The Arc of Protection: Toward a New International Refugee Regime

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Chapter One
The Inconvenient Refugee

In the state of nature, we suspect, people are regularly forced from their homes. The mightier and meaner take what they can—shelter, land, belongings—from those for whom they feel no restraining ties of affiliation. Those forced to flee move to where they are able to survive, a place either with no humans, friendly humans, or humans they themselves can displace.

It is only in a world of states that forced migrants become—and remain—*refugees*. Persons flee their homes and their communities either because their state has targeted them for severe harm or has failed to prevent the conflict and violence that makes residence at home intolerable. They become refugees by crossing an international border. Their inability to be "mere" forced migrants, pushed from their homes but able to find safety elsewhere on their own, follows from the fact that states have collectively claimed the globe; there is no open, habitable space to which one can flee. So refugees are a "problem"[1] that the international community of states both creates and must deal with; they must be let in somewhere. But where?

Stripped of home and belongings, separated from community and family, refugees assert moral and humanitarian claims that are powerful and easily understood. These claims are made to the conscience of their fellow human beings—and their persuasiveness is proven by the unease felt by the world community when it fails to respond. Refugees also make claims on states *qua* states. Here the countervailing interests are asserted with less of a sense of shame because refugees' requests for admission into territories of states not their own run up against a fundamental norm of the international system: that states, as a core aspect of sovereignty, have full control over whom they choose to permit to enter. From this perspective, refugees make an extraordinary claim, asking states to waive their rights to control their borders—an exception triggered usually by the acts or omissions of *another* state and the movement of *its* citizens.[2] It is thus not surprising that states tend to view the admission of refugees into their territory as an act of humane charity and human solidarity, but not as a matter of recognizing the right of refugees to enter.

The sovereigntist approach to forced migration held firm through the first half of the twentieth century. Hannah Arendt's celebrated chapter in *Origins of Totalitarianism* on the parlous state of refugees (whom she largely equated with stateless persons) showed just how little the world thought it owed, as a matter of right, to the forcibly displaced in pre-World

War II Europe. Pushed from home states and denied membership elsewhere, refugees were rightless and (de facto) stateless—conditions that, as Arendt noted, neither scholarly writings nor hortatory declarations on the human rights of all persons could prevent or remedy.[3]

Appeals to state sovereignty as a way to privilege border control over the claims of refugees continue in our day. Fences have once again gone up in Europe as boats have gone down in the Mediterranean. A refugee camp in Kenya which houses several hundred thousand persons is threatened with closure and refugees are told to prepare for return. The United States interdicts vessels in the Caribbean; Malaysia and Thailand push back boats on the Andaman Sea; and Australia "excises" part of its territory from its usual migration rules, thereby denying persons arriving by boat a right to apply for asylum. After providing safe haven to more than four million Syrian refugees, Lebanon, Jordan, and Turkey seal their borders to prevent further entries.

I.

There is an important difference between our times and Arendt's. Even as she was completing her volume, the international community was meeting to create a UN agency and draft an international convention to guarantee refugees rights and protection. In 1950, the UN General Assembly established the Office of the High Commissioner for Refugees (UNHCR), assigning the High Commissioner the responsibilities of "providing international protection" and "seeking permanent solutions" for refugees.[4] In the same year, the UN called for an international conference to consider solutions to statelessness and the refugee problem. Statelessness was hived off,[5] and in 1951 the Convention on the Status of Refugees was finalized and opened for state ratification. The Convention directly addressed the issue so powerfully portrayed by Arendt: if refugees stood rightless before the world, then they should be given rights. Over nearly three-dozen articles, the Convention lays out a robust set of rights—and further specifies that those rights do not simply exist "out there"; they are the concrete responsibility of ratifying states to protect and enforce. The rights in question include the right to free movement within a country granting asylum, the rights to work and start a business, to be protected by labor law and to be eligible for social benefits, to go to school, and to practice freely one's religion.

The human rights guaranteed to refugees had intrinsic merit. Many echoed important values enshrined in the Universal Declaration of Human Rights, adopted just a few years before. They also had instrumental value. The possession of rights—to work, to an education, to move—would help refugees rebuild their lives, provide for their families, and take up life again in peaceful human communities. Refugees in "displaced persons" camps, dependent on dwindling assistance from the international community, would instead be empowered to assume active roles in the economic and social spheres of their host societies. This would benefit the refugees and the hosting communities as well as reduce costs (human and financial) for their assistance. The Convention also included what has come to be seen as the central protection for refugees in the modern era: the guarantee against return to a country where the refugee would face persecution (known as the right of "*non-refoulement*").

The Convention was primarily concerned with rights that would be accorded by states in which refugees were residing, but another element of a new regime was recognized and suggested—although, importantly, not commanded: the responsibility of the international community to help the states to which refugees fled. In the postwar years before the drafting of the Convention, the international community put in place collective

programs that, taken together, remain unprecedented. First came mass resettlement: when UNHCR opened its doors, third states had already resettled more than a million refugees from Europe. Next came development aid: by the time the Convention entered into force in 1954, the Marshall Plan had provided asylum states in Central and Western Europe with financial support on a scale no host state has seen since.[6]

The Convention itself gestured at such responsibility-sharing—noting in its Preamble that "the grant of asylum may place unduly heavy burdens on certain countries" and declaring that "a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot . . . be achieved without international co-operation." One can view this as a sort of an insurance policy: no one knew where the next refugee crisis would occur, and states burdened by refugees were not usually responsible for the violence and conflict in a neighboring state that produced the flow. So the Convention and the Statute establishing UNHCR could envision a collective responsibility to ensure success of the venture as a whole. But neither instrument established a legal obligation of "responsibility-sharing" or a formal structure for accomplishing it.

Much like responsibility-sharing, international assistance—the tents, blankets, food, and medical care that we associate today with refugee response—figures little in the founding documents. The High Commissioner was charged with "[f]acilitating the coordination of the efforts of private organizations concerned with the welfare of refugees."[7] But neither the Convention nor the Statute established a general relief agency (as was created for refugees during and immediately after World War II,[8] Palestinian refugees starting in 1949, and Korean refugees in the fifties).[9] Indeed, UNHCR was prevented from engaging in material relief. Its initial budget was $300,000 per year, just enough to cover administrative costs and salaries for the small band of lawyers and diplomats who took up work in its office in Geneva. This was in sharp contrast to the hundred million dollar budgets, broad assistance mandates, and substantial clout of UNHCR's predecessors.[10]

The omission of an international assistance mandate in both the Convention and UNHCR's Statute is often regarded as yet another misstep—one that (unlike the omission of responsibility-sharing) was gradually corrected as UNHCR transformed itself, with states' blessing, from a modest legal protection agency into one of the world's largest humanitarian organizations. We put forth a different interpretation: the emphasis on rights instead of relief was both a purposeful and an inspired one. The great idea that illuminated the Convention and the establishment of the Office of High Commissioner was precisely not to establish a global system of humanitarian relief—what is generally seen today as the core of the international refugee regime. It was rather the guarantee of rights and the eventual restoration of membership to persons who would otherwise be in the situation of Arendt's refugee: rightless and belonging nowhere. The two objectives are not always aligned. As we explain later, the rise of relief as the centerpiece of refugee response has coincided with the diminution of global commitment to achieve the Convention's higher goals.

II.

Instead of creating a parallel system to dispense humanitarian aid, the Convention called for refugees to be incorporated directly into the economies and welfare states of countries of asylum.[11] But here we face a conundrum. The asylum countries at issue were still emerging from total war. Suddenly, beleaguered societies such as West Germany found themselves singularly responsible for an unprecedented refugee crisis. What incentive did they have to

comply with a regime that imposed substantial obligations only on them? Today, meanwhile, most refugees live in just a handful of developing countries nearby to their own. What incentive do today's overburdened host states have to let refugees in? These questions help explain the rise of the humanitarian refugee regime, providing a functionalist answer: host states would permit refugees onto their territory only if and when the international community committed to assist them. From this perspective, the gradual transformation of UNHCR into a humanitarian organization becomes understandable; funded by donor states, UNHCR's work has most certainly lessened the "burden" on host states to provide for refugees' basic needs.

Perhaps the more vexing question, then, is what incentive did *third* states have to assume such responsibility? Surely the tragic treatment of refugees that the world had recently experienced could have been enough to galvanize the international community in 1950 to act—to establish a UN organization and conclude a Convention that, in fact, put (certain) refugees in a preferred category when compared to other classes of forced migrants. But viewing the codification of international responsibility as motivated purely by compassion obscures the ways in which the new international refugee regime was consistent with, or compromised by, important political and economic interests as well.

III.

Conceptually, refugees represent a perturbation in the international system of states. As noted above, that system presupposes the world divided into sovereign states exercising authority over a defined territory and a defined population (its citizenry). Extraterritorial jurisdiction is narrowly construed. Control of a state's borders and citizens is seen as an inviolable aspect of sovereignty. Citizens, of course, may enter other states, but only—in theory—with the permission of those states and without losing the citizenship of the home state. Refugees, on this account, are anomalous. First, as described by Arendt, they are de facto stateless; belonging nowhere, they threaten systemic coherence; they render visible the deepest contradictions and depredations inherent in a state-based world "order." Second, they seek (demand) an uninvited entrance to another state and ask that they not be returned, thereby undermining the state's sovereign control of its borders and effectively nullifying the home state's authority to define its citizenry.

Several solutions to the "refugee problem" are conceivable.[12] States might attempt to intervene in the state from which refugees are fleeing in order to remove the cause of the flow and to permit safe return. But this constitutes a rather dramatic affront to notions of state sovereignty upon which the state system is based. The Refugee Convention makes no mention of such a response, choosing to chart a path forward rather than back. A second solution would be to deflect refugee flows, either to a place where they would be welcomed or to some kind of international space where their presence would not compromise the sovereignty of the intended state of entry. These measures have been adopted, but not with happy results.[13] The third—and the one adopted by the post-World War II regime—is to have refugees seek safety in a neighboring state and then to pursue a permanent resolution of their situation, either by returning home when it is safe to do so or by attaining settled status in the country of first asylum (local integration) or a third country (resettlement). That neighboring states permit refugees to enter asks a fair amount of countries of first asylum and can only reasonably be achieved if a global system of "responsibility-sharing" is in place. In this way—and only in this way—the regime resolves the perturbation in the system that

refugees occasion: it works to ensure that everyone is ultimately a member of some state somewhere.

The notion that refugees challenge state sovereignty at the point of entry is in part belied by the fact that states themselves, in their capacity as sovereigns, have created and committed to a system of international protection. But there is a harder version of the claim that the international refugee regime serves the interest of states. It is that the existence and response to the "refugee problem" acts to strengthen the state system itself by reinforcing the state idea. The very notion of refugees as a "problem," for instance, lends itself to the notion that the "normal" state of affairs is, in fact, residence in one's home state. Exercising state power in the face of refugee flows, meanwhile, permits states to show in dramatic fashion both strength and beneficence as they affirm their authority to control borders, either opening borders for humanitarian reasons or closing them to protect national interests and national security. Citizens of the state recognize in such actions the "goodness" of the state when it assists refugees and the "*raison d'etre*" of statehood when it keeps its members secure. Indeed, the power of the state is seen as that much greater when it is asserted—for purportedly legitimate reasons—against persons with compelling moral claims.

The political benefits of constructing a refugee regime can be of a more pragmatic nature as well. The international refugee regime was a project largely of the West. States that did not see the Convention as serving their interests—most particularly, the Soviet Union and its allies—removed themselves from its drafting and ratification, arguing that the West was seeking to protect as "refugees" citizens who could and should return to Eastern states. Colonized states whose sovereignty was yet to be recognized—including many of the states that now host the largest numbers of refugees— were not invited to the negotiations to begin with.

These conceptual and political considerations, when joined with humanitarian concerns, supported the establishment of a formal system for responding to the "refugee problem" that bore the mark of (Western) interests. But the role that state interests played in the regime's construction can be even more powerfully seen in the limits and restrictions that the pursuit of such interests built into the system at its founding.

Most important are the compromises at the core. The refugee regime, to succeed, needed to offer forced migrants a country in which to find refuge and ultimately a solution to their de facto statelessness. But the concept of state sovereignty would bend only so far. Somewhat paradoxically, the Convention provides rights to persons recognized as refugees (including the crucial right not to be returned to a state where one would face persecution); but it provides neither a right to enter a country to apply for asylum nor a right to be granted asylum if a claimant comes within the Convention's definition.[14] These were deemed matters of state discretion, fundamentally related to sovereign control of a state's borders.

This preservation of state authority would limit obligations of states toward future refugees. At the same time, the Convention restrictively defined current refugees to whom its guarantees would apply. By its terms, it limited Convention status to persons (1) displaced prior to 1951 who had (2) crossed an international border. And not just any international border: despite the presence of many millions of postwar refugees around the world, the Convention defined a refugee as someone "displaced by events in *Europe*." This ensured that the Convention applied only to a small subset of refugees: namely the "residual caseload" of postwar refugees in Europe who had yet to be resettled or returned home. It was not until 1967, with the adoption of a Protocol, that the Convention was formally shorn of these geographic and temporal restrictions (though, as we shall see, creative lawyering and an expansionist UNHCR made headway toward that end almost at once).

In addition to neglecting to affirm a right of entry and restricting Convention status to Europeans displaced prior to 1951, the Convention failed to guarantee a recognized refugee a right to a solution (return to one's home state or membership in the country of first asylum or a country of resettlement). The closest the Convention comes is Article 34, which requests states, "as far as possible," to "facilitate the assimilation and naturalization of refugees." As is the case more broadly, formal responsibility for solutions falls only on asylum states. The effective pursuit of solutions most certainly requires "burden-sharing" commitments among states. But no such apparatus is provided for.[15]

The Convention's failure to provide a right to enter a state to apply for asylum protects states' power to police and regulate their borders. Its failure to provide a right to a solution protects a state's plenary authority to set terms of membership. And its lack of a formal, global mechanism for burden-sharing protects all of the above.

No less notably, the Convention adopted an individualistic approach to refugee status determination that differed from pre-war refugee instruments, which had provided protection on a group or nationality basis (Russians fleeing the Bolshevik revolution, Jews leaving Germany). To be a refugee, a person would need to show a well-founded fear of persecution on account of race, religion, national origin, membership in a particular social group, or political opinion. From one perspective, this was a move toward universalizing the refugee definition (within the set geographical limits). But it also rendered the recognition process far more complex: each applicant had a burden to show particular reasons why he or she feared persecution; mere membership in a designated nationality (or ethnicity) under siege was not sufficient. This later proved unsustainable in parts of the world experiencing mass flows of refugees—Hungary and its neighbors in 1956 and thereafter primarily countries in Africa, the Middle East, and Asia—where requirements for individualized proof have been relaxed. But the individualized approach is still very much evident in administrative and judicial proceedings assessing asylum claims in Europe, the United States, Australia, Canada and elsewhere.[16]

Even the hallowed protection of *non-refoulement* was constructed with exceptions. Its benefits are denied to a person who otherwise qualifies as a refugee if "there are reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[17] These are exceptions with consequences: they authorize the return of persons to states where they are likely to face persecution. (This contrasts with the absolute bar on return provided in the Torture Convention for persons likely to be subjected to torture.)[18] The import of the exceptions is this: while refugees are entitled to rights in the state that has granted them asylum, they are subject to deportation for reasons that non-nationals are normally removable; however, in exercising the sovereign power of deportation, states are limited to where refugees may be sent (unless the refugee is a security threat or has committed a particularly egregious crime). This reading comports with an understanding of the refugee regime as embedded within—indeed, an exercise of— the general authority of a state to regulate immigration.[19]

The international refugee regime from its inception, then, has both served and been molded with the interests of states very much front and center. This should hardly surprise: the Convention was written not by political theorists or human rights activists; it was drafted and adopted by and for particular states at a particular moment in time.

IV.

The standard story of the modern refugee regime's first six and a half decades is well-known and needs but brief mention. Western states—as the Soviets had predicted—used the Convention for political purposes, welcoming all comers from the East.[20] Africa and Asia, left out of the Convention as originally drafted, quickly became the continents with the largest number of refugees. Independence and anti-colonial wars swelled the numbers into the millions, with the vast majority being housed and assisted in neighboring developing states. As noted above, the 1967 Protocol to the Convention removed the geographical and time limits of the 1951 document, now supplying a universal reach—at least in theory. Today, 148 states have ratified either the Convention or the Protocol or both.

Four developments of note accompanied this expansion in the reach of the legal norms and the growth in the number of refugees.

- **The focus on *assistance* rather than *rights*.** Although the Refugee Convention was limited to events in Europe, and although UNHCR was in theory prohibited from engaging in material relief, UNHCR did not so restrict its activities on either score. Following large movements of refugees in Africa, UNHCR began to provide material assistance to non-Europeans, both directly and through subventions to NGO partners. In its first twenty years, UNHCR was a small agency; in 1971, its budget was just $9 million. With the new assistance programs, its budget had grown to $500 million ten years later. Today the organization spends more than $3 billion, the vast majority of it for assistance programs for refugees (and for the staff needed to administer the programs).[21]

- **Expansion of the concept of "refugee."** As we detail in Chapter 2, both UNHCR and regional authorities consider as refugees persons and groups fleeing conflict and violence, with no requirement that a person show an individualized risk of persecution on account of one of the grounds specified in the Convention. At the same time, the expansion of recognition or assistance to new groups often coincided with the diminution in protection standards for those groups.

- **Movement away from the postwar Western development paradigm aimed at protecting rights and expanding state welfare entitlements and public services to neoliberal approaches that affect hosting state policies of inclusion for refugees.** Concomitant with the shift toward humanitarian assistance in the global South was a steady move away from a theory of economic development rooted in a strong welfare state. Where refugees in Europe were absorbed into growing and increasingly generous welfare programs, funded and facilitated by the Marshall Plan, the model of development applied to poorer host countries as early as the sixties stressed the importance of the "free" market and the absence of state intervention into the economy. Development aid to those countries mainly took the form of loans rather than grants, and the conditions attached to those loans often required host states to prioritize debt repayment even above development and to cut rather than expand their public services.[22]

- **The adoption of "*non-entrée*" policies in the North.**[23] States in the developed North began to take seriously the idea that the Convention was not a "blank check,"[24] moving from an "exilic bias"[25] of welcoming all "defectors" from the East to a range of policies aimed at deterring asylum seekers from arriving at state borders. These included: visa requirements, penalties on airlines and ship owners, interdiction of ships on the high seas, and legal doctrines denying refugee status to asylum seekers who transited through "safe countries" or had achieved "firm resettlement" elsewhere.

Together, these measures transformed the premises and promise of the refugee regime from rights, refugee self-reliance, robust development aid to host states, and resettlement to safety and assistance in regions of origin. The focus shifted from a protection orientation to a humanitarian imperative, coupled with limited onward movement to states of the global North and no Marshall Plan for states of the global South.

A humanitarian approach is understandable, particularly in response to emergency flight. Most refugees have in fact lost virtually everything material and much more. Humanitarianism literally saves lives, supports the key protection of *non-refoulement*, and injects tens of millions of dollars into the economies of hosting states.[26] But humanitarianism, if carried beyond an initial emergency phase, begins to create its own status quo. Humanitarian appeals seek tens of millions of dollars for the relief of refugees, which are channeled through multilateral agencies and international and local non-governmental organizations that provide material assistance needed by the bereft displaced. Little funding is given for advocacy or for programs dedicated to ensuring that rights guaranteed by the Convention (other than the right of *non-refoulement*) are respected. Indeed, as suggested above, to insist on such rights is to put pressure on the norm of *non-refoulement*: hosting states may be willing to keep borders open if they know that the international community will pick up much of the cost of caring for refugees and that refugees will be kept segregated; but they are less likely to do so if granting asylum comes with demands from the international community that refugees be given rights.[27]

A primarily humanitarian response thus serves state interests all around. States from which refugees flee are not at risk of intervention aimed at ending the causes of displacement. States hosting refugees face little insistence that refugees be included into overburdened state economic or social systems. States further afield (primarily states of the global North) supply humanitarian assistance in regions of origin but inadequate development aid and few slots for resettlement, content that they are saving lives and doing so closer to the refugees' home states (which facilitates the preferred solution of repatriation). The international refugee regime, in effect, constructs a bargain: hosting states will keep their borders open and house refugees in exchange for cash and camps, and the international community will turn a blind eye to the protection of rights and granting of membership. Non-entrée policies enforce the deal, keeping refugees in countries of first asylum. In effect, the prevailing motto in capitals of the North is: We help you take care of them *there* so that they do not come *here*.

This may be an efficacious way to accommodate state interests while pursuing the praiseworthy goal of assisting refugees. But the result is not a happy one for millions of refugees around the world or for many host states and host communities. Forced from their homes and homelands, refugees routinely find themselves excluded from the local economies, schools and health care systems, and social benefit programs of their hosting states—in effect, they find themselves in a *second exile*.[28] Most states deny refugees permission

to work or open a business (in violation of rights guaranteed by the Refugee Convention).[29] Refugees who work without authorization typically do so in the informal sector, subject to exploitation and without benefit of the protection of labor laws. Because humanitarianism has so little to say about rights and solutions, and because development aid has come to privilege "trickle down" over the welfare state, the second exile can last for decades or generations.

The long-term dependency and despondency of millions of refugees around the world is not what the drafters of the Convention foresaw. Indeed, it was precisely what they set out to ameliorate. The idea was that refugees exercising the rights guaranteed by the document would make their way in states of asylum, living lives like other lawful immigrants. They would seek employment and open businesses, their children would go to school, and refugee families would benefit from the protection of labor laws and social programs.

Despite these intentions, the compromises written into the Convention paved the way for the current systemic failure. Refugees were given no effective way to enforce the rights that would facilitate well-being, agency, and self-reliance; states assumed no obligations for sharing the responsibility to "solve" future refugee situations; and states had no duty to permit refugees to enter. The second exile is built on powerful state interests, present from the start, and sustained by approaches to development and humanitarianism that have emerged to put a kind face on policies of deterrence and the failures of responsibility-sharing.

The refugee situation is not one of displaced persons living in "states of exceptions"—that is, places where law is suspended (although some circumstances of detention of asylum-seekers approach a state of exception).[30] Arendt drew the important distinction of persons who are rightless and persons whose rights are being violated.[31] In the twentieth century, refugees moved from the first to the second category. But, for refugees, this is too often a distinction without a difference. Whether or not refugee camps or settlements or urban settings are places of "exception," they are too often places of neglect and deprivation.

V.

State practices undermining effective refugee protection, dramatic underfunding of development budgets and humanitarian operations, and the resulting situations of long-term displacement have been on the international agenda for many years. The Executive Committee of UNHCR has adopted resolutions, papers have been written, conferences convened, working groups formed.[32] High Commissioner Sadako Ogata and World Bank President James Wolfensohn initiated the "Brookings Process" in 1999 with the goal of instituting "a more integrated humanitarian-development response" to achieve "post-conflict stability";[33] in 2016, UNHCR High Commissioner Filippo Grandi and World Bank President James Kim issued a joint statement expressing similar sentiments.[34] On the ground, however, not much has changed in the intervening years—except the addition of millions more displaced persons, most living in intolerable poverty in protracted situations.

On the other hand, there is reason to believe that the wheels of change in the international response community are beginning to turn—for a number of reasons. The increasingly large shortfall in humanitarian funding for multilateral agencies combined with a rising number of displaced persons is a primary cause. While humanitarian funding totaled more than $27 billion in 2016,[35] nearly half of the amount requested by UN agencies went

unfunded.[36] A high-level panel convened by Secretary General Ban Ki-moon suggested in its 2015 final report a number of ways to close this gap.[37] As yet, no significant progress on any of these proposals has been made. Facing this enormous need in humanitarian funding, it is not surprising to find multilateral relief agencies gazing longingly at development accounts—which spend more than $140 billion a year in developing countries (where most of the world's displaced reside).[38]

The nuanced argument is not that development dollars should be transferred to humanitarian agencies, but rather that development agencies should adopt programming directed at displaced persons and the communities that host them. A 2016 report of the World Bank makes a persuasive case for putting displacement (back) on the development agenda.[39]

From this perspective, the humanitarian funding gap would be narrowed not by providing development funding to humanitarians but rather by *shrinking the humanitarian footprint*—returning it primarily to emergency situations and having the development actors concentrate on infrastructure, livelihoods, and economic and social inclusion.[40] This can be seen as getting the bureaucratic buckets in order (development actors do development better than humanitarian actors), but it in fact signals something more significant. It is the underlying model of response that is shifting—movement that should not only improve conditions for the displaced and hosting communities but also argue for a rethinking of the international structure necessary to make it happen. As we examine in subsequent chapters, the international community is approaching a consensus on the failure of the traditional "care and maintenance" approach that provides funds to humanitarian actors to meet the basic needs of displaced persons until a political solution can be found for their plight. There is now agreement that development actors can play an important role in supporting models of refugee self-reliance and hosting community resilience. But, as we also argue, there is little scrutiny of the role that development actors already play in host states or of the extent to which their policies and interventions can undermine self-reliance and resilience.

The necessity of properly conceived development strategies for the refugee regime is apparent. Without it, hosting states will likely continue to resist the new model because of its preference for inclusion of the displaced in state and local programs and systems rather than the parallel institutions currently paid for by the international community for displaced populations. Moreover, even if hosting states agree to include refugees in their economies and welfare systems, ill-conceived economic programs may continue to squeeze those economies and require cuts to those welfare systems such that refugee "inclusion" means little more than inclusion into structural poverty. So the new approach requires that substantial attention be given not only to the problems of over-reliance on humanitarian relief but also to the neoliberal economic interventions that have helped to perpetuate the conditions under which refugees become dependent on relief in the first place.[41] Donor state behavior, then, must change as well, with development agencies ensuring that funding for hosting communities is in addition to dollars already committed to support national development plans; that it is respectful of host state "ownership"; and that it supports an approach to development that is avowedly, not just rhetorically, redistributive and pro-poor.

VI.

In September 2016, the leaders of the nations of the world convened a high-level meeting at the UN to address the issue of migrants and refugees. It was the "crisis" in Europe—that is,

the large number of arrivals of refugees and migrants by sea and land in 2015—that occasioned the summit, but the topics scheduled for discussion went considerably further.[42]

The summit concluded with the New York Declaration for Refugees and Migrants. The Declaration included important statements about the benefits of migration; affirming the principle of *non-refoulement* and the 1951 refugee convention; promoting the human rights of migrants; urging action against sexual and gender-based violence and detention of children; supporting increased assistance to hosting communities; and calling for a global campaign against xenophobia. It lent support to a new model for responding to refugee situations (along the lines described above) and urged progress on solutions. At a time when domestic politics in many states is growing ever more hostile toward migration and refugees, the New York Declaration hoped to serve as a sort of a ratchet—stating that international commitments made over the past half century would not be reversed.

But the summit did little to respond either to the crises of the day or to the overall disrepair of the current system. No specific commitments or obligations were undertaken by states to better protect refugee rights or to establish a formal burden-sharing structure. Accountability for implementation of the new Comprehensive Refugee Response Framework (CRRF) (which would include both humanitarian and development actors) was left unclear. New norms to protect forced migrants who do not come within the 1951 definition of refugee were not proposed. The Declaration called for the preparation of two additional instruments: a Global Compact on Refugees (to be drafted by UNHCR) and a Global Compact on Safe, Orderly and Regular Migration (to be produced through an inter-state negotiation). These documents are scheduled to be adopted in late 2018. In the early drafts of these documents a half-step is taken toward putting in place mechanisms to enhance responsibility (which we will discuss in later chapters), and there is a hint of protection for broader classes of forced migrants. But the focus is very much on reducing the burden of forced migration on hosting states, not on affirming the rights of refugees or creating binding obligations on responsibility-sharing.

In the meantime, hundreds of thousands of displaced persons will continue to seek entry to Europe and other states of the global North, and tens of millions will remain in countries of first asylum or their home states in the global South. Populist politics in hosting and donor states, linked with more mainstream concerns about pursuing state-based interests, are likely to prevent any dramatic shift in state approaches to the "refugee problem"—to use the words of the 1951 Convention.

Perhaps it is possible to identify state interests powerful enough to motivate reform-minded action—concerns about security, achieving development goals, and preventing future flows—but any proposals for serious change will have to begin with two fundamental conceptual concessions: first, that the current state of the international refugee regime follows from a set of premises present at its creation and important to its maintenance (and therefore difficult to change); and second, that fidelity to the humanitarian imperative that now defines the system is as much about restricting refugee agency and maintaining state control as it is about saving and restoring lives.

Events in every part of the globe remind us that the refugee regime was created by and for powerful states. What responsibility follows from the recognition that it is states that create refugees, that seek to control their flight, and that decide whether or not to take them in and on what terms? And where does accountability lie for the failings of the system—with refugees inadequately assisted in places in which they are confined or left to fend for themselves, stripped of rights and excluded from economic, educational, and social opportunities that would permit them to rebuild their lives?

[1] The Preamble to the 1951 Convention relating to the status of refugees "express[es] the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States," and notes that "a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation."

[2] Thus states granting asylum make a strong intervention, effectively cutting off the claim of the home state to exercise authority over its citizen. See Matthew E. Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009), pp. 167-169.

[3] Hannah Arendt, *The Origins of Totalitarianism* (New York City: Harcourt, 1973), pp. 267-302.

[4] Statute of the Office of the High Commissioner for Refugees, G.A. Resolution 428 (V) of 14 December 1950, Ch I(1) ("UNHCR Statute").

[5] At the time, the refugee situation was seen as the more urgent. The General Assembly later adopted two conventions on statelessness: the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

[6] These points draw from Leah Zamore, "Development Finance: A Series of Proposals," (Zolberg Institute Workshop on the Global Compact on Refugees, New York City, October 2-3, 2017).

[7] UNHCR Statute, (II)(8).

[8] The United Nations Relief and Rehabilitation Administration (UNRRA), 1943-1947; the International Refugee Organization (IRO), 1946-1952.

[9] United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), in existence today; United Nations Korean Reconstruction Agency (UNKRA), 1950-1953.

[10] As the High Commissioner noted in 1954, "The achievements of my Office may seem somewhat intangible to those who have been accustomed to the more spectacular efforts of organizations which were lavishly endowed with funds…" Speech by Dr Gerrit Jan van Heuven Goedhart, United Nations High Commissioner for Refugees, at the 14th session of the United Nations Economic and Social Council (ECOSOC), January 1, 1954.

[11] Interestingly, the same eschewal of a parallel relief system can be seen at the national level. In West Germany, for instance, a Ministry of Expellees and Refugees was created that had no (non-administrative) budget. Its mission was not to offer humanitarian aid to refugees but to ensure that they received their due share of the social services made available to German citizens. See S.P. Chablani, "The Rehabilitation of Refugees in the Federal Republic of Germany." *Weltwirtschaftliches Archiv,* Bd. 79 (1957): pp. 281-304, https://www.jstor.org/stable/40434188.

[12] Direct *refoulement* would not be acceptable; although that doesn't mean that states have not resorted to such action as a "solution" to refugee movements. See, e.g., *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (rejecting challenge to direct return by U.S. of Haitians to Haiti).

[13] For example, policies of the Australian government that have sent asylum seekers entering Australian waters to Manus Island and Papua New Guinea have been widely criticized. E.g., Amnesty International, "This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea," December 2013, www.amnesty.org.au/wp-content/uploads/2016/09/Amnesty_International_Manus_Island_report-1.pdf.

[14] The Universal Declaration of Human Rights, adopted in 1948, likewise enshrined the rights to seek and enjoy asylum but not the right to be granted asylum. Art. 14(1).

[15] The broader postwar responsibility-sharing regime, described above, did not extend further into time or space than the Convention itself. Mass resettlement came to an end at about the same time that UNHCR was established. The Marshall Plan—and the "New Deal"-style development paradigm it ushered in—was restricted to Europe(ans). See Leah Zamore, "Refugees, Development, Debt,

Austerity: A Selected History," *Journal of Migration and Human Security*, no. 6 (2018): pp. 26-60, https://doi.org/10.14240/jmhs.v6i1.111.

[16] That is to say, individualized assessments take place in countries that are powerful enough, or far away enough, to prevent refugees from arriving in numbers that might strain their adjudicative capacity. When more refugees than usual do manage to arrive, as in Europe in recent years, the response to what is otherwise an entirely manageable number of arrivals (especially if designated on a group basis) is anything but judicious.

And it bears noting that those parts of the world where determinations are made on a group basis are the same parts of the world (namely, the global South) where international protection most often takes the form of "temporary" humanitarian assistance. In this sense, and as subsequent chapters note as well, there are in many ways not one but two refugee regimes: a formal, rights-based one for the few refugees who claim asylum in the West, and an assistance-based regime for the overwhelming majority of refugees residing in developing countries.

[17] Refugee Convention, Art. 33(2)

[18] See Art. 3, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[19] James C. Hathaway, *The Rights of Refugees Under International Law*, (Cambridge: Cambridge University Press, 2005), pp. 160-171.

[20] The Marshall Plan served a similarly ideological purpose.

[21] A number of other multilateral organizations—e.g., UNICEF, the World Food Program, the United National Population Fund, the International Organization for Migration—devote funding to displacement situations, as do hundreds of non-governmental organizations. States also provide bilateral humanitarian assistance.

[22] Leah Zamore, "Refugees, Development, Debt, Austerity: A Selected History," *Journal of Migration and Human Security*, no. 6 (2018): pp. 26-60, https://doi.org/10.14240/jmhs.v6i1.111.

[23] The term "*non-entrée*," with its obvious play on "*non-refoulement*," was coined by James Hathaway. James C. Hathaway, *The Rights of Refugees Under International Law*, (Cambridge: Cambridge University Press, 2005), pp. 279-290.

[24] Statement of the US delegate, Louis Henkin. UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Third Meeting Held at Lake Success, New York, on Tuesday, January 17, 1950, at 3pm, January 26, 1950, E/AC.32/SR.3, available at: http://www.refworld.org/docid/40aa193f4.html

[25] G. Coles, "Approaching the Refugee Problem Today," in *Refugees and International Relations*, edited by G. Loescher, and L. Monahan (Oxford: Oxford University Press, 1989), pp. 390-393.

[26] Humanitarian funding also results annually in several billions of dollars in funding for international organizations and NGOs.

[27] This is especially the case insofar as the international community provides no concomitant development support on the scale, or of the quality, needed to address poverty and deprivation in refugee-hosting areas. The vast majority of refugees are accommodated in just a handful of developing countries nearby to their own—a situation that has aptly been dubbed "responsibility by proximity." The rights in question entail obligations that in many cases go beyond what these states can provide even for their own citizens, such as rights to employment, public education, healthcare, and social security and other benefits.

[28] See T. A. Aleinikoff, Gruber Distinguished Lecture in Global Justice, delivered on February 8, 2016, at the Yale Law School. www.yjil.yale.edu/files/2016/09/41-spring-aleinikoff-rethinking-international-refugee-regime-1-28plgw9.pdf.

[29] Roger Zetter and Héloïse Ruaudel, "Refugees' Right to Work and Access to Labor Markets—An Assessment" (Working Paper, KNOMAD, 19 September 2016)

http://www.knomad.org/publication/refugees-right-work-and-access-labor-markets-assessment-part-1.

[30] For such an analysis, see Giorgio Agamben, *State of Exception*, (Chicago: University of Chicago Press, 2005). For critiques see Didier Fassin and Mariella Pandolfi, eds., *Contemporary States of Emergency: The Politics of military and Humanitarian Interventions*, (Brooklyn: Zone Books, 2013); and Michel Agier, *Managing the Undesirables: Refugee Camps and Humanitarian Governments* (Cambridge: Polity, 2011).

[31] Hannah Arendt, *The Origins of Totalitarianism* (New York City: Harcourt, 1973), pp. 290-92.

[32] For a list of UNHCR evaluations, reports, and conclusions on PRS over the past 15 years, see Crisp, Protracted Refugee Situations: A wide-ranging collection of UNHCR documents on the issue of protracted refugee situations, published since 1999 (2010), http://www.unhcr.org/en-us/research/epau/4a1d43986/protracted-refugee-situations.html.

[33] Jeff Crisp, Mind the gap! UNHCR, humanitarian assistance and the development process (New Issues in Refugee Research, Working Paper No. 43 2001), http://www.unhcr.org/en-us/research/working/3b309dd07/mind-gap-unhcr-humanitarian-assistance-development-process-jeff-crisp.html.

[34] That statement is available at: http://www.worldbank.org/en/news/press-release/2016/09/15/forced-displacement-a-developing-world-crisis.

[35] For that and other statistics related to humanitarian aid, see Development Initiatives, *Global Humanitarian Assistance Report 2017*, http://devinit.org/post/global-humanitarian-assistance-2017

[36] OCHA, *Humanitarian Funding Update December 2016—United Nations Coordinated Appeals*, https://reliefweb.int/report/world/humanitarian-funding-update-december-2016-united-nations-coordinated-appeals, ("As of 30 December 2016, the inter-agency coordinated appeals and refugee response plans within the Global Humanitarian Overview (GHO) require US$22.1 billion . . . to meet the needs of 96.2 million humanitarian crisis-affected people in 40 countries. By the end of 2016, $12.6 billion was raised towards the coordinated appeals—more than ever before. Despite immense donor generosity, it is only 57 percent of the requirements committed, leaving a short fall of $9.5 billion").

[37] High-Level Panel on Humanitarian Financing Report to the Secretary-General, *Too Important to Fail—Addressing the Humanitarian Financing Gap* (January 2016), https://reliefweb.int/report/world/high-level-panel-humanitarian-financing-report-secretary-general-too-important-fail.

[38] OECD, http://www.oecd.org/newsroom/development-aid-rises-again-in-2016-but-flows-to-poorest-countries-dip.htm.

[39] World Bank, *Forcibly Displaced: Toward a Development Approach Supporting Refugees, the Internally Displaced, and Their Host*, (World Bank, September 2016), http://www.worldbank.org/en/events/2016/09/15/report-launch-forcibly-displaced-toward-a-development-approach-supporting-refugees-the-internally-displaced-and-their-hosts.

[40] ODI, *Time to Let Go: Remaking HumanitarianAaction for the Modern Era*, (April 2016), https://www.odi.org/hpg/remake-aid.

[41] Leah Zamore, "Refugees, Development, Debt, Austerity: A Selected History," *Journal of Migration and Human Security*, no. 6 (2018): pp. 26-60, https://doi.org/10.14240/jmhs.v6i1.111.

[42] The Secretary General's preparatory report for the summit described the nature and consequences of large-scale movements across borders, and made recommendations on protecting migrants rights, the need for greater international cooperation on resolving refugee situations (including a goal of [10 percent resettlement]), increasing assistance to hosting communities, and urging a global campaign to combat xenophobia and discrimination. Importantly, the report supported the new model of response that combined humanitarian and development actors, which is labeled a "Comprehensive Refugee Response Framework." In *Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, 9 May 2016 (A/70/59), UN Secretary General Report, available at

https://interagencystandingcommittee.org/system/files/core_messages_secretary-general_report_addressing_large_movements_of_refugees_and_migrants.pdf. A "Leader's Summit on Refugees," held the day after the UN Summit, was convened by U.S. President Barack Obama that galvanized commitments from a wide range of governments on issues related to financing, education, and improved access to labor markets. See, e.g., "Fact Sheet on the Leaders' Summit on Refugees," (September 20, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/09/20/fact-sheet-leaders-summit-refugees.