THE LEGAL RECONSTRUCTION OF WALLS: *N.D. & N.T. v. SPAIN*, 2017, 2020

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Recently, Western democracies have turned to building border walls as a strategy of immigration control. This Article makes two claims. First, human rights courts and quasi-judicial bodies are deeply implicated in this move. In the past decade or so, these institutions have been successful in both enforcing and creating new rights for asylum seekers and irregular migrants. They have used variants of access to guarantee hyper-protection to individual non-nationals who have either entered a host state or come under its effective control. This legal success has resulted in the unintended consequence of rendering wall-building a logical move for state prevention of migration. Second, we ought to understand these rapidly proliferating walls as not only physical realities made from bricks and mortar, but also as legally constructed barriers. The wall-builders (politicians) and international human rights enforcement bodies (the judges) are reacting and responding to each other. Iteratively, and over time, they are generating the new physical-legal reality of border walls. Today, such walls select in favor of the strongest—a function of their physicality. Alas, this dynamic creates a tension with the paradigm of equality under human rights law. Further, it is also problematic in a practical sense. Even if some differentiation may be appropriate, physical might selects for the wrong criteria. It sidesteps the key political and distributional questions that are involved in immigration: (i) which individuals should be protected and in what order of priority; (ii) which states should protect them, and how to allocate protective duties; and (iii) what screening methods are acceptable.

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Introduction

In this Article, I consider the role of human rights law in the massive refugee and migrant crisis the world is now facing. Currently, the number of displaced people surpasses even post-World War II numbers.[1] Faced with surging migration flows, states are building walls as a strategy of immigration control.[2] By walls, I mean here only those physical barriers that are built on a territory that is without dispute, and are substantially designed to block illegal entry into a country.

The migrant crisis has spurred two separate conversations. First, there is a largely domestic political conversation that focuses on wall-

1. *Worldwide Displacement Hits All-Time High as War and Persecution Increase*, United Nations High Commissioner for Refugees (June 18, 2015), https://www.unhcr.org/en-us/news/latest/2015/6/558193896/worldwide-displacement-hits-all-time-high-war-persecution-increase.html. The number first reached the post-World War II record in 2014. Harriet Sherwood, *Global Refugee Figure Passes 50m for First Time Since Second World War*, Guardian (June 20, 2014, 1:00 AM), https://www.theguardian.com/world/2014/jun/20/global-refugee-figure-passes-50-million-unhcr-report.

2. In human rights law and international law, most scholarly attention to walls is given to the Berlin Wall and the Israeli Security Fence. The University of Texas at Austin Law School is an important exception, where scholarship has dealt with the U.S.-Mexico wall and others. *See, e.g.*, Denise Gilman, Working Grp. on Human Rights and the Border Wall, Obstructing Human Rights: The Texas Mexico Border Wall: Background and Context (June 2008) (unpublished briefing), https://law.utexas.edu/humanrights/borderwall/analysis/briefing-INTRODUCTION.pdf [https://perma.cc/7DUR-5NYZ]; Denise L. 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). Outside of law schools, there is also a growing body of literature that deals with walls, though this scholarship tends not to focus on the rule of law in regulating these walls, or differentiate between them on the basis of their function. *See, e.g.*, 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., 1st ed. 2013); Joseph Nevins, Operation Gatekeeper and Beyond: The Rise of the Illegal Alien and the Making of the U.S.-Mexico Boundary (2d ed. 2012); Reece Jones, Border Walls: Security and the War on Terror in the United States, India, and Israel (2013).

building.[3] This conversation discusses the efficacy of walls as an immigration control strategy, and whether there should be a distinction between irregular migrants and refugees in wall-building efforts.[4]

The second conversation is legal, and focuses on how to do more for asylum seekers.[5] Within this legal conversation, nearly all partici-

3. For examples, *see* sources cited *supra* note 2. Building a wall along the U.S.-Mexico border was a trademark campaign promise of then-U.S. presidential candidate Donald Trump, who, in a 2015 Republican primary debate, said, "[W]e're going to build a wall. We're going to create a border. We're going to let people in, but they're going to come in legally." Ron Nixon & Linda Qiu, *Trump's Evolving Words on the Wall*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html. Far-right American pundits such as Ann Coulter have since faulted the President for failing to secure funding for such a wall. Harriet Sinclair, *Ann Coulter Slams President Trump Over DACA and Border Wall*, NEWSWEEK (Sept. 5, 2017, 6:26 PM), http://www.newsweek.com/ann-coulter-freaking-out-about-daca-not-same-reasons-everyone-else-659943. Among Democrats, opposition to building such a wall has become a major talking point, though party leaders briefly offered to fund a wall in exchange for protection for undocumented immigrants who arrived in the country as children, known as "Dreamers." As one journalist put it, Senate Minority Leader Charles Schumer of New York "frequently mocked the president's demand that Congress front the money for a structure he repeatedly assured voters Mexico would pony up to build." Russell Berman, *How Democrats Stopped Worrying and Learned to Trust Trump's Border Wall*, ATLANTIC (Jan. 24, 2018), https://www.theatlantic.com/politics/archive/2018/01/democrats-schumer-trump-border-wall-daca/551288/.

4. The United States offers a prime example of the breadth of the immigration debate. Various politicians, thinktanks, and immigration-related organizations have debated the ability of walls to stem the flow of illegal immigration, especially since a large portion of illegal immigrants enter the country legally but then overstay their visas. Priscilla Alvarez, *The Border-Wall Prototypes Are Up—Now What?*, ATLANTIC (Oct. 26, 2017), https://www.theatlantic.com/politics/archive/2017/10/can-trumps-wall-stop-illegal-immigration/544056/. Then-Acting U.S. Secretary of Homeland Security Elaine Duke penned an op-ed highlighting the efficacy of a border wall as a matter of security, while her predecessor in the role, John Kelly, said a wall alone would not be effective. Elaine Duke, *Border Walls Work. Yuma Sector Proves It*, USA TODAY (Aug. 22, 2017, 3:15 AM), https://www.usatoday.com/story/opinion/2017/08/22/homeland-security-secretary-border-walls-work-yuma-sector-proves-it-elaine-duke-column/586853001/; Ron Nixon, *Homeland Security Secretary Has Said Border Wall Alone Will Not Work*, N.Y. TIMES (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/us/politics/homeland-security-john-kelly-border-wall.html. The current U.S. administration has also attempted to blur the distinctions between those seeking asylum and those committing the misdemeanor of entering the United States illegally with its controversial zero-tolerance policy for border crossings. Dara Lind, *The Trump Administration's Separation of Families at the Border, Explained*, VOX (Aug. 14, 2018, 1:29 PM), https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents.

5. Neither the International Covenant on Civil and Political Rights ("ICCPR") nor the European Convention on Human Rights ("ECHR") contains a right to political asylum, but both the UNHRC and the ECtHR read a non-refoulement obligation into Articles 6 and 7 of the ICCPR and Article 3 of the ECHR. (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 states

pants seem convinced that the solution to the refugee and migration crisis lies in rights; the debate is between those who call for stronger enforcement of existing rights and those who argue for the creation of new rights.[6]

My goal in this Article is to suggest some of the neglected downsides of the focus on rights from the perspective of a human rights activist, who is deeply committed to providing refugees with more meaningful protections. In particular, I would like to propose that the building of walls may be an unintended consequence of the success of establishing rights.[7] By rights, I mean here only rights of individuals which have resulted in interpretation and adjudication at the regional or international level.[8] The two conversations we are now witnessing—about wall-building, on the one hand, and greater rights creation and enforcement, on the other—may actually be linked.

An implicit assumption underlying the arguments of those who insist we need more rights creation and promotion is that we do not have enough of this at the moment. However, in the past decade, human rights courts and quasi-judicial bodies have actually been quite effective in both creating and enforcing rights for irregular migrants and refugees.[9] They have made protection of non-nationals a function

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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"). Under both the ICCPR and the ECHR, the right not to be subject to "torture or to cruel, inhuman or degrading treatment or punishment" is absolute. For the non-derogable nature of Article 3 of the 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 . . .").

6. In human rights law, this entails the notion that international law's central duty is the protection of individuals' rights by restricting the actions of states.

7. For a different view on the basis for wall building today, see BROWN, *supra* note 2. Brown suggests that walls are built as 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.

8. This excludes refugee law, which has no international adjudicator. As T. Alexander Aleinikoff writes, the Geneva Convention "neither mandates that states adopt procedures for refugee status determinations nor does it create an international body to make such decisions. It also fails to establish any formal reporting requirements or monitoring devices for investigating state compliance. Thus, the adjudication of who is a refugee—upon which all the protections of the Convention turn—is left entirely to state authorities." T. Alexander Aleinikoff, *State-Centered Refugee Law: From Resettlement to Containment*, 14 MICH. J. INT'L L. 120, 124 (1992).

9. Traditionally, immigration was outside the scope of human rights law. For example, the Universal Declaration of Human Rights grants every individual the right to leave any country, including the immigrant's native country. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 12 (Dec. 10, 1948). However, it only guarantees the right to enter her own country. Similarly, the ICCPR also guarantees every individual the right only to "enter his own country" (International Covenant on

of variants of access, whether the individual entered a host state or came under its effective control. This limits state responsibility by denying any control that is extraterritorial, in a very formal way. In doing so, I argue, they have made the building of walls both a predictable and a logical move for states that seek to maintain control over immigration. The attractiveness of walls lies in their passivity. After their construction, walls cap a state's responsibility without recruiting the human agency of the state. By erecting a wall, a state can both commit itself, in theory, to human rights, and at the same time prevent the exercise of these rights (with the exception of the small number of individuals who manage to get inside the state's borders). The wall, to some extent, insulates the state from human rights duties.

Of course, there is no way to empirically test whether there would be fewer walls if not for these legal decisions by human rights enforcement bodies.[10] Yet there are good reasons to conclude that the two processes are connected. In other words, even if some states would nevertheless build walls, recent human rights developments have created additional incentives to do so. And so, those of us—myself included—who care about refugee protection should begin to rethink what we may miss as a result of our focus on the enforcement or creation of new rights.

Importantly, moreover, even if I fail to demonstrate that human rights courts and quasi-judicial bodies play a contributing role in the current building of walls, I hope to suggest a second point. I argue that we ought to think about these immigration walls, and thus about the

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Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter "ICCPR"]), but not the right to enter her country of choice. For a historical review of the application of a human rights frame to immigration, see Ruth Gavison, *Immigration and the Human Rights Discourse: The Universality of Human Rights and the Relevance of States and of Numbers*, 43 ISRAEL L. REV. 26 (2010); Moria Paz, *A Most Inglorious Right: René Cassin, Freedom of Movement, Jews and Palestinians*, *in* THE LAW OF STRANGERS: CRITICAL PERSPECTIVES ON JEWISH LAWYERING AND INTERNATIONAL LEGAL THOUGHT (James Loeffler & Moria Paz, eds., 2019); Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 BERKELEY J. INT'L L. 1, 27–28 (2016).

10. There may be other reasons for wall building, for example, as a response to domestic political pressures. For instance, after failing to secure funding for a border wall, President Trump spent weeks "fielding the concerns of conservatives who worry he hasn't done enough to mollify his political base's demands for action on illegal immigration," immediately leading the president to "issue a series of social media invectives to signal his commitment to stemming illegal immigration and building the wall that became [a] prominent . . . staple of his campaign." Jeremy Diamond, *Trump's Base-Pleasing Border Tweets Foreshadow 2018 Role*, CNN (Apr. 4, 2018, 1:12 AM), https://www.cnn.com/2018/04/04/politics/donald-trump-border-tweet-2018/index.html.

territorial borders that they reinforce, not only as physical-material constructs but also as legal constructs. Human rights courts and quasi-judicial institutions enforce and expand the rights of irregular migrants and refugees. These rights come into contact both with the border, which is a physical-geographical reality, including the sea or the mountain or the desert where the state begins, and also a built environment, including walls, constructed by states. This built environment, in turn, was itself erected at least in part in response to these same legal developments determining where the state "starts" and how people "attach" to it (i.e., when and how a non-national can trigger states' obligations to protect her). In other words, states (the wall-builders) and human rights courts and quasi-judicial bodies (the judges) are now working in tandem to create a new physical-legal reality. And this reality has consequences. Today, as a practical matter, it selects on the basis of physical strength, though the desirability of this status quo is far from clear. As a normative matter, drawing on physicality to sort out protection privileges young men and betrays human rights commitment to universality (same protection everywhere and for everyone).[11] As a practical matter, even if some differentiation is appropriate, physicality may function poorly as a proxy for the real, substantive conflict between individual non-nationals and states over which sub-groups of non-nationals are to be protected, in what order of priority, and by what host state from all states.

I.
THE INTERNATIONAL LEGAL BACKGROUND: PROTECTION OF IRREGULAR MIGRANTS AND REFUGEES

International law overwhelmingly respects the sovereign rights of states to control their borders.[12] This makes it a heavy lift to protect

11. Human rights law recognizes fundamental positive rights in individuals, not simply the chance to receive "mere gifts or favors, motivated by love or pity." *See* JOEL FEINBERG, SOCIAL PHILOSOPHY 58–59 (1973) ("Rights are not mere gifts or favors, motivated by love or pity, for which gratitude is the sole fitting response . . . . A world with claim-rights is one in which all persons . . . are dignified objects of respect, both in their own eyes and in the view of others."). For a classic authority, see LOUIS HENKIN, THE AGE OF RIGHTS 32 (1990) (human rights are "human in that they are universal, for all persons in all societies").

12. A leading scholar has explained: "The state's exclusive right to decide what acts shall take place in its territory is virtually undisputed." MARTII KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 237 (1989). For earlier articulations of territorial constraints on jurisdiction, see Schooner Exch. v. McFaddon, 11 U.S. 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute"); S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("The rules of law binding upon States . . . emanate from their own free will. . . . Restrictions upon the indepen-

irregular migrants and refugees. Under international law, every state has the sovereign power to control its territory,[13] and in some cases a duty to do so.[14] Moreover, every state has the right to exclude whomever it wishes and grant nationality on the terms it wishes.[15] These prerogatives exist by virtue of sovereignty: the core meaning of self-determination is control over inclusion and exclusion.[16] In immigration cases, this means that a sovereign owes no right of entry to individuals to which it elects not to grant entry, even if they are peaceful, disadvantaged foreigners.[17]

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dence of states cannot therefore be presumed."). For a detailed discussion of a state's control over its borders, see KOSKENNIEMI, *supra* note 12, at 224–302.

13. *Id.* An implication of this territorial sovereignty is that states may not intervene in one another's sovereignty. Article 2, ¶ 4 of the United Nations Charter prohibits states from using force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, ¶ 4.

14. For example, in N.D. & N.T. v. Spain, App. Nos. 8675/15 & 8697/15, (Eur. Ct. H.R. 2020), http://hudoc.echr.coe.int/eng?i=001-201353, the ECtHR sitting as a Grand Chamber accepted Spain's argument that EU states have a duty to protect their borders. For Spain's argument, see *id.* ¶ 131 ("As a sovereign State belonging to the European Union and forming part of the Schengen external border, Spain had a duty to protect, monitor and safeguard its borders"); for the Court's decision, see *id.* at ¶ 168 ("With this in mind, the Court stresses the importance of managing and protecting borders and of the role played in that regard, for those States concerned, by the Schengen Borders Code, according to which '[b]order control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control' and 'should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations.' "). An implication of this territorial sovereignty is that states may not intervene in one another's sovereignty. Article 2, ¶ 4 of the United Nations Charter prohibits states from using force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, ¶ 4.

15. 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." While admitting that international law permits each State to formulate rules governing the grant of its own nationality, the ICJ still maintained that a State could not demand recognition of these rules by other States "unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.").

16. Treaty instruments exclude a right of entry to their beneficiaries. *See*, *e.g.*, Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 45, 6 U.S.T. 3516, 75 U.N.T.S. 287.

17. As Michael Walzer put it, "[a]dmission and exclusion are at the core of communal independence." MICHAEL WALZER, SPHERES OF JUSTICE 61–62 (1984). For this position in the US context, see the U.S. Supreme Court's opinion in *Sale v. Haitian*

Against that background, refugee and human rights law have expanded to include a set of protections for those individuals who are able to physically enter a state, regardless of how they get in (legally or illegally). For example, refugee law obliges signatories of the 1951 Convention Relating to the Status of Refugees not to "return" refugees to a place where there is a well-founded fear of persecution.[18] But it does not include a right to enter the state in order to seek protection in the first place.[19] For the purpose of this argument, I leave this body of refugee law aside. It has been internalized in various ways in national law.[20] But it is not interpreted and enforced through any international court.

At the same time, human rights law grants multiple rights to persons inside a state. Once there, they have rights, for example, to life, to education, to form a family, to own property.[21] These protections

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Ctrs. Council, Inc., 509 U.S. 155 (1993). In the case, Haitians and Haitian organizations challenged an Executive Order directing the Coast Guard to intercept vessels outside the territorial sea of the United States that were transporting passengers illegally from Haiti to the United States, and to return those passengers to Haiti without first determining whether they qualified as refugees under the Immigration and Nationality Act (INA) or the Convention on Refugees. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993). Writing for the majority, Justice Stevens found that neither the domestic statute nor the international treaty limited the President's authority to issue such an order because "[t]he INA offers . . . statutory protections only to aliens who reside in or have arrived at the border of the United States." *Id.* at 160. The majority concluded that neither the INA's provisions nor the Refugee Convention's *non-refoulement* obligation were "intended to have extraterritorial effect," notwithstanding "the moral weight of th[e] argument" to the contrary." *Id.* at 179. Stevens emphasized:

> The drafters of the Convention and the parties to the Protocol. . . may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.

Id. at 183.

18. Refugee Convention, *supra* note 16, art. 33.

19. Thus, the ECtHR Grand Chamber clearly states that: "Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence, and expulsion of aliens. . . . [T]he right to political asylum is not contained in either the Convention or its Protocols." Hirsi Jamaa & Others v. Italy, 2012-II Eur. Ct. H.R. 97, 140; *see also* Abdulaziz, Cabales & Balkandali v. U.K., 28 May 1985, ¶ 67, Series A no. 94; Boujlifa v. France, 21 October 1997, ¶ 42, Reports 1997-VI; N. v. U.K., 2008-III Eur. Ct. H.R. 227, 242 ¶ 30.

20. For the way U.S. law internalized refugee law, see, e.g., Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 101, 125–27 (forthcoming 2020).

21. *See, e.g.*, Universal Declaration of Human Rights, *supra* note 9. Rights include protection against torture, the right to marriage and to form a family, the right to own

are interpreted and enforced by a range of international courts and institutions,[22] though again, non-nationals have no right to enter the state in the first place to seek these protections.[23] In other words, they need to be already inside the state to benefit from rights against that state.

And so, the international legal status quo makes protection of non-nationals dependent upon successful entry into a host state, although it does not require that states let them in to begin with.

II.
An Expansion of Protections of Irregular Migrants and Refugees

In the past decade or so, however, human rights courts and quasi-judicial institutions have begun to change this de facto operation of the law and expand the extraterritorial application of human rights.[24]

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property, freedom of religion, and freedom of opinion and expression, among many others. *Id*. arts. 5, 16, 17, 18, 19. Similarly, under the ICCPR, individuals have the right to "privacy, family, home, or correspondence" free from interference. International Covenant on Civil and Political Rights, art. 17, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). Under the ECHR, individuals have the right to "private and family life" as well as "home" and "correspondence." Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 221.

22. For example, the ECtHR enforces the ECHR; the UNHRC enforces the ICCPR; the Inter-American Court of Human Rights enforces the American Convention on Human Rights; and the African Court on Human and Peoples' Rights enforces the African Commission on Human and Peoples' Rights.

23. Universal Declaration of Human Rights, *supra* note 9.

24. For this argument, see Moria Paz, *The Law of Walls*, 28 Eur. J. Int'l L. 601 (2017). In that essay, I argued that human rights courts and quasi-judicial bodies are implicated in Western democracies' interest in building border walls, and that the way human rights enforcement bodies have treated border walls has not only made them legally permissible, but encouraged their construction. The resulting redrawing of borders is politically unstable, and, from a moral perspective, unjustifiable. The UNHRC has 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." U.N. Human Rights Comm., General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter "UNHRC 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. See also for the UNHRC, among other examples, UNHRC 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"); U.N. Human Rights Comm., Comments of the Human Rights Committee: United States of America, ¶ 284, U.N. Doc. CCPR/C/79/Add.50 (Apr. 7, 1995) ("[I]n special circumstances, persons may fall under the subject-matter jurisdiction of a State party even when outside that State's

These institutions took as a given the basic right of a state to bar entry to any individual it does not wish to admit.[25] At the same time, however, they worked to enlarge protections for irregular migrants and refugees at the margins of that regime.

Human rights enforcement bodies made three significant changes: First, human rights courts and quasi-judicial institutions expanded the range of circumstances under which individuals would be deemed to have successfully entered the state. They did so by including not only those who are physically inside a country's borders, but also those who have come under the effective control of the state or its agents outside the state's borders.[26]

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territory."); U.N. Human Rights Comm., A.R.J. v. Australia, Comm. No. 692/1996, ¶ 6.8, U.N. Doc. CCPR/C/60/D/692/1996 (July 28, 1997); U.N. Human Rights Comm., Kindler v. Canada, Comm. No. 470/1991, ¶ 6.2, U.N. Doc. CCPR/C/48/D/470/1991 (July 30, 1993). The extraterritorial application of human rights was likewise supported by multiple other international human rights bodies as well as national courts. For a good summary of the wide interpretation of the extraterritorial reach of the non-refoulement obligation, see U.N. High Comm'r 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), https://www.unhcr.org/4d9486929.pdf. *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) ("[W]hile the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory."); J.H.A. v. Spain, ¶ 8.2, U.N. Doc. CAT/C/41/D/323/2007 (Nov. 21, 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: Conclusions and Recommendations of the Committee Against Torture: United States of America, ¶¶ 15, 20, U.N. Doc. CAT/C/USA/CO/2 (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, 1215 (1993); Office of the United Nations High Comm'r for Refugees, *The Haitian Interdiction Case 1993 Brief Amicus Curiae*, 6 INT'L J. REFUGEE L. 85, 86 (1994); Haitian Ctr. 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 ha[s] no geographical limitations."); *see also* Coard v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 37 (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.").

25. United Nations Charter, *supra* note 14.

26. *See* Hirsi Jamaa & Others v. Italy, 2012-II Eur. Ct. H.R. 97, 132 (prohibiting collective expulsion of all aliens). The court wrote, in part, that when a nonnational 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." *Id.*

For example, in *Hirsi Jamaa v. Italy*[27] 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 control of the state.[28] This triggers procedural protections for the passengers on the boat, including individual status determination.[29] In other words, the passengers enjoy the same procedural protections granted to individuals who have entered into the territory of the state (or, at least under soft law, to those who have reached the state's frontier).[30]

Here, the ECtHR did not create a right of entry.[31] Rather, the Court expanded what it means to be inside the territory of the state so that it also includes coming under the human agency of the state. This

27. *Id.*

28. *Id.* at 132–33.

29. *Id.* at 156–57 (showing that 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").

30. Exec. Comm. of the Programme of the U.N. High Comm'r for Refugees, Rep. of the Office of the U.N. High Comm'r for Refugees on Its Fifty-Second Session, add., ¶ 17, U.N. Doc. 12A (A/52/12/Add.1) (Oct. 17, 1997); Exec. Comm. High Comm'r's Programme, Protection of Asylum-Seekers in Situations of Large-Scale Influx No. 22 (XXXII), at (II)(A)(2), U.N Doc. 12A (A/36/12/Add.1) (Oct. 21, 1981); U.N. High Comm'r, *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975–2017 (Conclusion No. 1–114)*, U.N. Doc. HCR/IP/3/Eng/REV.2017 (2017) (collecting the following conclusions that refer to "non-refoulement" or "stowaway asylum-seekers": No. 6, § (c) (1977); No. 15, §§ (b)–(c) (1979); No. 53, § 1 (1988); No. 85, § (q) (1998)). This soft law interpretation is also supported by state practice. For example, states in Africa, Europe, and South East Asia allowed large numbers of asylum seekers to cross their frontier and remain pending determination of refugee status. For discussion, *see* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 207–08 (3d ed. 2011). In addition, this expanded interpretation is also supported by leading scholars. *See, e.g.*, James C. Hathaway, *Refugees and Asylum*, *in* FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 193 (Brian Opeskin et al. eds., 2012) ("The duty of *non-refoulement* . . . constrains not simply ejection from within a State's territory, but also non-admittance."); Cornelis Wolfram Wouters, International Legal Standards for the Protection from Refoulement 49 (Apr. 24, 2009) (Ph.D. dissertation, Leiden University) ("Article 33 does not contain any geographical limitation"); *id.* at 52 ("stopping a refugee at the State's borders . . . will not alter the applicability of Article 33(1)."). For the opposing view, see, e.g., 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 arguments and literature for and against applying art. 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 423–431 (2000).

31. In fact, the Grand Chamber affirmed: "Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence, and expulsion of aliens . . . .

made protection, at least in Europe, a function of access: to come under the effective control of a state, a non-national must first come close to that state.

Second, human rights courts and quasi-judicial bodies made it more difficult for states to deport individuals once they are "in." They did this by expanding the definition of "own country."[32] Under human rights law, any individual bears a right of entry to "his own" country.[33] Human rights enforcement bodies have expanded the definition of "own country" so that it encompasses not just citizens, but also informal nationals who "because of [their] special ties to or claims in relation to a given country, cannot be considered to be . . . mere alien[s]."[34] If, then, the first change to the status quo concerns cross-border mobility (the right to enter the state), this second change is about continuity (the right to stay put and not to be deported out of the state). The right for continuity is not absolute.[35] But it is highly protected, applying as a source of limitation on states' borders irrespective of whether other rights are involved.

For instance, in two different communications, Nystrom v. Australia[36] and Warsame v. Canada,[37] the majority of the United Nations Human Rights Committee (UNHRC) made an extended ongoing personal-territorial continuity within the territory of a state an instance of

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[T]he right to political asylum is not contained in either the Convention or its Protocols." *Hirsi Jamaa*, 2012-II Eur. Ct. H.R. at 140.

32. Universal Declaration of Human Rights, *supra* note 9, art. 13; ICCPR, *supra* note 5, art. 12. States, moreover, have a right to establish their own immigration policies. *See, e.g.*, Georgia v. Russia (I), 2014-IV Eur. Ct. H.R. 109, 161; Sharifi & Others v. Italy & Greece (Judgment), App. No. 16643/09, ¶¶ 124–34 (Eur. Ct. H.R. Oct. 21, 2014), http://hudoc.echr.coe.int/eng?i=001-147287; and Khlaifia & Others v. Italy, Judgment, App. No. 16483/12, ¶ 241 (Eur. Ct. H.R. 2016), http://hudoc.echr.coe.int/eng?i=001-170054.

33. *See* sources cited *supra* note 32.

34. U.N. Human Rights Comm., General Comment No. 27: Freedom of Movement (Art 12), ¶ 20, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 1, 1999) ("[T]he scope of 'his own country' is broader than the concept 'country of nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties or claims in relation to a given country, cannot be considered to be a mere alien."); U.N. Human Rights Comm., Nystrom v. Australia, Comm. No. 1557/2007, ¶ 7.4, UN Doc. CCPR/C/102/D/1557/2007 (July 18, 2011) [hereinafter Nystrom]; U.N. Human Rights Comm., Warsame v. Canada, Comm. No. 1959/2010, ¶ 8.4, UN Doc. CCPR/C/102/D/1959/2010 (July 21, 2011) [hereinafter Warsame]. For the genealogy of "own country" in human rights law, see Paz, *A Most Inglorious Right*, *supra* note 9.

35. The ICCPR restricts freedom of movement if "necessary to protect national security [or] public order." ICCPR, *supra* note 5, art. 12. The right is not limited within the text of the Universal Declaration of Human Rights. *Supra* note 9, art. 13.

36. Nystrom, *supra* note 34.

37. Warsame, *supra* note 34.

"own country."[38] A state is prohibited from deporting an individual who has established "long standing residence, close personal and family ties and intentions to remain (as well as [demonstrating] the absence of such ties elsewhere)."[39]

This is a negative duty: the duty not to deport an alien with ongoing personal-territorial continuity in the state.[40] The UNHRC did not create a positive entry right. This means that, to be protected, an alien must already be inside the state and be there for an extended period of time.[41]

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38. *See* Nystrom, *supra* note 34, ¶ 7.4:

> [T]he Committee recalls its General Comment No. 27 on freedom of movement where it has considered that the scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. In this regard, it finds that there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words "his own country" invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.

For an earlier articulation, see the dissenting opinion in U.N. Human Rights Comm., Stewart v. Canada, Comm. No. 538/1993, ¶ 5, U.N. Doc. CCPR/C/58/D/538/1993 (Nov. 1, 1996) (Evatt, Medina Quiroga, & Aguilar Urbina, dissenting) (asserting that the right protects the "strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it"). But see the strong joint dissent of Gerald L. Neuman and Yuji Iwasawa's in Nystrom arguing that the majority erred by removing the link to nationality, and relying on "subjective (and often unprovable) ties" to assess whether a country is one's "own." Nystrom, *supra* note 34, ¶¶ 3.1–3.5 (Neuman & Iwasawa, dissenting) (asserting that the primary function of article 12, paragraph 4, of the International Covenant on Civil and Political Rights is to "protect strongly the right of a state's own citizens not to be exiled or blocked from return," and that the reference to "own country" is simply to ensure that states cannot circumvent this protection by manipulating nationality law).

39. Warsame, *supra* note 34, ¶ 8.5. The Court similarly emphasized the significance of ties in Nystrom: "the Committee considers that the author has established that Australia was his own country within the meaning of article 12, paragraph 4 of the Covenant, in the light of the strong ties connecting him to Australia, the presence of his family in Australia, the language he speaks, the duration of his stay in the country and the lack of any other ties than nationality with Sweden." Nystrom, *supra* note 34, ¶ 7.5.

40. The UNHRC sets a floor on state's duty (not to deport), not a ceiling (a state may choose to give the non-national more rights). *See* Nystrom, *supra* note 34; Warsame, *supra* note 34.

41. Note, however, the particular circumstances involved. In Nystrom, the author was domiciled in the state since the age of one month. Nystrom, *supra* note 34, ¶ 7.5. In Budlakoti v. Canada, the author "believed he was a Canadian citizen by virtue of his having been born in Canada . . . the fact that the author was twice issued a Canadian passport and the fact that his brother, who was also born in Canada, is a Canadian

Third, and finally, the ECtHR, at least, has also—as a practical matter—made it easier for non-nationals to remain in a state once they are in. It did so by requiring states to provide certain positive protections or benefits to those who have made it inside, regardless of how they got in.[42] For example, in *MSS v. Belgium & Greece*,[43] the Court ruled that, under some circumstances, a state is required to provide asylum seekers with housing during the time it takes the state to determine their status.[44]

And so, by broadening the availability of status determination, which presumably enables more people to stay, human rights enforcement bodies have changed the state. Moreover, in expanding who can stay in a given state, they have also created something that approximates nationality. Finally, by mandating material benefits for asylum seekers, the ECtHR has reduced the difference in rights accorded to nationals and non-nationals.[45] However, none of these developments have changed the fundamental principle that noncitizens have no right of entry, and that states retain control over their borders.

III.
WALLS: N.D. & N.T. V. SPAIN, 2017 AND 2020

By whittling down the scope of states' ability to exclude those who are already inside the state, human rights enforcement bodies have increased the incentive for states to prevent unauthorized entry.

One increasingly favored mechanism for states to keep out irregular migrants and refugees is building border walls, including Spain,[46] the United States,[47] Hungary,[48] Bulgaria,[49] Greece,[50] Turkey,[51]

citizen." U.N. Human Rights Comm., Budlakoti v. Canada, Comm. No. 2264/2013, ¶ 9.3, U.N. Doc. CCPR/C/122/D/2264/2013 (Apr. 6, 2018).

42. For non-penalization in cases of illegal entry or presence, see Refugee Convention, *supra* note 16, art. 31 ("The Contracting States shall not impose penalties, on account of [refugees'] illegal entry or presence."). For discussion, see, for example, Guy S. Goodwin-Gill, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection (2003), https://www.unhcr.org/3bcfdf164.pdf.

43. M.S.S. v. Belgium & Greece, 2011-I Eur. Ct. H.R. 255.

44. *Id.* at 315.

45. *See* Nystrom, *supra* note 34, ¶¶ 3.1–3.5, (Iwasawa and Neuman, Committee Members, dissenting) (discussing the way in which the majority dilutes citizenship).

46. *See infra* note 56.

47. Though walls have gained greater prominence under President Trump, their use predates the current administration. David Stout, *Bush Signs Bill Ordering Fence on Mexican Border*, N.Y. TIMES (Oct. 26, 2006), https://www.nytimes.com/2006/10/26/washington/27fencecnd.html.

Israel,[52] and Austria,[53] among many others.[54] This strategy responds to one of the ways that courts have expanded rights: extending protection to those who come into human contact with the state or its agents, even if not within its borders. A reasonable way for a state to avoid triggering obligations to asylum seekers is to interdict their entry without any human agency, thus the attraction of walls. After the wall is erected, the state can control immigration without further human agency for as long as the wall remains in place.[55]

And so, by building a wall, a state can both maintain its commitments to human rights law, and, simultaneously, not act on those commitments beyond the small number of individuals who manage to get inside the state's borders, notwithstanding the walls built to keep them out.[56]

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48. Patrick Kingsley, *Migrants on Hungary's Border Fence: 'This Wall, We Will Not Accept It,'* GUARDIAN, (June 22, 2015, 2:00 AM), https://www.theguardian.com/world/2015/jun/22/migrants-hungary-border-fence-wall-serbia.

49. Stoyan Nenov, *Bulgaria's Fence to Stop Migrants on Turkey Border Nears Completion*, REUTERS (July 17, 2014, 12:26 PM), https://www.reuters.com/article/us-bulgaria-refugees-fence/bulgarias-fence-to-stop-migrants-on-turkey-border-nears-completion-idUSKBN0FM1ZF20140717.

50. *Greece Follows U.S. Example by Building Giant Border Wall to Keep Out Illegal Immigrants*, DAILY MAIL, (Jan. 4, 2011, 3:56 AM), https://www.dailymail.co.uk/news/article-1343885/Greece-follows-U-S-example-building-giant-border-wall-illegal-immigrants.html.

51. Turkey completed a 700 km-long wall along the Syrian border in 2017 and announced plans for a similar wall along the country's borders with Iran and Iraq. Nuray Babacan, *Turkey Builds 700 Kilometer Long Wall on Syrian Border*, HÜRRIET DAILY NEWS, (June 15, 2017, 3:30 AM), http://www.hurriyetdailynews.com/turkey-builds-700-kilometer-long-wall-on-syrian-border-114336.

52. *See, e.g.*, Gidon Ben-zvi, *Israel Completes 245 Mile, NIS 1.6 Billion Security Fence Along Sinai Border with Egypt*, ALGEMEINER (Dec. 4, 2013, 2:58 PM), https://www.algemeiner.com/2013/12/04/245-mile-1-6-billion-shekel-security-fence-between-israel-and-sinai-completed/; Amos Harel, *On Israel-Egypt Border, Best Defense Is a Good Fence*, HAARETZ (Nov. 13, 2011, 2:21 AM), https://www.haaretz.com/1.5209060.

53. *One of the Strongest Critics of Building Fences to Keep Out Migrants Has Just Announced it Would Build One*, BUS. INSIDER (Oct. 28, 2015, 9:47 AM), https://www.businessinsider.com/ap-austria-building-fence-along-parts-of-border-with-slovenia-2015-10.

54. Kim Hjelmgaard estimated that 77 new walls and fences were erected in recent years. Kim Hjelmgaard, *From 7 to 77: There's Been an Explosion in Building Border Walls Since World War II*, USA TODAY (May 24, 2018, 5:01 AM), https://www.usatoday.com/story/news/world/2018/05/24/border-walls-berlin-wall-donald-trump-wall/553250002/.

55. A state can build a wall today and it will control immigration 10 years down the road.

56. The same dynamic of a commitment to human rights without actually acting upon them is present when dealing with states that are not subject to the jurisdiction of international or regional human rights courts. The United States, for example, did not sign the First Optional Protocol to the International Covenant on Civil and Political

A recent ECtHR case illustrates this. *N.D. & N.T. v. Spain* (2017),[57] concerned two young men, N.D. from Mali and N.T. from the Ivory Coast, who attempted to scale a wall that Spain built on its border with northern Morocco as a strategy for immigration control.[58] This wall is around Melilla is, in fact, three concentric fences built on Spanish territory.[59] It had been a target of up to 1,000 migrants at once,[60] and the two men in this case were themselves among a group of sub-Saharan individuals who attempted to scale it at the same time.[61] N.D. and N.T. managed to climb to the top of the third barrier, although ultimately, the Spanish Guardia Civil apprehended them, along with approximately 70 other individuals, before they climbed down from the last border fence.[62] They were immediately "pushed back" to Morocco, without access to any legal procedures or protec-

Rights establishing an individual complaint mechanism. Yet when protection for the rights of Dreamers are raised, for example, President Trump responds with efforts to build the wall along the U.S.-Mexican border. *See, e.g.*, Burgess Everett, *Border Wall Dreamers Deal Implodes*, POLITICO (Mar. 19, 2018, 11:36 AM), https://www.politico.com/story/2018/03/19/border-wall-democrats-respond-470687.

57. N.D. & N.T. v. Spain (*N.D. & N.T. I*), App. Nos. 8675/15 & 8697/15, ¶¶ 9–12 (Eur. Ct. H.R. Oct. 3, 2017), http://hudoc.echr.coe.int/eng?i=001-177683 (referring to the Grand Chamber, which delivered judgment on Feb. 13, 2020).

58. For details of Spain's 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/. For more on the movement of migrants across Spain's borders, see Raphael Minder, *Spain Struggles to Halt Migrants at Two Enclaves*, N.Y. TIMES (Mar. 6, 2014), https://www.nytimes.com/2014/03/07/world/europe/spain-struggles-to-halt-migrants-at-two-enclaves.html (noting that the majority are Sub-Saharan Africans, but more recently, they were joined by Syrians fleeing their country); *see also* Giles Tremlett, *Spain Heightens Fence at African Enclave*, GUARDIAN (Sept. 21, 2005, 7:04 PM), https://www.theguardian.com/world/2005/sep/22/spain.gilestremlett; Suzanne Daley, *As Africans Surge to Europe's Door, Spain Locks Down*, N.Y. TIMES (Feb. 27, 2014), https://www.nytimes.com/2014/02/28/world/europe/africans-battered-and-broke-surge-to-europes-door.html. *See generally Europe's Huddled Masses*, ECONOMIST (Aug. 16, 2014), https://www.economist.com/leaders/2014/08/16/europes-huddled-masses.

59. N.D. & N.T. v. Spain (*N.D. & N.T. II*), App. Nos. 8675/15 & 8697/15, ¶ 16 (Eur. Ct. H.R. Feb. 13, 2020), http://hudoc.echr.coe.int/eng?i=001-201353. Spain built its first fence in 1998. For a brief history, see Maximilian Popp, *An Inside Look at EU's Shameful Immigration Policy*, SPIEGEL (Sept. 11, 2014, 11:24 AM), https://www.spiegel.de/international/europe/europe-tightens-borders-and-fails-to-protect-people-a-989502.html. For more on Spain's wall-building, see *id.*; David Meffe, *Spain: Keeping Africans Out*, NEW AFRICAN (Aug. 22, 2014), https://newafricanmagazine.com/8112/; Ashifa Kassam, *Spain to Raise Security Around Morocco Territories over Immigration Fears*, GUARDIAN (Mar. 6, 2014), https://www.theguardian.com/world/2014/mar/06/spain-security-morocco-territories-immigration.

60. Carlotta Gall, *At a Spanish Border, a Coordinated Scramble*, N.Y. TIMES (July 23, 2014), https://www.nytimes.com/2014/07/24/world/europe/migrants-say-storming-of-spanish-border-fences-is-carefully-coordinated.html.

61. *N.D. & N.T. I*, ¶ 12.

62. *Id.*

tion.[63] The two men appealed to the ECtHR, claiming that Spain violated their right not to be collectively expelled.[64] Spain, in turn, asserted that by erecting its system of fences it had limited its jurisdiction, which began only at the point where migrants had crossed all three of the fences comprising the system of border controls and had passed their police line.[65]

In reaching its decision, the ECtHR Chamber treated the case as an interdiction case. Much like in *Hirsi*, it held that Spain's jurisdiction was triggered as soon as its police exercised effective control over the two men.[66] Thus, it was unnecessary to determine whether the fences scaled by the applicants were located on Spanish or Moroccan territory.[67] The decision read: "In the Court's view, from the moment the applicants had come down from the border fences, they were under the continuous and exclusive control, at least de facto, of the Spanish authorities."[68] The Chamber found the expulsion of the applicants had been collective and unlawful.[69]

This is a minimal approach to the regulation of the wall. The Chamber did not create a right to enter; instead, it expanded what it means to be inside the territory of the state so as to also include successfully scaling the first fence. The court focused on the physical features of the barrier (i.e., how it was constructed) and not its relation to the border itself. Jurisdiction here lay in migrants coming under the effective control of the state.

But the judges could have also taken the very building of the wall — the act of interdiction — as an affirmative act by Spain that expands the scope of its human rights responsibilities. This would have

63. *N.D. & N.T. II*; Annick Pijnenburg, *Is* N.D. and N.T. v. Spain *the New* Hirsi*?*, EJIL TALK (Oct. 17, 2017), https://www.ejiltalk.org/is-n-d-and-n-t-v-spain-the-new-hirsi/.

64. *N.D. & N.T. II*, ¶¶ 93–94 ("The applicants took the view that Spain's jurisdiction was not open to question in the present case in so far as the fences were located on Spanish territory, a fact which had been acknowledged by the Government. The concept of 'jurisdiction' was principally territorial and was presumed to be exercised normally throughout the State's territory.").

65. *Id*.

66. *N.D. & N.T. I*, ¶¶ 98, 102–05 (holding that if interceptions on the high seas came within the ambit of Article 4 of Protocol No. 4, the same must also apply to the refusal of entry to the national territory in respect of persons arriving in Spain illegally). *Accord N.D. & N.T. II*, ¶ 124.

67. *Id.* at ¶ 90.

68. *N.D. & N.T. II*, ¶ 54.

69. The Court found a violation of Article 4 of Protocol 4 (prohibition of collective expulsions of aliens) and of Article 13 (right to an effective remedy) taken together with Article 4 of Protocol 4, "push-backs" had been collective and in breach of Article 4 of Protocol No. 4. *See N.D. & N.T. I*, ¶¶ 98, 102–05.

created entry, and would have left Spain owing the same process rights for individuals on both sides of its borders, including the determination of individual refugee-status, assisted by interpreters and legal advisers.[70] In this case, jurisdiction would lie in coming close to the state, even before coming under its physical control. The wall here would have anticipated a new border: one that is porous, at least procedurally.[71]

The ECtHR, in effect, took an intermediate position. The judges precluded Spain from the most extreme physical efficacy of its wall (if jurisdiction is triggered after the first fence is scaled, there is no added value in building three concentric fences), but they did not open the Spanish border procedurally. The judges looked to access—where the two men were located—to strike this compromise.[72]

Access here seems to play a simple rule-like function and to lead to decisions that are objective and fact based. Alas, access privileges territory, the location of the individual, which is a random category both with respect to the predicament of the individual, and also to the state's real capacity to care for refugees and/or irregular migrants. It ignores the needs of the individual and the degree of her vulnerability, and also the real constraints of a given state, including size, GDP, and its capacity to accept and absorb new migrants.

After review, however, the Grand Chamber (2020) found that Spain did not in fact violate the applicants' right not to be collectively expelled.[73] Without adopting a new interpretation of the term "expul-

70. *See* Hirsi Jamaa & Others v. Italy, 2012-II Eur. Ct. H.R. 97, 157 (declaring that the host state must provide an "examination of each applicant's individual situation" by personnel that is "trained to conduct individual interviews" and "assisted by interpreters or legal advisers"). This was confirmed in Georgia v. Russia (I), Judgment, App. No. 13255/07, Eur. Ct. H.R. ¶¶ 167–78 (2014), http://hudoc.echr.coe.int/eng?i=001-145546; Sharifi & Others v. Italy & Greece (Judgment), App. No. 16643/09, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-147287; Khlaifia & Others v. Italy, Judgment, App. No. 16483/12, Eur. Ct. H.R. ¶¶ 237–42 (2016), http://hudoc.echr.coe.int/eng?i=001-170054.

71. In this approach, in which being on the other side of the wall is as good as being inside the state's territory, the state loses effective control over its borders: it accrues obligations to individuals on both sides of the border. *See* Paz, *Between the Kingdom and the Desert Sun*, *supra* note 10, at 27–28. However, the inside/outside distinction more or less remains the status quo, and is particularly familiar from the United States: non-nationals who are deemed to have entered the U.S. territory are entitled to procedural due process, while aliens outside (or deemed to be outside) are not so entitled. *See, e.g.*, U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953); Landon v. Plasencia, 459 U.S. 21, 32 (1982).

72. *N.D. & N.T. I*, ¶ 12.

73. *N.D. & N.T. II*, ¶ 101 sec. 8.

sion,"[74] the Court narrowed Spain's obligation to the two individuals by drawing on their own culpable conduct.[75] Spain, wrote the judges, offered "genuine and effective access to its territory,"[76] but the applicants "did not make use of the existing legal procedures for gaining lawful entry to Spanish territory."[77] Instead, they choose conduct that "placed themselves in jeopardy."[78] In particular, their "culpable conduct"[79] included "storming of the Melilla border fence," taking advantage their "group's large numbers," and resorting to "force."[80]

74. As the Grand Chamber described,

> In the Court's view these considerations, which formed the basis for its recent judgments in Hirsi Jamaa and Others, Sharifi and Others and Khlaifia and Others . . . concerning applicants who had attempted to enter a State's territory by sea, have lost none of their relevance. There is therefore no reason to adopt a different interpretation of the term "expulsion" with regard to forcible removals from a State's territory in the context of an attempt to cross a national border by land.

Id. ¶ 187; *see also id.* ¶¶ 191, 203.

75. *Id.* ¶ 200 ("[T]here is no violation of Article 4 of Protocol No. 4 if the lack of individual expulsion decision can be attributed to the applicant's own conduct."); *see also id.* ¶ 231:

> In the light of these observations the Court considers that it was in fact the applicants who placed themselves in jeopardy by participating in the storming of the Melilla border fences on 13 August 2014, taking advantage of the group's large numbers and using force. They did not make use of the existing legal procedures for gaining lawful entry to Spanish territory in accordance with the provisions of the Schengen Borders Code concerning the crossing of the Schengen area's external borders (see paragraph 45 above). Consequently, in accordance with its settled case-law, the Court considers that the lack of individual removal decisions can be attributed to the fact that the applicants, if they indeed wished to assert rights under the Convention, did not make use of the official entry procedures existing for that purpose, and was thus a consequence of their own conduct . . . . Accordingly, there has been no violation of Article 4 of Protocol No. 4.

Accord id. ¶ 201 ("in assessing a complaint under Article 4 of Protocol No. 4, the Court will importantly take account of whether, in the circumstances of the particular case, the respondent State provided genuine and effective access to means of legal entry, in particular border procedures"); *id.* ¶¶ 227, 229.

76. *Id.* ¶ 222.

77. *Id.* ¶ 231. For these available means to legal protection, see *id.* ¶ 212:

> Spanish law afforded the applicants several possible means of seeking admission to the national territory, either by applying for a visa . . . or by applying for international protection, in particular at the Beni Enzar border crossing point, but also at Spain's diplomatic and consular representations in their countries of origin or transit or else in Morocco.

78. *Id.* ¶ 231.

79. *Id.* ¶ 208.

80. *Id.*; *accord id.* ¶ 206:

> The Court notes at the outset that the applicants in the present case were members of a group comprising numerous individuals who attempted to enter Spanish territory by crossing a land border in an unauthorised man-

Ultimately, the Court concluded, "the lack of individual removal decisions" could be "attributed and is a consequence" of the individuals' "own conduct."[81]

While the Grand Chamber dismissed N.D and N.T.'s complaints, it left unchanged the intermediate position expressed in the 2017 Judgment. The Court regulated the fence; specifically, it forbade Spain from using the fence to alter its border.[82] However, it legally permitted the construction of the fence. The judges stressed "the importance of

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ner, taking advantage of their large numbers and in the context of an operation that had been planned in advance.

81. As the Court described,

> [T]he Court considers that the applicants placed themselves in an unlawful situation by deliberately attempting to enter Spain by crossing the Melilla border protection structures . . . as part of a large group and at an unauthorised location. They thus chose not to use the legal procedures which existed in order to enter Spanish territory lawfully, thereby failing to abide by the relevant provisions of the Schengen Borders Code regarding the crossing of the external borders of the Schengen . . . and the domestic legislation on the subject. In so far as the Court has found that the lack of an individualised procedure for their removal was the consequence of the applicants' own conduct in attempting to gain unauthorised entry at Melilla . . . it cannot hold the respondent State responsible for not making available there a legal remedy against that same removal.

Id. ¶ 242; *see also id.* ¶ 231 ("the lack of individual removal decisions can be attributed to the fact that the applicants, if they indeed wished to assert rights under the Convention, did not make use of the official entry procedures existing for that purpose, and was thus a consequence of their own conduct"); *id.* ¶ 200:

> [T]he applicant's own conduct is a relevant factor in assessing the protection to be afforded under Article 4 of Protocol No. 4. . . . There is no violation of Article 4 of Protocol No. 4 if the lack of an individual expulsion decision can be attributed to the applicant's own conduct . . . In the Court's view, the same principle must also apply to situations in which the conduct of persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety.

Id. ¶ 210:

> [W]here such arrangements exist and secure the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner, the Convention does not prevent States, in the fulfilment of their obligation to control borders, from requiring applications for such protection to be submitted at the existing border crossing points . . . . Consequently, they may refuse entry to their territory to aliens, including potential asylum-seekers, who have failed, without cogent reasons . . . to comply with these arrangements by seeking to cross the border at a different location, especially, as happened in this case, by taking advantage of their large numbers and using force.

82. *Id.* ¶ 109 ("The existence of a fence located some distance from the border does not authorize a State to unilaterally exclude, alter or limit its territorial jurisdiction, which begins at the line forming the border.").

managing and protecting borders."[83] Indeed "Contracting States have the right to control the entry . . . of aliens."[84] They may "in principle put arrangements in place at their borders designed to allow access to their national territory only to persons who fulfil the relevant legal requirements."[85] In this way, the Grand Chamber signaled to states that erecting border walls substantially designed to block illegal entry into a country is unencumbered by constraints with regard to human rights. And so, states, at least in Europe, will build walls. They will build them on state borders, and perhaps in even more locations that we cannot predict now.[86] Further, they will strive to construct them in as efficacious and impermeable manner as possible. What will then be left of the universality of human rights law will be dependent on one's location vis-à-vis a fence. Fences are erected by politicians, but in *N.D. & N.T.*, it was the ECtHR that assigned these fences their normative essence.

IV.
Going Forward: Jurisprudence of Walls

The ECtHR in *N.D. & N.T.* made walls that convert the abstraction of the border into physical reality a legally permitted strategy for states, but the court stopped short of setting limitations on such walls. Going forward, human rights courts and quasi-judicial bodies will likely fill in this gap. They will focus on the physical features of a wall built as an immigration control and not its relation to the border itself. By foregrounding the wall and whether it was properly constructed, they will support, in practice, the traditional concept of a state with a non-porous border,[87] only carving out a few exceptions when dealing

83. *Id.* ¶ 168.

84. *Id.* ¶ 167.

85. *Id.* ¶ 168.

86. In 2014 the United Kingdom offered to give France an eleven-foot steel fence that had been used to protect world leaders at a NATO summit, suggesting that it could be used to stop hundreds of migrants from countries such as Afghanistan, Eritrea, and Ethiopia who regularly storm onto ferries leaving the port of Calais for Britain, Joe Tidy, *UK Offers To Send 'Ring Of Steel' To Calais*, Sky News, (Sept. 7, 2014, 5:22 AM), https://news.sky.com/story/uk-offers-to-send-ring-of-steel-to-calais-10390619. *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).

87. *E.g.*, Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Questions, League of Nations O.J. Spec. Supp. 3, at 5 ("the right of disposing of territory is essentially an attribute of the sovereignty of every state").

with the most vulnerable migrants. In doing so, these human rights enforcement bodies will effectively endorse the construction of walls as legally permissible, and even encourage decisionmakers to employ them, given intense political pressures to control migration and the relative porousness of other policy responses available. These bodies, in other words, will play a significant role in making walls the key legal differentiator by which human rights and recognition are allocated. This will establish walls, and the borders that they reinforce, not only as a physical-material construct, but also as a legal construct.

This prediction is preliminary; border walls are relatively recent phenomena, and the universe of cases is limited. I make this prediction by drawing on an analysis of the case law that deals with different forms of walls from multiple jurisdictions, including national (supreme court level in the U.S., Israel, and European liberal democratic states); regional (the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights); and international (the UNHRC and other UN quasi-judicial bodies). Importantly, while I exhaustively analyzed all relevant jurisprudence,[88] case law is still too sparse to document a definite trend.

International jurisdiction suggests that human rights courts are likely to support a state's right to build a physical barrier on its undisputed border. In an Advisory Opinion on the legality of the wall that Israel built in the Occupied Palestinian Territory,[89] for example, the International Court of Justice ("ICJ") held the wall to be per se illegal.[90] Yet it expressly limited its analysis to those parts of the wall constructed outside the territory that the ICJ regarded as part of Israel.[91] The implication, of course, is that as long as a wall built to control immigration is constructed within a state's territory, it is a

88. For methodology and list of cases, contact the author.

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

90. *Id.* ¶ 121 (explaining that the very construction of the barrier on occupied territory violates international law "would be tantamount to *de facto* annexation [of Palestinian land]").

91. *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 the Court "does not consider that it is called upon to examine the legal consequences arising from the construction of those parts of the wall"). On the same point, for the ECtHR, see Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 1; Bankovic & Others v. Belgium & 16 Other Contracting States, App. No. 52207/99, 11 B.H.R.C. 435 (2001); Al-Skeini & Others v. United Kingdom, 2011-IV Eur. Ct. H.R. 99.

non-event from a human rights perspective.[92] Similarly, in two cases that dealt with shootings on the Berlin Wall, the ECtHR declared that a wall may withstand a legal challenge if it serves a legitimate aim "to protect the border."[93]

The ICJ, however, must be convinced that the primary function of the wall is to protect the border. At least under soft law, ejection at the frontier[94] and/or collective expulsion of asylum seekers are forbidden (though, as we have seen above, at least the ECtHR has limited this soft law by subjecting protection to the conduct of the individual).[95] But a border wall built as an immigration control measure both protects the border and prevents asylum seekers and migrants from entering.

A case which came before the U.S. Supreme Court (and thus has no international status), *Memphis v. Greene*,[96] suggests that the courts might focus on the particular function of protection of the border, as it is politically more acceptable. The case dealt with a barrier constructed by the city of Memphis, Tennessee.[97] This was a local wall within the city but, much like an immigration wall, it had dual functions: It acted as a border between two neighborhoods, and also regulated traffic.[98] The latter function effectively prevented black mo-

92. The Security Fence can nevertheless be implicated in other human rights violations. *E.g.*, Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 EUR. J. INT'L L. 1 (2007).

93. *See* Streletz, Kessler & Krenz v. Germany, 2001-II Eur. Ct. H.R. 409, 444 (the aim of the Berlin Wall was "to protect the border between the two German States 'at all costs' in order to preserve the GDR's existence, which was threatened by the massive exodus of its population," and this aim "must be limited").

94. *See supra* note 30 for a discussion of the soft law interpretation.

95. 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. In the ECtHR's view, Article 4 of Protocol 4 to the ECHR prohibits the collective expulsion of aliens. *See* Hirsi Jamaa & Others v. Italy, 2012-II Eur. Ct. H.R. 97, 155:

> [Although] the notion of expulsion is principally territorial . . . the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.

See also Int'l Law Comm'n, Rep. on the Work of its Sixty-Fourth Session, U.N. Doc. A/67/10, at 9-83 (2012); Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. Rep. 639 (Nov. 30).

96. Memphis v. Greene, 451 U.S. 100 (1981).

97. *Id.* at 102–03.

98. *Id.* at 100:

> The city of Memphis decided to close the north end of a street (West Drive) that traverses a white residential community (Hein Park), the area to the north of which is predominantly black. West Drive is one of three

torists from driving through a white neighborhood.[99] The Court focused on the wall's benign aspects. The wall reduced the flow of traffic, increasing the safety of resident children, and from this perspective the wall did not violate the 14th Amendment.[100] This demonstrates a narrow point: By foregrounding the benign function of the wall, a court can justify an inequality that the law would not otherwise have tolerated.

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

> It was not without good reason that the government decided to invest enormous resources in the construction of the fence . . . it may be assumed that the border fence may help significantly to reduce the phenomenon of infiltration . . . To this it should be added that there are additional means that state [sic] can employ in order to enhance the efficiency of the physical barrier, such as electronic means and so forth.[101]

These means require considerable financial resources, but, the Court insisted, "the protection of human rights costs money, and a society that respects human rights must be willing to bear the financial burden."[102]

However, while a state may build an effective barrier, the barrier must not be overtly violent. The decision by the ECtHR regarding the Berlin Wall asserted that a wall that protects a border serves a "legitimate aim."[103] Yet the protection of the border is not an unrestricted imperative; it must be "limited" and "respect the need to preserve human life."[104] In other words, "indiscriminate" killing of people trying to scale the wall by means such as anti-personnel mines, auto-

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> streets that enter Hein Park from the north. The stated reasons for the closing were to reduce the flow of traffic using Hein Park streets, to increase safety to children who live in Hein Park or use it to walk to school, and to reduce "traffic pollution" in the residential area.

99. *Id.* at 103.

100. *Id.* at 127 ("The residential interest in comparative tranquility . . . [is] sufficient to justify an adverse impact on motorists who are somewhat inconvenienced by the street closing.").

101. HCJ 7146/12 Adam v. Knesset 1, ¶ 103 (2013) (Isr.).

102. *Id.* (citing Barak).

103. *Streletz, Kessler & Krenz*, 2001-II Eur. Ct. H.R. 409, 444; *accord* K.-H.W. v. Germany, 2001-II Eur. Ct. H.R. 495.

104. *Streletz, Kessler & Krenz*, 2001-II Eur. Ct. H.R. at 444; *see also K.-H.W.*, 2001-II Eur. Ct. H.R. at 506.

matic-fire systems, or a categorical order to "protect the border at all costs," infringes upon human rights law.[105]

While under *N.D. & N.T.*, a wall is legally approved so long as it is not too dangerous, there is still no sufficient case law on precisely what constitutes permitted protection of the border. Private law, such as the concept of "attractive nuisance" in tort law, may give some idea, however, of what can, or cannot, be done to fortify the wall.[106] The Inter-American Commission of Human Rights may be going in this direction. In a recent report dealing, *inter alia*, with the U.S.-Mexico wall,[107] the Commission warned that border walls that steer immigrants toward potentially lethal crossings are a human rights concern.[108] This report is only an observation, but it suggests that courts may be willing to place limits on how a border wall is constructed, in order to limit foreseeable harm to those who are shut out.

Moreover, a court may be more lenient toward a state if it is willing to modify the physical structure of its border wall when faced with certain kinds of emergencies. In making a wall breakable, the state demonstrates that the physical nature of the wall does not prevent it from either (i) meeting its international obligations to take in refugees, or (ii) exercising discretion when dealing with the most vulnerable populations. Take another case on the Israel-Egypt wall that reached the Supreme Court of Israel.[109] Here, the Court was asked to rule on the plight of twenty-one African migrants who were on the

105. *Streletz, Kessler & Krenz*, 2001-II Eur. Ct. H.R. at 449 ("[B]y installing anti-personnel mines and automatic-fire systems along the border, and by ordering border guards to 'annihilate border violators and protect the border at all costs,' the GDR had set up a border-policing regime that clearly disregarded the need to preserve human life.").

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

107. Inter-Am. Comm'n H.R., Report on Immigration in the United States: Detention and Due Process OEA/Ser.L/V/II, Doc. 78/10, ¶¶ 107–08 (2010), http://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf.

108. *Id.* ¶ 107:

> 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. . . . [T]his . . . increases the death rate among undocumented migrants.

109. HCJ 6582/12 Anu Plitim v. Ehud Barak-Minister of Def. (2012) (Isr.). My discussion of the case benefited from Omer Shatz, The Not So Good Samaritan: On Denial of Refugees (unpublished manuscript) (on file with the author).

Egyptian side of the fence.[110] At first, the Attorney General noted that, because the wall had no gates, admittance of the group was physically impossible.[111] At a later point in the proceedings, however, Israeli soldiers cut the fence and admitted into Israel two women and a child, as a humanitarian gesture.[112] In response, the judges dismissed the case in a unanimous decision, holding that "the petition had become redundant."[113] Here, the wall acted to shift regulation away from non-negotiable rights to humanitarian concerns that are under the discretion of the state.

The same leniency may operate in the court of public opinion. The public might be more forgiving of states' wall-building efforts if those efforts are accompanied by the state's commitment to protecting refugees. Turkey offers an example. In declaring an expansive commitment to refugees that exceeds its formal obligation under the Refugee Convention,[114] Turkey may have avoided significant scrutiny of the two walls it constructed along its borders with Syria and Iran—a shift from a previously generous open-borders policy to a wall-oriented one.[115]

A human rights court may also, under some circumstances, request that the state increase protections for those who have already entered. For example, if a wall is strong and only a few manage to enter, then those few may be entitled to more humane treatment than if larger numbers had done so. In the *Adam v. Knesset* case discussed above,[116] the Supreme Court of Israel encouraged Israel to build an effective wall.[117] At the same time, the judges also argued that if the absolute number of individuals who cross the wall is small, then put-

110. *Id.* Transcript of the first hearing (Sept. 6, 2012) is available at http://www.scribd.com/smc_law [Hebrew].

111. *Id.*

112. *Id*.

113. *Id*.

114. When Turkey signed the 1951 Convention Relating to the Status of Refugees, it "did so with a 'geographical limitation': Its mandate applies only to refugees from Europe." Mac McClelland, *How to Build a Perfect Refugee Camp*, N.Y. TIMES (Feb. 13, 2014), https://www.nytimes.com/2014/02/16/magazine/how-to-build-a-perfect-refugee-camp.html; *see also* Jenna Krajeski, *Taking Refuge: The Syrian Revolution in Turkey*, 2 WORLD POL'Y J. 59, 61 (2012).

115. Note, however, that despite erecting the two walls, Turkey has previously taken in more Syrian refugees than any other country in the European Union. Kelly M. Greenhill, *Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis*, 22 EUR. L.J. 317 (2016).

116. HCJ 7146/12 Adam v. Knesset 1, ¶ 103 (2013) (Isr.).

117. *Id.* ("To this it should be added that there are additional means that state [sic] can employ in order to enhance the efficiency of the physical barrier, such as electronic means and so forth.").

ting them under administrative detention is not constitutional. Indeed, it "makes 'a moral stain on the network of human values espoused by Israeli society.'"[118] However, if the numbers increase—that is, if the wall is less effective—then "it may be possible to justify this purpose, notwithstanding the grave and forceful injury to the infiltrator's liberty."[119] The wall functions to move regulation from a normative to a quantitative analysis, which supports state interests: Protection is not a matter of rights, but rather a question of numbers, and subject to different interpretations.

The courts in these cases, much like the ECtHR in *N.D. & N.T.*, do not challenge existing notions of borders and statehood. They accept the border as a definitive jurisdictional line of territorial nature, and they look at how the wall was physically constructed. By regulating the consequences of the wall at the margin, they offer symbolic gestures toward the human rights of all individuals. The result is a minimal regulation of the wall.

Access here becomes legally consequential. Courts draw on the location of the individual non-national vis-à-vis the wall in order to compromise between the interests of the individual and those of the state. If a non-national is on the wrong side of the wall, she will have no right of entry. If a non-national is on the right side, she may well have significant rights against forced ejection from the unwilling "host" state.

If my prediction proves correct, by regulating the physical features of a border wall, other human rights courts and quasi-judicial bodies will follow the path of the ECtHR in *N.D. & N.T.* and will legally, if partially, permit the construction of border walls. They will also make the allocation of protection dependent on an individual's ability to penetrate such a fortified barrier. This is an odd way to sort out policy interests; the wall is normatively arbitrary from the perspectives of both the state and the individual.

V.
Distributional Consequences

The result of states building walls and courts drawing on the access compromise (an intermediary position between the interests of the state and the individual non-national) may not be a stable equilibrium, but it will have certain distributional effects.

118. *Id.* ¶ 114.
119. *Id.* ¶ 93.

First, there are distributional effects among individuals. The legal and physical characteristics of the wall reward those individuals who have the physical ability to scale over it—in particular, strong young men. In other words, the two male claimants in *N.D. & N.T.* are not unusual.[120] They are privileged over women, older people, and children, whose human predicament may be no less, but who are less likely to have the physical strength required to scale a wall.

To give a numerical sense, on one day in May 2014, some 1,000 people attempted to cross one of the border walls around a Spanish territory in North Morocco.[121] More than 400 managed to make it over the fence; of these, only two were women.[122]

Importantly, by subjecting a state's jurisdiction to the culpable conduct of an individual non-national at the time of entry into the state, the Grand Chamber decision in *N.D. & N.T.* restricted this privilege, though the Court stopped short of scrapping it completely. The decision offers no precise definition of "culpable conduct," instead prohibiting only conduct that "places" the applicants "in jeopardy," including "storming the border fence," taking advantage of a "group's large numbers," and resorting to "force."[123] This leaves unclear whether a state owes protective duties to, for example, strong men who draw on their physicality to scale a fence, but do so individually, in smaller groups, or with less force.

Of course, a host state may make humanitarian exceptions (as illustrated by the case of the three African migrants admitted at the Israel/Egypt wall as a charitable gesture).[124] Anthropologists Miriam Ticktin and Didier Fassin have already shown that in an inhospitable immigration climate, extreme vulnerabilities can become advantages for would-be migrants,[125] but drawing on humanitarian concerns to determine entry rights misuses resources. It offers symbolic concessions to the most salient or sympathetic individuals and does not help

120. Recall that day, they were a part of a larger group of 80 individuals attempting to scale the fence. *See* Pijnenburg, *supra* note 63.

121. Gall, *supra* note 60.

122. *Id.* Note, however, that in other immigration contexts, women and children may be favored over men. For example, Canada issued a plan for the intake of refugees that explicitly excludes young men. *See*, *e.g.*, *Canada to Turn Away Single Men as Part of Syrian Refugee Resettlement Plan*, GUARDIAN (Nov. 23, 2015, 5:07 PM), http://www.theguardian.com/world/2015/nov/23/canada-syrian-refugee-resettlement-plan-no-single-men.

123. *See* sources cited *supra* notes 78–81.

124. HCJ 6582/12 Anu Plitim v. Ehud Barak-Minister of Def. (2012) (Isr.).

125. MIRIAM TICKTIN, CASUALTIES OF CARE: IMMIGRATION AND THE POLITICS OF HUMANITARIANISM IN FRANCE (2011); DIDIER FASSIN, HUMANITARIAN REASON: A MORAL HISTORY OF THE PRESENT 83–109 (2011).

solve the larger problems of migration and the refugee crisis. In addition, it uses individualized care and compassion to displace political possibilities for larger changes in structural inequalities between host states and non-nationals.

Scaling, however, is not the only way around a wall. There is also tunneling, which might enable children to crawl through, and there may also be maintenance workers who are open for bribes. As long as there are walls, there will be ways over, under, or otherwise around them, and these ways will also select for particular physical, economic, and locational features.[126]

This differentiation seems corrupt for two reasons. As a normative matter, it betrays the human rights commitment to universality. As a practical matter, moreover, it may select for the wrong criteria. Using physical ability to determine entry rights, for example, is likely to be negatively correlated with the gravity of an individual's predicament, if it is correlated at all. Furthermore, the young men most likely to possess the needed physical ability to gain entry also arguably represent the biggest threat to the state.[127]

Second, there are distributional effects among states. The regime burdens states unequally.[128] Consider, for instance, capacity to absorb immigration flows. In cases dealing with states of equal capacity, the accident of geography determines the protective burden: States with more easily penetrable borders, or unreliable or uncooperative neighbors, will bear a larger influx. In cases dealing with states of different capacity, states with fewer financial resources may be unable to afford a wall and will therefore bear a heavier burden. However, those characteristics have no relationship to what a rational system would look

126. For instance, some refugees fleeing to Canada risked freezing temperatures. In one case, two Ghanaians had either all or nearly all of their fingers amputated due to frostbite. In this example, the weather acted as a tool of selection. Ashifa Kassam, *Refugees Crossing into Canada from US on Foot Despite Freezing Temperatures*, GUARDIAN (Feb. 7, 2017, 5:00 AM), https://www.theguardian.com/world/2017/feb/07/us-refugees-canada-border-trump-travel-ban.

127. Men may be viewed as a security risk. *See, e.g.*, *Canada to Turn Away Single Men*, *supra* note 122, or a threat to the domestic labor market; *see also* Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, ¶ 67, Series A no. 94 (describing how the United Kingdom argued that "men being more likely to seek work thereby hav[e] a stronger impact on the labour market").

128. There are distributional effects already independently of constructed walls, primarily due to geography. In Europe, for example, "countries on the geographical front line," such as those in the Mediterranean, face a greater influx of migrants than Northern European countries. As a result, wealthier European countries bear less of a burden than, for example, Greece. *Europe's Huddled Masses: Rich Countries Must Take on More of the Migration Burden*, ECONOMIST (Aug. 16, 2014), https://www.economist.com/leaders/2014/08/16/europes-huddled-masses.

at: The ability of given states to accommodate refugees and to sort out, safely and humanely, economically-motivated mass migrations.

These distributional effects may be undesirable. As regards individuals, there is no reason why younger men should be privileged over children, women, and older people. As regards states, the regime allocates protective duties in a way that is random in relationship to states' real constraints.

Others may argue that these distributional effects do, in fact, serve a purpose. They may compensate for the reality that resettlement programs favor women, the elderly, and children, and regularly exclude single, male refugees.[129] Further, it may turn out that states are not too upset that walls screen out those who are too weak to scale them, and may select migrants able to perform useful labor.[130] However, before a debate over the normative implications and what should be done next can take place, it is necessary to understand the current moment.

Conclusion: Walls: A New Physical-Legal Reality

We are living in a massive crisis of mobility. A large percentage of humanity is unmoored from sovereign jurisdiction either because they broke the law in entering a host state with a hope of improving their lives, or because they have fled their home countries at gunpoint. How the international community treats these people between states' jurisdictions is a matter of life or death to millions. I end with two concluding thoughts.

First, at this moment of a massive crisis of refugees and of mobility, the international community has not agreed upon a treaty that explicitly targets the question of how to assign entry rights to specific duty-holders. Absent this further level of treaty negotiation, it has left human rights courts and quasi-judicial institutions to resolve cases on an ad-hoc basis. In doing so, they have also resolved normative ques-

129. For example, Canada is one state that has excluded single male refugees in resettlement programs. It excluded this group in its plan to accept 25,000 Syrian refugees in 2015. Hanna Kozlowska, *Canada's Plan to Accept Refugees Excludes Single Straight Men*, Quartz (Nov. 24, 2015), https://qz.com/558313/canadas-plan-to-accept-refugees-reportedly-excludes-single-men/.

130. The United States, for example, has offered a fast track to citizenship for individuals who join the Armed Forces, though the Pentagon recently changed this policy. Melissa Block, *Army Tightens Rules for Immigrants Joining As A Path To Citizenship*, NPR (Oct. 22, 2017, 7:37 AM), https://www.npr.org/2017/10/22/559336282/army-tightens-rules-for-immigrants-joining-as-a-path-to-citizenship. On the other hand, men may be viewed as a security risk, as indicated by Canada's decision to exclude them from resettlement. *See id.* Men may also be viewed as a threat to the domestic labor market. *See supra Europe's Huddled Masses*, note 128.

tions about who is most vulnerable and which states are most capable of providing protection. In the past decade or so, these enforcement bodies, operating without an internationally agreed-upon treaty, have been quite successful in both enforcing and creating new rights for asylum seekers and irregular migrants. They have used variants of access, or the physical location of an individual non-national, to enforce existing rights and to create new ones that constrain the actions of host states.

Ironically, however, an unintended consequence of this legal success established the building of physical walls as a predictable choice for states. This mechanism to clamp down on migration is a logical response to the terms of the access-based compromise that bootstraps protective duties onto an individual's coming under the human or physical agency of the state. The legal significance of walls lies in the intersection between their passivity and their very location on the undisputed border.

Second, those of us—myself included—who care about refugee protection ought to understand these walls proliferating around us as both a material reality, made from bricks and mortar, and as a legally constructed reality. The wall builders and judges are reacting and responding to each other, and iteratively, over time, they are generating a new physical-legal reality; while Spain built the three fences in northern Morocco, it was the ECtHR that gave this wall its legally permitted context. Today, as a matter of practice, this physical-legal reality construct selects in favor of physically strong individuals, or men. Ultimately, then, protective outcomes do not derive out of our common humanity as per the promise of human rights law. Nor do they necessarily reflect the interests of either of the two stakeholders, individual non-nationals and host states. Rather, they end up reaffirming the dictum that "might makes right." The normative or practical desirability of this selection mechanism is far from clear.