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Toward a Taxonomy of Freedom of Movement Claims: Identifying Rights-Based Pathways for Today's Refugees Beyond the 1951 Refugee Convention

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This Article discusses the current migratory crisis as one instance of a conceptual mismatch in human rights between formal law and the tools that courts and other quasi-judicial bodies actually utilize in adjudication. While the doctrine centers around individual right-holders, enforcement bodies provide a remedy only when there is a state duty-holder. Human rights scholarship regarding refugees focuses on the right to freedom of movement. However, this right frequently offers little benefit to these individuals adrift at sea or wandering in the desert.

An alternative framing might ultimately be more effective before human rights courts and other quasi-judicial bodies. This framing does not start with the right-holder but instead with the question of who the duty-holder is. Specifically, I differentiate plaintiffs based on whether they can articulate their claim in a way that identifies one discrete state duty-holder.

This revised understanding helps explain why the claims of so many individuals who are between states today do not in fact lend themselves to human rights litigation. Their plight is better served in the political arena, seeking public support for negotiation. At the same time, this approach opens potential pathways for human rights litigation to buttress protections currently afforded under the 1951 Refugee Convention to individuals on the run.

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Introduction

This Article focuses on individuals trapped in zones of indistinction: adrift in the Mediterranean Sea, marooned along the Italian or Greek coasts, or permanently stuck in transitional locations such as refugee camps or territorial borderlands. I analyze developments in human rights case law and scholarship concerning the so-called right to freedom of movement,[1] recognizing three complementary rights as they pertain to an individual's country: *the right to leave*, *the right to return*, and *the right to remain*.[2]

1. *See, e.g.*, Universal Declaration of Human Rights art. 13 (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights art. 12, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto art. 2, E.T.S. 46 (Sept. 16, 1963); *see also* Riener v. Bulgaria, App. No. 46343/99, ¶¶ 81–82 (May 23, 2006), https://hudoc.echr.coe.int/eng?i=001-75463 [https://perma.cc/TTT3-5U58]; González del Río v. Peru, Comm. No. 263/1987, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/46/D/263/1987 (Oct. 28, 1992). The right to freedom of movement is also contained in several regional and specialized human rights treaties. *See, e.g.*, American Convention on Human Rights art. 22, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143; African Charter of Human and Peoples' Rights art. 12, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Human Rights Charter]; Arab Charter on Human Rights art. 27, May 22, 2004; Convention on the Elimination of All Forms of Discrimination Against Racial Discrimination art. 5, Dec. 21, 1965, 660 U.N.T.S. 195; International Convention on the Suppression and Punishment of the Crime of Apartheid art. II(c), Nov. 30, 1973, 1015 U.N.T.S. 243; Convention on the Rights of the Child art. 10(2), Nov. 20, 1989, 1577 U.N.T.S. 3.

2. The other two human rights that assume mobility are the right to seek asylum and the right to nationality. Human rights, in turn, provide only a vague proclamation of a universal right of asylum that lacks any correlative obligation of admission. UDHR, *supra* note 1, art. 14 ("[E]veryone has the right to seek and enjoy in other countries asylum from persecution."). Since this Article specifically examines the international aspect of the right to freedom of movement, that is, mobility across states, I exclude the discussion of one's freedom of movement within a state.

This analysis departs from existing scholarship on legal orthodoxy, which relies on a textual interpretation of this human right to movement, and bounds it together with varying other formal rights such as the rights to "flee irreversible harm," to "leave and not to be pulled back," or to "seek asylum."[3] Of course, it is understandable to turn to human rights when seeking to vindicate the horrific harm faced by individuals abandoned at sea or in the desert. In fact, I show that the application of this right to persons on the run has a long history, reaching back to the very jurists who contributed to the crafting of both the Universal Declaration of Human Rights ("UDHR") and the European Convention on Human Rights ("ECHR").[4]

Alas, this approach encompasses two fallacies. To begin with, it blurs the distinction between formal loss of belonging and substantive loss of protection. These rights foreground exit (that is, fleeing, leaving) covered under the human right to leave. However, the vast majority of individuals who make these claims at the present moment also need a right to enter.[5] Specifically, they require admission into a state with which they have no prior relationship.[6] But there is no universal right of entry. The focus on

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3. On the "right to leave" literature, see generally Nora Markard, *The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries*, 27 Eur. J. Int'l L. 591, 594–99 (2016); Vladislava Stoyanova, *The Right to Leave Any Country and the Interplay Between Jurisdiction and Proportionality in Human Rights Law*, 32 Int'l J. Refugee L. 403, 439 (2020); Gregor Noll, Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection 386–90 (2000). On the right to "flee irreversible harm," see Violeta Moreno-Lax, Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law 340–65 (2017). On the right "leave and not to be pulled back," see Markard, *supra* note 3. For the right to "seek asylum," see Emilie McDonnell, *Realising the Right to Leave During Externalised Migration Control*, EJIL: Talk! (Sept. 27, 2021), https://www.ejiltalk.org/realising-the-right-to-leave-during-externalised-migration-control [https://perma.cc/UDN4-6XZ7]; Tilman Rodenhäuser, *Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control*, 26 Int'l J. Refugee L. 223, 237 (2014) (arguing that prohibiting an asylum seeker from boarding a carrier practically denies the person the right to seek asylum, and may amount to a violation of the principle of non-refoulement).

4. UDHR, *supra* note 1; Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, E.T.S. 9, 213 U.N.T.S. 262 [hereinafter ECHR].

5. Importantly, for many, the preference might be to return to home if they could do so safely. But that demand is an impossible one.

6. Of course, this is a first necessary step. After entry, the individual needs other rights in order to obtain status, employment, education, and so on.

formal rights fogs the exclusion of duties—for the majority of refugees today, human rights and refugee law create a clear body of rights-holders but only a vague sense as to the corresponding duty-holders.

Instead of foregrounding rights in a formal sense, I analyze the freedom of movement right within the particular historical and political context in which it was developed, and comprehensively consider the real limits that are built into the doctrine. This assessment considers mobility across borders from the perspective of both individual claimants and state actors.

I differentiate separate types of claims that individuals make for protection. While these claims ought to be distinguished based on the crises involved and relevant duty-holders, they are today lumped together. By claims, I refer to Weberian ideal types. No claim made by an individual precisely corresponds with either of my ideal types, and many claims combine elements from both.[7]

First, claims grounded in *continuity* pertain to the legal status of individuals who have lost their standing in their "own country." They ask to either remain in or safely return to their "own state," the place where they have developed ongoing belonging. In this case, the responsibility falls squarely on a *single duty-holder*: The claim to remain is submitted against one particular state, the individual's "own country."[8]

Second, claims anchored *in entry* revolve around the status of individuals who wish to escape their "own country" because that country is either the source of their harm or is unable to remedy their harm. They seek entry to another state with which they have no pre-existing ties. Here, the duty is *diffused*: The claim for admission is directed at any country other than the individual's "own country."

In reality, this division is not rigid. Individuals may have overlapping claims that cannot be neatly categorized. Moreover, the range of human motivations to cross borders often resists neat doctrinal classifications. For example, Palestinian refugees (whose case I detail later) occupy an intermediate position in my typology. They make continuity-based

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7. Max Weber, *Objectivity in Social Science and Social Policy*, *in* Max Weber: Gesammelte Werke [Max Weber: Collected Works] 146 (1968); From Max Weber: Essays in Sociology 59–61 (Hans H. Gerth & C. Wright Mills eds. & trans., 1946).

8. It is possible that for a return to be a realistic option, the "own state" may need assistance from other states to ensure safety for the individual. In this case, legal rights will not be sufficient alone, and other types of support such as financial or military may be needed.

claims—their status in Palestine has been upset—but they are *also* refugees in the strict legal sense, having crossed a border and sought asylum post-dispossession (that is, as refugees in Lebanon, Jordan, or another country).

It is valuable to frame the right of freedom of movement in its historical and political context, and to separate the two claims as distinct ideal types (that is, as those grounded in continuity and those in entry). This is because it clearly distinguishes two subsets of litigants who are today bundled together. Furthermore, it illuminates that the law has developed unevenly, and elucidates to these individuals and their advocates when a path to adjudication is and is not practically available.

Specifically, I propose two policy regimes related to the "right to remain," "right to leave," and "right to return." For more and more people today, and especially the most vulnerable, these distinctions are a matter of life and death.

Policy Regime 1 concerns claimants who are on the run but can make a claim based in *continuity*. They might draw on the human rights to return or remain in order to buttress traditionally defined protections currently afforded under the 1951 Refugee Convention Relating to the Status of Refugees.[9] These rights assign an admission duty to one obvious state and are thus cognizable as a matter of law. Substantively, the return claim already incorporates an entry element. Procedurally, the right points at one state duty-holder and thus lends itself to litigation. It can extend important protections for a broader category of individuals who fall within or outside the scope of the Refugee Convention, including any individual who (i) wishes to remain in their country where they face human rights abuses, or (ii) wishes to leave their country due to human rights abuses but does not satisfy the Article 1A(2) definition of the Refugee Convention.[10]

In contrast, *Policy Regime 2* bears on claimants who are also fleeing but whose claim is anchored in *entry*, not *continuity*. These individuals may want to consider alternatives to human rights adjudication. Their protection depends upon successful entry into a host state, or possibly reaching its borders or coming under its human agency. But while human rights

9. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 137, https://www.refworld.org/docid/3be01b964.html [https://perma.cc/9B73-2FBA] [hereinafter Refugee Convention].

10. *Id.* art. 1A(2).

integrate a right to leave, there is no universal entry right. Without an additional round of negotiation assigning specific admission duties to particular states, their exit claim does not point in the direction of a particular state as a duty-holder. Their claims are effaced de jure. Physically, they cannot stop moving. Legally, they are invisible, lacking both substantive and procedural protections. This leaves them, even if they qualify as refugees under the 1951 Convention, better served in the political arena, where they can seek public support for negotiation.

Importantly, there is an exception to Policy Regime 2. Those whose claim is based on *entry or admission* but have an ability to establish contact with a particular state or its agents can use this contact as leverage to locate a duty-holder by default. They thereby switch from the second to the first policy regime. Thus, the human right to leave can support the protection offered by the Refugee Convention, irrespective of whether the individual qualifies as a refugee in a strict sense.

This Article studies the period from 1873 to the present day. This 150-year timeline starts with the inauguration of the Institut de Droit International ("IDI"). The timeline is divided into three distinct periods:[11] (i) 1873–1919, widely accepted as the first birth of modern "professional" international law; (ii) 1919–1940, the inter-war period representing the second birth of this law; (iii) post-1948, the era following the adoption of the UDHR. I review treaty instruments, writings of scholars, and case law from different courts and various quasi-judicial bodies that bear on the regulation of this right. In particular, I focus on the jurisprudence of the European Court of Human Rights ("ECtHR"). I choose the ECtHR because of its role in the regulation of mobility in the Mediterranean Sea, the world's deadliest migratory route.[12] Mass death on this route has long been normalized, and this year seems poised to become even more lethal than previous ones.[13]

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11. For a similar periodization, see generally Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960 (2009) (referring to two periods: 1873–1919 and post-1948). I add a third period, 1919–1940, as a transitional period between the two periods.

12. Jon Henley, *More Than 2,000 People Missing at Sea as Use of Deadliest Route to EU Doubles*, The Guardian (Aug. 11, 2023), https://www.theguardian.com/world/2023/aug/11/more-than-2000-people-missing-at-sea-as-use-of-deadliest-route-to-eu-doubles [https://perma.cc/TV7P-LJXS].

13. Sally Hayden, *Welcome to Europe, Where Mass Death Has Become Normal*, N.Y. Times (Aug. 16, 2023), https://www.nytimes.com/2023/08/16/opinion/europe-tunisia-migration.html [https://perma.cc/7K4J-CUNF]; *see also Human Costs of Border Control*,

The argument proceeds in five parts. Part I briefly describes a familiar gap: Both human rights and refugee law extend a right to return, but lack an obvious legal right of entry, even to individuals who are needy and peaceful.

Part II offers a functional analysis of the so-called human right to movement—the right that most directly bears on border crossing, involving departure from and return to a country.[14] Rather than taking the right at face value, I examine it in its real-world context, with a particular consideration of the limits built into the doctrine.

Part III provides a genealogy of the legal regulation of borders across the three historical periods. This review demonstrates the consistent attribution to the state of the right to exclude. It also explores the way that various patterns of individual rights have imposed constraints on this state power: *entry*, *return*, and *nationality*. All these patterns derive legal mobility out of the threshold of belonging to a state. However, this "belonging" assumes different cultural content across this timeframe: It denotes a Pan-European identity in the first period (1873–1914), inheres in race, religion, or language of a minority in the second period (1919–1940), and attaches to "strong and enduring ties" with the state and its institution post-1948. Within this genealogy, I explain, it is not puzzling that individuals end up legally invisible when their claims are grounded in entry into another state with which they have no pre-existing links.

Parts IV and V map out the different ways in which the functions incorporated into today's human right to the freedom of movement—leaving, remaining, returning—interact with the Refugee Convention when concerning a large demographic (for example, internally displaced persons). Such individuals may or may not qualify within refugee definitions, and may ask (i) to remain or return to their "own state" (continuity) or (ii) to gain admission to another state (entry).

Finally, this Article concludes with a tentative typology of two different litigation strategies that are based on the motivations of individual claimants and the relevant duty-holders, and that correspond to the policy regimes outlined above.

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http://www.borderdeaths.org/?page_id=5 (a database of migrant deaths in the Mediterranean region, which concentrates on the border management system of Spain, Gibraltar, Italy, Malta, and Greece).

14. The right pertains to both mobility within the state and across states. Here, I only focus on the latter.

I. Return, but Not Entry

The accepted legal practice in cases involving border crossing aims to distinguish, in a humane and safe manner, between migrants seeking enhanced economic opportunities and refugees who are fleeing under duress.[15] Determinations about the former are bound by state immigration policies and influenced by the economic and political interests of states.[16] In contrast, the latter centers on the individual and encompasses international rights that limit the actions of states regardless of their consent.[17] Various overlapping international instruments guarantee specific rights for individuals deemed refugees.[18]

To begin with, human rights law grants individuals the right to return to their "own country" and to remain there, without persecution, irrespective of state consent.[19] It guarantees both the voluntary nature of

15. For instance, the U.S. Department of Homeland Security announced policies in May 2023 to "humanely manage the border through deterrence, enforcement, and diplomacy." Press Release, U.S. Dep't of State, Office of the Spokesperson, *Department of State and Department of Homeland Security Announce Additional Sweeping Measures to Humanely Manage Border through Deterrence, Enforcement, and Diplomacy* (May 10, 2023), https://www.state.gov/department-of-state-and-department-of-homeland-security-announce-additional-sweeping-measures-to-humanely-manage-border-through-deterrence-enforcement-and-diplomacy [https://perma.cc/X7ES-SHJ4]. In Europe, Frontex claims to "strictly adhere[] to the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, and relevant instruments of international and human rights law, including the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol." *Fundamental Rights at Frontex*, Frontex, https://www.frontex.europa.eu/fundamental-rights/fundamental-rights-at-frontex/fundamental-rights-at-frontex [https://perma.cc/QC2F-6Y26] (last visited Mar. 31, 2024).

16. Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 Cornell L. Rev. 457, 528–42 (2020).

17. Joel Feinberg, Social Philosophy 58–59 (1973) ("Rights are not mere gifts or favors, motivated by love or pity, for which gratitude is the sole fitting response.").

18. *E.g.*, Refugee Convention, *supra* note 9, arts. 1–2. For my prior work on this subject, see also Moria Paz, *Lost in the Maze: Refugees and the Law*, 52 Seton Hall L. Rev. 767, 791–95 (2022).

19. UDHR, *supra* note 1, art. 13(2); ICCPR, *supra* note 1, art. 12(4). In contrast to the non-binding character of the UDHR, the ICCPR is a binding human rights treaty. *See also* U.N. GAOR, Report of the Committee on the Elimination of Racial Discrimination, 51st Sess., U.N. Doc. A/51/18, ¶ 225 (Sept. 30, 1996); U.N. Hum. Rts. Comm., CCPR General Comment No. 27: Article 12 (Freedom of Movement), U.N. Doc. CCPR/C/21/Rev.1/Add.9, ¶ 19 (Nov. 2, 1999) [hereinafter General Comment No. 27]. Of course, a state had to consent to be bound by the treaty in the first place. In the alternative, an obligation can be binding on a state irrespective of its consent if there is opinio juris and a sufficiently general practice of non-objection by states.

repatriation and the correlative duty of states of origin to admit their nationals. This right applies to everyone, but the United Nations Human Rights Committee ("UNHRC") has emphasized its "utmost importance for refugees seeking repatriation."[20]

Additionally, those who meet the definitional criteria under Article 1(A)(2) of the 1951 Refugee Convention—being outside their country of origin or any other location where their life or freedom is at risk due to factors such as race, religion, nationality, membership in a specific social group, or political opinion[21]—possess the right not to be forcibly returned (non-refoulement). Recent developments have broadened the definition of persecution, potentially including the impacts of a climate crisis.[22]

Finally, under the Geneva system of 1951, refugees can also access a variety of rights in any country (apart from their country of origin) where they have sought refuge. These rights include a foundational set of basic guarantees, and apply once the individual is *within* the jurisdiction of that country.[23] However, further entitlements are contingent upon a territorial connection with the asylum state and the specifics of their residency.[24]

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20. UDHR, *supra* note 1, art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration."); General Comment No. 27, *supra* note 19, ¶ 19.

21. Refugee Convention, *supra* note 9, art. 33(1). Other forms of protection and non-refoulement exist under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14 art. 3, Nov. 4, 1950, E.T.S. 5. Those who pose a danger to the security of the country are excluded from protection. *See* Refugee Convention, *supra* note 9, art. 33(2) ("The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.").

22. Ioane Teitiota v. New Zealand, Comm. No. 2728/2016, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/127/D/2728/2016, ¶ 9.11 (Oct. 24, 2019). But this is still not the *lex lata*. On climate refugees see, for example, Matthew Lister, *Climate Change Refugees,* 17 Critical Rev. Int'l Soc. & Pol. Phil. 619, 620–21 (2014).

23. For example, free access to domestic courts, rationing, primary education, fiscal equality, and more. Refugee Convention, *supra* note 9, arts. 16(1), 20, 22(1), 29. Additionally, core rights such as the prohibition of discrimination and religious freedom are not predicated on physical presence within that country. *Id.* arts. 3–4.

24. There are different ways of classifying these entitlements. *See, e.g.*, Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law*, *in* Human Rights and Immigration 41 (Ruth Rubio-Marín ed., 2014).

Refugees do not have the right to enter a particular country of their choosing as a place of refuge.[25]

This rights-based approach conditions refugee protection on formal juridical principles. As Vincent Chetail has explained, these principles involve the criteria for protection, the content of entitlement, and the process of protection. A criterion of protection provides the legal definition of a refugee (the "crux of the entire matter").[26] Entitlement involves the right of non-refoulement: not to be forced to return to one's "own country" if that risks persecution[27] (the "cornerstone" of protection).[28] The process of protection includes aspects such as the status determination of a refugee and evidential requirements.

Significantly, then, both human rights and refugee law focus on *return*. The former postulates a positive return to the individual's "own country" without being persecuted there,[29] and extends this entry only to one of the state's "own."[30] The latter creates a negative return: Those who qualify

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25. This has been the matter of heated debate. For opposing views, which I discuss in detail below, see generally Noll, *supra* note 3; Moreno-Lax, *supra* note 3.

26. U.N. Ad Hoc Comm. on Statelessness and Related Probs., 1st Sess., 2d mtg., ¶17, U.N. Doc. E/AC.32/SR.2 (Jan. 26, 1950).

27. Refugee Convention, *supra* note 9, art. 22; African Human Rights Charter, *supra* note 1, art. 12. Importantly, most general human rights treaties have been construed by their respective treaty bodies as inferring an implicit prohibition of refoulement, deriving from the general prohibition of torture and inhuman and degrading treatment. *See* Soering v. United Kingdom, App. No. 14038/88 (July 7, 1989), https://hudoc.echr.coe.int/eng?i=001-57619 [https://perma.cc/9CGT-B8UY]; U.N. Hum. Rts. Comm., CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Doc. HRI/GEN/1/Rev.1, at 30 (Mar. 10, 1992); U.N. Comm. on the Rts. of the Child, General Comment No. 6, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005). *See generally* Reconceiving International Refugee Law (James C. Hathaway ed., 1997).

28. U.N. GAOR, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 2d Sess., 21st mtg. at 8, U.N. Doc. A/CONF.2/SR.21 (Nov. 26, 1951).

29. UDHR, *supra* note 1; ICCPR, *supra* note 1, art. 12; African Human Rights Charter, *supra* note 1, art. 12.

30. *See* Kay Hailbronner, *Comments On: The Right to Leave, the Right to Return and the Question of a Right to Remain*, *in* The Problem of Refugees in the Light of Contemporary International Law Issues 73 (Vera Gowlland-Debbas ed., 1996); Refugee Convention, *supra* note 9, art. 33; Convention Against Torture, *supra* note 21, art. 3; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 45, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. Of course, there are also other guiding principles; these include non-discrimination, prevention of arbitrary detention, right to family life and the best interests of the child, and prohibition of collective expulsion. *See, e.g.*, G.A. Res. 71/1 (Sept. 19, 2016). Refugee law, in turn, envisions resettlement and domestic integration in addition to return.

enjoy non-refoulement rights (that is, the right not to be forced to return to their "own country"),[31] as long as they risk persecution, torture, or inhuman or degrading treatment or punishment (or chain refoulement) in the departure state.[32] This non-return covers individuals who have established territorial presence inside a state's borders,[33] at its borders, or otherwise under its effective control.[34] At minimum, it extends a narrow right to cross frontiers and to remain pending determination of refugee status, assisted by interpreters and legal advisers.[35]

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31. Refugee Convention, *supra* note 9, art. 33. For an interpretation of the non-refoulement principle in international law, see James C. Hathaway, The Rights of Refugees Under International Law 307–70 (2005). There is a dispute as to whether non-refoulement applies extraterritorially. *See, e.g.*, Richard Barnes, *The International Law of the Sea and Migration Control*, *in* Extraterritorial Immigration Control: Legal Challenges 115–16 (Bernard Ryan & Valsamis Mitsilegas eds., 2010).

32. Hailbronner, *supra* note 30, at 78; Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-Refoulement in a World of Cooperative Deterrence*, 53 Colum. J. Transnat'l L. 235, 237–38 (2015); Refugee Convention, *supra* note 9, art. 22; African Human Rights Charter, *supra* note 1, art. 12. Importantly, most general human rights treaties have been construed by their respective treaty bodies as inferring an implicit prohibition of refoulement, deriving from the general prohibition of torture and inhuman and degrading treatment. *See* sources cited *supra* note 29. For a discussion on direct and indirect (chain) refoulement, see Hathaway, *supra* note 31, at 323.

33. *See, e.g.*, Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International Law 208 (3d ed. 2011). For additional support, see, for example, James C. Hathaway, *Refugees and Asylum*, *in* Foundations of International Migration Law 177, 193 (Brian Opeskin et al. eds., 2012) ("[T]he duty of non-refoulement . . . constrains not simply ejection from within a state's territory, but also non-admittance at its frontiers."); C.W. Wouters, International Legal Standards for the Protection from Refoulement 49 (2009) ("Article 33 does not contain any geographical limitations."); *id.* at 52 ("[S]topping a refugee at the State's borders . . . will not alter the applicability of Article 33(1)."). For the opposing view, see, for example, Jaya Ramji-Nogales, *Freedom of Movement and Undocumented Migrants*, 51 Tex. Int'l L.J. 173, 177–80 (2016) (arguing that refugees or asylum seekers are explicitly denied the right to enter a state in order to seek asylum). For a comprehensive analysis of the arguments and literature for and against applying Article 33 of the Refugee Convention to the situation of rejection at the frontiers, see Noll, *supra* note 3, at 423–31.

34. *See, e.g.*, Refugee Convention, *supra* note 9, art. 33; Convention Against Torture, *supra* note 21, art. 3; Fourth Geneva Convention, *supra* note 30, art. 45. For case law on the same point, see, for example, Sale v. Haitian Centers Council, 509 U.S. 155, 160 (1993); Regina v. Immigration Officer at Prague Airport [2004] UKHL 55, ¶ 70.

35. *E.g.*, Hirsi Jamaa v. Italy, App. No. 27765/09, ¶ 178, 184–85 (Feb. 23, 2012), https://hudoc.echr.coe.int/fre?i=001-109231 [https://perma.cc/M9S8-PWXK] (finding that the host state must provide an "examination of each applicant's individual

These rights—to return and to be protected from return—are stacked.[36] Human rights offer the normative basis of protection as a general law and create rights universally (the return to one's "own country"—however "own country" is defined—by virtue of the dignity inherent to all human beings).[37] Refugee law, in turn, is both *lex specialis* and selective in nature. The non-return to one's "own country" only applies to a predetermined category of protected persons: those who are outside their country and who are persecuted on predetermined grounds. It operates as a remedy after the state of origin has failed to fulfill its duty of human rights protection toward one of its own citizens.[38]

This aligns with the constrained scope of refugee law. The non-return duty does *not* address international migration, encompassing the compounding impacts of worsening conditions that compel individuals to seek refuge. Furthermore, refugee protection stands as a distinctive exception within this framework, recognizing the unique circumstances where escape becomes the only viable option, serving as a counterpoint that proves the rule, rather than constituting a fundamental challenge to the basic ideas of national sovereignty and borders.[39]

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situation" by personnel who are "trained to conduct individual interviews" and who are "assisted by interpreters or legal advisers").

36. It is now "virtually impossible to separate" human rights from refugee law. Chetail, *supra* note 24, at 19, 23–24, 39–40, 68. For earlier discussion of this relationship, see Paul Weis, *Refugees and Human Rights*, 1 Isr. Y.B. Hum. Rts. 35, 40–49 (1971).

37. U.N. Hum. Rts. Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (May 26, 2004) [hereinafter General Comment 31]; U.N. Hum. Rts. Comm., General Comment No. 15: The Position of Aliens Under the Covenant, U.N. Doc. HRI/GEN/1/Rev.1, ¶ 2 (Apr. 11, 1986) [hereinafter General Comment No. 15]. For the universal creation of rights, see Ralph Wilde, *'Let Them Drown': Rescuing Migrants at Sea and the Non-Refoulement Obligation a Case Study of International Law's Relationship to 'Crisis': Part II*, EJIL: Talk! (Feb. 27, 2017), https://www.ejiltalk.org/let-them-drown-rescuing-migrants-at-sea-and-the-non-refoulement-obligation-as-a-case-study-of-international-laws-relationship-to-crisis-part-ii [https://perma.cc/5FCG-SJ95].

38. Hathaway, *supra* note 31, at 5 (asserting that refugee law appears as "a remedial or palliative branch of human rights law"); Chetail, *supra* note 24, at 70 ("[C]ompared to human rights law, the Geneva Convention has much more to receive than to give.").

39. In developing this argument, I draw on both Chetail, *supra* note 24, and Motomura, *supra* note 16. Some commentators such as Violeta Moreno-Lax have interpreted IHRL so as to afford a right of entry. *See, e.g.*, Violeta Moreno-Lax, *Must EU Borders Have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees*, 10 Eur. J.

Constraining the definition of "individuals bearing the right of return" only to nationals (human rights law), and excluding entry from the non-refoulement right (Refugee Convention), is not accidental. The *travaux préparatoires* of both the 1948 UDHR and the 1951 Refugee Convention clearly display that their drafters deliberately refused to offer any lawful path into destination states.[40]

The drafters insist upon their plenary power to control migration, leaving judicial oversight marginal.[41] Furthermore, both global and regional human adjudicatory bodies often demonstrate sensitivity to state interests. For instance, the UNHRC explicitly clarified that the human right to movement does not encompass the "right for a person to enter a country other than his own."[42] The African Commission on Human and Peoples' Rights, as another example, is cautious not to challenge the prerogative of any state "to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide."[43] The ECtHR, which leans more conservative, not only respects

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MIGRATION L. 315, 334–35 (2008); Gregor Noll, *Seeking Asylum at Embassies: A Right to Entry Under International Law?*, 17 INT'L J. REFUGEE L. 542, 548–53 (2005).

40. For the *travaux préparatoires* (preliminary works) of the Refugee Convention, and the explicit denial of an entry right, see Jaya Ramji-Nogales, *The Role of Human Rights Law in Constructing Migration Emergencies*, EJIL: TALK! (Feb. 24, 2017), https://www.ejiltalk.org/the-role-of-human-rights-law-in-constructing-migration-emergencies-esil-blog-symposium [https://perma.cc/W7WN-BY2B]; Ramji-Nogales, *supra* note 33, at 177–80. Indeed, at a pivotal moment during the formulation of the UDHR, the French jurist René Cassin (1887-1976) emphatically asserted that "while the problem of free movement involved both emigration and immigration, the present article was only concerned with individual's right to emigrate." U.N. Comm'n on Hum. Rts., Drafting Comm., Summary Record of the 2d Sess., 36th mtg. at 1544, U.N. Doc. E/CN.4/AC.1/SR.36 (May 14, 1948), https://doi.org/10.1017/CBO9781139600491.006 [https://perma.cc/77SL-ATTD]. Other authors have also written on this gap extensively. *See, e.g.*, James C. Hathaway, *The Global Cop-Out on Refugees*, 30 INT'L J. REFUGEE L. 591, 597 (2018) (discussing the problem of "access to protection"); Guy Goodwin-Gill, *The International Law of Refugee Protection*, *in* THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES (Elena Fiddian-Qasmiyeh et al. eds., 2014) ("The 1951 Convention does not deal with the question of admission.").

41. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753 (1972); Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779 (Can.); Mitchell v M.N.R., [2001] 1 S.C.R 911 (Can.); Poll v. Lord Advocate, [1897] S.L.R. 35-637 (Scot.).

42. Varela Nuñez v. Uruguay, Comm. No. 108/1981, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/OP/2, ¶ 9.3 (Oct. 27, 1981).

43. Union Inter-Africaine des Droits de l'Homme v. Angola, Comm. No. 159/96, Afr. Comm'n Hum. & Peoples' Rts., ¶ 20 (Nov. 11, 1997).

the state's inherent right to manage its borders but also alludes to the safeguarding of borders as a duty.[44]

Focusing on return, and without creating either an entry or admission right, both human rights law and the international refugee regime adhere to a definition of sovereignty that is plenary and discretionary—the position adopted by the 1927 *Lotus Case*[45]—and that exercises a "virtually undisputed" legal right to exclude.[46]

44. N.D. & N.T. v. Spain, App. Nos. 8675/15 & 8697/15, ¶ 168 (Feb. 13, 2020), https://hudoc.echr.coe.int/fre?i=001-201353 [https://perma.cc/7ZUE-GN2K] (holding that "[b]order control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control" and that states "should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations").

45. S. S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, ¶ 44 (Sept. 7) ("[R]estrictions upon the independence of States cannot . . . be presumed."). For an earlier articulation of territorial constraints on jurisdiction, see The Schooner Exch. v. M'Faddon, 11 U.S. 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute."). A state makes no claim to rule outside its borders, and, conversely, recognizes no authority above itself within its borders; a state has sovereignty with a monopoly of coercion within its territory. *See generally* Max Weber, Politics as a Vocation (15th ed. 1965); *Rep. of the Int'l Comm. of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, League of Nations Doc. C.20/4/238 1920 VII, ¶ 2 (1920) [hereinafter *Report of the Int'l Comm. of Jurists on the Aaland Islands*] ("[T]he right of disposing of national territory is essentially an attribute of the sovereignty of every State."). Acquiring the characteristic of a jurisdictional authority demands territorial exclusivity as a constitutive element. *See* Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 840 (Perm. Ct. Arb. 1928) ("[C]ontinuous and peaceful display of the functions of State within a given region is a constituent element of territorial sovereignty."); Legal Status of Eastern Greenland (Den. V. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, ¶ 96 (Apr. 5) (holding that "the intention and will to act as sovereign" requires "some actual exercise or display of such authority" over fixed territory); *S.S. Lotus*, 1927 P.C.I.J. No. 10, ¶ 44 (finding that jurisdiction "is certainly territorial").

46. A leading scholar explained: "The state's exclusive right to decide what acts shall take place in its territory is virtually undisputed." Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 237 (1989). For a detailed discussion of a state's control over its borders, and the tension between the "rule-approach" emphasizing power politics and the "policy-approach" that sees all governmental or non-governmental global processes as part of international law, see *id.* at 224–302. Importantly, the "plenary power" doctrine was *not* adopted by the Inter-American or African courts. As Michael Walzer famously put it, "[a]dmission and exclusion are at the core of communal independence." Michael Walzer, Spheres of Justice 61–62 (1984). For the opposite view, see generally

This legal architecture has construed mobility as exceptional,[47] and forsaken border crossing as a method of correction, permitting the expression of disaffection through opting out geographically (broadly corresponding with what Albert Hirschman and Charles Tiebout referred to as *exit* rather than voice).[48] Further, it disavows attachments and belonging shaped by the experience of movement.[49] The law corrects through the state and within the state. Individuals are right-holding *only* against the state as duty-holders; they do not exercise rights against the state as one of several alternative sovereigns.

Regarding the people I reference at the beginning of this Article who have not yet arrived at a state—what you might call migrants or refugees in transit—a state does not enjoy *carte blanche* to violate human rights outside its borders or disregard extraterritorial duties for its own benefit. Nevertheless, the borders of a state do limit its duties to engage in humanitarian intervention while migrants are in their home country, en route to a destination country, or yet to establish jurisdiction.[50]

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

47. *See generally* Karen Knop, *Lorimer's Private Citizens of the World*, 27 Eur. J. Int'l L. 447 (2016) (explaining that provisions that involve mobility—departure from and return to a country, asylum, and nationality—were treated separately in the origins and drafting of the UDHR). More recently, Löw and Weidenhaus argued that people are "terrorized by the law." *See* Martina Löw & Gunter Weidenhaus, *Borders That Relate: Conceptualizing Boundaries in Relational Space*, 65 Current Socio. 553, 557 (2017); *see also* Ran Hirschl & Ayelet Shachar, *Spatial Statism*, 17 Int'l J. Con. L. 39, 39 (2019) (emphasizing states' use of law to restrict various forms of mobility by creating a "new configuration" of the Weberian state). For further discussion, see Beth Simmons, *International Borders: Yours, Mine, and Ours* (unpublished manuscript) (on file with author).

48. My analysis of the exit strategy draws on the writings of Charles Tiebout and Albert Hirschman. Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416, 416–24 (1956); Albert O. Hirschman, Exit, Voice, and Loyalty (1970).

49. For the evolution in the international regulation of mobility, see generally Frédéric Mégret, *The Contingency of International Migration Law: 'Freedom of Movement', Race, and Imperial Legacies*, *in* Contingency in International Law: On the Possibility of Different Legal Histories (Ingo Venzke & Kevin Jon Heller eds., 2021).

50. For a discussion, see Moria Paz, *A Most Inglorious Right: René Cassin, Freedom of Movement, Jews and Palestinians*, *in* The Law of Strangers: Jewish Lawyers and International Law in the Twentieth Century (James Loeffler & Moria Paz eds., 2019). For a response to Paz's article, see Nathaniel Berman, *There's No Place Like Home: Domicile, René Cassin, and the Aporias of Modern International Law*, *in* The Law of Strangers: Jewish Lawyers and International Law in the Twentieth Century (James Loeffler & Moria Paz eds., 2019). From a different perspective, Henkin

II. The Human Right to Freedom of Movement

Let me now briefly offer a functional analysis of the so-called human right to freedom of movement. This movement right is enshrined in almost all human rights instruments,[51] and arguably constitutes a norm of customary international law.[52] Here, I bring attention to its real-world implications and practical outcomes. Thus, I inquire not only into how the right is used by claimants and interpreted by scholars, but also into the way it plays out on the ground in specific cases in light of the limitations incorporated into the doctrine itself. Later, I describe how each of the three complementary protections embedded in this right—"remain," "return," and "leave"—evolved, and suggest how they might support the protection currently offered by the 1951 Refugee Convention.

The right to freedom of movement involves two functions that bear on border-crossing: exit and entry. Exit is universal and unlimited: Anyone, including irregular migrants,[53] can leave any country,[54] whether it is their own country[55] or a country other than their own.[56] With some

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argues that any state that is party to the ICCPR has legal standing to bring a claim against any other state for violations of rights such as the right not to be tortured, or the right to preserve "the indispensable condition of all human beings," regardless of whether those alleged violations have other connections to the case. Louis Henkin, The International Bill of Rights 18 (1981). However, even if a state has legal standing to bring a claim against any other state for torture, no state has an *obligation* to bring such a claim, and the rightsholder cannot force any state to bring such a claim.

51. UDHR, *supra* note 1, art. 13; ICCPR, *supra* note 1, art. 12; African Human Rights Charter, *supra* note 1, art. 12.

52. *See* Olivier de Schutter, International Human Rights Law 18 (2d ed. 2014) (Article 13 of UDHR is considered customary international law); Goodwin-Gill & McAdam, *supra* note 33, at 380; Vincent Chetail, *The Transnational Movement of Persons Under General International Law: Mapping the Customary Law Foundations of International Migration Law*, *in* Research Handbook on International Law and Migration 1 (Vincent Chetail & Celine Bauloz eds., 2014); *see also* Rodenhäuser, *supra* note 3.

53. General Comment No. 27, *supra* note 19, ¶¶ 8–10.

54. *See* UDHR, *supra* note 1, art. 13(2) (formally non-binding but viewed as codifying customary law); Oscar Schachter, International Law in Theory and Practice 336 (1991) (analyzing national court decisions that use the UDHR as a standard); ICCPR, *supra* note 1, art. 12(2) (a treaty binding on its signatories).

55. Battista v. Italy, App. No. 43978/09 (Dec. 2, 2014), https://hudoc.echr.coe.int/eng?i=001-148683 [https://perma.cc/B4W8-PHFY] (finding that preventing an individual from obtaining an identity document curtails his right to freedom of movement, as understood by Article 2 of Protocol No. 4 to the European Convention on Human Rights).

56. Montero v. Uruguay, Comm. No. 106/1981, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/18/D/106/1981, ¶ 9.4 (Mar. 31, 1983) ("[T]herefore, article 2(1) of

restrictions,[57] their exit is always in effect and operates irrespective of lawful legal status within the territory of a state party.[58] States, however, might adopt measures that impede exit both de jure and de facto, and preclude the effectiveness of this function.[59]

Conversely, and as I have already suggested above, there is no universal right of entry.[60] Instead, admission is particularized and limited to only those individuals who return to their "own country."[61] Its enforcement

the Covenant cannot be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory."); Baumann v. France, App. No. 33592/96 (May 22, 2001), https://hudoc.echr.coe.int/eng?i=001-59470 [https://perma.cc/3FJ4-8295] (holding that the confiscation of a passport constituted interference with the right to freedom of movement, as understood by Article 2 of Protocol No. 4 to the European Convention on Human Rights).

57. ICCPR, *supra* note 1, art. 12(3) (permitting restrictions to the right only where the restrictions "are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant"); *see also* GOODWIN-GILL & MCADAM, *supra* note 33, at 370.

58. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 204 (1993); *see also* ICCPR, *supra* note 1, art. 12(3). But limitations must not render the right ineffective. *See* General Comment No. 27, *supra* note 19, ¶¶ 13, 16; *see also* Colin Harvey & Robert P. Barnidge, *Human Rights, Free Movement, and the Right to Leave in International Law*, 19 INT'L J. REFUGEE L. 1, 6 (2007). For discussion of the right to leave in the maritime environment, see Markard, *supra* note 3; Rodenhäuser, *supra* note 3.

59. Examples of such measures include the infamous 1961 Berlin Wall and lethal shots incompatible with the ICCPR. *See* ICCPR, *supra* note 1, art. 12(2). However, a refusal of the right to leave can be an abuse of the right towards protection seekers. *See* GOODWIN-GILL & MCADAM, *supra* note 33, at 382–83.

60. For decisions by the U.N. Human Rights Committee, see, for example, Varela Nuñez v. Uruguay, Comm. No. 108/1981, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/OP/2, ¶ 9.3 (Oct. 27, 1981) ("[A]rticle 12 does not guarantee an unrestricted right to travel from one country to another. In particular, it confers no right for a person to enter a country other than his own."). For decisions by the European Court of Human Rights, see a line of cases from Abdulaziz v. United Kingdom, App. No. 9214/80, at 67 (May 28, 1985), https://hudoc.echr.coe.int/eng?i=001-57416 [https://perma.cc/5XK8-8EYR] ("[A]s a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory."), to Hirsi Jamaa v. Italy, App. No. 27765/09, ¶ 113 (Feb. 23, 2012), https://hudoc.echr.coe.int/fre?i=001-109231 [https://perma.cc/M9S8-PWXK] ("[C]ontracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens . . . . [T]he right to political asylum is not contained in either the Convention or its Protocols.").

61. Treaty instruments exclude a right of entry to their beneficiaries. Refugee Convention, *supra* note 9, art. 33; Convention Against Torture, *supra* note 21, art. 3; Fourth

in cases of violation derives regulatory force from a relationship between persons and their "home." Of course, a person can also enter any other "country of [their] choice to which [they] may be admitted,"[62] but in that case entry derives from consent.

The asymmetry between the application of exit and entry limits meaningful mobility to nationality, with border-crossing serving as a function of belonging to a state.[63] Consequently, the state becomes the primary site of correction, with protection contingent on reaching a certain threshold of "membership" therein.

Here is a gap. De jure, the so-called right to freedom of movement is conferred under the universal premise that underpins human rights instruments, characterized by their *erga omnes* and non-reciprocal nature (that is, the famous *Barcelona Traction* dictum).[64] In practice, though, the responsiveness of the freedom-of-movement right to harm suffered by individuals varies as a function of the nature of the claim they make and the relevant duty-holder.

The right to movement is more receptive to individuals whose claim is to return or remain. They seek *admission to their "own state,"* whatever the definition of "own state" may be. This demand is backward-looking and made by individuals against their homeland. The substantive content of

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Geneva Convention, *supra* note 30, art. 45. For case law on the same point, see Sale v. Haitian Centers Council*,* 509 U.S. 155, 155 (1993); Regina v. Immigration Officer at Prague Airport [2004] UKHL 55, ¶ 70. However, changes in regional and bilateral agreements might open a path for some refugees. For instance, many Venezuelans have entered Brazil as regional migrants, only thereafter applying for and obtaining asylum under the expanded Cartagena definition. *See* Diego Acosta & Leiza Brumat, *Political and Legal Responses to Human Mobility in South America in the Context of the Covid-19 Crisis: More Fuel for the Fire?*, 2 FRONTIERS HUM. DYNAMICS 1 (2020); *see also* UDHR, *supra* note 1, art. 13(2); ICCPR, *supra* note 1; International Convention on the Elimination of all Forms of Racial Discrimination art. 5(d)(ii), Dec. 21, 1965, 660 U.N.T.S. 195.

62. Peltonen v. Finland, App. No. 19583/92, ¶ 31 (Feb. 20, 1995), https://hudoc.echr.coe.int/eng?i=001-5980 [https://perma.cc/CU23-WA5S].

63. *See* Satvinder S. Juss, *Free Movement and the World Order*, 16 INT'L J. REFUGEE L. 289, 293 (2004); Eberhard Eichenhofer, *Einreisefreiheit und Ausreisefreiheit* [*Freedom of Entry and Freedom of Departure*], 33 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK 135, 139 (2013) (contending that the right to leave without a right to enter is only half a right).

64. The dictum of the International Court of Justice in the Barcelona Traction case states that obligations *erga omnes* include those derived "from the principles and rules concerning the basic rights of the human person." Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 34 (Feb. 5).

the need inheres in belonging, *continuity*, and concerns a legal relationship between a state and one of its own. Here, the function of mobility is to return home, where one belongs. This construes mobility from the perspective of arrival and leads to a duty-based discourse.

A continuity-based claim, whether to return or remain, implicates *one* particular state, the individual's own country, as a duty-holder.[65] In other words, there exists a "legal relationship," in a Hohfeldian sense, between an individual's right to protection and a state's duty to honor this right.[66] The duty can range from thin and negative (for example, not to displace or deport) to thick and positive (for example, to permit re-entry and normalize status post return). Only if positive does the duty involve border-crossing, restricting the control of the state over its borders.

This duty aligns with an international human rights regime which predicates duty on "jurisdiction."[67] The regime distributes sovereign exclusivity according to geographical borders, protecting the right to

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65. It is possible that, for a return to be a real option, an individual's "own state" may need assistance from other states to ensure safety for that individual. In this case, legal rights will not alone be sufficient. Other types of support (financial, military, etc.) may be needed.

66. Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710 (1917) (asserting that a legal relationship involves a pair of persons whose interests exist on opposing sides—someone's right exists with respect to someone else's duty). For a useful table summary, see *id.* at 710. For criticism of Hohfeld's negative definition of privileges, see, for example, Christopher M. Newman, *Hohfeld and the Theory of In Rem Rights: An Attempted Mediation*, *in* Wesley Hohfeld A Century Later: Edited Work, Select Personal Papers, and Original Commentaries (Shyamkrishna Balganesh et al. eds., 2022). On an articulation of this argument in the context of human rights, see Hersch Lauterpacht's critiques of refugee law. Hersch Lauterpacht, *The Universal Declaration of Human Rights*, 25 Brit. Y.B. Int'l L. 354, 373 (1948) ("[T]here is a right to 'seek' asylum, without any assurance that the seeking will be successful."). I began developing this argument in an article titled *Lost in the Maze: Refugees and the Law. See* Paz, *supra* note 18.

67. ECHR, *supra* note 4, art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."); ICCPR, *supra* note 1, art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."); Convention Against Torture, *supra* note 21, art. 2(1) ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."). For discussion, see, for example, Marko Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy (2011); Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To*, 25 Leiden J. Int'l L. 857 (2012). Importantly, however, the preamble to

nationality and legal personality.[68] Within this scheme, the human rights to return or remain recognize the individual claimant as a member of a state who belongs within a national-territorial political community, and draw mobility from this membership. The protection offered does not correlate with the actual neediness of the claimant, nor with whether or not she qualifies within refugee definitions. Instead, it derives duty from a relationship to one's "own country," or the breakdown of that relationship.

At the same time, though, the human right to movement is only half responsive to individuals whose claims concern fleeing, and who wish to leave *their "own state."* Their claim is forward-looking and focuses on the unavailability or the ineffectiveness of one's "own country."[69] In this case, the function of mobility is founded in running away from, not belonging to, home. Mobility allows these individuals facing harm to flee where they "belong" and enter another state with which they have no pre-existing ties. This practice looks at mobility from the perspective of *departure* and foregrounds the individual as a right-holder.

Claims rooted in entry arise after continuity-based claims have been exhausted.[70] This protection conforms to refugee law which, strictly speaking, protects those persecuted at home. As a category, they exist outside the human rights protection of their "own country." The 1961 Berlin Wall serves as an example of when exit protection is effective.[71]

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the UDHR envisions that all individuals are entitled to "universal respect" as "a common standard of achievement." UDHR, *supra* note 1, pmbl.

68. For territorial jurisdiction in international law, see Kal Raustiala, *The Geography of Justice*, 73 Fordham L. Rev. 2501, 2508 (2005) ("That defined territory demarcated, for most purposes, the reach of the sovereign's law."); S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18–19 (Sept. 7) ("Now the first and foremost restriction imposed by international law upon a State is that . . . it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial."). On the jurisdictional basis, see, for example, Samantha Besson, *Due Diligence and Extraterritorial Human Rights Obligations—Mind the Gap!*, 9 ESIL Reflections 1 (2020). On the link to nationality, see UDHR, *supra* note 1, art. 15; ICCPR, *supra* note 1, arts. 1, 24; The Movement of Persons Across Borders 39 (Louis B. Sohn & Thomas Buergenthal eds., 1992).

69. The refugee regime, importantly, also includes a claim of continuity. *See* Refugee Convention, *supra* note 9, art. 1(C) [hereinafter Refugee Convention Cessation Clause]. Thank you to Jaya Ramji-Nogales who suggested this temporal aspect.

70. Horvath v. Sec'y of State for the Home Dep't [2000] AC 489 (HL) 497 ("Another state is to provide a surrogate protection where protection is not available in the home state.").

71. *See* sources cited *supra* note 59.

However, the majority of claimants today also require—for their protection or their flight to be meaningful—*entry to any state but their own state*. Often this is a state with which they have no pre-existing ties (though they may have one preferred or targeted country of destination).

An entry-based claim entails two categories of duties. First, a negative duty on the home country to let go, and on transit countries that impede flight by imposing extraterritorial restrictions on exit.[72] Second, it places a positive duty on *all* other destination countries to let in and provide a remedy that always involves border-crossing or the right to exit one's state and settle in another.[73] Alas, after individuals have left their "own state" and transit countries, and before they have entered a specific country of asylum or destination, their entry-based claim does not point to a single duty-holder to grant admission. Thus, the focus on mobility from the perspective of the individual as a right-holder obscures the fact that without a further level of treaty negotiation to assign entry rights to specific duty-holders, no jural relationship in the Hohfeldian sense is established: The individual bears the right to exit *all* states in the world, but to enter only *one* particular state—"their own." States carry both the duty to allow the exit of all people, but also the privilege to bar the entry of anyone but their "own" people.[74] And so, the individual places an entry duty at the doorstep of *all* states that have signed the relevant treaty. However, for their escape to be meaningful, it requires one specific state to honor the claimant's exit by permitting their entry.

In fact, as early as 1947, the French jurist René Cassin—who would go on to contribute to the crafting of the European Convention on Human Rights ("ECHR"), and later serve as a judge and ultimately President of the European Court of Human Rights ("ECtHR")—already cautioned that the "implementation of the right of freedom of movement of persons might be difficult," as "the right of emigration . . . did not carry with it the right to enter another country."[75] A year later, he insisted: "[I]t is

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72. *See, e.g.*, MORENO-LAX, *supra* note 3, ch. 9.

73. Even resettlement, a remedy which may be granted before border crossing, requires exit and entry.

74. Hohfeld, *supra* note 66. For a discussion on this duty and privilege, see Paz, *supra* note 18.

75. U.N. Comm'n on Hum. Rts., Drafting Comm., Summary Record of the 1st Sess., 4th mtg. at 5, U.N. Doc. E/CN.4/AC.1/SR.4 (June 13, 1947), https://documents.un.org/symbol-explorer?s=E/CN.4/AC.1/SR.4&i=E/CN.4/AC.1/SR.4_9621567 [https://perma.cc/8PJM-8YWX].

impossible to recognize a right . . . if no one was bound to respect it."[76] Cassin accepted this tension, but only as a pragmatic first step, or, in his words, a "way to move ahead."[77] He remained convinced that "gradually . . . member states . . . [would bring] their legislation into conformity with the principles formulated in [the UDHR]."[78] In other words, states would in time supplement the negative exit with a positive duty. This never happened.

Therefore, in practice, while claims incorporating continuity can be accounted for by courts, those that concern entry do not immediately lend themselves to adjudication and protection that is "practical and effective, not theoretical and illusory."[79] Irrespective of refugee categorization, the latter—that is, claims anchored in entry—end up much like economically motivated migrants: at the grace of the state.

III. Rights to Return and Remain

A concise historical review, spanning from 1873 to the present day, segmented into three distinct periods—1873–1919, 1919–1940, post-1948—reveals that states continuously enjoyed the right to exclude. However, different patterns of individual rights limited this statist prerogative over borders: *entry*, *return*, and *nationality*. These right patterns created

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76. Johannes Morsink, The Universal Declaration Of Human Rights: Origins, Drafting, and Intent 77 (2000) (citing Cassin's comments on the right of asylum, during the Second Drafting Session of the UDHR).

77. Jay Winter & Antoine Prost, René Cassin and Human Rights from the Great War to the Universal Declaration 249 (2013).

78. *Id.*

79. Goodwin v. United Kingdom, App. No. 28957/95, ¶ 74 (July 11, 2002), https://hudoc.echr.coe.int/eng?i=001-60596 [https://perma.cc/J8QF-3TGF]. Clearly, a lot has been written and said about this point of ECHR interpretation. For a recent discussion, see Janneke Gerards, General Principles of the European Convention on Human Rights (2019). For the lack of entry, see N.D. & N.T. v. Spain, App. Nos. 8675/15 & 8697/15, ¶ 167 (Feb. 13, 2020), https://hudoc.echr.coe.int/fre?i=001-201353 [https://perma.cc/7ZUE-GN2K] ("Contracting States have the right to control the entry . . . of aliens."); Hirsi Jamaa v. Italy, App. No. 27765/09, ¶ 113 (Feb. 23, 2012), https://hudoc.echr.coe.int/fre?i=001-109231 [https://perma.cc/M9S8-PWXK] ("[C]ontracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens."). Since *Abdulaziz*, the ECtHR has explicitly limited this right and has subjected it to international human rights law duties, inclusive of non-refoulement. *See* Abdulaziz v. United Kingdom, App. No. 9214/80 (May 28, 1985), https://hudoc.echr.coe.int/eng?i=001-57416 [https://perma.cc/5XK8-8EYR].

legal mobility out of the threshold of belonging to the state. But the legal designation of belonging assumed different contents: commonality with a Pan-European culture larger than the state (1873–1919); the race, religion, or language of a minority smaller than the state (1919–1940); and strong and enduring ties with the state and its culture (post-1948).

Further, the history of human rights law shows that since the creation of the UDHR, enforcement bodies have significantly broadened the juridical interpretation of "own country," radically expanding the scope of mobility. I propose ways to press these bodies into stretching the juridical definitions of "continuity" further, extending the range of ways in which individuals can assert before courts that they belong "sufficiently" to gain protection from a state that is not the one of their formally prescribed nationality. In this way, litigating the human right of return could support protection under the 1951 Refugee Convention by meeting the needs of individuals who are on the move, regardless of whether they qualify as refugees.

This historical review focuses on Europe. It is not only connected to the rest of the world through its colonial and exploitative past, but also through the role that the ECtHR is now playing in governing the mammoth crisis unfolding across the Mediterranean Sea.

A. 1873–1919

In the first period (1873–1919), the Resolution of the Institut de Droit International ("IDI") in 1892 framed the state's control over its borders (who can enter the state) and associated population (who can form the bonds of the political community and on what terms) as "a logical and necessary consequence" of its sovereignty and independence.[80] But the Resolution qualified this prerogative of the state by morality, defined through Europe's cultural, historical, and racial dimensions,[81] and went

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80. Institut de Droit International [IDI], *Resolution Concerning International Regulations on the Admission and Expulsion of Aliens*, art. 6, 1892-Gen-01 (1892) [hereinafter *IDI Resolution*]; Burlingame-Seward Treaty art. 5, U.S.-China, July 26, 1868, 16 Stat. 739.

81. Henry Bonfils, Manuel de Droit International Public (Droit des Gens) [Manual of International Public Law (Law of Nations)] 19 (1914) (describing how European collective consciousness accepted, as the highest form of morality that ever existed, a "community of historical tradition" and a "mutual understanding that even in Europe needed thousands of years"); *see also* Thomas Lawrence, The Principles of International Law 59, 85 (1895) (contending that outside this elusive normative constraint, civilization, there was no "no general rule" that could

on to say that the "[f]ree entrance of aliens to the territory of a civilized state may not be generally and permanently forbidden."[82]

According to this logic, a state was not legally obligated to grant entry, but by refusing to do so it paid a price in loss of status and diminished membership in the "family of nations." William Hall, the author of possibly the most influential English textbook on international law of the period, referred to the discretion of a state over its borders as a "privilege" of sovereignty.[83] Alas this privilege was not absolute, and remained restricted by culture, or "civilization."[84] Hall declared that "[f]or a State to exclude all foreigners would be to withdraw from the brotherhood of civilized peoples."[85] Other members of the IDI voiced similar opinions.[86]

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be "laid down" in the determination of sovereignty, and that "[e]ach case" had to be "judged on its own merits by the powers who deal with it").

82. *IDI Resolution*, *supra* note 80.

83. William Edward Hall, A Treatise on International Law 200–01 (2d ed. 1884) (nothing that this privilege "follow[ed] from the independence of a state"). But a state could not draw nationality in an over-inclusive fashion by extending nationality to individuals to whom it could not reasonably lay claim; naturalization in such a case would have been "inconsistent with a due recognition of the independence of the state to which he belongs." *Id.* at 201. A state "may grant or refuse the privileges of political membership . . . . Primarily therefore it is a question of municipal law to decide whether a given individual is to be considered a subject or citizen of a particular state." *Id.* For examples of other jurists making the same point, see, for example, Pasquale Fiore, International Law Codified and Its Legal Sanction 299 (Edwin M. Borchard trans., 5th ed. 1918) ("Every state may determine the persons who are to be considered citizens and foreigners, and the roles for the determination must be considered within the sphere of the state's autonomy and independence."); Robert Joseph Phillimore, Commentaries upon International Law: Vol. 1 320 (3d ed. 1879) ("It is a received maxim of international law, that a government of a State may prohibit the entrance of strangers into the country, and may therefore regulate the conditions under which they shall be allowed to remain in it, or may require and compel their departure from it.").

84. Hall, *supra* note 83, at 211 (explaining that this discretion was "necessarily tempered by the facts of modern civilization").

85. *Id.*

86. Lassa Oppenheim, International Law: A Treatise § 314 (2d ed. 1912) ("And it is this duty which must be denied as far as the customary Law of Nations is concerned . . . . The reception of aliens is a matter of discretion, and every State is by reason of its territorial supremacy competent to exclude aliens from the whole or any part of its territory."). However, since admission in the law was limited to civilized states, states that restricted the right to enter risked losing their membership in the Family of Nations. *Id.* ("A State . . . cannot exclude aliens altogether from its territory without violating the spirit of the Law of Nations and endangering its very membership of the Family of Nations."). For further discussion, see also Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad, or, the Law of

Jurists likewise differentiated the right of entry based on perceived levels of civilization.[87]

Gaining entry represented an absolute individual right. The Italian international jurist, and a member of the IDI, Pasquale Fiore, insisted that legislation granting governments discretionary power to deny entry to foreigners constituted "a flagrant violation of the inalienable rights of man."[88] Protection included one function—entering—where morality superseded nationality for the purpose of crossing borders. There may have also been a second function attaching nationality after entry. According to Fiore:

> Every person legally capable of exercising civil rights may freely choose the state to which he wishes to belong and . . . he may demand recognition of his citizenship and the enjoyment of all the rights and privileges granted by law to citizens.[89]

Protection was never universal, however. An IDI Resolution from 1892 exempted altogether "colonies where European civilisation is not yet dominant" from entry privileges, and construed racial mixing as legitimate grounds to bar entry.[90] Thus, one of the "rigorous limits" within which migration could be prohibited was "a fundamental difference of morals or civilization."[91] Another was legitimized by "a dangerous organisation or accumulation of foreigners presenting themselves en

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International Claims 46–47 (1919); Ernst Isay, *De la Nationalité* [*On Nationality*], 5 Hague Acad. Int'l L. 425, 451 (1924) ("Il est contraire au droit des gens qu'un État qui fait partie de la communauté internationale, s'entoure d'une muraille de Chine." ["It is contrary to international law for a State which is part of the international community to surround itself with a Great Wall of China."]); Mégret, *supra* note 49.

87. *E.g.*, Borchard, *supra* note 86, at 46 (claiming that nonarbitrary immigration restrictions are intimately linked to the "network of commercial treaties by which the states, of the white race at least, are bound together").

88. Pasquale Fiore, Droit International Public Suivant les Besoins de la Civilisation Moderne [Public International Law Following the Needs of Modern Civilization] 284–86 (Paul Pradier-Fodéré trans., 1868). Importantly, Fiore acknowledged the right of states to control their borders and to take measures (including rules on entry and residence) against the dangers that foreigners can pose. Yet, Fiore concluded, it was contrary to international law to prohibit entry without due cause. *See generally* Thomas Spijkerboer, European International Law and Migration Since 1848 (unpublished manuscript) (on file with author).

89. Fiore, *supra* note 88, at 298.

90. *IDI Resolution*, *supra* note 80, art. 5.

91. *Id.* art. 6.

masse."[92] Five years later, in 1897, a draft convention of immigration restricted mobility "within the rigorous limits of the necessities of the social and political order."[93]

Like the IDI, states' practice on both sides of the Atlantic adopted an expansive interpretation of the right of entry as a pre-existing "inherent and inalienable right of man."[94] But, simultaneously, states differentiated their application on the basis of race, adopting laissez-faire policies only when concerned with white migrants.[95]

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92. *Id.* arts. 5–6. In contrast, "the men of 1873" explicitly excluded the protection of the domestic labor market from offering a valid ground for non-admission. *Id.* art. 7.

93. *Id.* art 2.

94. For example, a treaty concluded between the United States and China in 1868 recognized "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of free migration and emigration of their citizens . . . from the one country to the other, for purposes of curiosity, of trade, or as permanent residents." Burlingame-Seward Treaty, *supra* note 80, art. 5.

95. This period—the 1860s and 1870s—is today widely considered the apex of laissez-faire migration of those traditionally "included" in European civilization: white individuals. In their cases, imperial states kept their borders either not codified or lightly codified and had poorly enforced laws restricting immigration. Around the Atlantic, states had abolished passport requirements and most internal document checks, while across the colonies they showed high degrees of hospitality toward the immigration of white settlers. *See generally, e.g.*, Kal Raustiala, *The Evolution of Territoriality: International Relations and American Law*, *in* Territoriality and Conflict in an Era of Globalization (Miles Kahler & Barbara Walter eds., 2006); Adam McKeown, Melancholy Order: Asian Migration and the Globalization of Borders (2011); Timothy J. Hatton & Jeffrey G. Williamson, Global Migration and the World Economy: Two Centuries of Policy and Performance (2006); Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law (1996); *see also* Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 Yale J.L. & Humans. 51, 55 (2016). States' policies on the movement of persons across borders were liberal in the second half of the nineteenth century, when Lorimer wrote. *See* The Movement of Persons Across Borders, *supra* note 68, at 3; John Torpey, The Invention of the Passport: Surveillance, Citizenship, and the State 93 (1999). Importantly, though, while mobility was often reserved for white migrants and Europeans, in practice it was exercised mainly by those who were financially better-off. Leaving and staying remained particularly difficult for the lower economic classes. Jane Caplan & John Torpey, *Introduction*, *in* Documenting Individual Identity: The Development of State Practices in the Modern World 10 (Jane Caplan & John Torpey eds., 2001). From the late 1880s onward, the era of relative open borders seemed to end, and governments began instituting more immigration controls. But, on the ground, free movement of white Europeans persisted, at least until the outbreak of World War I. *See, e.g.*, Gérard Noiriel, The French Melting Pot: Immigration, Citizenship, and National Identity (Geoffroy De Laforcade trans., 1996); Torpey, *supra*

Thus, white Europeans, in particular those well-to-do economically, exercised free (subjective) choice in mobility: The right of entry was attached to their own "nature" and followed them irrespective of borders.[96] According to the Swiss jurist Johann Caspar Bluntschli, such an individual was "not absorbed in the State, but develop[ed] himself independently, and exercise[d] his rights, not according to the will of the sovereign State, but according to his own."[97] It was not considered "worthy of the state to hold" him "as if he were a serf, if he wishes to leave his home and hopes to find in another state better conditions for his advancement."[98]

By contrast, non-Europeans and non-whites were deprived of this discretion.[99] Their entry was a matter of state consent and was often left

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note 95, at 93 ("Late nineteenth century until WWI has been frequently viewed as an unexampled era of free movement in the modern age."); McKeown, *supra* note 95, at 42 ("By and large . . . the second half of the nineteenth century was an era of limited border controls."). In 1914, states increasingly reintroduced passport checks to control the entry and settlement of foreigners. Immigration control became permanent only after the Great War. Borders were codified as a site of control. *See* Torpey, *supra* note 95, at 111 (claiming that World War I "brought to a sudden close the era during which governments viewed foreigners without 'suspicion and mistrust' and they were free to traverse borders relatively unmolested").

96. On color line, see W.E.B. Du Bois, *The Color Line Belts the World*, *in* W.E.B. Du Bois: A Reader 42 (1995). Movement remained particularly difficult for the lower classes, not only with respect to leaving but also with staying; governments sometimes sought to remove "undesirables." Caplan & Torpey, *supra* note 95, at 10; *see also* Ann Curthoys, *Liberalism and Exclusionism: A Prehistory of the White Australia Policy*, *in* Legacies of White Australia: Race, Culture and Nation (Laksiri Jayasuriya, David Walker & Jan Gothard eds., 2003); Uday Singh Mehta, Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought (1999); Frédéric Mégret, *Transnational Mobility, the International Law of Aliens, and the Origins of Global Migration Law*, 111 AJIL Unbound 13 (2017).

97. Johann Caspar Bluntschli, The Theory of the State 58–59 (1875).

98. Johann Caspar Bluntschli, *Freedom, and Rights of Freedom*, *in* Cyclopaedia of Political Science, Political Economy, and of the Political History of the United States 281, 282–83 (John Joseph Lalor ed., 1881) ("[I]t was a long time before freedom of emigration was acknowledged. It is not acknowledged everywhere even to-day. But the state certainly has a right in this matter, viz, that the emigrant shall beforehand fulfil his indispensable duties toward his native country, and shall not, apparently to evade or mock the law of the land, simply step out of his previous allegiance to one government into allegiance to another.").

99. The result was contradictory patterns of immobility and coerced mobility. *See, e.g.*, Arjun Appadurai, *Putting Hierarchy in Its Place,* 3 Cultural Anthropology 36, 37 (1988) ("[N]atives are not only persons who are from certain places, and belong to those places, but they are those who are somehow incarcerated, or confined [to] those

subject to contradictory patterns, either coerced movement or complete immobility.[100]

This law, reflected by the IDI 1892 Resolution, incorporated mobility as formative. Border-crossing was not simply the physical movement from one location to another. Rather, the collective actions of individuals who shared the same European morality as they crossed borders stood for self-ascription and the fulfillment of the full and rich unfolding and the destination of mankind.[101] According to the Scottish international lawyer James Lorimer, a "civilized" individual carried a "right to exist, as a person."[102] This right to "energise freely" included the freedom to choose one's "own sphere of action" and left the person with the authority to select jurisdictions and take on the identity of a new location.[103] Moreover, border crossing also established a distinct cultural realm of "civilization" above the state, or what Bluntschli referred to as "la liberté des relations internationales."[104] Thus, closing borders for those who shared morality meant that "nations, as members of humanity" failed in what they were "bound" to do, which was "to respect the links that unite them."[105] When a "moral" individual was prevented from crossing

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places."). Instead, his entry was a matter of state consent, and motivated by political impulses and economic interests of colonial states. In practice, he was left subject to contradictory patterns: either coerced mobility or no mobility. Imperial nation-states progressively heightened policing of their borders and introduced more and more restrictions to limit or bar migration of non-Europeans (non-whites). *See* BORCHARD, *supra* note 86, at 46 (implying that nonarbitrary immigration restrictions intimately linked to the "network of commercial treaties by which the states, of the white race at least, are bound together").

100. *E.g.*, MCKEOWN, *supra* note 95; HATTON & WILLIAMSON, *supra* note 95; NEUMAN, *supra* note 95; Munshi, *supra* note 95.

101. *See* sources cited *supra* note 100.

102. JAMES LORIMER, THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES 438 (1883). For a detailed analysis of the writing of Lorimer, see generally Karen Knop, *Lorimer's Private Citizens of the World*, 27 EUR. J. INT'L L. 447 (2016).

103. *Id.* In regard to nations, Casper Sylvest argues that Lorimer's conception is reminiscent of Mill's account of the individual in the concern for freedom and the development of character. Casper Sylvest, *International Law in Nineteenth-Century Britain*, 75 BRIT. Y.B. INT'L L. 9, 51–53 (2004).

104. JOHANN CASPAR BLUNTSCHLI, LE DROIT INTERNATIONAL CODIFIÉ [INTERNATIONAL LAW CODIFIED] 381 (1874).

105. *See Chronique des Faits Internationaux* [*Chronicle of International Events*], 1 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 555 (1894); Mégret, *supra* note 49, at 176 ("[L]'idée de communauté internationale qui fait que les nations, en tant que membres de l'humanité, sont tenues de respecter les liens qui les unissents." ["[T]he

borders, "civilization" failed. Conversely, when such an individual successfully crossed, "civilization" triumphed.

Nationality, or political belonging within a state, remained subsidiary. At the end of the 19th century, laws governing nationality as an international legal concept were relatively new,[106] and there was still "no universal agreement as to the conditions or tests which determine to what State sovereignty each individual should be subject."[107]

At around the same time, when the jurists of the IDI[108] were shaping a right to enter that took race into account, they were simultaneously also involved in the formulation of the Treaty of Berlin (1878).[109] This

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idea of an international community means that nations, as members of humanity, are required to respect the ties that unite them."]). The same author went as far as to suggest that "the rule of the equality of states is an obstacle to states distinguishing between the foreigners that they intend to keep at bay: one cannot push back the subjects of one nation and at the same time accept two from another." ([L]a règle de l'égalité des Etats fait obstacle à ce qu'un gouvernement distingue entre les étrangers qu'il entend éloigner de son territoire: il ne saurait repousser les sujets d'une nation et en même temps admettre deux d'une autre."). *Id.*

106. The concept of nationality emerged only in the nineteenth century, thus explaining its absence from earlier legal treatises. *See, e.g.*, Note, *Draft Convention on the Law of Nationality*, 23 Am. J. Int'l L. 21, 39 (1929); Patrick Weil, How To Be French: Nationality in the Making Since 1789 258–59 (Catherine Porter trans., 2008) (explaining origins of the term); Ruth Donner, The Regulation of Nationality in International Law 21 (2d ed. 1994) (noting that Grotius did not address the concept of nationality as such); J. W. Garner, *Uniformity of Law in Respect to Nationality*, 19 Am. J. Int'l L. 547, 550 (1925) (noting that the French Institute of International Law had considered problems of nationality from 1880 forward); Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 Emory L.J. 1411, 1422–23 (1997); Peter J. Spiro, *A New International Law of Citizenship,* 105 Am. J. Int'l L. 694, 700 (2011). Thus, jurists, for example, still regarded awkward conflicts of nationality laws as exceptional. *See, e.g.*, John Westlake, International Law Part I: Peace 231–33 (1910); Bluntschli, *supra* note 104, at 364; George Cogordan, La Nationalité au Point de Vue des Rapports Internationaux [Nationality from the Point of View of International Relations] 7 (1890); Alphonse Rivier, Principes du Droit des Gens [Principles of the Law of Gender] 303 (1896); André Weiss, Traité Élémentaire de Droit International Privé [Elementary Treatise on International Private Law] 7 (1886).

107. McKeown, *supra* note 95, at 111 ("[T]here is no universal agreement as to the conditions or tests which determine to what State sovereignty each individual should be subject.").

108. Koskenniemi, *supra* note 11, at 70 ("The Men of 1873—the group of European lawyers who founded the Institut de droit international and reinvented the discipline of international law . . . ."). *See generally* Martti Koskenniemi, *The Politics of International Law—20 Years Later*, 20 Eur. J. Int'l L. 7, 18 (2009).

109. Treaty of Berlin, July 13, 1878, 153 C.T.S. 171.

treaty dealt with the consequences of the war in 1877 between Russia and Turkey, which involved three Balkan states.[110] Article 44 of the Treaty conditioned recognition of Serbia, Montenegro, and Romania as de jure sovereigns, and Bulgaria as a de facto sovereign state, on their acceptance of a clause requiring religious tolerance and prohibiting any form of discrimination based on religious beliefs.[111]

In this conceptualization, state recognition of religious equality indicates its alignment with the principles of "civilization," effectively signaling its preparedness for legal status. According to Johann Caspar Bluntschli:

> Europe is "impressed" with "the conviction" that a state's "laws and customs" can be qualified "in the interests of humanity and civilization" . . . . The reception of the Roumanian State into the family of European States is thus insured to Roumania under the special proviso that the differences of creed shall not be a hindrance in the enjoyment and exercise of civil and political rights . . . . Only when this rule has been complied with, the European Powers will be bound to recognise Roumania as an independent European State. Only under this proviso the Great Powers of Europe will treat with Roumania as with a European State which has acquired its full sovereign rights.[112]

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110. The Congress of Berlin, consisting of representatives of the six Great Powers, assembled in Constantinople to discuss the Balkan situation and plan a response to the Bosnian uprising.

111. Treaty of Berlin, *supra* note 109, art. 44 ("In Romania the difference of religious creeds and confessions shall not be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of civil or political rights, admission to public employments, functions, and honors, or the exercise of the various professions and industries, in any locality whatsoever. The freedom and outward exercise of all forms of worship shall be assured to all persons belonging to Romania, as well as to foreigners, and no hindrance shall be offered either to the hierarchical organization of the different communions, or to their relations with their spiritual chiefs. The subjects and citizens of all the Powers, traders or others, shall be treated in Romania without distinction of creed, on a footing of perfect equality."). Identical provisions of negative rights (providing for non-discrimination or negative equality) were inserted into the treaties with Serbia (art. 35) and Bulgaria (art. 5). Article 44 made religious liberty a basic principle of European public policy and an "established procedure" of the legal system. *See generally* Inis L. Claude Jr., National Minorities: An International Problem (1955).

112. Johann Caspar Bluntschli, Roumania and the Legal Status of the Jews in Roumania: An Exposition of Public Law (Anglo-Jewish Assoc. trans., 1879), https://www.jstor.org/stable/60235810.

As noted, William Hall used the notion of entry as a criterion for establishing morality and, consequently, the sovereign status of the state.[113] This allowed for correction by border crossing. By contrast, Johann Caspar Bluntschli invoked religious freedoms to confer the same "nature" and status on a state. Now, the emphasis shifted to correction within the state, through the interaction between individuals as rights-holders and states as entities with obligations.

"On the books," sovereignty was a matter of *territorial exclusivity*, with control over borders constituting an integral element of statehood.[114] In practice, sovereignty was also a product of a *particular moral superiority* that could tolerate territorial discontinuities and gaps (a "gift of civilization"). Under the former, it took on physical content and was contained in space and time, presuming the integrity and fixity of borders—between people and between territories.[115] Territory delimited the sphere of absolute

113. *See* Hall, *supra* note 83.

114. *See* Lawrence, *supra* note 81, at 136 ("International Law regards states as political units possessed of proprietary rights over definite portions of the earth's surface."); John Westlake, Chapters on the Principles of International Law (1894), *reprinted in* The Collected papers of John Westlake on Public International Law 131 (Lassa Oppenheim ed., 1914) ("Each state has a sovereignty in and over its territory . . . . A state may exclude other states from doing acts of sovereignty in its territory."); Bluntschli, *supra* note 97, at 202–03 (noting that a sovereign enjoyed a "complete power . . . to enforce its laws, execute its decrees, and exercise its jurisdiction," as well as the power to exclude "every other State or power from . . . interference with its territory"); Lassa Oppenheim, International Law: A Treatise 194 (1st ed. 1905) (claiming that states possessed "independence and territorial as well as personal supremacy" which could "naturally extend or restrict their jurisdiction as far as they like"). Later, in a 1907 speech, Lord Curzon insisted that the "least encroachment on the territory of another [as] an act of injustice." *See generally* Lord George Curzon of Kedleston, Romanes Lecture at the Sheldonian Theatre of Oxford University (Nov. 2, 1907).

115. Henry Wheaton, Elements of International Law § 78 (Richard Henry Dana, Jr. ed., 8th ed. 1866) (claiming that each sovereign state was broadly understood to "possess[] and exercise[] exclusive sovereignty and jurisdiction throughout the full extent of its territory" and that "no State can, by its laws, directly affect, bind, or regulate property beyond its own territory, or control persons who do not reside within it, whether they be native-born subjects or not") (internal quotations omitted). For a discussion of territorial jurisdiction in international law, see Raustiala, *supra* note 68, at 2508 ("That defined territory demarcated, for most purposes, the reach of the sovereign's law."). For a discussion of territorial jurisdiction in the national context, see Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 Mich. L. Rev. 843, 843 (1999) (mapping the territories "within which formally defined legal powers [were] exercised by formally organized governmental institutions"), and Richard T. Ford, *Geography and Sovereignty: Jurisdictional Formation and Race Segregation*, 49 Stan. L. Rev. 1365, 1416–17 (1997).

legal autonomy (internally) of the state and its relationship with other states and the rest of the world (externally). Under the latter, sovereignty tolerated borders that were substantively permeable, indeterminate, and potentially mobile, as morality was the foundation of the creation of the borders of the state. State relationships with other states and the rest of the world were characterized by hybridity, not fixity, of borders. The idea of a sovereign population remained fluid, with moral values offering a legitimate basis for some form of admission into the polity. The political community of the state was effectively expanded outward to include a cultural zone that exceeded the territory of the state proper and incorporated all those within its "nature."

B. 1919–1940

If 1873–1919 constituted the first period in my typology, the second spanned the years between 1919 and the 1940s, aligning with the legal developments following the Versailles Treaty in the aftermath of World War I. Much like the earlier regime, this law yielded to state authority in matters of border and population.[116] But it constrained this authority by the Minorities Treaties of 1919.[117] The Permanent Court of International Justice ("PCIJ") held: "[G]enerally speaking, it is true that a sovereign State has the right to decide what persons shall be regarded as its nationals."[118]

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116. A "defined territory" is one of the qualifications a "state as a person of international law should possess[]" according to the most widely accepted international convention on statehood. *See* Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 3801–24. For the writing of jurists, see, for example, Paul Fauchille, *Paul Fauchille on the Rights of Emigration and Immigration*, 31 Population & Dev. Rev. 765, 767 (2005) ("[Sovereignty] necessarily involve[d] the maintenance by the state of the unity and integrity of its constituent elements, among the foremost of which is its population."). In fact, nationality questions constituted "the sphere in which the principles of sovereignty find their most definite application," the Polish lawyer Szymon Rundstein added. League of Nations Committee of Experts for the Progressive Codification of International Law, *Nationality*, 20 Am. J. Int'l L. 21, 23 (1926); *see also* Paul Weis, Nationality and Statelessness in International Law 102 (1956) ("The power of a state to confer its nationality is derived from its sovereignty. It is an attribute of territorial supremacy.").

117. Treaty Between the Principal Allied and Associated Powers and Poland art. 4, ¶ 1, June 28, 1919, 225 C.T.S. 412 [hereinafter Polish Minority Treaty]. The treaty forced new states to give nationality to minorities who stratified two conditions: principle of habitual residence and the principle of origin. The Polish Minority Treaty was the first Treaty signed, but was later duplicated for all new states.

118. Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7, at 16 (Sept. 15) (discussing whether the national-ness of the new Polish state

However, "it is no less true that this principle [of state control over borders and peoplehood] is applicable only subject to the [Minority] Treaty obligations . . . ."[119]

The Minorities Treaties extended a right to individual members who belonged to certain racial, religious or linguistic minorities to choose their nationality,[120] and embedded two mobility rights within this provision.[121] Those who opted for the nationality of another state were required to *transfer* "their place of residence to the State for which they have opted."[122] Note, however, that the Minorities Treaties did not specify whether transfer was a right or a duty.[123] The optants theoretically had the liberty to select "any other nationality which may be open to them."[124] But in

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should affect the relationship between that state and individuals in matters of the acquisition of citizenship).

119. *Id.*

120. Polish Minority Treaty, *supra* note 117, art. 9 ("In towns and districts where there is a considerable proportion of Polish nationals belonging to racial, religious or linguistic minorities, these minorities shall be assured an equitable share in the enjoyment and application of the sums which may be provided out of public funds under the State, municipal or other budget, for educational, religious or charitable purposes.").

121. Treaty of Versailles art. 91, ¶ 6, June 28, 1919, 225 C.T.S. 188; Polish Minority Treaty, *supra* note 117, art. 3; Treaty of St. Germain-en-Laye art. 80, Sept. 10, 1919, 226 C.T.S. 8 ("Persons possessing rights of citizenship in territory forming part of the former Austro-Hungarian Monarchy, and differing in race and language from the majority of the population of such territory, shall . . . be entitled to opt for Austria, Italy, Poland, Roumania, the Serb-Croat-Slovene State, or the Czecho-Slovak State, if the majority of the population of the State selected is of the same race and language as the person exercising the right to opt.").

122. Treaty of Versailles, *supra* note 121, art. 91, ¶ 6 ("Persons who have exercised the above right to opt may within the succeeding twelve months transfer their place of residence to the State for which they have opted."); Polish Minority Treaty, *supra* note 117, art. 3 (announcing that members of minorities who exercised option "must, except where it is otherwise provided in the Treaty of Peace with Germany, transfer within the succeeding twelve months their place of residence to the State for which they have opted").

123. Under the Versailles Peace Treaty, Germans exercised a choice ("may opt" to transfer); under the Minority Treaty, however, minorities were required to relocate to perfect their option ("must" transfer). *Compare* Treaty of Versailles, *supra* note 121, art. 91, ¶ 6, *with* Polish Minority Treaty, *supra* note 117, art. 3. In Upper Silesia, optants were not required to leave to perfect their option, but were obliged to do so if requested by the state authorities. Georges Kaeckenbeeck, The International Experiment of Upper Silesia 183–86 (1942). For a more detailed discussion of the topic, see Nathaniel Berman, *"But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 Harv. L. Rev. 1792, 1830 (1993).

124. Polish Minority Treaty, *supra* note 117, art. 3.

practice, they often reunited with their kin-states.[125] This left transfer a function of consent.

At the same time, minority members who had fled the territories that were subsequently established as new states during wartime, but who nevertheless opted for their nationality, were entitled to a right of return dependent on their birth "in the territories ceded to [the new state] of parents habitually resident there."[126] Thus, repatriation of minority members, specifically refugees, was not contingent on their political allegiance—what the International Court of Justice ("ICJ") would later call a "genuine link"—to the state and its institutions.[127] Instead, it was based on the "principle of habitual residence and the principle of origin."[128] According to the PCIJ, which systematized and implemented the Minorities Treaties, domicile at the moment of origin established a "moral link" between individuals and their place of birth.[129] This link generated protection irrespective of whether the claimants or their parents consequently fled that territory, and regardless of whether the state accepted the legitimacy of this link.[130]

This scheme left return, including a formal status post entry, a mandatory obligation for new and enlarged states, directly influencing the status and recognition of these states. But the scope of recognition was restricted in three ways: (i) by duty-holder (applying only to states that signed a Minority Treaty), (ii) by right-holder (applying only to certain members of protected minorities), and (iii) by time (twelve months after the signing of the Treaty for the right of transfer and two years for that of return).[131]

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125. Josef L. Kunz, *L'Option de Nationalité* [The Nationality Option], 31 COLLECTED COURSES HAGUE ACAD. INT'L L. 107, 152 (1930) (noting that minority members reunited with those "in the same territory" and with "men of the same race, language and civilization").

126. Polish Minority Treaty, *supra* note 117, art. 4.

127. Nottebohm (Second Phase) (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4, at 23 (Apr. 6).

128. Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7, at 18 (Sept. 15).

129. *Id.* ("The establishment of his parents on the territory on this basis creates between the child and his place of birth a moral link which justifies the grant to him of the nationality of this country; it strengthens and supplements the material bond already created by the fact of his birth.").

130. *Id.* at 15 ("without attaching any importance to the political allegiance of these persons").

131. Polish Minority Treaty, *supra* note 117, arts. 3–4.

After 1918, mobility—through the right to return—was no longer an accessory to individual self-determination and the flourishing of a cultural realm of "civilization" beyond the state, as in the preceding period with the entry right. Rather, it served to allocate minority members to a single territorial jurisdiction and assign to the governing power of that one state the responsibility to confer formal status upon those viewed as potential threats to peace.[132] Before, commonality with a Pan-European culture larger than the state had supplanted nationality for the purpose of border crossing. After 1918, belonging within a minority culture smaller than the state, coupled with a "moral link" to the territory at the moment of birth, enabled border crossing, and was used in the service of administrating nationality.

Instead of sovereignty as both a matter of territory ("in the books") and also of culture ("in practice"), the PCIJ now defined sovereignty predominantly by closed borders, and situated it along a continuum ranging from a state that was still "on its way" to a territorial state de jure.

Max Huber, a Swiss lawyer and towering figure in the history of the PCIJ, differentiated between sovereignty that "signifies independence" and sovereignty that is still "progressive[ly] intensify[ing] . . . [its] State control."[133] He differentiated between sovereignty that "signifies independence" and sovereignty that is still "progressive[ly] intensify[ing] . . . [its] State control."[134] He defined independence "in regard to a portion of the globe" as "the right to exercise therein, to the exclusion of any other State, the functions of a State."[135] Sovereignty of the latter type still contained "gaps, intermittence in time and discontinuity in space" in "the exercise of [its] territorial sovereignty."[136] Indeed, "[t]he fact that a State cannot prove display of sovereignty as regards such a portion of

132. President Woodrow Wilson, Speech at the Plenary Session of the Peace Conference (May 31, 1919) (claiming that the discontent of minorities provided the fertile source of the next war).

133. *See* Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

134. *Id.* at 867.

135. *Id.* at 838.

136. *Report of the Int'l Comm. of Jurists on the Aaland Islands*, *supra* note 45. After receiving the report of the Commission of Jurists on the question of jurisdiction, the Council appointed the Commission of Rapporteurs to advise the Council on the resolution of the dispute on the merits. James Sheehan, *The Problem of Sovereignty in European History*, 111 Am. Hist. Rev. 1, 2 (2006) ("As a doctrine, sovereignty is usually regarded as unified and inseparable; as an activity, however, it is plural and divisible.").

territory cannot forthwith be interpreted as showing that sovereignty is in-existent."[137]

In the case of new and enlarged states that signed a Minority Treaty, sovereignty tolerated temporary hybridity and permeability of borders. Return rights effectively served to expand the political community of these states outward, encompassing a Pan-European cultural zone that exceeded the physical territory of a given state and included minority cultures. This resulted in (i) fluidity of population, and (ii) borders that were open because the minority culture was closely related to the creation of the borders of the state. The PCIJ insisted that the Minority Treaty "considerably extend[ed] the conceptions of minority and population."[138] And, furthermore, at the state's "final recognition as an independent state and of the delimitation of her frontiers," the new state "signed provisions which establish[ed] a right to its nationality"[139] for members of minorities. This right also encompassed those who were not, in fact, in the territory that then became the new state. Thus, new and enlarged states remained temporarily a fluid and dynamic space of relationships determined by minority cultures. This hybridity ended two years after the signing of the Minorities Treaties.

C. Post-1948

This brings us to the third period in my typology: the modern human rights era, marked by the Universal Declaration of Human Rights of 1948. The law defers to the supremacy of state power over borders and people,[140] but concurrently, human rights impose limitations on this power in the case of both nationals and non-nationals who are within the state's jurisdiction. The so-called right to freedom of movement created a right of return to one's "own country," and equated "own country"

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137. *Id.*

138. Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7, at 24 (Sept. 15).

139. *Id.* at 15 (citing Article 1 of the Polish Minority Treaty). On the same temporal simultaneity and its significance, see also German Settlers in Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 37 (Sept. 10) (noting that the Minority Treaty and "the Peace Treaties concluded on the same day").

140. Daniel-Erasmus Khan, *Territory and Boundaries*, *in* The Oxford Handbook of the History of International Law 225, 234 (Bardo Fassbender & Anne Peters eds., 2012). For a state's capacity to use borders to govern population, see Damiano Canale, *Walled Borders, Territoriality and Sovereignty: A Typology*, 1 Athena 37, 37 (2021).

with the state of formally prescribed nationality. Within this formulation, as noted, allowing the return of one of the state's "own" is obligatory irrespective of consent on account of "the special relationship of a person to . . . (her or his) country."[141] The right guarantees *thick* protection, including the two functions of remaining and returning.

This protection is universal. But because of the asymmetry between exit (universal) and entry (limited to those returning to their "own country"), in practice, the protection is restricted to formal citizens. Hence, in the paradox articulated by Hannah Arendt, the right of return of 1948 was an expression of freedom of movement *only* for citizens.[142] The result was legal mobility sanctioned at the dispensation of the state.

Legal sovereignty now rests within the confines of closed borders and no longer exists in the intermediary space between open and closed borders (1870s) or along a spectrum of closed borders (1919).[143] This revised iteration of the law eschews mobility as formative, with border-crossing remaining exceptional.[144]

However, in the seventy-five years since 1948, and especially more recently, human rights courts and quasi-judicial institutions have stretched the definition of "own country" to include not only formal nationality but also long-standing residency and ongoing participation in the culture of the state. In this revised formulation, continual residency supplies the connecting criterion that determines whether individuals without citizenship can claim a state as their "own."

For example, the UNHRC determined that Canada was the "own country" of a non-national Somali man who had entered the country at age four. The Council concluded that he had "close and enduring

141. General Comment No. 27, *supra* note 19, ¶ 19. *See also* sources cited *supra* note 32.

142. Hannah Arendt, Origins of Totalitarianism 296–97 (1958).

143. Article 2(4) of the U.N. Charter commits to the "territorial integrity [and] political independence" of states.

144. In his book on the origins and drafting of the UDHR, Johannes Morsink treats separately as "special" the provisions dealing with border crossing—including those involving the departure from and return to a country, asylum, and nationality—because they were not ordinarily found in domestic constitutions and depended on more than one state. *See* Morsink, *supra* note 76, at 72; *see also* Jane McAdam, *An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty*, 12 Melb. J. Int'l L. 1, 4 (2011) ("[D]espite the longstanding ideal of free movement in Western political and philosophical thought, it has in practice always been subject to state restrictions.").

connections" to Canada, effectively designating it his "own country."[145] It relied on the extensive emotional bonds the man had developed with the state over an extended period to serve as a substitute for formal nationality, providing him with protection from deportation.[146] This decision recognizes that "home" or a sense of belonging for the purpose of legal mobility can extend beyond formal citizenship and be rooted in strong emotional ties within the state; the Council considered "such matters as long standing residence, close personal and family ties and intentions to remain," while, simultaneously, also "the absence of such ties elsewhere."[147]

Expansion of "own country" through case law and U.N. treaty bodies is radical precisely because it sanctions mobility that subverts the exclusive right of the state within its territory or jurisdiction. Courts and quasi-judicial institutions inserted border-crossing into an international legal regime that forgoes mobility as corrective, assumes that individuals already belong to the jurisdiction of some state, and respects the sovereign control of states over their borders. These innovative advances in the definition of "own country" derive from an ongoing personal-territorial continuity in the state. But temporal continuity in the territory is an arbitrary legal category: It privileges those who are physically present in the territory at a particular moment and punishes those who are not, regardless of circumstances.[148]

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145. Warsame v. Canada, Comm. No. 1959/2010, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/102/D/1959/2010, ¶¶ 8.4, 8.5 (July 21, 2011); Nystrom v. Australia, Comm. No. 1557/2007, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/102/D/1557/2007, ¶ 7.4 (July 18, 2011). These communications do not rule on a refugee status. Instead, they concern circumstances similar to the Deferred Action for Childhood Arrivals program, or European case law on deportation of "second generation" non-nationals.

146. *Warsame*, Comm. No. 1959/2010, ¶ 8.4 ("[T]he Committee recalls its General Comment No. 27 on freedom of movement where it has considered that the scope of 'his own country' is broader than the concept 'country of his nationality.' It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. In this regard, it finds that there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality.").

147. *Id.*

148. *See generally* Moria Paz, *The Law of Walls*, 28 Eur. J. Int'l L. 601 (2017).

The example of Palestinian refugees is illustrative. Because of the intergenerational nature of their crisis, distinct generations of Palestinians make varied claims that relate to different forms of belonging and of "own state." Within the expanded UNHRC definition of one's "own country," which also includes informal definitions, first-generation Palestinian refugees would have likely qualified for return under the freedom of movement right, although their children might not have. Formal protection derives from adverse possession and they are two, three, or even four generations away from "domicile" in the usual sense in Palestine.[149] At the same time, the same threshold may *also* give second-generation Jewish settlers strong claims to the occupied territories. They were born and continue to reside there. In other words, the children of those who had expelled might end up with greater protection than the children of those who were ousted.

This outcome—as the passing of time legitimizes a wrong—is not limited to the Palestinian case. Other examples include the U.N. response to the Turkish occupation of Cyprus in 1974,[150] and earlier, the treatment by the PCIJ of German settlers in the territory that became Poland.[151]

Can the notion of "own country" be stretched further to capture continuities in a state outside personal-territorial presence so that it can include the status of the children of deportees, born post-dispossession and deportation? Some U.N. General Assembly ("UNGA") Resolutions expanded the meaning of "own country" under the right of return to capture the reality of the harm succeeding generations of Palestinians have

149. *See* Paz*, supra* note 18, at 781; *see also* Paz*, supra* note 50. This paper was completed before the current war between Israel and Gaza and the refugee crisis that ensued.

150. *See* Eyal Benvenisti, The International Law of Occupation 191–92 (2d ed. 2012); F. Stephen Larrabee, *Greek-Turkish Relations in an Era of Regional and Global Change*, 12 Se. Eur. & Black Sea Stud. 471, 472 (2012). For a discussion of the U.N. response, see generally Eyal Benvenisti, The Right of Return in International Law: An Israeli Perspective (unpublished manuscript) (on file with author) (describing how in 2003, the Secretary General of the United Nations, Kofi Annan, emphasized "the fact that the events in Cyprus happened 30 to 40 years ago and that the displaced people have had to rebuild their lives and their economies," and acknowledged the "legitimate claims" of both the refugees and those who currently reside in their property).

151. *See generally* Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7 (Sept. 15).

suffered.[152] For the purpose of return, this extension equates "own country" with a mix of traditions, customs, and ethnicity, and uses descent to challenge the exclusive authority of the State of Israel within its territory or jurisdiction in favor of the children of Palestinians who were expelled in 1948 or 1967. Here, the proxy for return to "own country" is long-standing territorial ties through culture and ancestry.

Musa Mazzawi, a pivotal figure in understanding the Palestine question within the framework of international law, succinctly encapsulated this proxy:

> A person's "country" is that to which he is connected by a reasonable combination of such relevant criteria as race, religion, language, ancestry, birth and prolonged domicile. Governments come and "go," and their political fluctuations and vagaries should not affect the fundamental rights of human beings, such as the right to return to one's own country and to have a homeland . . . A person's relationship to his country should not be at the mercy of politicians.[153]

UNGA resolutions are not considered binding.[154] If they were, they would allow descended generations of Palestinian refugees a return to Israel, a state with which they never had physical continuity but where their grandparents or other ancestors were born and lived, and from where they were forcibly expelled and dispossessed.[155]

Ironically, there exists a legal precedent that could be relevant for such an expansion: the British Mandate over Palestine.[156] In cases involving

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152. Resolution 194 of 1949 established the Conciliation Commission for Palestine ("UNCCP") to help the parties reach a final settlement, while reaffirming the rights of Palestinian refugees to return and restitution. G.A. Res. 194 (III) (Dec. 11, 1948). Resolution 3236 of 1974 reaffirmed the right of the Palestinians refugees to return to their homes and property. G.A. Res. 3236 (XXIX) (Nov. 22, 1974).

153. Musa Mazzawi, *Comment on the Middle East, in* The Right to Leave and to Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-20 June 1972 343–44 (Karel Vasak & Sidney Liskofsky eds., 1976).

154. In contrast, resolutions adopted by the Security Council, acting under Chapter VII of the U.N. Charter, are considered binding, in accordance with Article 25 of the Charter. U.N. Charter art. 25.

155. Paz, *supra* note 50.

156. *See Mandate for Palestine and Memorandum by the British Government Relating to Its Application to Trans-Jordan*, League of Nations Doc. C.529M.314 1922 VI (1922) [hereinafter *British Mandate for Palestine*]. Note, though, the British Mandate is not

Jews, the Mandate made a right to nationality a function of the "historical connection of the Jewish people with Palestine."[157] Thus, "historical connection" with a territory of a spiritual value (that is, a "National Home") acted as a proxy for juridical belonging, rather than ongoing physical presence.[158] The concept generated thicker protection: It enabled migrants to return a place with which they never had physical continuity, remain there, and acquire Mandate nationality (political belonging in a future state).[159]

Given that within the history of the human right to freedom of movement, "own country" has taken on a range of expansive juridical definitions and generated different degrees of protection, it is profitable to press human rights courts and quasi-judicial bodies to expand the legal meanings of "continuity." These courts and bodies can extend the ways in which individuals can come within the scope of protection. Two dimensions come into view: (i) the broadening of the legal understanding of "belonging" ("*how*" the person belongs) and (ii) the extension of the characterization of "home" ("*where*" the person belongs). Each of these dimensions is on a continuum and can take on a range of more or less expansive juridical definitions.

In considering the first dimension, a useful reference point is the landmark *Nottebohm* case of 1955, in which the judges held that citizenship goes beyond a mere formal status of membership.[160] They applied the principle of "real and effective citizenship"[161] to find that claims to having a home "which accorded with the facts," rather than a formal

universally acknowledged as capable of generating new legal claims. On the question of whether colonialism ended, see generally Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 169 (Feb. 25).

157. *British Mandate for Palestine*, *supra* note 156, pmbl. ("[T]he Mandatory should be responsible for . . . the establishment in Palestine of a national home for the Jewish people . . . ."); *see also* Declaration by Lord Arthur Balfour to Lord Walter Rothschild (Nov. 2, 1917); Palestine Citizenship Order 1925, Stat. R & O 1925/2 (Eng.).

158. *British Mandate for Palestine*, *supra* note 156, pmbl.

159. *Id.* art. 7; Palestine Citizenship Order, *supra* note 157.

160. Nottebohm (Second Phase) (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4, at 23 (Apr. 6) (decreeing that nationality must be "real and effective," in the sense of "[corresponding] with the factual situation").

161. *Id.* (holding that citizenship requires "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties").

legal-political status, could define valid political membership at the international level.

Nottebohm made the connecting criteria for deciding whether an individual without citizenship can claim a state as his "own" by demonstrating "real and effective" ties with the state. There may be other criteria for determining "how" a person belongs for the purpose of protection.[162]

One, as I have suggested above, is ancestry (as in the Palestinian or Jewish case). Another possible criterion is political. An interesting place to start is with Tendayi Achiume's argument that injustices associated with the past of colonial exploitation generate a form of political continuity.[163] Building on this theoretical work, a past of exploitation might be used by economic migrants from what were once colonized territories to make claims today for national admission and inclusion in Western states (entry with status following entry).[164] Here, admission is both personal and limited to those who have undergone dispossession. Individuals from Somalia and Nigeria seeking refuge from corruption and widespread poverty, therefore, may have grounds to seek entry to the United Kingdom but not the United States. Conversely, a person from Haiti could make an entry claim to the United States or to France but not necessarily to Canada. Those from Burkina Faso or Senegal could ask to enter France, and those from Eritrea may consider Italy as a destination. Whether the relationship of belonging is a matter of ancestry or politics, it generates individual admission, granting entry for particular people:

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162. For literature that grapples with the issue of "affinity" and related principles that substantiate claims to asylum, see, for example, Matthew J. Gibney, *Liberal Democratic States and Responsibilities to Refugees*, 93 Am. Pol. Sci. Rev. 169 (1999); Jean-François Durieux, *Three Asylum Paradigms*, Univ. Oxford Refugee Stud. Ctr. (Feb. 14, 2014), https://www.rsc.ox.ac.uk/news/three-asylum-paradigms-jean-francois-durieux [https://perma.cc/4LMS-B7V8].

163. E. Tendayi Achiume, *Migration as Decolonization*, 71 Stan. L. Rev. 1509, 1558 (2019) ("[M]igration as decolonization is at its core a corrective distributive justice argument").

164. *Id.* For other works that consider migration in relation to colonialism include, see generally B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. Refugee Stud. 350 (1998); Nadine El-Enany, Bordering Britain: Law, Race and Empire (2020); Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty*, 14 Melb. J. Int'l L. 392 (2013); Sarah Katherine van Walsum, The Family and the Nation: Dutch Family Migration Policies in the Context of Changing Family Norms (2008).

those of a given historical context (Palestinians/Israel) or of a certain colonial experience (Indians/United Kingdom).

A possible subsequent criterion on the spectrum, determining whether a non-national belongs "enough" to a state to establish a claim grounded in continuity, involves belongings associated with language or religion. Canada, for instance, privileges immigrants who can speak French.[165] In this case, linguistic commonality is "how" the individual belongs. It creates a much wider right to admission because the scope of protection extends to all people who speak the language.

Taken to the extreme, states might consider normative values exterior to the state to establish a relationship of belonging between a non-national and that state. One example could be the commitment to human dignity expressed in multiple legal instruments.[166] At least as a theoretical matter, this commitment creates a duty to let in when honoring the dignity of an individual requires entry as a practical matter. This might include human suffering caused, for example, by global warming. But at this point admission is universal, with "belonging" exercising regulatory power regardless of any relation between the claimant who asks for admission and a given country. In this interpretation, the legal entitlement can no longer be framed as a right to return to one's "own country." Rather than being tied to "belonging," it becomes one of universal admission or open borders.[167]

Furthermore, each of these points on the continuum of individual belonging can generate varying levels of protection, including a single function (remain in the state/no border crossing), a more robust protection with two functions (return and remain with some status), or yet an even stronger protection (return/formally prescribed nationality).

Just as the legal concept of "belonging" can be expanded, so can the legal characterization of "home." And so, "home" might square with "own country," with "own country" meaning a state of formally prescribed

165. Moria Paz, *The Tower of Babel: Human Rights and the Paradox of Language*, 25 EUR. J. INT'L L. 473, 489 (2014).

166. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 656 (2008) ("[T]he concept of 'human dignity' now plays a central role in human rights discourse."); *see also* U.N. Charter pmbl.; UDHR, *supra* note 1, art. 1; ICCPR, *supra* note 1, art.10. *See generally* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer & Eckart Klein eds., 2002).

167. For an argument for open borders, see generally Carens, *supra* note 46.

nationality (as under the UDHR), or that of long-standing residency (as under soft law expansion post-1948). "Own country" might also tolerate political and temporal anomalies, encompassing a future state (Jewish National Home).[168]

Deriving protection from belonging may be extended further to permit a definition of "home" that is different from a state. Thus, the territory itself can be the homeland. This can better capture indigenous claims, when the land, not the state, could be legally recognized as home. The Inter-American Court of Human Rights, for example, is moving in this direction.[169]

And, moreover, territory need not be limited to the immediacy of *jus soli*. The jurisprudence of the PCIJ, enjoying a chain of continuity with the ICJ and whose jurisprudence is still governing law today,[170] illustrates that equating "territory" with "home" for the purpose of establishing continuity with a state can incorporate past meanings. Recall that the PCIJ construed continuity with a particular land as a function of a "moral link" between individuals and their place of birth even if they consequently fled that territory, and used these ties to extend nationality. Likewise, the interwar era indicates that territorial presence can also take on a future meaning.[171] For example, in the "Territory of the Saar Regime," organized as a de facto state under international supervision,[172] membership was a function of "acquired domicile" and required taking

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168. Treaty of Versailles, *supra* note 121, art. 22 (sustaining the British Mandate over Palestine "until such time as [it is] able to stand alone").

169. *See* Moiwana Village v. Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005) (equating returning to "land" and returning "home" post-massacre).

170. *See, e.g.*, Legacies of the Permanent Court of International Justice (Christian J. Tams & Malgosia Fitzmaurice eds., 2013).

171. Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7, at 18 (Sept. 15) ("The establishment of his parents in the territory on this basis creates between the child and his place of birth a moral link which justifies the grant to him of the nationality of this country; it strengthens and supplements the material bond already created by the fact of his birth.").

172. *See, e.g.*, Treaty of Versailles, *supra* note 121, art. 45. Following Germany's defeat in the war, the highly industrialized Saar Basin was to be occupied and governed by the United Kingdom and France under a League of Nations mandate for a period of fifteen years. The Treaty created the Territory of the Saar Basin as a region that corresponded to neither preexisting sovereigns nor to preexisting nations. The Treaty's provisions concerning the Saar granted France certain rights in the Territory's coal mines "[a]s compensation . . . due from Germany for the damage resulting from the war." *Id.* Germany retained formal title, but France received ownership over its mines.

employment in the "mines or their accessories" for at least three years[173] as "*inhabitants*."[174]

A homeland that is not a state could also cover situations that involve a return to the same physical territory but under different political control. This may be the legal situation of Syrian refugees in Turkey. Turkey repatriated them to Syria, or the state of their nationality, but to a region that is under Turkish control.[175]

Each of these connecting criteria can also be situated on a spectrum. Consider again the example of Syrian refugees in Turkey. Such situations that involve a return to a physical territory under different political control extend the notion of "own country" to include (subjective) emotional links. These links—a place that is "felt" as a "homeland"—may assume both narrow and broad definitions. The former causes states to owe a duty of entry to small, predetermined subsets of people, and the latter to a larger and unspecified number of individuals from all around the world.

By hinting at the many ways in which individuals can assert before courts that they belong "enough" to gain protection, my goal was not to flesh out new legal claims that will necessarily pass muster. Likewise, I do not suggest that there is currently political opportunity for these expansions of membership. Such expansions may not necessarily be effective, and an individual's "own state" might default and fail to apply, implement, or enforce them. Expanding the conception of "own

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173. *Annex II: Official Journal of the Saar Basin Governing Commission*, 2 League Nations Off. J. 837 (1921) (defining inhabitant as "any person, irrespective of nationality and sex, who shall have had his legal residence in the Territory of the Saar Basin for a period of at least three years, during which period he shall have been subject to direct taxation . . . [and extended in] favor of persons furnishing proof, by the production of a certificate of employment, that they occupy a position which requires that their main residence be in the Territory of the Saar Basin.").

174. *Eighth General Report of the Saar Basin Governing Commission*, 2 League Nations Off. J. 837, 841 (1921) (encouraging the participation of "inhabitants" in the "economic and judicial life of the Region, not the state," so that they will have "more and more regard for . . . [the] interests [on the Region]").

175. *Rights Group: Turkey Forces Hundreds to Return to Syria,* AP News (Oct. 24, 2022), https://apnews.com/article/human-rights-watch-europe-turkey-middle-east-syria-6a7cba198e50a2b88e9a82c74fcf6352 [https://perma.cc/DW2B-L6SQ] ("[T]he government now aims to return increasing numbers of people to areas of northern Syria under the control of the Turkish military."); Carlotta Gall, *Turkey Starts Sending Captured Foreign Fighters Home From Syria*, N.Y. Times (Nov. 11, 2019), https://www.nytimes.com/2019/11/11/world/middleeast/turkey-isis-fighters.html [https://perma.cc/M6YW-LJMM].

country" may end up widening the gap between the de jure entitlement of an individual to stay or return and de facto recognition of this entitlement by their "own state." A state can dispossess "one of its own" of their nationality or otherwise exclude an individual. A state can also instrumentalize the definition of "belonging" to justify expulsion or transfer.[176] Rather, my point is that these expansions of "own country" are within a legal framework that construes jurisdiction territorially. They locate a duty-holder in one obvious state and derive protection from membership in that state.

There is probably a limit to the expansion of "own country" before courts risk upending the status quo and diluting the value of nationality as a central pillar of the international system (see Part IV). We saw that the human rights framework restricts the action of states relative to their own "nationals." It assumes that individuals already belong to the jurisdiction of a state and guarantees them the ability to exercise rights against that state. Under this system, political "belonging" is only to a (territorial) sovereign state, with boundaries of both inclusion ("us") and exclusion ("them") determined by national criteria. Drawing on moral, historical, or even subjective continuity to define "own country" might transform nationality from a mode of political belonging that is fixed by state law to one that is determined to a large degree by individuals from outside the state, whether or not they share political loyalty to the existing state and its institutions. Finally, once the door is opened to a more expansive definition of "own country" somewhere in the international system, it might be difficult to reject it outright elsewhere in the system.[177]

Human rights doctrine concerning the rights to remain and return is settled. The law establishes mobility from a certain threshold of "belonging" to a state. This claim does not ask human rights courts to create entry into a state. Rather, the claim itself already spells out the nature of individual membership in a single state ("own country") and identifies an obvious duty-holder that is responsible for the harm, whether or not the individual qualifies as a refugee. It defers to courts to ascertain

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176. *See, e.g.*, Paz, *supra* note 148.

177. The dissents in *Warsame* and *Nystrom* broaden the category of people who can raise the claim of "own country" so that it may include the subjective feelings of the individual. Warsame v. Canada, Comm. No. 1959/2010, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/102/D/1959/2010, ¶¶ 8.4, 8.5 (July 21, 2011); Nystrom v. Australia, Comm. No. 1557/2007, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/102/D/1557/2007, ¶ 7.4 (July 18, 2011).

the character of a specific belonging to a state. Such examinations necessitate delineation and examination of factual details, which align with the judiciary's expertise. These assessments do not contest prevailing concepts of borders and statehood but rather bolster the existing *status quo* by acknowledging borders as conclusive jurisdictional demarcations of a territorial nature.

The conception of the right to return in duty-based discourse can be diagrammed in the following way:

Right of return ➔ going back to the place of continuity ➔ duty-holder is one's "home"

A claim based on the right of return and grounded in continuity is well-suited for a strategy of human rights adjudication. An individual may bring forward a right of return against a particular state with which they can establish continuity either instead of, or in addition to, the right to asylum from any state but their state. In this way, the human right of return can support the protection that is currently afforded under the 1951 Refugee Convention both to those who qualify within the definition of a refugee and those who do not. In fact, it may be beneficial to press the adjudicatory bodies to explore how far they are willing to broaden from the narrowest form of belonging to "own state" (formally prescribed nationality) to the widest ultimate form of "belonging by way of our shared humanity" (open borders and universal admission). Such widening could extend protection to a large population that is on the run but that either does not satisfy the refugee definition or meets the definition but currently lacks an assertable "right" unless they can "enter" a state.

IV. Claims Grounded in Entry

In contrast to return-based claims, those related to entry involve individuals who seek to flee their "own country" because it is the source of their harm. Their demand is not to belong (stability), but rather to escape their country of formal nationality and to settle in another (mobility). This desire for escape might be motivated by a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[178] Or by "severe pain or

178. Refugee Convention, *supra* note 9, art. 1.

suffering, whether physical or mental" that "is intentionally inflicted on a person."[179] Or by fleeing a war zone.[180] Or even by environmental catastrophe[181] or slow economic and/or political deterioration, neither of which are recognized by formal law. In all these cases, the remedy required is entry. However, there is no universal right of entry.

I begin by suggesting that prominent scholars today attempt to make up for the lack of an entry right by either bootstrapping other rights onto the human right to leave or expanding this exit right. Another strategy to tackle the absence of an entry right is turning to national law. However, none of these strategies resolve the problem of diffusion identified earlier. Here, I elucidate the work of scholars, present and past, concerned with the lack of an entry right. The following section describes the way in which individuals who seek entry can regain visibility by using their own physical body to create de facto jurisdiction.

Faced with the real need of individuals to escape, leading contemporary scholars turn toward "a rights-based paradigm."[182] They combine the right to leave with different formal rights to create, as Violeta Moreno-Lax writes, variations of "composite rights" that operate organically and holistically together and infer an entitlement to gain admission.[183]

Some bundle an exit right (human rights) with the prohibition of refoulement (Refugee Convention) to establish a new right to flee exposure to irreversible harm.[184] Others aggregate this human right to flee with another human right to "seek asylum" in order to create an asylum protection, including admission and non-refoulement.[185] Yet others

179. Convention Against Torture, *supra* note 21.

180. African Charter, *supra* note 1, arts. 1–2.

181. Ioane Teitiota v. New Zealand, Comm. No. 2728/2016, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/127/D/2728/2016, ¶ 9.11 (Oct. 24, 2019).

182. Violeta Moreno-Lax, *From Complementary to 'Primary' Pathways to Asylum: A Word on the 'Right to Flee'*, Forced Migration Rev. (Nov. 2021), https://www.fmreview.org/externalisation/morenolax [https://perma.cc/K25W-FKTQ].

183. Violeta Moreno-Lax, *Intersectionality, Forced Migration, and the Jus-Generation of the Right to Flee: Theorising a Composite Entitlement to Leave to Escape Irreversible Harm*, *in* Migration and the European Convention on Human Rights 43, 46, 72–73 (Başak Çalı et al. eds., 2019).

184. Moreno-Lax, *supra* note 3.

185. McDonnell, *supra* note 3 ("[R]ealizing the right to leave [would be] bringing us one step closer to realizing . . . freedom of movement more generally."); Rodenhäuser, *supra* note 3, at 223 ("Moreover, prohibiting an asylum seeker to board a carrier practically denies the person the right to seek asylum, and may amount to a violation of the principle of non-refoulement.").

attach the right to flee to the privilege against collective expulsion or "pull-backs" to arrive at an entry right.[186]

A different subset of modern scholars expand, not bundle, the right to leave. Thus, for example, they assert that the right entails a denial of departure, *in addition to* some entitlement to elect destination. This creates protection for both asylum seekers who were rejected at a point of embarkation, as well as expelled aliens in irregular situations.[187] In incorporating elasticity to the right to leave, scholars often defer to the so-called "passport cases" that came before the UNHRC in the early 1980s and that concerned the refusal of the Uruguayan authorities to either renew or un-revoke authors' passports while they were outside the country. In these communications, the UNHRC found a violation of the human right to leave although, as Uruguay argued, the authors could still have left the countries they were in and returned to Uruguay without valid Uruguayan passports.[188] In other words, the Committee construed the right to leave as including at least some choice concerning destination.[189]

These scholars foreground the question of formal rights: to leave, to non-refoulement, or against collective expulsion. But they avoid questions of duty. Emilie McDonnell offers a typical example. She calls for "developing human rights-oriented regimes" and insists that "the focus of legal research and strategy needs to be not only on how externalization

186. Markard, *supra* note 3, at 591–616.

187. Özlem Gürakar Skribeland, *Revisiting and Further Exploring the Human Right to Leave*, EJIL: Talk! (Sept. 9, 2022), https://www.ejiltalk.org/revisiting-and-further-exploring-the-human-right-to-leave [https://perma.cc/9L52-QNG7]. ("[T]he right to elect destination is an inherent element of the right to leave. Without this key element of choice, the right to leave would lose a lot of its meaning and content."). This choice is limited to the options that may be legally available to the person. *Id.* ("To be clear, 'right to elect destination' is not intended to imply a right to enter any state of the person's choice. What I mean is a right to choose the state of return among the options that may be legally available to the person.").

188. Varela Nuñez v. Uruguay, Comm. No. 108/1981, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/OP/2, ¶ 9.3 (Oct. 27, 1981).

189. *See id.*; Montero v. Uruguay, Comm. No. 106/1981, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/18/D/106/1981, ¶ 9.4 (Mar. 31, 1983) ("[T]herefore, article 2 (1) of the Covenant cannot be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory.").

may prevent entry but also on how it interferes with and violates the right to leave."[190]

By emphasizing the right to leave to infer admission, these authors blur the absence of a recognized entry right. Furthermore, even if we momentarily entertain the notion of a potential entitlement to enter a state that is *not* "their own," without an agreed-upon doctrinal framework to assign an entry obligation to a single duty-holder that is responsible for the injury, these authors do not break out of the challenge of "diffusion."

Thus, the conception of the right to leave in a rights-based discourse can be diagrammed as such:

Right to leave ➔ escaping place of continuity ➔ duty-holder is anyone but "home country"

The oversight by contemporary scholars has its historical origins, tracing back to René Cassin. In 1972, Cassin co-organized in Sweden an International Colloquium on "The Right to Leave and to Return."[191] He later reflected on the Colloquium for the *New York Times*, in a piece he titled: *For a Right to Leave and a Right to Return*.[192] In that piece, Cassin discussed the application of the right to Jewish refugees, especially those seeking to flee the USSR.

Per Cassin, this right to movement bore a "particular meaning" for Soviet Jews.[193] It assured them the freedom to depart any state, not only in situations where their life and security were at risk,[194] but also where they were not subject to physical persecution and instead faced with the

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190. McDonnell, *supra* note 3.

191. *See generally* The Right to Leave and to Return: Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-20 June 1972 (Karel Vasak & Sidney Liskofsky eds., 1976).

192. René Cassin, *For a Right to Leave and a Right to Return*, N.Y. Times (Mar. 23, 1973), https://www.nytimes.com/1973/03/23/archives/for-a-right-to-leave-and-a-right-to-return.html [https://perma.cc/AE2X-VKSE].

193. *Id.* Elsewhere, I analyze Cassin's treatment of the human right to the freedom of movement in the context of Palestinian refugees. *See* Paz, *supra* note 50.

194. For example, from the summer of 1954 onward, Cassin, working with other Jewish international organizations, mobilized the right to leave for Moroccan Jews. *See* Nathan Kurz, A Sphere of the Nations?: The Rise and Fall of International Jewish Human Rights Politics, 1945-1975 200–73 (2015) (Ph.D. dissertation, Yale University) (on file with the author).

lesser threat of losing their separate culture.[195] Yet, much like the other scholars I reviewed here, Cassin focused only on the exit function to the detriment of entry. Emigration, he said, is within the framework "of the protection of human rights."[196]

While contemporary scholars often mask the lack of an entry right by combining rights from various instruments or by broadening the existing right to leave, Cassin overlooked the conditional nature of the exit function in human rights law through the state of Israel. In 1950, Israel passed the Law of Return securing the right of "[e]very Jew . . . to come to the State of Israel as an immigrant."[197] In 1952, it passed the Law of Nationality, making every immigrant in the sense of the Law of Return of 1950 an Israeli citizen.[198] Through these twin laws, Israel exercised its discretion as a state to secure Jews a landing place. This permitted Soviet Jews a robust entry right, including—like the human rights for the right of return of nationals—both a return (entry) function and a personal status post entry. But, in contrast to the right to return, Israel drew on common ethnic and cultural attachments, not nationality, as a proxy for "own country."[199] This echoes "the men of 1873," namely William Hall, Johann Caspar Bluntschli, and Pasquale Fiore, who took (European) cultural roots as a replacement for nationality for the purpose of legal mobility.[200] But now, culture was much smaller, referring to the state of Israel, not a pan-European morality, and coded differences, not commonality, between states.

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195. *See* Louis E. Pettiti, *The Right to Leave and Return in the USSR*, *in* The Right to Leave and to Return, *supra* note 191, at 182 ("Opposition to mass emigration of a cultural group is perhaps understandable as a way of avoiding the loss of the group's social and cultural contribution. But it should be counter-balanced by maintaining and encouraging the cultural development of the group. This is not the case with the Jewish minority in the USSR, which has constantly been deprived of publications in its own language, of synagogues, of schools and so on.").

196. Meeting Minutes of the Ad-Hoc Comm. on Moroccan Affs. 17 (Sept. 10, 1954) (on file with the author).

197. § 1, The Law of Return, 5710–1950, SH 51 159, as amended (Isr.), https://www.jewishvirtuallibrary.org/israel-s-law-of-return [https://perma.cc/XGJ9-JH6Y] ("Every Jew has the right to come to this country as an oleh.").

198. § 2(A), Nationality Law, 5712–1952, SH 95 196, as amended (Isr.), http://www.refworld.org/docid/3ae6b4ec20.html [https://perma.cc/L4BE-M92U] ("Every 'oleh' under the Law of Return, 5710-1950, shall become an Israeli national by return . . . .").

199. The Law of Return, *supra* note 197, at § 1 (referring to "[e]very Jew").

200. *See generally* Fiore, *supra* note 83; Hall, *supra* note 83; Bluntschli, *supra* note 97.

Cassin, therefore, missed that Soviet Jews were atypically situated. They had a pre-existing landing place. Ultimately, the entry of Russian Jews was the result of Israeli law. They enjoyed the right of mobility by virtue of legal claims of a non-universal nature.

Leading scholars, today and in the past, miss the fact that protective outcomes hinge fundamentally on the immigration policies of individual states,[201] particularly in situations where the demand is not to belong to one's "own country," but rather to escape and seek refuge elsewhere. This is true even if the individual qualifies as a refugee, and before the individual reaches the border of a state and can make a non-refoulement claim and/or asylum claim under one of the regional human rights law instruments. Admission decisions are made for soft factors of altruism, where states agree to accept a "fair share" of refugees, or states take refugees in as objects of sympathy, as well as by political motivations, with states accommodating those who are in their self-interest.[202] They are particular and do not stem from any international legal obligations that restrict the actions of states irrespective of their consent.

This myopia is evident when considering the case of a Syrian or Darfuri refugee aboard a boat in the Mediterranean Sea, before establishing contact with a potential host state or its agents.

If this refugee manages to reach a safe country, this person will most likely be granted international protection and a refugee status.[203] However, in all human rights treaties, duty is predicated on "jurisdiction,"[204] assigning signatory states responsibility, on the basis of their actual causal-factual authority ("effective control"). This authority can be presumed, rooting human rights obligations in the state's overall power over territory, whenever this power is effective.[205] Alternatively, it can be

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201. *See* Motomura, *supra* note 16.

202. *See generally* Ayelet Shachar, The Birthright Lottery: Citizenship and Global Inequality (2009).

203. *See What Is a Refugee?*, U.N. High Comm'r for Refugees, https://www.unhcr.org/au/what-refugee [https://perma.cc/4YSS-AKUN].

204. ECHR, s*upra* note 4, art. 1. Under Article 2(1) of the ICCPR, "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant," while Article 2(1) of the Convention Against Torture provides that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." ICCPR, *supra* note 1, art. 2(1); Convention Against Torture, *supra* note 21, art. 2(1).

205. *See* Loizidou v. Turkey, App. No. 15318/89, ¶ 62 (Dec. 18, 1996), https://hudoc.echr.coe.int/eng?i=001-58007 [https://perma.cc/N5YH-ZYER]; Martin Scheinin,

established, deriving personal obligations from the state's authority and control over persons outside the state's geographical space. However, the refugee in my example, namely the refugee out at sea, has not yet fallen under the effective control and the powers of any one state.[206]

Absent a correlative relation, the condition for a human rights duty to permit entry is not established against any specific state in particular. Instead, the entry-based claim imposes a duty on *all* states, and all states share this duty equally.[207] Indeed, the UNHRC indirectly acknowledged the challenge of a "shared responsibility" between states.[208]

Extraterritorial Effect of the International Covenant on Civil and Political Rights, *in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 73, 81 (Fons Coomans & Menno T. Kamminga eds., 2004). For territory "creat[ing] normativity," see Banković v. Belgium, App. No. 52207/99, ¶ 73 (Dec. 12, 2001), https://hudoc.echr.coe.int/eng?i=001-99238 [https://perma.cc/BQ7G-WCRQ] ("In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State."); Issa v. Turkey, App. No. 31821/96, ¶ 71 (Nov. 16, 2004), https://hudoc.echr.coe.int/eng?i=001-67460 [https://perma.cc/K8YR-6LZ3] ("[A] State may . . . be held accountable for a violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating—whether lawfully or unlawfully—in the latter State."); Lopez-Burgos v. Uruguay, Comm. No. 52/1979, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/OP/1, ¶¶ 12.2–12.3 (July 29, 1981); Coard v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L/V/II.106 doc. 3 rev., ¶ 37 (1999); Al Skeini v. United Kingdom, App. No. 55721/07, ¶¶ 133–37 (July 7, 2011), https://hudoc.echr.coe.int/fre?i=001-105606 [https://perma.cc/4VEM-EVVS]. Like the ECtHR, the UNHRC held that the state is responsible for protecting the human rights of all persons in their territory and all persons under their control. According to the UNHRC, the test for the applicability of the law is not territorial presence, but effective control of the State. This was confirmed by Article 2(1) of the ICCPR. *See* ICCPR, *supra* note 1, art. 2(1). Extraterritorial application of human rights has been likewise supported by other international human rights bodies as well as national courts. For a summary, 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, ¶ 36 (Jan. 26, 2007), https://www.unhcr.org/media/advisory-opinion-extraterritorial-application-non-refoulement-obligations-under-1951-0 [https://perma.cc/5AMB-FXDC].

206. *See* Noll, *supra* note 39, at 567 (quoting Coard v. United States); Moreno-Lax, *supra* note 39, at 319.

207. For a discussion of human rights jurisdiction for duty, see generally Besson, *supra* note 67. On human rights "responsibilities," see Samantha Besson, *The Bearers of Human Rights Duties and Responsibilities for Human Rights: A Quiet (R)evolution*, 32 SOC. PHIL. & POL'Y 244, 244 (2015).

208. When determining the measures of reparation, the UNHRC found that both Italy and Malta held concurrent jurisdiction. *See* S.A. v. Italy, Comm. No. 3042/2017,

In practice, then, the creation of composite rights for this refugee points at all states equally, absent clear legal articulation of how entry obligations should be distributed between states that signed the relevant treaties. This leaves no specific state identified as responsible for remedying their harm (that is, no "Hohfeldian" correlation between a right and a duty).[209] "Composite rights" thus remain distant from their lived reality, even if they fit the categorization of a refugee.

Without a particular duty-holder, the claims of such refugees for legal status or entitlements remain abstract because of the "diffused duty-holder."[210] Here, then, is a tweaking of Giorgio Agamben's "naked man": This figure of the *homo sacer* is only partially placed outside the legal domain.[211] Under human rights law, he or she bears a right to leave, or to flee, or to seek asylum. But what he or she cannot do is point to one specific duty-holder to satisfy these rights.

The complexity of the situation is heightened when addressing instances of refugees escaping persecution by private entities, where the state, though willing, lacks the capacity to prevent such persecution.

U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/128/D/3042/2017, ¶ 7.8 (Nov. 4, 2020); S.A. v. Malta, Comm. No. 3043/2017, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/130/D/3043/2017 (Mar. 13, 2020).

209. A state's human rights jurisdiction may extend to citizens outside its territory. An example are the so-called Passport cases by the UNHRC against Uruguay. In these cases, claims were addressed against the country of origin and the country of residence, and were adjudicated on the basis of "jurisdiction" rather than statehood or nationality. *See* Montero v. Uruguay, Comm. No. 106/1981, U.N. Doc. A/38/40, ¶ 9.4 (Mar. 31, 1983) ("[I]n the case of a citizen resident abroad, article 12 (2) imposes obligations on the State of nationality as well as on the State of residence and, therefore, article 2 (1) of the Covenant cannot be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory."). However, these cases concerned passports, and did not extend a "right to travel from one country to another." *See* Varela Nuñez v. Uruguay, Comm. No. 108/1981, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/OP/2, ¶ 9.3 (Oct. 27, 1981).

210. Of course, if this Syrian woman moves first to Lebanon and then to the Mediterranean, there is one duty-holder: Lebanon. This, however, both removes autonomy from this woman and also disproportionately burdens states on the basis of geography.

211. Giorgio Agamben, Homo Sacer: Sovereign Power and Bare Life (Daniel Heller-Roazen trans., 1998); Giorgio Agamben, Means Without End: Notes on Politics (2000). For a brilliant discussion of Giorgio Agamben in this context, see generally Itamar Mann, *Maritime Legal Black Holes: Migration and Rightlessness in International Law*, 29 Eur. J. Int'l L. 347 (2018); Itamar Mann, *Refugees*, 2 Mafte'akh: Lexical Rev. Pol. Thought 81 (2011); Itamar Mann & Julia Mourão Permoser, *Floating Sanctuaries: The Ethics of Search and Rescue at Sea*, 10 Migration Stud. 442 (2022).

Consider an individual fleeing gang violence in Central America. In this context, the legal precedent for determining refugee status is less definitive. The basis of the claim in these cases lies in seeking protection from the individual's "home country," motivated by continuity. The inability of the individual's "home country" to offer protection compels them to seek refuge by presenting an entry claim to other states. However, host states may not necessarily view these cases as meeting the criteria for refugee treatment and might approach the claim through the lens of refugee status determination.[212]

In this scenario, the party responsible is unclear in two distinct ways. First, is it the home state (where the gang violence occurred) or the host state (the potential place of refuge) that bears the duty? Neither jurisdiction nor responsibility needs to be exclusive, and the person in my example can make separate claims against two duty-bearers. Second, if the home state has no duty, then which particular host state must offer refuge? Before this person reaches the territory of one state, the jurisdiction of no single state is triggered, and there is no particular reason why any single state should take her in and provide refuge. She finds herself outside legal significance.

The sea environment might provide an exception. Depending on how the factual realities unfold, a "special relation of dependency" might attach human rights duties to one particular state in the maritime context.[213] Alas, it remains unclear whether this is exceptional or a hard precedent.[214] The Maritime Search and Rescue ("SAR") Convention[215] extends to large areas. Nonetheless, it does not cover the entire maritime environment. In international waters, where no state is internationally responsible for search and rescue operations—what Itamar Mann called

212. For example, the United States expanded the range of recognized claims to include persecution on account of gang violence. But the 2018 executive branch decisions made it much harder to seek asylum based on gang violence. *See* Matter of A-B-, 27 I & N Dec. 316, 320–23 (A.G. 2018); *see also* Matter of A-B-, 28 I & N Dec. 199 (A.G. 2021); Matter of A-C-A-A-, 28 I & N Dec. 84 (A.G. 2020).

213. S.A. v. Italy, Comm. No. 3042/2017, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/128/D/3042/2017, ¶ 7.8 (Nov. 4, 2020) (finding jurisdiction on the basis of the "special relation of dependency" generated in the maritime context, and attaching human rights duties to Italy specifically with regard to people on the high sea).

214. *Id.* (limiting the holding to "the particular circumstances of the case").

215. International Convention on Maritime Search and Rescue, Apr. 27, 1979, 1404 U.N.T.S. 23489.

"maritime Legal Black Holes"[216]—individuals fall outside the jurisdiction of any state and are, in fact, de jure rightless.[217]

In that sense, human rights law is becoming ever less adequate at addressing the current crisis of refugees and of mobility. In fact, the existing human right to leave might even become complicit in this emergency. It permits states to *both* claim that they are maintaining their commitments to human rights by adhering to the right to leave,[218] and, at the same time, to avoid anything beyond a relatively limited obligation of return.[219]

Possibly the emergence today of the refugee child as a favored object of sympathy epitomizes the displacement of legal duties with altruism. Sherally Munshi suggests that because children evoke genuine sympathy, the young child found at the water's edge captures not only the reduction from political agency to an object of sympathy, but also the child's exit from the world of law.[220] Any state can choose to be generous and admit him. But unless he crosses the border of a state, this child cannot point to any one state that has a duty to let him in.[221] He is torn from any actual legal protection and is left instead with only a sentimental appeal to an unspecified common humanity (what I call "diffuse duty-holder").[222]

The doctrine, as we have just seen, is relatively stable. Human rights derive mobility from statehood. In this regime, the human right to leave, which corresponds with a claim based on entry (mobility and admission),

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216. *See generally* Mann, *Maritime Legal Black Holes*, *supra* note 211.

217. An exception is Article 98 of the U.N. Convention on the Law of the Sea, which designates the duty to render assistance to vessels in distress at sea. Convention on the Law of the Sea art. 98, Dec. 10, 1982, 1833 U.N.T.S. 397.

218. For Australia, see, for example, Alison Mountz, The Death of Asylum: Hidden Geographies of the Enforcement Archipelago (2020).

219. *See* Paz, *supra* note 148, at 622.

220. For the child as the subject of sympathy, see generally Sherally Munshi, *Unsettling the Border*, 67 UCLA L. Rev. 1720 (2021). For more on the critique of humanity, see generally Samuel Moyn, Not Enough: Human Rights in an Unequal World (2018); Miriam Ticktin, Casualties of Care: Immigration and the Politics of Humanitarianism in France (2011); Didier Fassin, Humanitarian Reason: A Moral History of the Present (2011).

221. *See* D.D. v. Spain, Comm. No. 4/2016, U.N. Comm. on the Rts. of the Child, U.N. Doc. CRC/C/80/D/4/2016 (Feb. 1, 2019). This case concerned an unaccompanied minor. After the applicant crossed the border fence between Morocco and the Spanish enclave of Melilla, he was apprehended by the Spanish authorities at the fence. The CRC held that under the Convention on the Rights of the Child, States must conduct an initial assessment prior to any removal, which has to include, *inter alia*, age and vulnerability assessments.

222. Munshi, *supra* note 220.

does not lend itself to adjudication. The need is for admission. Alas, there is *no* agreed-upon doctrinal framework that dictates how courts should distribute entry obligations. Treaty law does not identify a single duty-holder that is responsible for the injury, but instead points at all states equally. In practice, this leaves an individual, even if she fits the categorization of a refugee, unable to identify any one state as responsible for remedying her harm. And, at the same time, it allows a state to claim its adherence to human rights law without actually acting upon its commitment. Significantly, my point here is not that the right to leave is intrinsically not susceptible to adjudication. Rather, to be efficacious in the cases of those who are on the run, they require a further level of political treaty negotiation to assign an entry right to specific duty-holders. Absent this additional negotiation, human rights adjudicatory bodies are becoming ever less relevant to address their harm. They leave these individuals with only partial protection: They enjoy exit, but they cannot stop moving.

V. Exception

In recent years, human rights courts and other quasi-judicial bodies have created one exception to ameliorate the "diffused duty-holder" problem. Unlike both present-day scholars and their predecessors, these enforcement bodies have chosen not to concentrate on the notion of exit. Instead, without instituting a blanket entry right into a state without its consent, they have widened somewhat the interpretation of "entry." This expanded definition encompasses non-nationals requesting admission to a state in which they are physically present, perhaps on its borders,[223] or with whose agents they have come into contact. They ground their assertion of entry in the act of establishing direct physical contact with the state's actors, leveraging this contact to identify a single duty-holder by default.

A landmark judgment in this context is *Hirsi Jamaa v. Italy*,[224] a 2012 case involving a group of Somali and Eritrean nationals rescued in international waters by Italian navy vessels. As I have discussed at length elsewhere,[225] the European Court of Human Rights in *Hirsi Jamaa* established that when a state interdicts a boat on the high seas carrying

223. At least under soft law, asylum seekers should not be rejected at the frontier. *See id.*

224. *See* Hirsi Jamaa v. Italy, App. No. 27765/09, ¶ 178 (Feb. 23, 2012), https://hudoc.echr.coe.int/fre?i=001-109231 [https://perma.cc/M9S8-PWXK].

225. *See generally* Paz, *supra* note 18; Paz, *supra* note 148.

would-be migrants and asylum seekers, that act itself effectively places these individuals within the state's sphere of control. The ECtHR affirmed that jurisdiction is invoked "whenever the State through its agents operating outside its territory exercises control and authority over an individual."[226] Such physical engagement with state agents triggers essential procedural safeguards for those aboard the intercepted vessel, encompassing the right to individual status determination.[227]

Importantly, the ECtHR did *not* create a right of entry. The judges insisted that "[c]ontracting States have the right . . . to control the entry, residence, and expulsion of aliens."[228] Instead, the ECtHR expanded the definition of entry—hence, state responsibility (being "within its jurisdiction")—so that it covers not only individuals who are inside the state proper (jurisdiction is territorial), but also possibly those arriving at the state's borders, or even at the functional equivalents of borders[229] (jurisdiction qua "effective control").[230]

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226. The ECtHR has been reluctant to apply the ECHR outside the territory of the Convention states. *See* Banković v. Belgium, App. No. 52207/99, ¶¶ 59–80 (Dec. 12, 2001), https://hudoc.echr.coe.int/eng?i=001-99238 [https://perma.cc/BQ7G-WCRQ]. However, even in this case, the court concluded that the ECtHR has consistently held that the obligations under the ECHR apply extraterritorially in situations "when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government." *Id.* ¶ 71. In more recent cases, the ECtHR declined jurisdiction for acts outside the territory of a member state not on territorial grounds but, rather, on various other considerations. *See, e.g.*, Hussein v. Albania, App. No. 23276/04 (Mar. 14, 2006), https://hudoc.echr.coe.int/eng?i=001-72789 [https://perma.cc/2FX7-LQPS] (finding inadmissibility because governmental power transferred to Iraqi authorities); Saramati v. France, App. No. 78166/01 (May 2, 2007), https://hudoc.echr.coe.int/fre?i=001-80830 [https://perma.cc/2AV9-FZP9] (finding inadmissibility based on incompatibility ratione personae). Here, international law developed in the opposite way to U.S. law. *See* Sale v. Haitian Centers Council*,* 509 U.S. 155, 160 (1993).

227. *Haitian Centers Council*, 509 U.S. at 184–85. For a discussion, see Paz, *supra* note 148.

228. *Hirsi Jamaa*, App. No. 27765/09, ¶ 113 ("[T]he right to political asylum is not contained in either the Convention or its Protocols.").

229. For further discussion, see Ayelet Shachar, The Shifting Border: Legal Cartographies of Migration and Mobility 7 (2020) (calling for a shift in perspective in migration scholarship "from the more familiar locus of studying the movement of people across borders to critically investigating the movement of borders to regulate the mobility of people").

230. See ICCPR, *supra* note 1, art. 2(1). Like the ECtHR, the UNHRC held that the state is responsible for protecting the human rights of all persons in their territory and all persons under their control. According to the UNHRC, the test for the applicability

In making the duty dependent on proximity to a state or its agents, the ECtHR permitted individuals to use their bodies to create legal agency. By successfully establishing "contact," they can designate a single state as a duty-holder by default, until it can identify another state to take its place. The protection offered is, at a minimum, thin and transitory, and lasts only as long as necessary for an individualized examination of applications for protection. However, individual status identification procedures would presumably enable more passengers on the boat to access a process through which they can claim a right to remain. At most, this protection provides rights under the refugee system by precluding a state from refouling a person who meets the selective criteria.

Much like the ECtHR, other human rights courts and instruments have performed the same two-part maneuver. They have not only supported the extraterritorial application of human rights,[231] but have also gone out of their way to clarify that they are not upsetting the policy of state control over borders.[232]

Consider, once again, my example of a Syrian or a Darfuri refugee. If this refugee reaches the territory of a state and requests entry (strong

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of the law is not territorial presence, but effective control of the State, which was confirmed by Article 2(1) of the ICCPR. Extraterritorial application of human rights has been likewise supported by other international human rights bodies as well as national courts.

231. For a good summary of both 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, ¶ 36 (Jan. 26, 2007); *see also* General Comment No. 31, *supra* note 37, ¶¶ 10, 12; U.N. Hum. Rts. Comm., Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/79/Add.50, ¶ 284 (Apr. 7, 1995); Kindler v. Canada, Comm. No. 470/1991, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/48/D/470/1991, ¶ 6.2 (July 30, 1993); A.R.J. v. Australia, Comm. No. 692/1996, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/60/D/692/1996, ¶ 6.8 (Aug. 11, 1997).

232. *See, e.g.*, G.A. Res. 40/144, art. 2 (Dec. 13, 1985) ("Nothing in this Declaration shall be interpreted as . . . restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay."). For ECtHR decisions delineating these principles, see Abdulaziz v. United Kingdom, App. No. 9214/80 (May 28, 1985), https://hudoc.echr.coe.int/eng?i=001-57416 [https://perma.cc/5XK8-8EYR]; Boujlifa v. France, App. No. 122/1996/741/940, ¶ 42 (Oct. 21, 1997), https://hudoc.echr.coe.int/eng?i=001-62668 [https://perma.cc/G8X2-VSYM]. For the same in the Inter-American system, see Inter-American Convention Regarding the Status of Aliens in the Respective Territories of the Contracting Parties art. 1, Feb. 20, 1928, 132 L.N.T.S. 302.

territoriality), or comes within the effective control of this state or its agents and requests entry (neo-territoriality), there is a single state of jurisdiction that is the duty-holder by default, until it can identify another state to take its place.

More recently, some scholars began to develop a "contactless control" model. They identified the forms of cross-border migration techniques deployed by states, particularly by the European Union and its member states, to outsource to third transit states the work of deterring and restraining the onward movement of refugees and migrants to Europe. These authors draw on these contactless forms—including political and financial promises of fund transfers, visa facilitation, or accession talks—to engage the international responsibility of the destination states for breaches of human rights, such as the principle of non-refoulement and the right to leave any country.[233]

There is still debate as to whether these forms of "contactless control" may count as legally valid. Either way, much like the ECtHR judges in *Hirsi Jamaa*, these do not create entry. Rather, they extend when entry also includes potential asylum seekers who are contained within the jurisdictional domain of countries of transit.

Access, then, or the place of contact, remains consequential for jurisdiction. Getting close, whether to a host state or to a third transitory state (or their agents), acts as leverage to renegotiate legal circumstances: An individual non-national shifts their status from indistinction (diffuse duty-holder) to legal eligibility (a duty-holder by default).

In my earlier writings, I suggested that even if some differentiation might be appropriate in the protection of refugees, access, or the proximity of a non-national to the state, is an odd way to allocate duty as a matter of policy. From the perspective of the individual non-national, it selects for some physical, economic, and locational features. This probably favors those who enjoy relative mobility and punishes those who are already vulnerable due to their physical weaknesses. From the perspective

233. *See* Violeta Moreno-Lax & Mariagiulia Giuffré, *The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows*, *in* Research Handbook on International Refugee Law (Satvinder Singh Juss ed., 2019); Markard, *supra* note 3. A convincing case can be made that the definitional scope of the right is engaged, and therefore the measures of training Libyan border guards and providing border control equipment and intelligence to countries of origin and transit, so that departures are obstructed, harm the interests protected by the right.

of the state, access allocates protective duties irrespective of the actual capacity of the state.[234]

Here, I want to make two different points. The first concerns the way in which contact creates a *duty* on the state. Notwithstanding the lack of a right of universal entry, an individual non-national can draw on their body to evade, as a legal matter, the sovereign power of the state to exclude them. So, if a person is able to attach themselves to the boat, then as a doctrinal matter, they create a relationship of belonging, even if thin and only for the purpose of status determination. Here, the value behind protection is continuity, not mobility. In other words, the relevant human right is not to leave, but rather to remain.

My second point is about the violence of these encounters. In *N.D. & N.T. v. Spain*[235]—a case concerning individuals who stormed a border fence—the ECtHR clamped down on this thin protection that is a function of physical presence.[236] The ECtHR, sitting as the Grand Chamber, interpreted Article 4 of Protocol No. 4, which prohibits collective expulsion of aliens, as tolerating collective pushbacks under certain conditions.[237] The judges referred to *Hirsi Jamaa* and declared that it had "lost none of [its] relevance."[238] But they subjected the state's duty to offer individual status determinations to the culpable conduct of a non-national: The ECtHR, read the decision, could not ignore "the 'new challenges' facing European States in terms of immigration control" and the 2015–2016 migration influx into Europe.[239] The ECtHR found that a host

234. Paz, *supra* note 148.

235. App. Nos. 8675/15 & 8697/15, ¶ 167 (Feb. 13, 2020), https://hudoc.echr.coe.int/fre?i=001-201353 [https://perma.cc/7ZUE-GN2K].

236. The ECtHR Grand Chamber seems to suggest a differentiation between land and sea borders. *See id.*

237. Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, E.T.S. 46, https://rm.coe.int/168006b65c [https://perma.cc/S8AC-QD5U]. The Special Rapporteur on the Human Rights of Migrants at the United Nations Office of the High Commissioner for Human Rights defines pushbacks as "various measures taken by States which result in migrants, including asylum seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of any individual assessment on their protection needs which may lead to a violation of the principle of non-refoulement." *See* Special Rapporteur on the Hum. Rts. of Migrants, Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea, U.N. Doc. A/HRC/47/30 (May 12, 2021).

238. *N.D. & N.T.*, App. Nos. 8675/15 & 8697/15, ¶ 187.

239. *Id.* ¶ 78; *see also* Khlaifia v. Italy, App. No. 16483/12, ¶ 185 (Dec. 15, 2016), https://hudoc.echr.coe.int/fre?i=001-170054 [https://perma.cc/RTM3-8MW6]

state that enables legal entry at official borders owes no individual status determination to non-nationals who have not made "use of the existing legal procedures for gaining lawful entry," and instead choose behavior that places "themselves in jeopardy."[240] The court never offered a precise definition of "culpable conduct."[241] Instead, it only made opaque references to irregular entry and under-defined criteria such as "storming . . . fences," "taking advantage of a group's large numbers," and "using force" as elements that indicate culpable behavior.[242] Later cases clarified the standard developed by *N.D. & N.T. v. Spain*,[243] and limited it in the case of children due to their particular vulnerability.[244]

N.D. & N.T. v. Spain assumed the existence of legal pathways for refugees and migrants, but did not assess the actual availability of entry options on the ground.[245] More recently, in *M.K. v. Poland*—a case about

(describing "extreme difficulties"). Some refer to 2015 as "the year of Europe's refuge crisis." William Spindler, *2015: The Year of Europe's Refugee Crisis*, UNHCR (Dec. 8, 2015), https://www.unhcr.org/us/news/stories/2015-year-europes-refugee-crisis [https://perma.cc/8AP5-DMJH].

240. *N.D. & N.T.*, App. Nos. 8675/15 & 8697/15, ¶ 231.

241. *Id.* ¶ 208.

242. *Id.* ¶¶ 200, 201, 208, 231. The court references culpable conduct as that which "places" the applicants "in jeopardy."

243. Shahzad v. Hungary, App. No. 12625/17 (July 8, 2021), https://hudoc.echr.coe.int/fre?i=001-210853 [https://perma.cc/4ZAT-FYK6]; M.K. v. Poland, App. Nos. 40503/17, 42902/17, 43643/17 (July 23, 2020), https://hudoc.echr.coe.int/fre?i=001-203840 [https://perma.cc/FV8C-EP36].

244. M.H. v. Croatia, App. Nos. 15670/18, 43115/18 (Nov. 18, 2021), https://hudoc.echr.coe.int/fre?i=001-213213 [https://perma.cc/65V6-QYXC]. Judge Turkovic's opinion, relying on Article 22 of the United Nations Convention on the Rights of the Child, argued that states are required "to ensure that a child seeking refugee status, whether unaccompanied or accompanied by his or her parents or by any other person, receives appropriate protection and humanitarian assistance," in accordance with the principle of the best interests of the child. *Id.* ¶ 4. For a discussion of the case, see Iris Goldner Lang, *Pushbacks Against the Child's Best Interests*, Verfassungsblog (Jan. 7, 2022), https://verfassungsblog.de/pushbacks-against-the-childs-best-interests [https://perma.cc/NG78-Y2RV].

245. *N.D. & N.T.*, App. Nos. 8675/15 & 8697/15, ¶¶ 200–01, 231. Importantly, the *N.D. & N.T.* ruling was based on the previous finding that Morocco was to be considered safe for the applicants and that there was no danger of chain refoulement. For more on a safe third country, see, for example, Center for Peace Studies, *Croatia: Police Pressuring Human Rights Defenders and Lawyers Protecting Refugees*, Hum. Rts. House Found. (Apr. 26, 2018), https://humanrightshouse.org/articles/croatia-police-pressuring-human-rights-defenders-lawyers-protecting-refugees [https://perma.cc/JD2U-TJ6Z]; Moria Paz, *The Legal Reconstruction of Walls: N.D. & N.T. v. Spain, 2017, 2020*, 22 N.Y.U. J. Legis. & Pub. Pol'y 693, 693 (2020); Daniel Thym, *A Restrictionist*

applicants who repeatedly applied for admission at the official border checkpoint—the ECtHR declared that legal entry procedures must not be completely ineffective.[246]

We can view *Hirsi Jamaa*, therefore, as a "first move" in making the allocation of duty dependent upon physical contact between an individual non-national and the state. Hence, a person who comes under the effective control of the state or its agents—if she attaches herself to a host state—generates a right for an individualized return decision. But the *Hirsi Jamaa* decision nonetheless explicitly supports the traditional, statist concept of a non-porous border, declaring that a state has a right, and maybe even a duty, to control its borders.[247]

N.D. & N.T. is a second move, making the state's duty subject to the conduct of the individual non-national and in light of the "challenges" European states are facing.[248] Persons who cross irregularly and whose "own conduct" is "culpable" can be returned without an individualized procedure.[249] The judges created symmetry between culpability and self-jeopardization, yet left vague the definition of both terms. Thus, it is unclear whether it includes, for example, situations of clandestine entry that are group-organized but largely non-violent,[250] individually organized

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Revolution? A Counter-Intuitive Reading of the ECtHR N.D. & N.T. Judgment on 'Hot Expulsions', EU IMMIGR. & ASYLUM L. & POL'Y (Feb. 17, 2020), https://eumigrationlawblog.eu/a-restrictionist-revolution-a-counter-intuitive-reading-of-the-ecthrs-n-d-n-t-judgment-on-hot-expulsions [https://perma.cc/GQ3D-7QPA] ("[T]he factual situation of the N.D. & N.T. case discloses a noticeable mismatch between potential aspirations and factual entry options: . . . the number of asylum requests at border crossing points and corresponding countries of origin reveals their illusory character for West-Africans; similarly, the number of working visas for these states was minimal.").

246. *M.K.*, App. Nos. 40503/17, 42902/17, 43643/17, ¶ 207. *See* Ulrike Brandl & Philip Czech, *A Human Right to Seek Refuge at Europe's External Borders: The ECtHR Adjusts Its Case Law in M.K. vs Poland*, EU IMMIGR. & ASYLUM L. & POL'Y (Sept. 11, 2020), https://eumigrationlawblog.eu/a-human-right-to-seek-refuge-at-europes-external-borders-the-ecthr-adjusts-its-case-law-in-m-k-vs-poland [https://perma.cc/6WLX-B4ZS].

247. Hirsi Jamaa, App. No. 27765/09, ¶ 113 ("Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence, and expulsion of aliens . . . . [T]he right to political asylum is not contained in either the Convention or its Protocols.").

248. *N.D. & N.T.*, App. Nos. 8675/15 & 8697/15, ¶¶ 167, 169.

249. At the other extreme, a state owes protection to those who do all that they can realistically be expected to do to enter the country legally.

250. For instance, via the green border between Croatia and Bosnia.

yet violent entries, or entries involving a large group of migrants who either crossed in a less obviously illegal way or engaged in a conduct that is not as clearly violent.[251]

"Physical contact" generates jurisdiction (*Hirsi* ruling) while "culpable contact" prevents jurisdiction (*N.D. & N.T.* ruling). If a non-national engages in some amount of risky behavior to attach herself to a host state, she may successfully open a space for agency and gain access to significant due process protections against forced expulsion from an unwilling host state. However, if she exceeds a certain undefined level of riskiness in this behavior, she may fall back into legal indistinction: She has a right to exit but cannot point to any one duty-holder to complement this right with admission.[252]

Writing in a different context, Seyla Benhabib suggested the paradigm of "porous" borders to capture a space between the two extremes of closed and open borders.[253] In the 1870s, this space was forged out of amorphously defined "morality," and differentiated protection on the basis of race and color. Here, the ECtHR derives this porousness from the conduct of the individual, and as a function of degree of disruption to the border ("culpability"). A "culpable contact" closes the borders, while a "non-culpable contact" (non-criminality) may keep the border porous. The former avoids any notion of responsibility of the host state toward the effects of colonialism, capitalism, or climate on the predicament of the non-national. The latter frames the admission of this non-national as a function of morality (rescue), not law, and is reserved for the sympathetic refugee.

Both "morality" and "culpability" tend to align with the stability of Western states. The concept of "morality" excluded colonized individuals from being considered part of "civilization," while the idea of "culpability" restricts the options a non-national has for self-help: To be protected,

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251. These hypotheticals likely fall between the two extremes of *N.D. & N.T. v. Spain* on the one hand (where applicants made an unlawful entry attempt "taking advantage of the group's large numbers and using force," instead of making use of "the existing legal procedures for gaining lawful entry to Spanish territory") and *M.K. v. Poland* on the other (where applicants repeatedly presented themselves at the official border checkpoint asking to enter in a legal way). *Compare N.D. & N.T.*, App. Nos. 8675/15 & 8697/15, ¶ 231 *with M.K.*, App. Nos. 40503/17, 42902/17, 43643/17, ¶ 207.

252. Unless, of course, the applicant can reach the state and make use of the existing legal procedures for gaining lawful entry.

253. Seyla Benhabib*, Borders, Boundaries, and Citizenship*, 38 Pol. Sci. & Pol. 673, 674 (2005).

acting alone is probably better than in an organized group, and passivity is preferable to active measures. Thus, nearly drowning is more effective than an organized mass crossing of the border.

I have argued in this Article that when dealing with claims anchored on continuity (to remain or return) or entry and mobility (to leave), the law is relatively settled. It dictates an obvious duty-holder for the former, and a diffuse duty-holder for the latter. This structure leaves international adjudication less relevant for a majority of refugees today who are on the run. Incrementally, however, by drawing on variants of physical access ("contact") to trigger jurisdiction, the ECtHR has opened up a path for litigation for a subset of those left outside legality. It constructed the site of contact as the site of negotiation: If a non-national can attach herself to a state, she not only enters the map physically (admission, at least for status determination), but also, and at the same time, reappears within the law. Hence, this presents an opening for Agamben's "naked man" to gain agency.[254] The person changes their indistinction (diffuse duty-holder) to that of legal eligibility (one duty-holder by default) by resorting to very perilous behavior.

In this compromise, by making the physical presence of an individual a basis for creating jurisprudence, the ECtHR was able to incorporate at least some non-nationals into jurisdiction. This carries significant protective benefits for some individuals who are fleeing. But the ECtHR has also made an opaque degree of violence the key legal differentiator for the purpose of distributing protection, legally permitting and even incentivizing (if only partially) the violence that inheres in these uneven contacts. In other words, the ECtHR participated in structuring the very violence we now see at sea. This is a far cry from the goal of the refugee regime: differentiating economically motivated migrants safely and humanely.

Conclusion

Facing today's "migration emergencies," the current legal practice conditions the protection of refugees on (i) the definition of a "refugee," and (ii) the right of non-refoulment.[255] However, I contend that this formal

254. For more on Agamben in this context, see generally Mann, *Maritime Legal Black Holes*, *supra* note 211.

255. *See* Jaya Ramji-Nogales, *Migration Emergencies*, 68 Hastings L.J. 609, 609 (2017).

legal practice blurs the difference between types of refugees and the claims they make, thereby also obscuring the looseness of obligations under human rights and refugee law.

Instead, I have introduced a new taxonomy that divides refugees and irregular migrants by the nature of the claims they make: claims of "continuity" and claims of "entry." The taxonomy also differentiates between two separate normative impulses: stability or "stasis" (guaranteeing the right of an individual to remain or to return to where she belongs, territorially, sociologically, politically or emotionally), and mobility (protecting the right of an individual facing harm to leave where she "belongs" and to enter to another state). The taxonomy moreover distinguishes these individuals on the basis of the duty-holder against whom they are making their claims for protection—"own country" or "any country but own country"—and differentiates the duty not to deport from the duty to admit.

Significantly, if pushed to the extreme, the two demands not only merge with each other, but also with a universal claim to general admission grounded in the dignity of all human beings. At that point, the claim, essentially one for open borders, operates irrespective of a particular relation between the claimant and any single country.

Further, I provided a historical lineage of how the regulation of the right to exclude has evolved within international law, showcasing that states have consistently possessed authority to define their borders and inhabitants. This authority, however, has never been unrestricted. The types of limitations on state power have shifted from 1873 to the present day.

Within this taxonomy and genealogy, I argue for a reorientation of the accepted practice. The "crux of the matter" is not the definition of refugees, but rather whether there is a relevant duty-holder. The "cornerstone" of protection is not the right of non-return to home country (non-refoulment) but instead that of entry (admission) to another state.

There are some practical implications for the way in which the so-called "human rights to movement"—including the rights to "leave," "remain" and "return"—can "sit" alongside and supplement the framework provided under the 1951 Refugee Convention. I differentiate between two policy regimes.

Policy Regime 1: Those who are on the run, whether or not they qualify within strict refugee definitions, and those who can incorporate into their claim for protection elements of continuity with one specific state, are well advised to plead the human rights to *remain* or *return* before

adjudicative bodies. In their case, the rights already integrate an element of entry into one particular state. Their claim can be accounted for within existing doctrines and is eligible for review by the courts. It can buttress the protection currently afforded to refugees (as traditionally defined) and also provide important rights for a large subset of individuals who have been compelled to flee but do not satisfy the Article 1A(2) definition of the 1951 Refugee Convention. And so, they could raise a human right of return claim against a country with which they can establish continuity, in addition to (should they qualify as refugees), or instead of (if they do not qualify as refugees), the right to asylum by any state but their state.

In fact, these individuals and their advocates may pressure international enforcement bodies to expand both the scope of legal belonging and the degree of protection, so that the human rights to remain or return can apply to more incidents involving the breakdown of stability—whether of home, legal status, or territory after the bond of citizenship has de facto (if not de jure in the case of the stateless) been revoked or displaced.

A *thin* expansion of the definition of legal belonging could extend protection to internally displaced people or individuals who carry nationality in a state different from the one in which they have established a longstanding habitual residence, and who are making a claim about continuity of life before displacement. These individuals have not crossed a border, and do not qualify within the proper definition of a refugee. They want to go back to their old life.

An illustrative instance involves Syrian citizens who were driven out from big cities such as Aleppo or Idlib. They still maintain their formal status in Syria, but they are not allowed back to their homes. A more recent case pertains to Sub-Saharan Africans who had lived in Tunisia for years but had lost their jobs and had been evicted after a series of mistreatment and persecution incidents.[256]

An *intermediate* expansion of belonging, in turn, might stretch human rights protection to those threatened by statelessness within territories. These individuals have also not crossed a border, but their claim concerns the forceful destabilization or dispossession of legal status, or even its complete breakdown both in terms of protection and in terms of

256. The violence was sparked by comments made by the country's president, who insinuated that Sub-Saharan Africans were involved in criminal activities aimed "to change the demographic composition of Tunisia." Hayden, *supra* note 13.

"belonging" (stateless people). They want not only to go back to their old life, but also the reinstitution of their legal status.

Take, for instance, the two million people in the state of Assam from whom India has stripped citizenship.[257] These persons are still in India, yet have lost their legal status therein. Other examples of individuals who seek to regain their legal continuity include naturalized citizens in the United States whose citizenship was recently revoked[258] and non-citizen long-term domiciliaries in countries such as Canada, France, and Tanzania, whose status was withdrawn after a criminal conviction or suspicion regarding their residency statuses.[259]

Finally, a *thicker* expansion of belonging could ask courts to account for those individuals whose status was revoked and who were then pushed out. Their claim involves a continuity argument that addresses the issue of deportation post-dispossession. They attach to their claim for the reinstitution of legal status also a claim to go back across the border.

Last year, more than 1,000 Sub-Saharan Africans were rounded up in Sfax, Tunisia, and then dumped on the Libyan border without food or water.[260] Bahraini individuals were stripped of nationality and expelled.[261] These individuals call for a right to return to Tunisia or Bahrain, and to remain there. If an *intermediate* claim concerns de-nationalization (for example, in the Indian example above), these examples concern the next step of a forcible removal.

Such claims can also extend to cases where there was no deportation, but the situation is one of exclusion after de-nationalization. For instance, the young British girls who were groomed, trafficked, and coerced into "marrying" older Islamic State fighters subsequently had their citizenship revoked

257. Suhasini Raj & Jeffrey Gettleman, *A Mass Citizenship Check in India Leaves 2 Million People in Limbo*, N.Y. Times (Aug. 31, 2019), https://www.nytimes.com/2019/08/31/world/asia/india-muslim-citizen-list.html [https://perma.cc/YLX4-J6Q3].

258. Seth Freed Wessler, *Is Denaturalization the Next Front in the Trump Administration's War on Immigration?*, N.Y. Times (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/magazine/naturalized-citizenship-immigration-trump.html [https://perma.cc/W297-Q9EY].

259. Of course, these people may have other citizenships.

260. Hayden, *supra* note 13.

261. *Rohingya Refugee Crisis Explained*, U.N. High Comm'r for Refugees (Aug. 23, 2023), https://www.unrefugees.org/news/rohingya-refugee-crisis-explained [https://perma.cc/VP8W-5HFN]; *Bahrain: Hundreds Stripped of Citizenship*, Hum. Rts. Watch (July 27, 2018), https://www.hrw.org/news/2018/07/27/bahrain-hundreds-stripped-citizenship [https://perma.cc/BV2D-ADLZ].

and were denied the right of return.[262] Their claims involve both a negative function of remaining and a positive function of returning and reinstating status, making it a "thick" claim. The remedy now implicates border-crossing and seeks to address the breakdown of legal and territorial stability.

Policy Regime 2: This regime concerns those individual claimants who cannot make a claim based on "belonging" and are unable to establish "access" to create jurisdiction for a right based on entry. They might forego adjudication under the freedom of movement right even if they do qualify within the refugee definition. In their case, the right to leave does not establish entry into any specific state. And so, all states are free to treat the rights of such refugees as someone else's duty. Unable to point to a single obvious duty-holder, their claim is not accounted for in law and is excised from courts. This renders these legal regimes less and less relevant to the reality on the ground. Instead of adjudication, such claimants might be better off turning to the realm of negotiations, bilateral or multilateral agreements, and the political arena for support.

Finally, a sub-set of litigants who make claims that are more "refugee-like"—seeking to escape their "own country," either because it is the source of their persecution or because the state is willing but unable (or able but unwilling) to prevent the persecution, while requiring entry to a state other than their own—are still advised to emphasize the human right to leave. These individuals should only assert their exit right if they possess the means, physical, financial, or otherwise, to establish a presence within a certain state's territory or to come under the effective control of the state or its agents ("contact" or "access"). They can leverage their presence to legally matter: to point to the direction of one duty-holder by default and to force courts to grapple with their claim. And so, their "access" permits them to move from Policy Regime 2 to Policy Regime 1. However, this means that they might need to subject themselves to violence. Children and adults use their bodies to climb walls, cross deserts, and take dangerous boat journeys.

This approach has the potential to augment protections currently afforded to those who qualify as refugees in a strict sense, such as Ukrainians who fled across Europe after the Russian invasion, Rohingya who

262. Karla Adam, *Shamima Begum, Teenager Who Joined ISIS, To Lose UK Citizenship*, Wash. Post (Feb. 20, 2019), https://www.washingtonpost.com/world/europe/shamima-begum-teenager-who-joined-isis-to-lose-uk-citizenship/2019/02/20/3b02feec-3511-11e9-8375-e3dcf6b68558_story.html [https://perma.cc/YWM6-9F57].

escaped persecution in Myanmar's Rakhine state, Haitians who were forcibly deported from the Dominican Republic, Yazidi women and girls forcefully driven out of Upper Mesopotamia, and Syrian or Iraqi Kurds pushed outside their country.

In addition, this strategy can also offer important human rights protection for a broader category of individuals who have been compelled to flee but fall outside the scope of the Article 1A(2) definition of the 1951 Refugee Convention. Examples include not only refugees *sensu stricto* who qualify within different formal legal definitions (such as those who escape war or those who qualify as refugees under the African Convention but not the 1951 Refugee Convention),[263] and those who face the possibility of torture in their "own countries" and are treated as de facto refugees.[264] Examples also include those who seek to leave a country to escape unsettled political conditions, endemic poverty, corruption, lack of healthcare to treat preventable diseases, war zones, civil wars, environment degradation, or other causes of large-scale forced migration.[265]

The right of return could potentially offer protection to internally displaced persons who are still within their home country and therefore fall outside the scope of the 1951 Refugee Convention's refugee definition. Similarly, the right to leave might reach those who are fleeing but whose motivations for escape do not fall under the 1951 Geneva system, if they are able to forge contact with a potential host state. Which one of these human rights is more efficacious or politically realistic for these individuals on the run is an empirical question and is outside the scope of this Article.

Alas, there is no clear resolution to the claims of those millions who need entry and who can neither satisfy a relationship of "belonging" nor establish physical contact to create a duty-holder by default. They are trapped in the coils of a legal dragon, unable to identify a single duty-holder for their protection under the human right to movement.

The so-called freedom of movement right offers some real, protective benefits. But this same right condemns most refugees to the anomie of legal ineligibility. Even before they founder in the sea or perish of thirst in the desert, these refugees have vanished altogether as a legal matter.

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263. *See* African Human Rights Charter, *supra* note 1.

264. *See* Convention Against Torture, *supra* note 21.

265. Claims grounded in entry might possibly also include temporary protected status holders who have entered and are seeking the right to remain, but whose claims are directed against one specific host state.