A HISTORY OF FINNISH HIGHER EDUCATION FROM THE MIDDLE AGES TO THE 21ST CENTURY* 11 (Jussi Välimaa ed., 2019).

297. BASAK TANULKU & SIMONE PEKELSMÄ, *LIMINALITY, TRANSGRESSION AND SPACE ACROSS THE WORLD: BEING, LIVING AND BECOMING(S) AGAINST, ACROSS AND WITH BORDERS AND BOUNDARIES* (2024).

298. CLARISSA CONFER, *DAILY LIFE IN PRE-COLUMBIAN NATIVE AMERICA* 89 (2008).

299. Treaty of Amity, Commerce, and Navigation, Gr. Brit.-U.S., Nov. 19, 1794, 8 Stat. 116.

300. Donald A. Grinde, *Iroquois Border Crossings: Place, Politics, and the Jay Treaty*, in *GLOBALIZATION ON THE LINE 167* (Claudia Sadowski-Smith ed., 2002).

is a Mohawk band leader, part of the Iroquois Confederacy. On 22<sup>nd</sup> March 1988 he entered Canada from the US with goods (“one washing machine, ten blankets, twenty bibles, used clothing, one case of motor oil, ten loaves of bread, two pounds of butter, four gallons of milk, six bags of cookies, and twelve cans of soup”) destined for Mohawk territories that straddle New York state and Quebec and Ontario provinces (this was a repeat of an earlier 1969 incident involving the same Mitchell that had led to a blockade of the international bridge).<sup>301</sup> He was required to pay 361.64\$ of custom duty, which he refused to pay, arguing that such payment infringed Aboriginal and treaty rights under Canadian law. Some of the goods were destined for a shop, and others to be presented as gifts to another Mohawk community in a ceremony that “followed the traditional custom between the two peoples who had formed a trading relationship for several generations.”<sup>302</sup>

Grand Chief Mitchell alleged unsuccessfully before the Canadian Supreme Court<sup>303</sup> and subsequently before the Inter-American Commission on Human Rights that his right to culture (article XIII of the Inter-American Declaration) included the right “to bring goods, duty free, across the U.S./Canada border dividing the territory of the indigenous community” based on an “Aboriginal right to trade with other indigenous First Nations (which exist on both sides of the Canadian/United States border) without having to pay customs duties to either country for the purpose of trade with other First Nations.”<sup>304</sup> The right to trade was argued to be “an integral aspect of Mohawk culture.”<sup>305</sup> The specifically cross-border implications of this right to trade was underlined, as well as the fact that it was “intimately connected to the ancestral lands of Chief Mitchell’s people and to productive organization, by Mohawk and Iroquois peoples on these lands.”<sup>306</sup>

The point was thus made that the Chief was being deprived of an “Aboriginal right [...] based on historic practices and customs of the indigenous peoples of Canada that existed prior to the arrival of the European settlers.”<sup>307</sup> In fact, “the division caused by the existence of an international border affects the residents of the Akwesasne on a daily basis and allegedly constitutes a profound interference with their ability to live their lives, according to their traditions.”<sup>308</sup> The goods were not intended for trade in the “commercial mainstream” but merely with other First Nations in Canada. The Jay Treaty was thus specifically invoked as evidence that this right had, in fact, been recognized in the colonial

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301. IAN KALMAN, FRAMING BORDERS: PRINCIPLE AND PRACTICALITY IN THE AKWESASNE MOHAWK TERRITORY 95 (2021).

302. Grand Chief Michael Mitchell v. Canada, Case No. 12.435, Inter-Am. H.R., Comm’n Report No. 61/08, ¶ 24 (Jul. 25, 2008).

303. Mitchell v. M.N.R., [2001] 1 S.C.R. 911 (Can.).

304. Mitchell, Report No. 61/08, ¶ 3–4.

305. Id. ¶ 25.

306. Id. ¶ 32.

307. Id. ¶ 4.

308. Id. ¶ 22.

era.<sup>309</sup> The claim to unhindered mobility was in a sense nothing more than the claim to what had always been Mohawk expectations about mobility.

This was only the latest incident in a long dispute. Canada denied that the right to culture involved a right to trade freely across the border. Trade was “essentially an economic activity” not protected as culture, and Canada had the right to control its borders. Moreover, the goods had not been bought from an indigenous group in the US, which belied an intention to engage in an intra-cultural practice. The Jay Treaty was no longer in force and had long been superseded by intervening legislation. Canada was a sovereign state, and “the imposition of taxes, tariffs, and restrictions on imported goods is an attribute of sovereignty.”<sup>310</sup> At any rate, even cultural rights could reasonably be limited. Canada was, in sum, unreceptive to the idea that a commerce implied mobility, that mobility could be framed as culture, and that practices long invisible could form the basis of rights.

The Inter-American Commission ended up siding with Canada, finding that the petitioners had not proved that the tariffs prevented trade altogether in a way that would violate Chief Mitchell’s right to culture. Tariffs appeared to be “reasonable limitations” and the State was “entitled to exercise control over its borders.”<sup>311</sup> Still, the decision was only relative to trade and not mobility as such. Despite that tactical loss, moreover, the Canadian Border Service Agency abandoned their station on reserve land in 2009 after being warned by local indigenous groups that armed agents would not be welcome there. To this day, that part of the border is essentially not policed by Canada.

Subsequently in 2016, the Canadian Senate Committee on indigenous affairs recognized that, notwithstanding the invalidity of the Jay Treaty, the border separation had “real and practical implications” for border indigenous groups who were required to cross the border daily and were “seriously inconvenienced by this situation.”<sup>312</sup> The Committee thus pleaded for more accommodations, including special identification that would make the process of border crossing for local band members seamless. It has also been argued that certain measures should be adopted to enhance mobility rights, notably by allowing members of indigenous groups to acquire citizenship in both countries that have jurisdiction over them.<sup>313</sup>

Although peculiar, this example is revealing of other indigenous experiences in other locations and the predicament of a range of “indigenous borderland peoples.” Other groups along the US/Canada border have been plagued by similar issues, including in Alberta (for example, the Blood and Blackfoot bands which were originally confederate nations until they were divided by

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309. *Id.* ¶ 24.

310. *Id.* ¶ 52.

311. *Id.* ¶ 82.

312. LILLIAN EVA DYCK & DENNIS GLEN PATTERSON, BORDER CROSSING ISSUES AND THE JAY TREATY 9 (2016).

313. Michael Sullivan, *The Border Crossed Us: Enhancing Indigenous International Mobility Rights*, 39 J. BORDERLANDS STUD. 246 (2022).

the US-Canada border) or British Columbia (the Okanagan band).<sup>314</sup> The question of Inuit mobility in the circumpolar region has also long been alive, based on long-standing historical circulation in the Inuit Nunaat and obstacles to the Inuvialuit of Canada keeping connections to the Iñupiaq of Alaska or the Inuit of Greenland.<sup>315</sup> The national representative organization for the 70,000 Inuit in Canada, Inuit Tapiriit Kanatami, has developed proposals to implement the UN Declaration on Indigenous Rights Action Plan Measure 52 based on Article 36 of the Declaration, designed to “eliminate legislative and policy barriers to cross-border mobility and immigration that arbitrarily divide Inuit,” thereby connecting the Innuits of Alaska and Greenland with those of Canada.<sup>316</sup> In other words, cross-border mobility is claimed as a means of self-determination and maintaining connections between indigenous nations.

Along the US-Mexico border, the Yaqui people who used to straddle the borderland are not recognized as being indigenous in the US and therefore treated as immigrants there.<sup>317</sup> However, in South America, indigenous peoples have maintained significant cross-border relationships that continue to inform mobility practices. Specifically, the Indigenous Territory and Governance Initiative (Iniciativa Territorio Indígena y Gobernanza), includes 108 transborder towns that perpetuate “fluid transborder practices between communities that differ from state sovereignty practices.”<sup>318</sup> Gonzalo Álvarez Fuentes suggests the Achuar peoples separated as they are by the border between Peru and Ecuador, the Pasto people (Colombia and Ecuador border), or the Aymara (borders of Bolivia, Chile and Peru) and Mapuche (borders of Chile and Argentina) have maintained relations even during COVID, often illegally.<sup>319</sup>

Similarly, the Wayúu people move seamlessly between Colombia and Venezuela, implicitly questioning the relevance of the borders that separate them<sup>320</sup> and contributing to build a “great Wayúu nation without borders” that even encompasses cities in both countries.<sup>321</sup> The “Aymara sin fronteras”

314. Denise Evans, *Superimposed Nations: The Jay Treaty and Aboriginal Rights*, 4 DALHOUSIE J. LEGAL STUD. 215 (1995).

315. Olivia Stefanovich, *Immigration Minister Says He Wants to Make It Easier for Indigenous People to Cross Borders*, CBC NEWS (Sept. 29, 2023), <https://www.cbc.ca/news/politics/miller-international-border-crossings-indigenous-1.6979627> [<https://perma.cc/W47D-LK27>].

316. INUIT TAPIRIIT KANATAMI, IMPLEMENTING UN DECLARATION ACT ACTION PLAN MEASURE 52: PROPOSED AMENDMENTS (2023), <https://www.itk.ca/wp-content/uploads/2023/11/Implementing-UN-Declaration-Act-Action-Plan-Measure-52.pdf> [<https://perma.cc/6FLD-UHEG>].

317. CHRISTINA LEZA, DIVIDED PEOPLES: POLICY, ACTIVISM, AND INDIGENOUS IDENTITIES ON THE US-MEXICO BORDER (2019); Christina Leza, *Indigenous Identities on the US-Mexico Border*, 60 J. OF THE SOUTHWEST 914 (2018); BRENDEN W. RENSINK, NATIVE BUT FOREIGN: INDIGENOUS IMMIGRANTS AND REFUGEES IN THE NORTH AMERICAN BORDERLANDS (2018).

318. Gonzalo Álvarez Fuentes, *Indigenous Transborder Communities and the (f)Utility of Borders*, PROGRESSIVE INT’L (Apr. 30, 2021), <https://progressive.international/wire/2021-04-30-indigenous-transborder-communities-and-the-f-utility-of-borders/en> [<https://perma.cc/7LS3-L6BA>].

319. *Id.*

320. Eduardo Giraldo, *La Frontera Invisible Del Territorio Wayúu*, 1 TRANS-PASANDO FRONTERAS: REVISTA ESTUDIANTIL DE ASUNTOS TRANSDISCIPLINARES 47 (2011).

321. Eduardo Giraldo, *Les Guajiro, ethnie binationale transfrontalière ou nation amérindienne sans frontières?*, NUEVO MUNDO MUNDOS NUEVOS (Oct. 10, 2016), <https://journals.openedition.org/nuevomundo/69718> [<https://perma.cc/6GMS-2ZXS>].

organization seeks to foster mobility between members of that group across the triple frontier of Chile, Peru and Bolivia,<sup>322</sup> even though that effort is not beyond instrumentalization by states.<sup>323</sup> At the frontier between Brazil, Argentina and Paraguay, the Tupi-Guarani people have long maintained patterns of cross-border mobility, reclaiming their ancient heritage, as “one of the instruments they used for their own reconstructing.”<sup>324</sup> And in the Gran Sabana region between Brazil and Venezuela, indigenous communities in the former have welcomed communities in the latter following Venezuela’s political crisis.<sup>325</sup>

Another striking example, this one connecting indigenous and Afro-Caribbean epistemes as well as land and sea mobilities, is the complex constellation of the Corn Islands and the San Andres Archipelago in the Southwestern Caribbean Sea. As recounted by Marita Catalina Garcia, Creole/Raizel communities in both islands, united by historical bonds of kinship, are nonetheless “divided by imaginary lines in the sea, borders they cannot easily cross to meet their friends and relatives,” because they live on two sides of the Nicaraguan-Colombian maritime boundary.<sup>326</sup> Clearly, maritime boundaries can be just as artificial, if not more so than land ones. Relying on no feature except those informed by a distant coastline, they exist invisibly in ways that profoundly keep people apart in defiance of traditional patterns of mobility and run deeply against the “sea spatiality” of islanders in the name of economic and political rationality. In that respect, the emergence of maritime sovereignty has torn apart communities’ interconnectedness and harmed ancient patterns of mobility.<sup>327</sup> In other words, not even the sea is safe from the repression of movement.

Moreover, the point is that this repression is being carried out very much in the name of international law. For example, the maritime border dispute between Nicaragua and Colombia gave rise to litigation before the International Court of Justice that ignored creole “historical trade relations and kinship, favoring marine territorialization and states’ sovereignty.”<sup>328</sup> Contra the effort to apportion the sea between states, more or less equitable as it may be, the black inhabitants of the islands have emphasized the extent

322. Daniel Bello Arellano, *Alianza Estratégica Aymaras sin Fronteras: Una respuesta territorial a los desafíos de la “glocalización”*, 15 TINKAZOS 147 (2012).

323. Laetitia Rouvière, *Gobernar territorialidades transfronterizas. Seguridad y “desarrollo con identidad” aymara en la triple frontera del norte de Chile (Chile-Perú-Bolivia)*, 65 TRACE. TRAVAUX ET RECHERCHES DANS LES AMÉRIQUES DU CENTRE 37 (2014).

324. Cristina Pompa, *Indigenous Mobility in the Lowlands of South America*, in THE CAMBRIDGE HISTORY OF GLOBAL MIGRATIONS, 1400-1800, at 199, 218 (Cátia Antunes & Eric Tagliacozzo eds., 2023); see also Marcos Mondardo, *La lucha por el territorio ancestral continental de los guaraníes transfronterizos en América del Sur*, 22 ESTUDIOS FRONTERIZOS 1 (2021).

325. Roger Burks, *Indigenous People from Venezuela Seek Safety Across the Border in Brazil*, U.N. HIGH COMM’R FOR REFUGEES CAN. (Aug. 9, 2019), <https://www.unhcr.ca/news/indigenous-people-venezuela-seek-safety-across-border-brazil/> [<https://perma.cc/V3B3-SUMR>].

326. Maria Catalina Garcia, *The Sea Unites Us but It Is Governed to Keep Us Apart: Restoring the Creole Afro-Indigenous Sea Mobilities in the Southwestern Caribbean.*, 19 ISLAND STUD. J., 238, 238 (2024).

327. See *id.* at 242–44.

328. *Id.* at 254.

to which, as far as they are concerned, “the Caribbean basin is a single territory.” They accordingly refuse the logic that prevents them from crossing the expanse of water that separates them from their cousins in neighboring islands.<sup>329</sup> They have sought the recognition of customary rights of mobility as part of a broader recognition of their identity, culminating with a Creole representative from the San Andres Archipelago appearing before the ICJ and arguing in favor of a specific form of sea mobility.<sup>330</sup> The idea of “maritory,” articulated in the context of the Kawésqar nomadic ‘people of the sea’, points to a very similar inspiration.<sup>331</sup>

International law is clearly not at the forefront of these developments that fundamentally challenge its Westphalian grammar, but nor has it been entirely disconnected from or unreceptive to them. It is worth noting that ILO Convention 169 requires governments to “take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.”<sup>332</sup> Furthermore, UNDRIP specifically anticipates the predicament of indigenous peoples “divided by international borders,” highlighting their “right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.”<sup>333</sup>

Special Rapporteur on the rights of Indigenous Peoples Francisco Cali Tzay has decided to devote his 2024 report on “The Situation of Mobile Indigenous Peoples,” with a view to addressing “pastoralists, herders, hunter-gatherers, shifting agriculturalists, seafaring/maritime peoples and other mobile peoples who self-identify as Indigenous under international human rights law.”<sup>334</sup> Specifically, he will look at “the particular situation of transboundary mobile Indigenous Peoples whose ancestral territories span national borders and who encounter discrimination, displacement, lack of recognition, restricted freedom of movement and limited access to basic services.”<sup>335</sup> One can thus expect that the rich and lively debate that has characterized aboriginal rights domestically could translate into an even more significant cross-border conversation internationally.

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329. *Id.* at 254–55.

330. *Id.* at 256.

331. José Barena, Alberto Harambour, Machiel Lamers & Simon R Bush, *Contested Mobilities in the Maritory: Implications of Boundary Formation in a Nomadic Space*, 40 ENV'T & PLAN. C: POL. & SPACE 221 (2022).

332. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, art. 32, June 27, 1989, 28 I.L.M. 1382.

333. G.A. Res. 61/295, *U.N. Declaration on the Rights of Indigenous Peoples*, art. 36(1) (Sept. 13, 2007); see also Int'l Law Ass'n, Res. No. 5/2012, ¶¶ 3–5 (Aug. 30, 2012).

334. *Call for Inputs: Mobile Indigenous Peoples*, OFF. OF THE U.N. HIGH COMM'R FOR HUM. RT. (Jul. 16, 2024), <https://www.ohchr.org/en/calls-for-input/2024/call-inputs-mobile-indigenous-peoples> [https://perma.cc/8VWQ-FQ2P].

335. *Id.*

In other words, international law is at least timidly willing to countenance for indigenous peoples what it is not willing to contemplate more generally. Most importantly, cross-border indigenous peoples themselves have seized upon UNDRIP to push back against border harassment and impediments, notably, in the case of the Tonoho O’odham Nation, culminating in a declaration that “tribes divided by international borders, have the inherent right to maintain and develop contacts; relations; and spiritual, cultural, political and economic activities with their citizens and relations.”<sup>336</sup> The highly distinctive regime of Hans Island (Tartupaluk) as a result of an agreement between Canada and Denmark following extensive consultations with Inuit communities, guarantees the free mobility over this small territory and “holds a significant symbolic value for the Inuit of both sides, since it demonstrates the integrity of Inuit traditional areas that extend beyond state-established sovereign borders.”<sup>337</sup> It has been suggested that it “may further signify a first step towards the acknowledgment of the overall integrity of Inuit territories that extends across the borders of Greenland and Canada.”<sup>338</sup>

And attention to ancient cross-border mobilities may yet change certain dominant understandings of international law. For example, even as the ICJ refused to go beyond requiring that Chile dialogue with Bolivia to negotiate an access to the sea, Yuri Mantilla has argued for paying more attention to indigenous heritage to move beyond the sort of “ethnocentric ideas in Chile and Bolivia [that] have shaped both countries’ international relations.”<sup>339</sup> In particular, he points out that much of the territory that separates Bolivia from the ocean (essentially, the Atacama Desert) once belonged to the Inca Empire, which straddled the territory that would become Bolivia and Chile.<sup>340</sup> This led to a tight connection between the Andean region and the ocean going back to the Tiwanaku pre-Incan civilization into a single political entity. The “views and interests” of the descendants of these empires should, therefore, be taken seriously.

Finally, despite the spectacular illustration of borderland mobility in the case of indigenous peoples separated by frontiers, it should be noted that cross-border mobility is also relevant between non-indigenous minorities.

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336. Eric V. Meeks, *Navigating the Border: The Struggle for Indigenous Sovereignty in the Arizona-Sonora Borderlands*, 61 J. ARIZ. HIST. 639, 639 (2020).

337. Apostolos Tsiouvalas & Enyew Endalew Lijalem, *The Legal Implications of the 2022 Canada-Denmark/Greenland Agreement on Hans Island (Tartupaluk) for the Inuit Peoples of Greenland and Nunavut*, ARCTIC INST.: CTR. FOR CIRCUMPOLAR SEC. STUD. (Jan. 24, 2023), <https://www.thearcticinstitute.org/legal-implications-2022-canada-denmark-greenland-agreement-hans-island-tartupaluk-inuit-peoples-greenland-nunavut/> [<https://perma.cc/KS6S-TK9V>].

338. *Id.*

339. Yuri Mantilla, *Indigenous Peoples’ Diplomacy, Mediation, and Conciliation as a Response to the I.C.J. Decision in the Obligation to Negotiate Access to the Pacific Ocean Case*, 51 CAL. W. INT’L L. J. 29, 34 (2020).

340. *Id.* at 41.

For example, whether in the tripartite Hungarian-Slovak-Ukrainian Tri-border region<sup>341</sup> or on the Russia-Estonia border,<sup>342</sup> one witnesses patterns of negotiated mobility that predate current maps and that are actively encouraged by kin states.<sup>343</sup> These suggest an ongoing fluidity that certainly need not be recognized formally, but which states are only too happy to defer to on the basis of the evident desire of local communities separated by borders for continued interaction.

## B. *Lex Peregrinorum, From El Camino to the Hadj*

A second way of envisaging roaming rights as a residual but enduring feature of the international system is through the complex network of legal obligations that have historically and to this day underscored the possibility of pilgrimage. These outline the contours of a *lex peregrinorum* or law of pilgrims, presiding over forms of cross-border mobility with a mystical component. This is interesting for several reasons. First, it underscores the religious dimensions of some nomadism and therefore its double contradistinction to the world of monolithic territorial sovereigns: as literal, cross-border transgression but also as de facto religious contestation of the (relatively) secular order of states. Second, the very mode of legal production of what emerged as the *lex peregrinorum*<sup>344</sup> attests to the pluralist roots of roaming rights: not so much a fully constituted and distinct branch of law under the strict supervision of canon law as a composite of laws, an assemblage of legal traditions based on the distinction between travelers and mere vagabonds.<sup>345</sup> Third, the mobility of pilgrimages attests to the intrinsic worth of mobility for a variety of spiritual, metaphysical and social experiences that are a far cry from the emphasis on staying put implicit in the Westphalian model.

Pilgrimage routes such as the notorious Camino de Santiago de Compostela, but also the pilgrim paths to Rome (via the Romea Francigena) or to Trondheim, or St Cuthbert's way charted a network of roads that crisscrossed Europe and the Levant. Elaborate systems of hospitality helped to sustain this devotional mobility.<sup>346</sup> Pilgrimages were not only routes but an entire infrastructure

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341. Sík Endre & Blanka Szeitl, *Quasi-Diaspora and Cross-Border Diaspora in the Hungarian-Slovak-Ukrainian Tri-Border Region*, 25 REV. SOCIO 107 (2015).

342. Alena Pfoser, *Between Security and Mobility: Negotiating a Hardening Border Regime in the Russian-Estonian Borderland*, 41 J. ETHNIC AND MIGRATION STUD. 1684 (2015).

343. Ruxandra Trandafoiu, *Kin Border Crossings*, in THE POLITICS OF MIGRATION AND DIASPORA IN EASTERN EUROPE (2022).

344. Henri Gilles, *Lex peregrinorum [The Law of Pilgrims]*, 15 CAHIERS DE FANJEAUX 161 (1980).

345. Emmanuel Falzone, *L'officium Judicis et l'encadrement Des Pèlerins En Droit Canonique: La Doctrine Classique et La Pratique Des Officialités Dans Les Pays-Bas Méridionaux Au Moyen Âge [The Office of Justice and the Supervision of Pilgrims in Canon Law: Classical Doctrine and the Practice of Officialities in the Southern Netherlands during the Middle Ages]*, 32 CAHIERS DU CRHIDI. HISTOIRE, DROIT, INSTITUTIONS, SOCIÉTÉ 91 (2009).

346. See Silvia Beltramo, *The Places, Architectures and Paths of Faith: Religious Hospitality in the Italian Sanctuaries in the Middle and Modern Age*, DIALNET (2012), <https://dialnet.unirioja.es/servlet/articulo?codigo=7820996> [<https://perma.cc/4TNC-8PLC>].

of personal protection and privileges.<sup>347</sup> The *lex peregrinorum* was framed by canon law (protections by both ecclesiastical and lay bodies), private law (wills mandating pilgrimage for the soul of the deceased, vicarious pilgrimage), criminal law (pilgrimage as punishment),<sup>348</sup> public law (pilgrims' licenses as proof that they had reached their destination). The movement of the peregrini, who received a "licencia" allowing them to go on pilgrimage, was ensured through a variety of church and secular regimes that protected them from violence, theft and taxes, and entitled them to assistance, notably in the form of hospitality, along the way.<sup>349</sup>

Nor was this a Western invention or monopoly. Under the Abbasid Caliphate (8<sup>th</sup>-10<sup>th</sup> Century), at the height of Muslim Golden Age, the road that connected Mecca to Baghdad, known as the Darb Zubaydah (Zubaydah's trail), was equipped with "wells, pools, dams, palaces, houses, and partially paved to facilitate the passage of pilgrims" through the desert, with 27 major stations identified as well as an equal number of midway stations and milestones.<sup>350</sup> The emphasis on securing pilgrimage routes has largely disappeared from the international system in its Christian variant (mobility on the "camino" for example has largely been subsumed under intra-European mobility), this is not the case in connection to Islam. As the custodian of Islam's most sacred sites, Saudi Arabia is understood to have religious responsibilities to grant access to the Kaaba to allow Muslim pilgrims to discharge that most sacred of duties. Article 24 of the 1992 Saudi Constitution specifies the obligation to protect the Holy places and those who come there to make the Hajji. The Ministry of Pilgrimage is responsible for accommodation but also supervising transport.

This implicates Saudi Arabia's broader responsibility when it fails to ensure the basic security of pilgrims<sup>351</sup> but also specifically when, for example, it arbitrarily blocks some Palestinian<sup>352</sup> or Qatari and Syrian<sup>353</sup> pilgrims from engaging in the Hajj. It thus frames Saudi Arabia's role in allowing access

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347. Atria A. Larson, *From Protections for Miserabiles Personae to Legal Privileges for International Travellers: The Historical Development of the Medieval Canon Law Regarding Pilgrims Studies*, 16 GLOSSAE: EUR. J. LEGAL HIST. 166 (2019); Jessalynn Bird, *Canon Law Regarding Pilgrims*, ENCYC. MEDIEVAL PILGRIMAGE ONLINE (2012), [https://doi.org/10.1163/2213-2139\\_emp\\_SIM\\_00007](https://doi.org/10.1163/2213-2139_emp_SIM_00007) [<https://perma.cc/C8VX-M844>].

348. Étienne van Cauwenbergh, *LES PÉLERINAGES EXPIATOIRES ET JUDICIAIRES DANS LE DROIT COMMUNAL DE LA BELGIQUE AU MOYEN ÂGE [EXPIATORY AND JUDICIAL PILGRIMAGES IN THE COMMUNAL LAW OF BELGIUM IN THE MIDDLE AGES]* (1922).

349. GÉRARD JUGNOT, *LES CHEMINS DE PÉLERINAGE DANS LA FRANCE MÉDIÉVALE [PILGRIMAGE ROUTES IN MEDIEVAL FRANCE]* (1982).

350. *The Hajj Pilgrimage Routes: The Darb Zubaydah (Saudi Arabia)*, UNESCO WORLD HERITAGE CENTRE, <https://whc.unesco.org/en/tentativelists/6577/> [<https://perma.cc/7LCM-7AY5>] (last visited Nov. 13, 2025).

351. Mustafa Hameed, *The Failure of the Custodian of the Holy Sanctuary*, FOREIGN POL'Y (Sept. 25, 2015) <https://foreignpolicy.com/2015/09/25/failure-custodian-holy-sanctuary-mecca-hajj-stampede-saudi-arabia/> [<https://perma.cc/5EFM-UA2X>].

352. Nadine Sayegh, *Is Saudi Arabia Abusing Its Authority as the Custodian of Mecca?*, TRT WORLD (Sept. 21, 2018), <https://www.trtworld.com/opinion/is-saudi-arabia-abusing-its-authority-as-the-custodian-of-mecca-20358> [<https://perma.cc/24UE-TPQ8>].

353. *Hajj Observation Committee Condemns Saudi Ban on Qataris and Syrians*, MIDDLE EAST MONITOR (Jun. 23, 2018), <https://www.middleeastmonitor.com/20180623-hajj-observation-committee-condemns-saudi-ban-on-qataris-and-syrians/> [<https://perma.cc/UT4J-MJQS>].

to its territory in ways that are subtly at odds with those of the Westphalian system. Denial of access to Muslim Holy sites<sup>354</sup> or various other religious shrines<sup>355</sup> has, moreover, increasingly been framed as a violation of religious freedom. In fact, the banning of foreign pilgrims during the COVID pandemic and, more generally, the failure of Saudi Arabia to guarantee access to all pilgrims following the implementation of a country quota system have resurrected calls to rethink Saudi Arabia's role in a global context where "a concern for health and safety has taken priority over rituals."<sup>356</sup> In practice, only a small fraction of the world's 1.7 billion Muslims manage to do the Hajj every year (2.5 million) and many have to wait decades into old age to do so. As a result, it has been argued that the "solution to these problems is to implement a collective management structure for the Hajj," one that would involve the Organization of Islamic Cooperation (OIC) in collaboration with Muslim communities.<sup>357</sup>

The role of Saudi Arabia, then, creates a disjunction between the secular and the religious when it comes to the specific mobility of the Hajj. On the one hand, Islamic theology obliges all Muslims to visit Kaaba and evidently permits them to do so. On the other hand, international law grants Saudi Arabia as a state the presumptive right to deny entry on its territory and to control access to the Holy Sites. Criticism of this situation has been intensified by a sense that Saudi Arabia uses its role as custodian of the Two Holy Cities strategically to cement its power at home and recompense allies as well punish competitors abroad,<sup>358</sup> reinforcing calls for internationalized management of the Hajj.<sup>359</sup> Interestingly, concerns about pilgrim mobility not only weigh on the host state but also potentially on sending states which not only have to make sure that departure to the Hajj is possible<sup>360</sup> but also occasionally press concerns bilaterally about the conditions of pilgrimage<sup>361</sup> and actively seek the opening of facilitated transportation.<sup>362</sup>

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354. *Saudi Arabia Bans 300,000 Palestinians from Makkah*, MIDDLE EAST MONITOR (Sept. 19, 2018), <https://www.middleeastmonitor.com/20180919-saudi-arabia-bans-300000-palestinians-from-makkah/> [https://perma.cc/M5NF-JT7D].

355. Peter W. Mason, *Pilgrimage to Religious Shrines: An Essential Element in the Human Right to Freedom of Thought, Conscience, and Religion*, 25 CASE W. RES. J. INT'L L. 619 (1993).

356. Turan Kayaoglu, *It Is Time to Reform the Management of the Hajj*, BROOKINGS (Jul. 23, 2020), <https://www.brookings.edu/articles/it-is-time-to-reform-the-management-of-the-hajj/> [https://perma.cc/U86N-ZQC8].

357. *Id.*

358. *Id.*

359. Mohammad Taha Ali, *Should the Saudis Continue to Manage the Hajj?*, MIDDLE EAST F. (Jul. 22, 2025), <https://www.meforum.org/mef-observer/should-the-saudis-continue-to-manage-the-hajj> [https://perma.cc/H8LM-J844].

360. William Claiborne, *After 30 Years, Israeli Moslems to See Mecca*, WASHINGTON POST (Oct. 26, 1978), <https://www.washingtonpost.com/archive/politics/1978/10/26/after-30-years-israeli-moslems-to-see-mecca/9a3fb8d5-1b7c-4ab4-b4c7-413d47924019/> [https://perma.cc/75H2-T9WH].

361. Frédéric Mégret, *The Changing Face of Protection of the State's Nationals Abroad*, 21 MELB. J. INT'L J. 450 (2020).

362. Tobias Siegal, *Israel Asks Saudi Arabia to Allow Direct Flights for Muslim Pilgrims on Way to Mecca*, TIMES ISRAEL (Jul. 7, 2022), <https://www.timesofisrael.com/israel-asks-saudi-arabia-to-allow-direct-flights-for-muslim-pilgrims-on-way-to-mecca/amp/> [https://perma.cc/NZ38-LTAJ].

Israel is in a somewhat similar position in relation to the Holy Sites of Jerusalem which it controls following successive wars. There have been grumblings for example that Christian pilgrims have been barred from the country, including Ethiopians.<sup>363</sup> The first Trump administration's normalization of UAE/Oman relations with Israel was premised on the freedom of Muslims to engage in pilgrimage to Jerusalem. One thus witnesses, again, pressures at least in specific bilateral cases to normalize and institutionalize certain mobilities based on the presence of religious sites in one country. Pilgrimage routes provide a peculiar but powerful retort to any sense that states have an unfettered rights to deny access to their territory, especially if one adopts a broad pluralist legal lens. Their exceptionalism is a clear limitation but they also help make the case that the actual spiritual mobility practices of a great variety of peoples traverse and challenge neat territorial divisions.

### C. *Traditional Pastoral Mobilities: Alpine and Sahelian Transhumance*

Pastoral lifestyles occur on a quarter of the surface of the globes.<sup>364</sup> Transhumance is the French name given to the traditional practice of animal and herder mobility in search of pasture and water on a typically seasonal basis. Pastoralist practices are inherently mobile and have existed for thousands of years. Ancient practices of transhumance in Africa nonetheless stood to be heavily disrupted by the emergence of African states after decolonization. The same had been true in Europe where large-scale transhumance in the Alps began to decline in the 19<sup>th</sup> Century.<sup>365</sup> The point is, of course, that herd trajectories have little to do with respect for borders and that the persistence of transhumance is dependent both on roaming within states and across borders as part of the recognition of complex shepherding practices and the ecosystems that go with them.

At the same time, pastoralist practices have been linked to conflicts with crop farmers, generally but also specifically when crossing borders and as they transit arable land.<sup>366</sup> One issue is the difficulty legally of granting or proving tenure over grazing lands. The problem is compounded both by climate change, leading pastoralists in the Sahel to have to go further to find grazing lands in a context of pasture scarcity, as well as improvements in veterinary care which have

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363. Toi Staff, *Israel Said Barring Ethiopian Christian Pilgrims From Country, for Fear They'll Stay*, TIMES ISRAEL (Mar. 14, 2022), <https://www.timesofisrael.com/israel-said-barring-ethiopian-christian-pilgrims-from-entering-country/> [<https://perma.cc/U2AN-8C7D>].

364. See HENNING STEINFELD, PIERRE GERGER, TOM WASSENAAR, VINCENT CASTEL, MAURICIO ROSALES & CEES DE HAAN, LIVESTOCK'S LONG SHADOW: ENVIRONMENTAL ISSUES AND OPTIONS 272 (2006).

365. See Eugene Costello & Eva Svensson, *Transhumant Pastoralism in Historic Landscapes: Beginning a European Perspective*, in HIST. ARCHAEOLOGIES TRANSHUMANCE ACROSS EUR. 8 (2018).

366. See Abba Gana Shettima & Usman A. Tar, *Farmer-Pastoralist Conflict in West Africa: Exploring the Causes and Consequences*, 1 INFO., SOC'Y & JUST. J. 163 (2008); Mabebe Erasmus Ntumva, *Land Conflict Dynamics in Africa: A Critical Review on Farmer-Pastoralist Conflict Perspectives*, 13 INT'L J. PEACE & DEV. STUD. 17 (2022).

greatly increased the size of herds. The challenge of pastoralism is both domestic and international, in stark illustration of some of the continuities highlighted by this article: (1) domestically, it sets pastoralists against crop growers and field owners and (2) internationally, it sets pastoralists against the border.<sup>367</sup>

What is remarkable nonetheless is the extent to which European, Asian but also particularly African states have gone to accommodate this sort of atypical roaming, essentially allowing (certain) humans to follow their animals. Several regional organizations and states have sought to do so specifically from within international law. For example, the African Union Policy Framework for Pastoralism in Africa seeks to protect and improve the lives of African herders and emphasizes the regional nature of many transhumance ecosystems and the need for harmonization among members. The Economic Community of the West African States (ECOWAS) has adopted the ECOWAS Transhumance Protocol,<sup>368</sup> which is probably the most ambitious of its kind. It indicates requirements for travel and allots responsibilities between herders and host-states. It also mandates “commission[s] of conciliation” to resolve disputes between herders and farmers.

The regime set up is very reminiscent, on an international scale, of roaming mechanisms, with due regard to the sovereignty of the host state. The latter is provided with a central role and key responsibilities such as deciding when herds may enter and exit its territory (Art. 14) or determining transhumance routes (Art. 7) and designating pastures for use, referred to as reception areas (Art. 15). Herders must also be protected by the authorities and their rights guaranteed (Art. 16). In turn, they must respect the legislation of the host country, including its conservation and vaccination rules (Art. 16).<sup>369</sup>

There are other smaller mechanisms in operation on the continent. In Central Africa, the Commission for the Evaluation, Regulation and Harmonization of Cross-border Transhumance (CEBEVIRHA) regulates the flow through a mechanism created by agreement between 6 head of states.<sup>370</sup> Member countries of the Lake Chad Basin Commission allow pastoral freedom of movement across borders. In East Africa and the Horn, the Intergovernmental Authority on Development (IGAD) Protocol on Transhumance deals with cross-border movement of herders.<sup>371</sup> The ILO has also implemented a project on “Free Movement of Persons and Transhumance in the IGAD Region.”<sup>372</sup> Although

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367. Girma Defere, Messay Mulugeta & Teferi Tolera, *Effects of International Boundary Making on Pastoralists Transboundary Environmental Resource Use in the Ethiopia–Kenya Borderland*, 44 RANGELAND J. 203 (2023).

368. Decision A/DEC.5/10/98 Relating to the Regulations on Transhumance Between ECOWAS Member States, 35 OFF. J. ECON. CMTY. W. AFR. STATES 3 (1998).

369. *Id.*

370. U.N. PEACEKEEPING, PREVENTING, MITIGATING & RESOLVING TRANSHUMANCE-RELATED CONFLICTS IN UN PEACEKEEPING SETTINGS: A SURVEY OF PRACTICE 9–10 (2020).

371. *IGAD Protocol on Transhumance*, INT’L AUTH. ON DEV. CTR. FOR PASTORAL AREAS AND LIVESTOCK DEV. (Feb. 27, 2020), <https://icpald.org/wp-content/uploads/2021/06/IGAD-PROTOCOL-ON-TRANSHUMANCE-Final-Endorsed-Version.pdf> [<https://perma.cc/8MAM-TZA8>].

372. *Free Movement of Persons and Transhumance in the IGAD Region: Improving Opportunities for Regular Labour Mobility*, INT’L LAB. ORG. (Jan. 28, 2024), <https://www.ilo.org/projects-and-partnerships/>

imperfect in practice, notably because it imposes burdensome administrative obligations on pastoralists, the regime at least formalizes a modality of “roaming” across the borders of some 15 countries for herdsmen. Creation of livestock corridors, including trails that allow herds to go through farming areas but also from one country to the next, whilst minimizing disruption, is one approach. There has also been talk of creating a specific framework of pastoralist rights.<sup>373</sup> Cross-border pastoralism is further touted as beneficial to ecosystem management and biodiversity. Indeed, it is inseparable from the joint management of pastoral ecosystems that straddle borders. All cross-border transhumance mechanisms also have an institutional, bilateral, or multilateral component, and some have dispute resolution mandates.

This, then, is a case where international law tools are being used to create regimes and even recognize rights for pastoralists. For example, the Sudan–South Sudan Border Issues Agreement (2012) states that parties shall protect the livelihoods of nomadic and pastoral communities, especially their “seasonal customary right to cross, with their livestock, the international boundary between the Parties for access to pasture and water.”<sup>374</sup> If one scratches beyond the form, one realizes that these rights are not so much a sovereign creation as a recognition of long-standing practices which must be accommodated and around which Westphalian usages can be diligently rearranged.

## V. CONCLUSION: TO ROME OR TO ROAM?

To the extent that international law has been obsessed by the legacy of Roman law, it is in the way it constantly returns to the legacy of the *civis* - even the imperial *civis* - as the basic building block of international order. That order is necessarily territorialized, understanding empire or city-states as circumscribed political spaces from which ‘others’ can be excluded through the artifice of citizenship or the *limes*. For the Romans, nomads were “wanderers without culture or laws”.<sup>375</sup> The Hellenic world similarly focused on the city as the pinnacle of political life and the Scythians as the ultimate barbarians,<sup>376</sup> although sometimes with grudging respect for their nomadic austerity.<sup>377</sup> “All roads lead to Rome” was also a fantasy about the unidirectionality of all movement and its constitution of a metropolitan centre.

projects/free-movement-persons-and-transhumance-igad-region-improving-opportunities [https://perma.cc/HM75-B247].

373. Miguel Ángel Martín López, *The Rights of Pastoralist Peoples. A Framework for Their Recognition in International Law*, AGE HUM. RTS. J. 83 (2016).

374. Agreement between The Republic of the Sudan and The Republic of South Sudan on Border Issues, S. Sudan-Sudan, Part VII (Mar. 13, 2012), <https://peacemaker.un.org/sites/default/files/document/files/2024/05/agreement20-20sudan20and20south20sudan20-20demarcation20of20the20boundary.pdf> [https://perma.cc/AX8T-7KPU].

375. ROGER BATTY, *ROME AND THE NOMADS: THE PONTIC-DANUBIAN REALM IN ANTIQUITY* (2007), 232.

376. ANDREW BELL-FIALKOFF, *THE ROLE OF MIGRATION IN THE HISTORY OF THE EURASIAN STEPPE: SEDENTARY CIVILIZATION VS. “BARBARIAN” AND NOMAD* (2016).

377. David Braund, *The Movement of Scythian Nomads Nuancing ‘Otherness,’* 10 J. MEDITERRANEAN STUD. 21 (2000).

Beyond the particulars of that history, the dichotomy between Rome as place and roaming as practice has deeply structured social, political and legal imaginaries. It has pushed the ability to roam relatively freely across borders beyond the pale for most of the world's populations, despite the apparently anomalous survival in purely domestic contexts of right to roam traditions.

Nomadic traditions nonetheless challenge and have always challenged this sort of division of the world through a different mythology. Collectively, their "mobile commons" constitute an alternative to a world of enclosures and borders. Theirs is a different nomos, one based on autonomous modes of being, sharing, traversing and resisting, that could be the source of a different, transnational constituent power.<sup>378</sup> Their fluidity is part of an effort at what Achille Mbembe has described as decolonial "disenclosure" expressed as a radical form of reclaiming rights of way, beyond the mere "modernist" move to reproduce land appropriation in newly decolonized states.<sup>379</sup> Contra Schmitt's obsession with land, it borrows from what Deleuze and Guattari have identified as a nomadological vision that is the extreme opposite of the enclosure movement.<sup>380</sup>

This article can thus be seen as a contribution to a global legal research agenda that is nomad-centric and even nomad-positive, rather than merely nomad-protective. Although it is beyond this article to make any such claim, others have noted how nomads might be a harbinger of new forms of global order - nomads as, all along, the native inhabitants of a borderless world.<sup>381</sup> This fundamental shift of perspective could precipitate a reversal of international law's foundational perspective. If nomadism is the rule and sedentarism is the exception globally,<sup>382</sup> then the implications surely have paradigm-changing implications. To roam is not only to demand an accommodation within a world of borders; it is to demand a different kind of border altogether. Roaming rights are to nomadic peoples what borders are to sedentary peoples: necessary legal contraptions that manifest both a distinct ethos and nomos.

It might appear that this sort of aimless mobility is not the problem of the day in a world where people are routinely and violently being denied the ability to even escape persecution (as asylum seekers) or fundamentally diminished economic circumstances (as immigrants). Indeed, migration more generally seems to have hit a state of permanent crisis in which states outbid

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378. Łukasz Moll, *The Nomos of Mobile Commons: Towards a Nomadic Constitution of Europe*, 27 CITIZENSHIP STUD. 584 (2023).

379. ACHILLE MBEMBE & DANIELA GINSBURG, *OUT OF THE DARK NIGHT: ESSAYS ON DECOLONIZATION* 61 (2021).

380. GILLES DELEUZE, *A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA* (1987).

381. See Erik Ringmar, *Order in a Borderless World: Nomads Confront Globalization*, in *THEORIZING GLOBAL ORDER: THE INTERNATIONAL, CULTURE AND GOVERNANCE* (Gunther Hellmann ed., 2018).

382. Kiran Banerjee & Craig Damian Smith, *International Relations and Migration: Mobility as Norm Rather Than Exception*, in *NOMAD-STATE RELATIONSHIPS IN INTERNATIONAL RELATIONS* 265 (Jamie Levin ed., 2020).

each other in their effort to keep all migrants at bay.<sup>383</sup> It is worth acknowledging that the real problem on some level is the absence of paths to resettle in other lands to escape political oppression, poverty or lack of social, political and economic opportunities. Such resettlement involves, by definition, something more than just roaming and so the argument presented in this article is limited in that respect.

However, note that the problem of being denied possibilities of resettlement does not exist independently of the inequities of the deep global infrastructure of immobility; in fact, it positively thrives on them. Strategies of denying most forms of resettlement are only possible in a world that already denies and represses ordinary transient mobility. In that respect, the policing of borders not only excludes asylum seekers from seeking asylum and would-be migrants from migrating: it also catches in its nets the masses of peoples, particularly racialized, indigenous, and from the Global South, who would merely “visit” foreign lands transiently. The denial of that ordinary “intermediary” mobility (in the sense that it neither has the vocation to become long-term nor is merely a form of instant transit) evidently represents a huge proportion of the frustration of actual mobility, not to mention a considerable and aggravating part of the injustice of immobility. In that spirit, a contribution to a conception of a global right to roam is a contribution to the underlying normative infrastructure of mobility. *If there is no presumptive right to exclude, then all more definitive mobility endeavors will themselves be on a much stronger footing.*

Others might object that such an act of reimagining is so disconnected from the reality of the world as to represent a distraction from intellectual combats that require a more urgent investment. One of the inspirations for the article, however, is that nomadic mobility has been much more central to the human experience than a world of sovereign states bent on controlling access to their land suggests. In fact, it has by and large been the default, massively dominant position of even the Westphalian system for most of its existence. It is only by the mid 20<sup>th</sup> to early 21<sup>st</sup> Century that states began to develop much harsher controls of their borders to decide who could enter their territory.<sup>384</sup> The resulting practices have ended up seemingly colonizing the entire regime of global mobility (in the sense that the fear that is foregrounded is that every “traveler” could, henceforth, become an “illegal” migrant). Even then, however, as this article has endeavored to show, the system has met some of its limits in the form of the persistence of subaltern and transgressive mobilities.

In other words, although seemingly utopian, the ideas explored in this article merely reconnect with what was argued is a surprisingly resilient, ubiquitous and age-old set of practices. In bringing such practices to the fore and taking them seriously as normative practices, this article can be seen as a modest contribution to highlighting the intellectual conditions that could lead

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383. Myron Weiner, *The Global Migration Crisis*, in GLOBAL HISTORY AND MIGRATIONS (1997).

384. Chetail, *supra* note 36.

to roaming rights. But it is not a comprehensive formula for how to do so. Even powerful legacies of inherited rights do not simply impose themselves through sheer force of precedent; often, the point is that they will have been very much denied despite their exemplary nature. Even in domestic systems that gladly recognize roaming rights, such rights more often than not have faced chronic opposition and had to be legislated into law, all be it in recognition of their inherited status.<sup>385</sup> The status of roaming rights as inherited rights is thus not incompatible, far from it, with a concept of them as fragile social constructs brought about by a variety of conditions (rural leisure, fruit picking economies, etc.) and social struggles that must still sustain juridical configurations.

The policing, securitization and even militarization of borders remains rife; it remains, in fact, the default rule, upsetting fragile attempts to disrupt it through roaming practices. There is no mistaking the fundamental violence, hence, that the ongoing effort to systematically territorialize sovereignty does to the nomadic practices of certain groups, such as the Tuareg. The latter now find themselves at the epicenter of a multi-country security crisis linked to Islamic radicalization and the object of further efforts to normalize their pathways. Yet comparatively little attention is paid to their plight as a historically nomad people who were caught up by decolonization processes and that now find them straddling the territory of five distinct countries (Algeria, Burkina Faso, Libya, Mali and Niger). These processes of national self-determination have complicated their own connection to territory, and been accompanied by chronic dispossession and marginalization, leading to increased competition for scarce resources and, eventually, conflict. Their fate is testimony to the precarity of roaming people in a bordered world, but also to the endurance of such practices even in a system that has no patience for them.

Indeed, this paper has also suggested the survival and in some cases the thriving of alternative traditions of mobility that foreground either roaming or at least some kind of culture premised on the relativity and constantly renegotiated character of borders. In that respect, it fits well with the trend to problematize borders as in fact never acting quite the way borders are imagined to, e.g.: through the notion of “borderlands.”<sup>386</sup> In many ways, nomadic peoples model their own forms of governance that could serve as blueprints for forms of non-territorialized rule. The Tuareg, for example, are constituted in tribes, which themselves are embedded in confederations known as ettebel. The article was

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385. Sténs & Sandström, *supra* note 84.

386. See generally Nancy A. Naples, *Borderlands Studies and Border Theory: Linking Activism and Scholarship for Social Justice: Borderlands Studies and Border Theory*, 4 SOCIO. COMPASS 505 (2010) (reviewing borderlands and border theory scholarship and proposing a feminist rethinking of the field that links scholarly work with activism.); Emmanuel Brunet-Jailly, *Special Section: Borders, Borderlands and Theory: An Introduction*, 16 GEOPOLITICS 1 (2011) (noting that borders today are dynamic products of global forces and local actors); Emmanuel Brunet-Jailly, *The State of Borders and Borderlands Studies 2009: A Historical View and a View from the Journal of Borderlands Studies*, 1 EURASIA BORDER REV. 1 (2010) (offering a historical and conceptual overview showing that borders are products of “various ethical traditions”).

also an invitation to think about how one might go about unearthing such practices conceptually by taking movement seriously as a source of law.

Are these “anomalous” mobility regimes really anomalous, or do they indicate a norm on the *longue durée*, only obscured by the passage of time and the ongoing bulldozing of legal diversity inaugurated by modernity? There is certainly much evidence that pervasive forms of mobility characterized the Ancient world.<sup>387</sup> Historically, the greatest degree of mobility was probably achieved within extra-maritime and territorial empires.<sup>388</sup> It is, by contrast, as if the rise of states and self-determination, desirable as it may have been for other reasons, had also compromised century-old patterns of relatively fluid movement across lands separated by distance and physical obstacles rather than borders. The return to intra-imperial mobilities is, of course, unattractive, but this dilemma also brings attention to how difficult it is, in a sense, to have one’s cake and eat it: sovereign independence is both emancipatory of peoples, even as it sets up conditions in which territorial citadels keep the moving world at bay.

It is sometimes claimed, in a context of globalization, that sovereignty is not quite what it used to be, and that the porosity of borders is ripe for reimagining. Imagining post-territorial sovereignties, whether of “differently-territorial” peoples (indigenous,<sup>389</sup> roma,<sup>390</sup> nomadic<sup>391</sup>) or in “differently-territorial” spaces (cyberspace,<sup>392</sup> outer space,<sup>393</sup> the Arctic<sup>394</sup>) may have never seemed as opportune. There is also a close and hopeful association between visions of nomadic transnationalism and global cosmopolitanism, notably in Jewish thought<sup>395</sup> but also,

387. Elena Isayev, *Making Ancient Mobility Visible*, in *MIGRATION AND MIGRANT IDENTITIES IN THE NEAR EAST FROM ANTIQUITY TO THE MIDDLE AGES* (2018).

388. RESAT KASABA, *A MOVEABLE EMPIRE: OTTOMAN NOMADS, MIGRANTS, AND REFUGEES* (2011); SURAIYA FAROQHI, *TRAVEL AND ARTISANS IN THE OTTOMAN EMPIRE: EMPLOYMENT AND MOBILITY IN THE EARLY MODERN ERA* (2014); Florian Riedler, *The Istanbul–Belgrade Route in the Ottoman Empire: Continuity and Discontinuity of an Imperial Mobility Space*, in *THE BALKAN ROUTE* 103 (2021).

389. See generally SOVEREIGN SUBJECTS: INDIGENOUS SOVEREIGNTY MATTERS (Aileen Moreton-Robinson, ed. 2020) (discussing indigenous sovereignty in Australia and its existence within the public domain).

390. See generally Gaja Maestri, *The Contentious Sovereignties of the Camp: Political Contention among State and Non-State Actors in Italian Roma Camps*, 60 *POL. GEOGRAPHY* 213 (2017) (conceptualizing institutional camp sovereignty among the Roma as a fluid, contested process involving evolving power dynamics among diverse actors).

391. See generally Joseph MacKay, Jamie Levin, Gustavo de Carvalho, Kristin Cavoukian & Ross Cuthbert, *Before and after Borders: The Nomadic Challenge to Sovereign Territoriality*, 51 *INTERNATIONAL POLITICS* 101 (2014) (portraying how nomadic mobility disrupts sovereign territoriality and how states respond).

392. See generally Hans Klein, *ICANN and Non-Territorial Sovereignty: Government without the Nation State*, INTERNET & PUB. POL’Y PROJECT. GA. INST. TECH. (2004) (stipulating that ICANN’s technical design embeds real mechanisms of global Internet governance).

393. See generally Linda R. Sittenfeld, *The Evolution of a New and Viable Concept of Sovereignty for Outer Space*, 4 *FORDHAM INT’L L. J.* 199 (1980) (arguing that traditional territorial sovereignty is ill-suited for outer space and that a new non-territorial model is emerging).

394. See generally Hannes Gerhardt, *The Inuit and Sovereignty: The Case of the Inuit Circumpolar Conference and Greenland*, 14 *POLITIK* 6 (2011) (showing that Inuit sovereignty claims vary, with the ICC situating itself partly outside Westphalian norms while Greenland adheres to them).

395. CATHY GELBIN & SANDER GILMAN, *COSMOPOLITANISMS AND THE JEWS* (2017); CATHY GELBIN & SANDER L. GILMAN, *JEWS ON THE MOVE: MODERN COSMOPOLITANIST THOUGHT AND ITS OTHERS* (2019); NATAN SZNAIDER, *JEWISH MEMORY AND THE COSMOPOLITAN ORDER* (2013).

increasingly, as part of the lived experience of many diasporas.<sup>396</sup> In short, the experience of actual but frustrated mobility is much more ubiquitous than the few cases discussed in this article - as may be, therefore, the claim to corresponding roaming rights.

Nonetheless, the point is not that sovereignty cannot be porous, open or evolving; rather, it is that it has always translated into the *possibility* of brusque reassertions of the inexpugnability of territorial control. That is the challenge: imagining nomadic and diasporic mobilities that do not merely operate at the discretion of the sovereign system but exist, as has been this article's contention, as part of a broader and self-sustaining tradition of roaming *rights*. Translating these insights into positive international law is clearly a challenge, although it was also long a challenge domestically. In Scandinavia, the rise of the *allemanrätten* coincided with disputes over land, notably the picking of berries. In the international legal order, clearly rights to roam cannot prop themselves up by the sheer force of their ancientness and will need to be recognized, nurtured and promulgated.

One evident way to incorporate existing roaming traditions within international law is through the prism of human rights.<sup>397</sup> There has long been interest in how human rights and the rule of law might displace dominant understandings of sovereignty as exclusion, based on first rights principles.<sup>398</sup> One could imagine reconstructing a global right to roam inferentially from existing rights. For example, one might connect the right to roam both to the right to family life,<sup>399</sup> freedom of religion<sup>400</sup> or even academic freedom.<sup>401</sup> Clearly, the magnetic pull of certain rights is such that it begs to be allowed to have cross-border effects. The prohibition of discrimination, notably based on race or national origin, might also do considerable work in contesting the blatantly discriminatory effects of border regulation. There is by now a considerable effort underway, at the margins of human rights and even the study of mobility, to conceptualize at least a presumptive right of freedom of movement.<sup>402</sup>

International human rights law might therefore help generalize some of the insights of this article beyond specific roaming populations to a broader

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396. Anna Guttman, *Jews and Indians: Imagining Mobile Subjects*, in WRITING INDIANS AND JEWS: METAPHORICS OF JEWISHNESS IN SOUTH ASIAN LITERATURE 19 (2013).

397. Antoine Pécoud & Paul de Guchteneire, *International Migration, Border Controls and Human Rights: Assessing the Relevance of a Right to Mobility*, 21 J. BORDERLANDS STUD. 69 (2006).

398. See generally Dauvergne Catherine, *Sovereignty, Migration and the Rule of Law in Global Times*, 67 MOD. L. REV. 588 (2004) (stipulating that migration control has become the last expression of state sovereignty under globalization).

399. See generally Hugo Storey, *The Right to Family Life and Immigration Case Law at Strasbourg*, 39 INT'L & COMPAR. L. Q. 328 (1990) (examining how the European Court of Human Rights has interpreted Article 8's right to family in immigration cases, arguing that the court increasingly protects it).

400. See generally Mason, *supra* note 355 (arguing that the pilgrimage is a fundamental aspect of religion that should be legally protected as part of the international right to freedom of thought, conscience, and religion).

401. See generally Klaus Beiter, *The Protection of the Right to Academic Mobility under International Human Rights Law*, in ACADEMIC MOBILITY (2014) (contending that academic mobility is an essential component of academic freedom under international human rights law).

402. Oberman, *supra* note 41.

world encompassing anyone crossing borders. Although the Inter-American Commission was skeptical that trade was part of cultural rights of indigenous peoples, there is no doubt that cultural rights are protected as such and that certain mobilities, particularly those with a ritual component, are part of the cultural baggage of certain peoples, whether religious groups on pilgrimage, indigenous peoples or nomads. Indeed, UNESCO's increasing recognition of a variety of pilgrimage roads as World Heritage Sites and the Council of Europe's identification of the Camino de Santiago as a "European Cultural Route" are testimony to that limited reality. It has also been suggested that nomadic peoples' land rights could be protected as a function of their broader cultural rights.<sup>403</sup>

At the same time, international human rights law has long, perhaps unsurprisingly given its indebtedness to and embeddedness within international law, proved ill-adapted at challenging the pillars of a Western-inspired international legal order. Too immersed in the grammar of statehood, too dependent on the technology of borders, and too universalistic to take seriously the specific roaming and legal traditions of particular peoples, it is always at risk of merely condoning a particular distribution of sovereignty and territory.<sup>404</sup> The argument from human rights, moreover, would be more convincing if human rights (through self-determination, states' needs for security, and communitarian understandings of the liberal tradition) could not themselves conspicuously be understood to justify the selective closure of borders. Just as roaming rights have been challenged domestically based on the "human right to property,"<sup>405</sup> global mobility might be challenged based on the "human right to sovereignty" and its corollary, a right to exclude.<sup>406</sup>

It is unclear, then, that liberal human rights are the natural antidote to an equally liberal division of the planisphere into exclusive territorial domains. Against a cosmopolitan and transnational right to roam, the values of self-determination, communitarian and nationalist self-identification, national security and just deserts can easily be invoked as equally if not more deserving of rights protections. Moreover, even on rights grounds alone, it may be that the extolling of human freedom as fundamentally a right to mobility, broad and overinclusive as it may be, will have perverse effects and needs to be weighed against legitimate democratic demands to limit mobility.<sup>407</sup> This is especially the case in a context of global environmental degradation where unproblematic human liberties are increasingly associated with a modernist move to conquer and dominate the Anthropocene.<sup>408</sup> Further untrammelled tourism and the

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403. Jérémie Gilbert, *Land Rights and Nomadic Peoples: Using International Law at the Local Level*, 16 *NOMADIC PEOPLES* 78 (2012).

404. Mégret, *supra* note 17.

405. THEO R. G. VAN BANNING, *THE HUMAN RIGHT TO PROPERTY* (2002).

406. See KOK-CHOR TAN, *WHAT IS THIS THING CALLED GLOBAL JUSTICE?* 74–75 (2022).

407. Tore Sager, *Freedom as Mobility: Implications of the Distinction between Actual and Potential Travelling*, 1 *MOBILITIES* 465 (2006).

408. Mégret, *supra* note 17.

validation of privileged mobilities are not what a culture of respectful roaming contemplates.

But if not through the ultimately disappointing expedient of human rights, how might one connect currently repressed or marginal mobilities to the broader body of international law as part of an effort to excavate roaming legacies? One intuition is that a theory of roaming rights tells us less, despite the name, about rights (whose grammar is already deeply tied to the idea of international law and sovereign territories) than about how roaming might help reconceptualize the entire apparatus of territory, peoplehood and sovereignty. Thinking with rather than about roaming peoples might then help disrupt dominant understandings of international law that have been so problematically central to the exclusive appropriation of land. Consider, for example, the following description by H el ene Claudot-Hawad of how the Tuareg people relate to territory, a relation made impossible by the emergence of the frontier as manifesting “unicity, permanence and exclusivity”:

In concrete terms, each social unit, from the smallest (the camp) to the largest (society as a whole), is associated with a territory, which is itself included in other, vaster territories. Within this territory every unit exercises rights of use, which are preferential though not exclusive. These prerogatives are determined in relation to movements in space, that is to say to regular paths, where the exact course of each remains flexible according to climatic or political conditions. [. . .] The course of nomadic paths represents the establishment of contact and dialogue between the two faces of the world, deemed to be mutually indispensable, as opposite as they are complementary. These are wilderness and domestic space, the desert and the tent, the unknown and the known, otherness and identity, others and the self. [. . .] To be a nomad in the central Sahara thus signifies the practice of a mobility which not only provides economic advantages and the maintenance of ecological resources, but which also creates social and symbolic ties, a displacement linked to highly positive values. Nomadism, perceived as the opposite of vagrancy, implies organized and regulated journeys that, at each displacement, “build” and reshape the political and territorial body, in the image of that of the universe. [. . .] This organization therefore enhances the composite and flexible nature of the social fabric and the essential role played by interfaces and connections, whether they are embodied in mediatory characters or in crossroads. The nomadic frontier is not seen as a watertight barrier, forbidding foreigners access to resources or right of passage (it should be remembered that land rights are preferential, but not exclusive). It is quite the opposite: a line, negotiable and fluid, marking a meeting-point. Indeed on nomadic territorial borders wells, markets, roads, sacred places and urban settlements are set up, and in the past these formed part of a very widespread

system. In this context, the ability to “step over the frontier”—the territorial frontier, but equally the social, cultural or linguistic frontier—is viewed as a source of self enhancement, of emancipation and social improvement.<sup>409</sup>

In other words, the issue is not only how the international law of the border might make way occasionally for transient persons, but how sustained attention to that transience could remake international law in a very different shape. The rest of this conclusion will thus more specifically, albeit briefly, discuss three routes that simultaneously draw on yet challenge the hold of international law on our legal imaginations through the figure of the nomad. The question is how one might “de-anthropologize” such an understanding of Tuareg movement - peculiar and irreducible as it may be, although not unique or alien - to view it as a broader parable or invitation to reinvent territory through movement.

A first route is that transnational roaming, rather than merely or already being a right, is in fact, first and foremost, better understood as a form of *resistance*. It is political in that sense and to some extent always irreducible to the law that is implicated in crushing it. To invoke Robert Cover, resistance to the law is always jurigenerative in that it also simultaneously constructs the law.<sup>410</sup> In effect, many cultures of cross-border mobility continue to be repositories of an ethos of disobedience to the border as a political project,<sup>411</sup> reappraising the importance of transnationalism as a form of insurgency.<sup>412</sup> One could reevaluate the entire tradition of the “underground railroad,” for example, as expressing a deep aspiration to resist the forced immobility of slavery and the borders put in the way of emancipation.<sup>413</sup> Roaming can be linked to long-existing more or less clandestine practices in the shadow of the state system that can be re-appraised not as “smuggling,”<sup>414</sup> “illegal immigration”<sup>415</sup> or “contraband”<sup>416</sup> but as their emancipatory variants. Perhaps unsurprisingly, the Alps or the Pyrenees, as key sites of historical transhumance also emerged as sites of organized escape for Jews and dissidents fleeing

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409. Hélène Claudot-Hawad, *A Nomadic Fight against Immobility: The Tuareg in the Modern State*, in *NOMADIC SOCIETIES IN THE MIDDLE EAST AND NORTH AFRICA: ENTERING THE 21ST CENTURY* 654, 661–63 (Dawn Chatty ed., 2006).

410. ROBERT M. COVER, *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* (1992).

411. Mégret, *supra* note 44.

412. IDEAN SALEHYAN, *REBELS WITHOUT BORDERS: TRANSNATIONAL INSURGENCIES IN WORLD POLITICS* (2011).

413. Noelle K. Brigden, *Underground Railroads and Coyote Conductors: Brokering Clandestine Passages, Then and Now*, 5 *INT'L J. MIGRATION & BORDER STUD.* 29 (2019).

414. Julian F. Müller, *The Ethics of Commercial Human Smuggling*, 20 *EUR. J. POL. THEORY* 138 (2021).

415. Susan Bibler Coutin, *Contesting Criminality: Illegal Immigration and the Spatialization of Legality*, 9 *THEORETICAL CRIMINOLOGY* 5 (2005).

416. Rebecca B. Galemba, “*Corn Is Food, Not Contraband*”: *The Right to “Free Trade” at the Mexico–Guatemala Border*, 39 *AM. ETHNOLOGIST* 716 (2012).

Nazi occupation<sup>417</sup> and today as places of solidarity with asylum seekers and migrants.<sup>418</sup> Such reappraisal, in turn, often relies on a politics of reclaiming, through resistance, of long ignored routes, in a context where, in the Amazonian basin for example:

The memory of the elderly is filled with vivid recollections, lived or heard, from a time before the many modern barriers to the cross boundary mobility of the Guarani. Memories that date back to the first decades of the twentieth century and that refer to the old routes that connected this area to other distant areas in Brazil, Argentina, and Paraguay.<sup>419</sup>

These memories rekindle genuine, alternative and non-Westphalian imaginaries of mobility, part of broader agendas of “re-territorialization”<sup>420</sup> or “counter-territorialization”<sup>421</sup> against the state. In these imaginaries, indigenous peoples not only “inhabit” the land but “are” the land.<sup>422</sup> This can also lead to a reassessment of the history of indigenous mobilities in South America and their deep compatibility with attachment and claims to territory<sup>423</sup> as well as fierce contestations of existing colonial borders as impediments to movement. Among the notable practices of resistance to the border has been the issuing of their own passports since 1923 by the Haudenosaunee nation that straddles Canada (“Turtle Island”) and the United States.<sup>424</sup> It is these imaginaries that are at stake in both the domestic and cross-border variants of the right to roam, and that at times take the form of a deliberate form of more or less civil disobedience.

Their underlying and unmistakable claim, pushed to its logical conclusion, is that “there should be no borders for indigenous peoples.”<sup>425</sup> Interestingly,

417. AUTORI VARI, THE “JEWISH QUESTION” IN THE TERRITORIES OCCUPIED BY ITALIANS: 1939-1943, at 128 (2020).

418. Martina Tazzioli, *Towards a Genealogy of Migrant Struggles and Rescue: The Memory of Solidarity at the Alpine Border*, 25 CITIZENSHIP STUD. 603 (2021).

419. Evaldo Mendes da Silva, *Walking on the Bad Land: The Guarani Indians in the Triple Frontier, in BIG WATER: THE MAKING OF THE BORDERLANDS BETWEEN BRAZIL, ARGENTINA, AND PARAGUAY* 186, 192 (2018).

420. Marcos Mondardo, *Insecurity Territorialities and Biopolitical Strategies of the Guarani and Kaiowá Indigenous Folk on Brazil's Borderland Strip with Paraguay*, L'ESPACE POLITIQUE. REVUE EN LIGNE DE GÉOGRAPHIE POLITIQUE ET DE GÉOPOLITIQUE (2017), <https://journals.openedition.org/espacepolitique/4203> [<https://perma.cc/S87H-VP3A>].

421. Guillaume Lestrelin, *Rethinking State–Ethnic Minority Relations in Laos: Internal Resettlement, Land Reform and Counter-Territorialization*, 30 POL. GEOGRAPHY 311 (2011); Barrena et al., *supra* note 331.

422. MARISOL DE LA CADENA, *EARTH BEINGS: ECOLOGIES OF PRACTICE ACROSS ANDEAN WORLDS* (2015); DAMON B. AKINS & WILLIAM J. BAUER, *WE ARE THE LAND: A HISTORY OF NATIVE CALIFORNIA* (2022).

423. HEATHER F. ROLLER, *AMAZONIAN ROUTES: INDIGENOUS MOBILITY AND COLONIAL COMMUNITIES IN NORTHERN BRAZIL* (2014).

424. Sid Hill, *My Six Nation Haudenosaunee Passport Is Not a ‘Fantasy Document’*, THE GUARDIAN (Oct. 30, 2015), <https://www.theguardian.com/commentisfree/2015/oct/30/my-six-nation-haudenosaunee-passport-not-fantasy-document-indigenous-nations> [<https://perma.cc/U57G-LXQ7>].

425. Victoria Tauli-Corpuz, *There Should Be No Borders for Indigenous Peoples*, CULTURAL SURVIVAL (Mar. 3, 2020), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/there-should-be-no-borders-indigenous-peoples-victoria> [<https://perma.cc/95EV-KMG9>].

however, some bands in Canada in Australia have gone further by making the connection to the broader mobility of non-indigenous persons and notably asylum seekers, creating forms of solidarity in the process but also critically reexploring the legacies of previous waves of non-indigenous migration.<sup>426</sup> They have demonstrated in favor of immigrants, and connected their own, age-old cross-border mobility patterns, to that of newcomers (“no ban on stolen lands!”, “indigenous sovereignty means immigrant rights”).<sup>427</sup> The death of Somali migrants at the US-Canada border has been decried as having occurred at “an illegal settler-colonial construct that violates Indigenous sovereignty and cuts across Indigenous territory;”<sup>428</sup> some bands have sought to adopt refugee claimants whose asylum demands had been denied by the state;<sup>429</sup> or issued them with passports.<sup>430</sup> All of this, of course, in clear defiance of the state by acknowledging a “form of solidarity which challenges the singularity of a territorial model of belonging predicated on ownership and settlement.”<sup>431</sup>

A second route is that connecting to roaming rights’ past is a way of *decolonizing* international law. Elsewhere I have argued that international law’s entrenchment of regimes of immobility and rigid borders is deeply related to international law’s imperial mindset: mobility was *de rigueur* at the high point of Western imperialism when what was at stake was the vast transfer of settler populations to the Americas, Australia or parts of Africa.<sup>432</sup> Liberal international lawyers up to the mid-20<sup>th</sup> Century gushed about a presumptive right to immigrate. Yet that openness collapsed at the first signs that migratory mobility would henceforth mostly involve the peoples of newly decolonized states from “darker nations” emigrating to the “white” former metropolises.<sup>433</sup>

To reassert or claim roaming rights, by contrast, could also be a sort of poetic decolonial justice, asking of the West the benefit of the privilege that it long granted (and still grants) itself. Such an effort could be part of a

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426. *Intervention - “Addressing the Indigenous-Immigration ‘Parallax Gap.’”* ANTIPODE ONLINE (Jun. 18, 2014), <https://antipodeonline.org/2014/06/18/addressing-the-indigenous-immigration-parallax-gap/> [<https://perma.cc/AUF8-VS9J>].

427. “No Ban on Stolen Land,” *Say Indigenous Activists in U.S.*, CBC NEWS (Feb. 2, 2017), <https://www.cbc.ca/news/indigenous/indigenous-activists-immigration-ban-1.3960814> [<https://perma.cc/9TYK-FNFF>].

428. Harshita Yalamarty, *Dispatch: Lessons from “No Ban on Stolen Land”*, 14 STUD. SOC. JUST. 474, 477 (2020).

429. Harald Bauder & Rebecca Breen, *Indigenous Perspectives of Immigration Policy in a Settler Country*, 24 INT’L. MIGRATION & INTEGRATION 369 (2023).

430. *Refugees on Manus to receive Australian First Nation’s ‘passports’ from activists aboard sail boat*, ABC NEWS (Jul. 16, 2019), <https://www.abc.net.au/news/2019-07-17/refugees-on-manus-island-to-recvie-aboriginal-passports/11310214> [<https://perma.cc/GD3G-AM9W>].

431. Emma Patchett, *Solidarity Inside and Outside Colonial Borders*, CRITICAL LEGAL THINKING (Sept. 29, 2016), <https://criticalllegalthinking.com/2016/09/29/solidarity-inside-outside-colonial-borders/> [<https://perma.cc/HL7N-RGN3>].

432. See AMY ELIZABETH ROBINSON, TINKER, TAILOR, VAGRANT, SAILOR: COLONIAL MOBILITY AND THE BRITISH IMPERIAL STATE, 1880–1914 (2005).

433. Mégret, *supra* note 18.

forward-looking attempt at justice for the historical harms of both forced mobility and forced immobility. In that light, one can draw on the work of Tendayi Achiume to imagine what might be global roaming rights as a form of reparation for the legacies of colonialism.<sup>434</sup> Catherine Lu has also highlighted as one “strategy of transformative redress” to address the structural injustices of colonialism, limiting “the coercive rights of states to control the application of territorial borders to transboundary groups, to rehumanize such borders to facilitate the nonalienated agency of transboundary peoples and groups to move and travel, to trade and exchange, and to engage in various sorts of social relations across international boundaries.”<sup>435</sup>

In effect, in some countries, calls for a right to roam have already been inscribed in a more explicitly reconciliatory perspective underlining the colonial legacies of no-trespass laws. This is notably the case of Canada, where recognizing long-standing practices of cross-border mobility by indigenous groups has been hailed as one important modality of reconciliation.<sup>436</sup> To liberate mobility, then, is to free certain groups from the stranglehold of the Westphalian system in recognition of the harm that this system has done by “enshrining the settler-colonial territorial logic in the political imagination.”<sup>437</sup> This is also what drives the ocean justice (or “blue justice”)<sup>438</sup> movement in its emphasis on the harms done to coastal peoples by the fragmentation of their environment, in the name of forms of decolonial justice. In the case of the Creoles of the Caribbean for example, this leads to “strategies to re-center indigenous spatialities and reestablish cross-border sea mobilities,” reclaiming sea routes and unsettling borders through a process of mobile commoning that is also a challenge to racial subjugation.<sup>439</sup>

In some cases, roaming, aside from being a political and legal claim in itself, is also tied to more deliberately restorative agendas of transitional justice, a way of mending the kind of relations destroyed by enclosures and private property (and, by extension, borders and public sovereignty). In Canada, for example, a group of scholar activists has walked a series of paths, including the 350 km North-West Mounted Police Patrol Trail originally used by Lakota warriors, and the Swift Current to Battleford Trail used by Métis traders, along with First Nations and Métis hikers and the Catholic archbishop of Saskatchewan. As Matthew Robert Anderson, a professor of theological studies and himself the grandson of settlers, put it, the division of the Canadian prairies in a grid pattern changed the “ancestral pattern of movement” of its Métis

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434. E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019).

435. CATHERINE LU, JUSTICE AND RECONCILIATION IN WORLD POLITICS 269 (2017).

436. Sullivan, *supra* note 313.

437. Bauder & Breen, *supra* note 429.

438. Jessica L. Blythe et al., *Blue Justice: A Review of Emerging Scholarship and Resistance Movements*, 1 CAMBRIDGE PRISMS: COASTAL FUTURES e15 (2023); Jennifer A. Martin et al., *What Is Marine Justice?*, 9 J ENV'T STUD. SCI. 234 (2019); Irmak Ertör, *We Are the Oceans, We Are the People! : Fisher People's Struggles for Blue Justice*, 50 J. PEASANT STUD 1157, 1163 (2023); Nathan J. Bennett et al., *Environmental (in)justice in the Anthropocene Ocean*, 147 MARINE POL'Y 105383 (2023).

439. Garcia, *supra* note 326, at 258.

inhabitants and, by contrast, reclaiming a right to roam is in line with the implementation of the Truth and Reconciliation Commission recommendations.<sup>440</sup>

A third possible course is to, in a sense, give up on the universalizing frameworks of international law – descriptively poor and normatively stultifying as they may be<sup>441</sup> to invest in a renewed understanding of global mobility regimes as constituted by and through legal pluralism. This intuition presided over the third section of this article epistemologically, suggesting that only a legal pluralist framework could allow us to pierce the mystery of these mobilities’ meaning. In turn, mobilities speak to forms of law production that are irreducible to the centralized practices of modern states. Aboriginal rights provide a clue here: they may exist within the positive domestic law of certain states, yet they also emerge from within the indigenous legal traditions that give them their specific authority. Crucial to many indigenous groups’ claims is the notion that not only such rights were not extinguished as such, but that nor were the legal traditions that gave them independent validity, outside any recognition under colonial/settler law.

Understanding roaming rights as the rights of groups distances us from the promotion of a basic *human* or *international* right to roam. The article suggested this much: even as international law, in its ambition to universalize, can only universalize a cautious absence of a right to roam, situated normative traditions can, within their sometimes quite broad confines, instantiate forms of mobility that depart from that default pattern, on their own terms and in the very process of moving. The point is that just as there are ordinary roaming rights in some countries and not others, there could be transnational roaming rights in some regions or at some intersections and not others. Roaming rights, if at all, exist not as a function of the international law built on their gradual destruction or even under an international human rights law that would mandate their universal recognition, but in the *interstice*. This can limit the prevalence of roaming<sup>442</sup> but it can also entrench it where it is most meaningful.

At the very least, however, though international law does not mandate roaming rights, it certainly does not impose their absence, against juridical cultures that would uphold them. Where international law is “jurispathic,” effectively shunning and marginalizing legal diversity, legal pluralism is “jurisgenerative” allowing the springing of many parallel legal forms. This could lead to reevaluate mobilities, notably indigenous, that have historically always existed as parallel streams to colonial and state development, as irreducibly pluralistic practices.<sup>443</sup> Indeed, to hope that international law will “legalize” roaming rights may be worse than a pipe dream: conferring to the

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440. Anderson, *supra* note 125.

441. Mégret, *supra* note 287.

442. On the difficulty of exporting and translating normative traditions of roaming, see Ken Ilgunas, *This Is Our Country. Let's Walk It.*, N.Y. TIMES (Apr. 23, 2016), <https://www.nytimes.com/2016/04/24/opinion/sunday/this-is-our-country-lets-walk-it.html> [<https://perma.cc/TQ6E-5FVD>].

443. Tracey Banivanua Mar, *Shadowing Imperial Networks: Indigenous Mobility and Australia's Pacific Past*, 46 AUSTRALIAN HIST. STUD. 340 (2015).

very traditional guardians of limited and asymmetric global mobility the responsibility to authenticate and authorize nomadism. What roaming suggests, instead, is that it is not merely the passage from one enclosed area to another (as in the case of migration), but an entirely different modality of relating to space and therefore to law. As such, it does not and should not exist at the discretion of the territorial powers that be, but should be allowed to prosper as the very refutation of their logic.

These paths are not meant to be alternatives and can, in fact, combine, prompting us to rediscover mobilities grounded in a sense of resistance to the politically, culturally, socially and legally asphyxiating menace of immobility. That immobility can be understood as the threat of being trapped in slavery, war, destitution or ecological catastrophe but also, more specifically, of being denied the right to roam on the planet like one's ancestors and according to one's world view. The denial of roaming rights is ultimately a form of denial of self-determination for those humans and groups to whom it is central, underscoring the reality that all mobility is normative; that mobility is its own law.