Lost in the Maze: Refugees and the Law

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We live now amidst an unprecedented crisis of mobility. In response, human rights and refugee law are focused on the rights of refugees. They center protection around the definition of a "refugee" and the right of non-refoulement. But this formal legal frame blurs an important distinction between two different types of claims that refugees make for protection—those grounded in a right to remain (continuity) and those grounded in a right to entry. I demonstrate that, in recent years, a few important legal decisions have effectively expanded the protection of those refugees who ground their claims in continuity, but not those making claims for entry. Alas, the latter make up the majority of refugees today. And so, however welcome these legal developments, the human rights regime remains inadequate to address a worsening humanitarian crisis. At best, I show that the current international legal regime has lost touch with the real world; at worst, it compounds the crisis of most refugees today.

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I. INTRODUCTION

At the end of 2020, the United Nations Human Rights Council ("UNHRC") estimated that about 80 million people were displaced (roughly equal to the population of Germany or Iran) and 26.4 million were refugees (approximately the population of Taiwan or New Zealand).[1] They are on the run. Women and men struggle along roads, children wade through ocean surf, and the elderly trudge across the desert. In the face of this massive crisis of mobility and displacement—the largest in recorded history[2]—the practitioners of human rights and refugee law have sharpened their focus on *rights* as the solution.[3] Much hinges on the legal definition of a refugee,[4] and on the idea of "returning."[5] Under human rights law, refugees bear rights to return to their "own country" without being persecuted there,[6] while under refugee law they enjoy rights not to be forced to return to their "own country" (non-refoulement)[7] if they risk persecution.[8] These returns

[1] *Refugee Data Finder*, UNHCR: THE UN REFUGEE AGENCY, https://www.unhcr.org/refugee-statistics/ (last updated Nov. 10, 2021). Obviously, this crisis is not new. Stephen H. Legomsky, *An Asylum Seeker's Bill of Rights in a Non-Utopian World*, 14 GEO. IMMIGR. L.J. 619, 619 (2000) ("It is becoming trite to observe that in recent years few issues have been as wrenching or as intractable as the refugee crisis.").

[2] *Figures at a Glance*, UNHCR: THE UN REFUGEE AGENCY (June 18, 2021), https://www.unhcr.org/en-us/figures-at-a-glance.html.

[3] *See generally* RECONCEIVING INTERNATIONAL REFUGEE LAW (James C. Hathaway ed., 1997) (discussing, inter alia, states of reception's legal obligation to provide refugees some form of durable protection where safe repatriation is impossible).

[4] Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law*, *in* HUMAN RIGHTS AND IMMIGRATION 19, 23–24 (Ruth Rubio-Marin ed., 2014) (citing U.N. Ad Hoc Comm. on Statelessness & Related Problems, U.N. Doc. E/AC.32/SR.2 (Jan. 26, 1950) (statement of Mr. Leslie of Canada)).

[5] Some of the other guiding principles of human rights law include non-discrimination, prevention of arbitrary detention, right to family life and the best interests of the child, and prohibition of collective expulsion. Refugee law, in turn, envisions in addition to return two other paths: resettlement, and domestic integration.

[6] Importantly, this return to "own country" right is applicable to all humans. G.A. Res. 217 (III) A, art. 13, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, art. 12, Dec. 16, 1966, 999 U.N.T.S. 172 [hereinafter ICCPR]; Organization of African Unity, African Charter on Human and Peoples' Rights, art. 12, June 27, 1981, 1520 U.N.T.S. 218 [hereinafter African Charter].

[7] Final Act and Convention Relating to the Status of Refugees, art. 33, July 25, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

[8] *Id.*; African Charter, *supra* note 6, at art. 12. Most general human rights treaties have been construed by their respective treaty bodies as inferring an implicit prohibition of refoulement, which derives from the general prohibition of torture and inhuman and degrading treatment. *See* Soering v. United Kingdom, App. No. 14038/88, 161 Eur. Ct. H.R. 1, 27 (1989); U.N. Secretariat, Compilation of General Comments and General Recommendations Adopted By Human Rights Treaty Bodies, Note by the

are stacked: refugee law comes into play only after the state of origin has failed to fulfill its human rights duties toward its citizens.[9] Important scholarship challenges the narrowness and incompleteness of this rights approach under human rights and refugee law, suggesting expanded definitions for refugees[10] and the development of new rights for their protection.[11]

Secretariat, Art. 7, General Comment 20, Hum. Rts. Comm., HRI/GEN/1/Rev.9, ¶ 2 (Vol. I) (1992); U.N. Comm. on the Rts. of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶¶ 26–27, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005). At the same time, the cessation clause, Article 1C of the Refugee Convention, creates a right of return to one's own country. *See* U.N. High Comm'r for Refugees, The Cessation Clauses: Guidelines on Their Application (Apr. 26, 1999).

[9] HATHAWAY, *supra* note 3, at 5 (Refugee law appears as "a remedial or palliative branch of human rights law."); Chetail, *supra* note 4, at 70 ("[C]ompared to human rights law, the Geneva Convention has much more to receive than to give."). On the development of the *non-refoulement* obligation in human rights law territorially, see generally JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW (2007) and the sources cited therein. *See also* Chetail, *supra* note 4, at 23–24, n.22 (citing U.N. GAOR, 21st mtg. at 13, U.N. Doc. A/CONF.2/SR.21 (Nov. 26, 1951); James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 160 (1997).

[10] For example, scholars have suggested the need to expand the definition of refugees to include those impacted by climate change. *See* Bill Frelick, *It Is Time to Change the Definition of Refugee*, HUM. RTS. WATCH (Jan. 28, 2020, 9:00 AM), https://www.hrw.org/news/2020/01/28/it-time-change-definition-refugee. *See, e.g.*, OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW (Cathryn Costello, Michelle Foster & Jane McAdam eds., 2021) for a general discussion on the scope of the definition of refugee; Guy S. Goodwin-Gill, *The International Law of Refugee Protection*, in THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES 44–45 (Elena Fiddian-Qasmiyeh et al. eds., 2014); Isabelle R. Gunning, *Expanding the International Definition of Refugee: A Multicultural View*, 13 FORDHAM INT'L L.J. 35 (1989); MICHAEL DUMMETT, ON IMMIGRATION AND REFUGEES 37 (2001) ("The qualification laid down by the Convention for being entitled to claim asylum is too restrictive . . . .").

[11] *See* E. Tendayi Achiume, *Syria, Cost-Sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687, 746 (2015) (discussing a new, *non-coercive* use of the existing international doctrine of the responsibility to protect ("RtoP") to facilitate international refugee cost-sharing); Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 COLUM. HUM. RTS. L. REV. 53 (2016). For more on how the desire to treat migration in economic terms interacts with other developments in immigration policy, see *CATHERINE DAUVERGNE*, THE *NEW POLITICS OF IMMIGRATION AND THE END OF SETTLER SOCIETIES* (2016). For the shortcomings of the existing system of refugee protection and potential alternatives, see generally, OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW (Cathryn Costello, Michelle Foster & Jane McAdam eds., 2021). Another body of work goes the opposite route, focusing not on the narrowness of the rights-based system of refugee protection, but rather on the "dark side" of its progressive expansion in terms of both definitions of who is entitled to refugee-law protection and the development of complementary protection in human rights law. *See, e.g.*, Ralph Wilde, *The Unintended Consequences of Expanding Migrant Rights Protections*, 111 AJIL UNBOUND 487 (2017). For a discussion of human rights more generally, see Ralph Wilde, *The Extraterritorial Application of International Human Rights Law on Civil and Political Rights, in* ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN

But this rights approach is misguided. Human rights and refugee law focus on formal juridical principles, including the criteria for protection (the definition of a refugee), the content of entitlement (the right of non-refoulment), and the process of protection (refugee status determination, evidential requirements, etc.). This focus, however, obscures the relative inadequacy of these legal regimes to respond to the current crisis from the get-go: while they create a very clear body of right holders, they do not impose a corresponding obligation or duty on receiving states. Today, this asymmetry—clear rights but only a vague sense against whom these rights might be enforced—leaves human rights and refugee law quite distanced from the lived reality of most refugees on the ground.

This Article advances this argument in four parts. Part II introduces two types of claims that refugees make: those grounded in continuity and those grounded in entry. The former concerns the legal status of individuals who lost status in their "own country." An example is the recent decision of India to effectively strip two million people of their citizenship in the State of Assam.[12] These women and men seek to regain their status in India. The latter, in turn, are about the status of individuals who have fled their "own country" because it has either turned into the cause of their harm or is unable to remedy their harm. Here, an example is Syrian refugees who want to escape their "own country."[13] This Article suggests that these two claims—grounded in continuity or in entry—also differ in terms of (i) the relevant duty holder and (ii) the nature of the crisis involved.

Parts III and IV draw on a descriptive analysis of human rights doctrines and jurisprudence to illustrate the uneven development of the law in response to these two types of claims. I focus on human rights, as it offers the normative basis of protection. In addition, while refugee law has been internalized in various ways in national law, it is neither

RIGHTS 635 (2013); THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL 3 (2011); Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 BERKELEY J. INT'L L. 1 (2016); Moira Paz, *The Law of Walls*, 28 EUR. J. INT'L L. 601 (2017) [hereinafter *Walls*]; Jaya Ramji-Nogales, *Moving Beyond the Refugee Law Paradigm*, 111 AJIL UNBOUND 8 (2017); Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualism*, 47 VAND. J. TRANSNAT'L L. 699 (2014).

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

[13] Of course, in real life this division is not rigid, and so some Syrians might also like to return to their "own country," while some of the women and men from Assam, if given an opportunity, might opt for entry to another country.

interpreted nor enforced through any international court.[14] I show that human rights have evolved in a way that has expanded possibilities for refugees who ground their claims in continuity and ask to remain or return.[15] But human rights law remains relatively unresponsive to those refugees who anchor their claims in entry—i.e., those who escaped their "own" state and are making claims to be admitted into another state with which they have no pre-existing ties.[16]

The discrepancy in the legal treatment of these two groups is a function of the duty involved. The claim of refugees who seek continuity—a minority of refugees today—operates like law: it applies to an obvious state that carries a duty to honor their right.[17] Using case law, this Article describes the way human rights courts and other enforcement bodies have expanded the spectrum of juridical definitions of the state of "continuity." In contrast, the claim of refugees who seek entry—the overwhelming share of refugees today—identify no particular state as a duty-holder.[18] Without a further level of treaty negotiation to assign entry rights to specific duty-holders, international litigation marks a ceiling in their cases. Juridical principals in a formal sense do not actually recognize or adequately address their predicament. And so, in the case of refugees who lost substantive protection (entry), outcomes are ultimately dependent on the immigration policies of individual states.[19] Admission decisions are made for soft reasons of altruism (states agree to take in a "fair share" of refugees; states take refugees in as objects of sympathy) or are motivated by political impulses (states admit those in their self-interest), but do not result from any international legal obligations that restrict the actions of states irrespective of their consent. In that sense, human rights law is becoming ever less adequate to address the current crisis of refugees and of refugee mobility.

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[14] An exception to this is *Asylum Case (Colombia v. Peru)*, 1950 I.C.J. Rep. 266 (Nov. 20). There is also caselaw by ECtHR, I-ACtHR and CJEU regarding asylum and/or refugees. This is discussed throughout this Article.

[15] See *infra* Part III.

[16] See *infra* Part IV.

[17] *See generally* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (1919) (stating that a legal relationship involves a pair of persons whose interests exist on opposing sides).

[18] For an earlier articulation of this argument, see Hersch Lauterpacht's critiques of refugee law. H. Lauterpacht, *The Universal Declaration of Human Rights*, 25 BRIT. Y.B. INT'L L. 354, 373 (1948) ("[T]here is a right to 'seek' asylum, without any assurance that the seeking will be successful.").

[19] *See* Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457 (2020).

There is one exception. Drawing on jurisprudence, I describe how human rights adjudicatory bodies have created protection at the margins of this system. Without creating a universal right of entry into a non-consenting state, these enforcement bodies have expanded the definition of "entry" such that it also includes non-nationals requesting admission from a state in which they are physically present, or with whose agents they have come into contact.[20] Thus, if the individual's conduct is not culpable,[21] there is a single state that is the duty-holder by default, until it can identify another state to take its place. That state cannot refoule the person if she qualified under the selective criteria.[22] But these protections, however important, do not challenge the basic structure of the international system: states retain nearly complete control over their borders. And, moreover, this exception is also where the accepted practice of using juridical rights in a formal sense reflects complacency in today's refugee and mobility crisis.

First, deriving a duty-holder from physical presence creates a space for states to exploit: they can *both* avoid obligation (except in a relatively limited way), and, at the same time, also claim that they are

[20] At least under soft law, asylum seekers should not be rejected at the frontier. *See, e.g.*, Addendum to the Rep. of the U.N. High Comm'r for Refugees on Its Fifty-Second Session, U.N. Doc.A/52/12/Add.1 (1997). This soft law interpretation is also supported by state practices. Thus, for example, states in Africa, Europe, and Southeast Asia allowed large numbers of asylum seekers to cross their frontier and remain in the state pending determination of refugee status. *See* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 208 (3d ed. 2011). This interpretation is also supported by leading scholars. *See* JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 315 (2005) ("[T]he duty of non-refoulment . . . constrain not simply ejection from within a state's territory, but also non-admittance at its frontiers."); *see also* C.W. WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULMENT 49–52 (2009) ("Article 33 does not contain any geographical limitation" and "stopping a refugee at the State's borders . . . will not alter the applicability of Article 33(1) . . . ."). *But see* Jaya Ramji-Nogales, *Freedom of Movement and Undocumented Migrants*, 51 TEX. INT'L L.J. 173, 177–80 (2016) (arguing that refugees or asylum seekers are explicitly denied right to enter a state in order to seek asylum). For a comprehensive analysis of the application of Article 33 of the Refugee Convention to the situation of rejection at the frontiers, see GREGOR NOLL, NEGOTIATING ASYLUM: THE EU ACQUIS, EXTRATERRITORIAL PROTECTION AND THE COMMON MARKET OF DEFLECTION 423–31 (2000). Additionally, regional bodies prohibit collective expulsion of asylum seekers on the high seas. But this entry is temporary and lasts only for the purpose of an individualized examination of their applications for protection. *See* Hirsi Jamaa and Others v. Italy, App. No. 27765/09, Eur. Ct. H.R. 1, 47 (2012); *see also* Int'l Law Comm'n, Expulsion of Aliens, art. 10, U.N. Doc. A/CN.4/L.797 (2012).

[21] *See* N.D. & N.T. v. Spain, App. Nos. 8675/15 & 8697/15, Eur. Ct. H.R. 1, 34 (2017), http://hudoc.echr.coe.int/eng?i=001-177683; *see also supra* note 20 and accompanying text. I discuss this in length later in this Article.

[22] *See* U.N. High Comm'r for Refugees, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate* (2005), https://www.refworld.org/pdfid/42d66dd84.pdf.

maintaining their commitments to human rights and the 1951 Convention Relating to the Status of Refugees.[23] The law protects only the small number of individuals who manage to establish access, but states can erect barriers to prevent non-nationals from reaching their territory.[24] Second, even if some differentiation might be appropriate in the protection of refugees, physical access selects for the wrong criteria. Practically, it is random in relation to the seriousness of the predicament of the individual. Moreover, it probably favors those who already enjoy relative mobility. Normatively, physical presence, or accident of geography, contradicts universality, which is a preeminent norm under human rights law.[25] Third, and finally, the alignment between physical presence and duty also eliminates a legal responsibility in cases involving the majority of refugees today (those unable to establish access), replacing it instead with discretionary altruism.

The willful double blindness—the focus on formal rights to the exclusion of duties, and to the distinction between formal loss of belonging (continuity) and substantive loss of protection (entry)—is today a matter of life and death for millions. It obscures the way that human rights law fails most refugees who root their claim in entry. Part V ends with policy-oriented suggestions for refugees today.

So, here we are at a very cynical place. Individual refugees bear clear rights. States may agree that someone ought to do something for the protection of refugees. But they are also legally free not to be that someone. And so, on the ground, the majority of refugees are left marooned on land, adrift at sea.

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[23] *See* ALISON MOUNTZ, THE DEATH OF ASYLUM: HIDDEN GEOGRAPHIES OF THE ENFORCEMENT ARCHIPELAGO (2020) (discussing these actions in Australia); Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954), https://www.refworld.org/docid/3be01b964.html.

[24] *See* Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, *supra* note 11.

[25] For a classic articulation, see Louis Henkin, *The Universality of the Concept of Human Rights*, 506 ANNALS AM. ACAD. POL. & SOC. SCI., 10, 11 (1989) ("The term 'human rights' suggests the rights of all human beings anywhere and anytime.").

II. A NEW FUNCTIONAL TYPOLOGY: CLAIMS GROUNDED IN CONTINUITY AND IN ENTRY

Today, a variety of overlapping international instruments guarantee a separate set of rights to certain qualified refugees.[26] First, in general, human rights law provides a right to return to one's "own country" without being persecuted there.[27] The Human Rights Committee declared that this right "is of the utmost importance for refugees seeking repatriation."[28] It ensures both the voluntary nature of repatriation, and the correlative duty of states of origin to admit their nationals.

Second, refugees also have rights under the Geneva system not to be forced to return to their "own country" so long as they risk persecution. Article 33 of the Refugee Convention, for example, forbids the forced return of refugees to a place where there is well-founded fear of persecution "on account of race, religion, nationality, membership of a particular social group or political opinion."[29] Recent developments have expanded grounds of persecution, possibly including the effects of a climate crisis.[30]

The two return rights are lumped together.[31] Human rights is the norm, for it creates rights that are universal (return to one's "own country" is by virtue of the dignity inherent in being a human being).[32]

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[26] *E.g.*, Refugee Convention, *supra* note 7, at arts. 1–2; African Charter, *supra* note 6, at arts. 1–2.

[27] UDHR, *supra* note 6, at art. 13(2); ICCPR, *supra* note 6, at art. 12(4). In contrast to the non-binding character of the UDHR, the ICCPR is a binding human rights treaty.

[28] U.N. Hum. Rts. Comm., CCPR General Comment No. 27: Article 12 (Freedom of Movement) para. 19, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999).

[29] Refugee Convention, *supra* note 7, at art. 33(1). For other forms of protection and non-refoulement, see Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 114 [hereinafter Convention Against Torture] (preventing the real possibility of torture); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention] (as amended by Protocols Nos. 11 and 14) (preventing "inhuman or degrading treatment or punishment").

[30] U.N. Hum. Rts. Comm., Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016, ¶ 9.11, U.N Doc. CCPR/C/127/D/2728/2016 (advance unedited version) (Jan. 7, 2020). On climate refugees, see, e.g., Matthew Lister, *Climate Change Refugees,* 17 CRITICAL REV. INT'L SOC. & POL. PHIL. 618 (2014).

[31] It is now "virtually impossible to separate" human rights from refugee law. Chetail, *supra* note 4, at 19, 23–24, 39–40, 68. For an earlier discussion of this relationship, see Paul Weis, *Refugees and Human Rights*, 1 ISRAEL Y.B. ON HUMAN RIGHTS 35, 48–49 (1971).

[32] U.N. Hum. Rts. Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc.

Refugee law, however, is selective in nature: the non-return to one's "own country" is limited in applicability to only a predetermined category of protected persons.[33] The latter law becomes applicable only after the state of origin has failed to fulfill its duty of protection toward one of its own citizens.[34]

Third, and finally, under the Refugee Convention, refugees can also access a variety of rights in any country (other than their own) where they are living. Once *in* that country or under its jurisdiction, they have rights, at a minimum, to a core set of basic guarantees.[35] "[A]dditional entitlements are subordinated to the existence of a territorial bond with the asylum state," and to the nature of residency.[36] But refugees do not have the right to enter a particular country to which they would like to flee.[37]

Crucially, and deliberately, neither human rights law nor the refugee regime challenges the sovereign control of national borders. The return right under human rights law creates a positive right for legal entry across borders—entry that is obligatory on the state regardless of consent.[38] But this compulsory entry is limited to a single state ("own country"). There is no universal entry[39]—human rights provides only a vague proclamation of a universal right of asylum that lacks any

CCPR/C/21/Rev.1/add.13 (2004) ("[T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers [and] refugees . . . who may find themselves in the territory or subject to the jurisdiction of the State Party."); *see also* U.N. Hum. Rts. Comm., General Comment No. 15: Position of Aliens Under the Covenant, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

[33] Meaning, those who are persecuted on account of predetermined grounds. Refugee Convention, *supra* note 7, at art. 1(A)(2); Chetail, *supra* note 4, at 22 ("[H]uman rights law is *the* primary source of refugee protection, while the Geneva Convention is bound to play a complementary and secondary role.").

[34] HATHAWAY, *supra* note 20 (Refugee law appears as "a remedial or palliative branch of human rights law.").

[35] For example, prohibition of discrimination, free access to domestic courts, rationing, primary education, fiscal equality, and more. *See, e.g.*, Refugee Convention, *supra* note 7, at arts. 3, 16(1), 20, 22(1) & 29.

[36] Chetail, *supra* note 4, at 41. There are different ways of classifying these entitlements. *See id.*; HATHAWAY, *supra* note 20, at 121.

[37] *See, e.g.*, Refugee Convention, *supra* note 7, at art. 33; Convention Against Torture, *supra* note 29; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, art. 45, Aug. 12, 1949, 75 U.N.T.S. 278.

[38] Of course, a state had to consent to be bound by the particular treaty in the first place. In the alternative, an obligation can be binding on a state irrespective of its consent if there is *opinio juris* (sense of legal obligation) and a sufficiently general practice of states that do not persistently object to the treaty. UDHR, *supra* note 6, at art. 13, ¶ 2; ICCPR, *supra* note 6, at art 12, ¶ 2.

[39] *See* discussion *infra*, Part III.

correlative obligation of admission.[40] The non-refoulment right under the Geneva system, in turn, postulates a negative duty *not* to return individuals to persecution.[41] This protection is a narrow exception, not a fundamental challenge to the basic ideas of national sovereignty and borders. It squares with the narrow ambition of refugee law—the non-return duty does *not* target international migration, including the cumulative effects of deteriorating conditions that leave individuals with no choice other than escape.

This orthodoxy focuses on the formal *rights* of refugees. It lumps together separate types of claims that refugees make for protection, and that ought to be differentiated: those grounded in continuity and those grounded in entry. And by claims, I mean here Weberian ideal types: no claim made by a refugee precisely corresponds with either of my two ideal types, and many claims combine elements from both.[42] These two types of claims involve individuals who seek refuge, and both implicate border-crossing, but they are, in fact, distinguishable in two key ways.

To begin with, a continuity-based claim concerns the legal status of individuals for whom changes in sovereignty destabilize status at home. This claim is backward-looking and is about the right to remain. It is made by refugees against their homeland: they ask to *remain* or to *return* to their "own country." The substantive content of this claim, or its foundation, inheres in belonging, and concerns a legal relationship between a state and one of its own.

A continuity-based claim varies in degree. A *thin* claim is about a forceful dispossession of status. Remedy here entails protection from deportation, and does not involve border crossing (for example, the claim of the women and men from the State of Assam). A *thicker* continuity claim involves deportation post-dispossession. In this case, the remedy does implicate border-crossing. It attaches a remaining function to a return function. One example is the decision of the United Kingdom to revoke citizenship and deny the right of return to British national women who left to marry Islamic State fighters.[43] These women need both a right to return to the United Kingdom and also a right to remain there, including some sort of status regularization. The difference in protection is a matter of degree. A thick continuity claim

40 UDHR, *supra* note 6, at art. 14 ("Everyone has the right to seek and enjoy in other countries asylum from persecution.").

41 *See* Refugee Convention, *supra* note 7.

42 *See* Max Weber, "*Objectivity" in Social Science and Social Policy*, *in* GESAMMELTE WERKE 146 (1968); H.H. Gerth & C. Wright Mills, *Introduction*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 3, 59–61 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

43 Karla Adam, *Shamima Begum, Teenager Who Joined ISIS, To Lose UK Citizenship*, WASH. POST (Feb. 20, 2019), https://perma.cc/2LTH-K4DL.

involves a right to cross the border into one's "own country." It is "thick" because it entails two functions: to remain but also to return.

In addition to those individuals from the State of Assam who were made stateless by India, other examples include naturalized citizens in the United States whose citizenship was recently revoked;[44] Haitians who were forcibly deported from the Dominican Republic;[45] and non-citizen long-term domiciliaries in countries such as Canada, France and Tanzania, whose status was withdrawn after criminal conviction or suspicion regarding their residency statuses. Continuity-based claims in my typology include claims by (i) refugees, (ii) those threatened by statelessness (whether they fled destabilized territories or remained within them), and also (iii) individuals who carry nationality in a state different than the one where they have established a longstanding habitual residence and who do not qualify under strict refugee definitions.

A claim to enter, by contrast, is made by refugees who want to go to any state *but* their own state. It is about the legal status of individuals who seek to escape their "own country," either because it is the source of their persecution or because the state is willing but unable (or able but unwilling) to prevent the persecution.[46] This claim is forward-looking; it concerns mobility, or the right to exit one's state and settle in another, and deals with the unavailability or the ineffectiveness of one's "own country."[47] In a way, then, claims based on entry are made when claims based on continuity are no longer available.[48]

Entry claims include claims made by claimants who are both (i) refugees *sensu stricto* who fall under different formal legal definitions (thus, including those who flee war and who are refugees under the African Convention but not the 1951 Convention);[49] (ii) individuals who

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

[45] HUM. RTS. WATCH, "ILLEGAL PEOPLE": HAITIANS AND DOMINICO-HAITIANS IN THE DOMINICAN REPUBLIC 3 (2002) [hereinafter HAITIAN CTRS. COUNCIL], https://www.hrw.org/reports/2002/domrep/domrep0402.pdf.

[46] This includes also preventing the real possibility of torture and/or "inhuman or degrading treatment or punishment." *See* European Convention, *supra* note 29 and accompanying text.

[47] *See* Refugee Convention, *supra* note 7, at art. 1(C) (the "cessation clause"). The refugee regime, importantly, also includes a claim of continuity.

[48] *See* Horvath v. Sec'y of State for the Home Dep't [2001] 1 A.C. 489, 508 (H.L.) (appeal taken from Eng.) (U.K.) ("Another state is to provide a surrogate protection where protection is not available in the home state.").

[49] African Charter, *supra* note 6, at art. 2.

are treated as *de facto* refugees if they escape their "own country" where they faced the real possibility of torture;[50] and (iii) individuals who do not fall strictly within refugee categories but who are in the same dire situation of being forced to escape deteriorating conditions. This includes those fleeing unsettled political conditions, war zones, civil wars, environment degradation, or other causes of large-scale forced migration.[51]

Claims grounded in continuity and those grounded in entry not only concern distinct types of crises, they also point to different duty-holders (against whom the individual makes this claim). A continuity-based claim points in the direction of *one* particular state, the individual's own country, as a duty-holder. This duty can be thin and negative (not to deport), or thick and positive (to let back in). Only if the duty is positive does it involve border crossing and, in that case, it restricts the control of this one state over its borders. This is in line with an international human rights regime which is both jurisdiction-based and protects the right to nationality[52] (and also legal personality).

A claim to enter, in contrast, derives from flat-out suffering and places an entry duty at the doorstep of *all* states that signed the relevant treaty. This conforms to refugee law which, strictly speaking, protects those who are persecuted at home. As a category, they are outside the human rights protection of their "own country."

Here, the remedy always involves border-crossing.[53] It imposes a negative duty on one state (to let go), and a positive duty on *all* other states (to let in). This claim, therefore, limits the control of every state over its borders.

Of course, in real life, this division is not rigid. Individuals who make continuity-based claims might at the same time also need to make entry-based ones. In addition, often the range of human motivations to cross borders resists a clear disentanglement into neat doctrinal categories. Palestinian refugees, for example, occupy an intermediate position in my typology: they are both individuals who raise continuity-

50 Convention Against Torture, *supra* note 29, at art. 3.

51 Claims grounded in entry might possibly also include temporary Protected Status holders who entered and are seeking the right to remain. But their claims are directed against one specific host state.

52 On the jurisdictional base, see, e.g., Samantha Besson, *Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!*, 9 EURO. SOC'Y INT'L L. REFLECTIONS (2020). On the link to nationality, see UDHR, *supra* note 6, at art. 15; ICCPR, *supra* note 6, at art. 1, 24(3); LOUIS B. SOHN & THOMAS BUERGENTHAL, THE MOVEMENT OF PERSONS ACROSS BORDERS 39 (1992).

53 Even resettlement, a remedy which may be granted before border crossing, ultimately requires exiting one state and entering another.

based claims because their status in Palestine has been upset, and *also* refugees in the strict legal sense who have crossed a border and sought asylum post dispossession (e.g., Palestinian refugees in Lebanon, Jordan, etc.). Yet separating these two claims as distinct ideal types is still valuable, for it directs attention towards the latent tendencies within human rights and refugee law that leave one subset of refugees without a clear path to adjudication.

III. CLAIMS GROUNDED IN CONTINUITY: THE EVOLUTION OF THE RIGHT TO FREEDOM OF MOVEMENT, 1948–2020

I now turn to argue that human rights law—the regime that sets the norm of protection—has developed in ways that more readily recognize continuity-based claims (return). I look at the freedom of movement right, for it is the human right that most explicitly involves cross-border mobility[54] and thus directly bears on the lives of refugees. I illustrate that, within the history of the human right to freedom of movement, "own country" has taken on a range of more- or less-expansive juridical definitions, and generated different degrees of protection. The protection offered does not correlate with the actual neediness of the claimant. Instead, it is a function of the nature of the claim she makes: a claim that derives protection from a relationship to "own country" or the breakdown of that relationship.

The freedom of movement right under the 1948 Universal Declaration of Human Rights ("UDHR") generated a right *both* to return and also to remain therein. It involves two functions: exit and entry.[55] The exit function is always in effect. It is universal and unlimited: anyone can leave any country. This is confirmed by both the UDHR[56] (an aspirational document, sometimes viewed as codifying customary law, but one that is formally non-binding) and the International Covenant on Civil and Political Rights ("ICCPR") (a treaty binding on its signatories).[57] As for the entry function, it is limited only to an individual who returns to "his own" country.[58]

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54 The other two human rights that assume mobility are the right to seek asylum and the right to nationality.

55 I am looking here only at the international aspect of the right to freedom of movement (i.e., mobility across states).

56 UDHR, *supra* note 6, at art. 13, ¶ 2 ("Everyone has the right to leave any country, including his own . . . .").

57 ICCPR, *supra* note 6, at art. 12, ¶ 2 ("Everyone shall be free to leave any country, including his own.").

58 UDHR, *supra* note 6, at art. 13, ¶ 2; ICCPR, *supra* note 6; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(ii), Dec. 21, 1965, 660 U.N.T.S. 195.

In this 1948 configuration, "own country" is equated with the state of formally-prescribed nationality. In other words, the right to movement derives protection from a legal-political tie with the *state* (citizenship). Thus, while all individuals enjoy a universal exit, a right of entry is particular and limited only to nationals.

This right sanctions legal movement that is obligatory on a state irrespective of consent.[59] It guarantees a *thick* protection, to remain and to return. But it limits this protection to citizens. Aside from this exception, human rights law omits border crossing as a formative part of the regime.[60]

Human rights are centered on the state as the site of correction, and offer protection contingent on a certain threshold of "belonging" to a state. The definition of juridical "belonging" here assumes a legal-political significance (citizenship) that carries protective outcome. Consider, again, the Assam example. In the eyes of India, these two million women and men were not entitled to citizenship in the first place,[61] and are therefore outside the reach of the freedom of movement right under the 1948 articulation. Because the right makes protection a function of nationality, it does not sanction freedom of movement as such. Instead, it sanctions movement limited by nationality. Hence, the paradox articulated by Hannah Arendt:[62] human rights are supposed to be universal,[63] but the right to freedom of movement puts nationality back at the center of protection. The 1948 right of return is, in fact, an expression of freedom of movement that belongs *only* to citizens.

In recent years, human rights courts and quasi-judicial institutions have stretched the definition of "own country" to include *both* nationality and long-standing residency. In this articulation, long-standing residency supplies the connecting criteria that determine

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59 Of course, the treaties are consent-based. *See* discussion, *supra* note 38.

60 For example, in his book on the origins and drafting of the Universal Declaration of Human Rights, Johannes Morsink treats separately as 'special' the provisions on departure from and return to a country, asylum, and nationality because they were not ordinarily found in domestic constitutions and depended on more than one state. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 72–73 (2000). For more on this, see Karen Knop, *Lorimer's Private Citizens of the World*, 27 EUR. J. INT'L L. 447, 463 (2016). For the evolution of the international legal regulation of mobility, see Jane McAdam, *An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty*, 12 MELBOURNE J. INT'L L. 27 (2011).

61 Raj and Gettleman, *supra* note 12.

62 HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296–97 (1958).

63 UDHR, *supra* note 6, at Preamble ("[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . . ").

whether an individual without citizenship can claim a state as her "own." And so, for example, the UNHRC decided that Canada was the "own country" in the case of a non-national Somali man who had entered at the age of four. The Committee held that he had "close and enduring connections" in Canada.[64] The Committee used the extensive emotional links that the man formed with Canada over a long period of time to substitute for nationality.[65]

This is the most mobility that these courts and quasi-judicial institutions could introduce into an international legal regime that takes for granted a certain stasis, that assumes that individuals already belong to the legitimate jurisdiction of some state, and that respects states' sovereign control over borders.[66] It is a law that forsakes mobility as formative, and disavows attachments and belonging shaped by the experience of migration. After this expansion, if India deports the two million individuals from Assam, those individuals will qualify for a return to their "own country" under the human right to freedom of movement. Inherent in the revised legal form is the expiration of protection if personal-territorial continuity in the state breaks down.

What about the status of the children of deportees, born post-dispossession and deportation? The inheritance of refugee claims by multiple generations that have not been given a new nationality is hypothetical in the Assam case, but it is the reality for Palestinian refugees. Today, Palestinians are two, three, and even four generations removed from the original dispossession. Their example is illustrative: because of the intergenerational nature of their crisis, different generations of Palestinians make different claims that relate to different variations of belonging and of "own state."

The legitimacy of the claims of the children of Palestinians who were expelled in 1948 or 1967, and the reality of the harm they have suffered, calls for a further expansion of "own country." This expansion equates "own country" with a mix of traditions, customs, and ethnicity (descent). Here, the proxy for return to "own country" is long-standing

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

65 *Warsame*, *supra* note 64, ¶ 8.5.

66 As Michael Walzer famously put it, "[a]dmission and exclusion are at the core of communal independence." MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 61–62 (1983). For the opposite view, see generally Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 251 (1987).

territorial ties through culture and ancestry. This proxy would allow descended generations of Palestinian refugees a return to Israel, a state with which they never had physical continuity but from which their grandparents or other ancestors were forcibly expelled and dispossessed.

Ironically, there is a legal precedent that might be relevant for such an expansion: British Mandate over Palestine.[67] In cases involving Jews, the Mandate made a right to nationality a function of the "historical connection of the Jewish people with Palestine."[68] And so, "historical connection" with a territory, not physical presence, acted here as a proxy for juridical belonging. This belonging, moreover, was neither to a state nor to a place of ongoing domestic and economic roots. Rather, it was to a territory of spiritual value, a "National Home."[69] It generated a thicker degree of protection than others we have explored thus far, including three functions: to return, to remain, and to a Mandate nationality.[70] Importantly, I do not look here at the Jewish National Home as a generally accepted precedent that can generate new legal claims,[71] but rather to suggest the broad spectrum of "own country" interpretations that might be possible if we extend our imagination.

So far, my functional analysis of the human right to freedom of movement suggests that the term "own country" takes on a spectrum of more or less expansive juridical definitions. It can mean: (1) the *place* of ongoing domestic and economic roots; (2) the *state* of formally prescribed nationality; and (3) the *state* of longstanding residency; or perhaps also (4) the state, or the place, of long-standing territorial ties through ancestry. And it also illustrates that a return right can generate different degrees of protection from the minimum of belonging. It can

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[67] British Mandate for Palestine, *in* THE AVALON PROJECT, http://avalon.law.yale.edu/20th_century/palmanda.asp.

[68] *See id.* at Preamble ("[T]he Mandatory should be responsible for … the establishment in Palestine of a national home for the Jewish people ...."); *id.* at art. 7. *See also* The Balfour Declaration (Nov. 2, 1917). Palestinian nationality was regulated by the Palestine Citizenship Order, 1925, S.R. & O., no. 2.

[69] British Mandate for Palestine, *supra* note 67, at Preamble ("[T]he grounds for reconstituting their national home in that country ...."). In 1922, the precise content of "National Home" remained underspecified. *See* MICHAEL BRENNER, IN SEARCH OF ISRAEL: THE HISTORY OF AN IDEA, ch. 3 (2018); DMITRY SHUMSKY, BEYOND THE NATION-STATE: THE ZIONIST POLITICAL IMAGINATION FROM PINSKER TO BEN-GURION, ch. 1–5 (2018).

[70] British Mandate for Palestine, *supra* note 67, at art. 7; Palestine Citizenship Order, *supra* note 68.

[71] On the question of whether colonialism ended, see Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 118, ¶ 88 (Feb. 25, 2019).

include just a single function (to remain). And it can also assume two functions (to return and to remain with some status).

One might support an expansion of "own country." As a structural matter, it is within a rights framework and locates a duty-holder in one obvious state. Furthermore, it legally captures continuities in a state outside the simplest instance of ongoing personal-territorial continuity.

Such an expansion could incorporate *moral continuities* by recognizing claims associated with the injustices of colonialism, opening a route to draw on border-crossing as a remedy for ongoing dispossession. Thus, for example, economic migrants from what were colonized territories could potentially have claims for national admissions and inclusion in European states.[72] Further, "own country" could expand to include *political continuities* by allowing legal designation of a homeland that is different from a formal state, to cover situations that involve a return to the same physical territory but under different political control. The former can better capture indigenous claims. For instance, in cases involving indigenous communities, the land, not the state, could be legally recognized as home. Indeed, the Inter-American Court of Human Rights is moving in this direction.[73] The latter might legally denote the situation of Syrian refugees in Turkey. Turkey now demands to repatriate them to Syria, or the state of their nationality, but to a region under Turkish control. Finally, such an expansion could also include border crossers—mainly indigenous—who are exercising a freedom of movement that is outside and independent of state dispensation.[74]

In thinking about incorporation into a claim for protection elements of continuity with one specific state, one can defer to existing international caselaw that consider parameters of belonging. And so, for example, in the landmark *Nottebohm Case*, the International Court of Justice performed precisely this analysis to find that claims to having a home, rather than a formal legal-political allegiance, can define nationality.[75]

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[72] *See generally* E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019) (migration as a form of decolonialization).

[73] *See* Moiwana Cmty. v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ X (June 15, 2005) (Court equated between returning to "land" to returning "home" post-massacre.).

[74] For a discussion of the idea of indigenous mobility outside the state, see Sherally Munshi, *Race, Geography, and Mobility*, 30 GEO. IMMIGR. L.J. 245 (2016).

[75] Nottebohm Case (Liech. v. Guat.) (second phase), Judgment, 1955 I.C.J 4, 22 (Apr. 6) (Nationality must be "real and effective," in the sense of "correspond[ing] with the factual situation.").

Or one might reject such expansions—for there is no obvious way in which a regime that forgoes mobility as formative can accommodate claims that create positive entry obligations. The human rights framework, we saw, restricts the action of states relative to their own "nationals." It assumes that individuals already belong to the jurisdiction of a state and guarantees them the ability to exercise rights against that state. This law cannot readily tolerate expanding the notion of "own country" to include (subjective) emotional links, let alone cultural references. Such an expansion may leave states owing an entry duty to an unspecified number of individuals from all around the world. This possibility risks upending the state system and diluting the value of nationality, a central pillar of the international system.

Indeed, pushed to the extreme, the expansion of "own country" might unravel nationality doctrines all together. Under the existing system, political "belonging" is only to a (territorial) sovereign state, with boundaries of both inclusion ("us") and exclusion ("them") determined by national criteria and set by state law.[76] Drawing on moral continuity to generate "own country" (e.g., to fight the injustices of colonialism) might transform nationality from a mode of political belonging that is fixed by state law to one that is determined to a large degree by individuals from outside the state. These women and men might be connected to the state through history but share no political loyalty to the existing state and its institutions.[77] Finally, once the door is opened to a more expansive definition of "own country" somewhere in the international system, it might be difficult to reject it outright elsewhere in the system.

Whether one supports or rejects this expansion of "own country," the law here is relatively settled. It dictates an obvious duty-holder, and this duty-holder is responsible for the harm (thus, creating a legal

[76] *Id.* at 23 ("[I]nternational law leaves it to each State to lay down the rules governing the grant of its own nationality."). This state-based definition of nationality is supported by human rights law. *See, e.g.*, General Comment No. 15, *supra* note 32.

[77] This Treaty served as the model for the other Minority Treaties signed with the new states born after WWI. Art 4(1) of the Polish Minority Treaty forced new states to give members of minority who stratified two conditions—principle of habitual residence and the principle of origin—nationality. Minorities Treaty Between the Principal Allied and Associated Powers and Poland, June 28, 1919, 225 Consol. T.S. 412 ("Poland admits and declares to be Polish nationals . . . [members of a minority] who were born in the said territory of parents habitually resident there, even if at the date of the coming into force of the present Treaty they are not themselves habitually resident there."). Said the Permanent Court of International Justice: the duty on the state to grant nationality operates "without attaching any importance to the political allegiance of these persons." Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7, ¶ 25 (Sept. 15).

relationship within Hohfeldian taxonomy).[78] In cases that bear on "own country," courts and quasi-judicial bodies are asked to adjudicate the nature of individuals belonging to one single state and *not* to distribute obligations between states on an ad hoc basis. Resolving these claims involves line-drawing and poses factual questions. International enforcement bodies are well suited to these inquires. These claims are, therefore, well-suited for a strategy of adjudication.

IV. CLAIMS GROUNDED IN ENTRY: THE LAW IS INSUFFICIENTLY DEVELOPED

Even the strongest version of "own country" will *not* affect the situation of refugees who are making claims to enter. I now turn to suggest that a majority of today's refugees are left without legal recourse under human rights law because their claims do not correspond to a clear duty-holder. By examining case law before human rights courts and quasi-judicial bodies, I argue that a small subset of these "entry" refugees might nonetheless be protected. Their protection is a function of variants of access and is conditioned upon their ability to establish presence at a state border or to come under its effective control. But the equity, justice, or practical desirability of physicality as a selective criterion is far from clear.

Claims to entry concern refugees who seek to flee their "own country" because it is the source of their harm. Their demand is not to belong, but rather to escape their country of formal nationality. This desire for escape might be motivated by a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . . ."[79] Or by "severe pain or suffering, whether physical or mental" that "is intentionally inflicted on a person . . . ."[80] Or by fleeing a war zone.[81] Or even by environmental catastrophe,[82] or slow political deterioration (not recognized by formal law).

Regardless, the quest for mobility in these cases is a function of suffering, not belonging. The claim is not to remain or return, but to escape and to admit. And a meaningful escape requires the ability to exit from one state and to be admitted into another.

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78 HOHFELD, *supra* note 17.

79 Refugee Convention, *supra* note 7, at art. 1.

80 Convention Against Torture, *supra* note 29, at art. 1.

81 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), art. 1(2), 10 September 1969, 1001 U.N.T.S. 45, https://www.refworld.org/docid/3ae6b36018.html.

82 U.N. Hum. Rts. Comm., Ioane Teitiota v. New Zealand, U.N Doc. CCPR/C/127/D/2728/2016, para. 9.11 (advance unedited version) (Jan. 7, 2020).

But there is no universal right to cross-border movement.[83] International law overwhelmingly respects sovereign authority over borders. Pursuant to principles of sovereignty, every state has the power to control its territory, and in some cases a duty to do so.[84] Moreover, every state has the right to grant nationality on the terms it wishes.[85] Thus, a sovereign owes no entry duty to individuals it does not consent to—even if they are peaceful, disadvantaged foreigners.[86] Human rights law, as we have seen, qualifies this prerogative of the state only in cases that involve a return of one of the state's "own."

Operating at the margins of this regime, human rights courts and quasi-judicial bodies have begun in the past decade or so to enlarge protection of non-nationals. They have expanded somewhat the range of circumstances under which individuals are deemed to have successfully entered the state by including *both* those who are physically inside a country's borders, and also those who have come under the effective control of the state or its agents outside the state's borders.

For example, in *Hirsi Jamaa v. Italy*, 2012,[87] the European Court of Human Rights ("ECtHR") held that when a state interdicts a boat on the high seas carrying would-be migrants and asylum seekers, the very act of interdiction through the human agency of the state brings the passengers under the state's control.[88] This triggers procedural

[83] Treaty instruments exclude a right of entry to their beneficiaries. *See, e.g.*, Refugee Convention, *supra* note 7, at art. 33; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, art. 45, Aug. 12, 1949, 75 U.N.T.S. 287. For case law on the same point, see, e.g., HAITIAN CTRS. COUNCIL, *supra* note 45; Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others, [2004] UKHL 55, para. 70.

[84] *See e.g.*, Case of N.D. and N.T. v. Spain (App. Nos. 8675/15 & 8697/15) (Grand Chamber), ECLI:CE:ECHR:2020:0213JUD000867515, Council of Europe: European Court of Human Rights, Feb. 13, 2020, https://www.refworld.org/cases,ECHR, 5e4691d54.html.

[85] *Nottebohm (Liech. v. Guat)*, Judgment, 1955 I.C.J. 4, at 23 (Apr. 6) ("[I]nternational law leaves it to each State to lay down the rules governing the grant of its own nationality."). Treaty instruments exclude a right of entry to their beneficiaries. *See*, *e.g.*, Refugee Convention, *supra* note 7, at art. 33; Convention Against Torture, *supra* note 29, at art. 3; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, art. 45, Aug. 12, 1949, 75 U.N.T.S. 287.

[86] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 237 (1989) ("The state's exclusive right to decide what acts shall take place in its territory is virtually undisputed.").

[87] *Hirsi Jamaa, supra* note 20.

[88] *Id.* para. 74.

protections for the passengers on the boat, including individual status determination.[89]

Importantly, the ECtHR did *not* create a right of entry.[90] Instead, it stretched out the definition of entry so that it covers not only individuals who are inside the state proper (jurisdiction is territorial),[91] but also those arriving at the state's borders, or even at the functional equivalents of borders (jurisdiction qua "effective control").[92] This protection is thin and transitory. It lasts only insofar as needed for the purpose of an individualized examination of applications for protection[93] (although, of course, individual status identification processes would presumably enable more people to get into the state). Much like the ECtHR, other human rights courts and instruments have gone out of their way to clarify that they are not upsetting the policy of state control over borders.[94]

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[89] *Id.* paras. 184–85.

[90] In fact, the Grand Chamber affirmed: "Contracting States have the right . . . to control the entry, residence, and expulsion of aliens . . . . [T]he right to political asylum is not contained in either the Convention or its Protocols." *Id.* para. 113.

[91] States' obligations are rooted in the state's overall control over territory. *See* Loizidou v. Turkey, App. No. 15318/89, Judgment (preliminary objections), Feb. 23, 1995, para. 62.

[92] Like the ECtHR, the UNHRC held that the state is responsible for protecting the human rights of "all persons in their territory and all persons subject to their jurisdiction." UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulment Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol, para. 36 (Jan. 26, 2007) [hereinafter Extraterritorial Application], https://www.unhcr.org/4d9486929.pdf. According to the UNHRC, the test for the applicability of the law is not territorial presence, but effective control of the State. This was confirmed by Article 2(1) of the ICCPR. ICCPR, *supra* note 6, at art. 2(1). Extraterritorial application of human rights has been likewise supported by other international human rights bodies and national courts. For a summary, Extraterritorial Application, *supra* note 92, para. 36.

[93] *Hirsi Jamaa*, *supra* note 20. This was confirmed in Georgia v. Russia (I), App. No. 13255/07, para. 195 (July 3, 2014), http://hudoc.echr.coe.int/eng?i=001-109231; Affaire Sharifi et autres c. Italie et Grèce, App. No. 16643/09, (Oct. 21, 2014), http://hudoc.echr.coe.int/eng?i=001-147287; Affaire Khlaifia et autres c. Italie, App. No. 16483/12, para. 235 (Dec. 15, 2016), http://hudoc.echr.coe.int/eng?i=001-170054.

[94] *E.g.*, G.A. Res. 40/144, Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, art. 2 ¶ 1 (Dec. 13, 1985) ("Nothing in this Declaration shall be interpreted as . . . restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay . . . ."). For the European system, see also Case of Abdulaziz, Cabales and Balkandali v. the United Kingdom, App. Nos. 9214/80, 9473/81 & 9474/81, para. 67 (May 28, 1985); Boujlifa v. France, App. No. 25404/94, (Oct. 21, 1997), para. 42, http://hudoc.echr.coe.int/eng?i=001-58106; Boughanemi v. France, App. No. 22070/93, (Apr. 24, 1996), para. 42; Case of N. v. The United Kingdom, App. No. 26565/05, Eur. Ct. H.R. 12 (2008). For the Inter-American system, see Convention Regarding the Status of Aliens in the Respective Territories of the Contracting Parties, art. 1, Feb. 20, 1928, 132 L.N.T.S. 302.

Here, then, human rights courts and quasi-judicial bodies trigger jurisdiction by physical presence and make the allocation of protection dependent upon an individual's ability to come close to a state or its agents.[95] This leaves the location of the plaintiff consequential for the state power of exclusion. Normatively, the distinction between those extended protection and those left without protection is not fully justified. Human rights law claims universality, but here protection extends to some individuals and not others and is not generalizable.[96] As a policy matter, moreover, the proximity of a non-national to the state is an odd way to prioritize between the interests of these two relevant stakeholders. Furthermore, the incremental protections recognized by human rights courts and treaty bodies in developing this access-based compromise might actually decrease pressure for more fundamental reforms of the international refugee regime.

Recently, the ECtHR clamped down on even this thin protection, which is a function of physical presence. In *N.D. and N.T. v. Spain*, 2020,[97] the Court subjected the duty of the state to offer individual status determination to the culpable conduct of a non-national. Without a precise definition of "culpable conduct,"[98] the Court found that a state owes no individual status determination to non-nationals who have not made "use of the existing legal procedures for gaining lawful entry,"[99] and instead choose behavior that places "themselves in jeopardy."[100] And so, after human rights enforcement bodies have incentivized non-nationals to undertake dangerous travel to establish presence, they also penalize them for putting themselves in peril.[101]

All this begs the question: where does a law that lacks a universal right to cross borders, and case law that draws on physical access to extend protection, leave a refugee who makes a claim motivated by entry?

In this case, before the refugee is able to take the perilous journey to set foot in the territory of a host state or reach its borders, there is no

95 On this, see *Walls*, *supra* note 11.

96 Note, however, that important scholars offer a normative argument for granting protection to those who are 'here,' see generally, important work by Linda Bosniak. *E.g.*, Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES IN LAW, 389, 403 (2007); *see, e.g.*, AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY (2011).

97 *See supra* note 21.

98 *Id.* para. 231. A conduct that "places" the applicants "in jeopardy."

99 *Id.* para. 231. For these available means to legal protection, see *id.* para. 212.

100 *Id.* para. 231.

101 For discussion of *N.D. and N.T. v. Spain*, see Moria Paz, *The Legal Reconstruction of Walls:* N.D. and N.T. v. Spain*, 2017, 2020*, 22 N.Y.U. J. Legis. & Pub. Pol'y 693, 711 (2020).

clear nexus between the claim she makes and one particular duty-holder. Instead *all* states bear a universal and general duty, but no one state owes a particular entry duty. In fact, all states have a right, sometimes even a duty, to control their borders.

Consider the example of a Syrian refugee who is stopped in the Mediterranean Sea before making contact with a potential host state. As a Syrian, she qualifies as a refugee under the definition of the U.N. Refugee Agency.[102] But human rights jurisdiction in her case can neither be presumed (territorial jurisdiction) nor established (jurisdiction qua control). Absent a correlative relation, the condition for a human rights duty to permit entry is not established against any one state in particular. Instead, her entry-based claim imposes a duty on *all* states, and all states share this duty equally.[103] And so, resolving the claim of this woman involves the allocation of burdens and of inequities to *all* states. Those claims, therefore, are better suited to the realm of negotiations, bilateral or multilateral agreements, and the political arena.

This dynamic, then, displaces legal duties with altruism; any one state can choose to be generous and admit this woman, but it does not carry a duty to let her in. At the same time, it also reduces this woman to an object of sympathy. She is torn from any actual legal protection and is left instead with only a sentimental appeal to an unspecified common humanity.[104]

The exception is, of course, if the Syrian woman in this example reached the territory of a state and requested entry (strong territoriality). Or, in the alternative, if she came within the effective control of this state or its agents and requested this entry (neo-territoriality). In such cases, providing the woman's conduct does not qualify within the vague definition of "culpability" (recall *N.D. and N.T. v. Spain*), there is a single state of jurisdiction that is the duty-holder by default,[105] until it can identify another state to take its place.

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[102] UNHCR, *What Is a Refugee?*, U.N. (2020), https://www.unrefugees.org/refugee-facts/what-is-a-refugee/.

[103] For a general discussion of human rights jurisdiction for duty, see Besson, *supra* note 52. On human rights "responsibilities," see Samantha Besson, *The Bearers of Human Rights Duties and Responsibilities for Human Rights – A Quiet (R)Evolution*, 32 SOC. PHIL. & POL'Y 244 (2015).

[104] Munshi, *supra* note 74 (discussing children).

[105] *Hirsi Jamaa*, *supra* note 20, para. 74 ("Whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction . . . ."). The ECtHR has been reluctant to apply the ECHR outside the territory of the Convention States, notably ECtHR, Bankovic & Others v. Belgium & 16 Other Contracting States, App. No. 52207/99, 11 B.H.R.C. 435, para. 59–80 (Dec. 12, 2001), http://hudoc.echr.coe.int/eng?i=001-22099. Even in this case, however, the

In this case, the woman's physical location—her presence within the state—triggers a duty that trumps the state's control over its territory. But territorial access is an odd way to sort out the policy interests of the stakeholders involved. From the perspective of the individual non-national, it selects for some physical, economic, and locational features. From the perspective of the state, it burdens states unequally. In cases dealing with states of equal capacity, the accident of geography determines the protective burden: states with more easily penetrable borders, or with unreliable or uncooperative neighbors, will bear a heavier influx.

More complicated still are non-core cases, such as those involving refugees who flee private persecutors (when the state is willing but unable to prevent the persecution). For example, consider an individual fleeing gang violence in Central America. In this situation, case law on status determination is less clear. In the functional terms that I have suggested, the claim is for protection by the individual's "own country." In other words, it is a claim motivated by continuity. The inability of the individual's "own country" to grant this protection leads him to make an entry claim on other states for refuge. Those other host states, moreover, may approach the claim from the perspective of refugee status determination, and may not see these cases as qualifying for refugee treatment.[106]

In this case, the duty-holder is not clear in two separate ways. To begin, is it the home state where the gang violence occurred, or the host state that might take him in? And if it is not the home state, then what particular state must offer refuge? Before this man—or woman—reaches the territory of one state, there is no particular reason why any one state should take him in. Without a particular duty-holder, his claim for a legal status or an entitlement remains abstract.

Court concluded that "the ECtHR has consistently held that the obligations under the ECHR apply extraterritorially in situations where 'a State exercises through the effective control of the relevant territory and its inhabitants abroad . . . . All or some of the public powers normally to be exercised by that government,'" *Id.* para. 71. In recent cases, ECtHR based the decisions in which it declined jurisdiction for acts outside the territory of Member States not on territorial grounds. *See*, *e.g.*, Saddam Hussein v. Albania and others, App. No. 23276/04, Court Decision on Inadmissibility (Mar. 14, 2006), http://hudoc.echr.coe.int/eng?i=001-72789; Saramati v. France, Germany and Norway, App. No. 78166/01, Grand Chamber Decision on Admissibility (May 2, 2007), http://hudoc.echr.coe.int/eng?i=001-80830. International law here developed in an opposite way to U.S. law. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 160 (1993).

106 For example, the United States expanded the range of recognized claims to include persecution on account of gang violence. But see the 2018 executive branch decision that made it much harder to seek asylum based on gang violence, Matter of A-B-, 27 I & N Dec. 316, 320–23 (A.G. 2018).

By constructing a regime that guarantees universal exit but no corresponding entry duty, the law has abandoned "entry" refugees permanently stuck in transitional locations, such as refugee camps or territorial borderlands.

The Syrian woman I mentioned above leaves the sympathetic viewer thinking that she deserves our care. The genuine sympathy evoked obscures any analysis of the responsibility of the law for her predicament in the first place. This woman went to sea so she could get into a host state and use her access to create a legal right for protection.

Significantly, my point is not that entry claims are not susceptible to adjudication. Rather, that they require a further level of political treaty negotiation to assign an entry right to specific duty-holders. Without an agreed-upon framework that spells out how courts should distribute entry obligations, these claims do not lend themselves to adjudication. They leave courts moving ad hoc, resolving underlying normative questions about who is most vulnerable and who is most capable of providing protection. At the moment, courts do so by drawing on variants of physical access to compromise between the interests of the non-national and the state. But this compromise leaves *access* doing most of the work in the allocation of protection. Alas, access is a bad proxy for the real, substantive conflict between individual non-nationals and states over whom to protect, in what order of priority to protect, and by whom they should be protected. And, furthermore, access also leaves those individuals who fail to establish such physical presence figures of abjection; they remain objects of humanitarian sympathy more than bearers of legal rights.

V. CONCLUSION

At the present moment, the world faces a massive crisis of mobility. I have sought to bring human rights and refugee law into the frame of normative consideration by exploring the structural gaps in these regimes when addressing this crisis. These laws defer to the sovereign control of national borders and assume that individuals are already 'within' states. They forgo mobility as formative.

Operating within this state-centric frame, current legal practice conditions the protection of refugees on (i) the definition of a "refugee" and (ii) the right of non-refoulment. But I have argued that this formal legal practice blurs the difference between two sub-sets of refugees and the claims they make on the law, and also obscures the looseness of obligation under human rights and refugee law.

To illuminate the slippery nature of these obligations, I have introduced a new taxonomy that differentiates between two types of

refugee claims on the law: continuity-based claims and entry-based claims. This taxonomy divides refugees by the nature of the claims they make and differentiates between two separate normative impulses: stability or "stasis" (guaranteeing the right of an individual to remain or to return to where she belongs, territorially, sociologically, politically, or emotionally), and mobility (protecting the right of an individual facing harm to leave where she belongs and to enter to another state). Furthermore, this taxonomy also separates refugees on the basis of the duty-holder against whom they are making their claims for protection: "own country," or "any country but own country," and distinguishes between the duty not to deport and the duty to admit.

Drawing on an analysis of the human right to freedom of movement, I have further suggested that human rights law developed in a way that understands rights in terms of continuity—i.e., belonging to a national state. It finds justice and fairness inside one's own state. But this evolution does not fit the current political reality. Most refugees today are making claims motivated by entry. For them, justice and fairness lie in fleeing their "own state" and settling in another. In their cases, human rights and refugee law create clear rights, but they do not point at any obvious duty-holders. And so, all states are free to treat the rights of such refugees as someone else's duty. This leaves these regimes less and less relevant to the reality on the ground.

There are practical implications for states of this gap between the law and the empirical reality. Those states that resist participating in refugee protection today, like Hungary or Poland, may want to consider how small the vision of human rights and refugee law really is. Looking past the rhetoric of rights, both the human rights and refugee regimes in fact ask very little of states. They do not create an entry duty and instead acquiesce to state control over their borders. And those states that declare their adherence to human rights and refugee law might well consider that the real engine of today's refugee crisis inheres in the lack of entry. Without taking this challenge head on, regardless of their commitments to international law, they are already on the way towards the practice of Hungary or Poland.

Further, for those who are committed to the protection of refugees, it is worthwhile to acknowledge the misfit between the legal regime and the reality on the ground: without a further level of treaty negotiations to make entry-rights actionable against specific states, refugee law, first, fails on its own terms because it does not achieve what it sets out to do—namely, to protect the most vulnerable. Second, it comes up short as a matter of principle because it allocates privileges and duties arbitrarily.

In embracing an access-based compromise that awards consideration for protection on the basis of claimant location, human rights courts and treaty bodies might have actually compounded this inadequacy of refugee law. By linking human rights protections to the ability to establish a territorial presence in the state (strong territoriality) or to come within the effective control of the state or its agents (neo-territoriality), these human rights enforcement institutions have effectively reduced the pressure on the international refugee regime to achieve more structural reforms. And, at the same time, these adjudicative bodies may have also obstructed us from recognizing as rights holders those refugees who fail to establish access. Instead, before they reach our shores—through the desert, across the ocean, or over the wall—we more readily identify them as subjects of sympathy.

Facing a global crisis of mobility, it is vital to directly tackle the question of entry. This could entail building further on the work already started by leading scholars to reorient the international community away from the refugee paradigm and toward a new global legal framework, *a law of migration*,[107] or towards *criminal law* to enforce the rights of refugees and migrants.[108] Such frames should not be limited to the possibility of a presumptive right to migrate, broad liberal commitments to freedom of movement, and the doctrinal avenue of "crimes against humanity" to create individual criminal liability for border violence. Given the lack of an entry I traced in this Article, they must also articulate the duties of states. More specifically, how would lines be drawn around individuals who must receive maximal protection under the law, and by whom?[109] In addition, advocates of this shift away from the structure of refugee law must also reckon with the risk of losing universal consent to this elaborate body of law.[110]

Given that current political trends do not support progress toward a universal entry duty, an alternative avenue forward is to craft rights to entry through a legal regime that seeks to obtain state consent. A

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[107] There is mushrooming new work here, e.g., *Symposium on Mapping Global Migration Law,* 111 AJIL UNBOUND 504 (2017).

[108] For discussion, including sources, see Itamar Mann, *The New Impunity: Border Violence as Crime.*, 42 U. PENN. J. INT'L L. (forthcoming), https://ssrn.com/abstract=3548181.

[109] Some of the questions that are relevant: (1) what is the level of negotiations (who participates), and degree of transparency, (2) who will allow entry and to whom and to how many, and (3) what will be the role of law (if at all).

[110] James Hathaway is associated with this view. *See, e.g.,* James C. Hathaway, *Moving Beyond the Asylum Muddle*, BLOG EUR. J. INT'L L. (Sept. 14, 2015), http://www.ejiltalk.org/moving-beyond-the-asylum-muddle/ ("The moment has come not to renegotiate the Refugee Convention, but rather at long last to operationalize the treaty in a way that works dependably, and fairly.").

number of structures are possible that would expand a right to entry conditional upon prior state authorization, and I list here some examples. (1) *International*: create agreed upon entry duties by galvanizing state commitments to combat certain global ills, such as those that are climate- or inequality-related (e.g., resettlement programs). This entry derives from politics, not adjudication, and, if granted, is an exceptional act of sovereign grace. (2) *Regional*: entry obligations within smaller communities of states as a function of consensual agreements among them (see intra-regional free movement arrangements such as the European Union, the Economic Community of West African States, and the Southern Common Market MERCOSUR). This entry inheres in a legal duty and operates irrespective of state consent after signing the original agreement. (3) *State*: entry that is rooted in the explicit recognition of certain values by individual states; for example, a state voluntarily allocating entry to advance diversity (e.g., U.S. diversity VISA lottery).

Of course, it is impossible to predict the efficacy of any of these structures. It might turn out that ad hoc mechanisms tailored to specific states or regions might carry adverse consequences for some sub-sets of refugees. For example, states could select in favor of refugees who come from particular locations (for example, regions closer to Europe), or a favored religion (Jewish refugees going to Israel,[111] or Christians going to predominantly Christian states), or particular features or skills (athletes, doctors).[112] Such considerations could trump the gravity of an individual's predicament. In addition, entry that is a function of an ad hoc unilateral state action always remains tenuous and could be reversed at will.

In a legal reality that accords the state monopoly over human mobility, however, shifting focus from a universal normative frame to ad hoc mechanisms that are tailored to address interests of specific states might nonetheless provide better protective outcomes. Such interests could include expanding and diversifying labor, growing the state's tax base, mitigating the effect of an aging population, and incorporating young men into the market instead of leaving them at the border. This approach would encourage the state to take in more

[111] In 1950, Israel passed the Law of Return securing the right of "Every Jew . . . to come to the State of Israel as an immigrant," ("oleh") and, in 1952, it passed the Law of Nationality, making "[e]very immigrant in the sense of the Law of Return of 1950 . . . an Israeli citizen." In these twin laws, Israel exercised its discretion as a state to permit entry for Jews. Law of Return, 5710-1950, 4 LSI 114 (1950) (Isr.), art. 1; Nationality Law, 5712-1952, 6 LSI 50 (1950), art. 2.

[112] SHACHAR, *supra* note 96.

individuals in absolute numbers, but give the state agency over who these individuals are.

Finally, and significantly, this does not mean abandoning refugee law and human rights completely. Instead, individual non-nationals may want to tailor their protective strategy according to the nature of their claim. Those who can incorporate into their claim for protection elements of continuity with one specific state are well-advised to draw on strategies of human rights adjudication. In fact, they may press on international enforcement bodies to expand the scope of legal belonging. In doing so, they can defer to existing international case law. For example, they may begin with the *Nottebohm* precedent that claims to having a home, rather than a formal legal-political allegiance, can define nationality. From *Nottebohm*, they could also consider incorporating more proxies for continuity, such as historical (again see the precedent of a "Jewish National Home"); religious (e.g., Gambia welcomed Muslim refugees from Myanmar); linguistic (Canada privileges immigrants who can speak French), etc. And, furthermore, they could use these proxies to imagine thicker degrees of protection, including not only one or two functions (remain and return), but also three functions (return, remain, and nationality). My point here is not to flesh out new legal claims that can pass muster, but rather to gesture toward the broad range of ways that an individual can assert before courts that she belongs "enough" to gain protection.

For those refugees, in contrast, who cannot make a continuity-based claim, a legal path forward requires climbing towering walls, crossing dry deserts, and taking dangerous boat journeys so that they can establish presence and petition for entry into a host state. Yet, most refugees who ask for entry—the vast majority of refugees today—are unable to establish such access. Absent a further level of political treaty negotiations that explicitly targets the question of an entry duty, human rights and refugee law are less and less relevant to their reality on the ground. Juridical principles in a formal sense permit states to declare their (superficial) adherence to human rights and refugee rights. But they abandon those refugees who ask for entry and are unable to establish access. Their pleas are lost in the legal maze.