

Permeable Borders: Human Migration and Sovereignty¹

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Borders are central to sovereignty. They establish the categories of citizen and alien, which is a fundamental element of sovereignty. As Joseph Carens states: "The power to admit or exclude aliens is inherent in sovereignty and essential for any political community".² This conceptual abstraction is reified by such phenomena as border patrols and passports. Border patrols attempt to keep out the undesirables and passports help to regulate the temporarily desirables. Communities which are coterminous with the state are absolutised, and individuals who are not members are forgotten.

Borders also help to define the moral and ethical spheres in which we act. Moral and ethical rights and responsibilities accrue to those within constructed borders³ who are citizens, whereas states feel less compunction to treat non-citizens within their territory as equitably as citizens, and those outside their borders receive even less consideration. This is especially so when doing so might entail bringing some of "them" inside our borders, into the inner sanctum of sovereign privilege. The reasons for this are many, including basic greed—we have to hold onto what is "ours"—racism, or a concern with cultural purity. Whatever the reason, we define individuals in terms of citizenship instead of humanity, and this allows us to discard human rights in favour of citizen rights:

Migrants and refugees, however, are often on the periphery of effective protection. In part, their vulnerability stems from the fact of State sovereignty, from the particular role ascribed to States themselves as

1. This paper is a revised version of a chapter from my dissertation, entitled *The New Sovereignty: The Changing Humanitarian Agenda in the Emerging Global Order*. A slightly different version appeared as Occasional Paper 7:OP:2, Joan B. Kroc Institute for International Peace Studies, University of Notre Dame, Fall 1994. Previous incarnations of this article have benefited from comments by Gil Loescher, George Lopez, Sharon O'Brien, and Bob Johansen. I am particularly indebted to the individuals at the UN High Commissioner for Refugees, International Committee of the Red Cross, and other organisations in Geneva who generously provided me with their time and insights on the issues addressed here in October and November 1993. They are cited anonymously in the text because while some people were comfortable with being identified, others were less so. The research for this article was partially supported by a Zahm Research Travel Grant from the Graduate School of the University of Notre Dame.

2. Joseph H. Carens, "Aliens and Citizens: The Case for Open Borders", *The Review of Politics*, Vol. 49 (Spring 1987), p. 251.

3. Many times borders are constructed physically, as well as metaphorically and metaphysically. The Berlin Wall was a concrete manifestation of the Iron Curtain, and the fences between the US and Mexico are concrete representations of the 'Tortilla Curtain'.

guardians or protectors of human rights, and from a tendency to confine certain rights within a context of community or citizenship. Non-nationals, simply because of their lack of citizenship, are perceived to stand outside the community, and on that basis may be denied the substantive and procedural entitlements normally accorded to members.⁴

This is the way sovereignty is perceived to work: states have the right and the ability to maintain exclusive sovereign control over their borders. However, a closer look at empirical realities, as well as a commitment to human rights and a recognition that states are not natural, absolute entities and thus that borders do not circumscribe the only possibility for community and protection of rights, will provide a view of borders which are not, in fact, as impermeable as the traditional concept of sovereignty would suggest.

State borders are indeed permeable to many different types of incursions—ideas, such as democratic participation and human rights; money, at least in its electronic conceptualisation; and people. The first is perceived as most threatening by those states which do not live up to the standards which pour across their borders via television, fax and e-mail. Financial transactions—which amount to trillions of dollars a day—cross the borders of every state with impunity, and states make little effort to stop this from occurring.⁵ However, it is the flow of people which seems most threatening to states and people within the borders of states. In the past, authoritarian countries tried to keep people in. At the same time, and right up to the present, more democratically-oriented countries are attempting to keep people out, especially those which are perceived as a drain on resources or as disruptive to community.

Yet, spontaneously, in the form of mass refugee flows, and in a more calculated manner, one, two, or ten at a time, people do cross borders. Sometimes, the receiving country accepts these people graciously as part of what they see as their global humanitarian duty. Other times, people slip unwanted across porous borders, evading the officials whose job it is to put them on a bus back to their countries of origin. This illustrates one of the greatest paradoxes about the contemporary practice of sovereignty; even as states are increasing their efforts to control their borders, they are losing ground.⁶

4. Guy S. Goodwin-Gill, "Towards a Comprehensive Regional Approach: The Case for Closer Inter-Agency Co-operation". A paper written for the United Nations High Commissioner for Refugees and the International Organization for Migration, Human Dimensions Seminar on Migration, including Refugees and Displaced Persons (Conference on Security and Cooperation in Europe, 1993), p. 11.

5. Brian Barry, "A Reader's Guide", in Brian Barry and Robert E. Goodin (eds.), *Free Movement: Ethical Issues in the Transnational Migration of People and Money* (University Park, PA: Pennsylvania State University Press, 1992), p. 3.

6. Some of these measures can have the opposite effect, such as the US Immigration Reform and Control Act (IRCA) of 1986 which legalised previously illegal undocumented workers. As the government recognised the reality and the necessity (in terms of the need for inexpensive labour) of the movement of undocumented people across its borders, it actually created the conditions for even greater movement. See Jeffrey S. Passel, Frank D. Bean, and Barry Edmonston, "Undocumented Migration Since IRCA: An Overall Assessment", in Jeffrey S. Passel, Frank D. Bean, and Barry Edmonston (eds.), *Undocumented Migration to the United States: IRCA and the Experience of the 1980s* (Lanham, MD: University Press of America, 1990). More recently, the US Attorney General, Janet Reno, seemed to recognise the government's inability to effectively control illegal immigration: "The bottom line is: we will not reduce the flow of illegal immigrants until these immigrants find better jobs in Mexico". "Reno Says No Reduction of Illegal Immigrants", *Reuters* [Online] (7 October 1993), Available: Nexis.

The second issue with regard to borders, and the flow of people across them, is their moral status. In other words, even as states step up efforts to keep out non-citizens, one must ask whether they should—insofar as states are not natural, absolute communities how can they justify the claim to make such a sharp distinction between citizen and alien, those entitled to certain rights and those not entitled? If, as I would argue, we recognise individuals as humans first, and members of a multitude of communities second, then the absolute claims by various communities to keep out people are undermined to the extent necessary to ensure that human rights and humanitarian principles are upheld.

This article is concerned with how individual, state, and international practice are contributing to a somewhat ambiguous challenge to state sovereignty and to a reconceptualisation of sovereignty based upon human rights and humanitarian principles. It will investigate how the moral force of borders may not be what many would like it to be and how this, too, can contribute to what I call the New Sovereignty—a reformulation of the concept of sovereignty which focuses on human rights, popular sovereignty, and self-determination as the legitimating factors for claims to power and authority.⁷

I shall demonstrate that, empirically, states are fighting a losing battle in attempting to control tightly their borders and access to membership—*de facto* and *de jure*. In addition, concern with human rights and requirements of justice lead to the conclusion that borders should be much more open than they are now. Both of these observations lead to the further conclusion that the movement of people across state borders is undermining what has been called the “sovereignty discourse”;⁸ that is, the view that states are the primary actors on the global stage, have the power to ensure this primacy, and thus should hold the primary place in the study of global politics. For example, if a state has a right to stop people from crossing its border but is not able to do so, then it would seem clear that part of its sovereignty—in fact a central aspect of the sovereignty discourse—is being undermined. Further, international law requires that states provide certain types of assistance and protection, in particular to refugees, thus circumscribing somewhat the realm of sovereign action. I argue that more open borders are necessary, first, in terms of ensuring international distributive justice, and second, to implement the recognised right to leave one’s country. I conclude that communities do not have absolute rights to close their borders to outsiders; rather, it is only when the possibility of community is endangered can communities restrict movement across their borders.

Controlling Borders?

Many states, in their quest for sovereign control over their borders and thus the ability to decide who become members of their community, have in recent years

7. For an extended discussion of the New Sovereignty see Kurt Mills, “Human Rights and Sovereignty”, Occasional Paper 6:OP:2, Joan B. Kroc Institute for International Peace Studies, University of Notre Dame (Spring 1994).

8. Camilleri and Falk note that the “sovereignty discourse [is] a way of describing and thinking about the world in which nation-states are the principal actors, the principle centres of power, and the principle objects of interest”. Joseph A. Camilleri and Jim Falk, *The End of Sovereignty?: The Politics of a Shrinking and Fragmenting World* (Brookfield, VT: Ashgate Publishing Company, 1992), p. 2.

taken actions which are aimed at preventing the entry not only of undocumented workers but also refugees. These attempts are having much more ambiguous outcomes than what states would like: "Rapid changes in technology and transportation continually challenge those countries which want absolute sovereign control over who can and who cannot enter a state as a prerequisite to becoming members of those states".⁹

There are about 20 million people officially identified as refugees living in countries other than their own because conditions are intolerable in their country of origin. As was demonstrated in the case of Rwanda, waves of hundreds of thousands of refugees can flow over borders almost over night. Or, refugee pressures can build up over time, and refugee populations slowly get larger as a result of a prolonged conflict.

Between 1988 and 1992, 2,065,900 people applied for asylum in ten European countries; approximately half of these came from other European countries. In all of Europe there were 4,379,100 refugees by the end of 1992.¹⁰ Most of these were not granted asylum; but, neither did most of them leave Europe. Some were allowed to stay for humanitarian reasons.¹¹ Some had asylum claims in several countries at the same time and just moved among them. And some just disappeared from the sight of authorities within the countries in which they sought asylum.¹² Contrary to popular thought, Europe has become a "*de facto* immigration society".¹³ In other words, while Europe has been perceived as the 'Old World', it is becoming the 'New World' for quite a number of people from the Third World. This has created alarmist outcries from such people as Jean-Marie Le Pen in France. Yet, recent estimates show that European countries will actually have to increase immigration, at least for skilled labour.¹⁴ Of course, the problem for many in Europe and elsewhere is that many immigrants, in addition to being a perceived cultural threat, are also perceived as drains on the national coffers if they claim social benefits. For example, in the US, even though the director of the Immigration and Naturalization Service (INS) has indicated otherwise, there is a widespread perception that Mexicans come to the US solely to reap the benefits of the welfare state and provide nothing in return.¹⁵

9. Howard Adelman, "Refuge or Asylum: A Philosophical Perspective", *Journal of Refugee Studies*, Vol. 1, No. 1 (1988), p. 10.

10. United Nations High Commissioner for Refugees, *The State of the World's Refugees: The Challenge of Protection* (New York: Penguin Books, 1993), pp. 152, 159 (hereinafter referred to as UNHCR). The ten countries are: Austria, Belgium, Denmark, France, Germany, Netherlands, Norway, Sweden, Switzerland, and United Kingdom. About half of the asylum seekers came from three former Eastern bloc countries—the former Yugoslavia, Romania, and Poland—and Turkey.

11. Sadako Ogata, "Emergencies, Displacement and Solutions", Presented at the North South Roundtable on Movements of People in the 1990s: Challenges for Policy Maker, (December 1991), p. 3.

12. UNHCR official (October 1993).

13. David A. Martin, "Effects of International Law on Migration Policy and Practice: The Uses of Hypocrisy", *International Migration Review*, Vol. 23 (Fall 1989), p. 576.

14. M. T. Mapuranga, "Mass Movements of People in the Nineties: Problem, Prospects and New Challenges—A View from Africa", Presented at the North South Roundtable on Movements of People in the 1990s: Challenges for Policy Makers, (December 1991), p. 9.

15. Marc Sandalow, "INS Chief Says Illegals' Goal Isn't Welfare", *The San Francisco Chronicle* [Online] (30 October 1993), p. 1, Available: Nexis.

It should be noted that the magnitude of the problems with respect to asylum seekers and illegal immigration differs widely among industrialised countries. For example, in 1992, 438,000 people sought asylum in Germany, while 104,000 made asylum claims in the US. In Japan, on the other hand, which has very strict immigration procedures, only 100 people attempted to gain asylum during that year.¹⁶

Until very recently, at the US–Mexican border between Ciudad Juarez and El Paso alone, 10,000 illegal aliens crossed into the US per day. About 10% of these were apprehended. Many, though not all, of the rest came only to work during the day and returned to their homes in Mexico every night, but the US did not have the ability using its regular level of resources to stop 90% of the influx from the south. At the border near San Diego, 250,000 illegal aliens are arrested each year, which again is only a fraction of the actual number that gain entry into the country.¹⁷

All of this movement across borders has created a feeling of crisis in many countries. As Doris Meissner, the current Commissioner of the US Immigration and Naturalization Service (INS), has written: “unregulated and emergency migrations bespeak a loss of control. They challenge the capacity of governments to uphold basic sovereignty, in this case the choice of who resides in one’s country”.¹⁸ As a result of these real and perceived onslaughts, states have used a variety of policies and tactics to stop particular groups of people from entering their countries. On the one hand, they attempt to ‘push out’ their borders. On the other, they increase efforts to prevent admittance to refugees and non-refugee aliens alike.¹⁹

The US’s policy toward Haitian refugees is an example of attempting to ‘push out’ borders. Officials and citizens in Florida and other places where Haitians typically settle complained about the drain on resources and supposed increase in crime which results from ‘invasions’ of Haitians into their communities. As a result, the US, under two different presidents, instead of offering safe refuge to people fleeing war and oppression, imposed what amounted to a naval blockade around Haiti and forcibly returned Haitians leaving their country without even a fair hearing on their asylum claims. The US then changed its policy somewhat and tried to find temporary refuge for Haitians—outside US territory. Refugee pressures, among others, pushed the US to the brink of invading Haiti before a peaceful resolution to the crisis was negotiated.

In addition, the threat of another massive influx of Cubans on the scale of the 1980 Mariel exodus impelled the US administration to reverse long-standing and seemingly sacrosanct policy toward Cubans by declaring that they would no longer receive presumptive status and be given almost automatic residency status. Rather, with no little irony, like the Haitians, they are being sent to the Guantanamo Naval Base on Cuba, the island they are trying to flee in the first place.

16. UNHCR, *op. cit.*, p. 157.

17. Tim Golden, “US Blockade of Workers Enrages Mexican Town”, *The New York Times* [Online] (1 October 1993), p. 3, Available: Nexis; Sebastian Rotella, “Texas Border Crackdown Stems Tide, Raises Tensions”, *Los Angeles Times* [Online] (2 October 1993), p. 1, Available: Nexis.

18. Doris Meissner, “Managing Migrations”, *Foreign Policy*, Vol. 86 (Spring 1992), p. 68.

19. UNHCR official (October 1993).

In other types of situations, states will just prevent admittance to people, either refugees, or just certain types of people it considers undesirable. For example, worried about the movement of 10,000 people per day across the border from Ciudad Juarez in El Paso, the US instituted "Operation Blockade". Hundreds of border agents were deployed as close as 50 feet apart along a 20 mile stretch of the border. This effort has decreased dramatically the number of people who come from Mexico along 1% of the US-Mexican border, at great cost to the government, retailers in El Paso, and relations between the two countries. There have also been calls for the National Guard to supplement the Border Patrol.²⁰ Most recently, the INS launched "Operation Gatekeeper", which focuses Border Patrol resources on a five mile stretch of the border near San Diego to prevent crossing.²¹ While this may have led to less people crossing at San Diego, early indications are that there were more people crossing in Arizona and New Mexico. Unless the US commits much more resources, it will be unable to stem the tide of undocumented workers and other illegal aliens from the south.

Apart from the US, there are many other examples of states closing borders to some extent. During and after the Gulf War, 1.8 million Iraqi Kurds were displaced. Approximately 1.4 million of them took refuge either in Iran or in the border region with Iran. The other 400,000 fled to the border region with Turkey. Turkey refused them admittance. This can be explained, to a large extent, by the fact that Turkey has a large minority population of Kurds itself, against which it is essentially waging a war (it has also undertaken attacks against Kurdish populations in Iraq).²²

Massive refugees flows in Africa, also are putting severe strains on community and resources. African countries have traditionally been hospitable to refugees; however, in recent years this has begun to change. In Malawi, the government announced plans in 1992 to fence-in refugee settlements. That same year Kenya demanded (but later retracted) that all refugees in Kenya, mainly Somalis, be repatriated immediately.²³

Such reactions, while still disturbing, are understandable in the face of situations where state resources are being taxed beyond their limit. What is less understandable, and even more disturbing, has been the trend in the more affluent Western states with regard to admission policies. During the Cold War, the West had relatively open admissions policies, at least with regard to those coming from East Bloc countries. One of the main tenets of Western policy towards those countries was freedom of movement. That is, people in those countries should be free to leave and come to the West if they so desired. For example, in the early 1970s the US Senate passed the Jackson-Vanik amendment

20. Golden *op. cit.*; Glenn F. Bunting, "Plan for National Guard At Border Gains Support", *Los Angeles Times* [Online] (19 October 1993), p. 3, Available: Nexis.

21. "Operation Gatekeeper Starts", *The Associated Press* [Online] (1 October 1994), Available: USENET Newsgroup: clari.news.immigration.

22. UNHCR, *op. cit.*, pp. 84-85; "Turkish Kurds Seek Refuge in North Iraq", *Reuters* [Online] (22 May 1994), Available: USENET Newsgroup: clari.news.immigration.

23. UNHCR, *op. cit.*, p. 99.

which tied trade and credits to increased emigration of Soviet Jews.²⁴ The US allowed in virtually all individuals coming from communist countries such as Cuba and Nicaragua, assuming that since they had lived in such a system they could automatically claim persecution status. Those coming from Vietnam and the Soviet Union also had a presumptive status whereby they were presumed to be fleeing persecution. As Loescher and Scanlan point out:

As the cold war intensified during the 1950s and early 1960s, ideology became the principle determinant of merit, both positive and negative. Congress, obsessed with national security, made it virtually impossible for any refugee with significant Communist ties to enter the US.... On the other hand, it passed several bills permitting the entry of 'selected anti-Communist defectors', and 'escapees'.²⁵

However, with the end of the Cold War, the political exigencies which led to a certain level of open admissions faded away. The US and other Western countries, such as Germany, which has had a very open policy of asylum admission, began closing their borders to people who, in the past, would have had a *prima facie* claim to asylum.²⁶

The way in which the issue has been framed in these countries has further muddled the issue. When, for example, the US refuses entry, access to asylum procedures, or asylum itself, to people from Haiti, El Salvador, Guatemala, and other Latin American countries in which there has been violent conflict and widespread abuses of human rights, it frequently claims that they are economic migrants, like most Mexicans, and thus not entitled to entry on humanitarian grounds. The morality of not admitting those who are 'just' economic migrants will be discussed below. The issue at the moment, however, is the extent to which the US and other affluent Western countries have conflated the categories of economic migrant and those individuals and in groups with valid claims under the definition of refugee found in the 1951 United Nations Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees,²⁷ and later expanded definitions. As Ann Dummett argues: "a distinction is made [by poor countries], which Western countries have been deliberately blurring, between the special claims of the persecuted and starving and the lesser claims of an ordinary migrant".²⁸ Such a blurring allows states to make blanket generalisations about all of those seeking entry and to deny them that entry.

James Hathaway succinctly summed up why this is happening:

24. See Alan Dowty, *Closed Borders: The Contemporary Assault on Freedom of Movement* (New Haven: Yale University Press, 1987), pp. 213–214.

25. Gil Loescher and John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* (New York: The Free Press, 1986), p. 211.

26. On Germany see "German Gov. And Church At War", *The Associated Press* [Online] (14 May 1994), Available: USENET Newsgroup: clari.news.conflict. For a comprehensive look at US policy for the four decades after World War II see Loescher and Scanlan.

27. According to this convention, a refugee is: "any person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, unwilling to avail himself of the protection of that country".

28. Ann Dummett, "The Transnational Migration of People Seen from within a Natural Law Tradition", in Barry and Goodin, *op. cit.*, p. 178.

Why is *non-entrée* effectively replacing *non-refoulement* as the cornerstone of contemporary international law regarding refugees? From the perspective of states, its appeal is that it permits states to exercise control over refugee movements without also assuming responsibility for their welfare, as admission to that state's community would imply.²⁹

That is, states, with little political incentive to carry out their international humanitarian responsibilities, particularly to the extent of allowing people inside its borders, are now trying to finesse the issue entirely. This has had a number of serious international implications. It has, for example, opened the West to charges of hypocrisy. In the past, the West has promoted freedom of movement as a basic human right. Yet, with Cold War exigencies gone, they have modified their stance, undermining free movement as a right.³⁰

Such a change among Western countries—and others—has served to undermine two basic and interrelated principles of international refugee law. The first is that of *non-refoulement*. That is, no one can be forcibly repatriated to their country of origin. The most visible instance of this principle being undermined is the interdiction and forcible return of Haitian refugees by the US Coast Guard. The Haitians were fleeing documented violence and gross violations of human rights. The claim that they were either economic migrants—and perhaps many were insofar as searching for a basic level of subsistence (which is a basic human right) can be considered economic activity—or that there was no evidence that they were in danger if returned was a flagrant obfuscation of the situation.³¹

Non-refoulement is an important aspect of asylum. As the United Nations High Commissioner for Refugees (UNHCR) points out:

Today, asylum remains the cornerstone of international refugee protection. It is the principal means through which states meet their obligations towards refugees on their territory. The grant of asylum removes the threat of forcible return and provides the refugee with sanctuary until a solution to his or her problem can be found.³²

Yet, as a result of the changed international situation, including massive refugee flows³³ and reversals in Western admission policies, asylum is being undermined in a dramatic fashion. As the current UN High Commissioner for Refugees has pointed out: "The institution of asylum is coming under pressure in countries which, ironically, have been among the most stalwart supporters of UNHCR".³⁴

Such state responses to individual and mass movements of people across borders demonstrate one important thing about borders. The very fact that states feel they must take such actions demonstrates how important borders are for the

29. James C. Hathaway, "The Emerging Politics of Non-Entrée", *Refugees* (December 1992), p. 41.

30. Such charges come especially from those who have some connection with refugee movements in the Third World, such as some individuals at UNHCR who deal with refugees in Africa, the countries of which have had much more open borders with regard to refugee movements.

31. Juan P. Osuna and Christine M. Hanson, "United States Refugee Policy: Where We've Been, Where We're Going", in *World Refugee Survey—1993*, pp. 42–45.

32. UNHCR, *op. cit.*, p. 32.

33. The institution of asylum was never intended to deal with 100,000s or millions of asylum seekers.

34. Ogata, "Emergencies, Displacement and Solutions", p. 2. If I had to identify one theme which was common to all my interviews with UNHCR officials and those at other humanitarian organisations in Geneva it would be, as one interviewee put it, the "crisis of asylum".

practice of sovereignty and how much borders are not what they once were. As Ogata notes, freedom of movement, at least for many Western states, ends at the border: "Albania and Haiti also exposed the contradiction of western liberalism which supports the principle of freedom of movement but advocates restrictive action when the movements might actually cross national frontiers".³⁵ This further exposes the hypocritical stance of Western—and other—governments with regard to various types of human migration. However, this hypocrisy may have important and unintended implications in the future, for, as Martin points out, "the old standards that grew up in a more hypocritical period are not likely to go away".³⁶

The policy implications are two-fold, and seemingly contradictory. On the one hand, the distinction between economic migrants and refugees must be maintained such that policies with regard to the former do not interfere with attempts to protect the latter: "the new phenomenon of economic migrants should not be used as an excuse to deny asylum and sanctuary to genuine refugees...".³⁷ On the other hand, the line between different kinds of migrants is becoming increasingly blurred and thus forcing us to reconsider the conceptual categories we have used in the past:

The close link between economic, social and political factors is not only confusing the dividing line between refugees and economic migrants, but also calling into question the continued relevance of many refugee protection principles developed during the Cold War period.³⁸

One of the most important of these principles relates to the distinction between refugees and the internally displaced. Further, so-called economic migrants may have almost as good a claim to entry as do traditional refugees.

International Law and Insituational Frameworks

In practice, refugees are those who have crossed a border as a result of persecution or conflict. Within the refugee regime and broader issues of human rights, there are a number of rights for refugees and potential refugees and obligations for states. First, individuals have the right to leave their country and seek asylum—this is the right which the West so strenuously defended during the Cold War. This right is enshrined in Articles 13 and 14 of the Universal Declaration of Human Rights, as well as Article 12 of the International Covenant on Civil and Political Rights.³⁹

While the 1951 Convention and 1967 Protocol do not create a right to asylum, they do help define the status of refugees and certain other rights and legal protections, most notably the principle of *non-refoulement*. That is, an individual cannot be forced to return to a situation which may be dangerous or have the possibility for persecution. An individual does have the right to return to his or her country of origin. Along with this right is the attendant right to a nationality

35. *Ibid.*, p. 4.

36. Martin, *op. cit.*, p. 559.

37. Mapuranga, *op. cit.*, p. 3.

38. Ogata, "Emergencies, Displacement and Solutions", *op. cit.*, p. 2.

39. For example, Article 14 (1) of the UDHR states: "Everyone has the right to seek and enjoy in other countries asylum from persecution".

which cannot be taken away arbitrarily. This is part of the right to remain which has seen increased focus in recent years even as it has been undermined by the actions of states, as well as non-state actors such as rebel groups. The most notable recent instance is, of course, the policy of ethnic cleansing in Bosnia-Herzegovina where those Muslims which have not been killed have been forced to move from their homes. In fact, UNHCR has been criticised for facilitating this activity.

The UNHCR has the primary international mandate for assisting and protecting refugees. Many other humanitarian organisations work with it. However, a great burden falls on receiving states which must consider and process asylum claims and expend resources to assist and protect refugees on their soil. The traditional framework for dealing with refugees has been that first refugees receive at least temporary protection in the country of first asylum. Then, the search for durable solutions begins. These are: (1) repatriation; (2) permanent settlement in the country of first asylum; and (3) settlement in a third country. However, as a result of the dramatically increased numbers of refugees, as well as the changed geopolitical situation, this practice is falling apart and the institution of asylum is being undermined.

The post-World War II refugee regime was not designed to deal with the huge numbers of refugees flowing across borders at any one time. Asylum procedures are being overwhelmed and state resources, especially in the Third World, are being taxed to the limit. The end of the Cold War has also meant the end of political exigencies in the West which led governments to accept asylum seekers.

One new practice, which has occurred particularly in dealing with refugees from the former Yugoslavia in Europe, has been temporary protection. In this situation, the asylum claims of refugees are not examined, but they are allowed to remain in the country until the war is over and the situation becomes more stable. One instance where this practice could have been used, but was not, was in the case of Haitians attempting to enter the US (although the US tried to find temporary protection outside of US territory).⁴⁰ As one US official told me, even though he argued for temporary protection, most policy-makers were convinced that temporary protection would turn into permanent settlement.⁴¹ Certainly, some would want to stay and would blend into the background, as have many unsuccessful asylum seekers in Europe, thus undermining the ability of the state to decide who become members. However, it must also be noted that by and large, people do not want to leave their homes and would like to be able to return if possible. One does not make a dangerous journey on an overflowing rickety boat and become a refugee unless the situation in one's home country is severe.

Another issue with regard to dealing with refugees is an increased focus on preventing refugee flows in the first place. Such prevention can occur in several different ways. Indirectly, peacekeeping and peacemaking activities can help to create more stable conditions which are less conducive to flight. More directly,

40. The Immigration Act of 1990 specifically created a "temporary protected status" for those who fled their countries because the situation in the country was too dangerous. Juan P. Osuna and Christine M. Hanson, "United States Refugee Policy: Where We've Been, Where We're Going", in United States Committee for Refugees, *World Refugee Survey—1993* (Washington, DC: United States Committee for Refugees, 1993), p. 42.

41. United States official (November 1993).

early warning activities and human rights monitoring of internally displaced persons (IDPs) can also help to prevent the movement of people across borders. Prevention activities should be targeted at root causes by the:

... promotion of human rights, economic development, conflict resolution, the establishment of accountable political institutions, environmental protection and so forth. It encompasses, in other words, virtually the whole of the human agenda, with particular emphasis on the responsibilities of states to care for all their people without discrimination.⁴²

However, for the most part such activities are not carried out in any systematic way. Prevention is usually restricted to addressing immediate causes, especially with respect to the provision of food and other aid to decrease the need to go elsewhere for such resources, and to attempt "to repair relations between people and government before it is too late..."⁴³

Prevention activities are designed with a view to "seeking to limit the imperative to flee".⁴⁴ In this light, prevention activities can be seen as positive ways to alleviate the conditions which can lead to dislocation across borders. In addition, such activities can lead to small but significant humanitarian incursions on state sovereignty. As one UNHCR official put it, while there is a reluctance to talk about sovereignty as such when working within a country of origin, prevention activities can lead to greater involvement by UNHCR or other humanitarian organisation than what the state originally agreed to. The distinction made is between what is allowed by a state and what can actually be done once a presence is established—such as delivering food—which, he argues, may be more, especially in terms of human rights monitoring and protection.⁴⁵

However, prevention can also be seen in a much different light. Obstructive prevention, such as intercepting Haitian refugees at sea, and deterrent prevention, such as very restrictive and punitive immigration laws, do nothing to address either the root causes or the immediate needs of refugees. There is great concern that such state actions are undermining asylum. There is also concern that international organisations such as UNHCR which are responsible for ensuring asylum and protection are complicit in this. For example, when Turkey refused to allow Kurdish refugees to cross its border, UNHCR acquiesced.⁴⁶ And, it has been criticised for not being as forceful as it could be in other situations where states have resisted the extension of protection:

In the face of all of these efforts to minimize international refugee protection, the Office of the United Nations High Commissioner for Refugees has been either silent or a tacit co-conspirator, since its negligible funding base makes it virtually entirely dependent on the continuing goodwill of the very industrialized states it ought to be attempting to influence.⁴⁷

42. UNHCR, *op. cit.*, p. 122.

43. *Ibid.*

44. UNHCR official (November 1993).

45. UNHCR official (October 1993).

46. UNHCR official (October 1993).

47. James C. Hathaway, "Reconceiving Refugee Law as Human Rights Protection", *Journal of Refugee Studies*, Vol. 4, No. 2 (1991), p. 115.

It has, in the words of one UNHCR official, become a "Migration Management Organisation", helping states to maintain sovereign control of their borders.⁴⁸ Some point out that UNHCR's mandate, as well as refugee law in general, is to work for states: "refugee law as it exists today is fundamentally concerned with the protection of powerful states. It is also perceived by powerful states to perform that role inadequately".⁴⁹ However, while agreeing with part of this analysis, one UNHCR official noted that to the extent that this is so, this should not alleviate governments' humanitarian responsibilities.⁵⁰

Although these criticisms may be valid, one can question how else UNHCR can respond. In the case of Turkey, there is disagreement about what else UNHCR actually could have done. It does not have the ability to force states to accept refugees. The Kurds could probably also have become objects of persecution in Turkey. Even though it took a while, they probably ended up with greater protection as a result of the allied protection activities after the Gulf War than they would have had in Turkey.

However, there is still the criticism that UNHCR and others could have done more during the initial stages of the refugee flows. A US Senate staff report concluded: "If the refugees had been permitted to cross the border—even by half a mile—to enter more hospitable Turkish valleys and facilities, some of the tragic loss of life could have been minimised during those desperate early days in April".⁵¹ Instead, as one observer points out: "rather than persuade or pressure Turkey to keep its border open for desperate refugees, the Western Coalition contrived to keep the Kurds out of Turkey and to deny them the asylum they sought outside Iraq".⁵²

The foregoing has thus painted two different pictures of international practice in response to refugees, especially on the part of UNHCR. On the one hand, international agencies may be able to engage in humanitarian incursions of state sovereignty once they have gained access to a country. On the other, UNHCR is, to a certain extent, working with states in helping them to control entry into their territory. Both have some truth to them. Yet, with respect to the question of sovereignty, it must be pointed out that to the extent that states are relying on international organisations to maintain sovereign control of their borders, they also recognise that controlling borders is a lot harder than what they would like. In other words, while states are not ready to concede defeat with respect to movement of people across their borders, such attempts may be increasingly futile.

The Internally Displaced

There is one other issue with regard to displacement that, in some ways, is an even more fundamental challenge to sovereign control over borders. This is the issue of the internally displaced. By its very nature, this problem crosses conceptual and other boundaries. Two major points need to be made. First, in

48. UNHCR official (October 1993).

49. Hathaway, *op. cit.*, p. 114.

50. UNHCR official (November 1993).

51. Quoted in Bill Frelick, "Preventing Refugee Flows: Protection or Peril", in *World Refugee Survey—1993*, p. 8.

52. Frelick, *World Refugee Survey—1993*, p. 8.

one sense, IDPs differ from refugees only insofar as they have not crossed a state border.⁵³ They are displaced for many of the same reasons, including conflict, human rights abuses, and disasters, and have many of the same needs for protection and assistance. They are, in other words, those who are in refugee-like situations within the borders of their country of origin, and the distinction between the two is making less and less sense: "There is a growing realisation that it is senseless to insist that people in flight must cross an international border before they can be offered assistance, particularly if it is the need for assistance that is propelling them toward the border".⁵⁴ This also indicates a growing realisation that borders and the sovereign claims that usually go along with them are not of the same stature with respect to humanitarian issues as they once were. Second, there is no international agency which has a specific mandate to deal with the internally displaced and no body of law to deal with IDPs.⁵⁵

Yet, the international community, and especially UNHCR, has responded to the plight of IDPs in a number of innovative ways and has, as a result, either confronted or finessed the issue of sovereignty. The basic issue is that IDPs are still within the borders of their country of origin and thus, theoretically, still under the sovereign control of the state. Under traditional sovereign arrangements, then, the state would have to give consent to, and within the extreme form of the sovereignty discourse actively request, the provision of aid and protection from outside.

The instances in which UNHCR has been involved with IDPs are numerous and varied. They have occurred either as a result of a resolution by the General Assembly or at the request of the Secretary-General. UNHCR was involved, for example, with the Kurds displaced in Iraq in the aftermath of the Gulf War. While the initial involvement in Northern Iraq by allied troops occurred without the consent of the Iraqi government, subsequent UNHCR involvement occurred within the framework of a Memorandum of Understanding between UNHCR and Iraq. In the former Yugoslavia, UNHCR was designated the lead agency in coordinating UN humanitarian assistance. Somalia has also seen such UNHCR involvement. In all of these instances, UNHCR has been providing assistance and protection to mixed populations, including refugees, returnees, and IDPs.⁵⁶

The case of Somalia illustrated some of the most innovative activities which question the utility of borders in humanitarian crises. The civil war in Somalia created large populations of refugees and internally displaced. By the end of 1992, there were more than 400,000 Somalis in Ethiopia and almost 300,000 Somali refugees in Kenya, out of a total refugee population of 400,000 in Kenya.⁵⁷ In the middle of that year approximately 1,000 Somalis were fleeing into Kenya each day and UNHCR, along with other agencies, decided to put into place what it called 'Prevention Zones' and engage in 'cross-mandate' and 'cross-border' operations. These activities were "primarily designed to discourage mass movements of people within and across borders by providing assist-

53. UNHCR, *op. cit.*, p. 25.

54. *Ibid.*, p. 133.

55. *Ibid.*

56. UNHCR, *op. cit.*, p. 79.

57. *Ibid.*, p. 149.

ance to vulnerable groups in or as near to their areas of origin as possible".⁵⁸ This goal had several important operational implications. First, UNHCR 'crossed' its mandate by providing aid and protection to those who fell outside of the definition of refugee. It went into areas which were close to the Kenya–Somalia and Kenya–Ethiopia borders and assisted all of those in need, including returning refugees, IDPs, and others in the community who were not displaced but were still in need. The objectives were: (a) to contribute to the stabilisation of the area; (b) to prevent further famine-induced movement; and (c) to facilitate repatriation and return home. Unless all of the populations in need were provided aid, the preventive activities would have been futile, and UNHCR refugee sites within Somalia would have been overrun anyway.⁵⁹

The other innovative part of these operations, the 'cross-border' activities, indicate the irrelevance of borders in times of humanitarian disasters and refugee flows, as well as the fact that operational agencies on the ground are increasingly willing to pay less attention to such borders. At the beginning of the operation, UNHCR set up zones 50–100 kilometres on each side of the borders. These zones were seen as coherent and contiguous areas of operation within which aid organisations would work freely irrespective of borders to aid the displaced and prevent further displacement.⁶⁰ These activities not only demonstrate the empirical irrelevance of borders but also the increasing realisation on the part of those responsible for aiding various populations of the moral irrelevance of borders. That is, various aid organisations have adapted their operations in the face of what has been in the past a restriction on their operations—sovereignty—in such a way as to undermine the relevance of that restriction.

It should also be noted at this point that "it is mainly because of the lack of an acknowledged government authority with which the United Nations can coordinate its relief efforts, that recourse is being had to cross border operations".⁶¹ That is, since there was no sovereign authority in Somalia, questions of sovereignty are irrelevant. In addition, there is a general reluctance on the part of those at UNHCR to confront sovereignty head-on.⁶² However, the issue of sovereignty and access to those in need, especially the internally displaced, is being addressed or finessed in a number of ways. First, UNHCR has expanded its competence and been involved in situations of internal displacement which are outside its mandate but in which either the General Assembly or the Secretary-General have requested its involvement. In addition, UNHCR's mandate does include repatriation and thus it has a general right of access to repatriated populations.

Second, in other situations, UNHCR or other organisations have been involved on the ground in countries of origin. For example, numerous organisations provided aid to famine victims and displaced persons in Eritrea and Tigre in Ethiopia without the consent of the Ethiopian government. In fact, one

58. "Notes on the Preventive Zone Concept", UNHCR Memorandum (1 October 1992), pp. 1–2.

59. "A New Approach in the Horn of Africa: The Preventive Zone Concept", United Nations High Commissioner for Refugees (July 1992).

60. *Ibid.* Another zone between Kenya and Sudan was not a contiguous area since Sudanese refugees originated further inside Sudan than the immediate border region.

61. "Notes on the Preventive Zone Concept", *op. cit.*, p. 5.

62. UNHCR officials (October and November 1993).

UNHCR official noted that questions related to sovereignty are “mirage questions” because by the time UNHCR wants to obtain access to a population within a country, nongovernmental organisations frequently are already there, doing what UNHCR wants to do, irrespective of questions of sovereignty.⁶³

Third, a 1991 resolution by the General Assembly shifts somewhat the basis for international access to populations in humanitarian need. While Resolution 46/182 notes that “[t]he sovereignty, territorial integrity and national unity of States must be fully respected” it goes on to say that “humanitarian assistance should be provided with the consent of the affected country...”. This has been interpreted to mean that international agencies such as UNHCR can be more proactive in their approach and that consent is a weaker impediment to access than is requiring a request and the active participation of the government in question.⁶⁴ In addition, as one report has pointed out, even where governments have opposed outside intervention, arrangements have been made to gain access to affected populations: “innovative individuals and organisations, inside and outside of the UN system, have found ways around the constraints of sovereignty”.⁶⁵

The Morality of Borders

Boundaries are the demarcation lines we use to separate ourselves from each other. State boundaries separate ‘us’ from ‘them’, ‘we’ from ‘they’, ‘citizen’ from ‘alien’, ‘member’ from ‘other’. Borders are crucial to the theory and practice of sovereignty. Without borders there would be no focal point for an absolutised claim to sovereignty. Borders thus have a significant moral standing within the sovereignty discourse—they demarcate the space within which lies a community which is beholden and responsible to no other: “national boundaries might be regarded as the outer reaches of most people’s moral sympathy...”.⁶⁶

Several questions are raised when discussing the morality of borders. First, what are the rights of communities within borders? Second, what is the link between the widely acknowledged right to leave one’s country and the ability to enter another? Third, what are the claims that those outside of a particular border can make to cross a border and what are the concomitant obligations a state might have with regard to such claims? Finally, what do these questions say about sovereignty? These questions are all very much related and cannot be disentangled from each other in a meaningful way, so they will be addressed in parallel. Let us first consider the real differences between citizen and alien.

I will begin by agreeing with Ann Dummett, who asked poignantly: “What is an alien? Someone who, by accident of birth, born in the wrong place or to the wrong parents, is not a citizen”.⁶⁷ Because he or she was not born in the right place an individual does not have access to certain rights and resources that

63. UNHCR official (November 1993).

64. UNHCR officials (October and November 1993). As UNHCR points out: “It is more difficult for states actively to refuse their people than to neglect, passively, to *request* it”. UNHCR, *op. cit.*, p. 74 (italics in original).

65. “Internally Displaced in Africa: Assistance Challenges and Opportunities” (Washington, DC: Refugee Policy Group, 1992), pp. 41–42.

66. Charles Beitz, “Bounded Morality”, *International Organization*, Vol. 33 (Summer 1979), p. 420.

67. Dummett, *op. cit.*, p. 171.

others do. She may gaze across a border and see an abundance of resources, access to which might keep her from starving or ensure that her child would not be developmentally disabled by a lack of food or by drinking contaminated water. An alien may look through a fence and see a safe haven, protection from a regime which abuses human rights. According to Carens, aliens can be likened to feudal serfs prevented from sharing in the bounty of the baron's resources because of an accident in birth: "Citizenship in Western liberal countries is the modern equivalent of feudal privilege—an inherited status that greatly enhances one's life chances. Like feudal birthright privileges, restrictive citizenship is hard to justify when one thinks about it closely".⁶⁸ If this analogy is correct, it is hard to see, in Beitz's words, "why differences in citizenship should count as morally relevant differences".⁶⁹ What, in other words, imbues borders with such a moral significance that they can override issues related to distributive justice?

The response usually given is that it is the rights of the community to decide who does and does not get to enter and to decide what to do with its resources. Communities of different kinds can help people define who they are, and they can aid in the development of individual autonomy and the protection of human rights. For communitarians such as Michael Walzer, the protection of the community and its independence—its "common life"—is an extremely important moral good and communities have a right and obligation to ensure this through control of their borders:

But the right to choose an alien admissions policy... is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. What is at stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence.⁷⁰

Communities, in other words, require closure: "The distinctiveness of culture and groups depends upon closure".⁷¹

However, this closure cannot be determined once and for all. We are all members of various types of communities and privileging one of them—the state—above all others is not justified because it is not a natural entity which has prior claims on allegiances and resources. Giving the state absolute power to control access means that other types of communities within and across state borders are prevented from determining the status and make-up of their community.

Sub-state territorial entities in general have no restrictions on movement across their borders. An individual can move from Montana to Massachusetts or from Quebec to British Columbia with no impediments. Thus, within and

68. Carens, "Aliens and Citizens", *op. cit.*, p. 252. In *Closed Borders*, Alan Dowty discusses this concept of serfdom—what he calls the "new serfdom"—in a slightly different light. He argues that there are a number of states which restrict the right to leave or expel people based upon state goals such as nation-building and cultural homogeneity: "What the new serfdom does serve is the pursuit of total control and perfect homogeneity" (p. 226). In this way, people are treated like serfs, with little say in their destiny: "The tragic irony was that most who moved did not want to, and most who wanted to move could not. It was, indeed, a new serfdom" (p. 56).

69. Beitz, "Bounded Morality", *op. cit.*, p. 417.

70. Michael Walzer, "The Distribution of Membership", in Peter Brown and Henry Shue (eds.), *Boundaries: National Autonomy and its Limits* (Totawa, NJ: Rowan and Littlefield, 1981), p. 32.

71. Quoted in Dummett, *op. cit.*, p. 175.

between various communal entities—the state and sub-state entities—there is considerable individual autonomy with regard to movement and access to resources.⁷²

Further, as Carens points out, the differences between such sub-state communities “are often much greater than the differences across nation-states. Seattle has more in common with Vancouver than it does with many American communities”.⁷³ In fact, the region including these two cities—the American Pacific Northwest and British Columbia—already has a name—‘Cascadia’. Many members of this transnational community see a regional culture emerging along with the existing “ecological integrity” and growing economic ties. In addition, there is a shared mistrust of federal governments 3,000 miles away. And, there are special express lanes at border crossings for commuters. The commonalities in this region are not offset, to anywhere near the same degree, by the differences which can be found alongside the cultural similarities in the US–Mexico border region. Finally, there are many in Cascadia—particularly on the US side—who fear migration and cultural assault from Southern California much more than from across the national border.⁷⁴

Even though Oregon and Washington may want to restrict those from California who are in search of an environmentally-based ‘Ecotopia’⁷⁵—but who, Cascadians believe, only bring their high-stress, high-technology, high-pollution culture with them, thus affecting the culture in measurable ways—they cannot do so. It is thus necessary to ask why such states are morally different from the larger states of which they are a part. For, as Carens points out, making a distinction between these types of borders makes no sense if one is concerned with protecting individual autonomy:

... the radical disjuncture that treats freedom of movement within the state as a moral imperative and freedom of movement across state borders as merely a matter of political discretion makes no sense from a perspective that takes seriously the freedom and equality of all individuals.⁷⁶

The argument is made that tight control of the larger borders prevents smaller communities from becoming overwhelmed by outsiders and thus able to preserve their distinctiveness while at the same time preserving the individual autonomy mentioned above. This assumes that all of the smaller communities have the same goal at the same time—exclusion. Mark Gibney points out that this is not necessarily the case. For example, he notes that certain communities within the US, particularly some religious communities, have provided sanctuary to Central American refugees who have been denied asylum as result of the

72. Recently, California tried to cut welfare benefits for those coming from other states. This policy was overturned by a federal court, as was a similar Minnesota law, because, as one judge said, it “places a penalty on migration”. “California Welfare Cuts Banned”, *The Associated Press* [Online] (4 May 1994), Available: USENET Newsgroup: clari.news.immigration.

73. Carens, “Aliens and Citizens”, *op. cit.*, pp. 266–267.

74. Karl Schoenberger, “‘Cascadia’ Borders on the Future”, *Los Angeles Times* [Online] (1 November 1993), p. 1, Available: Nexis.

75. Ernest Callenbach was one of the first to conceive of the Pacific Northwest as an environmental utopia in his 1975 novel, *Ecotopia*.

76. Joseph H. Carens, “Migration and Morality: A Liberal Egalitarian Perspective”, in Barry and Goodin (eds.), *op. cit.*, p. 28.

political and ideological exclusionary proclivities of the federal government.⁷⁷ Thus, this is "a very good indication that ideological affinity may be a much more diffuse, and much less agreed upon phenomenon than Walzer seems to realize".⁷⁸ On the other hand, at least three states in the US which have large immigrant populations have sued the federal government for the costs of incarcerating illegal immigrants and providing them benefits.⁷⁹

This leads to a second issue with regard to Walzer's communitarian construction of borders—the idea of affinity. Perhaps the connections between people do not stop at borders, but rather with members of a society with certain affinities—ethnic, family, ideological—which serve to make strangers—nonmembers—members. Walzer views ethnic ties, for example, as immutable. As Gibney points out, such views were responsible for the internment of many Japanese in the US during World War II. And, they are responsible today for the discrimination experienced by many citizens and non-citizens in the US who are from non-white ethnic groups. However, these ties are, in fact, extremely mutable. Walzer feels that those who share affinities with a particular community should have special access to membership in that community. Regardless of whether or not this proposition is reasonable, the possibilities that it could be worked out in reality is virtually nil.⁸⁰ This is because one cannot, in general, point to one core concept or idea which all members of a community share and would be willing to identify as *the* trait on which to base all claims of affinity: "it is the multiplicity of ideological affinities in a pluralistic society like ours that makes this concept of 'affinity' such an unworkable concept".⁸¹ These affinities include ideologies (capitalism or socialism), religious views (Christian, Jewish, Muslim), those having to do with helping the most vulnerable (such as the sanctuary movement), and literally hundreds of ethnic ties with every part of the world. Many of these affinities are either perceived to be, or are in fact, exclusive of one another or at least in severe conflict with each other. In fact, if affinity were the basis for admissions, then we would be admitting a lot of people, all of whom at least some would like to keep out. When affinities *are* identified as core communal affinities, they are usually those of the powerful or the most vocal.⁸²

In addition, affinity and community come into direct conflict. If those in a community have shared experiences, such as culture, history, language, government, then "strangers, by definition, will not be imbued with these particular traits. The admission of strangers, perhaps any one stranger, would seem to

77. These refugees have also been the victim of the blurring of the line between asylum seekers and economic migrants. A similar movement has begun in Germany in reaction to the recent tightening of Germany's asylum policies. See "German Gov. And Church At War"; "Germans Break Laws To Give Aid", *The Associated Press* [Online] (10 May 1994), Available: USENET Newsgroup: clari.news.immigration.

78. Mark Gibney, *Strangers or Friends: Principles for a New Alien Admission Policy* (Westport, CT: Greenwood Press, Inc., 1986), p. 9.

79. "Arizona Sues Over Alien Costs", *The Associated Press* [Online] (2 May 1994), Available: USENET Newsgroup: clari.news.immigration; "California Files \$2 Billion Immigration Suit Against United States", *Reuters* [Online] (29 April 1994), Available: USENET Newsgroup: clari.news.immigration.

80. Gibney, *op. cit.*, pp. 6–9.

81. *Ibid.*, p. 15.

82. *Ibid.*

cause a severe disruption to a community, at least in terms of how Walzer characterizes a community".⁸³

A different analysis arises if one realises that communities of all types, from cities to states, are in a continual process of construction and reconstruction. Most states have, in fact, relied on significant immigration sometime in their history (and usually in their present, too) to become what they are. Immigrants have been crucial in their construction. The US has relied upon significant immigration in its development. The Statue of Liberty has served as a beacon for the 'tired', 'poor', and 'huddled masses'. Today, the tired and poor are turned away at the southern border in a nativist backlash. However, we should also remember that many of those who came to the US from Europe around the turn of the century—such as Italians and Irish—were also despised by wide sectors of the 'native' population—those whose ancestors had come perhaps 50 or 100 years earlier—but are now, even though many still retain their ethnic identities to varying degrees, are considered part of the mainstream and have been successfully assimilated.⁸⁴ It is the process of forgetting which can reify certain ideas or institutions.⁸⁵ In the case of the US, forgetting how it was constructed has led to a reification of an idealised, natural country founded upon the principles and hard work of the descendants of the *Mayflower* and which sprang forth in isolation from the rest of the world. The reality, of course, is much different.

Open Borders

There are several grounds on which to base more open borders. The first is the connection between the right to leave and the right to enter. Various human rights declarations, as well as statements from many countries—especially Western countries—have affirmed the right to leave one's country. What is in question, of course, is how to make that right meaningful. Until relatively recently, free movement across borders was the norm. The 1791 French Constitution guaranteed "*liberté d'aller, de rester, de partir*".⁸⁶ Coming, staying, and going were considered equal. In 1889, the members of the International Emigration Conference passed a resolution stating: "We affirm the right of the individual to come and go and dispose of his destinies as he pleases".⁸⁷ By World War I all of this changed. By the time of the Universal Declaration of Human Rights (UDHR), immigration and emigration were considered very different issues. The UDHR confirmed the right to emigrate, but the right of entry was restricted to nationals.

83. *Ibid.*, pp. 9–10.

84. As INS Commissioner Meissner has recently observed: "Things like immigration are wonderful in retrospect.... When it happened 100 years ago and it all worked out... it's lovely. But it has never been wonderful and easy when it's happening. It's extraordinarily difficult". Quoted in Sandalow, *op. cit.*, p. 1.

85. Walter Truett Anderson notes that the most potent form of reification occurs when people "invent institutions and then forget they have done so". Walter Truett Anderson, *Reality Isn't What It Used to Be: Theatrical Politics, Ready-to-Wear Religion, Global Myths, Primitive Chic, and Other Wonders of the Postmodern World* (San Francisco: Harper San Francisco, 1990), p. 39.

86. Quoted in Goodin, *op. cit.*, p. 13.

87. *Ibid.*

Does this really make sense? The right to leave is meaningless if one does not have somewhere to go: "Logically, it is an absurdity to assert a right of emigration without a complementary right of immigration unless there exists in fact (as in the mid-nineteenth century) a number of states which permit free entry".⁸⁸ This is certainly not the case today.⁸⁹ Thus, countries must have more open entry policies in order to ensure the right to leave. Further, the right to leave has had its roots in liberalism and liberal states have been the most forceful in advocating this right, even as they have tightened their borders. Thus, to be consistent, it is especially incumbent upon such states to open their borders more: "Liberal states are thus under collective obligation to provide at least a sufficient number of entries to foreigners so as to enable them to exercise their right to exit".⁹⁰ There are some limits to this, and they will be discussed below. However, these limits are much less severe than those currently placed on immigration.

The rights to exit, enter, and remain which have been recognised to varying degrees are all tied in with what has been described as the right to community. The right to remain means that an individual has a right to stay and participate in her community, with all of the attendant benefits, rights, and duties which go along with that. The community, I would argue, is crucial in developing and maintaining identity and is necessary in protecting human rights. Because we have a right to stay in our community, and such communities are essential in protecting human rights, the right to community can be considered a right itself. How this right is to be ensured is unclear. That is, if individuals have a right to community, exactly how do they claim such a right? This uncertainty may arise because "the community itself may be mutating in such a way that it is unable or unwilling to fulfil those individuals' needs that we normally associate with rights".⁹¹ This observation can be interpreted in two ways. First, it can be seen as referring to the fact that our notions of identity are changing in such a way as to render meaningless talk of *the one* territorially demarcated community of which we are a part and which is solely responsible for ensuring our rights. Second, one can interpret it in a more concrete way, referring to that fact that many communities (read states) cannot attend to the needs of their members, either because of civil disturbance or because of some sort of humanitarian disaster, or because the idea of community within a particular state-community has 'mutated' to such a degree that it excludes from membership within that community individuals who were, at one time, members. One need only look at the former Yugoslavia to see this point clearly.⁹²

88. Dummett, *op. cit.*, p. 173. As Dowty notes: "The right to leave a country is an empty one if there is no place to go"; Dowty, *op. cit.*, p. 239.

89. Even though many states cannot control their borders to the degree they would wish, thereby allowing many people in against the wishes of the state, this would not fulfil the conditions necessary to ensure the right to leave because those in the second country are there illegally and thus have no right to stay if the authorities caught up with them.

90. Aristide R. Zolberg, "The Next Waves: Migration Theory for a Changing World", *International Migration Review*, Vol. 23 (Fall 1989), p. 425.

91. Daniel Warner, in Daniel Warner and James Hathaway, "Refugee Law and Human Rights: Warner and Hathaway in Debate", *Journal of Refugee Studies*, Vol. 5, No. 2 (1992), p. 164.

92. Of course, just the opposite has just happened in South Africa, where nonmembers—Blacks—have become members. Unfortunately, this process seems the exception rather than the rule.

If the right to community is thus undermined, an individual can make a claim against some other community for inclusion as a way of implementing the right to community. Why this is so can be seen by referring to what might be called the social purpose of the state:

Since the very nature and creation of the state recognized that it is the *right* of every human being to have a place to live, then any individual, and not just members of a state, have the *right* to claim a place to live within that state provided that right has not already been exercised and recognized elsewhere.⁹³

That is, when an individual's right to community is not upheld in their country of origin, they can make a claim for inclusion in another community—that is, a state—because part of the social purpose of the state is to uphold the right to a place to live—that is, the right to community. This is why, although there is no defined right to asylum, there is a general feeling of obligation—although apparently receding—among states to take in those who have lost the ability to be a part of a community—refugees.

Yet, if one wants to be serious about individual autonomy and, as Carens puts it, the “equal moral worth” of individuals, then making a distinction between refugees and those who have left their state voluntarily⁹⁴ is not consistent. While a distinction between citizens and non-citizens can still be made, it is not in the exclusionary sense in which it is usually conceived:

Those who choose to cooperate together in the state have special rights and obligations not shared by non-citizens. Respecting the particular choices and commitments that individuals make flows naturally from a commitment to the idea of natural moral worth.... What is *not* readily compatible with the idea of equal moral worth is the exclusion of those who want to join. If people want to sign the social contract, they should be permitted to do so.⁹⁵

It might be argued that such openness would change the character of the community and so restrictions can be made on immigration to preserve culture. As Carens notes, the right of a community to protect its culture is “not self-evidently wrong”.⁹⁶

Further, this right is rooted in the idea of community, and not of the state: “it is not the state as such that gives rise to a claim to exclude, but rather the existence of a community with a distinctive and valuable way of life that would be threatened by immigration”.⁹⁷ The restrictions which might be put on immigration for such reasons will be developed further below. At this point, however, it is necessary to realise that various types of communities—that is the communal identities which define who we are—are not static entities, set in stone once and for all. Rather, they are dynamic, in a constant state of flux, changing and mutating with the changing times and perspectives of the (changing) members of the community. Thus, while a community may have certain

93. Adelman, *op. cit.*, p. 16 (italics in original).

94. Of course, many ‘involuntary’ migrants have really not had a choice if they are to maintain even just basic subsistence.

95. Carens, “Aliens and Citizens”, *op. cit.*, p. 270 (italics in original). *

96. Carens, “Migration and Morality”, *op. cit.*, p. 39.

97. *Ibid.*, p. 40.

rights, it does not have an absolute right, nor the ability, to preserve itself in some idealised form for once and for all against all outside influences:

People live in communities with bonds and bounds, but these may be of different kinds. In a liberal society, the bonds and bounds should be compatible with liberal principles. Open immigration would change the character of the community but it would not leave the community without any character. It might destroy old ways of life, highly valued by some, but it would make possible new ways of life, highly valued by others.... To deny such communities the right to exclude does limit their ability to shape their future character and destiny, but it does not utterly destroy their capacity for self-determination. Many aspects of communal life remain potentially subject to collective control.... To commit ourselves to open borders would not be to abandon the idea of communal character but to reaffirm it.⁹⁸

Besides making the right to leave and community meaningful, there are other bases, all having to do with the obligations of states, with which one can provide for a much greater right to enter. Two are described by Gibney—the Harm Principle and the Basic Rights Principle. The Harm Principle, which seeks to protect individual autonomy, has two basic components: (1) “individuals have a duty not to harm others”; and (2) “those who have caused harm have a duty of restitution”.⁹⁹ Thus, if a state has harmed another in some way it has a duty to make restitution, and one way to do this might mean admitting citizens of another country: “in order to avoid serious harm, or in order to make restitution for harm that has already occurred, a nation might have to admit ‘strangers’ for a certain period of time”.¹⁰⁰ An obvious example of this would be war: “I propose not only that noncombatants be protected, but I claim that in some instances the only means of doing this is by the admission of noncombatants to the intervening nation or some other country”.¹⁰¹ Thus, the US, which intervened in various ways in Central America, had a duty, for example, to admit Nicaraguans who were fleeing the US backed war.¹⁰² In the same way, the US, and other countries, had a duty to admit those who were fleeing the war in Iraq. Gibney further states that those admitted under such terms should be repatriated, unless they would suffer serious harm as a consequence.¹⁰³ Such harm might have something to do with the damage the state has done in the country of origin and how this would harm those returning. In addition, although he discounts this, the state should also take into account the kinds of communal ties one has made while being forced out of one’s community of origin by the actions of the intervening state. This would have the effect of letting more people stay.

The Harm Principle might also be invoked if a government is supporting an unjust regime—one that does not respect the rights of its citizens—in another country. In this case, it is contributing to the harm which is done against the

98. Carens, “Aliens and Citizens”, p. 271.

99. Gibney, *op. cit.*, p. 79.

100. *Ibid.*, p. 85.

101. *Ibid.*, p. 87.

102. The US did admit many Nicaraguans, but on ideological grounds rather than any sense of obligation to those it had harmed.

103. Gibney, *op. cit.*, p. 89.

people of that country and they can make certain claims against the first country.¹⁰⁴ For example, the US supported an unjust regime in El Salvador. It thus had a duty of reparation towards the people that were harmed by the persecution perpetrated by that regime. One way in which it could have discharged its obligation would have been to allow in the Salvadorans who were fleeing persecution. It did not do so.

The second basis Gibney puts forward for more open admissions is the Basic Rights Principle. It "obligates nations to play some part in meeting the basic rights of individuals in other societies even if they were not the cause of this need".¹⁰⁵ The rationale for this is simple: "Why should I defend defenceless human beings? Because they are human beings and they are defenceless".¹⁰⁶ There are certain rights that humans share as humans. However, as in the case of the right to leave, these rights are meaningless unless those who hold the rights have the means to carry them out. Peter Singer argues that "if it is in our power to prevent something very bad from happening, without thereby sacrificing anything of comparable moral significance, we ought, morally, to do it".¹⁰⁷ Thus, if a state can alleviate a harm without inflicting similar harm upon itself, it should do so. This obligation is not tied to any particular harm inflicted and it thus broadens the obligation to all those who are in a position to help. It is not an open-ended obligation because, as Walzer points out, a duty to care for everyone means that no one will be cared for.¹⁰⁸ While Walzer would, for the most part, have duties stop at borders, the Basic Rights Principle would argue that duties do extend beyond borders, but they are spread out among all such that each can make a contribution. This contribution might be to contribute a certain percentage of GNP to development aid. Or, more relevant to present purposes, a state could discharge its obligations through admitting those in need, including those who fit the narrow definition of refugee as well as those in search of basic subsistence.¹⁰⁹

This duty is based on the idea of the 'necessitous stranger'. This includes asylum seekers and others who are necessitous including those looking for basic subsistence. However, this also maintains a basic distinction between citizens and strangers. According to Warner, the duty to provide aid falls upon the state itself, not upon any particular communities within the state—he distinguishes between the two. Thus, "[t]he notion of necessitous stranger implies that the refugee will continue to be cut off from community".¹¹⁰ However, as I shall argue, those who are admitted should not be made second class citizens.

Another way to approach obligations states may have toward those outside the state, including those wishing to enter, is to use a modified version of Rawlsian theory. It should be noted that his focus is on domestic arrangements—he does not apply them worldwide. Two principles are of particular relevance to my argument. First is his idea of the original position. This is where members of a society, who do not know what their position in that society will

104. *Ibid.*, pp. 92–98.

105. *Ibid.*, p. 103.

106. Henry Shue quoted in *ibid.*

107. Quoted in *ibid.*, p. 36.

108. *Ibid.*, p. 5.

109. *Ibid.*, pp. 103–107.

110. Warner in Warner and Hathaway, *op. cit.*, p. 166.

be, get together to decide on the principles upon which the society will be based, including the degree of distributive justice and the type of regime. It is assumed that most would be relatively risk-averse and would choose a society which is at least somewhat egalitarian. One would assume that the same would be true at the global level, such that one would not want to have the chance of ending up in a poor society. Second, Rawls argues that one does not have any particular right to those things which are morally arbitrary. Certainly the distribution of resources among countries is morally arbitrary, and thus there is no special right to the resources within one's country.¹¹¹

To maintain otherwise would be to maintain, as Carens put it, feudal privilege. My focus is on human rights, a significant part of which is concerned with individual autonomy. However, as Gibney points out, such autonomy is not possible when one does not have access to certain resources which may be considered morally arbitrary: "Individual autonomy is not protected when individuals do not have the means for subsistence. The lack of food and shelter is just as devastating to an individual, if not more devastating, than persecution from unjust regimes of intolerant groups".¹¹² Thus, in the interest of protecting human rights, those outside of a particular territory may be able to make claims on certain resources within that territory which may be considered morally arbitrary. One way of responding to those claims may be, as with the Basic Rights Principle, to allow in some of those making the claims to give them access to those resources, such as food and shelter. Exactly where this obligation begins and ends is still fuzzy, and will be developed further below.

Parts of several of the arguments above might also come under the heading of international distributive justice. One of the underlying ideas of borders is that those within borders have special obligations to each other which they do not have toward those outside the border. This is based on the idea of the state as a community, within which people have special roles, rights, and obligations. These obligations, furthermore, override any obligations to those outside the boundaries of this community. Yet, this is not obviously so. One way in which obligations can be incurred is through an act of choice. For example, choosing to raise a family means that one has certain obligations to that family. However, a state is not a family, and, for the most part, the citizens within a state have not chosen their lot. Thus, while the state in which they live does have certain commitments to them with respect to its social purpose, one cannot say that those are its only, or at least overriding, commitments, and that the citizens have obligations to others within and outside the state which override other obligations, since the distribution of people (and resources) among countries is morally arbitrary.

If we accept the proposition that "if it is in our power to prevent something very bad from happening, without thereby sacrificing anything of comparable moral significance, we ought, morally, to do it", whatever obligations individuals within a state have toward each other, they must also take into account the possibility that obligations to those outside the state may take precedence. These obligations involve ensuring that minimum standards of basic necessities are upheld through at least some sort of distributive justice. The most comprehen-

111. Gibney, *op. cit.*, pp. 23-32.

112. *Ibid.*, p. 30.

sive way of doing this would be to reform the entire international distributional system. However, since this is unlikely anytime soon, other measures must be taken. For example, the affluent states need to transfer more of their resources such that poverty is addressed in a much more systematic way, and this aid should be thought of in terms of moral obligation rather than simple charity as it usually is. Or, as I noted earlier in the discussion of the Basic Rights Principle, this might also entail opening borders to those in need.¹¹³

Of course, none of these obligations are open-ended. Following Singer's formulation, the limit is when our distributive actions sacrifice something of "comparable moral significance"—that is, when our actions threaten our basic rights by, for example, depriving us of the minimal necessary subsistence requirements. One can probably also make the argument that the limit would come significantly before we reached an equilibrium point with, say, the living standard of the poorest in India. However, I will not attempt to do that here. Rather, what I am interested in is what the limits are on the obligation to allow people to cross one's borders.

Admitting the Other

First, let me review the grounds for admission: (1) to ensure the recognised right to leave; (2) to ensure the right to community; (3) human rights protection; (4) the Harm Principle; (5) the Basic Rights Principle; and (6) international distributive justice. The parameters for responsibility—which will actually be quite broad—for allowing non-citizens into a state can be framed by two principles. First, preserving basic human rights, especially subsistence, becomes a moral imperative for states which undermines their claims to prevent entry. People need access to certain resources to be able to live. Many of these resources, and the individuals who need access to them, are distributed morally arbitrarily within and among various types of borders. That is, by virtue of accident of birth, an individual may be situated inside the border of the state which cannot take care of her minimum needs and since one does not have a special right to things which are morally arbitrary beyond what one needs to live, others can make a claim on these resources to the extent that they need them to live. And, to the extent that these resources either are not or cannot be distributed to those who need them, those in need can cross arbitrary borders in order to gain access to them.

The other defining parameter on the obligation for admission is that a community—that is a state—can restrict admission when the possibility of community is undermined. That is, when the numbers of people, partly in relation to the available resources, are so great within a particular territorial area that any idea of community, perhaps as a result of environmental or population pressures, is no longer viable. This does not mean that when an existing community is in danger of changing its character somewhat it can restrict admission. It does not privilege any particular community, for communities and our identification with different communities are in a constant state of flux—no

113. For a more extended discussion of this issue of international distributive justice see: Beitz, "Bounded Morality", pp. 416–422; Charles R. Beitz, "International Distributive Justice", in Steven Luper-Foy (ed.), *Problems of International Justice* (Boulder: Westview Press, 1988), pp. 27–54.

community can hope to completely isolate itself from others and preserve its character forever. Rather, it recognises that communities do change, frequently in response to immigration, and that this is a natural part of the development of communities.¹¹⁴ It is only when this process calls into question the possibility of community—and therefore prevents the fulfilment of the right to community—that limits can be placed on the flow of people across borders.

Immigration in changing communities, however, can have both positive and negative consequences for a wide variety of values. The US, for example, has been based upon immigration and is what it is today because of the movements of large numbers of people into its territory. At the same time, certain types of mass immigration can have devastating negative consequences. For example, the movement of large numbers of Brazilians into the Amazon Basin in search of new farmland (which they create by burning down the rain forest) has displaced the native inhabitants such as the Yanomami and created a situation where they are overwhelmed that the possibility of community is denied them. The same sort of thing happened in the US when the Native Americans were pushed off their land, seriously disrupting their communities and forever altering their way of life. It is at this point that the values of self-determination and open borders come into conflict. The influx of people creates a situation where the change is so great and so instantaneous that the possibility of community is foreclosed for a certain portion of the population. That is, they are no longer able to participate in the self-determination process. At this point, the value of self-determination may outweigh the value of open borders and restrictions can be put on the movement of people into a particular territory.

In between these parameters is a wide space with a number of other principles related to admission. For example, people must be admitted on a number of human rights grounds. The first, already mentioned, is to maintain basic subsistence rights. Second is the right to community. That is, when an individual no longer has a community which fulfils her needs, then she can make a claim to join another community. Third, and related to this, is an obligation to admit those fleeing persecution. Although there is no recognised right to asylum under international law, if we are to take seriously protecting human rights, such a right must be put into practice. In addition, in a reversal from international practice which recognises persecution but not starvation as grounds for admission, if we recognise subsistence rights as grounds for a claim to admission, then it makes little sense to deny admission to those who may die in a different way without admission. The fourth principle with regard to human rights is that in order to implement the right to leave a country, a right to enter another must be recognised.

Associated with the right to enter is what rights individuals have when they do enter. I have already noted that the idea of necessitous stranger results in a situation where an individual who is admitted on the basis of need is still cut off from any real access to a community, and thus is denied the right to community.

114. For an in-depth study of how one particular community—the city of Miami—changed as a result of immigration see Guillermo J. Grenier and Alex Stepick III, *Miami Now! Immigration, Ethnicity, and Social Change* (Gainesville, FL: University of Florida Press, 1992). As the editors point out in the Introduction: “The history of Miami since the early 1960s has been affected thoroughly by one particular phenomenon—immigration. In fact, the latter half of the twentieth century can be divided into two basic parts: before the immigrants and after the immigrants” (p. 3).

There is a recognised right to self-determination for all sorts of communities. However, this right does not include the right to discriminate among people within a community—in other words, all are entitled to equal treatment. This means that a community cannot create different classes of members. Guest workers and refugees cannot be treated differently from others within a community—they cannot be denied access to food or medical services or, for that matter, jobs which will enable them to live. Walzer, who rejects relatively open admissions policies on the basis of self-determination, nevertheless states that when individuals are admitted, the way they are treated is, as Carens puts it, “constrained by principles of justice”.¹¹⁵ This means that once an individual is admitted to a community, it must be as a *member* of that community.

At the same time, however, it must also be recognised that many migrants are temporary refugees who want to go back to their country of origin when the situation changes. In these cases, while it is still incumbent upon states to admit these people and provide refuge and aid, those whose ultimate goal is to return to their country of origin would not be included in the community in the same way—with the possibility of citizenship—as others whose intention would be to stay permanently. As Hathaway contends:

Rather than continuing the Refugee Convention’s emphasis on facilitating the permanent exile of a narrowly defined subset of refugees, I believe that the international protection system should be easily accessed by a broadly defined group of involuntary migrants, but should direct itself ultimately to the refugee’s right to be restored to membership in her own community.¹¹⁶

That is, in addition to admitting refugees, it is incumbent upon the international community to ensure that their right to return is upheld. Yet, some may never be able to go back, and those, of course, should be more fully integrated into the community of refuge.

However, it must also be recognised that the magnitude of the refugee problem is so large that there are some situations where countries of refuge cannot handle the massive influx of people, at least not by themselves. Thus, countries who do not border refugee producing countries have an obligation first, to admit some number of refugees as countries of second asylum and, second, when this is not practical, to provide aid to those countries who do admit large numbers of refugees. This would fulfil obligations under the Basic Rights Principle and international distributive justice. Further, when a situation comes to a point where the influx of people threatens the possibility of community for those within the country, that country can refuse to admit any more as members. At this point it becomes clear that a much more international focus is needed with regard to dealing with refugees, and that those who are not overwhelmed, for the most part the northern states, must be more willing to accept refugees.¹¹⁷

115. Carens, “Aliens and Citizens”, *op. cit.*, p. 268.

116. James Hathaway in Warner and Hathaway, *op. cit.*, p. 170.

117. For a discussion of current issues with regard to resettlement see the December 1993 issue of *Refugees* magazine put out by UNHCR.

Human Migration and Sovereignty

The widespread movement of people in a number of different circumstances problematises the concept of sovereignty as anywhere near an absolutising principle. As I have argued, movements of individuals and groups across borders have called into question the ability of states to control their borders and to decide who is allowed in and who is barred from entry. The very fact that the US, the most powerful country in the world, was able to prevent only 10% of those who it considered to be undesirable from crossing certain points of its border until it engaged in extraordinary measures which will be extremely difficult, if not impossible, to sustain over an extended period of time along the entire border, illustrates that borders are much more permeable than people have thought. So, one question to be raised is, if a state does not do something which it is allowed to do within the sovereignty discourse, does it lose part of its sovereignty? If a state is not able to do something which it is allowed to do, then it would seem clear that some part of its sovereignty would be undermined. If states cannot control who enters and stays—a central right under the traditional sovereignty discourse—then it would seem that one of the building blocks of traditional conceptions of sovereignty is called into question.

Further, flows of refugees and other migrants are having many different effects on receiving countries with which they are unable to deal. In some countries, especially in Africa, movement of people is taxing state resources to the limit as they struggle to provide for refugees. In other countries, such as Germany which has had relatively open admissions policies, there have been attacks on immigrant populations. Further, in 1993, Germany significantly amended the 1949 law which had allowed almost anybody to enter and apply for asylum and receive welfare benefits.¹¹⁸ The following year, the German Border Guard was given new powers to operate outside of their traditional areas of operation in order to crack down on smugglers and illegal immigrants.¹¹⁹ In the US, too, a nativist backlash has resulted in calls for much tighter immigration enforcement. But, immigration has also changed the character of communities, such as the ones along the US–Mexico border, where, even though there is much hostility on the part of certain parts of the population north of the border towards the south, there is still much common cultural heritage and ceasing the movement of people across the border would have severe economic and cultural consequences.

In addition, international actors, such as UNHCR, impinge upon state sovereignty and have come to believe that borders should not be the barrier that they have been. Most notable have been the cross-border operations in Kenya, Ethiopia, and Somalia which have set up areas of operation which essentially ignore territorial demarcations.

If states did possess absolute sovereignty, then they could decide who can and cannot become members, expel members, and prevent them from leaving.¹²⁰ As

118. "German Gov. And Church At War". During 1993 about 40,000 people were deported, compared with 12,000 in the previous year. See also Stefan Telöken, "The Domino Effect", *Refugees* (December 1993), pp. 38–40.

119. "New Law Gives German Border Force More Power", *The Reuter European Community Report* [Online] (24 June 1994), Available: Nexis.

120. Adelman, *op. cit.*, p. 14.

I have demonstrated, states are losing the ability to decide who enters, although the trends and evidence are still somewhat contradictory. For example, in the case of the US, attempts to prevent illegal immigrants from crossing one portion of the US–Mexico border frequently just have the effect of pushing the flowing of migrants further down the border where enforcement is not as tight. In Germany, on the other hand, the 1993 revisions in the laws regarding the rights of asylum seekers do seem to have led to a marked decrease in the numbers of asylum seekers. However, court decisions and other factors have prevented it from giving Germany the ability to control the numbers of immigrants within its borders as its authors intended.¹²¹ Once people enter, they can become lost within the state and become *de facto* members.¹²² This is so, too, with those a state allows to enter temporarily, for example while asylum claims are being reviewed. The last two actions are ruled out by the recognised rights to remain and to leave.

Real-world developments, international law, and international practice, then, have qualified the sovereign control of borders. In addition, when looking at the morality of borders, I have argued that questions of human rights, distributive justice, and the way communities are constructed all call into question the moral authority of states to control borders to a significant degree.

The global distribution of both people and resources is morally arbitrary and has resulted in, as Carens points out, a feudal distribution of access to necessary resources. Thus, obligations under the Basic Rights Principle and principles of distributive justice necessitate that people who do not have access to subsistence requirements be allowed access to those resources in other countries. Other issues of human rights also lead to the conclusion that borders should not be the barriers to movement that they are perceived to be. Protection for those fleeing persecution and humanitarian disasters certainly qualifies one to cross borders. But so too does the acknowledged right to leave one's country, which would be inconceivable without a corresponding right to enter another.

In addition, I have argued that the very creation of the state recognised a right to community. States have an obligation to ensure that when one's state can no longer ensure that right, another state does. Further, while certain notions of community are used to exclude people from a community, communities are more mutable than many members would like to believe, and many factors, including the movement of people, contribute to the constant regeneration of communal identity. It is not, then, the preservation of a particular community for all times which can lead to restrictions on migration. Rather, it is when the *possibility* of community is threatened that restrictions may be imposed.

One can also see another connection between migration and communal self-determination. First, more open borders (particularly with regard to emigration) might help to relieve pressures which lead to communal conflict. In other words, if there were a greater degree of freedom of movement, and people saw that their ability to move was greater, they might decide to move and join

121. United States Committee for Refugees, *World Refugee Survey—1994* (Washington, DC: United States Committee for Refugees, 1994), pp. 134–137. In fact, USCR concludes that: "Practical difficulties in administration and contrary court decisions suggested that Germany would continue to host a sizable number of refugees for the foreseeable future" (p. 136).

122. Of course, they usually become members of the underclass.

some other community which might be more open to their communal identity. On the other hand, they might decide to stay and participate in the self-determination process, knowing that they could leave if necessary. All of this movement would have to be entirely voluntary, since to do otherwise would undermine, among other things, the right to remain. Second, an expanded view of self-determination, which recognises various forms of non-state-centric autonomy arrangements, could create the conditions for greater inclusion in the community on the part of a number of groups, thus relieving the pressures for movement which occur alongside communal conflict.

All of this leads to the conclusion that, although many states are vigorously reasserting their rights to control their borders with respect to the movement of people and membership—*de facto* and *de jure*—they are fighting a losing battle. Further, questions of human rights and justice require that states open up their borders much more than they are now. This can be seen as a significant blow to one of the most fundamental premises undergirding the concept of state sovereignty—the ability to control access to and membership within the broad community called the state.

Finally, human rights considerations may also lead to the conclusion that a new concept of citizenship is needed. Up until this point, citizenship has been state-centric and has reified claims by states to deny entry and membership to most people. However, I have argued that people may have much broader rights to cross borders and become members of other communities than are found in the sovereignty discourse. This is because, consistent with what I have characterised as the New Sovereignty, individuals are recognised as humans first rather than as citizens of a particular state. Thus, it is necessary to consider people as citizens of the world who also have affiliations which entail rights and responsibilities with respect to other communal entities. As individuals with certain rights with regard to autonomy, subsistence, and other values, people have the right in many different circumstances to change those affiliations. Thus, citizenship becomes, on the one hand, more mutable, and on the other, more encompassing, embracing both the local and the global.