The shifting border: legal cartographies of migration and mobility*

By Ayelet Shachar

Synopsis

We typically think of the border as a line on the map. In 1989, with the fall of the Berlin Wall, many predicted that sealed gates would soon become relics of a bygone era. Today, we find a different reality. Instead of disappearing, borders are metamorphosing. The current crisis reveals that governments are relying less on brick and mortar to restrict mobility. One of the most remarkable developments of recent years is that the border itself has become a moving barrier, an unmoored legal construct. The border has broken free of the map; it may extend well beyond the edge of a territory or well into its interior. The unmooring of state power from any fixed geographical marker has created a new paradigm: the shifting border.

The shifting border is not fixed in time and place; it consists of legal portals rather than physical barriers. From the United States conducting “preclearance” immigration regulation beyond the edge of its territory, to Australia “excising” its terrain to avert asylum seekers’ invocation of protection claims, the location of the border has been shifting for decades.

Regulation of mobility is severed from arrival at the actual border, it begins “elsewhere” and may continue to apply long after arrival.

These developments bear dramatic implications for the scope of rights and protections that migrants and non-citizens may enjoy. Far from the dream of a borderless world that emerged after the Berlin Wall, today we see not only more borders but also the proliferation of “portable” legal barriers that may appear anywhere but are applied selectively and unevenly.

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About the Author

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From the Great Wall of China to the Berlin Wall, fortified manifestations of the border have long served as a powerful symbol of sovereignty, real and imagined. In 1989, the fall of the Berlin Wall led many to predict that barbed wire and sealed entry gates would become relics of a bygone era. Over a quarter of a century later, we find a very different reality. Today, new walls are erected at an unprecedented pace the world over. Around Spanish enclaves in Morocco, between South Africa and Zimbabwe, India and Bangladesh, Hungary and Turkey, and along the US–Mexico border and Norway’s arctic border barrier with Russia, menacing border walls and steel fences continue to signal that even in a supposed post-Westphalian era physical barriers are still considered powerful measures to regulate migration and movement.

At the same time, a new and striking phenomenon—the shifting border—has emerged. The notion that legal circumstances affecting non-members change substantively only after they “pass through our gates” is well entrenched in both theoretical debates and regulatory practice. The remarkable development of recent years is that “our gates” no longer stand fixed at the country’s territorial edges. The border itself has become a moving barrier, an unmoored legal construct. As I will show in this essay, the fixed black lines we see in our world atlases do not always coincide with those comprehended in—indeed, created by—the words of law. Increasingly, prosperous countries utilize sophisticated legal tools to selectively restrict (or, conversely, accelerate) mobility and access by detaching the border and its migration-control functions from a fixed territorial marker, creating a new framework that I call the shifting border.

When it comes to migration control, the location of the border is shifting: at times penetrating deeply into the interior, at others extending well beyond the edge of the territory. And in other contexts, fixed territorial borders are “erased” or reftified. This is part of a shifting-border strategy that strives, as official government policy documents plainly and tellingly explain, to “push the border out” as far away from the actual [territorial] border as possible. The idea, enthusiastically endorsed by governments in relatively rich and stable regions of the world, is to screen people “at the source” or origin of their journey (rather than at their destination country) and then again at every pos-sible “checkpoint along the travel continuum—visa screening, airport check-in, points of embarkation, transit points, international airports and seaports.” The traditional static border is thus reimagined as the last point of encounter, rather than the first. In this way, the shifting-border strategy makes it harder and harder for unwanted and uninvited migrants to set foot in the greener pastures of the more affluent and stable polities they desperately seek to enter. Conversely, wealthy migrants wishing to deposit their mobile capital in these very same countries find fewer and fewer restrictions to fast-tracked admission. The shifting border is the key pillar in a wholesale agenda to strategically and selectively sort and regulate mobility as prosperous countries seek to

1 For a critical exploration of border walls, see Wendy Brown, Walled States, Waning Sovereignty (Cambridge: Zone Books, 2010). Definitions of sovereignty may vary, but legally there are three enduring constituent features: people, territory, and political authority exercised over that territory and its people. As Robert Jackson observes, “[s]overeignty is an idea of authority embodied in those bordered territorial organizations we refer to as ‘states’.” Robert Jackson, Sovereignty: The Evolution of an Idea (Cambridge: Polity Press, 2007), pp. ix. 1. In international law, Convention on the Rights and Duties of the State (Montevideo Convention) art. 1, 26 December 1933, 165 L.N.T.S. 19 echoes the tradi-tional Westphalian view, stating that: “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relation with other states.” In international politics, the centrality of territory to sovereignty is acknowledged as a basic norm of the Westphalian order. See Michael Zürn, Martin Binder, and Matthias Ecker-Ehrhardt, ‘International Authority and its Politicization’, International Theory 4 (2012): pp. 69–106.
4 This is so even as politicians frequently revert to images of a fixed legal spatiality when it comes to the rhetoric surrounding the exercise of sovereign authority, as in Donald Trump’s election promise to build an “impenetrable, physical, tall, powerful, beautiful . . . border wall.”
5 Canada Border Services Agency, Department Performance Report 2008–09, Section II: Analysis of Program Activities by Strategic Outcome (Ottawa: CBSA, 05 November 2009); Office of the Auditor General of Canada, Report of the Auditor General of Canada to the House of Commons, Ch. 5: Citizenship and Immigration Canada—Control and Enforcement (FA1-2003/1-5E, 2003), ch. 5.8.
7 My reference here is to the current legal situation which holds, in the words of the ECHR, that “[s]tates enjoy an undeniable sovereign right to control aliens’ entry into and residence in their territory.” Saadi v. UK, App. No. 33298/03, Eur. Ct. H.R. (2008), sec. 64 (internal references omitted). Contemporary political theorists have, however, questioned the justice and legitimacy of this current legal situation. For this fast burgeoning literature, see, for example, Sarah Fine, The Ethics of Immigration: Self-Determination and the Right to Exclude, Philosophy Compass 8 (2013): pp. 254–268.
“regain” control over a crucial realm of their allegedly waning sovereign authority.

This shifting border, unlike a reinforced physical barrier, is not fixed in time and place. It relies on law's admission gates rather than a specific frontier location. Just as the shifting border extends the long arm of the state, ever more flexibly, to regulate mobility half the world away, it also stretches deeply into the interior, creating within liberal democracies what have been variably referred to as “constitution free” zones or “waiting zones” (zones d’attente), where ordinary constitutional rights are partially suspended or limited, especially in relation to those who do not have proper documentation or legal status.9 Each of these spatial and temporal contractions and protrusions bears dramatic implications for the scope of rights and protections that migrants and other non-citizens may enjoy, revealing the violence that may be deployed through legal acts that ascribe meaning to bodies in relation to (shifting) borders, prescribing or denying them access and setting people in new relations of power in political spaces of im/mobility.10 In a world of mounting inequality and migration pressures, governments frantically search for new ways to expand the reach of their remit, both conceptually and operationally, inward and outward, in the process reinventing one of the classic dimensions of sovereignty in the modern era: namely, territoriality.

Philosophers and jurists are only now beginning to come to terms with these deep currents, which are reshaping the terrain of law and mobility in ways we might not yet fully recognize or understand. When it comes to today’s shifting border, we are, to borrow a metaphor from Seyla Benhabib, like travelers navigating a new terrain with the help of old maps; while the terrain has radically changed, our maps have not. Thus, we stumble upon streams we did not know existed, and climb hills we have never imagined.11

Despite its striking implications for human dignity, democratic accountability, and disparities in attaining access to territory and membership, the “near obsession” of wealthier countries with re-imaging migration and reinventing border control through sophisticated legal (not extralegal) shifting-border techniques and innovations, we currently lack the basic conceptual language to capture, describe, and critique these rapid changes.12 This book begins to fill this lacuna.

The theoretical landscape and the road ahead

The shift in perspective I propose—from the more familiar locus of studying the movement of people across borders to critically investigating the movement of borders to regulate the mobility of people—reveals a paradigmatic and paradoxical shift in the political imagination and implementation of the sovereign authority to screen and manage global migration flows in a world filled with multiple sources of law: formal and informal, hard and soft, local, national, supranational, transnational, and international. Scholars in multiple disciplines have creatively explored borders as processes or methods.13 My analysis builds on some of these insights but seeks to both deepen and sharpen them by emphasizing the core role of law and legal institutions in reconfiguring the border in the brazen exercise of governmental authority. I further explore whether there are limits on such authority, and if so, how to activate them and who should do so.14

In a world where borders are transforming, but not

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10 The theme of legal interpretation occasioning the imposition of violence upon others is central to the work of Robert Cover. See, for example, Robert M. Cover, ‘Violence and the Word’, Yale Law Journal 95 (1986): pp. 1601–1629.


13 Borders-studies scholars have creatively explored borders as processes or methods. See, for example, Thomas Niall, A Theory of the Border (Oxford: Oxford University Press, 2016); Sandro Mezzadra and Brett Neilson, Border as Method, or, the Multiplication of Labor (Durham: Duke University Press, 2013). My analysis complements these accounts by emphasizing the legal dimension of the reinvention of the border and the key challenges posed by these developments. Placing greater emphasis on territoriality and borders is part of a broader spatial turn in the social sciences, humanities, and law, to which critical and progressive geographers have significantly contributed. See, for example, Stuart Elden, The Birth of Territory (Chicago: The University of Chicago Press, 2013); Edward W. Soja, Postmodern Geographies: The Reassertion of Space in Critical Social Theory (London: Verso, 1989).

14 In legal and political theory, recent years have witnessed significant debates about whether—and if so, according to what grounds—states have the right to exclude. For influential accounts, see, for example, Arash Abizadeh, ‘Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders’, Political Theory 36 (2008): pp. 37–65; Fine, ‘The Ethics of Immigration’ (n 7); Joseph H. Carens, The Ethics of Immigration (Oxford: Oxford University Press, 2013). For a wide-ranging and illuminating analysis, see Sarah Song, ‘Why Does the State have the Right to Control Immigra-tion?’, in Jack Knight, ed., NOMOS: Immigration, Emigration, and Migration (New York City: NYU Press, 2017), pp. 3–50.
dissolving, I will aim to show that the question of legal spatiality—where a person is barred from onward mobility and by whom—bears dramatic consequences for the rights and protections of those on the move, as well as the correlating duties and responsibilities of the countries they seek to reach and the transit locations they pass through. And here lies the deep paradox of the shifting border: when it comes to controlling migration, states are willfully abandoning traditional notions of fixed and bounded territoriality, stretching their jurisdictional arm inward and outward with tremendous flexibility; but when it comes to granting rights and protections, the very same states snap back to a narrow and strict interpretation of spatiality which limits their responsibility and liability, by attaching it to the (illusionary) static notion of border control. This duality is perhaps most pro-foundly pronounced in the case of asylum seekers who trigger protection obligations only once the destination country’s soil is firmly under their feet, yet access to these territorial spaces of protection is increasingly unreachable. Those on the move are shut out long before they reach the gates of the promised lands of migration and asylum.15

By charting the logic of a new cartography (or legal reconstruction) of borders and membership boundaries I seek to show both the tremendous creativity and risk attached to these new legal innovations and the public powers they invigorate and propagate. I further seek to establish that debates about migration and globalization can no longer revolve around the dichotomy between open and closed borders. Instead, the unique and perplexing feature of this new landscape is that countries simultaneously engage in both opening and closing their borders, but do so selectively, indicating, quite decisively, whom they desire to admit (those with specialized skills, superb talents, or, increasingly, deep pockets), while at the same time erecting higher and higher legal walls to block out those deemed unwanted or “too different.”16

This dialectical relationship between restrictive closure and selective openness is what makes the study of the new legal gates of admission ever more vital; this is also where the reformulation of basic democratic conceptions of membership boundaries become entangled with pro-found questions of justice and distribution about how, by whom, and according to what principles access to membership should be allocated, whether at birth or later in life. It further reveals, quite vividly, the reca-libration of new immigration and border regimes as “public statements,” as a recent study put it, “about who we are now, who we want to become, and who is ‘worthy’ to join us.”17 This idea of a border that is in flux—operating in a quantum-like fashion, simultaneously both fixed and fluid, stationary and portable, exerting influence over those coming under its kaleidoscopic dominion—is at the heart of my inquiry. This reinvention of the border facilitates unequal access to desired destinations and the life chances they offer. As such, it touches on some of the most delicate and contentious issues that must be addressed by any membership regime that falls short of a global reach: defining who belongs (or ought to belong) and on what basis.

The shifting border is not a disappearing border, however. Although theorists and activists have prophesied the imminent demise of states and borders, the new reality explored in this study tests and challenges such conclusions. The examples I provide throughout the discussion show quite vividly that sovereign authority over migration is neither dissipating nor vanishing. Today’s brusque encounters of moving bodies and shifting borders provide concrete illustrations of both deeper and broader tensions, such as those between sovereignty and human rights, statists and cosmopolitans, local and global obligations, and the right of the state to exclude and its duty to protect. Instead of rehearsing these influential debates, I wish to initiate a discussion that disrupts some of these familiar dichotomies while simultaneously investigating the grounds on which they stand, literally and conceptually. My intervention adds a crucial legal dimension to these pressing debates, focusing on the often neglected dimension of how the spatial and regulatory reinvention

15 There is some disagreement in the literature regarding whether the exclusion of asylum seekers is an indirect and unintended side effect of these new bordering techniques or one of its causes. Most scholars writing in the vein of human rights law and protection tend to express the latter view, as reflected in the work of Cathryn Costello, James Hatha-way, Thomas Gammerloft-Hansen, Matthew Gibney, Guy Goodwin-Gill, Jane McAd-am, and Violeta Moreno-Lax, to name but a few. The contending view is articulated, among others, by legal academics and political theorists such as Kay Hailbronner and David Miller.


of borders matters dramatically to how we think about justice, equality, and the “crisis” of migration. In a rapidly changing system, freeing up sovereignty from a rigid and static “Westphalian” understanding of fixed territoriality is a powerful transformation.

This is the case because relaxing the relationship between law and territoriality and blurring the distinction between “inside” and “outside” opens up a whole new purview for exercising power in the name of securing the integrity of the home territory and vigilantly protecting its membership boundaries. The sheer reach and magnitude of the shifting border thus calls for revisiting the age-old question of how to tame menacing governmental authority. Today, states, localities, and supra-national entities such as Frontex (Europe’s border and coastguard agency) increasingly rely upon a complex web of national, subnational, supranational, transnational, and international instruments to profoundly reconceptualize and “de-territorialize” the classic Westphalian manifestation of sovereignty as an activity that may potentially take place anywhere in the world.

The shifting border is at once multidirectional and slippery, but not in the transnational, open, and tolerant variant that demise-of-the-state or post-Westphalian theories had foreseen. Instead, a darker, more restrictive, rigid and static “Westphalian” understanding of fixed territoriality is a powerful transformation. The size and volume of the inflow? The failure of member states to devise and implement a shared policy, which can be seen as a governance crisis, or a value crisis (as some EU officials have labeled it)? Another interpretation is that we are witnessing a crisis of solidarity and governability. Depending on how the crisis is defined, both politically and legally, we can expect different interpretations of its best resolution.

The rise of the shifting border is contemporaneous with growing anxiety over immigration domestically and a surge in the numbers of “people out of place” globally. This new constellation gives added impetus to addressing some of the most profound and arduous questions of our time. Is it legitimate for states to exclude non-members? If so, on what basis? Does the nascent multilevel architecture of global law assist, or paradoxically constrict, the protected rights available to people out of place? In a world of growing interdependence and strife, whose duty is it to assist those who are escaping harm’s way? Do such obligations extend to providing safe passage and temporary protection, or do they entail a right to resettlement and to embark on the road to citizenship? How much of a role should accidents of geography, such as “voluntary” versus “forced migration” fail to recognize the more complex reality of human mobility across borders, which is better captured by terms such as “mixed migration” or “people out of place,” which aim to highlight the mixed motives and multiplying drivers of mobility and displacement (escaping persecution, political instability, hunger, dire poverty, extreme environmental conditions, and so on). A debate is now brewing about whether the privileged legal protection granted to those fleeing a well-founded fear of persecution the pinnacle of the internationally recognized definition of a refugee, emanating from the 1951 Refugee Convention) captures the full range of just claims for asylum, and whether additional instruments of international cooperation should be introduced in order to address the plight of displaced persons who do not meet the legal definition of refugee. For further elaboration, see Jill I. Goldenziel, ‘Displaced: A Proposal for an International Agreement to Protect Refugees, Migrants, and States’, Berkeley Journal of International Law 35 (2017): pp. 47–89; Alexander Betts, Survival Migration: Failed Governance and the Crisis of Displacement (Ithaca: Cornell University Press, 2013); Matthew Price, Rethinking Asylum: History, Purpose, and Limits (Cambridge: Cambridge University Press, 2009).

18 The term “crisis” is charged, but I have chosen to use it here to follow the current reference in most academic and public debates. Standard accounts in international migration point to the untenable life conditions in countries of origin as push factors, whereas the promise of a better life in destination countries is perceived as a pull factor, yet this anal-ysis does not focus specifically on forced migration or the plight of refugees, who are entitled to international protection, whereas others fleeing dire circumstances, such as extreme poverty (as defined by the UN), for example, are not. Furthermore, it is not entirely clear what precisely is meant by the crux of the present “crisis” as it manifests in Europe: is it the very act of irregular entry by potential asylum seekers, which formally breaches states’ border controls and standard documentary requirements for interna-tional travel? The size and volume of the inflow? The failure of member states to devise and implement a shared policy, which can be seen as a governance crisis, or a value crisis (as some EU officials have labeled it)? Another interpretation is that we are witnessing a crisis of solidarity and governability. Depending on how the crisis is defined, both politically and legally, we can expect different interpretations of its best resolution.


20 I owe this phrasing of this point regarding the fluctuating degree, intensity, and frequency of regulation to Derek Dennman.

21 I intentionally use the term “people out of place,” which is broader than the legal definition of asylum seekers and refugees. See Alison Brysk and Gershon Shafir, eds., People Out of Place: Globalization, Human Rights, and the Citizenship Gap (New York: Routledge, 2004). The legal definition of a “refugee” under the 1951 Convention Relating to the Status of Refugees, article 1, is a person who: “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” is fleeing his or her country of nationality, or if stateless, is unwilling or unable to return to the country of his or her former habitual residence (UN General Assembly, Convention Relating to the Status of Refugees, July 28, 1951, United Nations, Treaty Series, vol. 189, p. 152, online www.refworld.org/docid/3be01b964.html). Today, migration schol-ars and international agencies readily acknowledge that the existing definitions, such as “voluntary” versus “forced migration” fail to recognize the more complex reality of human mobility across borders, which is better captured by terms such as “mixed migration” or “people out of place,” which aim to highlight the mixed motives and multiplying drivers of mobility and displacement (escaping persecution, political instability, hunger, dire poverty, extreme environmental conditions, and so on). A debate is now brewing about whether the privileged legal protection granted to those fleeing a well-founded fear of persecution the pinnacle of the internationally recognized definition of a refugee, emanating from the 1951 Refugee Convention) captures the full range of just claims for asylum, and whether additional instruments of international cooperation should be introduced in order to address the plight of displaced persons who do not meet the legal definition of refugee. For further elaboration, see Jill I. Goldenziel, ‘Displaced: A Proposal for an International Agreement to Protect Refugees, Migrants, and States’, Berkeley Journal of International Law 35 (2017): pp. 47–89; Alexander Betts, Survival Migration: Failed Governance and the Crisis of Displacement (Ithaca: Cornell University Press, 2013); Matthew Price, Rethinking Asylum: History, Purpose, and Limits (Cambridge: Cambridge University Press, 2009).
as a country’s proximity to war zones or regions of civil strife, play in determining which political communities are asked to shoulder the greatest responsibilities to “people out of place”? The arrival of the migration crisis (as it is known) at Europe’s borders has exposed the urgency of addressing these very questions, but this same crisis also immediately reveals the impossibility of formulating any easy answers.

A new road map is required to decipher the emerging code of the shifting border in a world in which prosperous “islands” of high standards of human rights, affluence, and democratic governance are increasingly protected through the operation of “portable” legal walls that may appear, disappear, and reappear in variable coordinates of space and time. This shifting border changes form depending on how it is approached and by whom. The better we comprehend the new logic and codebook informing these conceptual changes and policy instruments, the better positioned we will be to develop counter narratives and to carve out new theoretical and applied pathways to oppose their deleterious effects. I seek to fill an important gap in the refined scholarly and policy discourse by offering a grounded analysis, a fine-grained inquiry into the causes and consequences, explanatory and interpretive resources required to grasp the constitutive features of this new paradigm. After exploring the core implications of these recent transformations, I will develop innovative, real-world democratic and institutional responses to counter the rights-restricting dimensions of the shifting border.

The discussion proceeds in three parts, and it operates on three inter-related levels: diagnostic, interpretive, and prescriptive. I begin by painting a picture of the complex, multiflavored, and ever transforming border, one that is drawn and redrawn by the words of law. To comprehend the novelty of the shifting border, I will contrast it with contending models: the classic, clearly demarcated, territorial border that serves as the front-line for setting barriers to admission; and the alternate, globalist, vision of a world in which extant borders are, or soon will be, traversed with the greatest of ease, to the extent that they become all but meaningless. In combination with the sheer number of people on the move, this has led some scholars to argue that the grip of borders, or the even the fundamental principle of territoriality itself, is waning in a world “where agency (individual choice) takes precedence over structures (the laws and rules of territorial states).”22 As a corollary, it has been argued that in the current age of globalization, sovereignty is waning and states are losing control over their authority to determine whom to include and whom to exclude.23 The actual legal practices and exercise of authority by governments operating under the shifting-border framework, alas, refute this narrative of global, unidirectional progression toward a borderless world. Instead, we witness a more dynamic process of change whereby states—acting alone or in concert—are reinventing and rein-vigorating their borders and membership boundaries in profound ways.24 By locating the shifting border as an alternative to the established theoretical poles of “static” and “disappearing” boundaries, I aim to show that the proposed framework of analysis more fully captures and accounts for the profound patterns of change that we are witnessing in the world around us. To substantiate these claims about the multidirectionality of the shifting border, I will focus on the legal innovations adopted by the world’s leading immigrant-receiving countries that have spearheaded the shifting border paradigm: the United States, Canada, and Australia. I will also demonstrate how the European Union and its member states have also rewritten pages—if not chapters—of the shifting-border book in the context of re-bordering mobility through extensive “externalization” strategies. These case studies provide a


24 While in some cases operating unilaterally, states are also devising increasingly complex and multilayered mobility-control regimes that require extensive interstate cooperation. For an excellent exploration of bilateral cooperation in the North American context, see Matthew Longo, The Politics of Borders: Sovereignty, Security, and the Citizen after 9/11 (Cambridge: Cambridge University Press, 2018).
rich empirical foundation upon which the rest of the discussion relies.

Next, I place the analysis within a broader range of pressing debates, from the recent “methodological turn” in political theory to revisiting the demise-of-the-state thesis to evaluating how the ability of major actors to “shift” the level and timing of regulation in the service of the everywhere-and-nowhere border strains earlier predictions that supranationalism and transnationalism will, almost necessarily, contribute to emancipatory developments. I further highlight the role of private third parties and the growing reliance on cooperation agreements with transit and host countries that create “buffer zones” around affluent democracies in exchange for material and infrastructure investments. Such processes of externalization are enthusiastically pursued by the European Union and its member states, raising real concerns about human rights abuses and “outsourcing” responsibility. Any attempt at theory building that seeks to move beyond idealized discussions of borders and membership boundaries must engage more directly with these empirical observations. This is vital if we want our non-ideal theories of migration, mobility, justice, multilevel governance, and democratic legitimacy to have relevance to the here and now.

Lastly, I revisit the relationship between law and territoriality, space and political responsibility, including the classic writings of Hannah Arendt, before engaging in the always perilous act of seeking pragmatically minded responses to seemingly intractable dilemmas. This part of the discussion brings together insights from law, political philosophy, and institutional design to explore innovative ways in which to “internalize” the costs of the extraterritorial dimensions of migration control. Moving from the interpretive to the aspirational, I will argue that the dramatic reconception of the border requires an equally radical reinvention of our responses to these new realities on the ground. To realign the almost boundless reach of migration control in the age of shifting borders with adherence to human rights norms by state actors (or their delegates, public and private), this final section will explore fresh ideas for crafting participatory and contestatory political responses to, as well as legal remedies for, today’s new paradoxes of border control. In order to tame the rights-restricting tendencies documented in this study, we must not only decipher but also seek to “rewrite” the code of the everywhere-and-nowhere shifting border, infusing it with a migrant- and mobility-centered perspective that recognizes that states will continue to be key players in the current world order while at the same time de-centering them. One such promising direction for change is to amend the bases for attributing responsibility in a world of de-territorialized migration control. Instead of focusing on where the act of border regulation takes place, a more consistent and fair approach requires adopting a functional or jurisdictional test according to which obligations to protect are activated as soon as “effective control” occurs by official agents of states, acting alone or in concert, or their delegates. The idea is to acknowledge the restless agility and multi-scalar operations of the shifting border as eliciting a set of rights-enhancing protections from the restricting states, which hitherto have relied on this new “technology” of governance and spatiality to escape accountability and constrain rights. This line of response incorporates the very logic of de-territorialized migration control that lies at the heart of the shifting border, while at the same time subverting it, and relies on two prongs: expanding the extraterritorial reach of human rights and relaxing the fixation on territorial access. While not a panacea, the endeavor is to break the current deadlock and refute the claim that applicable solutions are beyond reach or impossible to imagine.

25 This position is shared by many human rights organizations and is also the theory that guided the ECtHR in the landmark Hirsi v. Italy, [GC], App, No. 27765/09, Eur. Ct. H.R. (2012). For an early defense of the position that “[n]arrow territorial interpretation of human rights treaties is an anathema to the basic idea of human rights, which is to ensure that a state should respect human rights of persons over whom it exercises jurisdiction,” see Theodor Meron, ‘Extraterritoriality of Human Rights Treaties’, American Journal of International Law 89 (1995): pp. 78-82, p. 82.
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