

The Borders of Human Rights

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Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls* (Stanford Public Law Working Paper No. 2526521), available at [SSRN](#).

What is the relationship between international human rights law and migration? Though many might assume a simple one – human rights protect migrants – the reality is much more complex, raising profound questions about state sovereignty, politics, and the nature of international law. In her new paper, *Human Rights, Immigration and Border Walls*, Moria Paz maps out the central tension of this relationship, providing an insightful and balanced description of deep structural problems with the current human rights approach to migration.

Paz defines clearly for the reader the tension between sovereignty and individual rights that underpins the relationship between human rights and migration. She argues that the two normative doctrinal approaches available to resolve questions of migration necessarily clash. According to Paz, the human rights approach locates the right to a minimum level of human dignity in the individual, whether or not that individual has complied with formal immigration requirements. Yet these rights exist in a statist international legal regime that provides states with absolute authority to decide who can enter, “under what conditions, and with what legal consequences.” In other words, states and their members have the right to decide who can become a member of their political community and how the state’s resources will be allocated. This tension is, of course, grounded in age-old questions about international law’s ability to constrain state behavior. Yet the highly politicized nature of migration law sharpens this perennial conflict, leading to interesting and unexpected outcomes.

Paz argues that human rights courts and treaty bodies have increasingly resolved this tension in favor of human rights by expanding substantive protection standards in the direction of more absolute rights for migrants. The heart of her paper, and a terrific contribution to the literature, is here. She highlights an important structural problem with this approach: courts have extended the reach of human rights protection by grounding jurisdiction in theories of territory and effective control. In the context of migration, these theories are of course self-defeating, and Paz explains lucidly why they are so problematic. Here her paper steps beyond international law, and asks important questions about law itself and its ability to constrain politics. Paz offers a cautionary tale of overreach and backlash.

The structural problem she describes is an ongoing struggle with the legacy of Westphalia, the international legal scholar’s shorthand for the delineation of rights by territory and its proxies. Paz notes that this approach is problematic from both directions. For individuals, a territorial delineation of rights privileges proximity and capacity to gain access rather than substantive immigration or protection needs. It doesn’t work for the states either, as their allocation of migrants depends on whether they have accessible borders or suffering neighbors rather than on their ability to assist or incorporate those migrants.

As a result, Paz explains, not only has the human rights approach to migration failed, but it has actually given rise to border walls. She begins her explanation of this phenomenon by categorizing current

jurisprudence into three buckets. First, the human rights tradition would find that states owe protective duties on both sides of the wall. In other words, jurisdiction is based on proximity to the border. Paz labels this the “wall as bridge” approach. Second, under a statist tradition, the state owes protective duties only to migrants who have entered the territory – the classic jurisdiction based on territory approach. This she labels the “wall as barrier” approach. Finally, Paz describes a compromise approach in which migrants obtain thin procedural rights outside and strong rights only inside the territory. In her words, the wall softens jurisdiction back to geography. Paz makes a compelling argument that these approaches are all problematic.

I won’t walk in detail through her exploration of “backdoor human rights protections” that the UN Human Rights Committee and European Court of Human Rights have implemented “to counteract sovereignty” – suffice to say that she offers a clear and detailed analysis of the case law that’s well worth a read. Paz describes the ways in which norms around family unity and private life as well as prohibitions on *refoulement* to torture have expanded to offer increased access to human rights by non-nationals. These adjudicators have both read norms more strictly and more absolutely, and have grown substantive protections beyond their original definitions. Yet jurisdiction has still been correlated with physicality grounded in territory. In other words, these human rights bodies offer more rights, but migrants have to reach a country’s shores in order to obtain those rights.

This grounding in territoriality enables backlash through “front-end strategies of immigration control.” Paz argues that because these rights attach to territorial access, states have responded by tightening their immigration policies through interdiction and border walls. In other words, in order to avoid activating these increasingly stringent human rights obligations, states have created physical boundaries to prevent entry by land or by sea. She offers several examples of human rights decisions about the latter situation, but notes that no human rights body has yet examined the question of rights that apply at a border wall.

Paz illustrates the shortcomings of current approaches by presenting this undecided question: when and how do human rights attach to individuals approaching border walls? Under the human rights tradition, she suggests, if human rights bodies guarantee rights to non-nationals approaching a wall, this may lead to withdrawal by states from their human rights obligations. The statist tradition suggests that a state has power to build a wall on its own territory and to decide to whom it owes obligations. Such an approach essentially would constitute a deferral to Northern states’ interests and a sacrifice of norms concerning universal and fundamental dignity. Finally, the compromise would be to distinguish between land and sea borders, providing different rights for different people. Again, Paz highlights the flaws in such an approach, as it would create too many distinctions that do not make sense.

The paper ends with a tantalizing proposal for reform. Paz suggests that international law should shift from its current concern with access to a focus on actual protection and consequences for the individual and the state. In terms of the individual, the international legal regime would focus on the nature of the misery to be alleviated and the process by which such misery should be assessed. For host states, this shift could create alternate means, apart from physicality, for distributing protective duties. Her vision leaves plenty of details to be worked out, which hopefully will be the topic of a future research project.

In the meantime, Paz has illuminated the central quandary in the relationship between human rights and migration. The current “focus on physicality . . . substitutes complex political criteria . . . with a set of arbitrary rules that require [answers to] relatively simple questions.” This approach hands to courts questions unresolved politically, thereby avoiding the messier, though potentially ultimately more effective, practice of negotiation, compromise, and politics.

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