
The Law of Walls

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Abstract

Recently, Western democracies have turned to building border walls as a strategy of immigration control. This article makes two claims. First, human rights courts and quasi-judicial bodies are deeply implicated in this move. Drawing on an analysis of case law, I show that they have worked out a system in which walls have become a predictable strategic solution for states that seek to retain control over immigration. They use variants of access to guarantee hyper protection to individual non-nationals who have either entered a host state or come under its effective control. This limits state responsibility by denying any responsibility that is extraterritorial in a very formal way. Being outside the wall means being beyond the state's human rights-based responsibility. Second, the way human rights enforcement bodies have treated border walls has made them legally permitted and even encouraged their construction. Immigration walls raise a jurisdictional challenge. Human rights law and the national law of many democratic states guarantee individuals that have established territorial presence access to basic human rights. A porous border is thus required by the very concept of universal human rights. In one view, because a wall is concrete in a way that the jurisdictional border is not, erecting a wall closes the porous border and thus becomes a matter of human rights. In another view, the construction of a wall is an administrative technique for controlling immigration and is, from a human rights perspective, a non-event. Neither view, however, can be wholly supported. The first is politically unsustainable, while the second is morally indefensible. Human rights enforcement bodies avoid taking a stand by regulating the physical structure of the wall. They focus on whether a wall was properly constructed. The result is the redrawing of borders that is politically unstable and normatively unjustifiable.

1 Introduction

Currently Western democracies seem resolved to build walls. Here, I consider only those walls designed to block illegal entry into a country and constructed on undisputed

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state territory.¹ Such walls have been erected between the USA and Mexico, the Spanish territories and Morocco, Israel and Egypt, Greece and Turkey, Bulgaria and Turkey, Hungary and Serbia, Austria and Slovenia, and, most recently, Macedonia and Greece. Despite the rapid increases in wall construction and the violence surrounding them, border walls remain under-researched in international legal scholarship.² What they are as legal objects is still both uncertain and unstable. This article examines the legal ontology of these border walls within international law and human rights law. I make a claim and a tentative prediction.

My claim is that human rights courts and quasi-judicial bodies have made border walls an attractive strategic solution for states that seek to regain their traditional control over immigration.³ In other words, they are deeply implicated in why states have turned to walls. This attractiveness is attributable to a recent compromise that human rights enforcement bodies have worked out in cases that bear on immigration between the interests of individual non-nationals and host states. Courts and quasi-judicial institutions link increasingly expansive human rights protections to

¹ This definition excludes walls that are constructed for political purposes such as the Israeli Security Fence, which, according to the International Court of Justice (ICJ), is built to achieve 'de facto annexation'. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 184, para. 121. It also excludes walls like the Berlin Wall that are designed to stop emigration and to 'stanch the endless flow of fugitives'. See ECtHR, *Streletz, Kessler and Krenz v. Germany*, Appl. nos 34044/96, 35532/97, 44801/98, Judgment of 22 March 2001, at para 69. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

² In human rights law and international law, by far most of the scholarly attention to walls is given to the Berlin Wall and the Israeli Security Fence. An important exception is scholarship out of the Law School at the University of Texas at Austin that deals mainly with the US–Mexico wall but also with other walls. See, e.g., Working Group on Human Rights and the Border Wall, *Obstructing Human Rights: The Texas Mexico Border Wall*, June 2008 (Submission to the Inter-American Commission on Human Rights), available at https://www.utexas.edu/law/clinics/immigration/Obstructing_Human_Rights_ALL.pdf (last visited 11 May 2017); Gilman, 'Seeking Breaches in the Wall: An International Human Rights Law Challenge to the Texas-Mexico Border Wall', 46 *Texas International Law Journal* (2011) 257 at 257. Similarly, in refugee law, there is very little discussion of walls as immigration exclusion modes. In fact, prominent scholars do not mention walls. See, *inter alia*, J.C. Hathaway, *The Rights of Refugees under International Law* (2005); T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2011); G.S. Goodwin-Gill, *The Refugee in International Law* (1996); H. Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (1995); R. Byrne, G. Noll and J. Vedsted-Hansen, *New Asylum Countries* (2002). At the same time, outside of law schools, there is a growing body of fascinating literature that deals with walls. But this scholarship tends not to (i) focus on the rule of law in regulating these walls and (ii) differentiate between these walls on the basis of their function. Some examples include W. Brown, *Walled States, Waning Sovereignty* (2012); M.O. Stephenson, Jr, and L. Zanotti (eds), *Building Walls and Dissolving Borders* (2013); J. Nevins, *Operation Gatekeeper and Beyond* (2012); R. Jones, *Border Walls: Security and the War on Terror in the United States, India, and Israel* (2013).

³ This is not a causal claim; there is no reason to believe that we had to reach the current chapter of walls. One possible counter-narrative for why states turned to walls is factual asymmetry: it is cheaper to expel non-nationals *ex ante* than to deport *ex post* entry. My argument instead is that the move to walls is a completely sensible and predictable response by states to the direction courts took, whether or not walls were inevitable to begin with. Based on case law, it is reasonable for states to assume legal asymmetry: human rights courts and quasi-judicial bodies will enforce more stringent standards to expel non-nationals and thicker protective duties after non-nationals have already entered the territory of the state.

what I term ‘access’, the ability for an individual to establish a territorial presence in the state (strong territoriality) or to come within the effective control of the state or its agents (neo-territoriality). This compromise does not remove the state’s traditional control over its own borders.⁴ Instead, it limits the state’s responsibility by denying any responsibility that is extraterritorial in a very formal way. This has left the construction of a wall as a predictable and sensible measure of exclusion for states: being outside the wall means being beyond the state’s human rights-based responsibility. A wall, to some extent, insulates the state from human rights duties.

This outcome seems corrupt for three separate reasons. First, by erecting a wall, a state can commit itself in theory to human rights, while, at the same time, preventing the exercise of these rights. Second, the rights that remain – that is, that may be invoked if the individual is inside the state – might be better understood not as rights that are based on universal human rights thinking but, rather, as quasi-citizenship rights.⁵ If the former derives from the concept of universality, in that rights are indifferent to one’s place of birth,⁶ the latter emerges out of variants of territoriality, in which rights allow an individual’s physical location – inside the state or under its agency – to trump the state’s control over its territory. These quasi-citizenship rights push universal human rights closer to territoriality because their exercise depends on access: where an individual is located. More rights mean more territoriality and, thus, a betrayal of the core commitment to universality.⁷ Third, making protection dependent on access results in a pattern of rights that is skewed; access is a bad proxy for the real, substantive conflict between individual non-nationals and states over whom to protect, in what order of priority and by whom they should be protected.

At the moment, border walls are still relatively under-regulated. They raise a fundamental jurisdictional challenge. Formally, the wall and the border share the same

⁴ A leading scholar already explained: ‘The state’s exclusive right to decide what acts shall take place in its territory is virtually undisputed.’ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), at 237. For an earlier articulations of territorial constraints on jurisdiction, see *The Schooner Exch. v. M’Faddon*, 11 US 116, at 136 (1812): ‘The jurisdiction of the nation within its own territory is necessarily exclusive and absolute’; *S.S. Lotus (Fr. v. Turk.)*, 1927 PCIJ Series A, No. 10 Pub: ‘[R]estrictions upon the independence of States cannot ... be presumed.’ For a detailed discussion of state’s control over its borders, including historical development and the tension between the ‘rule-approach’ emphasizing power politics, the ‘policy-approach’ that sees all (governmental or non-governmental) global processes as part of international law; the ‘idealistic position’; and the ‘skeptical position’ on state control over its territory, see Koskenniemi, *ibid.*, at 224–302.

⁵ Albeit citizenship understood both formally and informally and including individuals of ‘long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere’. See UN Human Rights Committee, *Warsame v. Canada*, UN Doc. CCPR/C/102/D/1959/2010, 1 September 2011, para. 8.4. On the same point, see UN Human Rights Committee, *Nystrom v. Australia*, UN Doc. CCPR/C/102/D/1557/2007, 18 July 2011. But see strong dissent in *Nystrom*, *ibid.*, at 3.1–3.3 Dissenting Opinion of Neuman *et al.* (arguing that the majority erred by removing the link to nationality in the return to one’s own country under the International Covenant on Civil and Political Rights [ICCPR] 1966, 999 UNTS 171, Art. 12(4)).

⁶ Universal Declaration of Human Rights (UDHR) 1948, UN Doc. A/810 (1948), Art. 1: ‘All human beings are born free and equal in dignity and rights’; permeable to the UDHR: ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.’

⁷ For a classic authority on the universality of the law, see L. Henkin, *The Age of Rights* (1990), at 32 (human rights are ‘human in that they are universal, for all persons in all societies’).

normative meaning. The wall is a physical manifestation of a pre-existing, undisputed border. Functionally, however, there is something different about the wall. Because it is physical, it functions to prevent individuals from crossing the border. There are legal and moral consequences. Human rights law and the national law of many liberal democratic states have already extended a set of minimum rights for any person who has established a territorial presence within a state. This protection can range from thin due process functions (of differing levels of scrutiny) to thicker more substantive functions (including, in some cases, emergency health care and public education).⁸ The wall affects the ability of a non-national on the ground to enter a state and, thus, to make a claim on those rights.

A human rights court or quasi-judicial body, therefore, must choose between two alternative jurisdictional discourses about the meaning of the wall. Both discourses represent prevailing normative outlooks and descriptions of behaviour.⁹ The first holds that the wall is an affirmative act by governments that expands the scope of a state's human rights responsibilities. A notion of basic human rights demands a porous border, at least with respect to process rights, and constructing a wall interferes with this demand. Thus, the wall falls within the jurisdiction of human rights (at a minimum, regarding procedure). This discourse supports the interests of the individual non-national. The state exercises authoritative jurisdiction over individuals even before they cross its territorial borders; it owes protective duties to anyone who comes close to the wall. Here, the wall acts as a zone that exceeds the territory of the state. This elicits a mapping of the state as an open-ended constellation with population and borders that are, to some extent, fluid.

The second discourse sees the wall merely as an administrative technique for controlling immigration and of no jurisdictional interest. This interpretation takes the interests of the state as central. The state exercises no jurisdiction over individuals outside its territory; it owes no duties to strangers, even if they are peaceful and needy. The wall is simply a (physical) territorial boundary; it is the most effective strategy in the state's arsenal to limit its responsibility only to those that are inside its territory. Here, the state is closed and bounded (the traditional sovereign nation-state¹⁰) and exercises absolute jurisdiction over a permanent population within a defined territory.

⁸ In the USA, for example, these substantive rights include access to public education (see *Plyler v. Doe*, 457 US 202 (1982)) and access to emergency health care (see United States Public Law regarding Payment to States, 42 USC 1396b(v); the federal government will fund a state's provision of medical services to 'the emergency medical condition of the alien'; however, Examination and Treatment for Emergency Medical Conditions and Women in Labor, 42 USC 1395dd, in turn, requires hospitals to evaluate a patient that comes into an emergency room and stabilize an emergency condition before discharge).

⁹ For an analysis of this tension, see Thomas, 'Convergences and Divergences in International Legal Norms on Migrant Labor', 32 *Comparative Labor Law and Policy Journal* (2011) 405; Thomas, 'What Does the Emerging International Law of Migration Mean for Sovereignty', 14 *Melbourne Journal of International Law* (2013) 1, at 4.

¹⁰ The traditional Westphalian spatial ideal conception of a state, drawing all power into the sovereign who controls absolutely a defined territory and its associated population. For discussion, see Raustiala, 'The Geography of Justice', 73 *Fordham Law Review* (2005) 2501, at 2508–2511. See also I. Brownlie, *Principles of Public International Law* (3rd edn, 1979), at 287 (asserting that '[t]he principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there; (2) a duty of nonintervention in the area of *exclusive* jurisdiction of other states' (emphasis added)).

The jurisdictional choice about the meaning of the wall thus matters; it defines borders and shapes conceptions of statehood in a substantive manner.¹¹ The challenge, however, is that the effects of making the choice contradict each other. Under the individualist interpretation, the construction of a wall enhances the states' protective duties, at least procedurally. Under the statist understanding, a wall helps the government to minimize its human rights obligations. At the same time, neither interpretation taken to its ultimate end point can be supported continuously. The individualist claim cannot be sustained politically in a world where states control their borders,¹² and the statist claim cannot be justified in a world that recognizes human rights.

Now for my prediction, which is preliminary; border walls are a relatively recent phenomena and the universe of cases is limited. I make it by drawing on an analysis of the case law that deals with different forms of walls from multiple jurisdictions, including national (supreme court level in the USA, Israel and European liberal democratic states), regional (the European Court of Human Rights [ECtHR], the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights) and international (United Nations Human Rights Council [UNHRC] and other UN quasi-judicial bodies).

Human rights courts and quasi-judicial bodies will dodge this impossible jurisdictional challenge altogether. In regulating walls, they will focus on the physical features of the barrier and not its relation to the border itself. By foregrounding the wall and whether it was properly constructed, courts will avoid making a clear normative commitment to either claim – the individualist or the statist. In practice, they will support the traditional concept of a state with a non-porous border. In doing so, human rights enforcement bodies will effectively endorse the construction of walls as legally permitted and even encouraged. In other words, they will play a significant role in making walls the key legal differentiator by which human rights and recognition are allocated. And how strange a law it is – bounded by a wall, human rights on one side, no rights on the other.¹³

My argument will turn from human rights courts and quasi-judicial bodies to wealthy liberal democratic states and back again. Section 2 of the article introduces an access-based compromise worked out by the courts in the past 10 years between the interests of the individual non-national and those of the host state. In this compromise,

¹¹ In other words, the wall participates in what Pierre Bourdieu calls a 'classification struggle' – the battle to 'impose the legitimate definition of the divisions of the social worlds, and through that, to make and unmake groups'. P. Bourdieu, *Ce Que Parler Veut Dire* (1982), at 137. In making this argument, I benefited from Manas and Nix, 'Constructing the State Extraterritoriality: Jurisdictional Discourse, the National Interest, and Transnational Norm', 103 *Harvard Law Review* (1989–1990) 1271; Ford, 'Law's Territory (A History of Jurisdiction)', 97 *Michigan Law Review* (1998–1999) 843, at 927; Ford, 'Geography and Sovereignty Jurisdictional Formation and Race Segregation', 49 *Stanford Law Review* (1997) 1365, at 1416–1417.

¹² As Judge Rosalyn Higgins pointed out in her inaugural lecture in 1982: 'States are still the most important actors in the international system and their sovereignty is at the core of that system.' Higgins, 'The Identity of International Law', in Bin Cheng (ed.), *International Law, Teaching and Practice* (1982) 3, at 3, cited in Koskeniemi, *supra* note 4, at 236.

¹³ A play on Pascal's *Pensées* (1670): 'Strange justice that is bounded by a river or mountain! The truth on this side of the Pyrenees, error on the other.'

the state power of exclusion is dependent upon the location of the individual non-national. Section 3 looks at how states have responded to this compromise and how the courts have in turn reacted. I focus, in particular, on the case of interdiction on the high seas. Section 4 considers the particular case of border walls and how they intersect with both jurisdictional borders and national law involving immigration in most Western liberal democracies. Border walls force a court to choose between borders that are either porous, at least procedurally, or completely sealed. As noted earlier, the former is unsustainable politically and the latter is indefensible in a world that respects human rights. In Section 5, I draw on case law to tentatively predict that courts will attempt to regulate the physical construction of walls themselves in order to avoid making a clear commitment to any one definition of borders. Over time, they will define the features of a legally acceptable wall. Finally, Section 6 concludes by fleshing out some of the concrete policy and normative implications of this argument for individuals, states and the human rights community, including judges, lawyers, scholars and activists.

2 An Access-Based Compromise: Rights and Duties Are Coextensive with the Location of the Individual

For the past 10 or so years, moving from case to case, human rights courts and quasi-judicial bodies have worked out a compromise between the interests of states and those of individual non-nationals. This compromise favours the individual.¹⁴ I have presented elsewhere a detailed analysis of this compromise as it has developed in cases that have come before the UNHRC and the ECtHR.¹⁵ Here, I will summarize the key terms of this compromise and argue that it implicates these enforcement bodies themselves in the recent fashion for border wall construction.

Human rights courts and quasi-judicial bodies have tailored a compromise that makes access normatively consequential. They read human rights norms expansively and have slowly increased individual protections. At the same time, they have limited their own jurisdiction only to those individuals who have either established a territorial presence in the host state¹⁶ or have otherwise come within the effective control

¹⁴ Traditionally, immigration was outside the scope of human rights law. E.g., the UDHR, *supra* note 6, grants every individual the right to leave any country, including the immigrant's native country (Art. 12). But it only guarantees the right to enter her own country. Similarly, the ICCPR, *supra* note 5, Art. 13, also guarantees every individual the right only to 'enter his own country', but not the right to enter her country of choice. For a historical review of the application of a human rights frame to immigration, see M. Paz, 'A Most Inglorious Right: René Cassin, Freedom of Movement, Jews and Palestinians', in J. Loeffler and M. Paz (eds), *The Law of Strangers: Critical Perspectives on Jewish Lawyering and International Legal Thought* (forthcoming).

¹⁵ Paz, 'Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls', 34(1) *Berkeley Journal of International Law* (2016) 1.

¹⁶ An inside/outside distinction is also familiar from the USA: non-nationals who are deemed to have entered the US territory are entitled to procedural due process, while aliens outside (or deemed to be outside) are not so entitled. See, e.g., *U.S. ex rel. Knauff v. Shaughnessy* 338 US 537 (1950); *Shaughnessy v. United States ex rel. Mezei*, 345 US 206 (1953); *Landon v. Plasencia*, 459 US 21 (1982). For discussion, among many, see Bosniak, 'A Basic Territorial Distinction', 16 *George Immanuel Law Journal* (2002) 407; Bosniak, 'Membership, Equality, and the Difference That Alienage Makes', 69 *New York University Law Review* (1994) 1047.

of the state or its agents. In consequence, the rights that individuals enjoy depend on their physical location, and a state can exercise some control over the duties it owes to a non-national by controlling access to its territory. An instructive example is the way the ECtHR deals with cases that bear on Article 3 of the European Convention of Human Rights (ECHR), which recognizes an individual's right not to be subject to 'torture or to cruel, inhuman or degrading treatment or punishment'.¹⁷ In the past 10 or so years, the Court has made four separate moves that have expanded the scope of this article.

First, the ECHR lacks a right to non-refoulement for refugees. Yet the ECtHR imported the principle of non-refoulement into the text of Article 3. In doing so, it appears to have drawn from the 1984 Convention against Torture's (CAT) definition of non-refoulement rather than from the one under the Refugee Convention (1951); the former is wider than the latter in terms of both the language of the treaty and the expansiveness of the obligation,¹⁸ and the latter qualifies the right in cases that involve criminal and security threats to the state.¹⁹ In addition, the ECtHR also has attached this right to the non-derogable nature of Article 3.¹⁶ One result of this selective reading is that the ECtHR forbids the deportation of non-nationals charged with terrorism if they face degrading treatment upon return to their home country on account of their involvement in terrorism.²⁰ As David Cameron, the former British prime minister noted, this potentially leaves states 'with someone who has no right to live in your country, who you are convinced – and have good reason to be convinced – means to do your country harm. And yet. ... you cannot detain them and you cannot deport them'.²¹

Second, the ECtHR also drastically expanded the substantive grounds of Article 3. Traditionally, the scope of the non-refoulement obligations has been limited to five grounds for ill-treatment specified under the Refugee Convention: race, religion,

¹⁷ Art. 3 ECHR.

¹⁸ The non-refoulement obligation under the Art. 3 specifically mentions 'torture' and does not qualify protection to individuals who fall under one of the five familiar grounds for protection. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984, 1465 UNTS 85. Note, however, that the state action requirement of CAT is stricter than of the Convention Relating to the Status of Refugees (Refugee Convention) 1951, 189 UNTS 137. For a useful discussion of CAT and the protection against torture, see Ramji-Nogales, 'A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System', 39 *Columbia Human Rights Law Review* (2008) 456.

¹⁹ Refugee Convention, *supra* note 18, Art. 33(2). For the non-derogable nature of Art. 3 ECHR, see ECtHR, *Soering v. United Kingdom*, Appl. no. 14038/88, Judgment of 7 July 1989, para. 88: 'Article 3 makes no provision for exceptions and no derogation from it is.'

²⁰ E.g., ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, Appl. no. 8139/09, Judgment of 9 May 2012, para. 185: 'Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion.' See also, e.g., ECtHR, *Saadi v. Italy*, Appl. no. 37201/06, Judgment of 28 February 2008, paras 139, 125, 138; ECtHR, *Chahal v. the United Kingdom*, Appl. no. 22414/93, Judgment of 15 November 1996.

²¹ R. Mason, 'David Cameron: Human Rights Laws Stop Britain Protecting against Terrorism', *Telegraph* (25 January 2012), available at www.telegraph.co.uk/news/politics/david-cameron/9038869/David-Cameron-human-rights-laws-stop-Britain-protecting-againstterrorism.html (last visited 11 May 2017). For more on the intersection of terrorism and human rights, see Paz, 'Asylum and Terrorism: The Death of Human Rights Law?' 102 *Iowa Law Review Online* 41 (2016).

nationality, membership in a particular social group or political opinion.²² Cases of widespread violence due to an ‘unsettled situation’²³ or from acute socio-economic deprivation had been excluded.²⁴ Over the span of three years, however, the Court extended non-refoulement protections to include cases involving general, widespread violence and/or potential socio-economic deprivation.²⁵

Third, the ECtHR also significantly reduced the procedures required to demonstrate an Article 3 non-refoulement violation.²⁶ In the early 1990s, an applicant had to produce ‘substantive grounds’ that he ‘faces a real risk’.²⁷ However, by the early 2000s, the Court tolerated a more lax standard, and ‘concerns as to the risks faced by the applicant’, for example, were sufficient.²⁸ Similarly, it had previously been the case that an applicant’s ‘personal situation’ had to have been ‘worse than the generality’ of other members of his community ‘who were returning to the country’.²⁹ Now it was enough for there to be, for instance, the possibility of ill-treatment on account of ‘a general situation of the non-observance of human rights in the applicant’s home country’.³⁰

Finally, in the case of asylum seekers, the ECtHR also enlarged the right of non-refoulement from a minimal negative obligation not to deport to a positive obligation to protect.³¹ And so, in 2011, the ECtHR’s Grand Chamber held that the failure to process asylum applications ‘within a reasonably short time and with utmost care’,²⁹ in

²² Refugee Convention, *supra* note 18, at Art. 2.

²³ See, *inter alia*, ECtHR, *H.L.R. v. France*, Appl. no. 24573/94, Judgment of 22 April 1997, para 41: ‘[G]eneral situation of violence existing in the country of destination ... would not in itself entail, in the event of deportation, a violation of Article 3.’ On the same point, see *Saadi*, *supra* note 20 at 131; ECtHR, *Vilvarajah and Others v. The United Kingdom*, Appl. no. 45/1990/236/302-306, Judgment of 26 September 1991, at 111; ECtHR, *Fatgan Katani and Others v. Germany*, Appl. no. 67679/01, Judgment of 31 May 2001; ECtHR, *Muslim v. Turkey*, Appl. no. 53566/99, Judgment of 26 April 2005.

²⁴ ECtHR, *N v. United Kingdom*, Appl. no. 26565/05, Judgment of 27 May 2008, at 54: ‘Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights.’ See ECtHR, *Airey v. Ireland*, Appl. no. 6289/73 Judgment of 9 October 1979. On the same point, see ECtHR, *N.A. v. United Kingdom*, Appl. no. 25904/07, Judgment of 6 August 2008, at 42; ECtHR, *Salah Sheekh v. the Netherlands*, Appl. no. 1948/04, Judgment of 11 January 2007, at 141.

²⁵ *N.A.*, *supra* note 24, at 115 (the Court will not discount ‘the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention’). Three years later, in ECtHR, *MSS v. Greece and Belgium*, Appl. no. 30696/09, Judgment of 21 January 2011, paras 252–253, 263, the European Court of Human Rights (ECtHR) held that acute financial deprivation, or a condition where an asylum seeker ‘is “wholly dependent on State support” and finds herself “in a situation of serious deprivation or want incompatible with human dignity” may likewise fall within the reach of Article 3 protection’.

²⁶ For a detailed discussion of this point, see P. van Dijk *et al.*, *Theory and Practice of the European Convention on Human Rights* (2006), at 433–434.

²⁷ See, e.g., ECtHR, *Cruz Varas and Others v. Sweden*, Appl. no. 15576/89 Judgment of 20 March 1991, paras 69–70; *Vilvarajah*, *supra* note 23, at 107–115.

²⁸ See, e.g., ECtHR, *T.I v. United Kingdom*, Appl. no. 43844/98, Judgment of 7 March 2000.

²⁹ *Vilvarajah*, *supra* note 23, at 111–112.

³⁰ *Chahal*, *supra* note 20, at 98–107.

³¹ On the narrow obligation, see, e.g., Noll, ‘Seeking Asylum at Embassies: A Right to Entry under International Law’, 17(3) *International Journal of Refugee Law* (2005) 548: ‘[N]on-refoulement is about being admitted to the State community, although in a minimalist form of non-removal.’

circumstances where the applicant is ‘wholly dependent on State support’ and in ‘a situation of serious deprivation’,³⁰ means that the state is responsible for providing asylum seekers with affirmative support and, in particular, adequate housing.³² To be sure, none of these rulings offer precise parameters for when the state can and cannot deport non-nationals. Many questions remain open. For example, it is still undefined how severe the violence or poverty must be to prevent deportation. Yet the combined result of these four decisions is that, in approximately 10 years, the Strasbourg Court expanded the right of non-refoulement from one grounded in narrow exceptions primarily relevant to First World concerns into one meant to deal with mass atrocities (economic, environmental and political) across the world. In some circumstances, moreover, this Court also attached positive obligations to the previously negative right not to be deported.

And the ECtHR is not alone. As I have shown elsewhere, the UNHRC is traversing a similar path.³³ These bodies increasingly constrain the state’s ability to deport and, moreover, also consider that it owes significant protections to individuals whom it never intended to let into the country. They do so by including in their decisions obligations that states never agreed to politically.³⁴ Importantly, legal obligation follows on territoriality. To be protected, a non-national must reach the shores of a state. Outside, the plight of the non-national is of no legal concern.³⁵ But, once the person is physically inside the state, with or without the state’s consent, rights inhere in that individual. The state is then held accountable for protecting these rights, regardless of political or financial cost.

This compromise has made access to the state that seeks to exclude into a kind of a jurisdictional talisman; human rights courts and quasi-judicial bodies use the non-national physical location to determine protection. But the focus on access (‘where is the plaintiff located?’) sidesteps the key political and distributional questions that are involved in this area, in particular: (i) which individuals should be protected and in what order of priority; (ii) which states should protect them and how should these protective duties be allocated and (iii) what screening methods would be acceptable.

3 ‘Front-Door’ Strategies of Control: Interdiction

The access-based compromise means that legal protection depends on establishing territorial presence inside a state.³⁶ In response, states have attempted to tighten up

³² *Ibid.*: ‘[T]he Greek authorities have not had due regard to the applicant’s vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself ... living in the street ... without any means of providing for his essential needs.’

³³ However, the United Nations Human Rights Council (UNHRC) is probably still more constrained than the ECtHR. See Paz, *supra* note 15.

³⁴ For a similar argument, see Hathaway, ‘Leveraging Asylum’, 45(3) *Texas International Law Journal* (2010) 503.

³⁵ E.g., *R. (European Roma Rights Centre and Others v. Immigration Officers at Prague Airport)*, [2003] EWCA 666, at 37 (legal protection ‘is concerned only with where a person must not be sent, not with where he is trying to escape from’).

³⁶ Human rights protection is also triggered if the plaintiff reaches under the effective control of the state, even if not physically present on the state’s territory. See the third section of this article below.

immigration control from what I term the ‘front door’³⁷ – in other words, they stop would-be immigrants or asylum seekers before they can establish that presence.³⁸ A key strategy of this front-door control is migrant interdiction on the high seas. By the early 2000s, the practice had become an essential border enforcement tool for coastal states, in particular, the USA, the European Union and Australia.³⁹ The US Supreme Court provided the justification, specifying that an international treaty ‘cannot impose ... extraterritorial obligations on those who ratify it through no more than its general humanitarian intent’.⁴⁰ Human rights do not apply on the high seas and are only recognized ‘on the threshold of initial entry’.⁴¹ In response, human rights courts and quasi-judicial bodies have attempted to constrain the *ex-ante* strategies of interdiction employed by states. They have done so, as we will see, by expanding the scope of access.

A recent landmark decision by the ECtHR, sitting as the Grand Chamber, in the case of *Hirsi Jamaa v. Italy and Others* sums up the interdiction precedent.⁴² The Court held that a state is allowed to interdict a boat bearing would-be migrants and asylum seekers. But it owes the passengers on the boat human rights protection, stating: ‘In the maritime environment’, there is no ‘area outside human rights law’.⁴³ For the Court, the act of border control itself – the practice of interdiction – falls under human rights jurisdiction. Jurisdiction is engaged ‘whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction’.⁴⁴ Jurisdiction entails, at a minimum, fundamental forms of due process,

³⁷ Other scholars use the term ‘non-entrée,’ first coined by James Hathaway in Hathaway, ‘The Emerging Politics of Non-Entrée’, 91 *Refugees* (1992) 40. In essence, it suggests that whereas refugee law is predicated on the duty of non-refoulement, the politics of non-entrée is based on a commitment to ensuring that refugees shall not be allowed to arrive. I, however, employ the phrase ‘to close the front door’ to refer to restrictions that take place at the actual border and therefore involve the specificity of the border itself. In this, my phrase ‘front door’ is different and narrower than ‘non-entrée’: ‘front door’ only applies to restrictions that take place on the actual physical territorial border of the state; ‘non-entrée’ applies more broadly to all restrictions on entrance wherever they take place.

³⁸ Some members of the UNHRC also began to recognize this dynamic of ‘harder out-harder in’. See, e.g., the strong dissent in *Warsame v. Canada*, *supra* note 5.

³⁹ T. Achiume, J. Kahn and I. Mann, ‘The Globalization of High Seas Interdiction: Sale’s Legacy and Beyond’, Online Symposium, 10 March 2014, available at <http://opiniojuris.org/2014/03/10/online-symposium-globalization-high-seas-interdiction-sales-legacy-beyond/> (last visited 11 May 2017).

⁴⁰ *Sale v. Haitian Ctrs Council, Inc.*, 509 US 155, at 158–159 (1993).

⁴¹ *Ibid.*, at 187.

⁴² ECtHR, *Hirsi Jamaa v. Italy*, Appl. no. 27765/09, Judgment of 23 February 2012.

⁴³ *Ibid.*, at 178. See also intervenor brief filed on behalf of the UNHCR in *Hirsi Jamaa v. Italy* (Filed pursuant to leave granted by the Court on 5 May 2011), UN Office of the High Commissioner for Human Rights (OHCHR), *OHCHR Intervention before the European Court of Human Rights in the Case of Hirsi et al. v. Italy*, Appl. no. 27765/09, Judgment of 5 May 2011.

⁴⁴ *Ibid.*, at 59–80. The ECtHR has been reluctant to apply the ECHR outside the territory of the Convention states (notably ECtHR, *Bankovic et al. v. Belgium and 16 Other Contracting States* (Admissibility), Appl. no. 52207/99, Judgment of 12 December 2001, paras 59–80. However, even in this case, the Court concluded that ‘the ECtHR has consistently held that the obligations under the ECHR apply extraterritorially in situations where ‘a State exercises through the effective control of the relevant territory and its inhabitants abroad ... all or some of the public powers normally to be exercised by that government’ (para. 71). In more recent cases, the ECtHR based the decisions in which it declined jurisdiction for acts

including the determination of individual refugee status, assisted by interpreters and legal advisers.⁴⁵ Like the ECtHR, the UNHRC has held that the state is responsible for protecting the human rights of 'all persons in their territory and all persons under their control'.⁴⁶ Extraterritorial application of human rights has been likewise supported by many other international human rights bodies as well as national courts.⁴⁷

Jurisdiction is no longer grounded only in territoriality since the plaintiff is physically located on the high seas. It is grounded also in control: a non-national must come under the control of the state, even if he or she is outside the territory of the state. This extraterritorial application of human rights law does not abandon the logic of the access compromise described above. It does not break the conceptual tie between legal presence and territoriality but, rather, expands the meaning of territoriality. Even when jurisdiction is based on the control of the state, a non-national must still physically approach the state (or its agents) that seeks to exclude him or her.

4 Walls: An Impossible Choice

Another front-door immigration control strategy is to construct a border wall. While interdiction is well regulated and researched, the regulation of walls is still underdeveloped.⁴⁸ But in light of the increase in wall construction and the mounting

outside the territory of a member state not on territorial grounds but, rather, on other considerations. See, e.g., ECtHR, *Saddam Hussein v. Albania and Others*, Appl. no. 23276/04, Decision on Inadmissibility of 14 March 2006 (inadmissibility because governmental power transferred to Iraqi authorities); ECtHR, *Saramati v. France, Germany and Norway*, Appl. no. 78166/01, Grand Chamber Decision on Admissibility of 2 May 2007 (inadmissibility based on incompatibility *ratione personae*).

⁴⁵ *Hirsi Jamaa*, *supra* note 42, at 184–185 (the host state must provide an 'examination of each applicant's individual situation' by personnel that is 'trained to conduct individual interviews' and 'assisted by interpreters or legal advisers'). This was confirmed in ECtHR, *Georgia v. Russia (I)*, Appl. no. 13255/07, Judgment of 3 July 2014; ECtHR, *Affaire Sharifi et autres c. Italie et Grèce*, Appl. no. 16643/09, Judgment of 21 October 2014; ECtHR, *Affaire Khlaifia et autres c. Italie*, Appl. no. 16483/12, Judgment of 15 December 2016.

⁴⁶ According to the UNHRC, the test for the applicability of the law is not territorial presence but, rather, effective control of the state – that is, whether in respect of the conduct alleged, the person is under the effective control of, or is affected by those acting on behalf of, the State in question. This was confirmed by the ICCPR, *supra* note 18, Art. 2(1). See also, e.g., Human Rights Committee, General Comment no. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras 10, 12; Human Rights Committee, Concluding Observations of the Human Rights Committee: United States of America, UN Doc. CCPR/C/79/Add.50 (1995), para. 284; Human Rights Committee, *Kindler v. Canada*, Communication no. 470/1991, UN Doc. CCPR/C/48/D/470/1991, 30 July 1993, para. 6.2; Human Rights Committee, *A.R.J. v. Australia*, Communication no. 692/1996, UN Doc. CCPR/C/60/D/692/1996, 11 August 1997, para. 6.8.

⁴⁷ For a good summary of both of these treaties and the wide interpretation of the extraterritorial reach of the non-refoulement obligation, see UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, 26 January 2007, para. 36, available at www.refworld.org/docid/45f17a1a4.html (last visited 11 May 2017).

⁴⁸ See, among many, Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013', 54(2) *Harvard International Law Journal* (2013) 315; Goodwin-Gill, *supra* note 2; Trevisanut and Papastavridis, 'The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans', 25(2) *European Journal of International Law (EJIL)* (2014) 616; Brouwer and Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide', 21(4) *Refugee* (2003) 6, at 7; Hathaway, *supra* note 37, at 40–41.

violence around them, human rights courts and quasi-judicial bodies will likely soon be called upon to adjudicate cases involving these walls. Walls raise a jurisdictional challenge. There are two plausible claims for regulation, one supporting the individual and the other supporting the state. Each represents a different jurisdictional choice about the meaning of the wall and correlates to a radically different vision of borders and statehood in the international order. But, at the same time, neither claim can be defended continuously. Here, I present both claims in their ideal type and take each tradition to its ultimate end point.

In the first claim, each individual enjoys a minimal set of rights by virtue of being human.⁴⁹ These rights exist whether or not the individual has complied with the state's immigration policy.⁵⁰ In immigration cases, under international and regional human rights law, this claim entails at least some procedural rights. The kind of scrutiny required differs across and among international and regional instruments,⁵¹ but all agree on some form of individualized processing for asylum seekers before deportation.⁵² At least under soft law, moreover, the latter should also not be rejected at the frontier.⁵³

⁴⁹ UDHR, *supra* note 6, Preamble and Art. 1

⁵⁰ J. Feinberg, *Social Philosophy* (1973), at 58–59: 'Rights are not mere gifts or favors, motivated by love or pity, for which gratitude is the sole fitting response.'

⁵¹ The inter-American system guarantees the broadest procedural protection, including the full canopy of process rights for all non-nationals. See IACtHR, *Wayne Smith, Hugo Armendariz et al. v. United States* (Judgment), 12 July 2010. The ECtHR, in turn, prohibits collective expulsion of all aliens, even on the high seas. See *Hirsi Jamaa*, *supra* note 42. Finally, the UNHRC guarantees the narrowest procedural protection. Art. 13 of the ICCPR, *supra* note 18, offers only non-citizens 'lawfully in the territory', but not undocumented more broadly, the right to an expulsion decision 'in accordance with law'. However, at least under soft law, Art. 13 applies also to aliens more broadly. See UN Human Rights Committee, CCPR General Comment no. 15: The Position of Aliens under the Covenant, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 18 (1994), paras 9, 10. In addition, leading scholars argue that the combination between Art. 13 of the ICCPR, UNHRC General Comment no. 15, para 10 and Art. 14(1) of the ICCPR (buttressing the commitment to fair proceedings) offers an important guarantee of procedural fairness in cases of deportation/removal proceedings of undocumented migrants. See Hathaway, *supra* note 2, at 647. In support of this position, see also Human Rights Committee, *Celepli v. Sweden*, Communication no. 456/1991, UN Doc. CCPR/C/51/D/456/1991 (1994), where the UNHRC took a broader view of when presence is sanctioned and, hence, lawful. Ultimately, it is probably fair to say that Art. 13 process protections do not apply to undocumented migrants with no lawful claim to remain, but do apply to those who contest removability on time. For a helpful discussion of due process in cases that bear on immigration of non-documented, see Ramji-Nogales, 'Undocumented Migrants and the Failures of Universal Individualism', 477 *Vanderbilt Journal of Transnational Law* (2014) 699, at 727–730. Thank you for Jaya Ramji-Nogales for extensive conversations on this point.

⁵² Even if UN General Comment no. 15, *supra* note 51, para. 9, does not override the treaty language of Art. 13 of the ICCPR, asylum seekers still bear due process under the Refugee Convention, *supra* note 18, at Arts 31(1), 32(2).

⁵³ Executive Committee of the UNHRC, Conclusion no. 81, 48th Session, UN Doc. 12A(A/52/12/Add.1), 17 October 1997; Executive Committee of the UNHCR, Conclusion no. 22, Protection of Asylum-Seekers in Situations of Large-Scale Influx, 32nd Session, UN Doc. 12A(A/36/12/Add.1), 21 October 1981; Executive Committee on the International Protection of Refugees, Conclusion no. 6 (XXVII) Non Refoulement (1977), para. (c). The Executive Committee on the International Protection of Refugees, Conclusion no. 15 (XXX) Refugees without an Asylum Country (1977), paras (b), (c); Executive

and collective expulsion is forbidden.⁵⁴ Asylum seekers and refugees, therefore, have the right to be considered for more substantive protection, such as non-refoulement or refugee protection, as soon they reach the external side of the wall.⁵⁵ In addition, for those who have established territorial presence, the national law of many liberal democratic states also guarantees another set of rights, including due process in contract and property disputes, access to courts and rights related to education and employment.⁵⁶ It is legally indefensible for a state to evade the obligations that these rights entail.⁵⁷ In collectively expelling all migrants and asylum seekers, a wall, in effect, transforms these legal rights into dead letters.

To support this claim, a human rights court could refer to case law that deals with interdiction. Interdiction is functionally similar to border walls; both utilize a hard physical line to prevent immigrants from entering in order that their entry not trigger

Committee on the International Protection of Refugees, Conclusion no. 53 (XXXIX) Stowaway Asylum Seekers (1988), para. 1; Executive Committee on the International Protection of Refugees, Conclusion no. 85 (XLIX) Conclusion on International Protection (1998), para (Q). This soft law interpretation is also supported by state practice. See, e.g., states in Africa, Europe and Southeast Asia that allowed large numbers of asylum seekers to cross their frontier and remain pending determination of refugee status. For discussion, see G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn, 2011), at 208. In addition, it is also supported by leading scholars, see, e.g., Hathaway, *supra* note 2, at 315: 'The duty of *non-refoulement* ... constrain not simply ejection from within a state's territory, but also non-admittance at its frontiers'; K. Wouters, *International Legal Standards for the Protection from Refoulement* (2009): 'Article 33 does not contain any geographical limitations' (at 49) and 'stopping a refugee at the State's borders ... will not alter the applicability of Article 33(1)' (at 52). But, for the opposing view, see, e.g., Ramji-Nogales, 'Freedom of Movement and Undocumented Migrants', 51(2) *Texas International Law Journal* 1, at 5–8 (arguing that refugees or asylum seekers are explicitly denied right to enter a state in order to seek asylum). For a comprehensive analysis of the arguments and literature for and against applying Art. 33 of the Refugee Convention to the situation of rejection at the frontiers, see G. Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (2000), at 423–431.

⁵⁴ Regional bodies prohibit collective expulsion of asylum seekers on the high seas. But this entry is temporary and lasts only for the purpose of an individualized examination of their applications for protection. See *Hirsi Jamaa*, *supra* note 42, para. 178. See also International Law Commission, Article 10 Sixty-fourth Session Geneva, Expulsion of Aliens, UN Doc. A/CN.4/L.797, 7 May–1 June and 2 July–3 August 2012; *Case Concerning Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, Judgment, 30 November 2010, ICJ Reports (2010) 639.

⁵⁵ E.g., Refugee Convention, *supra* note 18, at arts. 13–24, 26, 32–34 (providing rights to equal treatment as nationals in some areas and other non-citizens in other areas and the right not to be returned to persecution and to naturalization); CAT, *supra* note 18 (providing the right not to be returned to torture).

⁵⁶ *Yick Wo v. Hopkins*, 118 US 356 (1886): '[Fundamental rights] are not confined to the protection of citizens. The provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality.' For discussion, see L. Bosniak, *The Citizen and the Alien* (2006), at 37–76. Bosniak calls this 'hard-on-the-outside and soft-on-the-inside.' For an analysis of the legal significance in the USA of geographical presence and lack thereof, see Raustiala, *supra* note 10, at 2501 (critically describing and challenging the supposition that law and legal remedies are connected, and limited, by territorial location in US law).

⁵⁷ For an earlier articulation of this position, see I. Kant, *Perpetual Peace: A Philosophical Sketch* (1795) and the right to temporary sojourn: 'It is not the right to be a permanent visitor that one may demand. A special beneficent agreement would be needed in order to give an outsider a right to become a fellow inhabitant for a certain length of time. It is only a right of temporary sojourn, a right to associate, which all men have.'

state obligations to protect them. In the words of Harold Koh, interdiction is a ‘floating Berlin Wall’.⁵⁸ However, this idea expands immensely the scope of access. First, it does so temporally since, in interdiction, the very act of intercepting the boat is an act of control and initiates human rights jurisdiction. For each individual boat carrying would-be immigrants and asylum seekers, the state must act to interdict it (‘retail’ interdiction). Applying this precedent to the construction of a border wall would suggest that the act of construction itself is an act of control and, therefore, would invoke human rights jurisdiction.

But once the wall has been erected, no individual acts of control by the state must take place; the wall acts to exclude without further intervention from the state (‘wholesale’ interdiction).⁵⁹ In a sense, then, the wall functions as if it is rebuilt anew every day. The second expansion is geographical. In interdiction on international waters, there is no state authority except that of the intercepting state. Thus, the claim that the interdicting state is not responsible for providing protection is also the claim that no one else is liable. But, with a wall, there is a state with authority on each side of an international border. The claim then that one state is not responsible is also a claim that another state is responsible for protection. The application, therefore, of the interdiction precedent to a wall scenario may thus leave a host state potentially liable for protective duties when it was relatively passive and on the territory of another state. This individualistic claim carries implications about the proper meaning of borders and statehood in the international system.

From a normative perspective, at least with respect to asylum seekers, the border would be irrelevant, even if it is the jurisdictional (territorial) border. The border shares the same formal meaning of the wall. Both are legally permissible to the extent that they are porous enough to allow procedural justice. Fairness dictates that an asylum seeker be allowed, at a minimum, to present her case before deportation. Functionally, however, border walls are different from borders. Walls physically stop most would-be migrants and asylum seekers from crossing into a state’s territory in a way that jurisdictional borders do not. This does not change the structure of requests for hearing, but if the state refuses to grant a hearing, a border wall may prevent individuals from helping themselves by entering the state illegally and forcing the state to grant them the minimal set of human rights. And, thus, by shutting down the porousness of the border required by the conception of individual rights, the wall extends the jurisdictional power of the state to exclude on the ground. This creates two distinct populations as a matter of fact. Those asylum seekers that manage to cross the wall enjoy a fair determination of eligibility for protection. Others do not.

⁵⁸ Koh, ‘Closed-Door Policy for Refugees’, *New Jersey Law Journal* (1993) 413: ‘The Kennebunkport Order effectively erected a floating Berlin Wall around Haiti.’

⁵⁹ A wall is passive in two separate ways. First, it prevents a would-be immigrant from doing a specific act (getting in) but leaves her other options open, while an interdiction coerces a would-be immigrant to do a specific act (turn around). Miller, ‘Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh’, 38(1) *Political Theory* (2010) 111. Second, once the wall is constructed, exclusion no longer requires a new exercise of agency on the part of the state: a wall can restrain entrance even years after it was built.

However, a notion of human rights does not allow such a distinction in the application of rights.⁶⁰ For this reason, a human rights court could decide that the use of a border wall to prevent free entry, with respect to process rights, is illegal. States would be forced to hear the procedural claims of at least those asylum seekers who are still outside their borders. Jurisdiction could now follow proximity; individuals would only need to approach the border of the state to be under human rights jurisdiction. The border itself would become meaningless,⁶¹ at least with respect to process rights. Both border and border wall should be porous enough to allow due process. Asylum seekers on either side of the border, or the wall, would necessarily bear the same rights to due process.

The individualist claim, then, anticipates a new state, with attributes, including territory and population, that are fluid. The territorial boundaries of the state are effectively expanded outwards since the state owes procedural protection over a zone larger than its actual territory. Its membership moves from being based solely on citizenship to also being based in part on need because suffering could offer a legitimate basis for some form of admission to the state. Such an individualist claim cannot, however, be sustained. In its most modest articulation, it offers the right to a hearing to any asylum seeker who seeks protection and approaches the state. In the more extreme articulation, it requires nearly open borders. But if states come to view as unsustainable the flow of asylum seekers that human rights courts press them to accept, they may choose to withdraw from the jurisdiction of international human rights courts altogether.⁶²

The second possible claim to regulate border walls begins from the point of view of the state. Here, every state has the right to grant control over membership in its collective. This prerogative exists by virtue of being a sovereign; at the core of self-determination is discretion over inclusion and exclusion.⁶³ In immigration cases, this means that while a sovereign may bear protective obligations towards non-nationals who may have already established territorial presence, it owes no right of entry to individuals outside its territory, even if they are peaceful, needy foreigners.⁶⁴ A state, therefore, is legally permitted to build a wall that coincides with the border and to use this wall as an administrative mechanism to keep non-nationals out. The wall

⁶⁰ UDHR, *supra* note 6, Art. 1.

⁶¹ Indeed, Guy Goodwin-Gill explains that borders 'do not mark the limits of [international] law'. He adds: 'There is no physical space and no realm of human activity that is beyond the rule of the law.' Achiume, Kahn and Mann, *supra* note 39.

⁶² Brexit is an example that an international regime can be overturned through political pressures.

⁶³ For best articulation, see M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (1983), at 39 (a country is a membership community with 'shared ways of life' that its members are entitled to preserve. The members of the national community must have the right to 'control and sometimes restrain the flow of immigrants').

⁶⁴ Treaty instruments exclude a right of entry to their beneficiaries, see, e.g., Convention Relating to the Status of Refugee Convention, *supra* note 18, Art. 33; CAT, *supra* note 18, Art. 3; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287, Art. 45. For case law on the same point, see, e.g., *Haitian Ctrs Council*, *supra* note 40; *Regina v. Immigration Officer at Prague Airport and Another*, *Ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, para. 70.

effectively makes concrete the claim that states have responsibility only for those on the state's territory. In the words of the US Secure Fence Act, the wall is a 'necessary and appropriate' measure 'to achieve and maintain operational control of the entire international ... borders of the United States'.⁶⁵

There is a precedent to which one might turn. In an advisory opinion on the legality of the wall that Israel built in the Occupied Palestinian Territory,⁶⁶ the International Court of Justice (ICJ) held the wall to be illegal *per se*.⁶⁷ Yet it expressly limited its analysis to those parts of the wall constructed outside the territory that the Court regarded as part of Israel.⁶⁸ The implication, of course, is that as long as a wall built to control immigration is constructed within a state's territory, it is a non-event from a human rights perspective.⁶⁹ This statist claim makes the wall jurisdictionally irrelevant under human rights law and, like the individualist claim, carries implications about the proper meaning of borders and statehood. As a legal matter, the wall is identified with the border. The border predates the wall. The wall merely reinforces it. The border marks the precise territorial area over which a state may exercise absolute dominion.⁷⁰ This border 'shifts': it can operate to exclude on the edges of the territory.⁷¹ It can also be regulatory, operating to exclude inside the national geographical space by way of deportation and detention.⁷² It is left to the state to determine whether to control immigration *ex ante* or *ex post*. The location of a person is not consequential; territorial presence does not necessarily follow legal presence.

At the same time, again, a border wall is not functionally identical with a jurisdictional border. A border wall actively keeps people outside the territory of the state. This operates in two separate ways: (i) it enables the state to legally exclude migrants and asylum seekers with little or no direct action on its part and (ii) it positions the state better to deal with those who have nonetheless managed to scale the fence. The physical barrier makes the legal abstraction of the border a concrete reality and naturalizes the status of those who have crossed over, as criminal trespassers.⁷³ The result is an

⁶⁵ Secure Fence Act, Pub L 109–367 (2006) (authorizing the construction of 700 miles of fencing along the 2,000 miles USA–Mexico Border.)

⁶⁶ *Construction of a Wall*, *supra* note 1, at 136.

⁶⁷ *Ibid.*, para 121 (the very construction of the barrier on occupied territory violates international law 'it would be tantamount to de facto annexation [of Palestinian land]').

⁶⁸ The judges explained that 'some parts of the complex are being built, or are planned to be built, on the territory of Israel itself'. But the court 'does not consider that it is called upon to examine the legal consequences arising from the construction of those parts of the wall' (para. 67). On the same point, for the ECtHR, see *Cyprus v. Turkey*, Appl. no. 25781/94, Judgment of 12 May 2001; *Bankovic et al.*, *supra* note 44; ECtHR, *Al-Skeini and Others v. United Kingdom*, Appl. no. 55721/07, Judgment of 7 July 2011.

⁶⁹ Although the security fence can be implicated in other human rights violations, see, e.g., Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' 18(1) *EJIL* (2007) 1.

⁷⁰ See again Koskeniemi, *supra* note 4.

⁷¹ Shachar, 'The Shifting Border of Immigration Regulation', 3 *Stanford Journal of Civil Rights and Civil Liberties* (2007) 165, at 167.

⁷² See, e.g., *U.S. ex rel. Knauff*, *supra* note 16, at 206, 213: '[H]arborage at Ellis Island is not an entry to the United States, despite the fact that Ellis Island is US territory'.

⁷³ On the same point, see Gulasekaram, 'Why a Wall?', 2 *University of California Irvine Law Review* (2012) 147, at 149: '[T]he physicality and existence of a wall change the way citizens conceive of

in-out distinction that is a matter of law. The state now has definite borders, not a border 'zone'. The wall becomes the ultimate indicator of sovereignty.⁷⁴ In this view, the state is closed and bounded, with a stable, predefined territory and a fixed population. Need is not a legitimate basis of admission into the state.

However, this claim means that the state has no human rights obligation towards non-nationals outside its jurisdiction – even if they are asylum seekers – and, for those inside the state, can decide to detain or deport them.⁷⁵ It is a position that is difficult to defend if we accept the notion that all human beings share basic rights by virtue of their humanity.⁷⁶ And, so, this leads to a dead end. Human rights courts and quasi-judicial bodies must decide whether the border wall that acts as a definitive barrier to entry falls inside or outside the jurisdiction of human rights law. If a court can adjudicate issues regarding border walls, the border itself becomes a zone that exceeds the territory of the state. For political reasons, this is unworkable. If the court cannot regulate the border wall at all (it is outside its jurisdiction), we have a state without constraints, except those that are contingent on citizenship. Such a state is morally hard to justify.

5 Courts Regulate the Physical Features of the Wall?

How then will human rights courts solve this dilemma? This remains to be seen. However, having examined the case law from national, regional and international courts that deal with border walls that have both immigration and non-immigration functions, it is possible to draw some preliminary predictions on how courts might act. These predictions are tentative; while I exhaustively analysed all relevant jurisprudence, the case law is still too sparse to document a definite trend. However, I suggest that human rights courts and quasi-judicial institutions are likely to regulate physical features of border walls. They will focus on whether the wall was properly constructed, which will allow them to avoid committing themselves to either definition of borders and statehood. In practice, however, they will continue to support the traditional, statist concept of a non-porous border, only carving out a few exceptions when dealing with the most vulnerable.

immigration enforcement, alter the justifications for immigration enforcement itself, increase the perception and incidence of unlawful presence and naturalize the idea of immigration as an existential threat to U.S. sovereignty.'

⁷⁴ *Ibid.*: '[O]nce constructed, the fortified and physical border ... ratifies the very political, legal and social context that initially gave it life.'

⁷⁵ Aptly put by the US Supreme Court in *Haitian Ctrs Council*, *supra* note 40 at 175 (under the Immigration and Naturalization Act, 509 US 155, at 158–159 [1993]), aliens who were within our territory were treated 'as though they had never entered the United States at all'.

⁷⁶ Pushed to the extreme, citizenship in Western liberal democracies would become what Joseph Carens already denounced as the modern equivalent of feudal privilege – an inherent status that greatly enhances one's life chances and is indefensible in legal and in liberal and democratic terms. See Carens, 'Aliens and Citizens: The Case for Open Borders', 49(2) *Review of Politics* (1987) 251. Similarly, A. Sachar, *The Birthright Lottery, Citizenship and Global Inequality* (2009).

International jurisdiction suggests that human rights courts are likely to support the state's right to build a physical barrier on its undisputed border. Recall that the ICJ held that the wall Israel built in the Occupied Palestinian Territory was illegal *per se*, but it limited its ruling to those parts of the wall that were outside Israel's territory. Similarly, in two cases that dealt with shootings on the Berlin Wall, the ECtHR declared that a wall may withstand a legal challenge if it serves a legitimate aim 'to protect the border'.⁷⁷ The Court, however, must be convinced that the primary function of the wall is to protect the border. At least under soft law, we saw, ejection at the frontier and/or collective expulsion of asylum seekers is forbidden. But a border wall built as an immigration control measure both protects the border and prevents asylum seekers and migrants from entering.

Watson v. City of Memphis (1963),⁷⁸ a case that came before the US Supreme Court and, thus, has no international status, suggests that the courts might focus on the particular function of protection of the border since it is politically more acceptable. The case dealt with a wall constructed by the city of Memphis, Tennessee. This was a local wall within a city, but, much like an immigration wall, it had dual functions; it acted as a border (between two neighbourhoods) and also regulated traffic. The latter function effectively prevented black motorists from driving through a white neighbourhood.⁷⁹ The Court focused on the benign aspect. The wall reduced the flow of traffic, increasing the safety of resident children, and, from this perspective, the wall did not violate the 14th Amendment.⁸⁰ This demonstrates a narrow point: by foregrounding the benign function of the wall, a court is able to justify an inequality that the law could not otherwise have tolerated.

Another domestic law case, namely an Israeli Supreme Court decision regarding the wall that Israel built on its border with Egypt, moreover, supports the right of the state not only to build a wall but also to make it an effective physical barrier:

It was not without good reason that the government decided to invest enormous resources in the construction of the fence ... it may be assumed that the border fence may help significantly to reduce the phenomenon of infiltration ... To this it should be added that there are additional means that state can employ in order to enhance the efficiency of the physical barrier, such as electronic means and so forth.⁸¹

These means require considerable financial resources, but, the Court insisted, 'the protection of human rights costs money, and a society that respects human rights must be willing to bear the financial burden'.⁸² However, while a state can build an effective barrier, the barrier must not be overtly violent. The decision by the ECtHR regarding

⁷⁷ See, e.g., *Streletz, Kessler and Krenz*, *supra* note 1, at 71–73 (the aim of the Berlin Wall was 'to protect the border between the two German States "at all costs" in order to preserve the GDR's existence, which was threatened by the massive exodus of its population'. This aim 'must be limited').

⁷⁸ *Watson v. City of Memphis*, 373 US 526 (1963).

⁷⁹ *Ibid.*, at I.

⁸⁰ *Ibid.*, at IV: 'The residential interest in comparative tranquility ... are 'sufficient to justify an adverse impact on motorists who are somewhat inconvenienced by the street closing'.

⁸¹ High Court of Justice (Israel), *Adam v. the Knesset* (7146/12), 16 September 2013, para. 103.

⁸² *Ibid.*, para.103.

the Berlin Wall asserted that a wall that protects a border serves a 'legitimate aim'. Yet the protection of the border is not an unlimited imperative; it must be 'limited' and 'respect the need to preserve human life'.⁸³ In other words, 'indiscriminate' killing of people trying to scale the wall by means such as anti-personnel mines, automatic-fire systems or a categorical order to 'protect the border at all costs', infringes human rights law.⁸⁴ While a wall cannot be too dangerous, there is still no case law on precisely what constitutes permitted protection of the border.

However, private law may give some idea of what can, or cannot, be done to fortify the wall, such as the concept of 'attractive nuisance' in torts.⁸⁵ The Inter-American Commission of Human Rights may be going in this direction. In a recent report dealing, *inter alia*, with the USA–Mexico wall, the Commission warned that border walls that steer immigrants towards potentially lethal crossings are of human rights concern.⁸⁶ This report is only an observation, but it suggests that courts may be willing to place limits on how a border wall is constructed, in order to limit foreseeable harm to those who are shut out. Moreover, a court may be more lenient towards a state if it is willing to modify the physical structure of the border wall when faced with certain kinds of emergencies. In making a wall breakable, the state demonstrates that the physical nature of the wall does not prevent it from either (i) meeting its international obligations to take in refugees or (ii) exercising discretion when dealing with the most vulnerable populations.

Take another case that reached the Israeli Supreme Court on the Israel–Egypt wall.⁸⁷ Here the Court was asked to rule on the situation of 21 African migrants who were on the Egyptian side of the wall.⁸⁸ At first, the Attorney General noted that, because the wall had no gates, admittance of the group was physically impossible.⁸⁹ But, at a later point in the proceedings, Israeli soldiers cut the fence and admitted into

⁸³ *Streletz, Kessler and Krenz, supra* note 1, at 71–73. See also ECtHR, *K.-H.W. v. Germany*, Appl. no. 37201/97, Judgment of 22 March 2001.

⁸⁴ *Streletz, Kessler and Krenz, supra* note 1, at 102: '[B]y installing anti-personnel mines and automatic-fire systems along the border, and by ordering border guards to "annihilate border violators and protect the border at all costs", the GDR had set up a border-policing regime that clearly disregarded the need to preserve human life.'

⁸⁵ Under the doctrine, a landowner may be liable for injuries to children who trespass on land if the injury results from a hazardous object or condition on the land that is likely to attract children who are unable to appreciate the risk posed by the object or condition. Thank you for Karen Knop for this idea.

⁸⁶ Inter-American Commission on Human Rights (IACHR), Report on Immigration in the United States: Detention and Due Process, Doc. OEA/Ser.L/V/II 78/10, 30 December 2010, at 36, paras 107, 108. The Commission explains: 'One of the most harmful effects of the physical barriers erected along the border is that ... they merely steer immigrants in the direction of those border areas where no physical barriers have been erected and where conditions tend to be so extreme as to make the crossing highly dangerous ... this ... increases the death rate among undocumented migrants' (at 36, para. 107).

⁸⁷ High Court of Justice (Israel), *Anu Plitim v. Ehud Barak-Minister of Defense* (6582/12), 9 June 2012. My discussion of the case benefited from Omer Shatz, *The Not So Good Samaritan: On Denial of Refugees* (unpublished manuscript) (on file with the author).

⁸⁸ *Anu Plitim, supra* note 87, transcript of the first hearing, 9 June 2012, available at http://www.scribd.com/smc_law. [Hebrew] (last visited 11 May 2017).

⁸⁹ *Ibid.*

Israel two women and a child as a humanitarian gesture.⁹⁰ In response, the judges dismissed the case in a unanimous decision.⁹¹ Here, the wall acted to shift regulation away from non-negotiable rights to humanitarian concerns that are under the discretion of the state.

A human rights court may also, under some circumstances, request that the state increase protections for those who have already entered. For example, if a wall is strong and only a few manage to enter, then these few are entitled to more humane treatment than if larger numbers had done so. In the first case mentioned above that touched on the Israeli–Egypt wall, the Israeli Supreme Court encouraged Israel to build an effective wall. But, at the same time, the judges also argued that if the absolute number of those who cross the wall is small, then putting them under administrative detention is not constitutional. Indeed, it ‘makes “a moral stain on the network of human values espoused by Israeli society”’.⁹² If the numbers increase, however – that is, the wall is less effective – then ‘it may be possible to justify this purpose, notwithstanding the grave and forceful injury to the infiltrator’s liberty’.⁹⁴ Now the wall functions to move regulation from a normative to a quantitative analysis, which supports state’s interests; protection is not a matter of rights but, rather, a question of numbers and subject to different interpretations.

In these cases, the courts do not challenge existing notions of borders and statehood. They accept the border as a definitive jurisdictional line of territorial nature. By regulating the consequences of the wall at the margin, they offer symbolic gestures towards the human rights of all individuals. This is a continuation of the access-based compromise. Courts use the location of the individual non-national *vis-à-vis* the wall in order to compromise between the interests of the individual and those of the state. If a non-national is on the wrong side of the wall, she will have no right of entry. If a non-national is on the right side, she may well have significant rights against forced ejection from the unwilling ‘host’ state. If my prediction proves correct, then by regulating the physical features of a border wall, human rights courts and quasi-judicial bodies will legally, if partially, permit the construction of border walls. They will also make the allocation of protection dependent on an individual’s ability to penetrate such a fortified barrier. But this, again, cannot be supported. If nothing else, it is an odd way to sort out policy interests; the wall is normatively arbitrary from the perspectives of both the state and the individual.

From the perspective of the state, those with long, accessible borders, or with neighbours that happen to suffer crises, are disproportionately vulnerable to unwanted immigration regardless of their capacity to aid non-nationals at a particular moment in its history. From the perspective of the individual, those who might be able to cross a fortified border wall are disproportionately young strong men. For example, on one day in May 2014, some 1,000 people attempted to cross one of the border walls around a Spanish territory in north Morocco.⁹³ Approximately 400 managed

⁹⁰ *Ibid.*

⁹¹ *Ibid.*: ‘[T]he petition had become redundant.’

⁹² *Adam v. the Knesset*, *supra* note 81, paras 93, 114.

⁹³ C. Gall, ‘At a Spanish Border, a Coordinated Scramble’, *New York Times* (23 July 2014), available at www.nytimes.com/2014/07/24/world/europe/migrants-say-storming-of-spanish-border-fences-is-carefully-coordinated.html (last visited 11 May 2017).

to make it over the fence; of these, only two were women.⁹⁴ But using physical ability to determine entry rights is, if anything, negatively correlated with the gravity of an individual's predicament. Furthermore, young men arguably represent the biggest threat to the state.⁹⁵

Of course, a host state may make humanitarian exceptions (as illustrated by the case of the three African migrants admitted at the Israel–Egypt wall as a charitable gesture). The anthropologists Miriam Ticktin and Didier Fassin have already shown that in an inhospitable immigration climate, extreme vulnerabilities can become advantages for would-be migrants.⁹⁶ But drawing on humanitarian concerns to determine entry rights misuses resources. It offers symbolic concessions to the most salient individuals and does not help solve the larger problems of migration and the refugee crisis. In addition, it uses care and compassion to displace political possibilities for larger changes in structural inequalities between host states and non-nationals.

To rephrase a famous line from Joseph Carens, borders have walls, walls have guards and guards have guns.⁹⁷ These border walls, and their guards and their guns, as we have seen, are selectively open. Under human rights law, the guards are usually prohibited from shooting to kill, offering strong young men a chance of success. In exceptional cases, the guards may be ordered to open the gates to a few of the most suffering individuals. But no international agreement has dictated that these two subsets of the population should enjoy more access to borders than anyone else, including women, old people and children. And no agreement has determined that certain states, because of their location or the nature of their borders, should admit more refugees and would-be migrants than others. The result is a redrawing of borders – and also a shifting of populations – that is politically unstable (some states, but not others, are burdened with a large influx of non-nationals) and is normatively unjustifiable (some individuals, but not others, are protected, and protection is not generalizable).

6 Conclusion: A World of Walls?

What has been called 'wall disease' is likely to get even worse.⁹⁸ Border walls are effective. They exclude most non-nationals with little agency on the part of the state, and,

⁹⁴ *Ibid.* Note, however, that in other immigration contexts, women and children may be favoured over men. E.g., Canada issued a plan for the intake of refugees that explicitly excludes young men, see, e.g., Agence France-Presse, 'Canada to Turn Away Single Men as Part of Syrian Refugee Resettlement Plan', *The Guardian* (23 November 2015), available at www.theguardian.com/world/2015/nov/23/canada-syrian-refugee-resettlement-plan-no-single-men (last visited 11 May 2017).

⁹⁵ Men may be viewed as a security risk (see e.g., Agence France-Presse, *supra* note 94) or a threat to the domestic labour market (ECtHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, Appl. no. 15/1983/71/107-109, Judgment of 24 April 1985 (the UK argued that 'men being more likely to seek work thereby having a stronger impact on the labour market').

⁹⁶ M. Ticktin, *Casualties of Care: Immigration and the Politics of Humanitarianism in France* (2011); D. Fassin, *Humanitarian Reason: A Moral History of the Present* (2011), at 83–109.

⁹⁷ Carens, *supra* note 76, at 251.

⁹⁸ Term coined by the East German psychiatrist Dietfried Müller-Hegemann in 1973, available at <https://marcellocintio.com/2014/11/03/the-berlin-wall-disease/> (last visited 11 May 2017).

by converting the abstraction of the border into a physical reality, they make more concrete the act of trespass. At the same time, the dual function of the border wall – to protect the border and to stop would-be migrants and asylum seekers – also changes the legal conversation in a way that is advantageous for the state. It enables the court to accept the rejection of asylum seekers at the border in a way that the law could not have tolerated had it been more overt (recall the Memphis case) and shifts regulation to quantitative analysis or humanitarian concerns – both are matters of interpretation – rather than to fundamental rights. Indeed, by regulating the physical construction of walls, human rights courts and quasi-judicial bodies have already made border walls legally permissible to some extent. Thus, we are likely to see more walls. Over time, states will probably find a wall design that is likely to withstand most legal challenges. And so the number of non-nationals a state will be compelled to take in will drop significantly. A likely outcome is therefore more walls, all of a relatively similar design. The wall between Israel and Egypt is interesting in this context; both Hungary and Bulgaria have already approached Israel for advice on how to build their own border walls.⁹⁹

By building walls, therefore, states might be able both to commit themselves to human rights and to insulate themselves from actually respecting them. Two statements by Israeli Prime Minister Benjamin Netanyahu in regard to the Israel–Egypt fence capture this idea: ‘We do not intend to stop refugees fleeing for their lives’, he said. ‘[W]e allow them in and will continue to do so.’¹⁰⁰ But Netanyahu also added elsewhere: ‘We are determined to stop the flow of infiltration. We built a fence for this purpose.’¹⁰¹ Moreover, there is no reason to believe that states will only build walls on traditional borders. They are likely also to explore more creative locations. Just recently, the United Kingdom offered to give France a fence in order to stop the hundreds of migrants who regularly storm onto ferries leaving Calais for Britain.¹⁰²

There are concrete policy and normative ramifications to my analysis. To begin with, host states and individual non-nationals would likely do well to learn ‘to dance the jurisdiction’.¹⁰³ States that want to defend their walls from legal challenges should probably emphasize their function as protection for the border, rather than as

⁹⁹ D. Williams, ‘Amid Migrant Crisis, Europeans Interested in Israeli Border Barriers’, *Ha’aretz* (3 September 2015) available at www.haaretz.com/world-news/1.674381 (last visited 24 January 2017); ‘Hungary and Bulgaria have made preliminary inquiries about buying the Israeli-designed fences.’

¹⁰⁰ D. Weiler-Polak and Haaretz Service, ‘Rights Groups: Planned Refugees Detention Center Disgraces Israel’, *Ha’aretz* (28 November 2010), available at www.haaretz.com/israel-news/rights-groups-planned-refugees-detention-center-disgraces-israel-1.327412 (last visited 24 January 2017); Prime Minister’s Office, Israeli Prime Minister at the Weekly Cabinet Meeting, Press Release, 28 November 2010, available at www.pmo.gov.il/MediaCenter/SecretaryAnnouncements/Pages/govmes281110 (last visited 24 January 2017).

¹⁰¹ G. Ronen, ‘Eritreans on Border: 2 Women, Child Let In, the Rest Not’, *Israel National News* (6 September 2012), available at www.israelnationalnews.com/News/News.aspx/159718 (last visited 24 January 2017).

¹⁰² J. Tidy, ‘UK Offers to Send “Ring Of Steel” to Calais’, *Sky News* (7 September 2014), available at <http://news.sky.com/story/1331489/ukoffers-to-send-ring-of-steel-to-calais> (last visited 24 January 2017).

¹⁰³ Ford, ‘Law and Borders’, 64 *Alabama Law Review* (2012) 123, at 134.

deterrents to immigration. They should also consider barriers that require less human agency in preventing people from crossing, such as concentric physical barriers that do not require guards who might become involved in altercations. Based on case law, if individuals do succeed in entering, they may win their case against deportation if, as soon as they enter, they begin to develop social and economic ties and cut any links with their original home country.¹⁰⁴

There are also ramifications for human rights actors, including judges, scholars, activists and practitioners. Human rights courts and quasi-judicial bodies have worked out a compromise in cases that bear on immigration that relies on a relatively familiar legal category: access. They ask questions that courts know how to adjudicate: 'where is the plaintiff located?' Access here seems to play a simple rule-like function and to lead to decisions that are objective and fact based. But the outcome is a hodgepodge: a regime in which protection is provided arbitrarily and that is itself difficult to justify morally, politically or administratively. So long as the international community operates within the existing access-based compromise, the most change that can occur is that human rights courts and quasi-judicial bodies may insert additional safety valves for the protection of the most vulnerable. But this will not fundamentally change a reality where individuals, including asylum seekers and refugees, climb walls, cross deserts and take dangerous boat journeys, so that they can petition to get into a host state.¹⁰⁵ In other words, it will not alter a system that places a life-threatening barrier in the face of the very same individuals it is committed to protecting. This is insane.

A better way to effect more change is, first, to scrap the access-based compromise. Human rights courts and quasi-judicial institutions have developed this compromise by moving ad hoc from one decision to another. Even if each court decision was locally sensible, the overall result is to approach an open border world. The courts have reached that point by focusing on where the individual is physically located; they have never expressly stated the goal of open borders, nor have they harnessed political support for a system where one's place of birth is irrelevant in the exercise of rights.

The second change necessary is to focus on the issue of absorption capacity (how many can each state realistically take in). This requires a clear acknowledgement by all of the relevant actors that, on the one hand, human rights bodies have no aspiration to force states in the direction of open borders; no state should be held liable to take in an unknown number of non-nationals or be imposed with a cost disproportionate to that of other states or to its specific conditions. And, moreover, it should be explicitly recognized that, at a certain point in a state system, the state's responsibility to its own citizens trumps its responsibility to others. On the other hand, it should also be recognized that refugees have to go somewhere. Wealthy, developed states cannot completely shut out all asylum seekers and refugees, particularly because many of them have played a role in contributing to the chaos that created the refugee crisis to begin with.

¹⁰⁴ Paz, *supra* note 15.

¹⁰⁵ For a similar point, David Martin, 'What Angela Merkel's New Refugee Policy Misses', *Fortune* (20 December 2015), available at <http://fortune.com/2015/12/20/angela-merkel-migrants-syria/> (last visited 24 January 2017).

Reorienting the regime towards the issue of absorption capacity requires a political agreement on questions such as what is an ‘equitable’ absorption capacity for different states, how is equitable defined and by whom and how often is the definition revised.¹⁰⁶ These questions do not lend themselves to the absolute language of rights or a one-size-fits-all prescriptive solution. They are not easily adjudicable by an international court. To foster an honest conversation about absorption capacity, the third necessary step to effect change is to remove human rights courts and quasi-judicial bodies from their central role and make the process much more overtly political. This does not mean that enforcement bodies will be completely removed from cases that bear on immigration. They will still adjudicate cases that call for extensive fact-finding. However, they will not, as they do now, resolve underlying normative questions about who is most vulnerable and who is most capable of providing protection.

In the history of spaces, which is also the history of power, we have reached the chapter of border walls.¹⁰⁷ Human rights courts and quasi-judicial bodies are deeply implicated in writing it; in the past 10 or so years, they have used access to privilege the interests of the individual non-national over those of the state. But they have won the wrong battle; the compromise they have worked out has left walls as a sensible strategy for states and has also made them at least partially legally permissible. This may have not been inevitable, but it was totally predictable. And so today, when worldwide displacement is at an all-time high,¹⁰⁸ human rights courts have become a part not of the solution but of the problem.

¹⁰⁶ For a discussion of how national courts deal with the legal category of adequacy, see Liebman and Sabel, ‘The Federal No Child Left Behind Act and the Post-Civil Rights Agenda’, 81 *North Carolina Law Review* (2002–2003) 1703.

¹⁰⁷ Paraphrase on Foucault, ‘The Eye of Power’, in C. Gordon (ed.), *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977 by Michel Foucault* (1980) 146, at 149.

¹⁰⁸ UNHCR, Worldwide Displacement Hits All-Time High as War and Persecution Increase, 18 June 2015, available at www.unhcr.org/en-us/news/latest/2015/6/558193896/worldwide-displacement-hits-all-time-high-war-persecution-increase.html (last visited 24 January 2017).