

Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls

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ABSTRACT

A peculiar construction boom is in progress worldwide: border walls are being installed by wealthy countries at an unprecedented rate in order to control unwanted immigration by poor people. This Article asks why, almost a quarter of a century after the Iron Curtain came down, the walls are now going up again. It suggests a provocative answer: these separation barriers are a logical response by States to the way in which human rights law has been enforced in cases bearing on immigration. In other words, and counter-intuitively, the recent boom in border wall construction signals the success of the human rights tradition, rather than its failure to establish an alternative to territorial sovereignty.

At the same time, this Article also uses the case study of walls to make a larger point on the intractability of the human rights regime that bears on immigration. Building on a systematic analysis of jurisprudence, I argue that human rights courts and quasi-judicial bodies utilize an arbitrary category—territory—to balance the policy interests of the individual non-national and the State. The result is essentially random from the perspective of both of these stakeholders. Walls make concrete a perverse side effect of this compromise: because the regime conflates access with territory, it disproportionately rewards strong young men who already have sufficient capacity (in age, gender, or resources) to scale the barrier, even if their predicament may not actually call for protection. But it privileges them only after they have risked themselves, and if they survive that risk at all. And so, at least when it comes to immigration, the

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human rights regime operates in effect as a natural selection mechanism. This is fundamentally unstable and unjust.

There is no larger eternity than a door marked: closed today.
 Closed forever; no one's opening it, no one's coming.
 There are no clouds in the sky. Accept the verdict; sign.
 No one's opening. Go home, dream on.

(Yehuda Amichai¹)

“The distribution of membership is not pervasively subject to the constraints of justice. . . . [S]tates are simply free to take in strangers (or not) [T]he right to choose an admissions policy . . . is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination.”

(Michael Walzer)²

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INTRODUCTION

Sometimes walls become the world all around. Take the razor wire fence that Spain built in North Africa around its enclave Melilla that borders Morocco. Spain installed the physical barrier to close itself—and Europe—off from Africa. On one day in May, around 1,000 Sub-Saharan and Syrian migrants rushed this wall, seeking to cross.³ They devoted many months to preparing for their attack on the fence, including studying the movements of the guards and accumulating specialized gear, such as hooks to attach to their wrists and screws to stick to their shoes for a better grip.⁴ They coordinated D-day-style mass

1. Yehuda Amichai, *Esrím Meruba'im Hadashim* (הדשים מרובעים עשרים) (author translation).

2. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 61–62 (1983).

3. Carlotta Gall, *At a Spanish Border, A Coordinated Scramble*, N.Y. TIMES, July 23, 2014.

4. *Id.*

attempts on the wall, seeking to overwhelm guards so that some might make it across uncaught, or to topple a section of the fence by their sheer weight. And one attack came after another; in fact, in that same month, May 2014, there were three mass attempts on the barrier involving 1,000 to 2,000 people each.⁵ These numbers, though massive, are still only a small fraction of the 80,000 individuals that by the middle of 2014 were already approaching the fence.⁶

Spain, in turn, spends considerable resources to stop these men. It employs nearly 1,000 police and Guardia civil officers to guard these fences,⁷ making this border “one of the most closely guarded borders in the EU,”⁸ and has already announced that it is planning to deploy more.⁹ It equips the barrier with motion sensors, cameras, and watchtowers, and patrols by car and helicopter.¹⁰ More recently, Spain has resorted to live ammunition to deter men from scaling the fences,¹¹ and, in cooperation with Morocco, it is now also building an extra ditch and fence, crowned with concertina wire, about 500 meters from the existing Spanish fences.¹²

This border war zone is far from unique. Border walls like the one in Melilla, that are (i) substantially designed to block illegal immigration, and (ii) constructed on undisputed State territory,¹³ are quickly multiplying around us. Along with the physical barrier in Melilla (10.5 kilometers of border), Spain has also installed another six-meter-high double fence around its second land border

5. *Id.*

6. Raphael Minder, *Spain Struggles to Halt Migrants at Two Enclaves*, N.Y. TIMES, Mar. 6, 2014 (the majority are Sub-Saharan Africans, but more recently, they were joined by Syrians fleeing their country) [hereinafter Minder, *Spain Struggles*]; see *Europe's Huddled Masses: Rich Countries Must Take on More of the Migration Burden*, ECONOMIST, Aug. 16, 2014.

7. David Meffe, *Spain Keeping Africans Out*, NEW AFR., Aug. 22, 2014.

8. *Id.*

9. Ashifa Kassam, *Spain To Raise Security Around Morocco Territories Over Immigration Fears*, GUARDIAN, Mar. 6, 2014.

10. Nick Davies, *Melilla: Europe's Dirty Secret*, GUARDIAN, Apr. 16, 2010.

11. *See id.*

12. Raphael Minder, *At Spanish Enclave, A Debate Over What Makes a Border*, N.Y. TIMES, Nov. 24, 2014.

13. *See* Save Our Heritage Org. v. Gonzales, 533 F. Supp. 2d 58, 61 (D.D.C. 2008) (this definition includes barriers such as the U.S.-Mexico wall aimed at deterring “illegal crossings in areas of high illegal entry”); H CJ 7957/04 Mara’abe v. Prime Minister of Israel 60(2) PD 57–58 [June 21, 2005] (Isr.) (discussing the decision-making process to construct the separation barrier and the process of land seizure); H CJ 2056/04 Beit Sourik Village Council v. The Government of Israel 58(5) PD 16–17 [2004] (Isr.) (It also excludes walls built for security purposes. Here, again the example is the Israeli Security Fence, that, according to the Israeli High Court’s definition, is built to enhance security and is “motivated by security concerns” that do not “express a political border, or any other border.”); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 121 (July 9) (but it excludes walls that are constructed for political purposes such as the Israeli Security Fence that, according to the International Court of Justice, is built to achieve “*de facto* annexation”); *see also* Streletz v. Germany, 2001-II Eur. Ct. H.R. 409 ¶ 69 (similarly, this definition also excludes walls like the Berlin Wall that are designed to stop emigration and to “staunch the endless flow of fugitives”).

in North Morocco, Ceuta (7.8 kilometers long).¹⁴ These two fences are higher than the Berlin Wall¹⁵ and cost thirty million euros.¹⁶ According to Spain's Interior Minister, the goal of both walls is to "impede anyone from climbing" and to deter the thousands of migrants who arrive at the borders of its two enclaves.¹⁷ In 2006, only a year after Spain reinforced its fences, the United States began constructing its own massive 1,100 kilometer, double-layer fence between El Paso and Ciudad Juarez, and between San Diego and Tijuana, at a price tag of \$21 million per mile.¹⁸ In signing a bill into law to construct these barriers, U.S. President George W. Bush declared that there had been an increase in illegal immigration and that the fence "is an important step" among several "to secure our borders."¹⁹ Israel has also installed an immigration wall. In 2010, the country began to construct a 245-mile-long, five-meter-high fence (twice the height of the Israeli Security Fence, the separation barrier built by Israel in the West Bank).²⁰ This "monster of a fence"²¹ stretches almost the entire border between Israel and Egypt and cost \$450 million dollars to build, making it one of the largest projects in Israel's history.²² The reason? The Israeli Prime Minister explains: "[W]e cannot let tens of thousands of illegal workers infiltrate into Israel . . . and inundate our country with illegal aliens."²³ Then

14. For details of these two walls, see Lisa-Maria Leipersberger, *The European Hard Borders*, MIGRABLOG (Feb. 5, 2015), <https://migrablog.wordpress.com/2015/02/05/the-european-hard-borders/>.

15. Giles Tremlett, *Spain Heightens Fence at African Enclave*, GUARDIAN, Sept. 21, 2005.

16. Suzanne Daley, *As Africans Surge to Europe's Door, Spain Locks Down*, N.Y. TIMES, Feb. 27, 2014.

17. Ashifa Kassam, *supra* note 9.

18. Robin Celikates & Yolande Jansen, *Reclaiming Democracy: An Interview with Wendy Brown on Occupy, Sovereignty, and Secularism*, CRITICAL LEGAL THINKING (Jan. 30, 2013), <http://criticallegalthinking.com/2013/01/30/reclaiming-democracy-an-interview-with-wendy-brown-on-occupy-sovereignty-and-secularism>.

19. David Stout, *Bush Signs Bill Ordering Fence on Mexican Border*, N.Y. TIMES, Oct. 26, 2006; *see also Save Our Heritage*, 533 F. Supp. 2d at 59–60 (on the immigration control function of the wall); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 127 (D.D.C. 2007) (the U.S.-Mexico wall is aimed at deterring "illegal crossings in areas of high illegal entry"); Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006) (codified as amended in scattered sections of 8 U.S.C.) (authorizing the construction of 700 miles of fencing along the 2,000 miles U.S.-Mexico border).

20. Gidon Ben-zvi, *Israel Completes 245 Mile, NIS 1.6 Billion Security Fence Along Sinai Border with Egypt*, ALGEMEINER, Dec. 4, 2013. Originally, Israel built a five-meter high fence. But now it is raising it to six meters. Gili Cohen, *Israel Raising Height of Egypt Border Fence to Keep Out Asylum Seekers*, HAARETZ, Mar. 15, 2016, <http://www.haaretz.com/israel-news/premium-1.709035>.

21. Amos Harel, *On Israel-Egypt Border, Best Defense is a Good Fence*, HAARETZ, Nov. 13, 2011.

22. Gidon Ben-zvi, *supra* note 20. When thinking about walls and Israel, the Israeli Security Fence immediately comes to mind. The wall that I discuss here, on the Israel-Egypt border, is surprisingly under-researched.

23. Barak Ravid, *Israel to Build NIS 1.5b Fence Along Egypt Border*, HAARETZ, Jan. 10, 2010. In 2010, Benjamin Netanyahu, explained that he is ordering the construction of the fence in order to keep out African asylum seekers he claims are threatening the country's Jewish character:

Greece joined. In 2011, it began building the 12.89 kilometer “Evros Wall” on the land border it shares with Turkey. The cash-strapped country completed the almost \$10 million barbed wire fence in less than a year without EU support.²⁴ The objective, said the Greek Minister of the Interior, is that “no illegal migrant will be left in the country.”²⁵ And now others are joining. Bulgaria is erecting a thirty-three kilometer, four-meter-high wall on its rugged Turkish border to “prevent[] the illegal crossing of the border,”²⁶ while Hungary is building a wall to secure its 177 kilometers on the border with Serbia. “This is a necessary step,” said the Hungarian government’s spokesman, adding “[w]e need to stop the flood.”²⁷ Finally, more walls are coming: Austria recently declared that it would build a wall along its border with Slovenia to “control the refugees in an orderly way,”²⁸ while the Slovenian Prime Minister announced that “[i]f necessary, we are ready to put up [a] fence immediately.”²⁹

But despite the rapid increase in wall construction, and notwithstanding the mounting brutality surrounding them, the international legal community still has not decided how to treat these walls as legal objects. Surprisingly, border walls are under-researched in international legal scholarship, including in international law, human rights law, and refugee law.³⁰

he made “a strategic decision to secure Israel’s Jewish and democratic character.” *Id.* Only later, in 2011, after the trampling of the Mubarak regime in Egypt, a security function was also added to the wall. See Shuki Sadeh, *The Money Fence*, MARKER, Nov. 12, 2011 (original source in Hebrew).

24. *Greece Follows U.S. Example by Building Giant Border Wall to Keep Out Illegal Immigrants*, DAILY MAIL REP., Jan. 4, 2011.

25. *Government on Evros Fence*, INTERNET CENTRE ANTI-RACISM EUR., July 1, 2011, http://www.icare.to/news.php?en/2011-01#GOVERNMENT_ON_EVROS_FENCE (Greece)

26. Stoyan Nenov, *Bulgaria’s Fence to Stop Migrants on Turkey Border Nears Completion*, REUTERS, July 17, 2014.

27. Patrick Kingsley, *Migrants on Hungary’s Border Fence: ‘This Wall, We Will Not Accept It’*, GUARDIAN, June 22, 2015. Turkey announced that it too is building a wall—this one to secure its 900 kilometer southeastern border with Syria. The wall, the Turkish Interior Ministry made clear, is being built both for “for security reasons,” and “to curb smuggling and illegal crossings.” *Suriye Smirna Seyyar Duvar [Syria Border to the Mobile Wall]*, RADIKAL, Apr. 27, 2014 (Turk.); see also Dasha Afanasieva, *Turkey Builds Wall in Token Effort to Secure Border with Syria*, REUTERS, May 5, 2014.

28. George Jahn, *Austria to Build Fence Along Parts of Border with Slovenia*, ASSOCIATED PRESS, Oct. 28, 2015.

29. *Id.*

30. In human rights law and international law, by far most of the scholarly attention to walls is given to the Berlin Wall and the Israeli Security Fence. An important exception is scholarship out of the University of Texas at Austin Law School that deals mainly with the U.S.-Mexico wall, but also with other walls. See, e.g., Denise Gilman, *Seeking Breaches in the Wall: An International Human Rights Law Challenge to the Texas-Mexico Border Wall*, 46 TEX. INT’L L.J. 257 (2011); see also Yishai Blank, *Legalizing the Barrier: The Legality and Materiality of the Israel/Palestine Separation Barrier*, 46 TEX. INT’L L.J. 310–11 (2011) [hereinafter Blank, *Legalizing the Barrier*] (focusing mainly on the Israeli Security Fence, but also border walls in general); Marta Tavares, *Fencing Out the Neighbors: Legal Implications of the U.S.-Mexico Border Security Fence*, 14 HUM. RTS. BRIEF 33 (2007). Similarly, in refugee law there is very little discussion of walls as immigration exclusion modes. In fact, prominent scholars do not mention walls. See, *inter alia*, ROSEMARY BYRNE ET AL., NEW ASYLUM COUNTRIES? MIGRATION CONTROL AND REFUGEE

In this Article, I work through the unstable, uncertain international legal ontology of these border walls. I suggest that they reflect a disappointing story about human rights law: at least when it comes to immigration, the regime is both inherently arbitrary and fundamentally unjust. To tell this story of disillusionment, I begin with a familiar tension.

When human rights courts and quasi-judicial bodies decide cases that bear on immigration control, they can choose between two, often competing, doctrinal traditions. The first is a universal framework that views human rights as inherent in the individual, whether or not the individual complied with formal conditions for immigration. In this approach, the human rights of non-nationals may impose substantive constraints on the State's discretion to expel them. The second is an exclusionist international legal regime that gives the State sole authority to decide who may enter its domain, under what conditions, and with what legal consequences. Here, strangers who reach a State's shores have no claim to rights that the State does not willingly grant.³¹

These traditions represent two prevailing normative outlooks and descriptions of behavior that conflict with one another: if individuals have certain basic rights because they are human, then, at least under certain

PROTECTION IN AN ENLARGED EUROPEAN UNION (2002); THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL (2013); GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW (2d ed. 1996); JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW (2005); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS (1991); MAARTEN DEN HEIJER, EUROPE AND EXTRATERRITORIAL ASYLUM: STUDIES IN INTERNATIONAL LAW (2012); GREGOR NOLL, NEGOTIATING ASYLUM: THE EU ACQUIS, EXTRATERRITORIAL PROTECTION AND THE COMMON MARKET OF DEFLECTION (2000); HÉLÈNE LAMBERT, SEEKING ASYLUM: COMPARATIVE LAW AND PRACTICE IN SELECTED EUROPEAN COUNTRIES (1995). At the same time, outside law schools, there is a growing body of fascinating literature that deals with walls. But this scholarship tends (i) not to focus on the rule of law in regulating these walls, and (ii) not to differentiate between these walls on the basis of their function. *See, e.g.*, BOAZ ATZILI, GOOD FENCES, BAD NEIGHBORS: BORDER FIXITY AND INTERNATIONAL CONFLICT (2012); BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS (Jenna M. Loyd et al. eds., 2012); WENDY BROWN, WALLED STATES, WANING SOVEREIGNTY (2010); BUILDING WALLS AND DISSOLVING BORDERS: THE CHALLENGES OF ALTERITY, COMMUNITY AND SECURITIZING SPACE (Max O. Stephenson, Jr. & Laura Zanotti eds., 2013); REECE JONES, BORDER WALLS: SECURITY AND THE WAR ON TERROR IN THE UNITED STATES, INDIA AND ISRAEL (2012); JOSEPH NEVINS, OPERATION GATEKEEPER AND BEYOND: THE WAR ON "ILLEGALS" AND THE REMAKING OF THE U.S.-MEXICO BOUNDARY (2d ed. 2010).

31. For a detailed analysis of this tension, including detailed survey of relevant treaty law, review of the writing of legal scholars and philosophers, see Chantal Thomas, *Convergences and Divergences in International Legal Norms on Migrant Labor*, 32 COMP. LAB. L. & POL'Y J. 405 (2011), and Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty*, 14 MELB. J. INT'L L. 1, 4 (2013). For the roots of this tension, see IMMANUEL KANT, PERPETUAL PEACE 21 (FQ Classics 2007) (1795) and the right to temporary sojourn ("It is not the right to be a permanent visitor that one may demand. A special beneficent agreement would be needed in order to give an outsider a right to become a fellow inhabitant for a certain length of time. It is only a right of temporary sojourn, a right to associate, which all men have."). For a typology of positions on this, see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 184–85 (1989) (laying out four variants of the combination of the normative and the concrete in international law: the "rule-approach" emphasizing power politics; the "policy-approach" that sees all (governmental or non-governmental) global processes as part of international law; the "idealistic position"; and the "skeptical position").

circumstances, non-nationals can enter or remain in a State outside norms of the State's sovereign interests. If, however, the State has absolute power over who belongs in the national community, then non-nationals are not allowed to enter or remain in the State without government consent. Starting from this tension between universality and exclusion (or human rights and sovereignty), I make three claims.

First, in the past ten years, moving from case to case, human rights courts and quasi-judicial bodies have worked out a compromise between the two legal traditions that is biased in favor of human rights. In particular, they read norms more strictly and more absolutely, and develop substantive standards of protection beyond the five grounds specified under the Refugee Convention: race, religion, nationality, membership in a particular social group, or political opinion.³² But these enforcement bodies stop short of going all the way in the direction of universality; they do not suggest the extreme step of open borders (one's place of birth is irrelevant in the exercise of rights). Instead, they constrain the reach of increasingly expansive human rights protections by linking jurisdiction to variants of what I term 'physicality:' human rights courts and quasi-judicial bodies bootstrap expansive rights on either establishing territorial presence in the host State (jurisdiction grounded in territory) or coming within the effective control of the State or its agents (jurisdiction grounded in contact).³³ To be protected, then, an individual must get close to the State or its agents.³⁴

Paradoxically, therefore, this human-rights-leaning compromise has ended up reinforcing territoriality and thus also the exclusionist (statist) tradition. Because courts and quasi-judicial bodies attach access to territorial presence, every time that they enforce human rights, despite their emphasis on universality, they re-consecrate the centrality of territory. And so, more human rights also means more exclusion.

Second, border walls are a predictable strategic response by States that seek to regain exclusion capabilities, reacting to the way in which human rights courts and quasi-judicial bodies balance the tension between universality and exclusion.³⁵ In other words, the recent boom in border wall construction may

32. Convention Relating to the Status of Refugees art. 1(A)(2), Apr. 22, 1954, 189 U.N.T.S. 150 [hereinafter *Refugees Convention*]. I am focusing here only on legal obligations. I do not discuss emerging obligations around burden sharing such as, for example, obligations to promote economic justice either in the form of donation to United Nations Human Rights Council, contributions by rich donor States to enhance welfare in developing States, for example the Millennium Development Goals, or burden sharing with countries neighboring those in crisis (including things such as resettlement, aid in supplying sanitary, education, housing and other facilities, etc.).

33. An example of jurisdiction grounded in contact is interdiction on the high seas; for further discussion, see *infra*, Part III.

34. For discussion, see *infra*, Part II.

35. My claim here is not causal. A causal analysis requires extensive empirical data to account for the real efficacy of, first, human rights courts' decisions on actually shaping States' immigration policy on the ground, and, second, of border walls to control immigration in practice. But this is well

signal the success of the human rights tradition, rather than its failure to establish an alternative to territorial sovereignty.³⁶ The compromise that courts created assigns human rights protection only after would-be migrants and asylum seekers enter the territory of the host State (strong territoriality) or come within its effective control (neo-territoriality). But this balance impels States to tighten their borders to prevent a territorially-based human rights regime from being triggered by border crossing: in other words, the States' protective duties can be avoided if there is no one to protect.

Walls are not the only possible mode of deterring access left for States to utilize after international human rights courts have made it more difficult to exercise traditional exclusion authority.³⁷ But they do present a unique challenge for regulation. To begin, a wall is a relatively passive interdiction method: it does not require extensive State agency after its initial construction. In addition, a wall is installed on the very border of the State and physically reinforces that boundary: it simply marks the border that was always there. Borders, in turn, are central to the operation of the larger international legal and political regime.³⁸ Thus, a legal attack on such a wall also calls into question the larger international bargain. I use the treatment by the Israeli Supreme Court of the Israel/Egypt fence to demonstrate how the conflation of walls and borders made these walls legally permissible *ex ante*. This case study comes from a national, not an international court, but the Court is interpreting international law and human rights law. This jurisprudence suggests the inherent challenge in regulating a wall that a State erects on its own territory through an international legal system that squares sovereignty with territorial exclusivity.³⁹

Third, even if each court decision is locally sensible, the human-rights-leaning compromise that courts and quasi-judicial bodies have ultimately produced is senseless. To begin, the compromise does not serve the policy interests of either the individual or the State. Human rights enforcement bodies determine jurisdiction by the territorial location of the plaintiff: whether she was able to get into the State or close enough to establish contact with its agents.

beyond the scope of the purely legal analysis provided in this Article. Instead my claim is narrower: I argue that walls are a logical answer to the compromise that courts worked out.

36. For a different answer to the question of why walls are being built now, see *supra* note 30. In a fascinating argument, Brown suggests that walls are built as the symbols of sovereignty at the time of its definitive waning. Walls, she explains, are built to assert identity and to establish the "us" (with purity and integrity) against the "them" on the outside. While these walls are efficacious in drawing the "we"—who's in, who's out—they are not actually effective in re-establishing sovereignty in practice.

37. For an extensive and comprehensive review of immigration control strategies and their regulation by courts, see, among others, GAMMELTOFT-HANSEN, *supra* note 30; Lori A. Nessel, Externalized Borders and the Invisible Refugee, 40 COLUM. HUM. RTS. L. REV. 625 (2009); Ayelet Shachar, The Shifting Border of Immigration Regulation, 30 MICH. J. INT'L L. 809, 815-16 (2009); Leti Volpp, Commentary, *Imaginations of Space in Immigration Law*, 9 L. CUL. & HUMAN. 456, 459 (2012).

38. See *infra* text accompanying notes discussion in pages 32-35.

39. *Id.*

Territory here is the only category that matters. Alas territory is a normatively arbitrary category; it is random from the perspective of *both* the individual non-national and the State. Territory does not prioritize the substantive needs of the individual, but instead privileges ability to get close to the State or its agents—proximity that is determined by capacity (or special circumstances like luck, resources, gender, or physical traits such as youth, strength, and stamina). And, at the same time, territory is equally arbitrary from the perspective of the State: States with borders that are more accessible, or with neighbors that happen to suffer economic, political, or environmental crises, are punished regardless of the State's real constraints and efforts to deal with the inflow of immigration.

In addition, the compromise cannot be normatively justified. Walls highlight the moral intractability of this territorially-based settlement. The ability of walls to restrict movement—thus also access to human rights—depends on how courts regulate them. At the moment, border walls erected as an immigration control policy remain relatively unregulated in human rights law. But it seems clear that courts will have to address the problem of border walls—and in the not-too-distant future. So what are courts likely to do? Building on existing precedents from both human rights and international law, I map three possible approaches that a human rights court or quasi-judicial body can take in adjudicating such a border wall. Each of these methods works out a different compromise to the fundamental tension between putting the universalist (human rights) or exclusionist (statist) frame at the center of immigration control, and each correlates to a different vision of sovereignty and borders in international law.

First, *adopt the universalist tradition*: a State owes protective duties on both sides of the wall. In this approach, the wall acts as a bridge: establishing contact with the wall is tantamount to getting inside the State. Jurisdiction here is grounded in proximity to a wall. Second, *adopt the exclusionist tradition*: a State accrues protective duties only upon initial entrance to its territory. Now the wall acts as a final barrier: getting close to the wall does not entail rights. Jurisdiction is aligned with territory. Third, and also the existing status quo—*adopt the territorially-based compromise that courts institutionalized between universality and exclusion*: a State carries thin procedural duties on the external side of the wall. But after gaining entrance, it bears significant protective responsibilities outside its consent. This time, the wall, a physical barrier, becomes the essence of human rights protection. Proximity by itself no longer denotes rights.

Because these approaches to the regulation of a wall offer three different resolutions to the same problem (the tension between universality and exclusion), the choice between them highlights the values of human rights courts. But, I suggest, *none* of the three approaches, when taken to their logical conclusions, can be normatively defended. Which leaves us at a normative dead-end.

Furthermore, the existing status quo itself leads to a perverse side effect. Under the compromise approach, an individual's location vis-à-vis the wall

makes all the difference in the allocation of rights and duties (or lack thereof). This compels States to continually reinforce their walls, and to build additional layers of walls, to prevent would-be immigrants and asylum seekers from getting close enough to trigger territory-based human rights protections. At the same time, it also invites individuals to resort to ever more hazardous behavior to scale the walls that States construct. Consequently, the regime ends up protecting disproportionately those individuals who are mentally willing to assume serious risks and whose bodies are physically able to make the arduous attempt. Meaning, it protects only young men. But they receive this protection only if they risk themselves and are lucky enough to survive the ordeal. And, at the same time, this order also leaves too many non-nationals that human rights courts are committed to protect with no mechanism to access asylum rights. Ironically, this nonsensical result is due to the insistent actions of human rights courts and other quasi-judicial bodies to expand access to human rights. The path out of the desert and into the kingdom may be paved with good intentions, but is also barred with formidable walls.

I.

BACK DOOR STRATEGIES OF IMMIGRATION CONTROL

Over the past ten years, when adjudicating cases that bear on immigration, human rights courts and quasi-judicial institutions have worked out a compromise between universality and exclusion that brings down the gavel in favor of universality.⁴⁰ They restrict States' prerogatives to expel non-nationals out of what I refer to as the 'back door,' i.e. deporting them after they have already arrived inside the country illegally. At times, human rights enforcement institutions categorically ban deportation; at other times, they make it more difficult for the host State to deport non-nationals. Courts do so by conflating access and territory: they simultaneously expand substantive standards of protection *and* bootstrap protection on the fact of territorial presence. A non-national, therefore, has to reach the territory of the host State in order to trigger protection.⁴¹ Because courts condition human rights jurisdiction on physicality

40. Traditionally, immigration was outside the scope of human rights law. For example, the Universal Declaration of Human Rights (the Declaration) grants every individual the right to leave any country, including the immigrant's native country. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 13, U.N. Doc. A/RES/3/217 A (Dec. 10, 1948). The Declaration only guarantees the right to enter one's own country. Similarly, the International Covenant on Civil and Political Rights also guarantees every individual the right only to "enter his own country" but not the right to enter one's country of choice. International Covenant on Civil and Political Rights art. 12, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]. For a historical review of the application of a human rights framework to immigration, see Ruth Gavison, *Immigration and the Human Rights Discourse: The Universality of Human Rights and the Relevance of States and of Numbers*, 43 *ISR. L. REV.* 26–28 (2010).

41. An inside/outside distinction is also familiar from the United States: non-nationals who are deemed to have entered U.S. territory are entitled to procedural due process, while aliens outside (or deemed to be outside) are not so entitled. *See, e.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *but see*

grounded in territory, greater access means greater application of territoriality. Increased access to territory-based rights, therefore, paradoxically, also reinforces the exclusionist tradition.

This finding emerges out of my systematic examination of cases before the United Nations Human Rights Committee (UNHRC), and the European Court of Human Rights (ECtHR). I analyzed the way in which these institutions disposed of cases bearing on two types of rights: (i) the right for family unity and private life, and (ii) the right not to be subject to torture or to cruel, inhuman punishment.

I selected these two adjudicative institutions because they are the most significant international human rights enforcement bodies operating today.⁴² Both also create entitlements that give private rights of action to the individuals claiming them, and, through individual case adjudication, produce decisions that are of general application.⁴³ In addition, the UNHRC is the only active human rights complaints body with a “potentially universal reach,”⁴⁴ and provides a window into the working of the United Nations in matters of immigration.⁴⁵ The ECtHR, in turn, not only developed the most extensive case law on the rights of non-nationals, but also enjoys compulsory jurisdiction such that its case law is informally binding on all the parties that have signed and ratified the ECtHR.⁴⁶

I selected these two rights because they are the rights most commonly considered in the immigration setting and in particular the context of

Landon v. Plasencia, 459 U.S. 21 (1982). For discussion, see, for example, LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2008); Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIGR. L.J. 407 (2002); Linda Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994); see also David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673 (2000); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611 (2006); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV., 1 (1984); David A. Sklansky, *Developments in the Law—Immigration Policy and the Rights of Aliens, VI. Discrimination Against Documented Aliens*, 96 HARV. L. REV. 1400 (1983).

42. The jurisdiction of the UNHRC has become “a key component in the human rights movement.” RUTH MACKENZIE ET AL., *THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* 427 (2d ed. 2010). The ECtHR, in turn, is considered “a success story,” *id.* at 356, and “has become a source of authoritative pronouncements on human rights law for national courts that are not directly subject to its authority.” ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 80 (2004).

43. The UNHRC adjudications are not binding on States, but are highly significant recommendations. In addition, the UNHRC is empowered to entertain individual complaints only under the Optional Protocol (which means that the State must consent to its jurisdiction). This Protocol has 114 States-parties, and the United States and Israel, which are discussed in more detail later, are not part of them. For more on the working on the UNHRC, see MACKENZIE ET AL., *supra* note 42, at 415–31.

44. As of 2010, the number of State-parties to the Optional Protocol that have accepted the jurisdiction of the UNHRC to receive individual communications was more than double the number subject to the jurisdiction of any regional courts. MACKENZIE ET AL., *supra* note 42, at 426–27.

45. But note that decisions of the UNHRC are more expressively political and have a weaker compliance pull as compared to those of the ECtHR, whose jurisdiction is binding.

46. Eur. Ct. H.R. [ECHR], *The ECHR in 50 Questions* (Feb. 2014), http://www.echr.coe.int/Documents/50Questions_ENG.pdf.

expulsion.⁴⁷ In addition, these two rights cover the range of rights at issue, from the ‘lighter’ right of an individual to have a family to the ‘heavier’ entitlement not to be tortured. The cases also document the breadth of applicants’ plights, from the applicant who broke the law in entering the host State with a hope of improving her life, to the one who fled her home country at gunpoint. I examined all of the communications and cases dealing with these two rights in the context of immigration control that reached the UNHRC and the ECtHR from the inception of the institutions until January 2014. In total, I surveyed a little short of 150 communications and cases.

Let us start with the right to family unity and private life found in Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁴⁸

First, under prior decisions of both the UNHRC and the ECtHR, it had been settled that while the right to a family and private life can constrain the back door option of deporting non-nationals, the State’s interest in security and public order outweighed the interest of the individual in family life.⁴⁹ Case law of the last ten years, however, has brought this into question. Specifically, the cases address whether the right to family life for non-nationals who were convicted of crimes trumps the State’s right to security and public order in situations where reunion abroad between the applicant and his family is either not possible or could not be reasonably expected.

Thus, in *Francesco Madafferi v. Australia*,⁵⁰ the UNHRC told Australia that the decision to deny a permanent visa for an author without a lawful status⁵¹ and who was of “bad character”⁵² (a judgment stemming from criminal acts committed in the home country) constituted arbitrary interference with family life. The reasons for removal, the decision read, were not sufficiently pressing, and the removal would have imposed “considerable hardship” on the author’s family (Madafferi had been married for fourteen years to his wife, an Australian

47. For discussion on family life, see for example, Immigration Act, 2014, c. 22 (U.K.).

48. For the UNHRC, see ICCPR art. 17, Mar. 23, 1976, 999 U.N.T.S. 171 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence . . .”) and *id.* art. 23 (“1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.”). For the ECtHR, see Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 (“Everyone has the right to respect for his private and family life, his home and his correspondence.”) [hereinafter ECHR].

49. See PIETER VAN DIJK ET AL., THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 841–62 (2006) (focusing on “The Right to Marry and to Found a Family”).

50. *Madafferi v. Australia*, Communication No. 1011/2001, U.N. Hum. Rts. Comm., 81st Sess., July 5–30, 2004, U.N. Doc. CCPR/C/81/D/1011/2001 (Aug. 26, 2004).

51. *Id.* ¶ 2.2. Madafferi arrived in Australia on a tourist visa and stayed there after his visa expired. *Id.* ¶ 2.1. He later applied for a spouse visa but his application was denied because of his prior conviction and outstanding prison sentence in Italy. *Id.* ¶¶ 2.3–2.4.

52. *Id.* ¶ 2.4.

national, and had four children).⁵³ Instead the UNHRC ordered Australia to process a spouse visa for Madafferi with an eye to the State's obligation to protect his minor children.⁵⁴

The ECtHR goes even further than the UNHRC. *Madafferi* had mitigating circumstances: he had a viable path to a lawful immigration status in Australia, his sentences in Italy had been extinguished, and there was no outstanding warrant for his arrest.⁵⁵ The Strasbourg Court, however, was willing to reverse the expulsion order of applicants in a different case who had participated in serious crimes, even when the court acknowledged that it was *not*, in fact, "impossible for the spouse and the applicant's children to live" in the applicant's country of citizenship, but merely that doing so would "cause them obvious and serious difficulties."⁵⁶

53. *Id.* ¶ 9.8.

54. *Id.* ¶ 11. For contrast, in several cases before *Madafferi*, the UNHRC found no violation of the right to family life in deporting lawful permanent residents who had criminal convictions. See Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualism*, 47 VANDERBILT J. TRANSNAT'L L. 699, 736 n.161 (2014). More recently, in *Fernandes v. Netherlands*, Communication No. 1513/2006, U.N. Hum. Rts. Comm., 93d Sess., July 7–25, 2008, ¶ 1, U.N. Doc. CCPR/C/93/D/1513/2006 (Aug. 6, 2008), the UNHRC considered an application of two undocumented immigrants who were the parents of four children (three of them Dutch citizens). The case reached the court after the father's application for a residence permit was rejected due to a criminal record. The Committee found their claim insufficiently substantiated and therefore inadmissible. *Id.* ¶¶ 2.3–2.5, 6.3.

55. *Madafferi*, *supra* note 50, ¶ 9.8.

56. *Amrollahi v. Denmark*, App. No. 56811/00, ¶ 41 (Eur. Ct. H.R. 2002), <http://hudoc.echr.coe.int/eng?i=001-60605>. This case concerned an applicant convicted of drug trafficking, a serious crime with "devastating effects" on the society. *Id.* ¶¶ 15, 37. Note, in contrast to the UNHRC, most of the cases that come before the ECtHR involve applicants with lawful status who were ordered deportation based on criminal convictions. The ECtHR is less likely to find a violation of the right to family unity when dealing with applicants that were convicted on drug-related or other serious charges and more likely to find a violation when the applicants had a citizen spouse and children or had resided in the country since early childhood. Compare *Keles v. Germany*, App. No. 32231/02 (Eur. Ct. H.R. 2005), <http://hudoc.echr.coe.int/eng?i=001-70824>, with *Baghli v. France*, 1999-VIII Eur. Ct. H.R. 169. In a series of cases, the ECtHR established the test for determining violation of the right to family unity: whether the deportation order was "necessary in a democratic society." See, e.g., *Dalia v. France*, App. No. 26102/95, 33 Eur. H.R. Rep. 625, ¶¶ 49–55 (1998) (Eur. Ct. H.R.). Factors the ECtHR tends to weigh heavily include: the "nature and seriousness" of the offenses, the ability of the applicant to maintain contact with his or her family even if deported (i.e., whether the interference with the right to family is total or partial), and whether the claim is made on behalf of the individual being deported alone or additional family members as well (in particular children). See, e.g., *Boultif v. Switzerland*, 2001–IX Eur. Ct. H.R. 119, ¶ 48. For a useful discussion of how the ECtHR applies the right, see Ramji-Nogales, *supra* note 54, at 737–38. The ECtHR also made the deportation of foreigners who have committed serious crimes more difficult for the host State if the foreigner concerned is a person of a so-called "second generation." See, e.g., *Moustaquim case v. Belgium* 1991, App. No. 12313/86, ¶¶ 13, 44 (concerning a Moroccan national who arrived to Belgium at the age of two and he and his family and relatives all lived in Belgium); *Beldjoudi v. France* 1992, App. No. 12083/86 (concerning a plaintiff who was born in France of parents who originated from Algeria, a territory which was French at the time, and how was deemed to have lost his French nationality as his parents did not make a declaration of recognition).

Second, under prior case law, the UNHRC and the ECtHR accepted that claimants without a lawful status cannot present the State with a “fait accompli,”⁵⁷ i.e., establishing residence does not lead to rights. However, more recent case law, discussed below, adds uncertainty over whether presenting the host State with the birth of a child can sway the balance in favor of the individual’s interest in family life over the State’s right to control its immigration policy.

For the UNHRC, the birth of a child does not categorically prevent the deportation of the parent who is in the State in breach of its immigration law. But it does make the deportation procedurally more difficult. *Winata v. Australia*⁵⁸ concerns two Stateless individuals who overstayed their visa terms and gave birth to a son in Australia.⁵⁹ The day after the son was granted Australian citizenship—because he was born in the country and had resided there for ten years—his parents asked for a protection visa, which Australia denied.⁶⁰ In light of the length of time the parents and their son had spent in Australia, however, the Committee determined that Australia was under a duty to demonstrate “additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness.”⁶¹ This, in effect, required Australia to grant the parents a status.⁶²

For the ECtHR, in turn, the birth of a child might ban the deportation of the parent. An example is *Nunez v. Norway*.⁶³ In that case, an applicant entered the country with a forged passport and, once there, received a residence permit and had children with whom she developed “long lasting and close bonds.”⁶⁴ In this case, the Court ruling was based on the best interests of the children, and held

57. See *Omorieg v. Norway*, App. No. 265/07, ¶ 65 (Eur. Ct. H.R. 2008), <http://hudoc.echr.coe.int/eng?i=001-88012> (even birth of one applicant in Norway “could not of itself give rise to any such entitlement”).

58. *Winata v. Australia*, Communication No. 930/2000, U.N. Hum. Rts. Comm., 72d Sess., July 9–27, 2001, U.N. Doc. CCPR/C/72/D/930/2000 (Aug. 16, 2001).

59. *Id.* ¶ 2.1. The couple were formerly Indonesian nationals. They arrived on valid visas that subsequently expired. *Id.* ¶¶ 1, 2.1.

60. *Id.* ¶¶ 2.2–2.4. First, the couple applied for asylum, but after their application was denied, they appealed their asylum claim and applied for a parent visa. *Id.* Once their asylum appeal was denied, they asked that the government exercise humanitarian discretion based on hardship to their son of removal to Indonesia. *Id.*

61. *Id.* ¶ 4. For contrast, see *Stewart v. Canada*, Communication No. 538/1993, U.N. Human Rights Comm., 58th Sess., Oct. 21–Nov. 8, 1996, U.N. Doc. CCPR/C/58/D/538/1993 (Dec. 16, 1996), where, when dealing with Articles 12 of the ICCPR (the freedom of movement or the right to enter one’s country) and Article 17 (the right to a family life) of a permanent resident, the majority rejected the result of Canada’s immigration law.

62. While technically the couple was undocumented, they had a viable route to lawful status (parent visa). For a detailed discussion of the case, see Ramji-Nogales, *supra* note 54, at 734–35, and Gavison, *supra* note 40, at 36–37.

63. *Nunez v. Norway*, App. No. 55597/09 (Eur. Ct. H.R. 2011), <http://hudoc.echr.coe.int/eng?i=001-105415>.

64. *Id.* ¶ 84.

that expulsion of the mother violated the right of the children to a family life.⁶⁵ A year later, however, in *Antwi v. Norway*,⁶⁶ the Court reached the opposite conclusion with regard to an applicant who also came into the country using forged documents, received a work and residence permit, and had a daughter of whom he was the main caretaker.⁶⁷ In that case, the judges held that even if an applicant established a family, there is no Article 8 violation if “[a]t no stage from when he entered [the country] . . . could he reasonably have entertained any expectation of being able to remain in the country.”⁶⁸ While the majority in *Antwi* considered that there were “fundamental differences” between *Antwi* and *Nunez*,⁶⁹ the strong dissenting opinion was adamant that the two cases were “very similar” and “the solution in *Nunez* should have been applied in the present case *a fortiori*.”⁷⁰ This leaves a State uncertain as to how the Court will hold in the next case that deals with the expulsion order of a parent who entered the State in breach of its immigration laws and had a child who is still young at the time of the order.

Third, prior established jurisprudence of both the UNHRC and the ECtHR prioritizes the right to family life as a basis to restrict a State’s discretion to expel non-nationals, but such protection considered only immediate family members. More recently, however, the ECtHR (though *not* the UNHRC) began recognizing a free-standing right to private life, thereby protecting the totality of the social relationships that an alien’s presence spawns in the host country as a grounds to bar deportation. In *Slivenko v. Latvia*,⁷¹ the Court, sitting as the Grand Chamber, reversed the deportation order of a former Soviet army officer

65. *Id.* ¶¶ 79–82, 84 (The applicant was “the children’s primary care person from their birth,” the children “lived all their lives in Norway,” and had already suffered “disruption and stress” due to the decision in the custody proceedings that moved them to the father after the deportation order was issued. “In these circumstances,” the Court concluded that, “the children were vulnerable” and that deporting the mother would violate Article 8).

66. *Antwi v. Norway*, App. No. 26940/10 (Eur. Ct. H.R. 2012), <http://hudoc.echr.coe.int/eng?i=001-109076>.

67. *Id.* ¶¶ 6, 9, 72.

68. *Id.* ¶ 91.

69. *Id.* ¶ 100. In *Nunez*, the daughters developed “long lasting and close bonds to their mother,” and the decision in the custody proceedings to move the children to the father had already led the children to experience significant “disruption and stress,” and a “long period” elapsed “before the immigration authorities took their decision to order the applicant’s expulsion with a re-entry ban.” *Id.* But “[u]nlike what had been the situation of the children of Mrs. Nunez, [Antwi’s daughter] had not been made vulnerable by previous disruptions and distress in her care situation Also, the duration of the immigration authorities’ processing of the matter was not so long as to give reason to question whether the impugned measure fulfilled the interests of swiftness and efficiency of immigration control that was the intended purpose of such administrative measures [Therefore] the Court is satisfied that sufficient weight was attached to the best interests of the child in ordering the first applicant’s expulsion.” *Id.* ¶¶ 101–02.

70. *Id.* ¶¶ 9–10 (“Contrary to the opinion of the majority, the present case is very similar to *Nunez*. . . . [i]f there is indeed a difference between *Nunez* and the present case, this lies in the fact that the latter is even more striking than the former. Consequently, the solution in *Nunez* should have been applied in the present case *a fortiori*.”).

71. *Slivenko v. Latvia*, 2003-X Eur. Ct. H.R. 229.

and his family from Latvia following the withdrawal of Russian troops.⁷² As the deportation order concerned all members of the family unit, it did not amount to an interference with the Slivenkos' right to family.⁷³ Yet the judges concluded that the family's right under Article 8 had, nonetheless, been violated because they were "removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being. Furthermore, they lost the flat in which they had lived."⁷⁴

The growing bias of both the UNHRC and the ECtHR in favor of the human rights tradition is possibly even more evident in cases bearing on the right not to be subject to "torture or to cruel, inhuman or degrading treatment or punishment."⁷⁵ The best examples are cases that deal with non-national applicants who are charged with involvement in terrorism.

Neither the ICCPR nor the ECHR contains a right to political asylum. But both the UNHRC and the ECtHR read a non-refoulement obligation,⁷⁶ or the "cardinal principle of international refugee law,"⁷⁷ into Articles 6 and 7 of the ICCPR and Article 3 of the ECHR. This reading of language from two treaty instruments leaves the host State in the worst situation. Under the Refugee Convention, the non-refoulement right is restricted in cases that involve criminal and security threats to the State.⁷⁸ Under both the ICCPR and the ECHR, in turn, the right not to be subject to "torture or to cruel, inhuman or degrading treatment

72. *Id.* ¶¶ 16–18, 128–29.

73. *Id.* ¶ 97.

74. *Id.* at 232; *see also* Maslov v. Austria, 2008-III Eur. Ct. H.R. 301 ¶ 63. Further, in *Kuric v. Slovenia*, in his partly concurring opinion, Judge Vučinić, observed that the right to private life required protection of the ability of an individual to have relationships in a "public context"—he described this aspect of the right as follows: "Article 8 protects . . . the right to personal development and the right to establish and develop relationships with other human beings as well as the outside world, even in the public context, which may also fall within the scope of 'private life.'" *Kurić v. Slovenia*, 2012-IV Eur. Ct. H.R. 1, 84 (partly concurring, partly dissenting opinion of Judge Vučinić).

75. ICCPR arts. 6–7, Mar. 23, 1976, 999 U.N.T.S. 171; ECHR art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

76. For a definition, see Guy S. Goodwin-Gill, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, 23 INT'L J. REFUGEE L. 443, 444 (2011) ("The obligation on [S]tates not to send individuals to territories in which they may be persecuted, or in which they are at risk of torture or other serious harm . . .").

77. B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. REFUGEE STUD. 350, 355 (1998).

78. Refugee Convention art. 33(2), Apr. 22, 1954, 189 U.N.T.S. 150 ("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."). For a detailed discussion of this exception, see HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, *supra* note 30, at 342–55. Hathaway writes: "In cases that fall under Art. 33(2), the asylum country is authorized to expel or return even refugees who face the risk of extremely serious forms of persecution." *Id.* at 344.

or punishment” is absolute.⁷⁹ The UNHRC and the ECtHR, however, have imported from the Refugee Convention *only* the right of non-refoulement *without* the qualification and, in addition, they attached it to the non-derogatory nature of the right not to be subject to “torture or to cruel, inhuman or degrading treatment or punishment.” This means that both enforcement institutions forbid the deportation of non-nationals charged with terrorism if they face degrading treatment upon return to their home country on account of their involvement in terrorism.

And so, in *Ahani v. Canada*,⁸⁰ the UNHRC reviewed a communication dealing with an author who, after he was accepted as a refugee, was identified by Canada as a trained assassin and was put on deportation proceedings, even though he claimed that if sent back he would face torture and execution.⁸¹ Canada deported the refugee before the UNHRC reached its determination. But the Committee held that “the prohibition on torture . . . is an absolute one that is not subject to countervailing considerations.”⁸² Similarly, in *Othman (Abu Qatada) v. United Kingdom*,⁸³ the ECtHR reversed the deportation order of a radical Islamic preacher regarded as one of Al Qaeda’s main inspirational leaders in Europe because of the risk that he would be tortured to obtain evidence.⁸⁴ The decision held: “Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion.”⁸⁵

In addition, the ECtHR, but *not* the UNHRC,⁸⁶ has gone even further in expanding the scope of the right not to be subject to “torture or to cruel, inhuman or degrading treatment or punishment.” The European Court has made three separate moves.

79. For the non-derogable nature of Article 3 of ECHR, see the landmark case *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 88 (1989) (“Article 3 . . . makes no provision for exceptions and no derogation from it is permissible . . .”).

80. *Ahani v. Canada*, Communication No. 1051/2002, U.N. Human Rights Comm., 80th Sess., Mar. 15-Apr. 2, 2004, U.N. Doc. CCPR/C/80/D/1051/2002 (June 15, 2004), <http://www.refworld.org/docid/4162a5a50.html>.

81. *Id.* ¶¶ 2.1–2.5.

82. *Id.* ¶ 10.10.

83. *Othman (Abu Qatada) v. United Kingdom*, 2012-I Eur. Ct. H.R. 159.

84. *Id.* ¶ 25.

85. *Id.* ¶ 185; *see also* *Saadi v. Italy*, 2008-II Eur. Ct. H.R. 144, ¶ 139 (“The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived.”); *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 413.

86. In general, the jurisprudence of the ECtHR is more liberal than that of the UNHRC. In fact, the Court has been called “the crown jewel of the world’s most advanced international system for protecting civil and political liberties.” Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT’L L. 125, 159 (2008). In cases that bear on immigration, applicants to the UNHRC often ask that the Committee take guidance from the jurisprudence of the ECtHR. *See, e.g., Winata*, *supra* note 58, ¶ 3.5; *Ahani*, *supra* note 80, ¶ 3.5.

First, the ECtHR has drastically expanded the substantive grounds of non-refoulement. Traditionally, the European Court had carefully capped the scope of Article 3 non-refoulement obligations at ill treatment that resulted from persecution in situations where the alien faces a well-founded fear of harm in her home State on account of any of the five familiar grounds.⁸⁷ But case law excluded “ill treatment” that derived either from widespread violence due to an “unsettled situation”⁸⁸ or from an “acute pertinence of socio-economic” deprivation in the receiving country.⁸⁹ In the span of three years, however, the ECtHR extended non-refoulement protections to include cases involving general, widespread violence or potential socio-economic deficiency.

In *NA. v. United Kingdom*,⁹⁰ the ECtHR, sitting as the Grand Chamber, held that the Court will not discount “the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention.”⁹¹ Three years later, in *MSS v. Belgium and Greece*,⁹² a case that dealt with an asylum seeker who reached the territory of the host State, the

87. See *supra* p. 7 (discussing five grounds from Refugee Convention).

88. See, *inter alia*, Saadi, *supra* note 85, ¶ 131 (remarking that “the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3”); *Fatgan Katani v. Germany*, App. No. 67679/01, (Eur. Ct. H.R. 2001); *H.L.R. v. France*, 1997-III Eur. Ct. H.R. ¶ 41 (noting a “general situation of violence existing in the country of destination . . . would not in itself entail, in the event of deportation, a violation of Article 3”); *Vilvarajah v. United Kingdom*, 215 Eur. Ct. H.R. (ser. A) ¶ 111 (1991) (“Since the situation was still unsettled there existed the possibility that they might be detained and ill-treated as appears to have occurred previously in the cases of some of the applicants A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3”); Press Release No. 228(2005), Council of Europe, European Court of Human Rights – Chamber Judgments Concerning France, Poland, Turkey and Ukraine, Council of Eur., <https://wcd.coe.int/ViewDoc.jsp?id=893751&Site=COE> (summarizing that in *Muslim v. Turkey*, App. No. 53566/99 (Eur. Ct. H.R. 2005), the ECtHR “reaffirmed that a mere possibility of ill-treatment as a result of temporary instability in the country did not in itself entail a breach of Article 3”).

89. *N. v. United Kingdom*, 2008-III Eur. Ct. H.R. 227, ¶ 44 (“Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights.”); *id.* ¶ 42 (“Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from . . . social or other forms of assistance and services provided by the expelling State. The fact that the applicant’s circumstances . . . would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3.”); *Sheekh v. Netherlands*, App. No. 1948/04, ¶ 141 (Eur. Ct. H.R. 2007), <http://hudoc.echr.coe.int/eng?i=001-78986> (“While the Court by no means wishes to detract from the acute pertinence of socio-economic . . . considerations to the issue of forced returns of rejected asylum seekers to a particular part of their country or origin, such considerations do not necessarily have a bearing, and certainly not a decisive one, on the question whether the persons concerned would face a real risk of ill-treatment within the meaning of Article 3 of the Convention in those areas.”).

90. *NA. v. United Kingdom*, App. No. 25904/07 (Eur. Ct. H.R. 2008), <http://hudoc.echr.coe.int/eng?i=001-87458>.

91. *Id.* ¶ 115.

92. *M.S.S. v. Belgium & Greece*, 2011-I Eur. Ct. H.R. 121.

ECtHR, again sitting as the Grand Chamber, held that acute financial deprivation, or a condition where an asylum seeker is “wholly dependent on State support” and finds herself “in a situation of serious deprivation or want incompatible with human dignity,” may likewise fall within the reach of Article 3 protection.⁹³

Second, the ECtHR has significantly liberalized the procedural threshold required to demonstrate an Article 3 non-refoulement violation.⁹⁴ In the early 1990s, the Court applied a narrow assessment of risk: an applicant had to produce “substantial grounds” that he “faces a real risk”⁹⁵ on account of one of the five grounds.⁹⁶ However, by the early 2000s, the Court tolerated a more lax standard: “concerns as to the risks [the applicant] faced,” for example, were sufficient to trigger Article 3 non-refoulement duty.⁹⁷ Similarly, the Court moved from requiring a fairly high level of individualization (an applicant’s personal “situation” must be “worse than the generality of other members” of his community “who were returning to the country”)⁹⁸ to accepting a more general risk (for instance, possibility of ill-treatment on account of “a general situation of the non-observance of human rights in the applicant’s home country.”).⁹⁹

Third, in dealing with those classified as asylum seekers, the ECtHR enlarged the right of non-refoulement from a minimal negative obligation not to deport (non-removal)¹⁰⁰ to a positive obligation to protect. The key case here is *M.S.S v. Belgium & Greece*, mentioned previously. In deciding the case, the ECtHR’s Grand Chamber held that the failure to process asylum applications “within a reasonably short time and with utmost care”¹⁰¹ in circumstances where the applicant is “wholly dependent on State support” and in “a situation of

93. *Id.* ¶¶ 252–53, 263 (deprivation must be serious enough to reach levels of “extreme material poverty”).

94. For a detailed discussion of this point, see VAN DIJK ET AL., *supra* note 49, at 433–34.

95. *See, e.g.*, Cruz Varas and Others v. Sweden, 201 Eur. Ct. H.R. (ser. A) ¶¶ 69–70 (1991); Vilvarajah, *supra* note 88, at 107–15.

96. *See supra* p. 7 (discussing five grounds from Refugee Convention).

97. *See, e.g.*, T.I. v. United Kingdom, 2000-III Eur. Ct. H.R. 435, 438.

98. Vilvarajah, *supra* note 88, at 111–12.

99. *N.A. v United Kingdom*, App. No. 25904/07, 2008 at 115 (“the Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention.”).

100. *See, e.g.*, FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 193 (Brian Opeskin et al. eds., 2012) (“[T]he duty of *non-refoulement* only prohibits measures that cause refugees to ‘be pushed back into the arms of their persecutors’; it does not establish an affirmative duty to receive refugees.”); Gregor Noll, *Seeking Asylum at Embassies: A Right to Entry Under International Law?*, 17 INT’L J. REFUGEE L. 542, 548 (2005) (“*Non-refoulement* is about being admitted to the [S]tate community, although in a minimalist form of non-removal.”).

101. *M.S.S. v. Belgium & Greece*, *supra* note 92, at 103 (Judge Sajó, partly dissenting)

serious deprivation”¹⁰² engages the State’s responsibility to provide asylum seekers with affirmative support and, in particular, adequate housing.¹⁰³

The combined result of these three moves is that the Strasbourg Court is growing the regime of refugee law from one that is grounded in narrow exceptions relevant essentially to first-world concerns¹⁰⁴ into one that can deal with mass atrocities (economic, environmental, and political) across the world. In some circumstances, moreover, this Court also attaches positive obligations. And so the ECtHR holds the State owing significant protection to an undefined number of individuals it never intended to let into the country in the first place.

To be sure, none of the rulings analyzed above provide precise parameters for when the State can and cannot deport non-nationals. Many questions remain open. For example, when dealing with the right to a family life, the precise scope of protection is contested. The vast majority of available case law deals with non-nationals in one of two situations: (i) an individual in a permanent lawful status who broke his or her terms of entrance (like *Amrollahi*) or (ii) those without a status but with a viable path to lawful status prior to deportation proceedings (like *Winata*). This leaves unresolved whether enforcement bodies would be willing to prioritize the family right of an individual over the State’s prerogative to exclude in cases that involve less sympathetic undocumented migrants who push harder on the immigration policy of the host State.¹⁰⁵ Similarly, with the right to non-degrading treatment, it is still undefined how bad the violence or poverty must be to bar deportation.

What *is* certain is that when it comes to immigration, in the past ten years the UNHRC and the ECtHR have changed their bias in favor of the universalist tradition. They increased the access of non-nationals to human rights. In particular, they read human rights norms more strictly and more absolutely, and developed substantive standards of protection beyond the five traditional grounds in the Refugee Convention—especially with regard to the ECHR. Importantly, however, the way in which they moved in the direction of the human rights tradition *interlocks* with, rather than opposes, the statist dedication to territory: human rights courts and quasi-judicial bodies correlate jurisdiction with physicality grounded in territory.¹⁰⁶ Beneficiaries have access to more

102. *Id.* ¶ 253.

103. *Id.* ¶ 263 (“[T]he Greek authorities have not had due regard to the applicant’s vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.”).

104. Harold Koh refers to this as the “good aliens.” See, e.g., Harold Hongju Koh, Who Are the Archetypal “Good” Aliens? 451 (Jan. 1, 1994) (unpublished manuscript) (on file with the Yale Law School Legal Scholarship Repository) (“[T]he archetypal ‘good’ alien . . . is a white, healthy, law-abiding, self-sufficient, anti-communist, heterosexual, male political refugee, who arrives by himself at the U.S. Embassy in Moscow and seeks political asylum; Rostropovich and Baryshnikov are two obvious examples.”). For more on a comparison between the “good” alien of the Cold War and the “bad” alien of the 1990s onwards, see Chimni, *supra* note 77, at 355–60.

105. For this point, see Ramji-Nogales, *supra* note 54, at 733–38.

106. Human rights protection is also triggered if the plaintiff reaches under the effective

rights, but they can only trigger the State's protection of those rights if they are able to reach the State's shores. Once inside the State, the rights are inherent in the individual and external to the State's interests. The State, in turn, is held accountable for these rights, even if meeting this expectation is politically or financially costly. Outside the State's jurisdiction, however, the plight of the non-national is of no legal concern to the State.¹⁰⁷ And so, as human rights adjudicatory bodies moved in the direction of the universalist legal tradition, they have also, in effect, further produced territoriality.

II.

FRONT DOOR STRATEGIES OF IMMIGRATION CONTROL

States have moved to tighten up immigration from what I term the “front door”: stopping would-be immigrants or asylum seekers *ex ante* before they reach any direct contact with the territory of the receiving State and can activate protective duties.¹⁰⁸ Here, I only look at two strategies of “front door” control: maritime migrant interdiction on the high seas and the building of border walls as an immigration control policy. These two strategies are similar. States utilize defined physical boundaries to stop immigrants from getting in, either by land or sea, so that their entry does not activate State obligations for their protection. Indeed, Professor Harold Koh referred to interdiction as a “floating Berlin Wall.”¹⁰⁹ But while interdiction is extensively researched,¹¹⁰ walls remain

control of the state, even if she is not physically present on the state's territory proper. *See infra* p. 28 for discussion of the extraterritorial application of human rights law.

107. In the context of non-refoulement, this idea was nicely summed up by the House of Lords: the legal protection “is concerned only with where a person must not be sent, not with where he is trying to escape from.” *European Roma Rights Centre v. Immigration Officer at Prague Airport*, [2003] EWCA (Civ.) 666, [37] (Eng.), *aff'd*, *R v. Immigration Officer at Prague Airport*, [2004] UKHL 55 (appeal taken from Eng.). James Hathaway adds that a weakness of non-refoulement is that it traps “would-be refugees . . . inside their own count[ri]es.” HATHAWAY, *THE LAW OF REFUGEE STATUS*, *supra* note 30, at 19.

108. Other scholars use the term “non-entrée.” *See* James C. Hathaway & Thomas Gammeltoft-Hansen, *Non-Refoulement in a World of Cooperative Deterrence* 6 n.12 (Mich. Law Sch. Law & Economics Working Paper, 2014) (noting the term “was first employed by James Hathaway” in 1992, and that “[i]n essence, it suggests that whereas refugee law is predicated on the duty of *non-refoulement* (that refugees shall not be turned away), the politics of *non-entrée* is based on a commitment to ensuring that refugees shall not be allowed to arrive.”). I, however, employ the phrase “to close the front door” to refer to restrictions that take place *at the actual border* and therefore involve the specificity of the border itself. In this way, my phrase “front door” is different from and narrower than “non-entrée”: “front door” only applies to restrictions that take place on the actual, physical territorial border of the State; “non-entrée” applies more broadly to all restrictions on entrance wherever they take place.

109. Harold Hongju Koh, *Closed Door Policy for Refugees*, *LEGAL TIMES* S36, S37 (July 26, 1993) (“The Kennebunkport Order effectively erected a floating Berlin Wall around Haiti, preventing Haitians from fleeing not just to the United States, but to any of the scores of islands between the United States and Haiti.”); *see also* Linda Greenhouse, *Court is Asked to Back Haitians' Return*, *N.Y. TIMES*, Mar. 3, 1993, at A16 (“Mr. Koh said his position would not require the United States to accept all Haitian immigrants. He said there were other islands the Haitians might reach if they were not prevented from leaving by a ‘floating Berlin wall.’”); Harold Hongju Koh, *The ‘Haiti*

relatively unexamined.¹¹¹ Yet walls make concrete the morally unsatisfactory nature of the compromise that courts worked out between universality and exclusion.

Let me begin with interdiction. Starting in the 1980s, highly developed nations increasingly turned to maritime interdiction on the high seas.¹¹² By the early 2000s, the practice was consolidated into a key border enforcement tool for coastal States, and, in particular, for the United States, the European Union, and Australia.¹¹³ The U.S. Supreme Court, called to review the practice in *Sale v. Haitian Ctrs. Council*,¹¹⁴ provided what later developed into the model justification for interdicting States.¹¹⁵ The Supreme Court held that human rights

Paradigm in *United States Human Rights Policy*, 103 YALE L.J. 2391, 2396 (1994).

110. See EFTHYMIOS PAPASTAVRIDIS, *THE INTERCEPTION OF VESSELS ON THE HIGH SEAS, CONTEMPORARY CHALLENGES TO THE LEGAL ORDER OF THE OCEANS* (2013); JOANNE VAN SELM & BETSY COOPER, *THE NEW "BOAT PEOPLE": ENSURING SAFETY AND DETERMINING STATUS* (2005); Itamar Mann, *Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013*, 54 HARV. INT'L L. J. 315 (2013) [hereinafter Mann, *Dialectic of Transnationalism*]; Goodwin-Gill, *supra* note 76; Barbara Miltner, *Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception*, 30 FORDHAM INT'L L.J. 75 (2006); Jon L. Jacobson, *At-Sea Interception of Alien Migrants: International Law Issues*, 28 WILLAMETTE L. REV. 811 (1992); Mark Pallis, *Obligations of States Towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes*, 14 INT'L J. REFUGEE L. 329 (2002); Andrew Brouwer & Judith Kumin, *Interception and Asylum: When Migration Control and Human Rights Collide*, 21 REFUGEE: CAN.'S J. ON REFUGEES 6–7 (2003); James C. Hathaway, *The Emerging Politics of Non-Entrée*, 91 REFUGEES 40 (1992).

111. See *supra* note 30.

112. By interdiction, I follow the definition of the U.N. Refugee Agency (UNHCR) to mean stopping persons from crossing international borders if they lack the required documentation, and preventing them from making their way to their destination country. Standing Comm., Exec. Comm. of the High Comm'r's Programme, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, ¶ 12, U.N. Doc. EC/50/SC/CRP.17 (June 9, 2000).

113. Tendayi Achiume, Jeffrey Kahn & Itamar Mann, *Online Symposium: The Globalization of High Seas Interdiction—Sale's Legacy and Beyond*, OPINIO JURIS (Mar. 10, 2014), <http://opiniojuris.org/2014/03/10/online-symposium-globalization-high-seas-interdiction-sales-legacy-beyond/>. For interception around the Mediterranean and in the Atlantic Ocean, see for example Derek Lutterbeck, *Policing Migration in the Mediterranean*, 11 MEDITERRANEAN POL. 59 (2006). For interdiction and the EU, see Goodwin-Gill, *supra* note 76, at 443. For the Australian policy of interdiction, see *M70/2011 v. Minister for Immigration and Citizenship* (2011) 244 CLR 144 (Austl.).

114. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 158–59 (1993). In the case, the U.S. Supreme Court was asked to decide whether an interception on the high seas violated the United States' obligations under the 1967 United Nations Protocol Relating to the Status of Refugees. For an overview of the relevant history, see generally Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139 (1995). For the United States' policy of interception, see a series of articles by Harold Hongju Koh, for example, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994) and *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L. L.J. 1 (1994). See also Arthur C. Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 N.Y.L. SCH. J. HUM. RTS. 325 (1993). For a broader account of Haiti's place in the history of world politics, see generally SUSAN BUCK-MORSS, *HEGEL, HAITI, AND UNIVERSAL HISTORY* (2009).

115. Itamar Mann, *supra* note 110, at 328 ("For better or worse, Haiti provided a paradigm for international law in the next two decades. The model of law that came out of the Haiti affair,

obligations are strictly territorial, and international treaties “cannot impose . . . extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.”¹¹⁶ Thus, human rights do not apply on the high seas and are only triggered “on the threshold of initial entry.”¹¹⁷

And the response of human rights courts and quasi-judicial bodies? Both the UNHRC and the ECtHR have increasingly constrained States’ ex ante strategies of interdiction. In *Jamaa v. Italy*,¹¹⁸ the ECtHR, sitting as the Grand Chamber, provided the landmark ruling on interdiction. The judges explained that human rights jurisdiction “is essentially territorial.”¹¹⁹ But it is also engaged “[w]henver the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction.”¹²⁰ When a non-national is affected by those acting on behalf of the State, “the State is under an obligation . . . to secure to that individual the [human rights] that are relevant to the situation of that individual.”¹²¹ In interdiction cases, this means that an intercepting State must provide the passengers on the boat with procedural guarantees (an individual refugee-status determination procedure)¹²² and a

combining bilateral relations, a treaty, and a domestic court, later migrated outside of the United States.”). Harold Koh was the first person to argue that the Haitian refugee crisis should be understood “as illustrating a paradigmatic crisis of the New World Disorder.” Harold Hongju Koh, *Refugees, the Courts, and the New World Order*, 1994 UTAH L. REV. 999, 1009 (1994).

116. *Sale*, 509 U.S. at 183. In contrast, see Harold Hongju Koh arguing that foreign courts were bound by “principles of comity, sanctity of treaty, and respect for human rights that must form the bedrock of any new world order[.]” Harold Hongju Koh, *Reflections on Refoulement and Haitians Centers Council*, 35 HARV. INT’L L.J. 1, 20 (1994).

117. *Sale*, 509 U.S. at 180.

118. *Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 97.

119. *Id.* ¶ 71 (and is “presumed to be exercised normally throughout the State’s territory”).

120. *Id.* ¶ 74.

121. *Id.*; see also *id.* at 173 (Pinto de Albuquerque, J., concurring) (“The prohibition of *refoulement* is not limited to the territory of a State, but also applies to extraterritorial State action, including action occurring on the high seas.”). Note that in this holding, the ECtHR is merely repeating what it said many times prior. See, e.g., *Ilașcu v. Moldova*, 2004-VII Eur. Ct. H.R. 179; *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333. But, in contrast, Chimène I. Keitner confirms that even in a context in which courts increasingly face claims regarding the rights of people located beyond their countries’ borders, they largely remain bound to territorial adjudication. Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT’L L. 55, 57–58 (2011). The ECtHR has been reluctant to apply the ECHR outside the territory of the Convention States (notably *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333). However, even in this case, the Court concluded that “the ECtHR has consistently held that the obligations under the ECHR apply extraterritorially in situations where a “State, through the effective control of the relevant territory and its inhabitants abroad . . . exercises all or some of the public powers normally to be exercised by that government.” *Banković*, 2001-XII Eur. Ct. H.R. ¶ 71. In more recent cases, the ECtHR based the decisions in which it declined jurisdiction for acts outside the territory of a Member State not on territorial grounds, but on other considerations. See *Ilașcu v. Moldova*, 2004-VII Eur. Ct. H.R. 179, ¶ 310–31 (holding Moldova responsible even in the absence of effective control over the Transnistrian region within Moldova).

122. *Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 97, ¶ 185 (the host State must provide an “examination of each applicant’s individual situation” by personnel that is “trained to conduct individual interviews” and “assisted by interpreters or legal advisers.” This means that collective expulsion is in breach of Article 4 of Protocol No. 4 to the Convention).

substantive obligation (non-refoulement, or not to send back an individual who faces harm).

Similar to the ECtHR, the UNHRC has also held that the State is responsible for the human rights (including non-refoulement) of “all persons in their territory and all persons under their control.”¹²³ And the extraterritorial application of human rights was likewise supported by multiple other international human rights bodies as well as national courts.¹²⁴

In Part II, this Article showed that the UNHRC and the ECtHR deploy jurisdiction based on territory: they require territorial presence in order to activate human rights protective obligations. Here, with interdiction on the high seas, the UNHRC and the ECtHR apply jurisdiction extraterritorially: they correlate jurisdiction with physicality grounded in contact, such that jurisdiction follows the State on the high seas wherever it establishes contact with or exercises effective control over the non-national, whether that is inside or

123. Human Rights Comm., General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter General Comment No. 31]. According to the UNHRC, the test for the applicability of the law is not territorial presence, but effective control of the State — that is, whether in respect of the conduct alleged, the person is under the effective control of, or is affected by those acting on behalf of, the State in question. *See* ICCPR art. 2 ¶ 1, Mar. 23, 1976, 999 U.N.T.S. 171. *See also* for the UNHRC, among other examples, General Comment No. 31 ¶ 10 (the protection of the ICCPR is triggered when a person is “within the power or effective control of that State party, even if not situated within the territory of the State Party.”); Human Rights Comm., Concluding Observations of the Human Rights Committee: United States of America, ¶ 284, U.N. Doc. CCPR/C/79/Add.50 (Apr. 6, 1995) (same); *A.R.J. v. Australia*, Human Rts. Comm., U.N. Doc. CCPR/C/60/D/692/1996, ¶ 6.8 (July 28, 1997); *Kindler v. Canada*, Communication No. 470/1991, U.N. Human Rights Comm., U.N. Doc. CCPR/C/48/D/470/1991, ¶ 6.2 (July 30, 1993).

124. For a good summary of both those treaties and the wide interpretation of the extraterritorial reach of the non-refoulement obligation, see U.N. High Commissioner for Refugees, 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, e.g.,* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 109 (July 9, 2004) (“[W]hile the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.”); *J.H.A. v. Spain*, Communication No. 323/2007, U.N. Comm. Against Torture, 41st Sess., Nov. 3–21, 2008, U.N. Doc. CAT/C/41/D/323/2007, ¶ 8.2 (2008) (“[T]he jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, de jure or de facto effective control”); U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, 36th Sess., May 1–19, 2006, U.N. Doc. CAT/C/USA/CO/2, ¶¶ 15, 20 (May 18, 2006) (affirming that the State must ensure that the non-refoulement obligation is “fully enjoyed, by all persons under the effective control of its authorities . . . wherever located in the world”); *UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council*, 32 INT’L LEGAL MATERIALS 1215 (1993); Office of the United Nations High Commissioner for Refugees, *The Haitian Interdiction Case 1993 Brief Amicus Curiae*, 6 INT’L J. REFUGEE L. 85 (1994); *Haitian Centre for Human Rights v. United States*, Case 10.675, Inter-Am. Comm’n H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 157 (1997) (“[A]rticle 33 had no geographical limitations.”). *See also* *Coard v. United States*, Case No. 10.951, Inter-Am. Comm’n H.R., Report No. 109/99 ¶ 180 (1999) (“Given that individual rights inhere simply by virtue of a person’s humanity, each . . . State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a [S]tate’s territory, it may . . . refer to conduct with an extraterritorial locus”).

outside of the State's borders. This extraterritorial application of human rights law is not an abandonment of the logic of territoriality: it does not break out of the conceptual bind between access and territory. Instead it is an extension, even a hypertrophy, of territoriality: it only expands the limits of the existing territorial scheme.

The act of exercising border constraint—the State's interception or contact with a non-national—is legally crucial. The plaintiff (the individual right bearer) is not only where she is physically found, but also where she might have been without the coercion of the State (the interception practice), so that her intended destination State becomes a defendant. A State, then, can coerce, or repel an asylum seeker or a would-be immigrant from entering its territory, but that act of coercion—the act of border control—itself triggers human rights protective responsibilities because the State exercises effective control over the individual. And so, on the high seas, individuals are *always* protected by human rights law, or, in the words of the ECtHR Grand Chamber, “the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by [the ECHR].”¹²⁵

A State that seeks to maintain control over the inflow of would-be-immigrants and asylum seekers coming in by boat, without accruing protective duties over an undefined number of people, must therefore move its immigration control to the shadows. It ought to deter at sea without looking like it is deterring, and develop soft deterrents in lieu of, or in advance of, hard deterrents that would trigger human rights protections. Indeed some European States are already outsourcing interdiction practices to source or transit countries, thereby avoiding any direct fingerprint that would trigger jurisdiction and broad protective obligations.¹²⁶

What about walls? Around 2005, States also began building border walls and other physical or technological constraints as part of their immigration control policy.¹²⁷ Today, we see such walls across the North America, the EU, the Middle East, and Africa.¹²⁸ The legal justification for such walls, as stated by the United States District Court for the District of Columbia, “pertains to

125. *Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 97, ¶ 178.

126. David Martin, *YLS Sale Symposium: Interdiction of Asylum Seekers—The Realms of Policy and Law in Refugee Protection*, OPINIO JURIS (Mar. 15, 2014, 11:30 AM), <http://opiniojuris.org/2014/03/15/yys-sale-symposium-interdiction-asylum-seekers-realms-policy-law-refugee-protection/> (“The more ambitious the ruling, the further into the shadows such channels may go.”). See also Mann, *Dialectic of Transnationalism*, *supra* note 110.

127. For instance, Spain began the construction of double fences earlier, in 1998, but considerably reinforced it in 2005. Tremlett, *supra* note 15.

128. For specific information on those walls, see Migrants' Rights, *Connected Walls—Web Documentary Supported by FIDH*, FIDH, July 11, 2014, <https://www.fidh.org/International-Federation-for-Human-Rights/migrants-rights/16427-25th-anniversary-of-the-fall-of-the-berlin-wall>.

both foreign affairs and immigration control” and is “inherent in the executive department of the sovereign.”¹²⁹

As for the human rights response? At the moment, border walls are relatively unregulated under the law. Yet immigrants are coming to these walls in ever larger and increasingly coordinated numbers.¹³⁰ It is thus only a question of time until a human rights court will be called on to regulate such a wall.

A human rights court or a quasi-judicial institution that is asked to adjudicate a border wall built as part of an immigration control strategy will have to choose between three competing approaches to regulating such a wall. These choices correspond to the tensions, outlined at the beginning of this paper, between the universalist and exclusionist frameworks. Each approach correlates to a radically different vision of borders and sovereignty in the international order, and, at the same time, *none* of these three methods for regulating a border wall can be defended normatively and continuously.

A. *First Method—Adopt the Universalist Tradition.*

A court that chooses this tradition builds upon the similarities between liquid and solid barriers, interdiction and wall-building, to apply the interdiction precedent to a wall scenario: if human rights apply on the high seas before non-nationals enter the territory of the State, human rights are also guaranteed to non-nationals approaching a wall, before they cross to the other side. This would mean that a host State could build a wall, but still owe procedural duties (individual assessment of refugee claim) and substantive duties (non-refoulement) to anyone who comes close to the wall. In doing so, the court takes the *Jamaa v. Italy* ruling to its ultimate conclusion: jurisdiction aligned with physicality and grounded in proximity.

To support this approach, a court could defer to traditional interpretations of the duty of non-refoulement under the Refugee Convention, which are normally understood to constrain both ejection from within a State’s territory *and* non-admittance at its frontiers.¹³¹ Such a court could even go a step further. A recent report by the Inter-American Commission of Human Rights that deals, *inter alia*, with the “terrible effects”¹³² of the U.S.-Mexico wall, explains:

129. *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 129 (D.D.C. 2007).

130. See discussion *infra* Conclusion.

131. See, e.g., Exec. Comm. of the High Comm’r’s Programme, Non-Refoulement, Conclusion No. 6(c) (XXVIII) (Oct. 12, 1977), <http://www.unhcr.org/3ae68c43ac.html> (acknowledging “the fundamental importance of the observance of the principle of non-refoulement—both at the border and within the territory of a State”); GREGOR NOLL ET AL., STUDY ON THE FEASIBILITY OF PROCESSING ASYLUM CLAIMS OUTSIDE THE EU AGAINST THE BACKGROUND OF THE COMMON EUROPEAN ASYLUM SYSTEM AND THE GOAL OF A COMMON ASYLUM PROCEDURE 36 (“Today, there appears to be ample support for the conclusion that Article 33(1) of the Refugee Convention is applicable to rejection at the frontier of a potential host [S]tate.”). For a detailed discussion, see HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW, *supra* note 30, at 315–18.

132. INTER-AM. COMM’N ON HUMAN RIGHTS, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS ¶¶ 107–08 (2010),

One of the most harmful effects of the physical barriers erected along the border is that . . . they merely steer immigrants in the direction of those border areas where no physical barriers have been erected and where conditions tend to be so extreme as to make the crossing highly dangerous. Summing up, this type of measure increases the death rate among undocumented migrants¹³³

This report is only an observation and a caution on the effects of the U.S.-Mexico barrier.¹³⁴ But it does suggest that the wall, by impeding immigration flow at certain crossings and channeling it instead to more dangerous routes, may itself trigger human rights jurisdiction because of the foreseeable harm to would-be migrants and asylum seekers.

Earlier, in the discussion of the interdiction cases, this Article highlighted that the UNHRC and the ECtHR aligned jurisdiction with physicality grounded in contact (the non-national's coming within the effective control of the State). The State's act of coercion—turning away the boat—confers jurisdiction regardless of whether the border control practices take place on the State's territory or on the high seas. However, here contact is no longer required to trigger responsibilities. Getting close to the wall (even if there is no actual contact with the State or its agents), or jurisdiction grounded in proximity, would be equal to establishing territorial presence inside the State. A host State would owe protective duties not only to anyone it actively forced away, but also to a potentially unlimited number of plaintiffs who reach the vicinity of the wall.

In this approach, a border wall acts as a bridge: being on the other side of the wall is as good as being inside the State's territory. But a wall is simply a physical manifestation of the border. It reinforces a border that was always there and is not disputed. If getting close to the wall triggers human rights protection (jurisdiction grounded in proximity), then the State loses effective control over its borders: it accrues obligations to individuals on both sides of the border. Indeed, Professor Guy Goodwin-Gill, one of the leading scholars of refugee law and a legal adviser in the Office of the UNHCR from 1976 to 1988, explains that borders “do not mark the limit of [international] law.”¹³⁵ And so, just as much as on the high seas individuals are *always* protected by human rights law (recall *Jamaa's* statement that even in “the maritime environment” there is no “area outside the law”),¹³⁶ there is no place on land that is not covered by human rights law.¹³⁷ Again from Professor Goodwin-Gill: “[T]here is no physical space

<http://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf>.

133. *Id.* ¶ 107.

134. The United States could respond to the concern of the Commission by sealing off the more dangerous crossings (i.e., increasing the wall) as well as by taking down the wall. Alternatively, it could do nothing.

135. Guy Goodwin-Gill, *YLS Sale Symposium: Sale's Legacy and Beyond (Part III)*, OPINIO JURIS (Mar. 16, 2014, 6:00 PM), <http://opiniojuris.org/2014/03/16/yale-sale-symposium-sales-legacy-beyond-part-ii/> [hereinafter Goodwin-Gill, *YLS Sale Symposium*].

136. *Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 97, ¶ 178.

137. It should be noted that more open borders do not mean automatic protection. Rather it means that more people would come under human rights jurisdiction and would, therefore, be able to invoke protection. However, whether they would actually be covered by the law would still depend

and no realm of human activity that is beyond the rule of law.”¹³⁸ Sovereignty in this approach no longer denotes a space that is outside human rights law. Pushed to its extreme, the result is open borders: a universal application of human rights that is divorced from territorial limitations (one’s place of birth carries no legal significance in the operation of human rights).

An “open borders” international regime is, however, at this point, utopian and disconnected from reality.¹³⁹ It would provide absolute rights while largely ignoring consequentialist concerns about implementation or remediation.¹⁴⁰ Furthermore, if States came to view as unsustainable the number of immigrants that human rights courts might press them to accept, they might even choose to withdraw altogether from the jurisdiction of international human rights courts and other quasi-judicial institutions altogether.¹⁴¹ This is not an empty threat—in fact, former British Prime Minister David Cameron put this exact loaded gun on the table, vowing that he is ready to lead Great Britain outside the ECtHR if it is the only way to send back foreign criminals.¹⁴²

Even if a scenario of open borders were feasible, in a reality of finite resources, boundaries must be permitted somewhere in order for welfare rights to be economically and politically tolerable. Without boundaries, citizenship rights (or membership that guarantees some form of an insider preference) would become meaningless, and all that would be left would be individual property rights (or the ability to provide for oneself). Citizens and non-citizens alike would be eligible to receive precisely nothing from any public entity. This leaves those citizens without property in the host State worse off than before borders were open, and non-nationals that come into the State no better off.

on whether they met the definition of protection.

138. Goodwin-Gill, *YLS Sale Symposium*, *supra* note 135.

139. Without borders, the existing notion of a state-based polity (including citizenship) disappears.

140. This resembles a Dworkinian top-down process of constitutional adjudication that is not concerned with considerations of efficacy, consequences, empirical data, or political pressures. But Dworkin writes in the context of a closed philosophical system of abstract legal principles with no real world consequences. *See, e.g.*, RONALD DWORKIN, *LAW’S EMPIRE* (1986). For more on the difficulty of separating rights from remedies in the context of constitutional law, see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

141. For more on judicial backlash and human rights law in a different context, see Andrew T. Guzman & Katerina Linos, *Human Rights Backsliding*, 102 CALIF. L. REV. 603 (2014).

142. Matt Chorley & James Slack, *Britain Could Leave European Convention on Human Rights if it is the Only Way to Kick Out Foreign Criminals, Cameron Vows*, DAILY MAIL, June 3, 2015 (“Our plans set out in our manifesto do not involve us leaving the European Convention on Human Rights. But if we can’t achieve what we need . . . when we’ve got these foreign criminals committing offence after offence and we can’t send them home because of their right to a family life, that needs to change. I rule out absolutely nothing in getting that done.”). This is not the first time that Cameron has made this threat. Only a few days after the ECtHR banned the deportation of Abu Qatada, in *Othman v. United Kingdom*, 2012-I Eur. Ct. H.R. 159, Cameron called for the ECtHR to restrict its power to overrule national judgments on immigration matters. Stephen Castle, *Cameron Calls for European Court to Limit Its Reach*, N.Y. TIMES, Jan. 25, 2012.

B. Second Method—Adopt the Exclusionist Tradition.

Since, as a practical matter, walls and interdiction are the same, a court that elects this tradition will use a case that bears on a wall to revisit and to pressure the interdiction precedent: if a State's border is final and the wall simply concretizes the border, then the wall is also a final obstacle to entry. Getting close to the wall does not trigger human rights jurisdiction. Instead jurisdiction is softened back from the interdiction precedent (jurisdiction initiated through physicality grounded in contact) to requiring territorial presence (jurisdiction associated with geography). To substantiate this approach, the court could refer to precedents coming out of international courts adjudicating the two most notorious walls in international law: the Israeli Security Fence and the Berlin Wall. These precedents grant the State the power to build a wall on its own territory, defining to which persons it owes obligations and to whom it does not.

In its Advisory Opinion, *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,¹⁴³ the International Court of Justice (ICJ) was called to review the legality of the wall built by Israel.¹⁴⁴ The Court held the Israeli Security Fence illegal *per se*.¹⁴⁵ Yet it expressly limited its analysis to those parts of the wall constructed outside the territory of Israel.¹⁴⁶ By implication, the ICJ considered the parts of the wall built within the State to be necessarily lawful and without limitations *vis-à-vis* human rights jurisdiction.¹⁴⁷

Further, in a series of cases that involved shootings on the Berlin Wall,¹⁴⁸ both the ECtHR and the UNHRC suggested that even if a wall built on a State's

143. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 121 (July 9, 2004).

144. *Id.* at 141 (the ICJ was asked to render an opinion on the question: "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian territory[?]").

145. *Id.* ¶ 121 (the very construction of the barrier on occupied territory violated international law because it was erected to "to create a 'fait accompli' on the ground that could well become permanent, in which case . . . it would be tantamount to *de facto* annexation [of Palestinian land]."). As such, Israel was under an obligation to cease construction works, to dismantle the structure already built, to repeal or render ineffective all legislative and regulatory acts relating hitherto, and to make reparations for all damages caused by the construction of the barrier.

146. *Id.* ¶ 83 (explicitly capping their analysis to those parts of the walls that "deviate[] from the Green Line . . . to encompass settlements, while encircling Palestinian population areas"); *id.* ¶ 67 (explaining that "some parts of the complex are being built, or are planned to be built, on the territory of Israel itself," but not considering that "it [wa]s called upon to examine the legal consequences arising from the construction of those parts of the wall").

147. Indeed in examining the evolution of the jurisprudence challenging the barrier both before the ICJ and the Israeli High Court, Yishai Blank found that "no legal argument was made against a barrier which would have been erected on the internationally recognized border of Israel." Blank, *Legalizing the Barrier*, *supra* note 30 at 311. Michael Safra argues that "[i]n fact, it would have been possible to build a wall or a fence, even a tech with crocodiles, without raising any legal difficulty, especially not an international one. The simple and legal way would have been to construct the 'separation barrier' right on the Green Line," SHAUL ARIELI & MICHAEL SFARD, HOMAH U'MEHDAL [The Wall of Folly] 145 (2008) (Isr.).

148. *Streletz v. Germany*, 2001-II Eur. Ct. H.R. 409; *K.H.W. v. Germany*, 2001-II Eur. Ct.

own border does infringe on an important human right, the wall may still withstand a legal challenge if it serves a legitimate aim “to protect the border” and the aim is “limited” and “respect[s] the need to preserve human life.”¹⁴⁹

In deferring to a State’s power to erect a wall on its own territory, the decisions on both the Israeli Security Fence and the Berlin Wall are in line with larger international legal orthodoxy. With some important exceptions, the international order is still centered on the geography of the State.¹⁵⁰ To avoid questioning Statehood, and thereby the larger legal and political order, all key players of the regime (international courts,¹⁵¹ treaties and doctrines,¹⁵² and

H.R. 495; Lovell v. Australia, Communication No. 920/2000, U.N. Human Rights Comm., 80th Session, Mar. 15–Apr. 2, 2004, U.N. Doc. CCPR/C/80/D/920/2000 (May 13, 2004); Baumgarten v. Germany, Communication No. 960/2000, U.N. Human Rights Comm., 78th Session, July 14–Aug. 8, 2003, U.N. Doc. CCPR/C/78/D/960/2000 (Aug. 19, 2003). These cases examined whether the German Democratic Republic’s (GDR) policy to use deadly force to prevent Eastern citizens from escaping over the wall into West Berlin violated human rights.

149. Streletz v. Germany, 2001-II Eur. Ct. H.R. 409, ¶ 71 (noting that the aim of the Berlin Wall was “to protect the border between the two German States ‘at all costs’ in order to preserve the GDR’s existence, which was threatened by the massive exodus of its own population.”). This aim, the judges held, “must be limited.” *Id.* ¶ 72. Above all it must “respect the need to preserve human life,” such that it cannot have an “indiscriminate effect” or a categorical nature to “annihilate border violators . . . and protect the border at all costs.” *Id.* ¶¶ 72–73.

150. The traditional example is *Island of Palmas (U.S. v. Neth.)*, 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928) (territorial sovereignty is “the point of departure in settling most questions that concern international relations”). For a more recent example, see *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 263 (June 27) (affirming “the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.”).

151. See, e.g., *Treaty of Lausanne (Frontier Between Turkey and Iraq)*, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 12, ¶ 53 (Nov. 21) (“[T]he very nature of a frontier and of any convention designed to establish frontiers between two countries imports that a frontier must constitute a definite boundary line throughout its length.”); *Island of Palmas*, 2 R.I.A.A. at 870 (“International law . . . has the object of assuring the coexistence of different interests which are worthy of legal protection. If . . . only one of two conflicting interests is to prevail [the case involves a territorial conflict] . . . the interest which involves the maintenance of a state of things having offered at the critical time to the inhabitants of the disputed territory and to other States . . . ought, in doubt, to prevail”); *Temple of Preah Vihear (Cambodia v. Thai.)*, 1962 I.C.J. 6 (June 15) (ICJ held that when two countries establish a frontier between themselves one of the primary objectives is to achieve finality and stability); *Beagle Channel (Arg. v. Chile)*, 11 R.I.A.A. 53, 89 (Ct. Arb. 1977) (the Arbitration Tribunal observed in respect of the *Argentina-Chile Boundary Treaty of 1881* that “the regime set up by the Treaty . . . was meant thenceforth to govern the question of boundaries and title to territory, and that it was meant to be definitive, final and complete”); *Nicaragua v. United States*, 1986 I.C.J. ¶ 55 (“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”) (quoting Article 18 of the *Organization of American States Charter*).

152. See, e.g., U.N. Charter art. 2, para. 1 (sovereign equality of the UN members); *id.* art. 2, para. 4 (the prohibition on the threat or use of force “against the territorial integrity or political independence of any state”); *id.* art. 2, para. 7 (the reserve domain of domestic jurisdiction into which intervention is not permitted); *Vienna Convention on Succession of States in Respect of Treaties* art. 11, Aug. 23, 1978, 1946 U.N.T.S. 3 (“A succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary.”); *Vienna Convention on the Law of Treaties* art. 62, para. 2, May 23, 1969, 1155 U.N.T.S. 331 (“A fundamental change of circumstances may not be invoked as a ground

prominent scholars)¹⁵³ prioritize the stability of borders and disfavor the creation of new territorial and boundary difficulties.

In this second approach, and in contrast to the first approach, the wall acts as a wall—a barrier rather than a bridge. The border is sacrosanct: it marks the precise area over which a State may exercise absolute dominion.¹⁵⁴ A State can freely choose to build a wall at its borders. Such a wall only serves to literalize the border—from a legal perspective, nothing has happened as a result of building a fence. If the State’s territory is not disputed, then its border is final and complete, and the wall is a definitive block to entrance. Jurisdiction is squashed back to geography rooted in territory (human rights obligations are strictly territorial). Merely getting close to the State is not the same as getting into the State. Sovereignty now means a space outside human rights law: a State is only bound by obligations to which it consented via positive law making.

But, much like the first approach, this approach also cannot be normatively justified if taken to its ultimate conclusion. If courts remain deferential to border walls as part of an immigration control policy, more States may gravitate toward building physical walls as their preferred strategy to control immigration. And there is no reason that States will restrict themselves to building walls only on the very border itself rather than also expanding walls to more creative locations. In fact, just recently the United Kingdom offered to give France an eleven-foot steel fence that had been used to protect world leaders at the NATO summit.¹⁵⁵ The United Kingdom suggested that the fence could be used to stop hundreds of migrants from countries such as Afghanistan, Eritrea, and Ethiopia

for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary . . .”). For doctrines, see for example *Frontier Dispute (Burk. Faso/Mali)*, 1986 I.C.J. 554 ¶¶ 24–25 (Dec. 22) (discussing the importance of *uti possidetis juris* (“as you possess under law”) that transforms the former boundary of a colony into an international frontier at the moment it becomes independent, because “the maintenance of the territorial status quo in Africa is . . . the wisest course The essential requirement of stability in order to survive”).

153. See, e.g., IAN BROWNLIE, *AFRICAN BOUNDARIES: A LEGAL AND DIPLOMATIC ENCYCLOPEDIA* (1979) at 1015–16 (“Legal and other considerations dictate a principle of finality and stability . . .”); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 37–95 (2d ed. 2006); HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 241 (1958) (noting “principles of finality, stability and effectiveness . . . have characterised the work of the Court”); Daniel Bethlehem, *The End of Geography: The Changing Nature of the International System and the Challenge to International Law*, 25 *EUR. J. INT’L L.* 9, 14 (2014) (“Jurisdiction, although it has non-territorial dimensions, is largely manifest in territorial terms.”).

154. See, e.g., *Customs Régime Between Germany and Austria*, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41, at 45 (Sept. 5) (State’s independence means that it has the “sole right of decision in all matters economic, political, financial or other”); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 55 (June 27) (“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”).

155. Joe Tidy, *UK Offers to Send ‘Ring Of Steel’ to Calais*, SKY NEWS, Sept. 7, 2014, <http://news.sky.com/story/1331489/uk-offers-to-send-ring-of-steel-to-calais>.

who regularly storm onto ferries leaving the port of Calais for Britain.¹⁵⁶ What is already referred to as our “Walls disease”¹⁵⁷ will become even more acute.

Taken to the extreme, the alignment of norms with the supremacy of State sovereignty means, in effect, deferring to developed States’ interests and sacrificing our evolving norms concerning the universal and fundamental dignity of every individual. All that will be left from the universality of human rights will be many smaller spheres of specific rights regimes. Different people will be subject to different rights, depending on their geography.

C. Third Method—Adopt the Compromise Approach that Human Rights Courts Tailored Between Universality and Exclusion and that is Structured Through Territory.

As opposed to the earlier two approaches, a court that adopts this compromise will differentiate between the two strategies of front-end immigration exclusion, interdiction and walls, and use the distinction to limit the procedural rules that emerge out of interdiction. This keeps intact the normative force of *Jamaa*, which guarantees access to individuals at sea, but, at the same time, maintains the State’s right to exclude non-nationals on land and next to a wall. A court would do so by using the wall to balance between these two conflicting policy interests of the individual (universality) and the State (exclusion): on the external side of the wall, jurisdiction is softened back to geography. On the internal side the wall, individuals may have expansive rights independent of State consent. At least when it comes to walls, jurisdiction retreats back to physicality grounded in geography. Proximity would no longer denote rights.

Such a court would differentiate between liquid and solid barriers by drawing on formally available legal distinctions. For example, the court could defer to legal precedents emerging from the law of the sea that prioritize land over the seas, so that what applies on the sea does not extend to the land.¹⁵⁸ Alternatively, the court could also cite the intersection of two sovereign States at an international border, as opposed to the lack of any State authority upon the high seas. In the case of migration by land, the claim that a host State is not responsible for protection duties is also a claim that another State *is* responsible.

156. *Id.*; see also Miranda Prynne, *Migrants Try to Storm Ferry After Breaking into Port of Calais*, TELEGRAPH, Sept. 4, 2014 (2:08 PM), <http://www.telegraph.co.uk/news/uknews/immigration/11074268/Migrants-try-to-storm-ferry-after-breaking-into-port-of-Calais.html>.

157. The East German psychiatrist Dietfried Müller-Hegemann coined this term in 1973. CONNECTED WALLS, <http://www.connectedwalls.com/en/intro> (last visited Mar. 4, 2016).

158. Existing jurisdiction that deals with law of the sea repeatedly affirms that “the land dominates the sea.” Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (*Nicar. v. Hond.*), 2007 I.C.J. 659, ¶ 113 (Oct. 8); see also Maritime Delimitation in the Black Sea (*Romania v. Ukraine*), Judgment of 3 February 2009, ICJ Reports 2009, 61, para. 77; Aegean Sea Continental Shelf (*Greece v. Turk.*), 1978 I.C.J. 3, ¶ 86 (Dec. 19); North Sea Continental Shelf (*Ger./Den.; Ger./Neth.*), 1969 I.C.J. 51, ¶ 96 (Feb. 20).

This is not the case in an interdiction scenario (migration by sea), which usually occurs in international waters where there is no other responsible party.

Finally, the court might also rely on the relative passivity of border walls as a method of exclusion, as compared to interdiction. Border walls are passive elements in two ways. First, a wall *prevents* a would-be immigrant from doing a specific act (getting in) but leaves her other options open, while an interdiction *coerces* a would-be immigrant to do a specific act (turn around).¹⁵⁹ Second, once the wall is constructed, exclusion no longer requires a new exercise of agency on the part of the State: a wall can restrain entrance even years after it was built.¹⁶⁰

In this scenario, like the second approach but in contrast to the first approach, the wall truly acts as a wall—a barrier, rather than a bridge. Jurisdiction is aligned with territory (human rights obligations are strictly territorial) and proximity is not the same as getting into the State. Sovereignty again means a space outside human rights law as a State is only bound to what it has consented to.

This third approach, however, also fails the normative test. Translating this approach into actual practice results in too many distinctions that do not make sense and rulings that may lead to perverse effects. For example, a host State would not owe obligations to an individual that starves while waiting on the other side of a wall, but if she climbs up and sits on top of the fence or attaches herself to the fence in some hazardous manner and refuses to leave, then a destination State that removes her will owe such duties. The incentive structure, therefore, would be for an individual to risk herself precisely so that the host State would be forced into action and such action would trigger jurisdiction.¹⁶¹ In addition, the regime would tempt (or perhaps even require) individuals to take steps that are dangerous before they can access rights. At least when it comes to asylum seekers, this means that the protective regime itself adds on an actual life-threatening danger for those who are at least allegedly already fleeing persecution, before their claim can even be heard.

This Article does not suggest how a human rights court will choose between these three approaches to the regulation of a wall. But this choice brings us to the unresolved end-point of the arrangement that courts worked out between universality and exclusion and that is conditioned on territory: each of the three different approaches to regulation correlates to a drastically different vision of borders and sovereignty in the world, and none of them can be

159. My discussion here builds on David Miller, *Why Immigration Controls are Not Coercive: A Reply to Arash Abizadeh*, 38 POL. THEORY 111 (2010), <http://cesem.ku.dk/papers/whyimmigrationcontrolsarentcoercivedavidmiller.pdf>.

160. In fact, the UNHCR in a different context (in-country interception at airports) suggested already that “there is a distinction . . . between ‘the active interdiction or interception of persons seeking refuge from persecution’ . . . and ‘passive regimes, such as visa and carrier sanctions.’” *European Roma Rights Centre v. Immigration Officer at Prague Airport*, [2003] EWCA (Civ) 666, [48] (Eng.).

161. For how this incentive system operates in the context of interdiction, see Mann, *Dialectic of Transnationalism*, *supra* note 110.

continuously defended. Thus, the story of walls presents a court with a choice between utopia disconnected from reality, a walled world, or a nonsensical order that incentivizes dangerous behavior. In other words, it is a story of disappointment.

III.

A CASE STUDY: THE ISRAEL-EGYPT WALL

We still do not know how an international human rights court will adjudicate a wall erected as an immigration control strategy. But a case study from a national court may be illuminating—the Israeli Supreme Court’s response to the fence Israel built on its border with Egypt. I chose Israel because it is “the only Western country that has a relatively long land border with Africa”¹⁶² and that has built a wall that runs all throughout the length of the border.¹⁶³ I examined all four cases that came before the Israeli Supreme Court in regards to this fence. Using these cases, I demonstrate how, when faced with a decision regarding how to regulate the Israel-Egypt Fence, the Israeli Supreme Court adopted the statist tradition and structured the border fence as the point of equilibrium between universality and exclusion.

The only time that the Israeli Supreme Court was called to directly review the Israel-Egypt fence was in *Anu Plitim v. Ehud Barak-Minister of Defense*.¹⁶⁴ The case concerned the first group of people from the African Continent—eighteen men, two women, and a child—who brought a case on the Israel-Egypt fence after its completion.¹⁶⁵ It offers a rare judicial review of the fence in real time: the Court was asked to rule on the situation as the plaintiffs were begging for their lives under the unforgiving desert sun on the Egyptian side of the wall.¹⁶⁶

Both sides agreed that Israel, as a sovereign State, had a right to build a wall on its territory.¹⁶⁷ Their dispute was over the function of the wall in

162. H CJ 7146/12 Adam v. Knesset 1, 35 (June 2, 2013), RefWorld (unofficial translation) (Isr.), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5277555e4>.

163. For a description of the wall, see Gidon Ben-zvi, *Israel Completes 245 Mile, NIS 1.6 Billion Security Fence Along Sinai Border with Egypt*, ALGEMEINER, Dec. 4, 2013, (Isr.), and Amos Harel, *On Israel-Egypt Border, Best Defense is a Good Fence*, HAARETZ, Nov. 13, 2011 (Isr.).

164. H CJ 6582/12 Anu Plitim v. Ehud Barak-Minister of Defense (2012) (Isr.), <http://elyon2.court.gov.il/files/12/820/065/S03/12065820.S03.htm>.

165. *Id.* Before the fence was completed, and during the Mubarak regime in Egypt, Israel’s policy was to intercept asylum seekers after their entry to Israel and immediately expel them back to Egypt without any guarantee as to the safety of the returnees, known as the “Hot Return Procedure.” Following a petition to the Supreme Court the government eventually announced that due to the change of regime in Egypt, the use of this practice had ceased. See H CJ 7302/07 Hotline for Migrant Workers v. Minister of Defence (July 7, 2011) (Isr.).

166. My discussion of the case benefited from Omer Shatz, *The Not So Good Samaritan: On Denial of Refugees* (unpublished manuscript) (on file with author).

167. Transcript of First Hearing, H CJ 6582/12 Anu Plitim v. Ehud Barak-Minister of Defense (Sept. 6, 2012) (Isr.), http://www.scribd.com/sme_law.

relationship to the application of non-refoulement. The petitioners adopted the human rights (universalist) tradition: they referred to the *Jamaa* ruling and the UNHCR to argue that non-refoulement is engaged also on the external side of the fence.¹⁶⁸ Otherwise, the petitioners explained, the fence transforms Israel's legal obligations under the Refugee Convention "into a legal 'dead letter.'" ¹⁶⁹

The State, in turn, adopted the exclusionist (statist) tradition to the wall: Israel, a sovereign State, had the right to decide who was entitled to enter its territory, and conversely, it was not obliged to act with respect to aliens who were located outside its actual territory, effectively marked by the new fence.¹⁷⁰ Here, the fence was precisely designed to prevent infiltration into Israel: it is a final and complete constraint on entrance. In fact, the attorney general added, the fence does not have gates, which means that admittance of the group is not even physically possible.¹⁷¹

The Israeli Supreme Court never decided between the universalist and the exclusionist traditions. Instead, the judges waited for three days and in that time, the government resolved the matter. Israeli soldiers cut the fence, crossed to the Egyptian side and admitted into Israel the two women and the child as a humanitarian gesture.¹⁷² They put the eighteen men on an Egyptian van that drove away.¹⁷³ The soldiers then stitched the fence back together again.¹⁷⁴ Thereafter, the eighteen African men were never heard from again.

Following the acts of the Israeli government, the judges, in a unanimous decision, dismissed the case: "3 members of the group were allowed to enter Israel The rest of the group members, 18 persons, left their whereabouts near the fence and turned back . . . the petition became redundant."¹⁷⁵ And so by waiting, and without choosing between universality and exclusion, the Israeli Supreme Court allowed the fence to act as a final barrier to entry as a matter of fact. The fence was broken—and then immediately sealed—for reasons that have to do with compassion and that exist outside the normative realm of the law.

While not reviewing the legality of the Israel-Egypt fence directly, the Supreme Court also dealt with the fence in two more decisions: *Adam v. Kesset*¹⁷⁶ (*Adam*) and *Gebreselaissie v. Israeli Government*¹⁷⁷ (*Gebreselaissie*).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. For a discussion of this incident, see Shatz, *supra* note 166.

174. *Id.*

175. H CJ 6582/12 Anu Plitim v. Ehud Barak-Minister of Defense (Sept. 6, 2012) (Isr.) <http://elyon2.court.gov.il/files/12/820/065/S03/12065820.S03.htm>.

176. H CJ 7146/12 Adam v. Knesset 1, 35 (June 2, 2013), RefWorld (unofficial translation) (Isr.), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opedocpdf.pdf?reldoc=y&docid=5277555e4>.

177. H CJ 8425/13 Gebreselaissie v. Israeli Government (Sept. 28, 2014), RefWorld (unofficial

Both cases examined the constitutionality of two consecutive Amendments and Temporary Provisions to the Prevention of Infiltration Law (Offences and Jurisdiction), which authorized the State to hold in detention illegal immigrants (statutorily termed “infiltrators”), whom it cannot expel, in order to prevent settlement in Israel and to deter future arrivals.¹⁷⁸

The Third Amendment to the Prevention of Infiltration Law, reviewed by the *Adam* court, allowed the imprisonment of infiltrators for a period of up to three years without trial. It was struck down because it ran contrary to the Basic Law on Human Dignity and Freedom.¹⁷⁹ The Fourth Amendment to the Prevention of Infiltration Law, in turn, was passed by the government soon after the Supreme Court found the Third Amendment unconstitutional. It limited the maximum extent of detention to one year, and applied this sanction only to new “infiltrators” who would enter the country from then on. It also established a new “infiltrator staying facility,” where the State could compel undocumented immigrants, not liable for deportation, to live indefinitely.¹⁸⁰ Then, in *Gebreselaissie*, the Court also struck down this newer amendment, triggering another political and legal earthquake—the Supreme Court had never overturned a law twice—because the new legislation had failed to comply with the constitutional guidelines set out in its first opinion.¹⁸¹ The government changed the name of the facility, but it did not alter the reality of imprisonment.¹⁸²

In both decisions, the Israel-Egypt fence provided the Court with an alternative to detention. In the words of Justice Edna Arbel, writing the main opinion in *Adam*: “there is a fair probability that it would have been possible to manage with a less injurious means in the form of the border fence between Israel and Egypt.”¹⁸³

translation) (Isr.), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54e607184>. For a useful discussion of both cases, see Ori Aronson, *Dialogue to the Bottom?*, *VERSA*, Jan. 5, 2015, <http://versa.cardozo.yu.edu/viewpoints/dialogue-bottom>.

178. H CJ 7146/12 *Adam v. Knesset*; H CJ 8425/13 *Gebreselaissie v. Israeli Government*. Article 30(a) of the law establishes that “the [deportation] order shall be a legal warrant for holding the infiltrator in custody pending his deportation.” Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954, § 30(a) (1954) (as amended) (Isr.). The two of the largest groups of migrants that enter Israel via Sinai are coming from Sudan and Eritrea—two countries to which Israel cannot expel, as it would have normally done with other non-refugee illegal immigrants, either because it does not have a diplomatic relationship (Sudan) or is too dangerous to allow return (Eritrea). *See id.*

179. H CJ 7146/12 *Adam v. Knesset*, ¶¶ 115–18; *see also Summary of the Judgment*, STATE ISRAEL, http://elyon1.court.gov.il/files_eng/12/460/071/b24/12071460.b24.pdf

180. For a useful discussion of both cases, see Aronson, *Dialogue to the Bottom?*, *supra* note 177.

181. The court had ordered the State to close the detention facility for asylum seekers and overturned the provision that allowed asylum seekers who entered Israel illegally to be incarcerated without trial in a closed facility for up to a year.

182. Aronson, *Dialogue to the Bottom?*, *supra* note 177.

183. H CJ 7146/12 *Adam v. Knesset*, ¶ 103; *see also* ¶¶ 3, 108 (it is the “border fence with Egypt” that secures the purposes of the Amendment (deterrence and prevention of settlements) with no “injurious to the constitutional right [liberty]”); *but see id.* ¶ 25 (Vogelman, J.) (“Given the

For Justice Arbel, the fence on the border with Egypt is efficacious. While she consents that proving causality between construction of the fence and reduction of entrance to Israel is difficult,¹⁸⁴ she writes:

It was not without good reason that the government decided to invest enormous resources in the construction of the fence. . . . [I]t may be assumed that the border fence may help significantly to reduce the phenomenon of infiltration, whether because of the physical barrier or because of the need to invest greater resources in order to enter Israel unlawfully, in such manner that the investment will not be worthwhile for the infiltrator or for his smugglers. . . . To this it should be added that there are additional means that [a] state can employ in order to enhance the efficiency of the physical barrier, such as electronic means and so forth.¹⁸⁵

And, at the same time, the fence also carries no legal limitations. The determinative question, in Justice Arbel's analysis, is empirical, and the normative inquiry follows the quantitative data: so long as the fence successfully blocks "infiltrators" and the numbers of those who do manage to get into Israel is small, Justice Arbel explains, the "detention of asylum seekers for the purpose of deterring additional asylum seekers from arriving in the state" is not constitutional.¹⁸⁶ If numbers are low, Justice Arbel continues, a detention that deprives a person of her liberty "makes a moral stain on the network of human values espoused by Israeli society."¹⁸⁷ But, if the numbers increase, then an administrative detention for purposes of deterrence could in fact become constitutional: "in an extreme situation in which the purpose becomes extremely vital for the survival of the state and . . . [to] maintain its most basic interests, it may be possible to justify this purpose [detention], notwithstanding the grave and forceful injury to the infiltrator's liberty."¹⁸⁸

distress, which is not in dispute, a ladder will be found for any fence, and no physical barrier is hermetic.").

184. HCJ 7146/12 Adam v. Knesset, ¶¶ 98–101, 103, 108 (Arbel, J.) (noting "it is unclear whether" the normative framework, the Amendment, or the wall was the "dominant factor in the dramatic reduction in the number of infiltrators entering Israel."); *see id.* ¶¶ 1–3, 5–6 (discussing more on the argument of causality in the case); *but see id.* ¶¶ 25, 38 (Justice Vogelmann doubting Arbel's causality). For more on the argument of causality in the case, *see id.* ¶ 1 (Amit, J.); *id.* ¶ 6 (Hendel, J.); *id.* (Grunis, J.) ¶¶ 2–3, 5.

185. *Id.* ¶ 103.

186. *Id.* ¶ 92.

187. *Id.* ¶ 114 (internal quotation marks omitted).

188. *Id.* ¶ 93; *see also id.* ¶ 2 (Justice Amit stating "As emerges from the figures before us, as of today, the number of infiltrators who have penetrated Israel in recent years totals some 65,000, close to one percent of the population in Israel [I]t could be argued that one percent of the population is a number that an enlightened and economically strong country such as the State of Israel can and should bear Such is the situation today But what of the future? What is the numerical 'red line' that a country can bear without concern of tangible injury to its sovereignty, its character, its national identity, its cultural and social profile, the structure of its population and its diverse features, and without fear for its resilience and fear of reaching [a] breaking point in terms of congestion, welfare, and the economy, internal security and public order? Naturally, the State of Israel, like any other enlightened country, cannot absorb all the unfortunates, the oppressed and the persecuted throughout the world and in Africa In balancing basic rights with other basic rights, or with vital state interests, therefore, we must be cognizant of the figures, estimates, and forecasts. There are situations in which 'quantity means quality' As noted, this is not currently the

The Israel-Egypt fence emerges in Justice Arbel's opinion as an equilibrium point. It stabilizes the two legal traditions, universalist and exclusionist, by dividing them geographically. On the Israeli side, "the stranger, infiltrator, or refugee who has entered Israel" has rights because a "person's liberty is a right that accompanies him wherever he goes . . . whether he is present in a place where he has been permitted to be present or has entered a place he has been forbidden to enter."¹⁸⁹ Therefore, even an economic migrant who breached the State's immigration law but is already inside the country—or, is standing 'in front of our eyes'—is guaranteed protection. On the Egyptian side, by contrast, Israel owes no protective duties. A person who was unable to cross the fence has no face and no rights.¹⁹⁰ And what differentiates the State's protective duties and lack thereof? One's location vis-à-vis the fence. Justice Arbel concludes that a barrier requires considerable financial resources, but "the protection of human rights costs money, and a society that respects human rights must be willing to bear the financial burden."¹⁹¹ The fence, which itself lacks any normative significance, becomes the essence of human rights protection.

This is where the analysis ends: the Israeli Supreme Court adopted the exclusionist tradition and permitted Israel to build a fence on its own border, and then used this fence to square the circle. The fence stabilized the conflict between universality and exclusion by dividing them geographically. The long-term stability of this equilibrium is unclear, and it may be more or less stable across different States depending on both empirical factors (for example, territorial location of the State, level of migration into the State, etc.) and legal obligations (such as whether the State has ratified the Optional Protocol to the ICCPR or is subject to ECtHR jurisdiction.)¹⁹² Nonetheless my mapping is a warning; if, as the Israeli Supreme Court said, immigration walls are both an effective immigration tool and unencumbered by constraints vis-à-vis human rights, then States will build walls. They will build them on the State's borders and around ports and maybe in even more locations that we can predict at

situation, but given different situations and figures, the outcome in the legal sphere might also change."); *id.* ¶ 5 (Chief Justice A. Grunis: "The question might be asked as to what will happen if the situation changes If, heaven forbid, a substantive change occurs and the phenomenon of the entry of infiltrators in large numbers returns, it will be necessary to reconsider the issue.").

189. *Id.* ¶ 113.

190. The fence also acts as the point of equilibrium and becomes the essence of human rights in the second case, HCJ 8425/13 Gebreselassie v. Israeli Government (Sept. 28, 2014), RefWorld (unofficial translation) (Isr.), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opedocpdf.pdf?reldoc=y&docid=54e607184>. See, *inter alia*, *id.* ¶ 9 (Amit, J.) ("The State's responsibility to these individuals that entered its territory is not the same responsibility to who are not in its borders even when we are dealing with uninvited guests."). But, importantly, "the State is permitted to act . . . to prevent . . . the arrival of additional uninvited guests." *Id.* How? Amit answers: "by placing . . . the physical barrier of the fence." *Id.*

191. HCJ 7146/12 Adam v. Knesset, ¶ 103.

192. For example, the United States and Israel have not ratified the Optional Protocol and thus they did not consent to the jurisdiction of the UNHRC to entertain individual complaints. This means that an author in the United States or Israel cannot challenge the U.S.-Mexico wall or the Israel-Egypt fence before the UNHRC.

present. What will then be left of the universality of human rights law will be minimized into one's location vis-à-vis the fence: on one side, the kingdom is given; on the other side, the desert sun. This is possibly best summed up in two statements by Israeli Prime Minister Benjamin Netanyahu in regards to the Israel-Egypt fence: "We do not intend to stop refugees fleeing for their lives," he said. "[W]e allow them in and will continue to do so."¹⁹³ But, Netanyahu also added elsewhere: "It is important that everyone understand that Israel is no longer a destination for infiltrators."¹⁹⁴ "We are determined to stop the flow of infiltration. We built a fence for this purpose. . ."¹⁹⁵ And so asylum seekers who can satisfy the access criteria to trigger jurisdiction have expansive protections in Israel, but most cannot. In other words, they have rights but not protection.

CONCLUSION

Let me now go back to where I began: the tension between universality and exclusion. In the past ten years, working piecemeal, moving from one decision to another, the UNHRC and the ECtHR have worked out a path-dependent compromise between the two legal traditions that leans in favor of universality. They reached this compromise by using territory, or the location of the individual plaintiff, to map the individual's access: a non-national that establishes physicality—associated with territory, contact, and maybe even proximity—activates norms of protection. These norms are increasingly absolute and inflexible, go beyond the traditional five grounds of protection, and exist outside a State's interests or constraints (universality). In contrast, a non-national who fails to establish physical presence has no rights to which the State has not willingly consented to (exclusion).¹⁹⁶

The resulting compromise makes judicable a process that does not easily lend itself to international regulation: it substitutes complex multi-party political negotiation about who deserves asylum (who is most vulnerable) and from what

193. Dana Weiler-Polak & Haaretz Service, *Rights Groups: Planned Refugees Detention Center Disgraces Israel*, HAARETZ, Nov. 28, 2010 (4:45 PM) (Isr.), <http://www.haaretz.com/israel-news/rights-groups-planned-refugees-detention-center-disgraces-israel-1.327412>; Press Release, Prime Minister's Office, Israeli Prime Minister at the Weekly Government Meeting (Nov. 28, 2010), <http://www.pmo.gov.il/MediaCenter/SecretaryAnnouncements/Pages/govmes281110>.

194. Isabel Kershner, *Israel to Admit 3 of 21 Africans Waiting in Desert*, N.Y. TIMES, Sept. 6, 2012, http://www.nytimes.com/2012/09/07/world/middleeast/israel-to-admit-3-of-21-africans-waiting-in-desert.html?_r=0.

195. Gil Ronen, *Eritreans on Border: 2 Women, Child Let In, the Rest Not*, ISRAEL NAT'L NEWS, Sept. 6, 2012.

196. My point here is that who gets to be considered for human rights protection is arbitrarily decided. The test for protection is only invoked for an individual who successfully established physicality—associated with territory, contact, and maybe even proximity. An individual who scaled a border wall, for example, may still be denied protection if she does not meet the criteria for protection (for instance, faces persecution on account of the five grounds). But it is worth remembering that many individuals who scale the wall disappear and stay without entitlements, or else root themselves socially in the new host state and in time could secure entitlements through these social ties.

State (who is most capable) with a set of arbitrary rules that ask a court only to locate the plaintiff and to answer relatively simple questions.¹⁹⁷ In doing so, the compromise allows international courts to decide human rights obligations that were never resolved politically.¹⁹⁸

But the outcome of this compromise—who benefits and who is hurt—is arbitrary, thus making the regime radically unstable. There are two key interests involved in cases that bear on immigration. First, for the individual: what is the nature of the misery that should be alleviated, and how and by whom should such misery be assessed?¹⁹⁹ Second, for the State, how to distribute protective duties, and how and by whom such duties should be determined? However, territory, I suggested in this article, is an arbitrary legal category from the perspective of *both* these two interests.

From the perspective of the non-national, the compromise collapses the whole account of the individual's interests into a single question: whether she is able to meet the regime's condition of access. But territory is a poor proxy for who is most needy: it does not take into consideration the substantive interests of the individual or the nature of her predicament. From the perspective of the host State, in turn, the regime privileges a single normatively random category: territorial location of the plaintiff vis-à-vis the State or its agents. Alas, territory is also a bad proxy for who has a lower cost of absorption of non-nationals—it leaves out of the protective equation the State's real constraints (such as size, Gross Domestic Product, numbers of non-nationals coming in, etc.) and aggregated efforts (procedurally and substantively) to deal with non-nationals at a particular moment. Territory, in other words, says nothing about who is most vulnerable and who is most capable of helping.

Further, the compromise is also fundamentally unjust. Protection is conditioned upon establishing physical presence. This dynamic disproportionately favors those individuals with capacity—defined in terms of luck, resources or physical abilities—who can get close enough to the State or its agents. They are protected because they are strong, fortunate, or both, not necessarily because of the substantive causes of their misery.

197. For more on the way in which human rights obscure political inequality, see, for example, RICHARD THOMPSON FORD, *RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY* 21 (2012); DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 13 (2004); Cass R. Sunstein, *Rights and Their Critics*, 70 *NOTRE DAME L. REV.* 727, 743–44 (1995).

198. Indeed it is hard to imagine a situation where the UNHRC carries the authority and power to hold, for example, that Canada ought to be responsible for the protection of twelve percent of women who suffer sex offenses and flee Central America. This is not to say that international courts will not play any role in a new and revised regime. But their role is likely to be narrower: they may only be called into action in cases that bear on the most extreme forms of torture and degrading behavior. For a similar argument, see James C. Hathaway, *Leveraging Asylum*, 45 *TEX. INT'L L.J.* 503 (2010).

199. Or, should the Refugee Convention be changed to reflect the changing circumstances in the world? And, if yes, then how? And who decides?

Walls take this compromise to its perverse extreme and so make concrete its intractability. The correlation between protection (access) and territoriality invites States that seek to maintain their exclusionary powers to erect additional layers of walls to prevent would-be immigrants from getting close enough to the actual border to trigger proximity-based human rights protections. And so the question of “who can establish physical presence” becomes “who can scale walls that are almost impassable.” The answer is often strong, fast individuals with an aptitude for risky behavior; in other words, young men. But they are rewarded by the regime only after they have risked themselves in traversing an ever-growing numbers of barriers; and, if they endure. The result is reminiscent of a gladiatorial fight: those savage and bloody combats of the slave against other men, tigers, and armed chariots in old Rome, which, if victory were achieved, could free the slave. Today those who survive the terror of the fight—the traversing of the fence—are welcome to enter the kingdom. And we, those who are lucky enough to be in the kingdom, are watching.

This dynamic is perhaps most readily visible around the two fences that Spain built in North Morocco. On a single day in May 2014, between one and two thousand Sub-Saharan migrants rushed the razor-wire fences in Melilla—”actually three fences, two 20 feet high and a middle one that is slightly lower.”²⁰⁰ About 450 of the migrants managed to make it over the towering fence: only two of them were women.²⁰¹ Those who made it to the other side “kissed the ground” and yelled “with joy as they touched Spanish soil.”²⁰² They were jubilant because at the very moment that their legs left one side of the fence and touched the ground on the other side, Spanish protective rights were triggered.²⁰³ That moment alarmed Spain, as the contact activated expansive duties, including, at a minimum, providing each of these migrants with an individual status determination before deportation, and arranging much more substantive accommodations for those who qualify as refugees.²⁰⁴ But Spain was already “at its limit” in terms of capacity to absorb new arrivals, according to its minister of the interior.²⁰⁵

200. Gall, *supra* note 3.

201. *Id.*

202. Ashifa Kassam, *400 Migrants Break Through Border Fence in Spain's African Enclave Melilla*, GUARDIAN, May 28, 2014 [hereinafter Kassam, *400 Migrants*].

203. *Id.*; Suzanne Daley, *As Africans Surge to Europe's Door, Spain Locks Down*, N.Y. TIMES, Feb. 27, 2014. (Most of the people who made it into Spanish territory “will probably spend a year or more in the immigration center as their applications for asylum are processed. Few will get such status. But most will end up transferred to the mainland before being handed an order to leave Spain. Most cannot be deported because Spain does not have treaties with many of the countries they come from. . . . [M]any of those who make it to Melilla and Ceuta will be largely free to remain in Spain or other European nations.”).

204. Under the Schengen agreement and the Dublin regulation (a building block of Schengen), migrants that enter Europe must be processed by the country through which they enter. *See Illegal Immigration Europe's Huddled Masses*, ECONOMIST, Aug. 16, 2014.

205. Kassam, *400 Migrants*, *supra* note 202.

In this episode, what made the difference between those non-nationals that benefited and those that were hurt by the legal regime was physical ability (the power to climb up the first fence, jump from one fence to the other without a crashing fall, and then climb down the third fence, all in “one minute [thirty]”²⁰⁶) and luck (whether the individual happened to stand next to the one chunk of the fence that crashed down that day,²⁰⁷ or whether he survived the jumps more or less intact). There was no consideration of an individual’s worthiness for protection or of preferences that could or should be shown toward particular groups. For example, are men more worthy of protection than women? Young athletes more than the elderly? Or, from the other direction, are other EU states better equipped to handle asylum requests from 400 individuals than Spain—a country undergoing a dramatic economic crisis, and that has already absorbed many waves of migrants?

Because it is all about the wall, the migrants and asylum-seekers risk all they have into scaling the physical barrier. They attack the fences again and again until they either successfully cross over or fatally injure their bodies. “I was thinking that I was finally in Spain,” explained a sixteen-year-old boy from Niger who had been “violently thrown back” after successfully scaling all three fences but failing to pass the last line of police.²⁰⁸ Nevertheless, he will try again: “I’m not going to go back now to Niger, where there is nothing to do and no work, when every time I now wake up I can at least already see Europe.”²⁰⁹ At the same time, the Spanish government is taking increasingly elaborate steps to fortify the fence, erecting a growing number of concentric barriers. In 1998, Spain built the first fence.²¹⁰ Then in 2005, it enhanced this single barrier with two more fences.²¹¹ In 2013, Spain permanently reintroduced razor-sharp barbed wire to the top of the border fences (it had been installed in the past but was removed because it inflicted serious bodily harm.)²¹² A year later, the state added what it calls an “operational border” to the fixed border—set wherever the last line of police security stands—arguing that even if individuals crossed the three fences they are still not on Spanish territory until

206. “‘You have to get over in one minute 30,’ said Nili Onana, a basketball player from Cameroon, who made it over in a wave on May 28 and was interviewed in a short-stay center for immigrants in Melilla.” Gall, *supra* note 3.

207. Kassam, *400 Migrants*, *supra* note 202.

208. Raphael Minder, *At Spanish Enclave, A Debate Over What Makes a Border*, N.Y. TIMES, Nov. 24, 2014 [hereinafter Minder, *At Spanish Enclave*].

209. *Id.*

210. Maximilian Popp, *Europe’s Deadly Borders: An Inside Look at EU’s Shameful Immigration Policy*, SPIEGEL, Sept. 11, 2014 (11:24 AM), <http://www.spiegel.de/international/europe/europe-tightens-borders-and-fails-to-protect-people-a-989502-2.html>.

211. Tremlett, *supra* note 15.

212. The Spanish government first introduced the razor-sharp barbed wire in 2005 but it had mostly been removed from the top of the fence after causing serious injuries to migrants as they tried to cross the border. See Paul Hamilos, *Razor Wire on Fence Dividing Melilla from Morocco Condemned as Inhumane*, GUARDIAN, Nov. 1, 2013.

they have crossed the “operational border.”²¹³ And, more recently still, operating in cooperation with Spain, Morocco began building an extra ditch and fence, “crowned with concertina wire about 500 meters (almost 1,640 feet) from the existing Spanish fences, further extending the obstacle course for the migrants.”²¹⁴

And the human rights community? They also focus on the fence. Important human rights groups are now preparing a case against Spain that challenges the location of the fence. Their central premise is that when Spain began erecting the first fence, Morocco insisted that no Spanish construction machinery operate on Moroccan soil. And so, they argue, even the first of the series of the three fences that Spain erected actually rests inside Spain.²¹⁵ The implication is that just reaching the outer perimeter of the enclave may mean that the migrants have already entered Europe. The Spanish government’s delegate to Melilla aptly summarized this argument when he responded to the case by saying that if the human rights group is successful then “just by touching the first fence” a person would have “already reached Spain.”²¹⁶ Or, in the terminology used in this Article, jurisdiction is attached to proximity to the fence: getting close to the fence is as good as crossing over. Spain will owe protective duties on both sides of its border. With an estimated 80,000 migrants and asylum seekers that have already headed for Spain’s two exclaves by the middle of 2014,²¹⁷ this could exponentially expand the numbers entitled to legal counsel, asylum claims, or proper deportation proceedings from Spain.

Whether we will keep moving toward a world of walls or instead work out another uneasy compromise between universality (human rights) and exclusion (sovereignty) remains to be seen. One thing is sure: today there are more than fifty million people displaced.²¹⁸ And the desert is getting even drier and the kingdom more lavish still. The international response, in the words of Ban Ki-moon, the UN Secretary-General, is to place human rights “at the centre”²¹⁹ of the efforts to meet this mammoth challenge of displacement. But, as this Article argues, this approach is profoundly flawed: it is conditioned upon a compromise that is based on territory—where an individual is located—alas territory is an arbitrary legal category. And so the legal victory of the human rights tradition has resulted in a practical defeat for *both* individuals and States. It is a deeply unjust regime.

213. Minder, *At Spanish Enclave*, *supra* note 208.

214. *Id.* “Spain talks about having great cooperation with Morocco,” said a founder of a human rights organization that is challenging Spain. *Id.* “But this cooperation is really just about paying Morocco to do the dirty work for Spain . . .” *Id.*

215. *Id.*

216. *Id.*

217. Minder, *Spain Struggles*, *supra* note 6.

218. Harriet Sherwood, *Global Refugee Figure Passes 50m for First Time Since Second World War*, *GUARDIAN*, June 20, 2014.

219. Leo Dobbs, *UN Chief Urges More Action to Tackle Displacement; Recalls Youth on the Run in Wartime Korea*, UNHCR (Oct. 1, 2014), <http://www.unhcr.org/542bf04cfc5.html>.