

SYMPOSIUM ON FRAMING GLOBAL MIGRATION LAW – PART III

THE INCOMPLETE RIGHT TO FREEDOM OF MOVEMENT

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We live now in the midst of a massive global crisis of mobility. An ever-growing population finds itself refugees displaced from the legitimate jurisdiction of any territorial state. In the face of this pressing emergency, influential voices argue that international human rights law should be placed “[at the center](#)”¹ of international efforts to meet this challenge. But today’s calamity is set against the backdrop of a universal human rights regime that is not only thin but, more importantly, incomplete. When it comes to cross-border mobility, human rights law ensures that states allow individuals to leave their state, but alas does not require that any other state let them enter and remain. Such entry and residence rights are required only for a country’s own nationals (however nationality is defined). And so, many refugees who have exercised their human right to exit come up against a functional block to mobility: they have no place to stop moving.² Some of them may nonetheless find a state willing to take them in. In that case, they may enjoy meaningful protection, but this protection exists only by virtue of a state’s domestic policies and has little to do with international human rights.

In light of this gap in the law, I argue, there is an urgent need for a new field of global migration law. This field ought to give attention to, first, how mobility actually operates on the ground, and, second, how rights that regulate mobility are cashed out in practice. In what follows, I take a first stab at both questions. To do so, I examine the right to freedom of movement, which is the human right that most explicitly involves cross-border mobility. I discuss two separate shortcomings of this right: one having to do with the limitation of the return right of nonnationals, and one having to do with the unavailability of an entry right for refugees.

In what follows, moreover, I distinguish between two subsets of refugees that are currently bundled together under human rights law. *Refugees in exile* is the terminology I use for refugees who ask to return to their “own country” after being expelled from it. *Refugees in flight* means refugees who request to escape their “own country” because conditions there are intolerable. Both lost their citizenship, and both require mobility—the ability to exit one state and to enter another—in order to redress their injuries. But their motivations to move differ. The demand for the mobility of *refugees in exile* comes from the notion that individuals and groups are better off in their “own country,” the specific site where they have developed continual cultural and political ties. That of *refugees in flight*, by contrast, stems from the notion that individuals and groups are better off when they escape their “own country,” because it has turned into the source of their harm or is unable to remedy their harm. *Refugees in exile* are concerned about

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¹ Ban Ki-moon, [UN Chief Urges More Action to Tackle Displacement; Recalls Youth on the Run in Wartime Korea](#), UNHCR NEWS (Oct. 1, 2014).

² I focus in my essay only on human rights norms which purport to grant rights to individuals and are interpreted and enforced by a range of international courts and institutions. I leave aside refugee law which has been internalized in various ways in national law but is not enforced through any international court.

continuity (the right to remain) after a political change in the state and express a collective sentiment. *Refugees in flight* are concerned about exiting a state (the right to withdraw) and often, though not always, reflect an individual sentiment.

With this distinction between *refugees in exile* and *refugees in flight* in mind, let me now turn to the freedom of movement right. The right embodies two functions: exit and entry. For this right to have practical meaning, both functions must be in effect. Entry, moreover, can be thin (a right to cross a border) or robust (a right to *both* border crossing and status regularization post entry).

Under human rights law, the exit function is always in effect. It is universal and unlimited; anyone can leave any country. This is confirmed by both the [Universal Declaration of Human Rights](#) (UDHR) and the [International Covenant on Civil and Political Rights](#) (ICCPR).³

As for the entry function, it is limited to three main situations.⁴

(i) *Entry under the right of return.* [Human rights law](#) provides any individual with a right of return, or entry, to “his own country.”⁵ This entry comes from a [recognition](#) of “the special relationship of a person to ... [her or his] country.”⁶ The UN Human Rights Council (UNHRC) defines the scope of “own country” as protecting nationals in a *formal* sense, i.e., citizens, and also nationals in an *informal* sense, i.e., individuals “who, because of ... [their] special ties to or claims in relation to a given country, cannot be considered to be a mere alien.”⁷

While both formal nationals and informal nationals qualify for protection, there are differences in the ways in which they acquire the status of “own country” and also in the rights that they accrue from this status. According to the UNHRC, the protection of formal nationals does not depend on physical-territorial presence in their “own country”; they bear the right of return even if they [never lived](#) in the state prior to exercising entry.⁸ Protection here is robust, regulating the two aspects of return: the actual entry into the state (a mobility right), as well as status in the state after entry (a continuity right). The protection of informal nationals, in contrast, is a function of an ongoing personal-territorial continuity in the country. [According to the UNHRC, the determination](#) of this continuity invites 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.”⁹ This protection is thin and attends only to the right permitting an informal national to remain, or not to be expelled (a continuity right). This protection is the opposite of mobility, leaving the exit and entry functions irrelevant for the operation of the right. So while formal nationals bear a return right (a mobility right), informal nationals do not. Instead they bear what I call the *right of domicile*—the right to remain in the place where they live.

³ [GA Res. 217 \(III\) A](#) art. 13(2) (Dec. 10, 1948) [hereinafter UDHR]; [International Covenant on Civil and Political Rights](#) art. 12(2), Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR].

⁴ There may be a fourth variation: a right for entry under family unification. But under human rights law this entry is mainly limited to family members of migrants lawfully present, while under humanitarian law it is only aspirational in nature.

⁵ [UDHR](#), *supra* note 3, art. 13(2); [ICCPR](#), *supra* note 3, art. 5(d)(ii); [International Convention on the Elimination of all Forms of Racial Discrimination](#), GA Res. 2106 (XX) (Dec. 21, 1965).

⁶ Human Rights Committee, [CCPR General Comment No. 27: Article 12 \(Freedom of Movement\)](#) para. 19, UN Doc. CCPR/C21/Rev.1/Add.9 (Nov. 2, 1999).

⁷ *Id.* at para 20.

⁸ HURST HANNUM, [THE RIGHT TO LEAVE AND THE RIGHT TO RETURN IN INTERNATIONAL LAW AND PRACTICE](#) 56 (1987).

⁹ Human Rights Committee, [Warsame v. Can., Communication No. 1959/2010](#) para. 8.4, UN Doc. CCPR/C/102/D/1959/2010 (Sept. 1, 2011); Human Rights Committee, [Nystrom v. Austl., Communication No. 1557/2007](#) para. 7.4, UN Doc. CCPR/C/102/D/1557/2007 (Sept. 1, 2011). For an earlier articulation, see [Stewart v. Can., Communication No. 538/1993](#), dissenting opinion, UN Doc. CCPR/C/102/D/538/1993 (Dec. 16, 1996). *But see for a strong dissenting opinion* [Nystrom v. Austl., Communication No. 1557/2007](#), dissenting opinion of Committee members Neuman & Iwasawa, paras. 3.1-3.3, UN Doc. CCPR/C/102/D/1557/2007 (Sept. 1, 2011).

This type of entry is narrowly constrained. The return function is limited only to formal nationals, and the domicile right is constricted by location: an informal national can bring a claim only from within the state to remain in the state. Protection, moreover, is minimal and negative (nonremoval).¹⁰ Additional positive rights are provided at the discretion of the host state.

(ii) *Entry under refugee status.* Some instruments guarantee vulnerable individuals a right of entry into host states as refugees: the UDHR, for example, pledges to uphold the “right to seek and to enjoy in other countries asylum from persecution,”¹¹ and the [Convention on Asylum](#) guarantees under certain circumstances entry for political asylum.¹² However, the vast majority of international treaties—including, most importantly, the [Refugee Convention](#) and the [Convention Against Torture](#)—prohibit a state from returning individuals only when there is a “well-founded fear that they will be persecuted”¹³ or “subjected to torture.”¹⁴ Alas, while these treaties create an obligation for the state not to send back a refugee (“non-refoulement”), they do not provide an individual with a right to enter the state in order to seek protection in the first place.

As a result, the opportunity to enter as a refugee is narrowly restricted. It is constrained territorially: an individual can be considered for entry only *after* she has established a territorial presence, either inside the state (including, at least under soft law, at the border of the state), or under the effective control of the state or its agents, even if beyond national borders. At the same time, this form of entry is also imprecise: the [legal meaning](#) of territorial presence changes over time.¹⁵

(iii) *Entry under a deliberate decision of the host country.* [Public international law](#) permits any sovereign the right to exclude whomever it wishes and to grant nationality on the terms it wishes within and in relation to its own domestic legal system.¹⁶ This state-based definition of nationality is supported by [human rights law](#),¹⁷ and is considered valid so long as it is not challenged by another state.¹⁸

This type of entry, much like the earlier two, is also restricted; it is circumscribed by the will of the state. An individual has no ability to enter and/or remain without the state’s consent.

The result is that while a right of return obliges states not to expel nationals, either formal or informal, it does not require them to allow the reentry of informal nationals if they were not originally expelled. This offers meaningful

¹⁰ See, e.g., Human Rights Committee, [supra note 6](#), at paras. 19–21.

¹¹ UDHR, [supra note 3](#), art. 14.

¹² [Convention on Asylum](#), Feb. 20, 1928, O.A.S.T.S. No. 34.

¹³ [The Convention Relating to the Status of Refugees](#) art. 33(1), Apr. 22, 1951, 189 UNTS 137.

¹⁴ [Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) art. 3(1), GA Res. 39/46 (Dec. 10, 1984). There has been a great deal of commentary on the gap between a “right not to be returned” and a “right to enter to see if you ought to be returned.” But, as already mentioned, I leave this body of law to the side and focus here only on Human Rights law which does purport to grant rights to individuals and is interpreted and enforced by a range of international courts and institutions.

¹⁵ On this, see Moria Paz, [Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls](#), 34 BERKELEY J. INT’L L. (Article 4, Spring 2016).

¹⁶ [Nationality Decrees in Tunisia and Morocco Case](#), 1921 P.C.I.J. (ser. B) No. 4, at 36 (Nov. 8); [Nottebohm Case](#) (Liech. v. Guat.) (Second Phase), 1955 ICJ REP 4, 20 (Apr. 6). In fact, in some cases, a sovereign even bears the *duty* to control its territory. No state, for example, may permit its territory to become a haven for people intent on violating the sovereign rights of another state.

¹⁷ See, e.g., Human Rights Committee, [General Comment 15: The Position of Aliens Under the Covenant](#) para. 5 (Apr. 11, 1986) (“It is in principle a matter for the State to decide who it will admit to its territory.” Note, however, exceptions listed therein.).

¹⁸ [Nationality Decrees in Tunisia and Morocco Case](#), [supra note 15](#) at 36; [Nottebohm Case](#), [supra note 15](#) at 20–22. Population exchange is possibly a second form of a nonobligatory entry under a deliberate decision of a host state, see Moria Paz, [A Most Inglorious Right: René Cassin, Freedom of Movement, Jews and Palestinians](#), in [JEWISH LAWYERS AND INTERNATIONAL LAW: A SPHERE BETWEEN NATIONS](#) (James Loeffler & Moria Pez eds., forthcoming, 2018).

protection for refugees in exile who are formal nationals and who ask to return to their “own country,” regardless of the reasons why they are not there. It also covers first-generation informal nationals who were expelled from the state after they had established their physical continuity.

But second-generation refugees in exile who seek to return to their “own country,” from which their parents were expelled, but of which they are not formal nationals, find themselves without protection. Human rights law guarantees them what I call a domicile right, a right to remain where they are, but makes this right a function of ongoing personal-territorial continuity. Without the ability to show physical continuity, they are unable to return to the place of original dispossession.

At the same time, for *refugees in flight*, the return right can amount to death sentence. They do not seek to remain (a continuity right), but rather to flee their “own country” (a mobility right). The right to free mobility mandates that states permit them to exit, but it does not require other states to allow them to enter, unless they are nationals.

For some, the right to exit, by itself, is indeed meaningful. One example is individuals with extreme vulnerability, such as Syrian refugees, or Edward Snowden. Their primary concern is the ability to leave a particular state. By leaving, they would have the possibility, at the very least, to file an entry claim somewhere, and perhaps some state would make a humanitarian exception and let them in. Another example is individuals with high [physical capacity](#), such as young strong men.¹⁹ For them, exit alone may be sufficient. By exiting, they could have the chance to approach a potential host state or its agents. And, if they succeed in establishing a de facto entry, they would have, at minimum, a transitory entry pending determination of refugee status.

But a large percentage of the *refugees in flight* and *refugees in exile* who exercise their freedom of movement right to leave their state for whatever reason, but who are unable to reach a host state or its agents, find themselves in limbo. Human rights law guarantees them universal exit. Without a state that consents to accept them, however, they are on a journey without a destination: permanently stuck in transitional locations such as refugee camps or territorial borderlands.

This configuration of the right to mobility operates within an international legal system that places the state as the center of corrective legal processes. It guarantees individuals private rights with respect to a state. And, moreover, it allocates protection to those individuals who are either *within* state territory after they have established territorial presence in the state (responsibility grows out of territoriality), or who have come under the state’s effective control (responsibility grows out of contact). And so, individuals must be inside the state or under its control in order to benefit from rights against a state.

This frame leaves without protection those who are stranded between states—whose state of nationality either is the source of their harm (positive violation) or is unable to remedy their harm (negative violation). They can exit their state, but no state has a corresponding duty to allow them in.

To incorporate those who are left outside the human rights regime, a new field of migration law ought to address the problem of the entry function, including the two aspects of a thick entry: entrance (mobility right) and status post entry (continuity right).

One way to generate a robust entry is to codify new law compelling unwilling host states to take in refugees, including both the right to enter and to remain. Such an entry right would be universal and would not be subject to state’s preference. Unfortunately, however, our time is one of xenophobia. Strong states, rich with resources, may well refuse to sign on to such a law. And leaders who do might be punished by their electorates.

Another way to create an entry right is to override state will by drawing on existing law without creating new rights. There are two possibilities: (1) the definition of informal nationality—or what I propose to call a *domicile right*

¹⁹ On this, see Moria Paz, [The Law of Walls](#), 28 EUR. J. INT’L L. (2017).

—could be expanded, and thus also the right of return into one’s “own country”; and (2) the meaning of territoriality could be expanded, and thus also the ability to enter under refugee status.

Informal nationality (a domicile right in my terminology) and territory, however, are arbitrary legal categories. Informal nationality is arbitrary in a temporal sense; it privileges those who are [physically present on the territory](#) at a particular moment, and it punishes those who are not, regardless of circumstances.²⁰ Territorial presence, in turn, is arbitrary from a policy perspective; it rewards individuals who can physically approach the state or its agents, and punishes states based on geographic factors. Thus, widening the existing legal definition of “own country” and “territory” does not resolve the concern that mobility under human rights law is, in fact, determined by the situation of the individual, and is a function of particular circumstances that fall outside the purview of universal law.

So long as we live in a state system, with territory limiting the responsibility of states such that states have no duties to engage in unilateral humanitarian intervention, a better way to effect change is by putting pressure on states to voluntarily permit more entry. Alas such entry rights would not be universal, dependent as they would be on the political will of each state. An example is the current Syrian refugee situation and the assertion by politicians in the United States of America and Hungary that they will take in only Christian refugees.

Here we are. Thick entry (including border crossing and status regularization) across the borders of some, but not all, states, becomes possible for certain subcategories of refugees, but not for others. And the remaining refugees who are unable to secure entry? Whether they chose or were forced to leave their state, human rights law guarantees them only a point of departure but no point of arrival. Marooned on land and adrift at sea, they carry suitcases full of meaningless human rights.

²⁰ For example, see Eyal Benvenisti’s discussion of the UN response to the Turkish occupation of Northern Cyprus in Eyal Benvenisti, [The Right of Return in International Law: An Israeli Perspective](#). See earlier: [Settlers of German Origin in Poland](#), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6 (Sept. 10); [Question Concerning the Acquisition of Polish Nationality](#), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7 (Sept. 15).