



Border Regimes and Human Rights

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I Introduction

The question I want to address in this paper is what a state's border regime would have to be like in order to respect the human rights of those who are subject to it. By a 'border regime' I mean the set of rules and procedures that apply to those who are trying to enter the state's territory, encompassing a number of questions such as who is given legal permission to enter, what procedures are applied to those whose admission status is as yet undetermined, and what happens to people who are present on the territory without having rights of residence – for instance asylum seekers and illegal migrants. There is little doubt that the border regimes of existing states, whether liberal or non-liberal, do raise human rights issues; indeed it has been said that 'the treatment [by states] of non-nationals is an area of persistent, serious and systematic human rights violations on a world scale'.² Such abstract claims are often backed up by vivid images of the treatment suffered by immigrants at the hands of those physically responsible for controlling borders, whether it is a land border with barbed wire and guards with guns, small boats laden with refugees being turned back on the high seas, or the miserable conditions endured by those held indefinitely in detention camps following entry.

It is possible to approach this question through the medium of international human rights law. There are indeed fat volumes setting out the many declarations, covenants,

¹ This article was originally written for the workshop on 'Borders and Human Rights', Academic Center of Law and Business, Tel Aviv, January 10-11, 2012. It was also given as a Moffett lecture at Princeton University on February 23rd 2012, and presented to conferences on 'Walls and Fences: The Politics and Ethics of Border Barriers', Yale University, April 13-14, 2012, and on 'Ius Migrandi', University of Palermo, June 4th, 2012. I should like to thank the audiences on all these occasions for helpful comments, as well as the referees for this Journal for their criticisms and suggestions. I am especially grateful to Elizabeth Finneron-Burns for research assistance that helped me significantly in writing the paper.

² T. Clark, 'Human Rights and Expulsion: Giving Content to the Concept of Asylum', *International Journal of Refugee Law*, 4 (1992), p. 193.

and treaties, as well as the several bodies of case law, that lay down the human rights standards that are supposed to apply to cross-border migrants of different kinds.³ Although one can learn much by reflecting on the evolution of international law in this area, I am going to dig a bit deeper and adopt the perspective of political philosophy. From this perspective, one can't assume that everything that is awarded human rights status by international lawyers is genuinely a human right, nor on the other hand that everything that *should* be recognized as one is already so recognized. Instead I shall examine the principles that we should apply to decide whether any given border regime respect human rights, or fails to do so. The article is organized as follows. In section II I explain why border regimes should be judged in human rights terms, and sketch in the theory of human rights that informs the remainder of the article. In section III I assess the claim that there is a human right to immigrate that would condemn all border controls as right-violating, and conclude that no such right exists. In section IV I examine the claims of refugees, and ask both what states must do to verify their status as asylum-seekers, and under what circumstances it may be justifiable to resettle refugees in third countries. In section V I ask whether discriminatory admissions policies, applied to those who are not refugees, may violate the human rights of those discriminated against; I conclude that such policies are certainly unjust, but not necessarily rights-violating. Finally, in section VI, I consider the position of those who find themselves inside a country without having a legal right of residence: illegal migrants, and asylum seekers whose status is so far undetermined; I ask what responsibilities the state has to protect their human rights. I begin by saying a few words about why political philosophers have so far had difficulty in getting to grips with the phenomenon of cross-border migration.

³ On refugees in particular, see, for example G. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (Oxford: Clarendon Press, 1996); J. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005).

II How to understand human rights

Political philosophy as it has developed from the time of, say, Hobbes down to the present has concerned itself centrally with the relation between the state and its subjects or citizens. Observing the enormous power that the state wields over the lives of its members, political philosophy asks how this power can be made legitimate, and what obligations the members owe to one another as well as to the state itself. It is tacitly assumed that the relationship between state and citizen runs from birth to death, an assumption made explicit in recent times in the work of John Rawls, who, accordingly, had almost nothing to say about the movement of people between states.⁴ Of course, in response to the growth of international institutions, and the phenomenon of globalization more generally, attention has turned to issues of global governance and global justice – understood as the principles that should govern our (institutionally-mediated) relations to distant strangers who we might help, or harm, by the external policies we adopt. But the relation between the state and the immigrant, at the moment when the immigrant stands at the state’s door and asks to enter, is different from either of these.⁵ The immigrant is not a distant stranger, because she is directly subject to the state’s power in the way that the foreigner is not; what the state decides to do may have an immediate and profound impact on her life. On the other hand, she is not yet part of the system of reciprocal obligation that obtains among citizens, and so she cannot automatically claim the rights and

⁴ Rawls said that his theory of (social) justice was meant to apply to ‘an ongoing society, a self-sufficient association of human beings which, like a nation-state, controls a connected territory ... a closed system; there are no significant relations to other societies, and no one enters from without, for all are born into it to lead a complete life’ (J. Rawls, ‘Kantian Constructivism in Moral Theory’, in J. Rawls, *Collected Papers*, ed. S. Freeman (Cambridge, MA: Harvard University Press, 1999), p. 323.) For Rawls’ cursory treatment of migration in his later account of international justice, see J. Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), pp. 8-9, 39n.

⁵ I shall use ‘immigrant’ broadly to refer to anyone who seeks to enter the state for a substantial period of time, whether or not they intend to remain permanently. In other words, I exclude tourists and people travelling on business, but include refugees and others who may envisage returning home eventually after an extensive stay. For other purposes, a narrower definition of ‘immigrant’ may be useful.

privileges that go along with that, any more than a person who has applied to join a club can already lay claim to the benefits of membership. So we can't assume that the principles developed within our theories of social and global justice respectively apply straightforwardly here.⁶

We need, in other words, an account of justice that is tailored to the particular case of a state's border regime. A central part of that account must refer to the human rights of immigrants. This will not be exhaustive: justice covers more than human rights proper.⁷ Why is it appropriate to invoke human rights here? Since human rights are universally binding, they must apply to the relationship between state and immigrant as well as to other relationships. Even though the doctrine was originally developed to apply to the internal relationship between state and citizen, it extends naturally to the state's treatment of non-citizens.⁸ The only way to avoid this conclusion would be to say that when people apply to immigrate, they resign their human rights in relation to the state they approach, as boxers are said to do with respect to their opponents when they enter the ring. But this would be implausible, not least because much migration is undertaken out of necessity rather than choice.

Yet if we are going to appeal to human rights as a necessary, although not sufficient, criterion of an ethically acceptable border regime, we must be careful only to invoke human rights proper, and not the fuller set of rights that belong to the citizens of liberal democracies, especially, by virtue of their citizen status. We must avoid the rights inflation that is so prevalent in our culture, and may even infect parts of international law. That is why we need to provide human rights with a philosophical grounding. I have argued elsewhere that grounding a human right involves showing

⁶ For a fuller discussion of the *sui generis* legal relationship that exists between a prospective immigrant and the state that she has applied to enter, see M. Blake, 'Immigration and Political Equality', *San Diego Law Review*, 45 (2008), 963-980.

⁷ On this point, see J. Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), *passim*.

⁸ Or at least it does so when what is at stake are the so-called negative human rights – rights that protect against the infliction of various kinds of harm. For instance the reasons why the state may not torture its own citizens apply with equal force to the torture of aliens.

that it forms an essential part of a set of rights which together provide the right-holders with the opportunity to lead a minimally decent human life.⁹ We begin with the core idea of a human life itself, as made up of a number of activities which are reiterated across the many more specific forms of human life that have arisen at different times and places. We can then identify a set of basic needs which must be fulfilled if a decent human life is to be possible – material needs such as food and shelter, but also needs to engage in communal life, to form intimate relationships, to express one’s beliefs and cultural identity, and so forth. Human rights secure the conditions under which these needs can be met. They do so either by protecting people from threats that would prevent them satisfying their needs – say a threat of injury or coercion if a person does X or Y (plays music or engages in a religious ritual, say) – or by imposing obligations to provide resources that fulfil needs, such as food or basic health care. The move from basic needs to human rights is not entirely straightforward, because one has to consider the effect that recognizing a right has not just on the right-holder himself, but on others who would be subject to the obligations that the right imposes.¹⁰ For that reason one should think of any particular right as enjoying human rights status when it forms part of a (mutually consistent) *set* of rights whose fulfilment provides the conditions for a minimally decent life for all.

We should note that the list of human rights that emerges will contain not only substantive rights, but also procedural rights, such as the right to participate in political decision-making, and the right to a fair trial on the part of those accused of crimes. Such rights do not of course correspond to human needs directly – there is no ‘need’ to participate, or to be involved in certain legal procedures. Their role is to ensure that substantive rights are fulfilled, by protecting people against predictable threats or providing mechanisms that force states to discharge their rights-related obligations. In order to ground them, therefore, we have to appeal to empirical

⁹ See D. Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), ch. 7, and D. Miller, ‘Grounding Human Rights’, *Critical Review of International Social and Political Philosophy*, 15 (2012), 407-27 – the latter account of human rights revises the former in certain respects.

¹⁰ In case this is not intuitive, consider the suggestion that there is a human right to the very best health care available at any historical moment. This would be disqualified once we reflect on the impact that realizing this right would have on the protection of other human rights, by virtue of the enormous cost of fulfilling it.

evidence that shows that they perform this function. But so long as it can be demonstrated that these rights are essential members of the set of rights under which human needs can most reliably be satisfied, they qualify as genuine human rights. This is important for what follows, because it will turn out that it is very often these procedural rights that are violated by existing border regimes. Of course, as signalled earlier, it is important not to confuse (procedural) human rights with the corresponding rights of citizens: we cannot assume that *everything* that citizens enjoy as a right of citizenship by virtue of their special status will translate into a human right. To illustrate: the fact that immigrants, at the point at which they encounter the border regime, do not have the right to vote for the government of the state they are trying to enter, does not by itself entail that their human rights are being violated.¹¹ To support that latter claim one would have to show that such a wide interpretation of the right of political participation was essential.

III Is there a human right to move freely across borders?

Armed with this understanding of human rights, we are now in a position to ask a quite basic question: do border regimes, by their very nature, constitute a violation of human rights? In other words, is there a human right to move freely across the world that *any* border regime, regardless of what specific controls on movement it imposes, is bound to abrogate? Although not often explicitly defended, this supposed right seems to lie behind a number of defences of the open borders position on immigration.¹² So it seems important to discuss it first, before looking at the more

¹¹ For the much weaker proposal that potential immigrants have the right to participate in political decisions over the border regimes to which they will be subject, see A. Abizadeh, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders', *Political Theory*, 36 (2008), 37-65; for further debate on the grounds for this proposal, see D. Miller, 'Why Immigration Controls are not Coercive: a reply to Arash Abizadeh', *Political Theory*, 38 (2010), 111-120, and A. Abizadeh, 'Democratic Legitimacy and State Coercion: A Reply to David Miller', *Political Theory*, 38 (2010), 121-30.

¹² For examples, see J. Carens, 'Migration and Morality: a liberal egalitarian perspective' in B. Barry and R. Goodin (eds.), *Free Movement: ethical issues in the transnational migration of people and of money* (Hemel Hempstead: Harvester Wheatsheaf, 1992), pp. 27-8; J. Carens, 'A Reply to Meilaender: Reconsidering Open Borders', *International Migration Review*, 33 (1999), 1082-1097, pp. 1093-6; T.

specific human rights that border regimes may violate. I shall argue that there is no human right to move freely across borders: states that impose border controls are not, merely by virtue of so doing, abusing the human rights of those they prevent from entering.¹³

If we approach this question through the theory of human rights sketched above, the issue is whether the right to move freely across borders, understood as including the right to remain in the society one has entered, can be defended as essential to the protection of basic human needs. One argument often made is that people must have the right of exit from their present society in order to escape the various threats and deprivations to which they may be subject in that society, and this right makes no sense without a corresponding right to enter. But this could not be used to justify an unlimited right of free movement. It can only support a much more limited right, namely the right to enter society S1 when this provides the only way of escaping from the human rights violations that are occurring in society S2. So it would not apply at all in the case of those whose human rights were reasonably secure in their country of residence, and in the case of others, it reduces to something like the right of *non-refoulement* (to be discussed more fully later), that is the right not to be returned to a place where one's most important human rights are put at risk. Society S1 can refuse entry to people fleeing from S2 so long as some other reasonably safe society is willing to take them in.

Behind the counter-argument I have just presented lies the assumption that human rights constitute a kind of moral minimum: where a less extensive right will do the

Hayter, *Open Borders: The Case Against Immigration Controls*, 2nd ed. (London: Pluto Press: 2004), pp. 149-52; and M. Dummett, *On Immigration and Refugees* (London: Routledge, 2001), ch. 3 (Dummett, however, draws back from asserting that there is a strong right to immigrate). For the most explicit defence of the right in question that I know of, see the forthcoming paper by Kieran Oberman, 'Immigration as a Human Right'.

¹³ I draw here on my fuller treatment in 'Is there a human right to immigrate?' in S. Fine and L. Ypi (eds.), *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford: Oxford University Press, forthcoming). The discussion in this section concerns a universal right to move across state borders possessed by everyone regardless of their particular circumstances. In the following section of the article I examine the special claims of refugees.

job, asserting a more extensive right *as* a human right is unjustified. The reasons for this assumption were foreshadowed above. Any right that is added to the list of human rights is likely to impose burdens on others, whether these are in the form of restrictions of their freedom, or of obligations that they are required to discharge. Your human right to food could at most impose on me an obligation to provide adequate food in the form that is most convenient to me (costs me the least labour to produce, for example), not an obligation to provide food in the form that you happen to prefer. Supplying the latter would be generous, and might be required by some particular agreement or arrangement we had entered into, but could not be demanded as a human right. Since the right to move freely across borders, if exercised on a wide scale, might prove very costly to the members of receiving societies, one has to show that no lesser right would be sufficient to realise the right of exit. That seems very unlikely to be true. Even if one thought that allowing states discretion in deciding whether it was safe to deny entry to particular individuals emerging from dangerous societies left those individuals too vulnerable to arbitrary decisions by border officials, an alternative would be an internationally managed system of refugee flows where each qualifying person would be allocated a specific country of entry. Admittedly such a system would be difficult to construct in practice, for political reasons. But these same reasons apply with even greater force to implementing an international right of free movement. The point is that the availability of an alternative mechanism is sufficient to defeat the claim that the right of exit entails an unrestricted right to immigrate.

The same premise, that human rights must be interpreted minimally, entails that more direct arguments for the right to immigrate freely also fail. These often rely on citing instances in which people have specific interests that can only be pursued if they are allowed to enter S1 – those who fall in love with people living in S1, or those who want to practise a religion that as it happens only has adherents within that society.¹⁴ But if one begins with a conception of human rights as protecting the conditions for a minimally decent human life, these interests are too specific to ground human rights proper. There are indeed (genuine) human rights to engage in intimate loving relationships, and to practise religion, but these should be construed as generic in

¹⁴ For these cases, and others, see Oberman, ‘Immigration as a Human Right’.

character – as the right to a reasonable opportunity to carry out these activities. After all there are several reasons why a particular instance of the generic interest may fail to be realised: the person one loves may decline to reciprocate, or there may be material barriers to the relationship that neither is willing to overcome. In the religious case, the congregation may exercise its right of free association and refuse to admit the would-be adherent. Under these circumstances, the person in question has to search for alternatives to fulfil the human need that is at stake. The same applies to the person whose quest is frustrated by border controls. So long as a reasonable range of alternatives – hard to specify precisely – remains accessible, the relevant human rights have been fulfilled.¹⁵

A challenge to this argument is that it cannot explain why the human rights that we support domestically have such a wide scope. If human needs are met so long as one has ‘a reasonable range of alternatives’, why do we insist that the state should not, for example, prohibit *any* religion; or why do we not allow it to confine people within a smaller geographical area inside the state that is large enough to meet the needs served by freedom of movement – a Canadian Province or an American State, for instance? Why does the human right to ‘freedom of thought, conscience and religion’ entail that *all* religions may be practised rather than, say, half-a-dozen suitably varied ones that the state decides to licence? Why would the right to freedom of movement not be satisfied if the U.S. federal government were to allow residents to move freely within California, say, but not beyond its boundaries? The answer to these questions must I believe involve reference to the original idea of human rights as bulwarks against the power of the state. Allowing the state to judge which religions were to be permitted or which areas of the country people were to be allowed to travel to would also give it enormous power to oppress vulnerable groups. In order to fix the scope of

¹⁵ One can construct hypothetical examples in which a component of that range is only available in a single state – for example a world in which every state but one forbids same-sex partnerships and persecutes people who are openly gay. In that case, the one liberal state would *prima facie* be obliged to admit all gay people who applied to enter on human rights grounds (although the huge numbers prospectively involved would bring competing considerations into play). Although the example is far-fetched, it usefully highlights the distinction between a generic interest – in this case having the opportunity to form intimate relationships with members of one’s own sex – and a specific one – having the opportunity to form such a relationship with Peter, say.

particular human rights such as freedom of movement, we have to make judgements about the dangers that may follow from the misuse of state power. Permitting states to control the inward movement of people across their borders does not appear to present similar dangers, because the state's power to oppress outsiders is limited by the fact that these outsiders can choose which states they attempt to enter. There are not long queues of people seeking to enter North Korea or Burma under the generals.

This is by no means to say that border regimes, even of liberal states, pose no human rights issues. As we shall shortly see, such issues do indeed arise, and they are difficult to resolve. All I have tried to do in this section is show why the very existence of such regimes is not an offence against human rights. Domestic freedom of movement and international freedom of movement are not on all fours, as the critics of border controls suggest.

IV The human rights of refugees

Under what circumstances may states refuse entry to potential immigrants without violating their human rights? Most discussion of this issue begins with the case of refugees and deploys the principle of *non-refoulement* which 'prescribes, broadly, that no refugee should be returned to any country where he or she is likely to face persecution or torture'.¹⁶ The clear implication of this principle is that states may not deny entry to people who have a valid claim to refugee status and where the only alternatives are to take them in or to return them to the country from which they have fled. To do the latter would be to infringe their human rights because, although the state that refused entry would not *directly* be involved in perpetrating rights violations, it would be exposing the refugees to a serious risk of having their basic rights, including the right to life, violated by others.¹⁷

¹⁶ Goodwin-Gill, *The Refugee in International Law*, p. 117. Note that this principle, in the form stated, sets quite narrow limits to the conditions that prohibit the return of a refugee ('persecution or torture'). In what follow I shall adopt a somewhat wider interpretation that would prohibit a person being returned to a country where her human rights would be seriously threatened, which I think captures the spirit if not the letter of the international law principle.

Two questions arise from the principle of *non-refoulement*. One concerns the steps that a state is required to take in order to judge whether the person claiming refugee status falls under the principle – whether he or she ‘has a well-founded fear of persecution or faces a substantial risk of torture’.¹⁸ The other is whether the state may be justified in sending the refugee to some third country in which his or her rights will be reasonably secure. I will examine them in reverse order.

In general, we can assume it is an arbitrary matter which state the refugee approaches in his search for asylum. Either he makes a choice when deciding which flight or ship to board, or he has no choice but to flee to the country that borders the one he is escaping from. If that is not the case – if there is some special connection between the refugee and the country of asylum (for instance he has family connections in that country, or he is owed rectification because of its involvement in creating the situation from which he is now trying to escape¹⁹) – then the issue is straightforward: the state must take him in. In other cases, however, the obligation is far less clear. Just because the refugee’s claim against the receiving state is arbitrary, that state (and its citizens) may ask why it has any special responsibility to admit him.²⁰ That question is a good one if other states are equally well placed to grant asylum, and if the effect of arbitrary choice is not to distribute refugees in a reasonably fair way between states – i.e. if they tend to cluster in particular states that are more attractive for reasons not having inherently to do with the protection of human rights. Or as Matthew Gibney

¹⁷ The nature of the state’s obligation here is illuminated by Joseph Carens in ‘Who Should Get in? The Ethics of Immigration Decisions’, *Ethics and International Affairs*, 17 (2003), 95-110, who explains why the state has a stronger reason not to ‘send a person back to the country of origin to be tortured or killed’ than to ‘leave someone languishing in a refugee camp’ by reference to the nature of the state’s causal involvement with the outcome (p. 101).

¹⁸ Goodwin-Gill, *The Refugee in International Law*, p. 137.

¹⁹ An example often referred to here is the United States’ willingness to accept large numbers of refugees from Vietnam following its involvement in the Vietnam War.

²⁰ For a discussion of the general issue of distributing responsibilities, see my essays ‘Distributing Responsibilities’, *Journal of Political Philosophy*, 9 (2001), 453-71 and ‘The Responsibility to Protect Human Rights’ in L. Meyer (ed.), *Legitimacy, Justice and Public International Law* (Cambridge: Cambridge University Press, 2009).

puts it, contemplating the effects of removing the current barriers to movement which quite severely restrict refugees' choice of where to seek asylum, 'it seems likely that new and perhaps equally arbitrary inequalities between states would emerge. This is so because there is no reason to believe that the settlement patterns of refugees and asylum seekers would track morally relevant differences between states, such as GDP or total population'.²¹

In these circumstances, we might envisage three possible solutions, in descending order of attractiveness from the refugees' point of view. First, states might agree on a set of criteria for distributing refugees 'fairly' and a mechanism for determining how many refugees in any time period each state is required to admit.²² Achieving such an agreement is going to be a difficult, if not impossible, task, but supposing it can be reached, then each state's obligation is well-defined; it must admit as many refugees as the agreement requires but not more than that, since the remainder are now other states' responsibility. Second, states might enter into a series of bilateral arrangements that allow them to 'export' refugees to countries willing to take them in, in return for financial support. Here no country is obliged to accept any fixed number of refugees, but it does have an obligation to ensure that refugees who seek to enter are at least given refuge in a safe country, even if under relatively poor conditions (crowded refugee camps, for example). Third, states might try to pass the responsibility on to one another by putting in place mechanisms that deter asylum-seekers from even reaching their borders, for example requiring them to obtain visas

²¹ M. Gibney, 'Forced Migration, Engineered Regionalism and Justice between States' in S. Kneebone and F. Rawlings-Sanaei (eds.), *New Regionalism and Asylum Seekers* (New York and Oxford: Berghahn Books, 2007), p. 67. See also here T. Kritzman-Amir, 'Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law', *Brooklyn Journal of International Law*, 34 (2009), 355-93, Part I.

²² For proposals of this kind, see J. C. Hathaway, and R. A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Journal*, 10 (1997), 115-211, and P. Schuck, 'Refugee Burden-Sharing: A Modest Proposal', *Yale Journal of International Law*, 22 (1997), 243-97. They are criticised, though more on political than philosophical grounds, in D. Anker, J. Fitzpatrick and A. Shacknove, 'Crisis and Cure: a Reply to Hathaway/Neve and Schuck', *Harvard Human Rights Journal*, 11 (1998), 295-310. For a comprehensive review of these and other proposals, see Kritzman-Amir, 'Not in My Backyard'.

before they board planes, or refusing to allow them to disembark from ships that will travel on to a second country.

How do these solutions look from a human rights point of view? The first solution, assuming that it works, protects the human rights of the refugees. They may not be admitted to the state to which they have chosen to apply for asylum, since a state that has fulfilled its quota is entitled to pass refugees on to somewhere else. But I have already in section II rejected the suggestion that there is a human right to enter the country of your choosing, and this applies to refugees as much as to anyone else. What if it does not work because some states refuse to take in their allotted share despite having signed the agreement? In these circumstances compliant states do not infringe human rights by declining to take more refugees than the quota requires, although they do have an obligation to try to ensure that the agreement is respected by, for instance, sanctioning the non-compliant states.²³

The second solution is worse than the first because it may place an unfair burden on economically poor states to accept large numbers of refugees, and also because from the refugees' own point of view their living conditions are likely to be considerably worse if they are denied access to a developed country and obliged to settle in a developing one. Human rights are only violated, however, if the conditions are so bad that other rights – to subsistence, shelter or basic medical care, for instance – go unfulfilled. It is not acceptable from a human rights point of view, therefore, for states to discharge their obligations simply by sending refugees to places where they are not likely to face persecution or torture; all their human rights must be secure in the place to which they are sent. This also involves taking a longer term view: it is not acceptable for the refugees to be permanently accommodated in camps, for instance. Either there must be a reasonable prospect that they can return to their original countries when the human rights situation there has improved; or they must

²³ I have spelt out the underlying rationale that supports this claim in 'Taking Up the Slack? Responsibility and Justice in Situations of Partial Compliance' in C. Knight and Z. Stemplowska (eds.), *Responsibility and Distributive Justice* (Oxford: Oxford University Press, 2011).

be given the opportunity to build a new life and integrate into the country that has taken them in.

The third solution is plainly a human rights disaster if every state employs the same preventive measures to stop refugees arriving at the border and registering their claim to be admitted. In a technical sense the principle of *non-refoulement* has been complied with, because no-one is being ‘returned’ – they are simply being prevented from leaving their countries of origin. But from a material point of view the effect is the same, because the would-be asylum seekers have no option but to stay in a place where their human rights are at grave risk. What if only some states adopt the deterrent strategies? Perhaps one can imagine a scenario in which states that are liable to attract large numbers of refugees manage to deter a sufficient number so that only their fair share actually arrive, the others meanwhile finding refuge in states that are less restrictive. This is clearly, however, a very optimistic scenario. The likelihood is that there will be, at the very least, significant unfairness in the way that refugees are distributed between states, and probably human rights violations on a large scale as well.²⁴

So to sum up on our second question about refugees, it is not in principle a violation of human rights if states make arrangements to divert them to some third country, but such arrangements must meet the conditions specified above; furthermore, they may be unfair to the political communities involved even if they do not put human rights at risk.

Our prior question, however, was about refugee status itself. Even if we restrict attention to the relatively narrow definition of ‘refugee’ used in current international law, deciding whether a particular individual meets the criteria is still a difficult task. As one commentator puts it ‘a decision on the well-foundedness or not of a fear of persecution is essentially an essay in hypothesis, an attempt to prophesy what might happen to the applicant in the future, if returned to his or her country of origin’.²⁵ Yet

²⁴ This is, in fact, more or less the situation that obtains today: see the evidence presented in Gibney, ‘Forced Migration, Engineered Regionalism and Justice between States’.

if the wrong decision is made, the rejected applicant may be exposed to a serious risk to her human rights, which suggests that the procedure for reaching it should be weighted in her favour. A comparison might be made here with criminal cases, especially those for which the penalty involves imprisonment. Given the loss of rights involved if the person is found guilty, we require strict procedures that minimise the chance that an innocent person will be sent to gaol. Should the procedures used to decide asylum cases be equally strict – in other words, should an authority that wants to turn down an asylum claim have to prove that the risk involved in returning the person to his country of origin is very small? This might require quite elaborate legal procedures to be followed. But the comparison is not exact. In one case, the authority that makes the decision will itself deprive the person found guilty of his rights, and will do so with virtual certainty. In the other case, the rights violations will be perpetrated by those in the country of origin, and the risk of this happening, though it may be high, is still less than a certainty.²⁶ I think it is reasonable, therefore, that the procedural rights of the asylum seeker should reflect these differences. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* sets down a number of procedural requirements – facilities to allow asylum applicants to present their case, including access to interpreters, the right of appeal in the event of a negative decision, and so forth – without stipulating the exact form that these should take, and in particular without requiring judicial review of asylum decisions.²⁷

To conclude this section, Kant famously defended the idea of hospitality, which he interpreted as ‘the right of a stranger not to be treated with hostility when he arrives on someone else’s territory’.²⁸ But he immediately went on to say that such a person

²⁵ Goodwin-Gill, *The Refugee in International Law*, p. 35

²⁶ The argument here assumes that we have greater responsibility for the rights violations we commit ourselves than for the violations that we allow others to commit by failing to prevent them. This of course will be challenged by strong consequentialists.

²⁷ Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva: UNHCR, 1992), p. 46.

can be turned away if this can be done without causing his death. We can assume that Kant was thinking here of pushing the boats of shipwrecked sailors back out to sea, or its terrestrial equivalent. With the arrival of human rights, we construe the principle more broadly, as the right not to be placed in a condition in which one faces a serious risk of death or bodily injury. So if people are liable to being turned away and sent to places where this right might be violated, more formal procedural safeguards must be put in place. For example, the receiving state must seek out and use the best available evidence about conditions in the relevant countries – either the country from which the person is fleeing, or the third country in which asylum might be granted. So refugees have a human right to an adequate procedure for determining their status as refugees and for deciding whether the place to which they might be sent (if the receiving country declines to admit) is sufficiently secure.

V Do discriminatory admissions policies violate human rights?

I turn next to the admission of immigrants generally, and the question of whether the use of certain selection criteria might infringe the human rights of those who are refused admission. It might seem at first glance as though once it is shown that there is no human right to be admitted, as I argued in section II, someone who is turned away can have no grounds for complaint, regardless of the grounds on which the decision has been made. But this is not how we think in other cases that might appear to be analogous. For example, a firm can decide that it does not want to take on any more employees – no one has a right to be employed by this particular firm. But once a decision is made to hire new employees, the firm cannot discriminate on, for example, grounds of race. There is a human right against discrimination, referred to in Article 7 of the original Universal Declaration of Human Rights. As first envisioned, this was no doubt intended to apply to discriminatory practices within domestic society, such as apartheid. But our question is whether this right might be extended to apply to the practice of admission itself.

²⁸ I. Kant, *Perpetual Peace: A Philosophical Sketch* in H. Reiss (ed.), *Kant's Political Writings*, trans H. Nisbet (Cambridge: Cambridge University Press, 1970), p. 105.

States do of course discriminate (in a neutral sense) whenever they employ selection criteria to determine who gets in and who doesn't, and no-one has argued (to my knowledge) that all such criteria are illegitimate. Carens, for example, in a thoughtful discussion, distinguishes between the use of family connections (relatives already living in the country) and economic criteria (the immigrant's potential contribution to the society) on the one side, and religious affiliation and ethnicity on the other. He argues that employing the latter as selection criteria would offend against fundamental liberal values of freedom and equality.²⁹ This is undoubtedly true. But the question it provokes is why the state must apply these particular principles to people who are not yet members of the political community – the decision that is taken being precisely about who should become a member and who shouldn't. To some it may seem obvious that a liberal state must follow exactly the same principles in its dealings with outsiders as it does with insiders. But in fact this is not obvious.³⁰ Of course liberal states must refrain from actions or policies that infringe the human rights of non-citizens. But the issue here is one of equal treatment, and the scope of legitimate partiality when benefits are being provided to non-citizens. For example, would we necessarily think it objectionable if a liberal state were to direct its foreign aid programme towards particular poor societies with which its members felt that they had a religious or cultural affiliation? If it is not objectionable to discriminate in a case such as this, why must it be so when the question is who should be allowed to enter, and eventually become a citizen of, a liberal state?

²⁹ Carens, 'Who Should Get in?', pp. 106-10.

³⁰ The underlying issue here is how far, if at all, the state can justifiably be partial towards its own citizens. There is a very large literature on this question, including the following: S. Caney, *Justice Beyond Borders* (Oxford: Oxford University Press, 2005), ch. 4; C. Fabre, 'Global Distributive Justice: an egalitarian perspective', *Canadian Journal of Philosophy* (supplementary volume), 31 (2006), 139-64; D. Moellendorf, *Cosmopolitan Justice* (Boulder, CO.: Westview Press, 2002); T. Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs*, 33 (2005), 113-47; A. Sangiovanni, 'Global Justice, Reciprocity and the State', *Philosophy and Public Affairs*, 35 (2007), 3-39; S. Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001), chs. 3-4; K.-C. Tan, *Justice, Institutions, and Luck* (Oxford: Oxford University Press, 2012), Part III. My own position is set out in *National Responsibility and Global Justice*, chs. 2-3, and in D. Miller, 'Reasonable Partiality Towards Compatriots', *Ethical Theory and Moral Practice*, 8 (2005), 63-81.

A good argument for not using religion or ethnicity, or indeed race, as selection criteria is that this is very likely to be seen as lowering the status of existing members of the political community who belong to the disfavoured groups – they are effectively being told that they are unwanted, or second-class citizens.³¹ As Blake puts the point, ‘the state making a statement of racial preference in immigration necessarily makes a statement of racial preference domestically as well’.³² But although the argument is good, it suffers from the limitation that it would not apply to a state that was already religiously or ethnically homogeneous and whose members wished it to remain so.³³ Notice also that the argument hinges upon the injustice that is done to existing citizens whose status is lowered by the discriminatory policy, not on any wrong that is done specifically to the excluded candidates for admission. It therefore cannot show that the human rights of excluded immigrants are violated by the use of invidious selection criteria, even though it does give reason for the state not to use such criteria in all cases where minority groups are already present in significant numbers.

To see whether discriminatory admissions policies violate human rights, we need to look more directly at the human right against discrimination. How should we understand it? Recall that I am interpreting human rights as rights that protect the conditions under which people can lead minimally decent lives. How does a right against discrimination contribute to this? It does so in two ways. First, serious discrimination – in employment or housing, say – may deprive the discriminated-against group of the opportunity to satisfy basic needs. Of course this would not happen as a result of a single instance of discrimination, but the right serves to protect

³¹ It is made in Carens, ‘Who Should Get in?’, and at greater length in M. Blake, ‘Discretionary Immigration’, *Philosophical Topics*, 30 (2002), 273-89, and M. Blake, ‘Immigration’ in R.G. Frey and C. H. Wellman (eds.), *A Companion to Applied Ethics* (Oxford: Blackwell, 2003). I also used the argument in an earlier discussion, Miller, *National Responsibility and Global Justice*, ch. 8.

³² Blake, ‘Discretionary Immigration’, p. 284.

³³ This is conceded by Blake in ‘Discretionary Immigration’, p. 285. See also M. Walzer, *Spheres of Justice* (Oxford: Martin Robertson, 1983), pp. 35-51 and the discussion in Blake, ‘Immigration’.

vulnerable groups against a systematic policy of discrimination, carried out either by the state or by the dominant group in the society. Second, discrimination, even if it is only sporadic, may frustrate human beings' need for recognition (I say 'may' because I shall enter a qualification shortly). I assume here that the list of human needs will include, alongside material and other needs, the need to have one's existence as a person acknowledged by those with whom one interacts and whose valuation matters. Imagine, for example, a person whom no one will talk to, or whose opinion is never taken seriously when issues are discussed. It will be hard, if not impossible, for this person to lead a minimally decent life, surrounded by others all of whom are recognized in a way that she is not. Acts of discrimination threaten this need through the message they convey that the person discriminated against is someone who doesn't count as others do. In this second respect what matters is not the material loss that discrimination may occasion, but the damage it does to the victim's self-conception.³⁴

This must be qualified, however, by the observation that the harm caused by discrimination is to some extent contextually determined. It depends on how the group from which recognition is sought is designated. In modern liberal societies, that group is widely drawn to include all citizens, giving rise to a 'politics of recognition' in which any sub-group within the society that believes it has been the victim of discriminatory treatment will call for rectification.³⁵ In societies of other kinds, by contrast, what may matter is discrimination *within* sub-groups, because these are the relevant groups from which recognition is sought. If there is a clear social hierarchy, and members of each rank accept their place within it, discrimination between ranks will not cause psychological damage. One can live a minimally decent life as, say, a Vaishya within a caste society, because what matters is recognition as an equal by other Vaishyas; the fact that Brahmins get better treatment and have higher status does not matter *from this point of view*. This is not meant as a defence of the caste system, to which of course there are many other objections, but simply as a way

³⁴ For a rather similar account of why (certain forms of) discrimination may violate human rights, see Griffin, *On Human Rights*, pp. 41-2.

³⁵ The seminal essay here is C. Taylor, *Multiculturalism and 'The Politics of Recognition'*, ed. A. Gutmann (Princeton, NJ: Princeton University Press, 1992).

of underlining the point that the recognition that matters is recognition by the group that owes you recognition, which in turn depends upon your social identity.

Applying this now to the case of immigrants, suppose that the receiving society does discriminate on grounds of religion or ethnicity in deciding whom to admit. Could this count as a human rights violation on the grounds that it deprives those discriminated against of the chance to lead a minimally decent life? That will depend of course on whether such a life is available in the society that they are trying to leave, or in some other society that is willing to admit them. The existence of such alternatives reveals that the immigrants are not, in most cases, *dependent* on the receiving state for the chance to lead a decent life in the way that its own citizens are. Some of course might prove to be vulnerable to the state in this respect; but this is also true of those who are turned down for admission on grounds that are usually thought to be acceptable, such as whether they possess employable skills. In other words, the problem, where it exists, does not stem from the state's use of morally arbitrary selection criteria such as religion or ethnicity.

What about the claim that being refused entry on religious or ethnic grounds is psychologically demeaning? Recall here the point made above, that damaging discrimination presupposes a reference group of 'significant others' from whom recognition is sought. It does not seem plausible to count the pool of applicants for admission as such a group – after all, applicants are not even likely to know who has applied and who has been accepted. Nor is it plausible to think that the relevant group are the existing citizens of the state to which entry is being sought. Why should immigrants arrive with the expectation that those citizens will recognize them as equals already? Suppose, to illustrate, that I were to apply to emigrate to Iran and was turned down on the ground that Iran had decided to give priority to Shiite Muslims in admission. I might feel cross that my wish had been frustrated but I could hardly feel demeaned, since I have no reason to expect recognition from Muslims, whether inside or outside Iran, as a group.³⁶

³⁶ It might be argued here that I already have a secure status in my society of origin, so non-recognition by Iranians poses no psychological threat to me, but this is not likely to be true of a poor immigrant applying to join a rich Western society. I accept that the latter has the stronger claim to be admitted, and as I suggest later can properly

I conclude that although the right against discrimination counts as a genuine human right, once its basis is properly understood, it does not extend to include a demand that border regimes should not discriminate. Having said that, we would undoubtedly take exception to a regime that did discriminate on racial or religious grounds, so what explains this? Although, leaving refugees aside, immigrants do not have a *right* to be admitted, they do in most cases have a strong interest in being admitted, so a state that is going to turn them down must at least provide an acceptable reason for doing so. Such a reason would be one that shows that the particular decision taken is governed by either substantive or procedural norms of fairness – substantial in cases where the policy reflects the legitimate interests of the receiving society, such as the need to recruit skilled workers, procedural where for example immigrants are chosen for admission by a lottery that gives everyone an equal chance of success. In contrast, somebody turned away simply for having the ‘wrong’ skin colour or ‘wrong’ cultural background is not being given a reason that they could possibly accept. So they are being treated unjustly. But, as noted earlier, not everything that justice requires can be demanded as a human right.

VI The human rights of illegal migrants and asylum-seekers

The final question I want to address concerns the human rights of those who have entered a country without being granted a legal right of residence (or citizenship). This embraces two categories of people: asylum-seekers whose claims are yet to be determined, and illegal migrants who have evaded border controls.³⁷ The two categories differ insofar as asylum-seekers have announced their presence to the state by virtue of making their asylum claim, whereas illegal migrants are likely to try to remain under the state’s radar, so to speak, but in four other respects their position is analogous. First they are physically dependent on the society they have entered for life-support, and simultaneously exposed to the state’s power and the various threats

complain of injustice if he is turned away on invidious grounds. But I do not accept that he has a right to be recognized as an equal by a group to which he does not yet belong.

³⁷ Asylum seekers may of course become illegal migrants if they disappear from the state’s view either before or after their application for refugee status is adjudicated.

to their well-being that come with it. Second, by virtue of that fact, the state has to take special responsibility for protecting their human rights for so long as they remain on its territory. Third, at the same time, the state is not obliged to extend to them the full set of rights that it grants to citizens, and that it may also grant to legal residents who it regards as citizens in the making.³⁸ Fourth, although asylum-seekers may prove to be ‘bogus’ once their claims are examined, and illegal migrants have by definition flouted immigration laws, they have not forfeited any of their human rights in the way that convicted criminals – or terrorist groups seeking to attack the society – may have done. They have broken important social rules, but they have not disregarded the basic rights of others in such a way as to put continued respect for their own human rights in question.

It might perhaps be questioned why the state has the special responsibility referred to above, given that the individuals in question have arrived uninvited on the territory, and in the case of the illegal migrants in the face of ‘keep out’ signs. They are not part of the reciprocal social contract that obtains between citizens, so why should the state owe them any more than the *negative* obligation not to violate human rights which it owes to everyone everywhere? The simple fact of proximity might be a sufficient answer, but a more powerful one is that one of the conditions under which a state can claim to govern a territory legitimately is that it protects the basic rights of all those who stand on that territory. It subjects them to its commands, but in return it must guarantee their rights (this applies even to casual visitors). So the state must not only refrain from harming or injuring immigrants in these two categories, but it must ensure that they have access to food, shelter, basic medical care and the other components of their (positive) human rights. It must also guarantee their procedural rights if they are accused of lawbreaking, for example those listed under articles 10 and 11 of the UN Declaration. Whether it must provide them with exactly the same legal rights as those that citizens enjoy (barring of course those rights that relate

³⁸ This could be challenged, of course, but the basic principle is accepted even by those such as Carens who want to argue for a fairly extensive set of rights for ‘irregular migrants’ (his preferred term). See J. Carens, ‘The Rights of Irregular Migrants’, *Ethics and International Affairs*, 22 (2008), 163-86, and my own response in ‘Irregular Migrants: An Alternative Perspective’, *Ethics and International Affairs*, 22 (2008), 193-7.

directly to their situation, such as the right to remain in the country) is more moot, but a case can be made for there being a substantial degree of overlap.³⁹

Two specific issues, however, have given rise to controversy. One (which applies chiefly to illegal migrants) is whether there ought to be a ‘firewall’ between immigration law enforcement and the other arms of the state – the legal system as a whole, the social services, and so forth – so that immigrants can use these services without fear that their presence will be reported to the immigration authorities. Carens has argued that this is essential if the rights of immigrants are to be respected, since otherwise many will not make justified claims on the state for fear of being detected and deported.⁴⁰ It is a moot point whether the firewall idea can be coherently implemented in a modern state.⁴¹ But supposing it could be, is this what human rights require? Carens’ claim is that if immigrants are deterred from asserting their rights for fear of deportation, they are in effect being denied those rights. ‘It makes no moral sense to provide people with purely formal legal rights under conditions that make it impossible for them to exercise those rights effectively’.⁴²

Perhaps, though, Carens overstates the case here. ‘Impossible’ is too strong. What the immigrants we are considering cannot do, in the absence of a firewall, is to exercise their rights without some risk of deportation proceedings being initiated. Whether they actually are initiated must depend on the policy of the state in question, and the particular circumstances of the immigrant – for example she might have entered as an asylum seeker but absconded out of fear that the case would go against her, whereas in fact her claim is justified and would be accepted. Then there is the issue of what the consequences of deportation would actually be, assuming that the state is sticking consistently to the principle of *non-refoulement*. The immigrant will lose what may be enhanced rights in the society she has moved to and enjoy only

³⁹ On this, see the careful discussion in Carens, ‘The Rights of Irregular Migrants’.

⁴⁰ Carens, ‘The Rights of Irregular Migrants’, esp. pp. 167-8

⁴¹ See C. Boswell, ‘The Elusive Rights on an Invisible Population’, *Ethics and International Affairs*, 22 (2008), 187-92.

⁴² Carens, ‘The Rights of Irregular Migrants’, p. 167

more basic rights in the society to which she is deported. This admittedly may give her a strong incentive not to expose herself to the risk of deportation. But how should we judge the situation from a human rights perspective? This person is trading rights off against one another, thinking that the various material advantages she enjoys at present make it worthwhile for her to give up some protective human rights, such as the right to go to the police when she is a victim of crime. We would need to formulate a theory about when such trade-offs are acceptable and when they are not before reaching a final verdict.⁴³

A more worrying case is where the person is deterred from making contact with the authorities because of a strong though irrational fear that he will in fact be deported back to his country of origin, which is not safe – in other words that the *non-refoulement* principle will not be observed. Carens' 'impossible' becomes 'psychologically impossible', but that does not substantially weaken the force of his point. If there are many such cases, the argument for a firewall (supposing one can be built) becomes correspondingly strong.

The second controversial issue (which applies chiefly to asylum-seekers) is whether the state is justified in detaining immigrants while their claim to enter is decided upon. It should go without saying that detention, to be justified, must not involve the breach of any human rights other than the right of free movement itself. The immigrant is not being punished: the only good reason for detention is that there is a significant risk that otherwise the immigrant would disappear before the review process was complete, and would then be hard to trace.⁴⁴ So conditions in detention centres must otherwise meet the criteria for having a decent human life (for example, opportunities for easy contact with family members).

⁴³ For some reflections on the wider question of when rights trade-offs may be permissible under an asylum regime, see M. Gibney, *The Ethics and Politics of Asylum* (Cambridge: Cambridge University Press, 2004), pp. 249-54.

⁴⁴ I assume here that no case can be made for regarding immigrant detention as justified punishment. For an argument to this effect, see L. May, *Global Justice and Due Process* (Cambridge: Cambridge University Press, 2011), ch. 8.

Yet detention clearly does violate the human right to freedom of movement, and others as well, such as the right to work. So how can it be justified? The asylum seeker is claiming the right to enter on the grounds that he ‘has a well-founded fear of persecution or faces a substantial risk of torture’ if he were to be sent back to the society he has just left. Since he makes that claim, he must agree to a reasonable procedure for assessing it, and to abide by the results of that procedure (I referred briefly above to some features of the procedure to which he is entitled).⁴⁵ So the state is entitled to some assurance that he will comply. If he is able to provide it in some other way – for instance he or someone else is prepared to put up bail money – that is a better solution. Detention must be the last resort in cases where there is a real risk that the person will abscond if not detained, and no alternative form of assurance is available. This implies that rather than there being a standard policy whereby all asylum-seekers (or some sub-set of these) are detained as a matter of routine, each immigrant is entitled to have her case decided on an individual basis.⁴⁶ Given the breach of human rights involved in detention, she is also entitled to have the procedure carried out under judicial supervision, with the opportunity to appeal.

VII Conclusion

The issues I have discussed by no means exhaust the topic of borders and human rights. I have not, for example, looked at the physical means by which borders are defended, or the techniques used to deport those who are judged to have no entitlement to stay, although these plainly may raise human rights issues. What I have suggested is that thinking about border regimes from a human rights perspective

⁴⁵ The ‘must’ here is normative. Whether any given person actually consents to the procedure that is used to assess her claim for asylum is an empirical question. But we can perhaps speak of ‘normative consent’, an idea introduced in D. Estlund, *Democratic Authority: a Philosophical Framework* (Princeton, N.J.: Princeton University Press, 2008), ch. 7 (for a critique, see W. Edmundson, ‘Consent and Its Cousins’, *Ethics*, 121 (2011), 335-53). The thought is that if some person not already entitled to a conditional benefit wants to claim it, she normatively consents to a fair and accurate procedure for deciding whether her claim is justified.

⁴⁶ A strong argument in favour of this is made in H. O’Nions, ‘No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience’, *European Journal of Migration and Law*, 10 (2008), 149-85.

raises some serious and difficult questions, without entailing that no such regime could ever be human-rights compliant. I argued that there was no human right to cross borders without impediment; the human right to free movement did not require that. But for those unable to protect their human rights in the place where they currently reside, there were a number of procedural rights that must be recognized by the state in which they seek refuge. Their case for asylum must be properly investigated, and in the event that the state declines to admit them as refugees, it must ensure that the third country to which they are transferred can protect their rights securely. There are also both procedural and substantive rights that apply while they are physically present on the state's territory and their immigration status is being investigated. The state's obligation to protect these rights arises from the power it exercises over them. In contrast, I have argued that the state does not exercise equivalent power over those it declines to admit in the first place, even though its immigration criteria – if they are discriminatory in the negative sense – can be faulted on other grounds. Beneath these arguments lie two basic assumptions: one is the need to separate human rights claim proper from other claims of justice, especially those deriving from *citizenship*; the other is the need to determine who bears the obligations that correspond to these rights. Attention to the different relations in which prospective immigrants may stand towards the state they hope to enter can help us understand how border regimes may comply with, or violate, human rights.