

# The Arc of Protection: Toward a New International Refugee Regime

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## Chapter Three Principles of Protection

Our argument so far has been that the international community has a responsibility to provide international protection to persons forced to flee their homes and to do so equitably and expeditiously. As we have seen, such effective provision of international protection links norms with institutions and practices. In this Chapter, we will seek to give a robust view of the normative content of international protection. We will consider institutional arrangements in subsequent chapters.

The usual way a discussion on international protection proceeds is to focus on the rights of refugees, which derive from the Refugee Convention and other international law instruments. This is typically followed, in the academic literature, by a demonstration of how those rights are routinely violated. We agree that rights are at the core of international protection and that they are far too frequently dishonored in their breach.<sup>1</sup>

Here, however, we want to address the content of international protection from a starting point other than the rights of refugees. We do so for two reasons. First, *refugee* rights is too narrow a category because it does not include forced migrants who also have rights arising from both their humanity and their displacement—particularly IDPs who are guaranteed human rights as well as specific rights under regional arrangements (such as the African Union’s Kampala Convention) and forced migrants eligible for human rights and subsidiary protection in the EU. Second, even a robust implementation of existing refugee *rights* would not bring about a state of affairs adequate to the needs of displaced persons. We have underscored the importance of support to host states, both to strengthen the economies in which refugees live and as a form of equitable responsibility-sharing among states. Adequate provision of international protection will require recognition of additional rights and the crafting of new institutional and responsibility-sharing practices.

As we have argued in earlier chapters, the overall aim of international protection is to remedy the harms of forced displacement. Traditionally, international protection has embraced three core commitments: offering safe haven to forced migrants who have escaped from violence and other atrocious conditions that make their lives at home intolerable; enabling them to rebuild their lives or to provide for their welfare when they are unable to do so; and helping them exit from the category of uprooted. We will refer to these elements of protection as *safety*, *enjoyment of asylum*, and *solutions*. To these well-established three, we will add two more: enhancing the ability of the displaced to pursue opportunities for economic, educational and social advancement through movement; and ensuring that those displaced have a role in the crafting of international and domestic responses to their displacement. We will refer to these additional elements as *mobility* and *voice*. Together, these five commitments recognize and seek to protect refugee agency and to restore the hope and possibility of human flourishing. Starting from these commitments gives a dynamic reading to the concept of

international protection, and one distinct from the view (frequently asserted) that the core concern of international protection is *non-refoulement* and international humanitarian assistance. To us, the success of international protection is when it puts itself out of business. In this story, rights play an essential role, but they are one of several means to a larger end.

## 1. Safety

Protection of forced migrants begins with assuring them safety. Safety, in turn, must include both a right to access a safe place and the right not to be returned to danger. We will call this the “principle of safety.” These straightforward and commonsensical propositions run into the sophisticated idiosyncrasies of the current international refugee regime. The 1951 Convention, as scholars regularly note, protects against return to (certain kinds of) danger—this is the principle of *non-refoulement*—but it includes no right to enter another country to claim asylum. This state of affairs leads to a lot of head-scratching, but there it is. At its founding, the modern system for protecting refugees was willing to challenge state sovereignty only so far.<sup>2</sup> The Convention, in particular, had in mind those refugees—the aforementioned “residual caseload”—already in states of asylum. Access to safety abroad was presupposed.

### a. *Rescue*

Sophistication breeds sophistication. A (limited) right to enter, it is argued, can be inferred from the Convention’s guarantee of non-return. Such an inference proceeds as follows: the right of non-return cannot have meaningful effect if a person is not able to assert it; in a world where no habitable territory remains unclaimed by states, it is states that must provide a process for determining whether the right applies, and this implies entry to *some* state, at least so far as to permit the filing of an asylum claim.<sup>3</sup>

The line of reasoning is a persuasive work-around of the contradiction at the heart of the international system of protection. But note that it is of limited value to most fliers of necessity: it does not specify *which* states have a due to admit, and it requires an applicant to have a claim under the Convention’s definition of refugee, which, as we have seen, is an inadequate measure of persons who need international protection. More importantly, it gets the argument precisely backwards. Rather than inferring a right to enter from the right of non-return, the right to non-return is in fact compelled by the principle of safety. We use the term “principle” to make clear that we are not asserting there is a freestanding “right” under international law to enter another state to file a claim for asylum. Our argument, instead, is that a well-functioning system of international protection for forced migrants must start by guaranteeing safety, and to do so it must enable those in need to access a safe place.<sup>4</sup> The argument is therefore functional rather than strictly legal. Following rescue, other questions arise—such as what rights and opportunities should be provided to those rescued (which we address below). But it is obvious that such persons cannot be summarily prevented from fleeing danger nor returned to the very danger they have fled; either would make a mockery of the principle of safety.

Indeed, the Convention, read carefully, gets this all in the right order. The core idea of Article 1’s definition of refugee is “fear”—a fear that makes a person outside his or her home state unwilling to call on the assistance of that state.<sup>5</sup> That is, the Convention presupposes that flight has already occurred and that a person needs a guarantee of safety in the place in which he or she is—including a guarantee against being returned to danger. Following this recognition of a need for safety comes a robust list of rights to which refugees are entitled within and from the state of asylum. Among these rights, *non-refoulement* does not appear until Article 33, and it applies, like all the others, to persons already recognized as refugees—i.e., persons already outside their countries of origin and admitted to a new state. Its purpose, as we detail below, is to provide a defense against deportation

rules of the hosting state. Were *non-refoulement* the core Convention value—the edifice upon which the international refugee regime is to be constructed—it is surely oddly placed and oddly worded.

Recognizing the commitment of safety first comports with common understandings of the purposes of a system of protection. The requisite opportunity to enter a state is about affirmatively saving lives in danger and restoring lives devastated by the vicissitudes of flight. It is reduced in moral authority to see it simply as a right to assert a negative claim to non-return.

There are historical precedents that are rough approximations of an obligation of states to permit entry. The most direct is found in the 1933 Convention, which commits states “in any case not to refuse entry to refugees at the frontiers of their countries of origin” (although note that the section, like the *non-refoulement* provision in the 1951 Convention, applies only to already recognized refugees).<sup>6</sup> A Declaration on Territorial Asylum adopted by the General Assembly in 1967<sup>7</sup> included a similar principle of “non-rejection at the border” for persons granted asylum.<sup>8</sup> A draft Convention on Territorial Asylum—proposed by UNHCR in 1974 but not ratified—would have prohibited rejection at the border that would have occasioned return to persecution.<sup>9</sup>

Regional law puts a right of non-rejection on firmer textual grounds. The EU Directive on Asylum Procedures applies to “all applications for international protection made in the territory, *including at the border*, in the territorial waters or in the transit zones of the Member States.” It specifically enjoins states to adopt processes for the filing of asylum claims by persons stopped at borders:

Where there are indications that third-country nationals or stateless persons held in detention facilities *or present at border crossing points*, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so. In those detention facilities and crossing points, Member States shall make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure.<sup>10</sup>

Furthermore, applicants “shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision.”<sup>11</sup>

The principle of safety is, in fact, applied to the benefit of most of the world’s necessary fliers. The vast majority of persons fleeing intolerable situations are permitted entry into neighboring states, primarily in the global South, where more than 85 percent of the world’s refugees reside. Persons such as those escaping generalized violence, civil disorder, and destruction caused by earthquakes and tsunamis are routinely provided safe haven and assistance outside their home states. Refugee law, in asking why a person fears returning home, is largely orthogonal to these practices. The principle of safety properly identifies how the world confronts persons fleeing life-threatening circumstances: it takes them in.

#### b. *Non-return*

The principle of non-return has not had a straightforward history.<sup>12</sup> Nor was it the central concept from which refugee protection arose. And it has only recently come into its own—now routinely deemed to be the cornerstone of refugee protection. In the interwar years of the twentieth century, refugee law and policy concerned groups that were understood to be *de jure* or *de facto* stateless. It was thus not thought that they could or would return: in effect, they had no state to return to. During the Cold War, refugees from Communist states had enormous political value for Western states of asylum; forced return to the Eastern bloc was politically nonsensical. Indeed, as noted elsewhere, the postwar refugee regime was marked by an “exilic bias” almost from the outset.

The first appearance of a *non-refoulement*-like provision protected refugees from being arbitrarily deported to any other state. The sensible idea was that refugees should be permitted residence like other non-citizens—they should not be liable to being pushed off to another state (and

such protection was needed since, by definition, their former home state would not offer diplomatic protection). Thus, the 1933 Refugee Convention provided:

Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authori[z]ed to reside there regularly, unless the said measures are dictated by reasons of national security or public order.<sup>13</sup>

Note that the provision applies only to refugees already “authori[z]ed to reside there,” and further that there is no mention of fear of persecution in the home state. Here is *non-refoulement as responsibility*: a state has taken a refugee in and should continue to offer refuge unless he or she undertakes conduct that would generally permit a state to deport a non-citizen.

A few years later, *non-refoulement* appears in a 1936 “provisional arrangement” of the League of Nations concerning refugees from Germany. Again, states are enjoined not to deport refugees unless “such measures are dictated by reasons of national security or public order.” Where such reasons might obtain, it was nonetheless understood that refugees should not be returned to Germany—but then a curious provision: “Refugees shall not be sent back across the frontier of the Reich unless they have been warned and have refused to make the necessary arrangements to process to another country or to take advantage of the arrangements made for them with that object.”<sup>14</sup> Unlike the 1933 Convention which essentially said to hosting states, the refugees you have accepted are yours to keep, the 1938 instrument actually would have permitted return to Germany if refugees had somewhere else to go and had refused to go. This is *non-refoulement as threat*. One can conclude that the different renderings of *non-refoulement* in the thirties is largely dependent on the classes of refugees under consideration: Russians and Armenians in 1933; Jews in 1936.

The Constitution of the International Refugee Organization (IRO) provides a bridge to the modern concept of *non-refoulement*. The principle figures not as a bar to state action—it could not, since the IRO is an international organization—but rather as part of the IRO’s definition of persons of concern to the organization. It worked this way: the IRO was charged with promoting repatriation of wartime refugees (and also seeking their resettlement, where repatriation was not possible); it was recognized, however, that some refugees would not want to return home—either because of what had happened to them in the past or because of current fears arising from a new regime. It was decided that IRO’s jurisdiction should extend to refugees who presented “valid reasons” for not accepting repatriation, with “valid reasons” specified as “persecution or fear based on reasonable grounds of persecution because of race, religion, nationality or political opinion.”<sup>15</sup> This is *non-refoulement as moral conscience*. Although this definitional provision imposed no binding rules on states, it had the indirect effect of providing protection against *refoulement* (for the specified grounds) because the IRO was the chief instrument of the international community to effect solutions to the “refugee problem.”

In the 1951 Convention’s celebrated codification of the norm of *non-refoulement* we see tracings of these earlier renderings. Taking from the 1933 Convention, Article 32 of the 1951 instrument permits the deportation of refugees only on grounds of national security and public order (that is, states cannot seek to push refugees off to other hosting states simply to reduce their burden). And, in picking up language from the Annex of the IRO Constitution, Article 33 provides that, in any event, return cannot occur to states where a refugee would face a threat to life or freedom based on one of the five grounds specified in the Convention’s definition of refugee (race, religion, nationality, membership of a particular social group and political opinion).<sup>16</sup> By linking non-return in Article 33 to the definition of refugee in Article 1, we see the modern rendering: *non-refoulement as protection*.

The inclusion of *non-refoulement* in the Convention does not appear to have been controversial. Nor should it have been. Permitting return of refugees to places of harm would undercut the Convention’s main purposes of safety and integration. Furthermore, as noted above, at the time refugees in Europe were constituted by two major groups: the “residual caseload” of the

IRO, for whom repatriation was not possible, and persons fleeing regimes in the East, for whom repatriation was not politically desirable.

The importance attached to *non-refoulement* today has little to do with its provenance and much to do with the fact that the Convention does not provide refugees a right to enter any particular state and claim asylum. In this world of discretionary border control and the end of the “exilic bias” that welcomed refugees from Eastern Europe, the right of non-return has appropriately moved front and center (even if states continue to flout it by denying entry, denying asylum for the wrong reasons, and pushing asylum seekers to places other than their countries of origin). It has become the pressure point in the system for asserting a legal claim. Indeed, the Convention’s linkage of the *non-refoulement* and definitional provisions has come to be seen as axiomatic: refugees are just those people who cannot be returned to their home state because of their fear of harm on one of the five protected grounds.

If we start (and end) with the Convention as defining the scope of the international system of refugee protection, the centrality of *non-refoulement* appears understandable and appropriate. But once we shift the discussion to ask what principles of protection would constitute a just and defensible approach to forced displacement, things begin to look different. The first principle, as we have argued above, must be rescue and safety. Once safety is obtained, the next focus must be on inclusion, welfare, and self-reliance pending a permanent solution to displaced persons’ plight. The protection of *non-refoulement* is an obvious and vital side-constraint—the teleology of the refugee protection regime cannot be accomplished without it. But *non-refoulement* is not an end in itself; it is not what the Convention is driving at, nor what a broader system of protection should be primarily pursuing.

Furthermore, the Convention provides too narrow a rendering of the principle of non-return. This is because it is linked to the refugee definition and because its focus is on refugees already recognized and admitted into a state of asylum. We believe that a broader conception is necessary to serve the overall purpose of a re-visioned system of protection. First, *non-refoulement* norms should ¶G3 be extended to all necessary fleers. Safety of forced migrants is indivisible and non-derogable. It is no more acceptable to return a person to indiscriminate bombs than it is to targeted bullets. Second, the central question to be asked is, given the fact that a person has fled and now has found (or seeks) a place of safety, what would be fair and appropriate grounds for asking a person to go home? An answer to that question should turn not just on what refugees face in their home countries, but also what they are being asked to give up in their place of residence. Suppose, for example, that a refugee family has been present in a country of asylum for several years. Children are in school, the parents are earning adequate money to get by, serious medical needs are being taken care of—in short, they are in the process of successfully rebuilding their lives. Conditions in the home country might mean that they no longer face a risk of danger. But a return to the lives they once led there or now lead abroad may be unlikely due, for example, to destruction of home communities and infrastructure or lack of work opportunities. Is it right to ask them to now be uprooted again and return to their country of origin simply because they would be returning to a survivable life? This necessarily adds an element of reasonableness to any withdrawal of protection and demand that they return.

Walter Kälin and Nina Schrepfer have provided an analytical framework for a principle of non-returnability regarding persons forced to migrate because of climate change.<sup>17</sup> We believe that it can be expanded and generally applied to the broader category necessary fleers. Kälin and Schrepfer suggest that return is acceptable when it is *permissible*, *feasible*, and *reasonable*. This approach, unlike the Refugee Convention, disaggregates the reasons for flight from protection against return.

The element of permissibility incorporates the legal norm of *non-refoulement*; the elements of feasibility and reasonableness focus on additional factors. The authors argue that even “where return would be permissible and feasible,”

people should not, on the basis of compassionate and humanitarian grounds, be required to go back if the country of origin does not provide any assistance or protection in any part of

the country that can be reached by the displaced, or if what is provided falls far below international standards of what would be considered adequate. The same is true where authorities do not provide any kind of durable solutions to the displaced that are in line with international standards and would allow them to resume normal lives, especially where areas of land have become (or have been declared) uninhabitable and people have been unable to find an acceptable alternative themselves.<sup>18</sup>

We would go further, including in the determination of reasonableness, examination of what a would-be returnee would be asked to give up. We are not suggesting that all forced migrants, once they arrive in a place of safety, can never be asked to return. But we do believe that they may have, in the words of the IRO Constitution, “valid reasons” for not returning—reasons that go beyond a well-founded fear of harm. In this calculation, states might appropriately set a fairly high standard for not returning persons who face little or no danger at home; principles that automatically turn rescue into a right to remain would put pressure on a state’s willingness to provide safety. Furthermore, where return can be accomplished fairly quickly after the precipitating event, necessary fleers are unlikely to have established significant ties to the hosting state.

This conception of *non-refoulement* provides a better argument for the principle’s central role in the international system of refugee protection than does one focused solely on non-return to harm. It is at home with, and a complement to, the system’s goals: it is entailed by the principle of safety and is open to the realities of refugee’s lives that might provide valid reasons for non-return. This is not to say that we should in any way give up on the binding legal norm of *non-refoulement* as specified in the Convention, which provides a crucial protection that is enforceable in courts around the globe. But for too long our ability to conceive of an adequate system of international protection has begun and ended within the four corners of the Convention. The task before us is to continue to progress along the path the Convention opened to us.

## **2. Rebuilding lives and communities: Enjoyment of asylum**

An international system of protection cannot be constructed solely on the concept of safety. This would be like understanding responses to domestic violence as complete when temporary shelters are built for abused women. And yet, remarkably, today’s refugee regime seems to operate in this fashion. People are generally able to flee across borders and receive emergency assistance. We now know that the vast majority will not return to their home countries in any reasonable period of time. As they wait (and wait), assistance might continue or, more likely, decline while little occurs to include refugees in social and economic systems of hosting states; to enable them to move on with their lives. This, as we have said, effectively produces a second exile.

Where there is no prospect for return in the foreseeable future, forced migrants must be given the opportunity to begin to rebuild their lives and to reconstitute communities in which individual lives take shape and derive meaning. Indeed, the Universal Declaration of Human Rights (UDHR) recognizes the right of every individual not only to seek but (if granted) to *enjoy* asylum. Such enjoyment is often described as the goal of “self-reliance,” but it should be given a meaning much broader than economic self-sufficiency—to include physical and psychological well-being, education, inclusion in social programs, and other dignity- and agency-enhancing elements—elements of the “good life” that few of us derive from markets alone.

We claim no novelty for our broader conception of enjoyment of asylum. The Refugee Convention was adopted precisely to make such enjoyment possible. With repatriation and resettlement efforts waning, the states negotiating the Convention made clear that the next step needed to be inclusion of remaining refugees in the economic and social life of hosting states—not necessarily through naturalization, but through access to work, social benefits, and schools. As we have noted, the main vehicles for ensuring such inclusion—ones designed to remedy the tragedy that

Arendt had chronicled—were (a) to give refugees status and rights; and (b) to give host states the support needed to ensure that those rights could exist not just on paper but in practice.

a. *Rights*

Read as a whole, the 1951 Convention displays a clear strategy for inclusion through rights. One can see this by contrasting the set of rights guaranteed in the Refugee Convention with the rights included in the Universal Declaration of Human Rights, which was written just a few years before. The UDHR codified a comprehensive list of civil and political rights, applicable to all persons. These include (now familiar) rights of freedom of thought and religion; due process; non-discrimination protections; rights to life, liberty and security of person; prohibitions on slavery, torture, and arbitrary arrest; and a right to privacy. The UDHR also protected social rights such as rights to work, social security, education, and health.<sup>19</sup> The rights in the Refugee Convention are more circumscribed. They apply only to refugees; and they are usually written in a comparative fashion<sup>20</sup>—that is, refugees are entitled to certain rights to the same extent as either other foreigners in the hosting state or citizens of the state. So the right to work in the UDHR is phrased as, “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment” (Art. 23); in the Refugee Convention it is stated as: “The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment” (Art. 17(1)).<sup>21</sup>

That is to say, the Refugee Convention does not purport to be a comprehensive “bill of rights” for refugees.<sup>22</sup> As human beings, refugees are already entitled to the full set of rights contained in the treaties and customs that make up international human rights law. Instead the Refugee Convention reinforces the floor set by human rights law by identifying those rights essential to resolving the first exile (such as non-refoulement and the principle of safety) *and* to preempting the second: rights to work, to free movement, and protection of labor laws. Since many refugees (including children, elderly, disabled, caregivers) are temporarily or permanently unable to earn a living through employment, the Convention also guarantees access to education, housing, public relief, and social security on terms equal to what is provided to nationals.<sup>23</sup>

With these rights front and center, refugee response in postwar Europe, while by no means perfect, proved remarkably successful, especially compared to what occurred elsewhere—and since. Camp clearance was the top priority. Refugees who could and would work were rapidly absorbed into labor markets and social security schemes. In the UK, for instance, the removal of labor restrictions ensured that by 1954 there was “very little unemployment among the refugee population.”<sup>24</sup> Refugees were not the only ones to benefit. Across Europe, refugee labor played an important role in reconstruction and development.<sup>25</sup> Nor did efforts to foster enjoyment of asylum begin and end with free movement and the right to work. In the same year that the Refugee Convention entered into force, the Council of Europe formally extended the personal scope of its conventions on social security and on health care to include refugees.<sup>26</sup> Host and resettlement states made similar changes at the national level. In Germany, for instance, a Ministry of Expellees and Refugees was created not to provide parallel relief but to ensure that refugees had equal and ample access to national and local welfare benefits and social services.<sup>27</sup> Similarly, in the UK and elsewhere, “refugees [were] treated in matters of social welfare in the same manner as British subjects.”<sup>28</sup>

So conceived, the goal of enjoyment of asylum (understood as distinct from and additional to safety) is plainly at odds with the “care and maintenance” approach that dominates the current international system—as has been recognized since the earliest days of the modern era of refugee protection. G.J. van Heuven Goedhart, the first High Commissioner at UNHCR, penned these words in 1953:

Give a refugee a home, employment, and the same rights and obligations of the ordinary citizen, and if he meets no hostility on the part of the population, he will cease to be a lonely

figure in a forbidding world. Keep him in a camp in drab, depressing circumstances, refuse him employment, or allow him to take only inferior jobs, throw him only the crumbs of charity, or forget him his misery, and the refugee will become an embittered and unsettled element in the country where he is living through the force of circumstances.<sup>29</sup>

But nor is enjoyment of asylum synonymous with independence from aid. Both Goedhart's and the Convention's emphasis on rights beyond the right to work make clear: the goal of enjoyment is freedom from *want*.

#### b. *Development aid*

In Germany during the fifties, an Indian official named S.P. Chablani considered the response to refugees there: "The German refugee problem, like the Indian problem, was one of extreme severity; but the difference has been that whereas in India it has been tackled as a distinct and specific problem, it has been treated in Germany as an integral aspect of general reconstruction."<sup>30</sup> In particular, the official noted, "there could be no 'relief-camps' for them [refugees in Germany] in the sense we had them in India."<sup>31</sup> New refugees arriving in Germany remained in reception centers "for barely a week," whereas in India, "over one million refugees [were held] in our camps on gratuitous relief for a year or more."<sup>32</sup>

Today, the situation is in some ways worse, with enjoyment of asylum but not safety increasingly prevailing in richer countries, and safety without enjoyment remaining the norm in many developing countries. Thus, countries like Australia, Italy, and the United States seek in many ways to prevent refugees from reaching their territories because they wish to avoid providing all the rights that come with the enjoyment of asylum in the North. Countries like Kenya and Bangladesh, meanwhile, largely keep their borders open, at least in part, because they know that refuge on their territory will not give rise to responsibilities much beyond that (at least so long as a care and maintenance model funded by international donors remains the rule).

These two states of affairs are neither tolerable nor sustainable. Nor are they analogous. The lack of enjoyment of asylum in the global South is often understood in terms of the restrictive policies of host states. Encampment and other restrictions on rights most certainly play a role; they help perpetuate the violent precarity that refugees suffer in urban areas and the prolonged desolation that awaits them in camps. But this restrictivism is itself a function of a broader political economy that shifts the costs of protection onto those who can least afford it.<sup>33</sup> As Chablani described the main impediment to enjoyment in his country: "India ... has had to contain all its refugees and to depend entirely on its own resources."<sup>34</sup> Or as Goedhart similarly recognized: "If the absorption of the refugees into the economies of the country in which they now reside is to be left to the normal economic processes then the refugee problem will remain with us for the rest of our lives."<sup>35</sup> He continued: "If the United Nations is sincere in its desire for permanent solutions to the refugee problem, then not only must opportunities be given for resettlement but also a real financial effort for the integration of the refugees must be made in certain countries of residence."<sup>36</sup>

A similar line of thinking has recently (re)emerged within the international protection regime. Recent policy processes<sup>37</sup> have reaffirmed the centrality of providing additional support to host states, for reasons both moral and instrumental: host states provide a global public service, the costs of which should be borne globally and equitably; host states that struggle to provide for their own citizens are unlikely to favor inclusion unless the steps toward that end bring tangible benefits to host communities as well. Not only at the policy level but on the ground, it is once again a commonplace that displacement constitutes a development challenge and that development aid is a crucial component of any comprehensive response. Instead of food aid, blankets, and tents, aid agencies operating in countries like Lebanon and Jordan are increasingly turning to cash assistance and local housing vouchers—forms of assistance far more conducive to assimilation into local communities than emergency relief. Efforts to stimulate self-reliance through livelihoods and education are



growing in number and in sophistication. Meanwhile, the focus has expanded to encompass host communities, which are often as poor, if not poorer, than refugees themselves.

These are welcome developments. But there is a deep omission in their midst. The rights that form the core of international protection presuppose the existence of a host state that is not only willing but able to defend those rights—able, for instance, to enforce labor rights vis-à-vis powerful corporations or to collect sufficient taxes to provide decent and universal public services. That is precisely the kind of state that the Marshall Plan, and the New Deal-style development paradigm it ushered in, aimed to (re)construct in Europe.<sup>38</sup> It is also the kind of state that emerged in Africa and elsewhere following decolonization. Indeed, throughout the sixties and seventies, host states like Tanzania set about to create generous welfare states for citizens and refugees alike. The latter, for instance, provided refugees with land and employment opportunities; free education and healthcare; and, ultimately, citizenship. By contrast, for the last several decades, development policies have tended to push host states in a different direction. The focus has been on opening up developing economies to global markets and foreign investment, including by rolling back the welfare state and by deregulating the labor market, on the theory that a “rising tide will lift all boats.” But the tide in many host countries has not risen, while the boats off their shores continue to sink.

### 3. Solutions

Safety and enjoyment of asylum are vital elements of a system of protection but they cannot be the whole story. For reasons that should be apparent, the status of being a flier of necessity—of being a person in need of international protection—should be of limited duration. Even if displaced persons are given a real opportunity to begin to rebuild their lives, there is a legal precariousness inherent in the status (at least as currently conceived). Thus we posit a *principle of solution*: an effective system of international protection should seek as quickly as possible to end displacement and the need for international protection.

This principle would seem uncontroversial. The 1950 statute establishing UNHCR charges the High Commissioner with “seeking solutions to the problem of refugees.” Executive Committee Conclusions, dozens of UNHCR reports, and a huge academic and policy literature call for focused attention on—and the urgent need for—solutions.<sup>39</sup>

The three traditional “solutions” for refugee situations—repatriation, local integration and resettlement—are well-known and are usually seen as following directly from our core understanding of what it means to be a refugee: if a refugee is someone who has lost the protection of his or her home state (or, stated another way, whose ties with one’s state of citizenship have been sundered), then ending refugee status must entail the re-establishment of state protection through the restoration of membership in a state. This interpretation takes strength from Arendt’s implicit equating of “refugeeness” with statelessness and her assertion that rights could only be secure when a person belongs to a political community.

The linkage of solutions with membership has come to be seen as natural, virtually definitional, and yet—upon analysis—it is puzzling. First, neither resettlement nor local integration guarantee political membership (if understood as citizenship).<sup>40</sup> Resettled or locally integrated refugees are typically granted rights of settled immigrants; they may or may not be on a “path to citizenship.” Indeed, Article 34 of the Refugee Convention makes clear that refugees have no right to citizenship in a hosting state. It provides only hortatory language that

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

So for the concept of solution to be coherent, it either must mean more than the traditional three versions—that is, it must in fact mean full membership in a political community—or it must

mean something else; or both. We suggest that a better understanding of solution would be linked to the concept of international protection and the international responsibility to provide it. That is, the international community may responsibly disengage from international protection when the justification for it no longer exists. This would obtain when Convention rights and other applicable international human rights norms are being fully respected by hosting states, including the principle of non-return (so that there will be no return to danger), and when the economic, social, and political conditions in hosting states are conducive to human flourishing.<sup>41</sup>

Under this interpretation, a “solution” to “the refugee problem” could occur whether or not the person still meets the refugee definition. That is, a person may still have a well-founded fear of persecution in her home state, but the security afforded by the hosting state (including compliance with the principle of non-return) would mean that she has no risk of danger at home and has been assimilated into the hosting state. But mere “cessation”—under the Convention, refugee status may be withdrawn if the circumstances giving rise to refugee status no longer exist—is not enough to constitute a solution if neither the hosting state nor the state of origin is fully guaranteeing Convention and other rights that provide for effective enjoyment of asylum and integration.

It is worth noting that this interpretation of solutions better links to the traditional three solutions than the membership account; and, more importantly, it helps to work against the state-based bias of the regime as currently understood. Under the state-based view, the solution for refugees can only come when they return as full members of their home state or attain full membership elsewhere. But seeing solutions as linked to rights (that guarantee enjoyment of asylum) opens up a non-state based understanding of the international regime for protecting fleers of necessity, including emphasis on welfare, agency, and mobility (which we develop in Chapter 4)—not just on legal status.<sup>42</sup>

It might be questioned whether an interpretation of solution that turns on the need for continued international protection could leave refugees in an insecure situation: if it is not safe for them to return home and they are not granted citizenship in the hosting state, they are in effect immigrants and as such are subject to deportation (although not to their country of origin); or worse, they are to some extent stateless persons with no ability to exercise political rights anywhere. One benefit of the membership-as-solution approach is that, if achieved, it restores membership in a political community. There are two possible routes out of this conundrum. First, it can be argued that the refugee regime need not do the work of the statelessness regime—that is, if persons are in fact indefinitely disenfranchised by not having effective citizenship in any state, that is a problem for the system of norms established for eliminating statelessness. A less pass-the-buck answer would suggest that long-term refugees be given either a path to citizenship or political rights in hosting states. Again, the exercise here is considering the scope of a fair and just international regime for the forcibly displaced. **We suggest that such a regime would, in effect, amend Article 34 of the Convention to provide a right to citizenship after a lengthy stay as a refugee with no prospect of return in the foreseeable future.**

#### 4. Mobility

As we noted in Chapter 2, a central innovation of the post-World War I efforts to extend protection to refugees was the “Nansen Passport,” a document issued in the name of the first High Commissioner for Refugees Fridtjof Nansen. For many refugees who had no documentation from either their home state or hosting state, the Nansen Passport served as an identity card. The Nansen Passport did not guarantee entry to another state; admission would depend on the domestic laws and policies of that state pertaining to non-citizens. But it facilitated travel outside the borders of the state of asylum: receiving states would accept the document as adequate for purposes of identification, and asylum states would recognize the Nansen Passport as sufficient to permit re-entry of a refugee who had ventured abroad. The movement of refugees was generally understood as important to attaining self-reliance—refugees would travel to other states in search of gainful employment.

This sensible idea of providing opportunities for refugees to move—to work, to join family, to find a welcoming community—no longer figures in the refugee regime. Refugees are, in effect, given one shot at safety and security; they are to be admitted to countries of first asylum (usually next door to their home states) and they are expected to stay there until they return to their country of origin or are accepted for “resettlement” in a third country. Refugees who seek to move beyond countries of first asylum are usually forced to do so illegally, and are often treated as undocumented migrants (or criminals) by the next state of destination. Complicated legal norms control whether they can apply for asylum when arriving in another state (generally, not if they have been recognized as a refugee or firmly settled in the country of first asylum and can be safely returned).

Consider how this played out during the movement of hundreds of thousands of Syrian refugees from Turkey to Europe in 2015 to 2016. Those who were accepted into European states were placed into the asylum process, where they are subject to individualized determinations as to their status as refugees. Others met with border police, fences, and other barriers and were denied entry; for those receiving states, the refugees were simply illegal migrants who had no right to enter either based on their refugee status or in order to file a claim for asylum. A decision by the governing body of the EU to distribute Syrian asylum seekers among EU members according to a formula was rejected by several member states and never put into effect. Eventually, an agreement was negotiated between the EU and Turkey, which permitted the return of Syrian asylum seekers to Turkey (in exchange for a promise of six billion euros, progress toward visa-free travel for Turks in the EU, and a restart of the process that could eventuate in Turkey’s admission to the EU).<sup>43</sup> Thus while EU politicians, journalists, NGOs, and other humanitarian actors have no difficulty in traveling to Turkey to negotiate about, report on, and work with more than 2.5 million refugees being housed by Turkey, the refugees themselves now face formidable legal and practical barriers in moving beyond the country of first asylum. Freedom of movement, it seems, is a privilege of the most fortunate, not the most in need.

It is possible, however, to imagine a different state of affairs—not one based on a claim of a human right to mobility or the illegitimacy of borders, but rather on an understanding of what it means to be a member of the international refugee regime. We will discuss at length in Chapter 4 the importance of global responsibility-sharing to a well-functioning international system of protection. Here we press one aspect of that broader principle—the idea of free movement for the forcibly displaced among members of the regime. In essence, we are suggesting revival of the Nansen Passport, and endowing it with the additional element of presumptively authorizing entry of recognized refugees to other members of the refugee regime. Persons arriving from a country of first asylum would not be subject to lengthy asylum determinations that take years and impose substantial costs on receiving states; prior adjudication of refugee status—perhaps certified by UNHCR or another international body—would suffice for all members of the regime. To be acceptable to member states—and to be consistent with fair distribution of responsibilities—they could limit admissions to a certain annual amount or could condition admission of some portion of refugees upon demonstration that they have means of supporting themselves and their families (and other conditions relating to security and the like). But the central principle would be one of supporting refugee agency as they attempt to rebuild their lives.

Free movement among members of a political body is hardly a new idea. From the creation of the United States, to the EU and the Economic Community of West African States (and perhaps soon the South American trade bloc Mercosur),<sup>44</sup> the right to move is protected by law. To be sure, a new Nansen Passport would extend that privilege to non-citizens of the political entities that constitute the whole, but they will have achieved a certain degree of membership by meeting standards that warrant the exercise of international protection—which all members of the regime are committed to guaranteeing. Refugees could choose their state of residence as states accept their responsibilities as regime members. This is similar to current refugee resettlement programs, but puts the right of initiative in the refugees’ hands: rather than states selecting refugees, refugees select states.

It is worth noting how this proposal differs from—indeed, is diametrically in opposition to—schemes of scholars suggesting regime reform. For several decades James Hathaway, and now more recently Alexander Betts and Paul Collier,<sup>45</sup> have proposed that persons seeking asylum be taken in but denied a choice as to where they will eventually be offered admission should their claims be recognized. The idea is that spurious asylum claims can be deterred if applicants are not able to know where they will be offered residence as a refugee. While some accommodation to state interests may be necessary for reform efforts to gain traction, this seems to move so precisely against the goal of enhancing refugee agency that it ought to be rethought.

So, we would identify as a fourth core commitment of a fair regime of international protection a *principle of mobility*: persons should be able to seek protection, travel within states of asylum, and be provided opportunities to move to other regime members.<sup>46</sup>

## 5. Voice

At a level of deep structure, the prevailing regime of humanitarianism cares relatively little about refugee voices. The goals of the system appear obvious: food, shelter, medical care, education, protection against sexual and gender-based violence, and the like. So the regime might well seek to know how effectively and efficiently this assistance is being delivered. But it rarely asks refugees what goals they would like the system to pursue and to what extent the current activities materially improve their lives.

We are struck once again by the cogency of Arendt's argument that the (de facto or de jure) statelessness of the uprooted and their exclusion from political society meant that they had no voice, that no one had to listen to them.<sup>47</sup> Nearly 70 years later, refugees remain largely voiceless, with their interests being represented in the main by NGOs and international organizations.

It is thus stunning that refugees have no formal representation—indeed, no regular informal role—in UNHCR's Executive Committee. This is not a problem of logistics: at Standing Committee meetings and the annual meeting of the Executive Committee, representatives of the NGO community are given a speaking role. So too representatives of refugee communities could be invited to participate, perhaps based on regionally and nationally based refugee organizations. Occasionally, a refugee is included in a panel discussion on some current topic to give the “refugee view.” But this is an inadequate and essentializing format for consulting with refugee communities.

UNHCR has made episodic attempts to bring refugees into national, regional, and international conversations. Its Dialogues with Women in 2010 to 2011, in which 1,000 refugees, asylum seekers, and IDPs participated, is an important example.<sup>48</sup> And in refugee camps, UNHCR maintains close relations with refugees, through “elders councils” and informal contacts. But refugees—as fixed by the aid system—remain supplicants; they do not share in the governance of the camp. Outside of camps, where the majority of refugees now reside, there is far less daily contact. UNHCR is largely seen as a social service agency (and also, for the favored few, a route to resettlement). Refugees, of course, have no say in the governance of local, national, and international development policies that dramatically affect their lives.

For tens of millions of people to have their lives and futures determined by institutions and governments in which they have no role violates fundamental norms of political legitimacy. Perhaps their situation vis-à-vis hosting states can be analogized to other non-citizens, who are usually denied a right to political participation. But the analogy strikes us as tenuous given that refugees have been cast out of the political system of their home state and constitute an “aberration” within the broader states system. (This, of course, was the original basis of the definition of refugee—a person who could not call upon the “protection” of their home state when residing in another state.) They are thus voiceless both at home and abroad. And the case for political rights (including vis-à-vis international organizations) gets stronger as time in exile increases. On what basis should a second (or third!) generation of refugees be without political rights in a state that has no duty to provide

them a route to citizenship? On what basis should a regime mobilized to protect displaced persons continue to operate without their participation and consent?

Despite these arguments, which seem to be rather straightforward applications of fundamental democratic theory, it seems obvious, especially, that hosting states are unlikely to grant political rights to refugees. That makes programs that begin to take us down this road all the more important. UNHCR should begin to experiment with forms of political participation in camps and in cities; and it should adopt procedures that make itself accountable to refugees (and not just large donors). Perhaps the agency can persuade local leaders to develop committees of citizens and refugees to tackle common problems (health and education, for example). And advocates should begin to press such claims at the international level.

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Commitment to these five principles—*safety, enjoyment of asylum, solution, mobility, and voice*—would provide a strong foundation upon which to reconstitute the current (failing) system of international protection. Their pursuit would move the arc of protection forward, for refugees and other fliers of necessity.

But to state these core principles of protection is to see immediately how widely they are neglected (indeed, regularly violated) by hosting states and the international community in general. Theorists have tended to deploy the refugee camp as the archetypal symbol of refugee (non-)protection today—a place where the displaced are denied, in Arendt's famous formulation, "the right to have rights." Refugees in camps are immobilized, stripped of voice, excluded from the political.

The scholarly focus on camps is somewhat misplaced, both because most refugees today do not live in camps and because the international refugee regime was put in place precisely to establish many of the rights that Arendt observed were denied them. Yet starting from the perspective of the camp in analyzing today's protection regime may be closer to the truth than starting from the Convention. In many places in the world, refugees and asylum seekers face severe restrictions on their movement. Kenya's "encampment" policy affects half a million refugees; Ethiopia restricts Somalis to camps, and Thailand does the same for Myanmarese refugees. Australia has caused the indefinite imprisonment of thousands of asylum seekers in Nauru and on Manus Island in Papua New Guinea; the United States detained families fleeing violence in the North Triangle of Central America until federal courts ordered their release; fences in Europe accomplished the goal of first keeping asylum seekers in camps in Greece and then generally deterring flight to Europe.

Even when not restricted to camps, refugees face exclusions and denials of rights—the second exile—that have the effect of isolating and impoverishing them in hosting states. When other states prevent onward movement of refugees (through visa rules, interdiction at sea, border fences and sanctions on carriers)<sup>49</sup> and then severely limit resettlement opportunities and development aid, the barriers of the virtual camp begin to become visible.

In all these sites, Convention rights and principles of protection are no match for muscular assertions of state sovereignty. Hosting states can exclude from within, other states from without. All the specialness of refugee status—the internationally acknowledged claim to be recognized and protected—seems to evaporate. Refugees, it turns out, are no more than other foreigners, migrants, strangers, whom the state, in the exercise of its sovereign prerogatives, can choose to admit or not and on whatever conditions they consider to be in their national interests.

So even if there were widespread agreement on the principles that should guide the reform of the international refugee regime, we would still be faced with the rather daunting question of how states might be persuaded to move the process of reconstitution forward. We turn to this question in the chapters that follow.

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<sup>1</sup> In state after state, all of which are either parties to the Refugee Convention or other international human rights agreements (or both), rights are violated, under-enforced, and ignored. Displaced persons are *refouled*, pushed back, and otherwise denied access to territories and to asylum procedures. They are denied the right to work, to freedom of movement; restricted to camps, placed in detention, and denied due process. Children are excluded from education, and families have no access to social programs. So a program of and for rights must resolutely pursue avenues of enforcement of rights if the lives of displaced persons are to be materially improved.

<sup>2</sup> Similarly, the Universal Declaration of Human Rights, adopted just three years before the Refugee Convention, guarantees a right to *seek* and *enjoy* asylum, but not a right to *enter* a state to claim asylum or a right to be *granted* asylum. Article 14(1), available at:

<http://www.refworld.org/docid/3ae6b3712c.html>.

<sup>3</sup> James C. Hathaway, *The Rights of Refugees Under International Law*, (Cambridge: Cambridge University Press, 2005), p. 315; Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (Oxford: Oxford University Press, 2007), p. 207.

<sup>4</sup> See Alexander Betts and Paul Collier, *Refuge: Rethinking Refugee Policy in a Changing World*, (Oxford: Oxford University Press, 2017), p. 196.

<sup>5</sup> See Peter Nyers, *Rethinking Refugees: Beyond States of Emergency*, (Oxon: Routledge, 2006), pp. 47-48.

<sup>6</sup> Convention of October 28, 1933 relating to the International Status of Refugees League of Nations, Treaty Series Vol. CLIX No. 3663, Art. 3 (“1933 Convention”).

<sup>7</sup> UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), available at: <http://www.refworld.org/docid/3b00f05a2c.html>.

<sup>8</sup> UNHCR, (Draft) Convention on Territorial Asylum, Article 2,

<http://www.unhcr.org/excom/excomrep/3ae68c023/note-international-protection-addendum-1-draft-convention-territorial-asylum.html>.

<sup>9</sup> “No person shall be subjected by a Contracting State to measures such as rejection at the frontier, return, or expulsion, which would compel him to return directly or indirectly to, or remain in a territory with respect to which he has a well-founded fear of persecution, prosecution or punishment for any of the reasons stated in paragraph 1 of Article 1.” Article 2.

<sup>10</sup> Article 8(1) (emphasis supplied), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&qid=1487456102470&from=FR>.

<sup>11</sup> Ibid. Art. 9.

<sup>12</sup> Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (Oxford: Oxford University Press, 2007), p. 117.

<sup>13</sup> 1933 Convention, Art. 3.

<sup>14</sup> Provisional Arrangement of 4th 1936 concerning the Status of Refugees coming from Germany League of Nations Treaty Series, Vol. CLXXI, No. 3952, Art. 4(3). There is similar language in the 1938 agreement relating to German refugees. Convention concerning the Status of Refugees coming from Germany, Geneva, 10 February 1938, League of Nations Treaty Series, Vol. CXCII, No. 4461, page 59, Art. 5(3) (softens the 1936 provision by adding that refusal to make arrangements to move to another country be made “without just cause”).

<sup>15</sup> IRO Constitution, Annex I, Part 1, Section C (1)(a)(i). Also protected against return were persons with “compelling family reasons arising out of previous persecution, or, compelling reasons of infirmity and illness.” Id. (a)(iii).

<sup>16</sup> In addition, that part of the IRO definition stating that persons with “valid reasons” would not be asked to repatriate appears in a new formulation as an exception to the “cessation” provision of the 1951 Convention (Art. 1(C)(6)) (cessation of refugee status “shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence”).

<sup>17</sup> Walter Kälin and Nina Schrepfer, “Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches,” UNHCR, Legal and Protection Policy Research Series (February 2012). This approach is itself derived from Swiss law regarding persons granted

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subsidiary protection. (Kälin was UN rapporteur on IDPs and advisor to the Nansen initiative.)

<http://www.unhcr.org/4f33f1729.pdf>.

<sup>18</sup> Ibid. at 66.

<sup>19</sup> And, as previously mentioned, the right “to seek and to enjoy” asylum. Art. 16.

<sup>20</sup> Hathaway uses the term “contingent” to describe what we call “comparative.” James C. Hathaway, *The Rights of Refugees Under International Law*, (Cambridge: Cambridge University Press, 2005).

<sup>21</sup> Compare also reference to the freedom of movement in both instruments. The UDHR states Everyone has the right to freedom of movement and residence within the borders of each State. (Art. 13(1). The Refugee Convention states: “Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.” (Art. 26.)

<sup>22</sup> Of course, the human rights of refugees are protected by other human rights instruments that apply to all human beings irrespective of status and citizenship.

<sup>23</sup> The Convention also includes provisions that pertain to the special situation of refugees—e.g., Art. 7 (exemption from reciprocity), Art. 28 (refugee travel documents), and the all-important Art. 33 (*non-refoulement*).

<sup>24</sup> UN High Commissioner for Refugees (UNHCR), *Report of the United Nations High Commissioner for Refugees*, January 1, 1954, A/2394, para. 136, <http://www.unhcr.org/4f33f1729.pdf>.

<sup>25</sup> See e.g., Robert F. Gorman and Gaim Kibreab, “Repatriation Aid and Development Assistance,” in *Reconceiving International Refugee Law*, edited by James C. Hathaway (Leiden: Martinus Nijhoff Publishers, 1997), pp. 35-76.

<sup>26</sup> UN High Commissioner for Refugees (UNHCR), *Report of the United Nations High Commissioner for Refugees*, January 1, 1954, A/2394, available at: <http://www.refworld.org/docid/3ae68c968.html>.

<sup>27</sup> See e.g., S.P. Chablani, “The Rehabilitation of Refugees in the Federal Republic of Germany,” *Weltwirtschaftliches Archiv*, Bd. 79 (1957), pp. 281-304.

<sup>28</sup> UN High Commissioner for Refugees (UNHCR), *Report of the United Nations High Commissioner for Refugees*, January 1, 1954, A/2394, para. 136, <http://www.refworld.org/docid/3ae68c968.html>.

<sup>29</sup> (High Commissioner) G.J. van Heuven Goedhart, “People Adrift,” *Journal of International Affairs*, no. 7 (1953): pp. 7-29, at p. 9.

<sup>30</sup> S.P. Chablani, “The Rehabilitation of Refugees in the Federal Republic of Germany,” *Weltwirtschaftliches Archiv*, Bd. 79 (1957): pp. 281-304.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> As we explain further in Chapter 4, rich countries today host a fraction of the world’s necessary fleers and could easily host many more. Even the nearly one million refugees that Germany has recently accepted—widely considered a radical act—pales in comparison to the roughly ten million uprooted persons it absorbed after World War II, when its population was smaller and its economy was in ruins. Equally, richer countries can afford to provide substantially more support to developing host countries. Today, European states spend more of their foreign aid budgets integrating the few refugees admitted to Europe than they do on all other refugees combined. (In 2016, such “in-donor” refugee costs exceeded \$15 billion, more than four times the budget of UNHCR.) They spend many billions more on walls, fences, prisons and ships to keep refugees out. It is little wonder, then, that host states have grown impatient with calls that *they* live up to their responsibilities.

<sup>34</sup> P. Chablani, “The Rehabilitation of Refugees in the Federal Republic of Germany,” *Weltwirtschaftliches Archiv*, Bd. 79 (1957): pp. 281-304.

<sup>35</sup> UNHCR, 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, <http://www.unhcr.org/en-us/admin/hcspeeches/3ae68fb610/speech-dr-gerrit-jan-van-heuven-goedhart-united-nations-high-commissioner.html>.

<sup>36</sup> Ibid.

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<sup>37</sup> As we noted in Chapter 1, in September 2016, the UN General Assembly adopted a Declaration (the “New York Declaration for Refugees and Migrants”) that set in motion a process to develop a “Global Compact on Refugees” by 2018. Annex I of the Declaration also elaborated what is known as the Comprehensive Refugee Response Framework (CRRF). Further information about these processes can be found here: <http://www.unhcr.org/en-us/new-york-declaration-for-refugees-and-migrants.html>.

<sup>38</sup> 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>.

<sup>39</sup> “Refugee Problems and their Solutions,” Address of Dr Gerrit Jan van Heuven Goedhart, United Nations High Commissioner for Refugees, at Oslo on December 12, 1955, available at <http://www.unhcr.org/uk/admin/hcspeeches/3ae68fb918/refugee-problems-solutions-address-dr-gerrit-jan-van-heuven-goedhart-united.html>.

<sup>40</sup> Hathaway provides a curious treatment. He declares that resettlement is of course a “solution” for refugees. As for local integration, he recognizes that the Convention, if complied with, will produce integration (if understood as giving refugees rights normally afforded to settled immigrants); apparently in an effort to make the local integration “solution” mean something more than compliance with the Convention, he adds to it a requirement of naturalization. James Hathaway, *The Rights of Refugees Under International Law*, (Cambridge: Cambridge University Press, 2005) pp. 963-975.

<sup>41</sup> Arguably, the 1950 General Assembly Statute establishing UNHCR is close to this understanding of solution, and at odds with the solution-as-membership conception. It charges the High Commissioner with “Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.” When coupled with the Convention’s soft language on naturalization, it seems likely that “assimilation” was understood to mean something other than “membership.”

<sup>42</sup> If solutions obtain only with full membership, it would mean a solution for a resettled or locally integrated refugee might take away that person’s right to return to their state of origin, if in naturalizing elsewhere they are required to renounce other citizenships.

<sup>43</sup> About 3.5 million refugees are settled in Turkey but the EU has not yet paid the entire amount and has not liberalized visa procedures. Patrick Wintour, “Turkish PM Warns EU Over Refugee Deal Ahead of Syrian Peace Talks, *the Guardian*, November 27, 2017, <https://www.theguardian.com/world/2017/nov/27/turkey-threatens-to-scrap-refugee-deal-over-syrian-peace-talks>.

<sup>44</sup> Fact Sheets on the European Union (2018), [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_2.1.3.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_2.1.3.html); Ecowas, Protocol A/P.1/5/79 Relating to Free Movement of Person, Residence and Establishment, [http://documentation.ecowas.int/download/en/legal\\_documents/protocols/PROTOCOL%20RELATING%20TO%20%20FREE%20MOVEMENT%20OF%20PERSONS.pdf](http://documentation.ecowas.int/download/en/legal_documents/protocols/PROTOCOL%20RELATING%20TO%20%20FREE%20MOVEMENT%20OF%20PERSONS.pdf)

<sup>45</sup> James C. Hathaway and R. A. Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection,” *Harvard Law School Human Rights Journal*, no. 10 (1997): pp. 115-212; Alexander Betts and Paul Collier, *Refuge: Rethinking Refugee Policy in a Changing World*, (Oxford: Oxford University Press, 2017), pp. 102-105.

<sup>46</sup> While our first three principles—safety, enjoyment, and solutions—are similar to the reasoning of Betts and Collier, we are in strong disagreement with their discussion of mobility. Betts and Collier see the question of refugee mobility as about whether or not there is a global right to free movement. They argue that the right to move is only the right to move to a place where one can be rescued and where autonomy can be restored. A long journey—say, for most refugees, to Europe—would therefore not be justified; at that point refugees become migrants, interested not in rescue but in economic betterment. We see mobility differently. Refugees are people who by definition forced from their homes and ripped from their communities. International protection that starts with rescue can end only when homes and communities are restored. A refugee seeking to move beyond a



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desperate situation in a country of first asylum is seeking that restoration. This is not a claim about a universal right of free movement; it is a claim that particularly applies to the international regime of protection for refugees—in which refugees should be able to seek tolerable living conditions and state members of the regime should equitably share the responsibility to make that happen.

<sup>47</sup> Hannah Arendt, *The Origins of Totalitarianism*, (New York City: Harcourt, 1973), pp. 290-292.

<sup>48</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR's Dialogues with Refugee Women*, 14 February 2013, available at <http://www.unhcr.org/511d160d9.pdf>.

<sup>49</sup> Thomas Gammeltoft-Hansen, “International Refugee Law and Policy: The Case of Deterrence Policies,” *Journal of Refugee Studies*, no. 27 (2014): pp. 574-594  
<http://jrs.oxfordjournals.org/content/27/4/574.short?rss=1&ssource=mfr>; Kathleen Newland, Elizabeth Collett, Kate Hooper, and Sarah Flamm, *All at Sea: The Policy Challenges of Rescue, Interception, and Long-Term Response to Maritime Migration*, (New York City: Migration Policy Institute, 2016).