Introduction

My father tells the story of his family’s clandestine escape from Hungary into Austria in 1956, after Soviet tanks and troops crushed an anti-communist uprising in his hometown of Budapest. The border, which was not visibly demarcated at my grandparents’ point of crossing, served as the boundary between two distinct political and legal regimes: on one side, subjection to the Hungarian police state; on the other, access to international protection. Austria’s decision to recognize all fleeing Hungarians as refugees within the meaning of the 1951 Refugee Convention, and the relatively rapid resettlement of some 170,000 Hungarian refugees in third states, meant that the primary barrier to escaping Hungary and entering Austria was physical (based on one’s willingness and ability to undertake the hazardous journey across the border) rather than legal (based on one’s personal identity or status).

The Austrian response to the influx of Hungarian refugees in 1956–1957, and the large number of third states willing to aid in resettlement, proved rather anomalous in recent history. As Ayelet Shachar’s lead essay on The Shifting Border: Legal Cartographies of Migration and Mobility describes, states have developed myriad techniques to deter and prevent (and, selectively, to facilitate and accelerate) entry by foreign nationals. The topic of migration is both timely and timeless, as politicians continue to use manufactured immigration “crises” to galvanize domestic support for their political platforms. The time-honored technique of blaming the “other” for social and economic ills, and the still-elusive formula for building lasting civic solidarity in diverse societies, make it unsurprising that states interpret their legal obligations towards non-citizens narrowly. Perhaps more alarming are the exclusionary definitions of citizenship and national identity that undergird policies targeting immigrants who are, in many cases, would-be citizens.

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Shachar’s lead essay focuses on these narrow interpretations and their accompanying enforcement strategies. Her essay is as important for what it does not address, as for what it does. As she recounts, states seeking to deter entry have built and fortified physical barriers along their geographic borders. They have also “externalized” border controls to “make it more difficult for vulnerable migrants to reach [destination countries] safely and exercise their legal rights.” And those who succeed in crossing the border may find themselves subject to an immigration law regime that increasingly resembles criminal law enforcement. Yet offering a critique of these strategies does not get us very far towards understanding, or attempting to alleviate, the structural and other factors that contribute to their adoption in the first place. The shifting border is a symptom, not the disease.

The selective reception of immigrants—particularly by countries surrounded by oceans that can more easily control physical entry—has deep historical roots. That said, the perception of a “refugee crisis” and the resurgence of immigrant threat narratives have spurred additional measures designed to regulate and to restrict the movement of people across borders. The cumulative effect, as described by Anil Kalhan, is that “the migration border—the set of boundary-points at which nation-states authorize individuals to enter or be admitted, prevent or allow their entry or admission, or subject them to possible expulsion—has been decoupled from the territorial border and rendered ‘virtual’: layered, electronic, mobile, and policed by an escalating number of public and private actors.” To be sure, these developments merit serious attention, even if they are largely epiphenomenal.

Shachar contends that “we currently lack the basic conceptual language to capture, describe, and critique these rapid changes.” Given the proliferation of academic and policy work documenting and responding to these changes, I am less persuaded that the core problem is one of conceptual under-development. Rather, scholars from a range of disciplines, including those cited by Shachar, have grappled with the challenges posed by strategies of border externalization. Representative recent work includes David FitzGerald, *The Asylum Paradox: Remote Control of Forced Migration to the Global North* (forthcoming); Bill Frelick, Ian M. Kysel & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. MIGRATION & HUM.

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3 See, e.g., Paz, Moria. “Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls.” *Berkeley Journal of International Law*, vol. 34, no. 1, p. 7 (observing that “border walls are a predictable strategic response by States that seek to regain exclusion capabilities”).


8 Scholars from a range of disciplines, including those cited by Shachar, have grappled with the challenges posed by strategies of border externalization. Representative recent work includes David FitzGerald, *The Asylum Paradox: Remote Control of Forced Migration to the Global North* (forthcoming); Bill Frelick, Ian M. Kysel & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. MIGRATION & HUM.
as Shachar notes with respect to Australia’s externalization policies, “[d]espite domestic contestation and international condemnation, the major political parties in Australia have refused to reverse the policy of offshore processing.”

It appears that the core problem is not a lack of conceptual tools, but a lack of political will.

Although Shachar acknowledges “the blurring line between law and politics in the age of shifting borders,” she focuses her attention on law. Yet law alone will not save us, at least in its current forms. Notably, as Guy Goodwin-Gill and others have emphasized, the 1951 Refugee Convention, and corresponding customary international law norms, do “not deal with the question of admission, and neither [do they] oblige a state of refuge to accord asylum as such.”

I am thus less optimistic than Shachar that existing legal norms—which themselves are forged by deeply political compromises—can be activated to achieve the level of protection of non-nationals that the normative positions underpinning her approach appear to demand. As suggested below, even if more flexible interpretations of existing obligations were legally achievable, they would likely be unsustainable unless accompanied by a deep shift in political understandings. As Shachar notes, quoting Rainer Forst, “[i]f we do not understand how norms and interests intermesh to generate and reproduce power, we are condemned to failure in our efforts to understand political, legal, and normative orders, let alone transform them.”

Although it is natural for lawyers to look to law for answers, laws are necessarily embedded in existing political frameworks. In order to be effective, any reconceptualization of the scope and content of a state’s domestic and international legal obligations must ultimately be accepted by the state itself, in addition to other relevant stakeholders. Part I of this essay briefly traces the regulatory shift from location to identity that lies at the heart of Shachar’s account. Part II canvasses some of the persistent obstacles to states’ acceptance of constraints on their ability

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10 Id. at 38. See also id. at 38, n.118.


to regulate entry by non-nationals. Part III suggests that what I refer to as governance models of migration regulation might ultimately be better suited than advocacy models to addressing contemporary challenges of global human protection.

I. The Regulatory Shift from Location to Identity

The idea that state sovereignty entails an absolute right to exclude foreigners has a relatively recent pedigree.13 James Nafzinger observed in 1983 that “it is only a slight exaggeration to note that authority today for the proposition absolving the sovereign of any legal duty to admit aliens is derived ‘almost exclusively’ from turn-of-the-century common law precedent, even in writings from some countries outside the common law tradition.”14 This understanding, which has become deeply entrenched, has had profound implications for immigration law and policy. As Shachar and others have described, states have intensified efforts to deny individuals the opportunity to enter. As Thomas Gammeltoft-Hansen and James Hathaway have observed, “the politics of non-entrée is based on a commitment to ensuring that refugees shall not be allowed to arrive.”15 The “shifting border” is created by the exercise of control at the moment of encounter between a state’s authorities (or its proxies) and the immigrant, which might not coincide with the moment of encounter between the immigrant and the state’s territorial border.16

Well-documented strategies of non-entrée mean that, “in exercising sovereignty, states are shifting their focus from control over territory to control over people.”17 Consequently, as Alison Kesby has noted, “[t]he border is not that which is stable and delineated, but rather shifts in meaning, location, and the manner in which it is experienced.”18 In the evocative words of Marie-Laure Basilien-Gainche, “[t]he border is the migrant.”19


18 Id. at 102.

Shachar sees a “deep paradox” in these developments. On the one hand, “when it comes to controlling migration, states are willfully abandoning traditional notions of fixed and bounded territoriality, stretching their jurisdictional arm inward and outward with tremendous flexibility.” Conversely, however, “when it comes to granting rights and protections, the very same states snap back to a narrow and strict interpretation of spatiality which limits their responsibility and liability, by attaching it to the (illusionary) static notion of border control.” She critiques states’ insufficient guarantees of protection for vulnerable migrants, and also what she characterizes as states’ willful hypocrisy.

Although Shachar faults certain states for actual non-compliance, her core critique involves states’ arguable compliance with the letter—but not the spirit—of the legal commitments they have undertaken. In Shachar’s view, states such as Canada, the United States, and Australia have walked too fine a line “between skirting their constitutional and human rights obligations and the pretense to uphold them and to gain legitimacy by so doing.” Litigants have framed this objection as one based on the interpretive principle of good faith, challenging “the lawfulness of measures that were taken to prevent [legal obligations] ever being triggered.” Migration control thus takes place in a border zone between lawful and unlawful state behavior that is constructed and contested through authoritative interpretations of applicable laws.

Shachar’s account of the regulatory shift from location to identity “emphasiz[es] the core role played by law and legal institutions in the reinvention of the border in the presence of the sovereign authority to regulate migration, and further explores whether there are limits on such authority, and if so, how to activate them and by whom.” In so doing, she does not differentiate consistently among constitutional, statutory, and international sources of law. Yet the answer to “whether there are limits on such authority, and if so, how to activate them and by whom” often turns critically on differences among these types of legal regimes.


21 Id.

22 Id.

23 Id. at 55–56.


In particular, the relative lack of judicial enforcement mechanisms at the international level means that “activat[ing]” legal limits on governmental authority requires identifying provisions that are enforceable in domestic courts, as described below.\(^{27}\) Notably, although Shachar argues that “there is no inherent reason why the sovereign authority to control borders” ought to be free from judicial oversight,\(^ {28}\) she spends much more time on the extraterritoriality problem, and does not devote equal attention to arguments for subjecting the immigration regime as a whole to more rigorous judicial review.

There is a deeper challenge that surfaces when the lens widens from “law and legal institutions” to encompass the social and political context in which laws are embedded, and in which legal institutions operate. In addition to “activating” legal limits on governmental authority, we need to understand why that authority has been deployed to begin with. States are responsive to, and responsible for, their domestic constituencies. It is natural for activists to use the legal tools they currently have at their disposal and to interpret state obligations expansively, but it is also natural for states to interpret their legal obligations narrowly, and to craft policies that respond to political incentives while avoiding legal liability. As Thomas Gammeltoft-Hansen has cautioned, a predictable result in the refugee context is that “courts’ opinions that establish extraterritorial obligations under carefully circumscribed conditions may in some situations provide an indirect road map for executives to develop next generation deterrence measures creatively.”\(^ {29}\) Long-term answers to the problems Shachar identifies cannot come from courts, but only from new political compromises within and among states.

II. The Debate Over Extraterritorial Obligations

Within the existing legal framework, the regulatory shift from location to identity raises the critical question of extraterritorial protection of migrants. Shachar advocates “expanding the extraterritorial reach of human rights” to address the lack of sufficient legal protections for non-nationals outside a state’s border.\(^ {30}\) In particular, she proposes a “hinge-like strategy” under which “[w]here a country intentionally de-links migration control from its geographical borders, a correlated expansion of rights and protections for the individual must follow.”\(^ {31}\) This would involve: (i) expanding the extraterritorial reach of human rights, on the one hand, and (ii) relaxing the fixation on territorial access as a precondition for

\(^{27}\) Shachar, Ayelet. “The Shifting Border: Legal Cartographies of Migration and Mobility”, p. 48, n.150.

\(^{28}\) Id. at 59.


\(^{31}\) Id.
securing refuge, on the other.” The first part of this strategy calls for closing a protection “loophole” that states have identified by pushing human rights obligations out past a state’s geographic border. The European Court of Human Rights (ECtHR) increasingly has interpreted the geographic scope of the European Convention on Human Rights (ECHR) consistent with this proposal, although as many have observed one result has been that European states have outsourced migration controls to third states that are not bound by ECHR obligations. The second part would require going beyond what states have thus far agreed to do in the Refugee Convention, and would likely require securing political agreement as a precondition for implementation.

The clearest example of a doctrinal evolution towards functional, rather than strictly territorial, criteria for triggering a state’s human rights obligations lies in the jurisprudence of the European Court of Human Rights (ECtHR), whose decisions are binding on states parties to the European Convention on Human Rights (ECHR). Yet even the ECtHR’s landmark Hirsi Jamaa decision could not invent an international right to asylum. 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. … [T]he right to political asylum is not contained in either the Convention or its Protocols.

That said, Article 3 of the Convention does “impl[y] an obligation not to expel” an individual to a country where there are substantial grounds to believe the person would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment (in this case, in the form of repatriation to Somalia and Eritrea). In addition, Article 4 of Protocol 4 to the ECHR prohibits the collective expulsion of aliens. In the ECtHR’s view:

[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

32 Id. at 59.


35 Hirsi Jamaa at 113.

36 Id.
of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.\textsuperscript{37}

The ECtHR thus concluded in the \textit{Hirsi Jamaa} case that Italy could not avoid its obligations under the ECHR by using Italian ships to intercept migrants at sea.

Shachar contrasts the ECtHR’s approach to defining the scope of a state’s obligations under the ECHR to that of the U.S. Supreme Court in \textit{Sale v. Haitian Centers Council, Inc.}, which interpreted different legal obligations.\textsuperscript{38} In \textit{Sale}, Harold Hongju Koh—who later served as Legal Adviser to the U.S. Department of State—represented Haitians and Haitian organizations challenging 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.\textsuperscript{39} Justice Stevens wrote the majority opinion, which 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.”\textsuperscript{40} The majority concluded that neither the INA’s provisions nor the Refugee Convention’s \textit{non-refoulement} obligation were “intended to have extraterritorial effect,” notwithstanding “the moral weight of th[e] argument” to the contrary.\textsuperscript{41}

Justice Stevens’s opinion emphasized the voluntarist nature of treaty undertakings, and the risk of a purposive interpretation in exceeding the parties’ explicit commitments:

The drafters of the Convention and the parties to the Protocol—like the drafters of [INA] § 243(h)—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 unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.\textsuperscript{42}

\textsuperscript{37} Id. at 178.

\textsuperscript{38} Shachar, Ayelet. “The Shifting Border: Legal Cartographies of Migration and Mobility”, p. 61.


\textsuperscript{40} Id. at 160.

\textsuperscript{41} Id. at 179.

\textsuperscript{42} Id. at 183.
In addition to making a point about treaty interpretation, this passage encapsulates a broader concern about judicial interpretations outpacing political agreement. On the one hand, particularly in the context of individual and human rights, we rely on courts as a backstop for political actions that abrogate protections afforded by fundamental laws. On the other hand, as backlash against the ECtHR illustrates, the legitimacy and authoritativeness of courts, and the stability of the legal systems in which they operate, can depend on the exercise of a sufficient degree of judicial restraint.

Lord Bingham of Cornhill echoed this sentiment in his opinion for the U.K. House of Lords in *R. v. Immigration Officer at Prague Airport ex parte European Roma Rights Centre*: “However generous and purposive its approach to interpretation, the court’s task remains one of interpreting the written document to which the contracting states have committed themselves.” In that case, and perhaps anticipating Shachar’s critique of duplicitousness, Lord Bingham emphasized that “there is no want of good faith if a state interprets a treaty as meaning what it says and declines to do anything significantly greater than or different from what it agreed to do.” This meant declining to interpret the term “refugee” as including Czech nationals of Romani origin who were denied visas to enter the United Kingdom by British immigration officers temporarily stationed at Prague Airport. Although the situation of visa denial is, on its face, quite different from maritime interdiction, the arguments in the *Prague Airport* case illustrate one possible version of Shachar’s proposal to “relax[] the fixation on territorial access as a precondition to securing refuge.” In rejecting this proposal as going beyond the requirements of existing law, Lord Bingham quoted Dr. Nehemiah Robinson, director of the Institute of Jewish Affairs of the World Jewish Congress, who wrote at the time the Refugee Convention was drafted that “Article 33 concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally .... [If] a refugee has succeeded in eluding the frontier guards, he is safe; if not, it is his [sic] hard luck.” One might disagree vehemently with this distinction and find it unjust or arbitrary, but one cannot simply wish it away.

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43 House of Lords. *R. v. Immigration Officer at Prague Airport ex parte European Roma Rights Centre*, vol. 55, 2004, p. 18 (Lord Bingham). See also Id., quoting Brown v. Stott [2003] 1 AC 681, 703 (indicating that “caution is needed ‘if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept’”).

44 *R. v. Immigration Officer at 19* (Lord Bingham).


This is not to say that one cannot interpret the Refugee Convention’s non-refoulement obligation as applying extraterritorially, at least in certain circumstances. Notably, the Office of the United Nations High Commissioner for Refugees (UNHCR) followed the Human Rights Committee’s approach to the interpretation and application of the International Covenant on Civil and Political Rights (ICCPR) and concluded:

In determining whether a State’s human rights obligations with respect to a particular person are engaged, the decisive criterion is not whether that person is on the State’s national territory, or within a territory which is de jure under the sovereign control of the State, but rather whether or not he or she is subject to that State’s effective authority and control.

As indicated above, Shachar embraces this approach as an antidote to states’ attempts—through strategies such as interdiction on the high seas and screening at foreign airports—to avoid incurring legal obligations towards refugees by deploying the coercive power of the state to prevent refugees from reaching the state’s geographic border. Yet UNHCR has espoused this more expansive approach for over a decade, without persuading national courts to embrace it or legislatures to adopt it.

Regional human rights bodies have been more amenable to embracing purposive approaches; indeed, Lord Bingham endorsed the reasoning of the Inter-American Commission of Human Rights, which found that the United States had breached both the Inter-American Declaration of the Rights and Duties of Man and the Refugee Convention in its treatment of Haitians who were—unlike the Czech Roma—“certainly outside Haiti, their country of nationality.” In Lord Bingham’s assessment:

There would appear to be general acceptance of the principle that a person who leaves the state of his nationality and applies to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned to the first state without appropriate enquiry into the persecution of which he claims to have a well-founded fear. But that principle, even if one of customary international law, cannot avail the appellants, who have not left the Czech Republic nor

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48 Advisory Opinion at 35.

presented themselves, save in a highly metaphorical sense, at the frontier of the United Kingdom.\footnote{R. v. Immigration Officer at 26 (Lord Bingham). The House of Lords did, however, find that the Prague operation violated the domestic and international prohibition on discrimination.}

Lord Bingham reasoned that “the appellants’ position differs by an order of magnitude from that of the Haitians, whose plight was considered in Sale” because “[t]he appellants were at all times free to travel to another country, or to travel to [the United Kingdom] otherwise than by air from Prague.”\footnote{Id. at 21 (Lord Bingham).} In his view, appellants’ encounter with U.K. authorities in the Prague airport could not be held to create legal obligations on the United Kingdom precisely because states have refused to accede to a regime for refugee protection triggered by anything short of presentation at the \textit{physical} (rather than the “metaphorical”) frontier.

What, then, lies in the way of Shachar’s proposal to realign the legal frontier of protection with the “metaphorical” frontier of the encounter between an individual and the destination state’s authorities or proxies, wherever that encounter takes place? As Shachar notes, the United States officially took the contrary position in 2007, rejecting the UNHCR’s conclusion that the \textit{non-refoulement} obligation in the 1951 Convention and 1967 Protocol applies extraterritorially.\footnote{Shachar, Ayelet. “The Shifting Border: Legal Cartographies of Migration and Mobility”, p.51, n.165.} In his capacity as State Department Legal Adviser, Harold Koh subsequently prepared two legal memos endorsing the extraterritorial application of the ICCPR\footnote{“Memorandum on the Geographic Scope of the International Covenant on Civil and Political Rights.” \textit{United States Department of State}, Office of the Legal Adviser, 19 Oct. 2010, \url{https://www.justsecurity.org/wp-content/uploads/2014/03/state-department-iccpr-memo.pdf}.} and the \textit{non-refoulement} obligation in Article 3 of the Convention Against Torture,\footnote{Koh, Harold Hongju, “Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict.” \textit{United States Department of State}, Office of the Legal Adviser, 21 Jan. 2013, \url{https://www.justsecurity.org/wp-content/uploads/2014/03/state-department-cat-memo.pdf}.} yet neither of these analyses was officially adopted by the U.S. Government. Although more expansive interpretations of states’ legal obligations have been endorsed by scholars and some regional and international bodies,\footnote{See, e.g., Méndez, Juan. “Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.” \textit{United Nations Commission on Human Rights}, Office of the High Commissioner, U.N. Doc. A/HRC/37/50, 26 Feb. 2018, p. 53 (Advance Unedited Version ) (emphasizing that “the principle of non-refoulement applies at all times, even when States operate or hold individuals extraterritorially, including on the high seas” and that it prohibits “rejections at the frontier” in the form of pushbacks or border closures because such measures “aim to exercise effective control over the physical movement of migrants” and therefore “bring affected migrants within the jurisdiction of the operating State for the purposes of the prohibition of refoulement”).}
destination states themselves—including, by and large, their domestic judiciaries—have not followed suit. As Lord Hope of Craighead reasoned in the Prague Airport case, the Refugee Convention “does not require the state to abstain from controlling the movements of people outside its borders who wish to travel to it in order to claim asylum. It lacks any provisions designed to meet the additional burdens which would follow if a prohibition to that effect had been agreed to.”\textsuperscript{56} Absent an enlarged and more protective treaty regime, those seeking protection must argue that they are entitled to such protection under existing agreements. The conceptual and doctrinal tools for making such arguments have existed for quite some time; the challenge lies in persuading the relevant decision-makers to adopt them.

III. Advocacy vs. Governance Models of Transnational Migration

When Shachar looks at the commitments states have already made towards vulnerable migrants, she sees a different picture than destination states themselves purport to see. In her view, destination states “are proving endlessly enterprising in trying to ‘release’ themselves from domestic, regional and international law protection obligations they have undertaken, without formally withdrawing from them.”\textsuperscript{57} As explored above, she criticizes states for “attempt[ing] to skirt responsibility in a global system whereby the standard interpretation of access to protection is tied to a fixed interpretation of territoriality.”\textsuperscript{58} Yet, the global legal system is, by and large, defined by the undertakings and understandings of states. To be sure, aspirational texts can, over time, become embedded in collective understandings and assume the status of binding commitments, just as expansive interpretations of existing commitments can, if accepted by states, prevail over narrower constructions. Yet if anything, the current rise of “populist nationalism” in many destination states, and the deployment of immigrant threat narratives, makes such a process appear less, not more, likely to occur.\textsuperscript{59} It might well be true that, as Shachar emphasizes, “international cooperation is possible.”\textsuperscript{60} However, the ideological benefits associated with accepting refugees from Communist countries during the Cold War, for example, no longer exist in the post-Cold War

\textsuperscript{56} House of Lords. \textit{R. v. Immigration Officer at Prague Airport ex parte European Roma Rights Centre}, vol. 55, 2004, p. 64 (Lord Hope).

\textsuperscript{57} Shachar, Ayelet. “The Shifting Border: Legal Cartographies of Migration and Mobility”, p. 57.

\textsuperscript{58} Id. at 46.

\textsuperscript{59} As Ralph Wilde notes, “[o]bjections to non-refoulement and extraterritorial applicability have to be understood, in part, as objections to the legal protection of rights for foreigners, especially given the xenophobic turn commentators have identified and are identifying for the period corresponding to that under present analysis, where non-entrée policies, extraterritorial migration-policy-activities, and the backlash against human rights protection, have taken place.” Wilde, Ralph, “The Unintended Consequences of Expanding Migrant Rights Protections.” \textit{American Journal of International Law Unbound}, vol. 111 2018, p. 490 (2018).

\textsuperscript{60} Shachar, Ayelet. “The Shifting Border: Legal Cartographies of Migration and Mobility”, p. 70.
era. The task is to identify other incentives that can be deployed to motivate countries to more evenly share the burdens associated with the transnational movement of people, and to address the underlying causes of displacement.61

In considering these broader questions, Shachar “beg[s] to differ” with Hannah Arendt’s assessment that the problem of refugees is one of “political organization” rather than one of space.62 Shachar argues that “the challenges posed by current migration flows encompass both our notions of space and political organization, and, as a result, any new answers will require addressing these combined factors in tandem.”63 By way of example, she suggests thinking in “a more out-of-the-box fashion” about “the allotment of designated parcels of land for ‘refugee nations’ to rebuild their lost homes and political autonomy.”64 Yet it is unclear what would lead us to expect a “refugee nation”—were an accessible and habitable parcel of land fortuitously available for resettlement—to avoid replicating the very policies of exclusion and non-entrée that current states exhibit.

It is worth considering Arendt’s reflections in context. As Shachar notes, Arendt observed:

What is unprecedented is not the loss of a home but the impossibility of finding a new one. Suddenly, there was no place on earth where migrants could go without the severest restrictions, no country where they would be assimilated, no territory where they could find a new community of their own. This, moreover, had next to nothing to do with any material problem of overpopulation; it was a problem not of space but of political organization.65

Arendt posited that the true “calamity of the rightless” was that “they no longer belong to any community whatsoever.”66 “Space” (a term she used quite literally to mean overpopulation) was, and is, not the problem preventing destination states from incorporating displaced persons into their respective political communities. Rather, as Arendt correctly identified, the problem was, and is, one of “political organization”: the fact that destination states remain, as a general matter,


63 Id.

64 Id. at 66 n.202.


66 Id. at 295.
unwilling to absorb large migrant populations. The United Nations has rightly made migration a top priority, but the prospects of a new framework for sharing responsibility for human security across borders—particularly absent the moral and political leadership of destination states—remain uncertain at best.

Conclusions

Shachar recognizes that solutions to the problems she describes will require “daring political leadership that is currently short on supply,” and that “[a]ny sustainable solution or comprehensive response to migration pressures in an unequal world requires a wide-ranging approach that will facilitate development measures, expansion or addition of new definitions of people in need of protection, and opening up new legal channels of migration and mobility.” We do not lack visions of what these solutions could look like; what we lack are effective strategies to combat the political mobilization of xenophobia, and programs to alleviate the deep and growing inequality within and between societies that drives destination states to implement restrictive measures to begin with. Rather than spending too much time decrying destination states as hypocritical, we should focus our attention on identifying and addressing the political pressures that produce narrow interpretations of existing legal obligations and inhibit states from undertaking new, broader commitments.

67 As Moria Paz elaborates: “Strong states, rich with resources, may well refuse to sign on to such a law [providing refugees with a right to enter and to remain]. And leaders who do might be punished by their electorates.” Paz, Moria. “The Incomplete Right to Freedom of Movement.” American Journal of International Law Unbound, vol. 111, 2018, p. 517.


70 Id. at 71 n.213.