



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’être*” 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 *sbrinking 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?

Chapter Two

Protection, International Protection and Necessary Flight

That persons fleeing danger across international borders should be cared for—and not returned to harm—is uncontroversial. We believe that the moral case for assisting the displaced is “overdetermined.” They are “necessitous strangers,” to borrow Michael Walzer’s phrase;⁴³ fellow human beings who have experienced tragedy and trauma. To turn our backs on them is to deny our own humanity. Usually what they seek from our collective selves is far less than the benefits bestowed upon their individual lives. It is not surprising, then, that the Abrahamic religions enjoin adherents to care for the strangers in their midst.⁴⁴

Persons displaced across borders are also victims of the international system of nation states. Subject to brutality in the state to which they have been assigned (for most, assigned through no choice of their own) and which, according to the system’s rule, has near complete “sovereignty” over them, they have crossed a border only to find themselves in another state which exerts similar claims to authority over their lives and their fortunes. They have no place on earth to flee to where they are free to help themselves. But the claims they put forth—that their fundamental human rights have been violated—invoke obligations that the nations of the world have, in exercise of their sovereignty, assumed. The UN Charter, and other international instruments, commit states to promote “universal respect for, and observance of, human rights and fundamental freedoms for all.”⁴⁵ Most nations of the world have ratified either the 1951 Refugee Convention or its 1967 Protocol, and even those states that are not signatories (including Jordan, Lebanon, Pakistan and Thailand) currently protect millions of refugees. Meanwhile, when states take harsh actions against displaced persons, they generally deny that a violation of rights has occurred—for instance by calling refugees “economic migrants” or by insisting that conditions in their home countries are “safe” to be returned to; this further suggests that states consider themselves to be bound by the norms of international refugee law.

Most refugees find safety in poor countries nearby to their own. The communities that take them in are often as poor, or in some cases poorer, than refugees themselves. So caring for the world’s displaced can therefore be seen as one in a range of efforts to ameliorate global inequality, as most refugees derive from the global South and most of the aid they receive comes from richer states in the global North. If all this were not enough to justify protection for refugees, one could point to the self-interest of states, in both political and security terms, in paying attention to the root causes and consequences of forced displacement.⁴⁶

To note a global consensus on the case for aiding the forcibly displaced is not to specify the content of moral or legal obligations. Those questions, of course, are quite contentious. Part of the problem is that the terrain on which the arguments occur is a constantly shifting one. Sometimes the focus is on what classes of persons should be deemed to come within the Convention’s definition of “refugee” or how that definition might be expanded to include similarly situated groups. This approach is of particular interest to lawyers and advocates, who argue in favor of capacious readings of the Convention’s definition in order to extend rights to as broad a scope of people as possible. An alternative approach is to concede that the Convention definition is of restricted compass, but to assert that other categories of forced migrants warrant international concern as well. This strategy typically proceeds by identifying an underlying principle justifying assistance—such as flight from violence, or protection of fundamental rights or needs—and

then showing that it is arbitrary to include only groups that come within the Convention's definition.⁴⁷ That the Convention's definition arises from a particular historical moment reinforces this sense of arbitrariness.

We want to approach this debate from a different perspective. We start with the simple proposition—one, as we will argue, that is widely embraced in theory and practice—that persons who flee from circumstances in which they face a serious risk of harm should be received elsewhere and should not be forcibly returned (or be asked to return) to a situation in which they would face a serious risk of harm. We then explore for these people, whatever their motivations for leaving or the motivations of those who would do them harm in their place of origin, the nature and scope of the collective responsibility of the international community to aid them. We will call the content of that responsibility “international protection.”

These seem like straightforward and not particularly controversial propositions. And yet they do not reflect the prevailing conceptions of who is entitled to aid, what that aid should be, and what “protection” means. We believe that the discussion of “protection”—a word that defies easy or precise definition—went off track in the nineties and led to a fundamentally flawed description of the purpose and promise of the international refugee regime. We do not suggest a return to the “original understanding”—although our reconceptualization is at home with the purposes of the Convention and the regime in important ways. Instead, we suggest a 3.0 version of international protection, one that identifies more fully the responsibilities of the international community and member states of the international refugee regime.

Our approach is more empirical than linguistic. We look to existing international and regional practice to see how the relevant questions have been approached in the past and in our day and the expectations that have been created. Our claim is not that what is, is right; rather, we believe that an approach that looks both at precepts and practices will describe a trajectory of international responsibility and institutional design—an arc of protection—that can offer life-saving and life-sustaining aid to persons whom the world believes merit our deepest concern.

I. The protean meaning of protection: A short history

The word “protection” is mysterious to most readers. Apparently central to the definition of refugee, it means more than physical protection from bodily harm (although it may include that) or security. The origin of the use of the term derives from international legal principles that precede the 1951 Convention, but the concept of “protection” has moved far from its origins. It now plays a central role in many aspects of the international refugee regime. Properly understood and mobilized, it indeed deserves its place at the core of the international response to displacement.

This historical review can be brief because it has been described in detail in the scholarly literature.⁴⁸ The term “protection” is borrowed from general (European) international practice in the years immediately following World War I, and initially appears as part of the *definition* of refugee in a 1926 “arrangement” regarding Russian and Armenian refugees.⁴⁹ The idea was this: in the international law of that era, legal relations were state-to-state; persons existed as citizens of a sovereign state acting in the international realm. A person outside her country of origin would rely upon her home state to “protect” her—to give her documentation for purposes of international travel, to stand up for her in disputes

with nations in which she is travelling or residing, to provide other forms of “diplomatic protection.” The protection is afforded by the state of which the person is a citizen in the territory of another state. A refugee, however, is unable to rely upon the “protection” of her home state because that state has cast her out; she may no longer be a citizen (and thus not eligible for protection by the home state) or even if still a citizen, it is apparent that that state will not represent her interests in relations with other states or issue her documents that facilitate life outside the home state. Thus, in defining Russian refugees from the Russian civil war, the League of Nations employed the following definition: “Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality.”

The logic behind such a definition was simple: what refugees needed most from the international community was a legal identity, since they had lost—de jure or de facto—the citizenship of their home state and had not been granted status elsewhere.⁵⁰ It also bears noting that by the twenties, identity documents had become a regular feature of interwar life in many countries. Refugees faced a growing matrix of controls “of which passport systems, alien registration and restriction rules [were] symbolic.”⁵¹ Thus the crucial intervention of the first High Commissioner for Refugees, Fridtjof Nansen, was the creation of identity cards (later called “Nansen passports”).⁵² Nansen passports did not endow refugees with rights—either the right to enter other states or substantive rights in the state in which they were residing: these matters were left to domestic laws and inter-state agreements—but they did facilitate international travel and gave refugees “a more secure legal status” while helping to return their “lost identity.”⁵³ They also introduced a link between protection and what are now called “durable solutions,”⁵⁴ since legal identity is a crucial prerequisite to the acquisition of membership in a new state. In many ways, the Nansen passports called into being the very category “refugees” as a distinct object of intergovernmental responsibility and concern.

Notably, the definitions of refugee in the early international instruments made no mention of “persecution” or other deprivations by the home state. Although problems in the home state are implicit (it is, at least in theory, the reason why a person is unable or unwilling to seek the protection of her state of origin), to link an international response directly to wrongful acts at home would have been an intervention in domestic affairs not yet sanctioned in this pre-human rights era. So international protection turned on the (un)likelihood that the home state would fulfill its external, diplomatic responsibility toward its own citizens residing outside the state.

The Nansen passports and other measures were followed by a “legal avalanche” of arrangements and agreements related to international protection.⁵⁵ By 1933, the number of ad hoc responses to refugee systems led the League of Nations to draft a general Convention Relating to the International Status of Refugees. The Convention applied only to groups of persons already recognized as refugees under earlier instruments; thus it did not provide a universal definition applicable to groups or persons who might flee in the future. And in relying on earlier definitions, it implicitly accepted the concept that a refugee is someone who lacked the protection of his or her home state in another state. Indeed, it was not, as is often argued today, the lack of protection afforded refugees before they became refugees (such as persecution in the home state) but the absence of home-state protection abroad once refugees had fled that triggered international protection. Despite this distinction from the 1951 Convention, the 1933 Convention is an important, if forgotten, precursor to the former, laying out a number of rights that ratifying states would grant to refugees on their territory. These included access to courts and schools, issuance of Nansen certificates, and protection against expulsion.⁵⁶

The 1933 Convention had limited impact, attaining only eight signatories and establishing no methods of enforcement.⁵⁷ But by 1933 the chief elements of the modern system of international protection were in place: a Convention establishing rights, including economic rights and the right of *non-refoulement*, and an Office of High Commissioner. These steps towards some kind of international regime, however, were soon overtaken by new flows of refugees from rising fascist states.

Jews fleeing Nazi Germany gained worldwide attention in the thirties and produced two international agreements among European states. Both the 1936 “arrangement” and the 1938 Convention on the status of refugees from Germany continued to use lack of home state protection abroad in the definition of persons covered.⁵⁸ But the events occurring in Europe also suggested a different approach to refugee situations. The issue to be dealt with was not just cast-out populations, but also millions of persons in their home states who were subject to increasing degrees of harmful treatment and therefore likely to flee. This shifts emphasis away from a lack of protection by a home state for their citizens in a hosting state to a concern with persecution in the home state. While the evolving regime was helpful to some degree (the ’36 and ’38 agreements offered protection to at least 144,000 Jews in Europe), it is remembered primarily for its failures, from the Evian Conference to the German liner *St. Louis* and eventually the death camps. Jews faced the double tragedy of an unfolding catastrophe at home coupled with few states bound or willing to take them in. Despite the preceding decades of international agreements and maturing institutions, the failure of the nascent protection regime was crystal clear. As Hannah Arendt memorably put it, “once [these refugees] had left their homeland, they remained homeless; once they had left their state, they became stateless; once they had been deprived of their human rights, they were rightless, the scum of the earth.”⁵⁹

Post-World War II Europe provided a new chapter in the development of international refugee protection. As soon as the fighting ended, the problem of refugees came to the fore.⁶⁰ Some 20 to 30 million people were outside their countries of origins, and thus attention turned from flight to solution. But first a determination had to be made as to who would qualify for protection and solutions. During the first-ever session of the UN General Assembly, in January 1946, a substantial divide between the Western and Soviet representatives emerged. Russia insisted that *international* protection should be afforded only to German Jews and Spanish Republicans; that all other refugees (especially those that had fled Soviet expansion) were not refugees at all but “quislings and traitors” who should be returned to their countries of origin at once. Reluctant to provoke their Eastern ally, the Allies acquiesced. The preferred solution immediately after the war ended was (forced) repatriation, supported by the Allied military command and the Intergovernmental Committee on Refugees (IGCR) which had been established by FDR in 1938 after the failure of the Evian Conference. Millions of refugees were sent east. Many ended up in Soviet labor camps.

By 1946 the Cold War had arrived. The IGCR was succeeded by a UN body, the International Refugee Organization. The IRO began with an agenda of continued repatriations. But its constitution included a prohibition against *refoulement*: “No refugees or displaced persons shall be compelled to return to their country of origin.”⁶¹ In fairly short order the repatriation programs stopped and the emphasis shifted to resettlement— instantiating what scholars later took to calling the “exilic bias” of the postwar refugee regime.⁶² During the IRO’s five-year existence, over one million refugees found new homes in dozens of countries around the globe. As the Director General of the IRO explained, “the whole nature of the refugee problem had undergone a radical change since IRO was

established. Large numbers of the displaced persons who were uprooted during the war and immediately afterwards turned out in fact to be political refugees. This determines the essential nature of the organization's plans and program, dictating a shift in emphasis from repatriation to resettlement."⁶³ The IRO assisted in the repatriation of only 73,000 people, compared with the more than a million people whom it assisted in resettling.

In order to determine who should benefit from these international activities, the IRO's Constitution supplied a definition of refugee. It was necessarily capacious, as it needed to cover displaced populations in a range of circumstances if solutions were to be available to all. Thus in a somewhat unwieldy list, the IRO included previous groups of refugees, victims of the fascist regimes, Spanish Republicans, and others who were "unable or unwilling" to avail themselves of protection from their home governments.⁶⁴ The definition excluded, *inter alia*, war criminals and those who "assisted the enemies in persecuting civil populations." "Persecution" makes its first appearance in an international refugee instrument in two provisions of the IRO Constitution. First, it is included in an arcane part of the definition of refugee, which refers to "victims of Nazi persecution" who were returned to Germany or Austria "as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein."⁶⁵ More significantly, IRO's jurisdiction is defined as extending to persons whose help from IRO is necessary "to provide for their repatriation" or if they have "expressed valid objections" to return. "Valid objections" were defined as including: "persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions."⁶⁶ (This language, of course, is adopted as the core of the definition of refugee in the 1951 Convention; in the IRO Constitution, it plays a subsidiary role—explaining why IRO could act on behalf of persons who were unwilling to repatriate.)

The concept of protection was also recognized as having a substantive content. IRO's functions included the "legal and political protection" of refugees.⁶⁷ This term is not further defined in the Constitution but would have applied to the granting of identification and travel documents as well as the protection of the rights of refugees in hosting states—although neither the source nor the content of rights was specified.⁶⁸

The term of the IRO was set to expire in 1950 (later extended to 1951), and it was recognized by Western European states that some kind of international effort would need to continue on behalf of refugees—both for the "residual cases" of a million displaced persons for whom a solution had not been found and for refugees likely to arise from the expansion of Communism in the Eastern bloc.⁶⁹ In 1949, the UN General Assembly began work both to establish an international organization to succeed the IRO and to draft a convention on refugees.

II. Protection in the 1951 Convention

UNHCR was created by a Statute of the General Assembly, opening its doors on January 1, 1950—a date that can appropriately be seen as the beginning of the modern era of refugee protection. The High Commissioner, as we described in Chapter 1, was assigned the responsibility of "providing international protection" and "seeking solutions." The latter continued the work of predecessor organizations but the former was the first mention of *international protection* in an international instrument (as noted above, it is derived from the IRO's charge to provide "political and legal protection" for refugees). The Statute offered no definition of international protection but it supplied a list of activities that the High Commissioner "shall provide" for refugees under his mandate, including: promoting the

adoption of international conventions and supervising their application; assisting governments to promote solutions; promoting the admission of refugees; keeping in contact with governments, intergovernmental organizations and NGOs; and supporting through agreements with governments “the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection.”⁷⁰

It is not easy to identify an underlying concept of protection that is reflected in each of these specific activities, but it is important to see that the actions asked of the High Commissioner are the kinds of actions appropriate for an international organization.⁷¹ The idea is not that the High Commissioner would begin to provide rights to refugees that their home states had denied them (whose denial had occasioned their flight); indeed, how could the High Commissioner do so? International organizations do not, by themselves, guarantee or supply rights. Rather, the Office of High Commissioner was established to continue the kinds of programs that had been undertaken by international organizations for the previous half century: working with states (and private organizations) to support admission, improve the condition of, and find solutions for refugees. That is, the high Commissioner was to focus on the phenomenon of displacement—a problem of continuing significance for an international community of states.

International protection entailed a series of legal and diplomatic activities aimed at securing for remaining refugees a legal identity conducive to their integration in countries of asylum or onward movement to countries of resettlement. Crucially, and as we explain in more detail below, the Statute of the Office of the High Commissioner made no provision for material assistance (a central function of UNHCR’s predecessor, the IRO). By 1951, states had come to see the “residual” refugee problem in Europe as a temporary one.

The High Commissioner Statute also made no mention of refugee rights. That was to be the province of the Convention being developed at the same time. Here was something old and new. As noted, the 1933 Convention had included a rudimentary set of rights. By 1951, the world had witnessed the atrocities of World War II and had entered the human rights era, with the adoption of the Universal Declaration of Human Rights, and so the Refugee Convention became a full-throated charter for the rights of refugees.

The Refugee Convention (adopted a year after the creation of UNHCR) figured protection in two senses. First, protection is mentioned specifically in the definition of refugee, which borrowed from formulations in the various prewar instruments. Here we see protection in the early twentieth century sense—the acts of a home state to aid its citizens in a foreign state—combined with the subsequent focus on persecution. Article I of the Convention defines a refugee as a person who,

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, *is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country*; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

This use of “protection” in the definition, as scholars have argued, is either unnecessary or confusing.⁷² On the one hand, establishing that one has a well-founded fear of persecution ought to implicitly establish that a person is “unable or unwilling” to avail him or herself of the protection of the home state. On the other hand, it may be that a

refugee could reasonably fear persecution from some organ of the state and yet still be able to find a way to be granted a passport by officials in another part of the government (such as the embassy abroad). It is noteworthy that legal instruments that have come after the 1951 Convention have generally followed its definition but not included the language on protection.⁷³

Second, the Convention as a whole offered substantive protection, committing states to guaranteeing specific rights—including mandates that states issue travel and identity documents to refugees who lacked them.⁷⁴ The Convention's rights echo the Universal Declaration of Human Rights and are important guarantees in and of themselves.

The formulation of the rights had an instrumental objective as well. Recognizing rights for refugees was a vital strategy for dealing with the “residual” caseload of displaced persons. In essence, the states that had been funding the IRO (as well as broader development programs) and resettling hundreds of thousands of refugees came to the conclusion that the remaining populations would need to be integrated into the states in which they were residing. Thus international assistance directed at refugees would end; refugees would either be given the ability to provide for themselves or it was expected that host states would provide for them by integrating refugees into their welfare systems. The Convention was a way to provide that opportunity—guaranteeing freedom of movement within the host state (i.e., out of Displaced Persons camps), rights to work and open a business, protections of labor laws, a right to an education, and welfare rights.⁷⁵ This purpose was made evident and complemented by the duties of the new High Commissioner. The Office's funding was initially set at a few hundred thousand dollars, just a tiny fraction (0.2 percent) of the more than \$160 million that its predecessor organization, the IRO, received annually. Now that the primary responsibility for protection would fall to host states, the international protection functions of the High Commissioner—working at the international level to cajole states and coordinate NGOs—were seen as needing far less funding than the wide-ranging assistance activities of the IRO.

Thus, protection at the dawning of the modern era had a range of meanings. First, it described a set of rights for refugees that states joining the Convention promised to respect and promote. These rights were part of a project of promoting refugee welfare and the rebuilding of shattered lives through reconstruction and development. Second, framed as “international protection,” it meant the work of a new multilateral organization operating at the international level (that is, among states) to move forward an agenda of responding to and solving refugee situations. Protection also connoted providing refugees with documents that gave them an identity and facilitated their cross-border travel (the original function of the Nansen passports.) At both the state and international levels, protection was distinguished from international assistance.

III. Subsequent developments and the rise of an assistance regime

As we described in Chapter 1, over the next several decades the work of UNHCR grew dramatically. Mass flows of refugees from Hungary, Algeria, Rwanda, and other newly independent African countries, and adoption of the 1967 Protocol (which removed the geographical and temporal limitations of the 1951 Convention) supported a “universalistic” definition of refugee and also undercut the idea that it was focused primarily on individual cases. By the time of the large-scale displacement in the Great Lakes and the Balkans in the nineties, UNHCR had become, in truth, a different agency.

The UNHCR Statute had suggested a very limited role for UNHCR in providing assistance, but subsequent General Assembly resolutions, backed by funding by important donor states, requested and ratified expansion of the agency's mandate—both in terms of displaced persons assisted and the kind of assistance programs provided.⁷⁶ As the refugee regime expanded beyond Europe, a “care and maintenance” approach began to dominate; camps became routine; solutions seldom arose; and refugees were delinked from the economies and welfare systems of host countries. They became, in essence, wards of the international community.

James Hathaway has well described the “dualist approach” that took shape, one that could be traced to the foundational instruments:

The initial goal of the drafters of the Convention was to create a rights regime that would be conducive to the sharing out of the European refugee burden among a broad constituency of states. The needs of non-European refugees, on the other hand, were to be met by a combination of on-site assistance and the promotion of voluntary return to the state of origin. The result was a two-tiered protection scheme which is consistent with the facilitation of exile abroad for European refugees and which seeks to localize and contain refugees in the less developed world.

The result was that, “[w]hile extensions of the UNHCR's mandate . . . enabled the organization to assist large groups of persons in need, primarily in Africa, Asia, and Latin America, the assistance is qualitatively distinct from that given to ‘refugees’ under the Convention.”⁷⁷ And as the number of refugees in the global South began to far exceed the number in the North, the duality of response meant an increasing percentage of UNHCR's budget would go to programs for assistance rather than protection.

A similar dualism arose in developing solutions to refugee situations. In Europe, the exilic bias emerged early on, according to which it was all but unthinkable that refugees, who were mainly fleeing Soviet states, would be sent back. By contrast, as a U.S. representative to UNHCR put it in 1960: “Nevertheless, in other areas, such as Africa, the Middle and Far East, there are several million refugees for whom the solution which had proved effective in Europe, namely immigration, was not always suitable.”⁷⁸ Similarly, a consensus emerged that, “for the overwhelming majority of African refugees, their problems must be resolved on African soil. Resettlement in other countries is neither necessary, feasible, or desirable.”⁷⁹

The central players within the international system did not expressly base their acquiescence to a two-tiered refugee regime on geography or nationality. Instead, they constructed what B.S. Chimni has called the “myth of difference”: namely, that displacement outside of Europe was qualitatively different and therefore required a different sort of response.⁸⁰ As but one example, in 1985, High Commissioner Hartling repeated what had by then hardened into conventional wisdom: “internal upheavals and armed conflict”—not persecution—were the primary cause of refugee outflows in the developing world. “I would like to make it clear that I do not consider that persons falling into this ‘broader’ category are entitled to the same legal status as refugees according to the traditional definition.”⁸¹ Of course, when refugees had fled Hungary en masse in 1956, UNHCR had recognized them as Convention refugees despite their having fled armed conflict. Similarly when Czech citizens fled west in 1968.

While assistance has come to overtake protection in UNHCR's work, the nature of protection activities has not remained static. Responding to developments in human rights discourse and practice, UNHCR has grown considerably beyond activities identified in the

Statute and described above: ratifications of the Convention, access to asylum, and the like.⁸² Over time, new elements of protection have been added, so that UNHCR's Division of International Protection now includes within its remit programs dealing with sexual and gender-based violence, education, at-risk youth, statelessness, "community protection" strategies, the role of development actors and financing in solutions, and anti-xenophobia and anti-discrimination efforts.

So too the norm of *non-refoulement* has matured in importance over time. It first appears in the 1933 Convention, supplying protection to recognized refugees. In the immediate postwar period, when the focus was on solutions for mass displacement, *non-refoulement* provided a reason to prevent repatriation—that is, those with a "valid objection" to returning to their country of origin would not be required to do so. In the 1951 Convention, *non-refoulement* appears as a defense against deportation: earlier articles of the Convention suggested that a refugee could be removed for reasons of public order. But Article 33 of the Convention protected a refugee subject to deportation to return to a country in which he or she would be persecuted.⁸³

Today, the *non-refoulement* provision is seen as the fundamental protection of the 1951 Convention. It has gained in importance both because of the downplaying and lack of enforcement of other rights in the Convention, noted above, and because of the non-recognition of a right to enter (as we will explore in Chapter 3, a sort of right of asylum can be generated from a right to non-return). It is now implicitly linked to the definition of refugee and the concept of persecution: a refugee is defined as someone who cannot be returned to his or her country for fear of persecution, and states commit (via the *non-refoulement* principle) to not so doing.

* * *

International protection, then, can be conceived of as the collective actions of the international community, member states, and international organizations to guarantee rights and opportunities to persons forced from their homes and to ensure that they are not returned to danger. It is a response to *displacement*, focused on the particular harms and needs imposed by being forced from one's home.⁸⁴ The rights established, the programs put in place, and the solutions proposed and provided are tailored to displaced populations. At the same time, protection looks different in different parts of the world and at different times (often for reasons that have little to do with the needs or situations of displaced persons).

In the form that emerged in postwar Europe, international protection has a strong rights component, starting from the 1933 Convention, that now includes 1951 Convention rights and other applicable international human rights (arising from international humanitarian law, the conventions against torture, protecting women and minorities against discrimination, guaranteeing rights of children, and establishing labor protections for workers).⁸⁵ It is also constituted by the enhanced mandates of UNHCR and other international organizations, which work to gain adherence to international legal norms and support efforts by states and other actors to advance the interests of refugees. Those efforts are focused on vulnerable groups and also increasingly on helping refugees attain self-reliance (consistent with the founding goal of the Convention). While there is an argument that the High Commissioner's responsibility to seek solutions is distinct from his responsibility to provide protection, these two duties are in fact both parts of the broader aim of helping refugees rebuild their lives.

The current understanding of international protection is not compelled by international agreements or by logical induction or deduction. One could provide meaningful renderings of international protection that include action on removing the conditions that contribute to flight or that establish rights for hosting populations or that guarantee refugees free movement around the world. And nothing necessarily rules these interpretations in or out for the future. The history we have briefly reviewed should make clear that international protection has had and will continue to have a trajectory, an arc; traces of the past contribute to the present even as new global events suggest further development of the concept in the future.

IV. The inadequacy of the “modern standard account” of international protection

Our description of international protection deviates to a surprising degree from what might be termed the modern standard account. Developed in the nineties, that account sees international protection as “surrogate” protection. It works by taking the “unable or unwilling to avail himself of the protection of his country of origin” language and turning it inward. As we have noted, the concept has always referred to the inability of a refugee to claim the protection of her home state when residing in another state.⁸⁶ We have further noted that, with the focus now on persecution in the home state and the inhumanity of returning a person to persecution, the “protection” element of the refugee definition is an historical relic, playing no significant role in modern interpretations. The modern standard account, however, tries to provide relevance to the presence of “protection” in the definition by applying it to actions of the home state in the home state. That is, a refugee is conceptualized as someone who has been denied protection at home and thus must be provided protection outside her home state.⁸⁷ In schematic form, the modern standard account runs something like this:

- (1) Citizens of a state are entitled to the protection of their fundamental rights by their home state;
- (2) a refugee is someone (a) whose home state has failed in its duty of protection by either directly depriving a person of her fundamental rights or failing to prevent others from depriving a person of those rights, and (b) has been compelled to leave her country of origin because of the deprivation of rights and failure of state protection;
- (3) “international protection” constitutes “surrogate” (or substitute) protection, providing persons who have crossed into another state the protection of the basic rights denied by their home state.⁸⁸

The modern standard account was adopted to solve a particular problem in cases involving persecution committed by non-state actors. Thus, it was reasoned that a person who faced persecution from a non-state group could still be a refugee if the home state failed to prevent the harm because it was either unable or unwilling to do so (think here of a fundamentalist group that imposes extreme harms on women that a state is unable to control). International protection, then, became a surrogate for the protection that the home state could not deliver *at home*. The analysis was taken even further. Not only would the concept of surrogate protection help protect persons subject to persecution by non-state

actors, it also was asserted to be the foundation of the international refugee regime itself. That is, refugee protection as a whole is constituted by an obligation of the international community to remedy the failure of one of its members to live up to its duty to respect the rights of its citizens.⁸⁹ Both the state duty neglected and the international duty assumed are described as “protection.”⁹⁰

An easy symmetry informs the modern standard account: rights denied at home are compensated by rights provided by other states and the international community. But we believe that it has provided unnecessary complications for legal cases and also mischaracterized the basis and scope of the system of international refugee protection.

As noted, the concept of surrogate protection was deemed useful in cases involving non-state actors. In an oft-repeated formulation of a judge on the United Kingdom’s highest court, “Persecution = Serious Harm + Failure of State Protection.”⁹¹ But adding “failure of state protection” is unnecessary in non-state actor cases. As the cases from the United States show, adjudicators are able to find persons persecuted by non-state actors if the state is unable or unwilling to prevent the harmful conduct. That is, the failure of state action is relevant to the risk of persecution, not the concept of persecution. Furthermore, as Fortin has noted, this definition of persecution is nonsensical if applied to persecution perpetrated by the government.⁹² And as Susan Kneebone has pointed out, the formulation of “serious harm + failure of state protection” has tended to harden into an additional element of proof for applicants in asylum cases.⁹³

But more important than these technical legal issues is the attempt to frame the concept of international protection in “surrogate protection” terms. To do so is to fail to see international protection as its own project, one that calls out a collective responsibility of states to respond to situations of displacement. The central functions of international protection—*non-refoulement*, registration and documentation, economic rights and social programs for displaced persons, solutions—do not necessarily correspond to rights that home states are charged with guaranteeing to their citizens. Indeed, if international protection is a “surrogate” for anything, it is the inability or unwillingness of the *host* state to protect and assist refugees in their territories. Nor are the rights provided by the Convention a substitute for home state rights. Refugee rights in hosting states are measured by what that state provides to its citizens and residents, not by what was denied by the home state. And the goal of applying those rights to refugees is to permit them to rebuild their lives outside their state of origin. Again, the project is about ameliorating the harms of displacement where refugees are, not about substituting for rights denied back home.

To some degree, disputes over the meaning of international protection can be seen as a bit beside the point. Whatever the conception and purpose of protection alluded to in UN documents or scholarly treatises, UNHCR—with its partners in the international community—has continued (indeed, expanded) the work it puts under the heading of international protection. Those work streams have been annually affirmed, explicitly or implicitly, by the General Assembly, by states that fund UNHCR to carry out such activities, and by states that permit such activities to be undertaken on their territory.

But we have pursued this discussion for two reasons. First, the “surrogate protection” formulation is now commonly invoked almost without thought. It is just “common wisdom.”⁹⁴ As we have made clear, we think it is an incorrect and unhelpful account of the system of international protection. Second, the concept of surrogate protection acts to reaffirm a home-state-centric vision of the refugee regime. The entire international system of norms, agencies, programs and practices, funding appeals, solutions strategies is reduced to substituting international action for home-state action. This seriously

mischaracterizes the international protection regime. That regime is not a general program for the external enforcement of domestic rights. It is a system established to remedy the harms of displacement—in which rights guaranteed at the international level play a vital role—and to ensure that persons are not returned to situations of great harm.

V. To whom does international protection apply?

The discussion so far has primarily concerned the development of the system of international protection for refugees. We have noted a conceptual move from (external) protection to persecution and the growth of the mandate of UNHCR and other international institutions. Lawyers and advocates for refugees have focused primarily on the 1951 Convention's definition of refugee—generally how it may be expanded so that additional persons and groups can benefit from the Convention's catalogue of rights. In notable advances, adjudicators have been persuaded to recognize claims brought by victims of domestic violence and female genital cutting and by persons persecuted based on their sexual orientation. On a more general level, UNHCR's Division of International Protection has recently issued guidelines suggesting that most—if not all—persons fleeing civil disorder and violence probably have valid claims to international protection under the Convention or other norms of international human rights law.⁹⁵

In other scholarly literatures, the focus has been not on how the Convention definition should be interpreted. Rather, it addresses the question of international obligation by identifying a core concept (denial of “basic rights,”⁹⁶ or persons who “escape from violence,”⁹⁷ for example) that explains the basis for the obligation and then seeing what other classes of displaced persons the concept would extend to. Classes typically suggested include persons forced to flee because of natural disaster, civil disorder and violence, climate change or extreme poverty. The claim is based on equality concerns: these “new” groups are constituted by persons who look as necessitous or deprived as those currently captured in the refugee definition (at least as measured by the identified core concept), yet they are disprivileged in international law having neither a Convention nor a dedicated UN agency to protect their rights.

We adopt a different approach, more inductive than deductive. We start by looking at the groups of displaced persons currently understood as meriting international concern and response and then ask whether there is an underlying concept that explains the current practice. Because we believe that the appropriate international response varies as among groups, we will not be overly concerned if the category we develop appears quite broad. (That is, we will not suggest that every person or group so identified is automatically entitled to all the rights in the 1951 Convention; but nor will we countenance an approach that discriminates between groups of displaced persons on the basis of geography.)

Whatever the content given the Convention's definition of refugee, it is plain that international practice, supported by domestic and international norms, extends protection well beyond it. As has been frequently noted, the international community now regularly assists a wide circle of displaced persons, including internally displaced persons (IDPs), persons fleeing natural disasters, and persons fleeing civil disorder and violence.

- Although no international convention expressly protects IDPs, a set of Guiding Principles on Internal Displacement developed under the auspices of the UN are

now generally recognized to have attained “soft law” status. Furthermore, the multilateral system is organized to respond to IDP situations, with complicated structures in place to coordinate the work of dozens of international organizations and hundreds of NGOs. IDP emergencies due to conflict in Syria, Yemen, South Sudan, the eastern DRC, Ukraine, Iraq, Pakistan and Afghanistan have triggered massive international responses supported by funding appeals in the tens (sometimes hundreds) of millions of dollars. Regional measures and institutions likewise support responses to IDP situations. In 2012, the African Union’s Kampala Convention came into force, providing a uniform definition for IDPs, emphasizing the responsibility of states to protect the internally displaced, and outlining key rights for the internally displaced which states must respect.

- Persons displaced because of natural disasters—earthquakes in Haiti and Nepal, floods in Pakistan, typhoons and tsunamis striking the Philippines and Indonesia, drought affecting the horn of Africa and the Sahel—are met with massive infusions of foreign assistance. Regional and global institutions now seek to predict such disasters, support programs to mitigate their harm and prevent displacement, and promote measures to build resilience in likely-to-be affected communities and regions. Concern about displacement is working its way into global efforts on climate change, with particular attention being paid to island nations that may soon cease to exist because of rising sea levels.⁹⁸
- As described above, the mandate of UNHCR now effectively reaches all persons who flee violence and conflict whether inside or outside their countries of origin.⁹⁹ This expansion of mission has been ratified by resolutions of the General Assembly and the financial contributions of donor states. Regional conventions and arrangements, as many commentators have noted, have propelled and support this expansion.¹⁰⁰

These international interventions to assist and protect displaced persons move beyond the Convention’s definition in two respects. First, there is no need for a person to show that he or she fears persecution upon return; the fact of displacement (and its attendant harms) and the unlikelihood of immediate return triggers the international response. Second, the instruments and processes supporting relief in situations of conflict and violence require no “on account of” ground—that is, the motive of the state (or non-state group) responsible for the threatened harm is not relevant. Thus, the Guiding Principles on IDPs state simply:

“[I]nternally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”¹⁰¹

The OAU Convention defines its protected classes in the same terms, with no “on account ground,” no requirement to name the persecutor. (For natural disasters, like

floods and earthquakes, looking for motives would involve claimants and adjudicators in, one might say, metaphysical questions.)

Viewed as a whole, a very different picture of the international response to forced displacement emerges. Of the world's more than 60 million persons displaced by conflict and violence, nearly two-thirds are IDPs. A significant majority of the 16 million refugees under UNHCR's mandate are persons who fled situations of generalized violence in their home countries (and who have not been processed through a status determination hearing).¹⁰² And while it is difficult to estimate the number of persons displaced by natural disasters, it probably amounts to more than 25 million people a year.¹⁰³ The international community generally recognizes persons in these groups as meriting some form of assistance and protection—irrespective of whether they, or groups they belong to, have been victims of targeted persecution.

In examining the categories of displaced persons to which international assistance and protection is provided (and believed to be warranted), we can identify a concept that implicitly informs the practice. We will label it “necessary flight”: the idea is that some form of international response is merited for persons whose lives become so intolerable at home that flight is a reasonable and justifiable response. We have chosen our words carefully here. We are not proposing a standard of “coercion”—one that would suggest that a “fleeer of necessity” had no choice but to leave. Rather, we are saying that we can understand the decisions of millions of persons to flee because of threats to their physical safety, the loss of shelter and livelihood, their ability to care for themselves and their families. In situations of conflict and violence, these are persons that the international system of states has failed; for victims of natural disasters, these are people the international system of states has the means to assist.

Adopting the concept of necessary flight has several implications. First, on this analysis, there is no need to identify or examine the motives of a “persecutor,” as is required under the 1951 Convention definition. Second, with a focus on flight, the first element of an international response will be emergency care. But if the causes resulting in the flight continue, then it would be wrong to send the person home (which would simply produce flight again); that is, the concept of necessary flight must be linked to a norm of non-return to danger. In addition, it must be seen to require a shift in focus away from the causes of flight toward the impediments to well-being and agency in exile. This, too, is a departure from the modern standard account, which tends to frame the distinctiveness of “refugeehood” in terms of the human rights abuses that force people to flee rather than the violations and deprivations—the second exile—they endure once they are abroad. Third, the idea of necessary flight recognizes that many factors typically contribute to a decision to flee. Thus, the Convention's demand that a person demonstrate a fear of persecution based on a particular ground establishes an artificial and unreasonable standard. Call this the “congeries difficulty”—a problem that refugee law tends to sweep under the rug.

There is surprisingly little research and data on exactly why and when people decide to abandon their homes for a safer, better life elsewhere. Our mental images of flight are highly schematic: soldiers with guns at the door, dissidents thrown in jail and tortured, bombs falling on civilian populations, rising flood water, crops and herds dead from drought. All of these horrendous events are likely to contribute to decisions to flee, but so too might one's personal “risk appetite,” family left at home or already elsewhere, access to information related to the costs and risks of crossing to safety, other hardships at home, the expected life one would lead in the country of rescue. Those who flee might not be able to assess which of these—and a myriad of other factors—were most significant in a decision to

flee.¹⁰⁴ It is highly unlikely that an adjudicator could do better. The idea is that at some point an individual decides that life has become intolerable at home or in her home state. If she can offer a persuasive and reasonable justification for that conclusion, or if the situation itself readily attests to her decision, she appropriately triggers concern and response from the state to which she has fled or the international community (or both). That is, she has placed herself in the category of displaced persons for whom the need for international concern and response is plain. This is not to suggest that all displaced persons are refugees. Rather it is to suggest that identification of the groups and persons who merit international protection does not begin and end with the Convention definition.¹⁰⁵ Nor should it.

The concept of necessary flight recognizes that we have reached a point of inflection in the conceptualization of an international system of protection. The world has, in essence, taken the displaced as a whole—largely irrespective of the reasons for their displacement. This is a datum of surpassing importance. It signifies the (perfectly sensible) moral and humanitarian judgment that persons forced from their homes by threat of violence or natural disaster should be assisted when they flee and should not be asked to return home until it is safe to do so. This, of course, flips the usual analysis. Refugees are no longer the paradigmatic case; and strategies for protecting other categories of displaced persons no longer seek to simply assimilate their situations to those of refugees. Rather, “fleers of necessity”—whatever the cause or combination of causes for their flight—define the scope of the system of international protection.

Persons displaced by climate change represent a current example. After an initial rush to declare such persons “climate refugees,” thinking has advanced in other directions.¹⁰⁶ It is noted that migration caused by climate change is overwhelmingly internal to the affected state; thus the Guiding Principles of Internal Displacement are deemed more relevant than the Refugee Convention. So too the refugee regime’s demand for targeted persecution based on one of five grounds poorly fits climate change situations (which is a prime example of the “congeries difficulty”). Nor does the usual approach to solutions work: for climate migration, the most effective “solutions” may be mitigation and adaptation—strategies usually deemed inappropriate for refugees and victims of violence.¹⁰⁷

The point here is not that persons displaced because of factors related to climate change should not be the beneficiaries of international protection. Indeed, because of global contributions to the cause of their flight, global responsibilities ought to follow. The point is that there is already a general consensus that norms of international protection apply in this situation. The challenge is in determining the nature of protection to be applied, not whether it will be applied at all.

A number of objections can be raised to our analysis. At the outset, it will surely be argued that our concept of necessary fleers is far too broad a category for the world to swallow. It would involve international protection for potentially tens of millions more displaced persons. At some point, surely, it can be asserted, notions of national interest and sovereignty will trump concern for the displaced. It is difficult enough to find states willing to give refugees the full set of rights already guaranteed to them; how likely is it, then, that international responsibility will be seen to stretch this far?

Several factors, however, undercut this critique. First, our central claim is that most displaced persons who cannot return home are already “persons of concern” to the international community, and scores of agencies and billions of dollars are mobilized to offer assistance and protection. We are simply arguing that the frame of reference be shifted—that refugees be seen as the special case among the general category of (protected) forced migrants.

Second, the concern that asylum adjudications systems will be overwhelmed by a broader conception of protected persons is not persuasive. The vast majority of necessary fleers arrive as part of mass movements of people, escaping civil war, natural disasters and other dramatic circumstances. As we have noted, protection and assistance under the Refugee Convention or regional instruments is afforded without convening individual status determinations procedures. Hosting states and the international community are well apprised of the events that have caused flight. It may be that some persons will later seek onward movement beyond the country of first asylum. (Indeed, we will suggest in later chapters that such mobility ought to become a regular feature of a well-functioning system of international protection.) But those numbers can be readily handled within existing domestic protection systems of (primarily) developed states that include a range of protections for persons whom it would be unconscionable to return home. These include subsidiary protection in the EU (for persons fleeing “indiscriminate violence in situations of international or internal armed conflict”); Article 3 of the European Convention on Human Rights (which protects against return to “inhuman or degrading treatment”); Temporary Protected Status in the United States (for persons forced to leave due to armed conflict, environmental disasters, and other extraordinary conditions); and the Convention against Torture (preventing return where there are “substantial grounds” for believing the individual might be subjected to torture).

Third, to recognize that the international community has responsibilities toward displaced persons—that international action is a matter not of charity or largesse but of duty—is not to specify the scope of those responsibilities. It may well be that refugees—targeted for persecution and unable to return home safely—need special attention, including, perhaps, offers of membership elsewhere. Persons displaced by an earthquake, on the other hand, may be fully recognized and welcomed as citizens of their home state; their protection needs may be far less and return may be easier to envision.

Another objection levelled against approaches that move beyond the Convention—and one that frequently arises in the “who is a refugee” literature—concerns the case of persons who leave their homes due to extreme poverty. The argument usually takes the forms of a *reductio ad absurdum*: the theory being proposed, if pursued with integrity, will need to reach persons fleeing due to economic necessity. First, note that this category is already the impetus for international action: the *raison d’être* of the development community—whose funds exceed that of the humanitarian sector by a factor of ten—is global poverty alleviation. Furthermore, as just stated, international responses to situations of forced migration do not involve individual status determinations for most fleers. It is conceivable that a mass movement of extremely poor persons might occur—the drought in Somali in 2011 brought hundreds of thousands of desperate persons to Ethiopia and Kenya. In such circumstances, the world will surely respond (as it did when starvation threatened millions of persons in Biafra in the late sixties, Ethiopia two decades later, and in the Sahel and Somalia in this century). For individuals who travel beyond countries of first asylum, it may be unlikely that states will open up their domestic definition of refugees to include all “necessary fleers”—including persons fleeing extreme poverty. But it is highly likely that other forms of relief from return would be available to persons fleeing famine or violence caused by economic collapse.¹⁰⁸

Finally, it might be asked why our analysis focuses solely on persons who have been forcibly displaced. Are not never-leavers often in worse situations than those able to flee? (Compare the situation of Syrians who remained in Aleppo with those who fled across an international border.) If we are carrying humanitarian and moral principles forward so far

beyond the category of refugee, why impose an arbitrary condition (the necessity of leaving one's home) for international protection principles to apply?

Our answer here is sourced in path-dependent pragmatism, not deductive logic. A concern for the safety and well-being of human beings would of course embrace persons no matter where they are located. Indeed, the international system has put in place regimes and institutions—the multilateral development system, UN peacekeeping, the Geneva Conventions, and the human rights regime—in an effort to prevent and remedy harms everywhere. In addition, the world has developed a separate track for displacement. For various historical reasons, nearly a century of international attention has established norms, processes, and agencies that have produced displacement as a field of practice. While strategies and programming developed for displaced populations could be applied to persons who have not fled, they would need to take a far different form (beyond simple humanitarian relief).

This could of course change. It may be that in the future, the international community will decide that one international agency and strategy should apply to all persons living lives of danger and misery. But in today's world, given the current array of international institutions and scope of international practice, it seems sensible to us to maintain “displacement” as a category of analysis and action.¹⁰⁹

Conclusion: The past, present and future of international protection

The meanings of protection and international protection have shifted over time. Initially part of the definition of refugee, protection was largely superseded by persecution as the core conception (protection remained in the 1951 Convention's definition of refugee, but only as a vestige). Protection's substantive role began with travel and identity documents and developed fairly quickly to include rights (starting with the 1933 Convention). Set largely aside by the need to focus on rescue prewar and repatriation postwar, protection-as-rights returned in spades in the 1951 Convention. That Convention viewed rights instrumentally—as providing guarantees to refugees that would enable them to rebuild their lives in the states in which they were residing (and in countries of resettlement). The Convention also led to the elevation of *non-refoulement* as a cornerstone of refugee protection.

Alongside the Convention, the international community established an organization to provide international protection to refugees. Much of the work of UNHCR, as initially conceived, continued the work of predecessor organizations—granting travel documents, seeking solutions, encouraging states to join international agreements and respect refugee rights. But UNHCR's protection mandate has grown in important ways over its 60-year existence, expanding its programming to provide a wide array of interventions and services to “vulnerable” refugees, particularly women and children, and taking cognizance of general human rights instruments as they have developed since the post-World War II period.

At the same time as protection for refugees has broadened and deepened, the groups of displaced persons for whom protection is provided has also expanded. UNHCR's mandate is now understood to reach all persons who flee violence and conflict over an international border; and UNHCR is also part of a coordinated effort of international organizations and NGOs that provide assistance and protection to IDPs. So too the international community has repeatedly responded in robust ways to natural disasters and other emergencies in every part of the globe.

While fairly narrow legal norms restrict refugee status—and the rights that accompany it—to a small minority of the world’s displaced, some kind of protection (most importantly, *non-refoulement*) is extended to virtually all “necessary fleers.” Put simply, persons forced from their homes are generally offered protection and not asked to return until it is safe for them to do so. After World War II a focus on persecution replaced the lack of home state protection as the core concern of the international regime for forced migrants; today rescue and non-return has supplanted persecution as the system’s motivating principle.

International protection, historically and practically, has never meant “surrogate protection.” It has never simply been “compensation” for rights violated at home. Rather, it is a network of norms, institutions and practices that deal with displacement qua displacement. It is best understood as the collective responsibility and actions of the international community and international organizations to guarantee rights and opportunities to persons forced from their homes and to ensure that they are not returned to danger.

The development of the concept of international protection has not been a straight line. The crises of the historical moment have greatly influenced the path: the expulsion of nationalities as empires collapsed, fascist persecution, the Cold War. But one can trace a trajectory that has, overall, expanded the scope of protection, even if its central elements—rights, the goal of self-reliance, *non-refoulement* and the pursuit of solutions—have been transgressed or emphasized differently at different times and in different places. In our own historical moment, the mass secondary flow of refugees from countries of first asylum and the number and duration of protracted displacement situations will now challenge and shape the system of international protection.

As we project the arc of protection forward, two new elements of international protection come into view. The first is the role of development agencies and other actors from outside the humanitarian sphere in responding to and resolving displacement. The second is the call for creation of a formal system for responsibility-sharing, recognized as vital to the regime by the drafters of the 1951 Convention but not established as a set of binding commitments. Both will feature centrally in the narrative ahead.

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.¹¹⁰

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.¹¹¹ 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.¹¹²

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.¹¹³ 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.¹¹⁴ 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).¹¹⁵ A Declaration on Territorial Asylum adopted by the General Assembly in 1967¹¹⁶ included a similar principle of “non-rejection at the border” for persons granted asylum.¹¹⁷ 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.¹¹⁸

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.¹¹⁹

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.”¹²⁰

The principle of safety is, in fact, applied to the benefit of most of the world’s necessary fleers. 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.¹²¹ 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.¹²²

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.”¹²³ 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.”¹²⁴ 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).¹²⁵ 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 [JG3] 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.¹²⁶ 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.¹²⁷

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.¹²⁸ The rights in the Refugee Convention are more circumscribed. They apply only to refugees; and they are usually written in a comparative fashion¹²⁹—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)).¹³⁰

That is to say, the Refugee Convention does not purport to be a comprehensive “bill of rights” for refugees.¹³¹ 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.¹³²

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.”¹³³ Refugees were not the only ones to benefit. Across Europe, refugee labor played an important role in reconstruction and development.¹³⁴ 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.¹³⁵ 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.¹³⁶ Similarly, in the UK and elsewhere, “refugees [were] treated in matters of social welfare in the same manner as British subjects.”¹³⁷

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.¹³⁸

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."¹³⁹ In particular, the official noted, "there could be no 'relief-camps' for them [refugees in Germany] in the sense we had them in India."¹⁴⁰ 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."¹⁴¹

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.¹⁴² 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."¹⁴³ 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."¹⁴⁴ 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."¹⁴⁵

A similar line of thinking has recently (re)emerged within the international protection regime. Recent policy processes¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸

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).¹⁴⁹ 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.¹⁵⁰

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 fliers of necessity, including emphasis on welfare, agency, and mobility (which we develop in Chapter 4)—not just on legal status.¹⁵¹

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 eventually result in Turkey’s admission to the EU).¹⁵² 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),¹⁵³ 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,¹⁵⁴ 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.¹⁵⁵

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.¹⁵⁶ 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.¹⁵⁷ 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.

* * *

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)¹⁵⁸ 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.

Chapter Four

The Responsibility to Solve

If the international system of protection is failing, whose job is it to fix it? In this chapter, we will press several arguments as to why states and international organizations have a responsibility to mend the system they have created and through which they control the movement, reception, and lives of the forcibly displaced. Our argument is to some degree a legal one, focusing on instruments and doctrines that have some force in international law. Perhaps more importantly, we make claims based on functionalism (what the protection regime requires, in a deep sense, if it is to stop failing) and on principle (one that attempts to provide a “moral fulcrum” for change).

I. Protracted displacement situations (PDS)

The Dadaab refugee camp in northeastern Kenya is one of the largest in the world, hosting more than 200,000 refugees.¹⁵⁹ It is the third largest city in Kenya. The vast majority of refugees in Dadaab are Somalis who have fled years of conflict and drought. Dadaab is in its third decade, and it counts among its residents, according to UNHCR, thousands of children born to refugees who themselves were born in Dadaab—three generations of refugees and two that may never have experienced life outside of the camp into which they were born.

Dadaab—and the dozens of other long-term displacement situations around the world—does not fit the typical ways in which the lives of refugees are depicted. We imagine people streaming over borders, bound for emergency shelters built and supplied by the international community. If the turmoil that drove them from their homes ends relatively quickly, they return home to take up their lives where they left off. If conditions at home do not make safe return possible, they find a permanent home in their host country or are resettled to a new home in a new land.

Occasionally things work out this way. In 2010, nearly 90,000 ethnic Uzbeks living in Kyrgyzstan fled violence targeting their community; they returned a few weeks later. In 2011, over 150,000 Ivorians fled post-election violence in their home country, the majority to Liberia. Aided by UNHCR and a number of other humanitarian organizations in villages close to the Côte d’Ivoire border and elsewhere, many returned with the successful installation of Alassane Ouattara as president. So too tens of thousands of Libyans received temporary protection in neighboring Tunisia and returned home after the downfall of the Qaddafi regime.

More typical, however, are “protracted refugee situations” (PRS) (to use UNHCR’s terminology)—ones in which refugees “continue to be trapped . . . for five years or more after their initial displacement, without immediate prospects for implementation of durable solutions.”¹⁶⁰ UNHCR has identified more than three-dozen PRS, involving nearly 12 million persons—two-thirds of the world’s refugees.¹⁶¹

- *Syrians in Turkey, Lebanon, Jordan and Iraq*: Over the past six years, more than five million Syrians have fled the violence in which more than 250,000 people have perished. Efforts to end the conflict have repeatedly failed. Even if the fighting stops, many will be unable or unwilling to return, either because they fled the side

that prevails in the conflict or because they have no home, or even a hometown, to which to return.

- *Somalis in East Africa:* Nearly half a million Somalis are in Kenya and another half million Somalis reside in Ethiopia, Djibouti, and Yemen. The “Somali situation” began in the early nineties.
- *Eritreans in eastern Sudan:* We associate with Sudan those who have fled violence in Darfur (in the west of the country), and more recently those fleeing violence near the new international border that separates Sudan from South Sudan. But Sudan also hosts more than 100,000 Eritreans in its northeast region.¹⁶² They live in camps where UNHCR and Sudanese organizations have been providing assistance for more than 40 years. The majority of the refugees have in fact now been born in Sudan, yet they remain without Sudanese citizenship.
- *Afghans in Iran and Pakistan:* Millions of Afghans have fled their homes over the past several decades. While about six million have returned home, nearly three million registered refugees remain in neighboring Iran and Pakistan—many having fled the Soviet invasion and occupation of Afghanistan in the late seventies and eighties. Most of the Afghan refugees live in urban or semi-urban settings, and many have found work (even if not legally authorized). The official policy of both Iran and Pakistan is that refugees should return home, but repatriation appears premature, at best, for hundreds of thousands of refugees given both their long stays outside the country and the continuing conflict.
- *Bhutanese in Nepal:* In the early nineties, more than 100,000 Bhutanese found refuge in UNHCR camps in southeastern Nepal. Although UNHCR has worked with the international community to help resettle over 100,000 Bhutanese refugees, nearly 10,000 remain in camps in Nepal.
- *Burmese in Thailand:* Burmese refugees have lived confined in nine camps over the border with Thailand since the eighties. Despite the resettlement of tens of thousands of Burmese since 2005, 49,000 registered refugees and 50,000 unregistered asylum seekers remain in the camps.¹⁶³
- *Other developing protracted refugee situations:* In eastern Chad, over 250,000 Darfurians live in twelve remote camps where they sought refuge after the conflict in Darfur escalated a decade ago. There are more than 50,000 Colombian refugees in Ecuador, the majority in urban areas and the remainder in isolated regions near the border. In Tanzania, more than 60,000 Congolese are confined to the Nyarugusu camp, which opened more nearly two decades ago.

A similar list can be drawn for protracted situations of internal displacement: more than six million IDPs in Colombia and Syria; in Iraq, more than three million; two million in the DRC and Sudan.¹⁶⁴

Each protracted situation has its own particular causes and characteristics. But overarching causes are similar to all. For refugees, it is unresolved political instability at

home, a host country set against local integration, and an international community unwilling to accept onward movement of refugees or to provide the resources and the incentives necessary to make life tolerable in host states. For IDPs, continuing conflict makes return home impossible. And so the displaced wait—not necessarily for food or shelter, but for things less tangible but every bit as important: legal and social membership in a community, the opportunity to reconnect with family, the ability to take up normal lives. Whatever the causes, the results of protracted displacement are uniformly calamitous: children growing up in camps; inadequate health care and poor sanitary conditions; lost educational opportunities; prolonged detention; risks to physical safety (including widespread sexual and gender-based violence and female genital cutting); the recruitment of child soldiers; security concerns for states of asylum; and widespread, debilitating poverty.

The UN General Assembly, and UNHCR and its Executive Committee, have urged and supported policies to bring protracted refugee situations to a close.¹⁶⁵ And a number of plans and initiatives—some of which we described above and some we describe below—have been announced over the past two decades. But these have largely foundered on the unwillingness of states to take the necessary actions, such as increased funding, the appropriate intervention of development actors, additional resettlement, or the resolution of conflicts in the states of origin.

The inability of the international community and its constituent states to end protracted situations is more than a failure of political will. It is a derogation of legal duty and moral obligation. It is an affront to the first purpose of the postwar protection regime, which came into being precisely (and, for a time, solely) to address the plight of the “residual caseload.”

II. A right to a solution?

The failure of states to resolve protracted refugee situations constitutes a violation of the economic and social rights of refugees. Precisely because those rights are so often unprotected in situ, we argue, a case can be made that there is also an overarching right to a solution for refugees.¹⁶⁶

Putting to one side the question of where and how such a right might be enforced, it would seem that a “right to a solution” fits well with the human rights basis of the postwar protection regime. Although, as we have argued, the Refugee Convention was written by states pursuing state interests, the Convention plainly institutes a regime of rights. In addition to the Convention, other human rights norms—e.g., prohibiting sex discrimination and torture, and protecting rights of children—play an important role in the overall refugee protection system. Might one of those rights be a right to a permanent solution—a right, if you will, not to be forever a refugee?

The closest the Convention gets to a right to a solution is in Article 34 (“Naturalization”):

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.

The Article imposes no binding duty of assimilation or naturalization and relates to only one of the “durable solutions.” As Erika Feller, UNHCR’s former assistant high commissioner

for protection, has written: “The Convention foreshadows various types of solutions, as refugee status is by definition temporary, but again envisages no special arrangements to ensure they are realizable in a timely and durable manner.”¹⁶⁷

If a right to a solution cannot be identified in the Refugee Convention, might it be found elsewhere in human rights law? One could begin with the Arendtian claim that membership in a national community is a prerequisite to the effective assertion and protection of human rights. In a well-known paragraph Arendt writes: “The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion—formulas which were designed to solve problems within given communities—but that they no longer belong to any community whatsoever.”¹⁶⁸ As brought to the refugee regime, the argument could proceed: (1) Membership is vital to the effective protection of human rights; (2) refugees lack (effective) membership (by definition); (3) therefore, a commitment to human rights necessitates that refugees be provided membership or something close to it (a right to a solution).

But this formulation of the right not to be a refugee can only be secured if there is a corresponding duty on some country, some political association, to take a refugee in and make them a member. As just noted, such a right cannot be found in the Convention. Indeed, as we have noted in previous chapters, the refugee regime is notorious for not including an express right to “physical” entry of a state: persons granted refugee status have a right not to be returned to persecution but apparently no right to enter a state in order to make a claim that would make the right to *non-refoulement* enforceable. If the claim to physical entry is deemed controversial, then it would be difficult to sustain the claim that states have assumed an obligation to grant “political” entry. (This is not to assert that states are not bound to respect the human rights of all persons, irrespective of status; rather it is to say that it is not easy to establish “a right to a solution” predicated upon the claim of a right to political membership.)¹⁶⁹

But perhaps we can take this argument one step further and say that at least for the class of persons recognized as refugees, the freedom of states to grant or withhold political membership should yield to the necessities of protecting human rights. To see this, contrast the situation of migrants and refugees. In holding that states have autonomy regarding physical entry and citizenship vis-à-vis migrants, the result is (usually) that the migrant can count on his or her home state’s support while abroad and return to his or her home state and assert membership rights there. But this does not hold for refugees, who have, by definition, no home country in which they may safely claim the rights that normally accompany membership. So perhaps, in this special case, the privilege of a state to determine membership rules should yield and refugees should be provided an opportunity for membership (at least after some significant period of time).

We think this is not an implausible line of argument. To be sure, it is consistent with the “soft” language of Article 34 of the Convention. But a “hard” right to membership, assertable today, cannot be found in any legal instrument nor is it widely respected by state practice. And, somewhat paradoxically, it is possible that recognition of such a right could in practice work to undermine the refugee regime: if states were found to have a duty to admit recognized refugees to full membership, they might choose to close their borders or establish a form of “subsidiary relief” short of refugee status by which they could avoid the obligation. Indeed, this is in many ways what has happened already when it comes to protection, via *non-entrée* in the North and safety-without-enjoyment in the South.

So far we have been considering a right to a solution that guarantees (eventual) state membership. As we have suggested previously and will develop below, it is possible to

conceive of a “solution” in other terms—as circumstances in which international protection may be responsibly withdrawn because it has become redundant: a state of residence has guaranteed refugees a full complement of rights (including the ability to assert the right to non-return) and has provided meaningful access to economic self-sufficiency or inclusion in systems of social protection. While we will argue for the expansion of the concept of solutions to include this understanding, we cannot see the basis for a legal claim that a displaced person has a “right” to these arrangements—beyond recognition and enforcement of the rights already provided in the Refugee Convention and other applicable human rights instruments and under the domestic law of the hosting state.

III. The Responsibility to solve

So we allow that it will be difficult to sustain the argument that there is a “right to a solution” that refugees can assert or that states, at this time, would be willing to recognize. But perhaps there is another way to provide the moral fulcrum that would be important to the resolution of protracted displacement situations—one that focuses on the *responsibility* of the international community, rather than a *right* of a refugee (or a concomitant obligation of a host state only).

We will present three interrelated arguments in support of what we will call “the responsibility to solve” (R2S).¹⁷⁰ The first flows from the human harms imposed on those left in the limbo of refugee status for an extended period of time; the second focuses on principles that underlie the international protection regime (the goal of a solution and responsibility-sharing); and the third derives from specific commitments of members of the UN General Assembly and signatories to the Convention to cooperate with UNHCR in seeking solutions.

A. Responsibility to promote human security and human rights

We have identified above the obvious dramatic negative impacts of long-term refugee status. Some are quite specific: refugees in many parts of the world are unable to fully enjoy rights guaranteed by the Convention, either because the host country is not a signatory or because, even if a signatory, the state does not fully comply with the Convention’s norms. Thus, refugees frequently are not permitted freedom of movement, a right to work, and other civil, economic, and social opportunities on par with those provided to non-citizens or citizens in the host country as mandated by the Convention. Refugees living outside of camps in urban areas often face discrimination and marginalized existences. Refugees living in camps rarely are afforded treatment that accords with international standards on health, water, nutrition, and sanitation; sexual and gender-based violence is widespread (including female genital cutting); and education, skills training, and livelihoods are usually significantly constrained. UNHCR estimates that in some camps only about half of all primary school-aged refugee children attend school; a far lower percentage of refugee children attend secondary schools.¹⁷¹ Refugee camps have become largely places of “care and maintenance,” with refugees receiving enough to survive but surely not enough to flourish.

That refugees would score low on a “human security” scale is lamentable but should not be surprising.¹⁷² First, refugee camps are frequently placed in communities that already endure substantial hardship; indeed, it is often noted that conditions inside a refugee camp may be better than those for the local community outside the camp—hence, efforts are

frequently made to open in-camp resources, such as schools and medical facilities, to the local community. Second, the assistance that UNHCR and other international and local NGOs can provide to refugees depends on the funds they receive from donors. Each year, UNHCR conducts a global needs assessment for all refugees and other persons of concern to UNHCR and calculates the funding it would need to provide them with levels of assistance and services consistent with minimum international standards. In 2016, UNHCR calculated that amount at \$7.5 billion; yet the funds made available to UNHCR were just slightly over half this amount—leaving a shortfall of some \$3.5 billion. Accordingly, it is a certainty that UNHCR and allied organizations will not be able to fully provide refugees with levels of assistance that would meet even minimum levels of human security. Moreover, the funds that are made available tend to dwindle over time, as attention shifts to new emergencies and “donor fatigue” sets in. This is the darker side of “self-reliance,” which can serve to justify cuts in assistance that are motivated not by refugee self-sufficiency but by donor desires to reduce expenditures.¹⁷³

It would of course be unrealistic to assume that the international community could meet all needs and standards during or shortly after a humanitarian emergency. But the question we are considering concerns *protracted* displacement situations, in which persons—possibly have been living in a state of social suspension and significant deprivation for extended periods of time. These cumulative harms cry out for amelioration, as is true for the poor and underprivileged everywhere. But the needs of refugees represent additional factors: persons displaced for a considerable time are likely to live lives largely bereft of the kinds of community and human relationships recognized as necessary for human flourishing: family unification, community self-definition and development, self-reliance and self-determination, political participation, and effective protection against violence.

These kinds of serious deprivations, which stunt human capabilities and social and economic development, figure high on the international policy agenda. The 2030 Agenda for Sustainable Development, adopted at the UN in 2015, establishes seventeen far-reaching goals (and scores of targets) to promote human flourishing, reduce inequality, prevent environmental degradation, protect human rights, and build “peaceful and inclusive” societies. The sustainable development goals (SDGs) declare that “no one will be left behind” and that states commit to “begin with those furthest back.”¹⁷⁴

These commitments are the most recent manifestation of the more general, hortatory provisions of the UN Charter that affirm the duty of states to cooperate toward universal observance of human rights and solutions to international economic and social problems.¹⁷⁵ Furthermore, many of the harms addressed by the SDGs concern rights to food, education, health, work, and adequate living standards that are enshrined in the International Covenant of Economic, Social, and Cultural Rights (ICESCR). Similar to the Charter, the ICESCR commits states to progressively realize these rights not only through individual steps, but also “through international assistance and co-operation, especially economic and technical, to the maximum of its available resources.”¹⁷⁶

The Charter, ICESCR, and the SDGs have not established enforceable commitments to provide international assistance toward the goals of human and social development. But surely they are strong statements about the responsibility of states to pursue collective action towards these goals, both for the sake of human beings, and in the self-interested pursuit of global peace, prosperity, and security.

B. Principles of the international refugee regime that support a responsibility to solve

Members of the international refugee regime have a responsibility to ensure it achieves its purposes. R2S underpins this broader responsibility in two ways: (1) solutions represent a central goal of the regime, and (2) international responsibility-sharing—a key part of which is cooperating towards solutions—is necessary if the regime is to succeed.

1. *From protection to solutions*

The principles of protection we discussed in the previous Chapter provide a teleology implicit in the international refugee regime. For refugees, it can be summarized as *flight* (across an international border); *admission and recognition*; *assistance and rights protection (including both safety and enjoyment of asylum)*; and *solution*. This conceptualization flows from the very nature of the refugee problem: it is not simply the danger of being persecuted if returned; it is also fundamentally the fact of having been forced from one's home, stripped of community and denied opportunities for a normal life. The goal of the regime of international protection is to ameliorate those harms—that is, to provide a *solution* to the state of being a refugee. In the words of Gervase Coles, “In the refugee situation, international protection should be seen as a temporary holding arrangement between the departure and return to the original community or as a bridge between one community and another.”¹⁷⁷

The centrality of solutions to the international regime is made clear in the first paragraph of UNHCR's founding Statute. It states that the High Commissioner,

shall assume the function of providing international protection [to refugees] . . . and of seeking permanent solutions for the problem of refugees by assisting 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.”

This emphasis is affirmed in repeated resolutions of the General Assembly¹⁷⁸ and conclusions of UNHCR's Executive Committee.¹⁷⁹

Solutions were also central to the refugee regime at the time of the drafting of the Refugee Convention. Indeed, while we might question whether a *right* to a solution can be read into the Convention, we also believe there is a danger in making too much of the Convention's silence on solutions (beyond naturalization): in 1951, most of the postwar refugee situation had already been “solved.” To say that third states did not *additionally* accept responsibility for the “residual caseload” is by no means to say that they assumed no responsibility for solutions. To the contrary, solutions have never been more forthcoming than in the years leading up to 1951.

2. *Responsibility-sharing and solutions*

The argument in the previous section finds its source in regime responsibilities that the international community owes to refugees. A second approach derives from obligations that states owe to one another in establishing and maintaining the regime; it is grounded in the role of international responsibility-sharing.

We have argued at various points throughout this volume that the importance of responsibility-sharing for a well-functioning system of international protection is clear.

UNHCR's Executive Committee has made this linkage explicit in a Conclusion dealing specifically with protracted refugee situations:

[T]he status quo is not an acceptable option and, while every situation is unique, all feasible and practical efforts should be taken to unlock all continuing protracted situations especially through the implementation of durable solutions in the spirit of international solidarity and burden sharing.¹⁸⁰

The idea of responsibility-sharing can be constructed from notions of fairness: justice would argue for no one state to be disproportionately affected by refugee flows because it is likely that the burdened state was not the cause of the flow and it is burdened simply because of propinquity. It has long been recognized that that burden may be significant. A 1998 UNHCR paper on burden-sharing noted that "large refugee and returnee populations may impede or jeopardize the development efforts of developing countries" and identified a number of significant impacts on hosting states, including:

1. Economic impact: substantial demands on food, energy, transportation, employment, and public services such as education, health and water facilities, and administering asylum procedures;
2. Environmental impact: unexpected and massive demand for scarce natural resources such as land, fuel, water, food, and shelter materials, with long-term implications for their sustainable regeneration;
3. Social and political impact: particularly where refugees or returnees are from different cultural, ethnic, religious, or linguistic groups from the local population;
4. Impact on national, regional and international peace and security: problems of politicization and militarization of refugee camps, which places substantial demands on the police and armed forces of countries of asylum.¹⁸¹

These impacts escalate over time, as outside resources tend to decline and funding is put to new emergencies rather than continuing situations. Those impacts are all the more dire because the states in question—the Kenyas and Lebanons and Pakistans of the world—face enormous economic and social challenges on their own.

Responsibility-sharing may also be justified in regime-preservation terms. Effective protection of refugees demands collective action. As Erika Feller has noted: "Refugee protection is a global concern and a common trust. This means that responsibility for it is shared, not individual. It also means that, unless this is shouldered widely, it may be borne by none."¹⁸² It is thus not surprising to find reference to the necessity of responsibility-sharing in the Refugee Convention's preamble:

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and 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 cooperation.

Our argument, then, is that responsibility-sharing is a necessary commitment of states, and that supporting solutions is an important way for meeting that commitment.

Solutions to situations of displacement would reduce burdens on countries of first asylum and would help preserve the overall protection regime.

C. Specific commitments of member states to cooperate for solutions

The General Assembly resolution that establishes UNHCR calls upon states “to cooperate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions.”¹⁸³ Because seeking solutions is explicitly one of UNHCR’s functions, states are accordingly specifically committed to assisting the High Commissioner’s work in this regard.

This straightforward legal argument has potentially profound implications. Yet the commitment of states to cooperate in the pursuit of solutions cannot be enforced nor is it robustly monitored. UNHCR actively seeks to increase the number of resettlement slots each year; and while the number of states taking refugees for resettlement has increased, the total number resettled each year is but a very small fraction—typically less than one percent—of the overall number of refugees worldwide. Similarly, over the last decade refugee returns have declined precipitously while efforts at local integration have largely stalled. Under both the Statute and the Convention, UNHCR is given authority to supervise state compliance with their commitments.¹⁸⁴ It may now be time for it to exercise that authority in a more active manner to call attention to state responsibility to assist in finding solutions.

IV. From principle to practice

We have argued that R2S is a legal and moral commitment of state members of the international protection regime. The next question is how it may be translated from principle to practice.

A. Of multi-state agreements, old and new

States may take unilateral action to offer solutions to refugees. Naturalization programs, for instance, require simply the action of a single hosting state. As one example, in 2010 Tanzania began the process of naturalizing more than 160,000 Burundian refugees who had entered the country in 1972. PDS may also be resolved through exercise of the Convention’s “cessation clause,” coupled with assistance to refugees returning to their home states and aid to long-term hosting states for environmental and other rehabilitation efforts.

More frequently, however, R2S will need to be brought to bear as a cooperative enterprise. A formal model that is frequently invoked is the Comprehensive Plan of Action (CPA). A CPA is an agreement among hosting states and other states (resettlement and/or states of origin) to work out solutions *en bloc* for displaced persons in a protracted situation. The most notable, both launched in 1989, have been the plan for Central American refugees (known by its Spanish initials as CIREFCA), and a CPA for Indo-Chinese refugees. CIREFCA adopted policies of local integration and return, with development agencies playing a role.¹⁸⁵ Under CIREFCA, more than 110,000 Nicaraguans, Salvadorans, and Guatemalans voluntarily returned to their countries of origin; thousands more were locally integrated into countries of asylum.¹⁸⁶ The Indo-Chinese CPA focused on resettlement, return, and prevention of future flows of “boat people.” Under the CPA, a million refugees

were brought to the United States, several hundred thousand resettled in other countries (China, Canada, Australia, Thailand, and France) and 80,000 returned from refugee camps in the region to Vietnam.¹⁸⁷

In more recent years, these kinds of multi-state agreements (with the participation of UNHCR and other multilateral institutions) have taken a different form. Rather than devising a plan that “solves” a refugee situation, states may announce plans to make progress *towards* solutions. The shift is important because it is likely to include measures supporting refugee self-reliance in hosting states based on the recognition that return is not possible in the short-term. In this way, the work towards solutions merges with new thinking on moving beyond “care and maintenance” for refugees in protracted situations.

The Nairobi Declaration, signed by the IGAD¹⁸⁸ states in 2017, is an important example of this trend. With its objective to “collectively pursue a comprehensive regional approach to deliver durable solutions for Somali refugees, whilst maintaining protection and promoting self-reliance in the countries of asylum,” the Declaration calls for measures, *inter alia*, to support the voluntary repatriation of Somali refugees, to respond to drought in the region (to prevent new forced displacement and to address a significant driver of structural poverty), and to maintain asylum space. Of particular significance are commitments to enhance, with the support of the international community, education training and skills development for refugees to prepare them for gainful employment in host communities and upon return, and to align domestic laws and policies, including civil documentation, with the Refugee Convention.¹⁸⁹

Crucially, the Declaration also spells out responsibilities of the international community, particularly development actors and international financial institutions who are requested to accelerate debt relief and other financial assistance to facilitate development in Somalia, to provide concessional loans to affected communities, and to “mobilize resources to promote alternatives to refugee camps and the socioeconomic development for the mutual benefit of refugees and host communities.”¹⁹⁰ If such resources provide a genuine stimulus, they could well be transformative. The best example, to our minds, is not CIREFCA or the CPA but rather the Marshall Plan, which enabled millions of refugees in war-torn host states like Germany to rebuild their lives not only by strengthening labor markets but by enabling Germany to rebuild its welfare state. Indeed, Marshall aid is a crucial precedent not only—perhaps not even mainly—because of the scale of funds involved, but because of the form such funding took: grants instead of loans; stimulus instead of austerity.

Whether or not voluntary return with safety and dignity can occur in the medium term to Somalia (and there are disturbing signs that refugees are already being coerced into returning prematurely—including as a means to pay off the debts they have incurred as food rations have been cut),¹⁹¹ a kind of proto-solution of local integration can materialize. But it, too, must be accompanied by development aid—including, crucially, at the macroeconomic level—mobilized and directed to the benefit of hosting communities as well as refugees, with the goal for both groups being freedom from want, not (merely) independence from aid. Here, again, our reasoning is as much functional as it is moral. Such aid is necessary to incentivize host states to include refugees into their economies and societies, and it is crucial to ensure that such inclusion means more than inclusion into new forms of deprivation.

We must, however, temper these hopeful remarks with a word of caution. If, as is currently the case, development aid to the Somalias of the world remains inadequate; if it continues to come mainly in the form of loans (Somalia, like most host countries, is already indebted to development institutions); and if those loans come with austerity and privatization conditions; then such an approach would hardly be a departure from a status

quo that has not prevented one million additional Somalis from being uprooted internally in recent years, let alone one that could see hundreds of thousands of refugees return to something other than insecurity and violence. To state this more generally, comprehensive plans that move in the direction of durable solutions run a risk of reinforcing “responsibility by proximity” if they focus too narrowly on quasi-integration.¹⁹²

B. Labor migration and mobility

The “half-way” CPAs just described represent a softening of traditional understandings of solutions (that they must accomplish durable return to the state of origin or membership in another state). Once we move away from membership-based assumptions about solutions, other possibilities open up. So rather than seeing a situation as solved when a refugee is “re-attached” to a state, one can conceptualize a solution as a state of affairs in which refugee agency is restored—that is, when refugees and other fleers of necessity can exercise choice about a place of residence in which to pursue family life and attain economic and social security. Scholars have approached this understanding by suggesting that labor migration and mobility could be viable solutions. The idea—which has, as we suggested previous chapters, some resonance with the Nansen Passport—would be to fashion opportunities for refugees to move from countries of first asylum to other states to search for and take up employment, join other family members, or pursue an education. If the right to leave and return to a country of asylum is protected, then the continued provision of international assistance and protection for those refugees may become unnecessary.¹⁹³ And importantly, it would be a step toward transcending “responsibility-by-proximity.”

Indeed, mobility sounds like a radical suggestion only because our thinking is locked into the idea of a system where a refugee is granted protection in a country of first asylum and then must be “resettled” elsewhere if he or she seeks to leave (and refugees who depart a country of first asylum otherwise become “illegal migrants”). But in reality a solution of mobility asks less of other states—a right for a refugee to enter and take up employment or go to school or join a family member. It is not a request for membership. It is a “cheaper” way for a state to meet its R2S responsibilities vis-à-vis that number of refugees who choose to avail themselves of it, while at the same time contributing to refugee agency and easing pressure on countries of first asylum.

V. Counterarguments, and feasibility

In light of the above, we believe that a strong case can be made for the concept of a responsibility to solve long-term refugee situations. R2S, we have argued, follows from a general commitment of states to further human rights and the UN Charter and a specific commitment to support the High Commissioner in seeking solutions for refugees. It is also entailed by an obligation to ensure that the refugee regime—constructed and implemented by states—succeeds in its purposes. Recognition of R2S would provide an impulse for renewed attention to solutions, which could lead to enhanced funding for returns and local integration as well as more resettlement opportunities. It would also remind us that the principle of *non-refoulement*—while a crucial pillar of refugee protection—is not the ultimate goal of the international refugee regime. That is, the responsibility of the international community to refugees is not simply to support camps or other arrangements that provide (endless) temporary assistance to refugees; it is to restore human dignity and agency by

ending the condition of being a refugee. In today's world of a collapsing protection regime, there is a collective responsibility to prevent and remedy a looming collective failure.

There are counterarguments that need to be addressed. James Hathaway, has suggested that a focus on solutions “pathologizes” refugees and may be used to undercut enforcement of rights under the Refugee Convention:

Th[e] very simple notion—that the recognition and honoring of refugee rights is itself a fully respectable, indeed often quite a desirable response to involuntary migration—can too easily be eclipsed by the rush to locate and implement so-called “durable solutions” . . . Rather than propelling refugees towards some means of ending their stay abroad, the Refugee Convention emphasizes the right of refugees to take the time they need to decide when and if they wish to pursue a durable solution.¹⁹⁴

We agree with Hathaway on the importance of preserving and fostering support for rights protected by the Convention, and we appreciate that effective realization of Convention rights may enhance the opportunities for, and durability of, solutions. We are also well aware of examples of refugees being forcibly returned in violation of Convention rights. But refugees trapped in protracted situations—some of which have lasted their entire lives—are not likely to need additional time to decide if they wish to pursue durable solutions. Thus we caution against arguments that appear to privilege Convention rights over the search for solutions when in fact the two pursuits are co-constitutive.

Another counterargument is based on political feasibility. It runs like this: many members of the international community already think they are doing enough, if not too much, to help refugees and that they are unlikely to assume any additional responsibilities. Host states can properly say that they have kept their borders open, provided safety, and borne substantial burdens; they can further note that refugees often receive more assistance from the international community than members of the hosting areas, and that if they have any additional responsibility it would be to their own citizens first. Donor states are likely to assert that they have provided and continue to provide billions of dollars in assistance each year, and that nothing in the Convention or other norms of the regime requires them to take refugees in if they can be safely provided for in countries of asylum.¹⁹⁵ They would further argue that the primary solution for refugee situations is return, so it makes sense to keep refugees close to home and hardly requires a Marshall Plan for host states. In short, given everyone's recognition of the importance of solutions but lack of progress on providing them, it appears that the nations of the world have made clear through their actions that working toward solutions—even in other states—is not perceived to be in their particular interests. Why, then, should we expect that the identification of a “responsibility” to do something about the problem would actually change state behavior?

We are not ready to concede that moral principles have no sway in international affairs. From climate change to landmines, protection of endangered species and recognition of the rights of children, states continue to adopt policies that are not based on their pecuniary or political or near-term interests alone. Our guess is that many of the world's policy makers are not aware of the original vision from which the status quo makes such a tragic departure and that many could be moved to take action—particularly when the challenges are readily manageable. So identification of the current situation and a careful explication of relevant norms and principle can, we believe, have an impact.

If we are wrong, and states take actions only in pursuit of narrow and defined state interests, an appeal can be based on the benefits that would flow from taking up a collective responsibility to solve. It can be pointed out that donor states may, in the long run, save money spent from humanitarian funds for long-term “care and maintenance” of refugees. With the development of comprehensive plans for solutions, hosting states will see their burdens lessened due to increased repatriations or resettlement of refugees. And, if local integration is promoted, they will also reap the benefits of including a new workforce in local and national economies as well as development of local hosting communities.

Additional force could come from linking solutions plans to other kinds of state interests. Alexander Betts, in analyzing why some comprehensive plans of action have succeeded (CIREFCA and the Indo-Chinese CPA) and others not (the International Conference on Assistance to Refugees in Africa (ICARA)), has persuasively argued that it was UNHCR and the UN system’s recognition of and appeal to “states’ wider interests in linked areas such as security, peace-building, migration and development” that contributed to success.¹⁹⁶ This accords with our reading of the first, and most successful, postwar responsibility-sharing regime. In the midst of a budding Cold War, resettlement and the Marshall Plan made sense first and foremost as a way to curry favor with states that might have otherwise looked to the East for support. Both made sound ideological sense, in addition to being the right thing to do.¹⁹⁷

The entry of Big Development into the displacement field is evidence of one such “plus” in the current moment. For the development agencies, “[f]orced displacement is emerging as an important development challenge” and “[t]he best results are likely to be achieved when humanitarian and development actors work together.”¹⁹⁸ For the politicians that run the governments that run the development organizations, other factors may be at work. The development turn may arise from motivations not very different than those that led to the creation of camps (and the resulting PDS) in the first place: to act in a humanitarian fashion toward persons in need while creating institutions and norms that keep people in places to which they first fled. If the dollars promised are large enough so that asylum states can show material benefits to their own citizens in hosting communities, the deal can be sealed.

To no small degree, this is an unhappy place to end up. *If* ultimately the interests of states must be appealed to, *and* the primary interest for donor states today is to put in place policies of containment, then we are led to the conclusion that new thinking on solutions will cut against precisely the goals of agency and mobility that we have suggested must be part of a principled system of international protection. A responsibility to solve will become a faith worth fighting for only when it is yoked to a broader critique of the international refugee regime and a plan of action that moves us beyond a system based on (powerful) state interests. In previous chapters we have elaborated our own version of that critique. In the next and concluding chapter, we will bring the various threads of the critique that we have pursued heretofore; that will be the easy part. Developing a positive program for change, and a way to accomplish it, will be more difficult.

Chapter Five

Conclusion—Achieving the Vision

We have, in essence, defined four arcs along which international protection of refugees has progressed. First, the *classes of protected persons* have expanded dramatically. The geographical and temporal limits of the 1951 Convention have been removed, making the definition of refugee global. Regional instruments and international practice now affirm that persons fleeing across borders due to conflict and violence will generally be considered refugees.¹⁹⁹ We have come close, as a matter of practice, to ensuring that all necessary fleers receive some form of international protection.

Second, *protection activities* of UNHCR, other international organizations, and NGOs have moved considerably beyond those initially anticipated by the founders of the international refugee regime. In addition to the granting of identity and travel documents and advocacy for refugee rights, international protection today includes a wide range of programs for refugees in vulnerable situations—women, children, LGBTI people. Hundreds of millions of dollars are spent each year by the international community on refugee education, health, and livelihoods projects.

Third, *refugee rights* have expanded—at least as a formal matter—beyond those enshrined in the Convention to include norms from later adopted human rights instruments. The Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the ILO convention as well as the Covenants on economic, social, cultural and civil and political rights are particularly significant. Most recently, protections in international maritime law have come to the fore.²⁰⁰

Fourth, the *category of responders* has grown. Development agencies now see displacement as an important area for their intervention. And private sector actors—seeing both moral obligations and opportunities for profit—have entered the refugee protection space.

Thus over the past 70 years, we have witnessed substantial movement forward along the arc of protection. Today, more displaced persons are being assisted by more actors in more ways than at any time in history. It is thus an extreme irony that the system is largely in disarray, betraying its founding principles and enduring goals. A regime designed to put people back on their feet keeps them on their knees. A system of protection intended to guarantee the return to normal life has produced a surreal existence for the vast majority of displaced persons, condemned to life in extreme poverty and perpetual limbo. The country of first asylum—the place of rescue—has become, for most refugees, a place of confinement where they are both locked in and locked out: unable to return safely home and forbidden to move elsewhere, they are also denied entry into economic opportunities and social programs in hosting communities. Humanitarian programs have supplanted rights-based approaches, producing deprivation (and debt) instead of dignity.²⁰¹ Development programs have also retreated from their welfarist origins, often prioritizing global markets instead of the global poor.²⁰²

Plainly, dramatic measures are needed to repair this broken system. But the programs for reform proposed by those with most of the world's resources—the global North—are likely to reinforce rather than remedy the fundamental failings of the current state of affairs. Let us leave to one side proposals that would move the system backwards on the arc of protection—that would cut back on the definition of refugee, adopt encampment policies, restrict established refugee rights, or condition development aid on border closures or

interceptions.²⁰³ We will examine instead what we will label the New Liberal Consensus on reform of the refugee regime.

A. The New Liberal Consensus

The New Liberal Consensus has emerged over the past decade from programs, discussions, and funding decisions among states, the EU, multinational organizations, policy advocates, and academics. There is no formal New Liberal Consensus “manifesto,” but we can identify a set of ideas and policy recommendations that are generally adhered to and advocated for by a wide range of progressive, reform-minded government officials, experts, and institutions. (We should be clear: we have contributed to these discussions and agree with certain elements of the Consensus, as the preceding pages should make apparent.) The constituent elements of the Consensus are as follows:

- 1. The refugee definition should not be “opened up,” although persons fleeing conflict and violence have properly come to be understood, and assisted, as refugees.**²⁰⁴ While it is accepted that there are “new drivers of forced migration” producing displaced persons in refugee-like situations, there is great concern that any attempt to amend the refugee definition might backfire and produce a less generous definition. At the same time, international organizations receive large amounts of funding to respond to displacement caused by natural disasters and to situations of internal displacement, and states have not objected to UNHCR guidelines that suggest that persons fleeing conflict and violence—as distinct from persecution—are entitled to international protection.
- 2. Refugees are best assisted in states close to home.**²⁰⁵ A number of factors are said to support this proposition: staying in countries near one’s country of origin will make return easier (repatriation being considered, a priori, the “ideal” solution); refugees are likely to have co-ethnic or co-religious communities in states close to home states; it is cheaper to assist refugees in the global South than in the global North.
- 3. Self-reliance should replace “care and maintenance” as the primary focus of international programing; development aid is important to this paradigm shift.**²⁰⁶ Helping refugees attain self-sufficiency restores dignity and reduces dependence. It may also reduce expenditures for assistance in the long-run. To be successful, the turn to self-reliance requires significant support from the development community, and such funding should benefit both refugees and hosting communities.
- 4. Refugees can be a benefit to hosting states, if permitted to work.**²⁰⁷ The Consensus takes aim at the idea that refugees are a burden and that they compete with host community members for jobs and resources.
- 5. Resettlement programs should be expanded and additional legal pathways created to help share the burden imposed on countries of first asylum.**²⁰⁸ Increasing movement to third countries will help preserve “asylum space” in countries of first asylum and respect for the principle of *non-refoulement*.

6. ***Non-entrée* policies should be criticized and xenophobia condemned.**²⁰⁹ Australian, EU, and U.S. deterrence and detention policies risk *refoulement* and inflict serious harms on asylum seekers. They also lend cover to other states wishing to follow a similar course. The power and spread of populist anti-immigrant sentiment is said to make politicians in many developed states cautious (if not cowardly).

A number of these points find mention in the New York Declaration, its Annex on the Comprehensive Refugee Response Framework and the draft Global Compact on Refugees.²¹⁰

Were the world to adopt policies along the lines of the New Liberal Consensus, the lives of many refugees would surely be improved. And yet it is important to see that the Consensus is actually quite at home with the premises of the approach that has produced the present state of affairs. We can see this by noticing what's missing. While the Consensus gestures at increased responsibility-sharing (through, e.g., "new pathways" to third countries), no serious effort is made to construct a global framework for addressing protracted situations. States of the global North are not being asked to commit themselves to a system of distributing burdens, nor is any international structure or platform suggested for allocating "shares." And while xenophobia and *non-entrée* policies are criticized, they are not really confronted; indeed, they become a basis for supporting policies that offer developed states *more* protection from spontaneously arriving asylum seekers. That is no accident: the Consensus continues to relegate the overwhelming majority of refugees to the countries in which they were first provided protection; save for the tiny fraction of necessary fleers who may be resettled, movement beyond home regions is seen not as a core component of protection but rather as (irregular) migration and therefore subject to the "normal," often draconian, rules that states put in place for regulating the entry and stay of so-called regular migrants.

No less crucially, the New Liberal Consensus says very little about enforcement of refugee rights. It emphasizes access to labor markets, to be sure; but it does so, too often, to the exclusion of refugees' welfare and labor rights—rights intended to lessen rather than increase refugees' market dependency. That omission is often defended as a matter of *realpolitik*, of taking seriously host states' baseline hostility toward refugees. Yet it has as much if not more to do with the supply-side preferences and pro-business policies of donors and industry: namely, that labor markets are inherently emancipatory and self-regulating; that few problems cannot be fixed with the right mix of temporary vocational training, targeted micro-lending and corporate tax concessions; that minimal safety nets are sufficient to ward off abject poverty; that corporate power is benign; that wage theft and exploitation are exceptional.

The reality facing millions of refugees is far less sanguine. Their poverty remains endemic whether they earn it in the marketplace or receive it in camps, and unregulated and inequitable markets pose additional risks.²¹¹ While the New Liberal Consensus recognizes the need for "additionality," it proposes no funding solutions on the scale or of the quality necessary to overcome rather than maintain an increasingly intolerable status quo. The focus is primarily on ending one form of dependency: dependency on aid. Indeed, the tendency is often to reframe humanitarian funding *cuts* not as derelictions of international obligations but as opportunities for self-reliance and innovation.²¹² Meanwhile, the qualitative problems with development assistance—including its proclivity to create debt and to encourage austerity and to protect investors over workers or consumers—are left largely unexamined.

All of which is to say that the New Liberal Consensus is surprisingly close to the current North-South bargain and the broader political economy that undergirds it: the global North adopts policies to incentivize the global South to keep refugees from moving onward. According to the Consensus, development funds should be tapped to supplement declining humanitarian funding (until such time as refugees are deemed self-reliant) and should aim to insert refugees into global value chains and labor markets by, for instance, subsidizing foreign corporate investment in the export sectors of host states. The potential benefits to hosting states are said to be two-fold: increased overall levels of funding, and participation of refugees in host economies (and especially in the low-wage sectors that their citizens shun). Nothing more is demanded of the global North; indeed, once refugees have re-attained “productive” lives, their justification for moving North can be asserted to be far weaker (regardless of whether the economies and welfare systems of hosting states become in any sense adequate). A goal of self-reliance, it turns out, is simply the old humanitarianism tune with new development lyrics, a way for the global North to believe it is doing something to relieve human misery while keeping refugees immobilized in the poorer states to which they first fled.

The underlying problem with the New Liberal Consensus, then, is that it cedes too much to powerful states. In an attempt to generate “sellable” policy proposals, the Consensus offers no serious critique of the manner in which the entire regime has been constructed and put into practice by donor states for donor states. It places considerable blame on the humanitarian sector despite the fact that “care and maintenance” is more a symptom than a cause of systemic poverty in refugee-hosting areas. It asks states to be truer to their better selves, and tries to show them why it is in their interest to be so. But so long as the game continues to be played on the field of (Northern) state sovereignty, and so long as the power imbalances between donor states and hosting states (to say nothing of refugees) remain so dramatic, it is pretty clear what the results will be. If fundamental reform is to be achieved, powerful states must be persuaded to yield some portion of their power over outcomes and far more of their resources in a common endeavor of international action and governance (as they have in other areas of international practice).

The question then becomes: assuming states could be so persuaded, what might meaningful reform look like?

B. Program of reform

So it is now time to collect the various recommendations we have made throughout these pages and to set forth our view of a program of reform. We are well aware that we have not addressed questions of “root causes” and prevention of displacement—that is, that the best way forward on improving the international system of protection is to find ways to not have to invoke it. Our focus has been, and will continue to be, post-displacement policies. The proposals we offer all pose challenges to states; they cannot be adopted without states doing things they would rather not do. Thus we follow this section with some thoughts on how such a program of reform might gain traction.

Norms

People fleeing across international borders who cannot return in safety are generally offered assistance and protection by neighboring states and the international community. The classes

of persons protected now extend beyond the definition of refugee in the 1951 Convention, to include persons who flee because of violence and conflict, threats from organized crime and gangs, natural disasters and drought, social stigmatization, and other engines of upheaval. Various regional instruments recognize such groups as entitled to protection. So, too, does consistent state action.

We have suggested the term “fleers of necessity” to describe persons who have reasonable grounds for flight and who cannot reasonably be expected to return for some period of time. The arc of protection now extends in practice to necessary fleers. It is time that international norms conform to practice. This could be accomplished in a number of ways. The General Assembly could amend UNHCR’s statute or adopt a resolution confirming that UNHCR’s activities extend to all displaced persons in need of international protection. Or, a Protocol to the Convention could be drafted to the same effect.²¹³ The Guiding Principles on Internally Displaced Persons could be formally adopted at the UN (to date, they have only been “presented” to the Human Rights Council). Soft law norms can evolve from thematic processes such as the Nansen Initiative and its Protection Agenda (relating to movement across borders due to disasters and the effects of climate change),²¹⁴ which has further given rise to the Platform on Disaster Displacement.²¹⁵

To say that international norms reach all necessary fleers is not to say that all are entitled to all of the protections guaranteed in the Refugee Convention. Exactly what rights should apply would depend on the cause of flight, the likelihood of voluntary return, conditions in places of exile, and other factors. But to say that persons not coming within the narrow definition adopted in 1951 are not entitled to protection is no longer acceptable.²¹⁶

Rights

At a number of points we have stressed the importance of refugee rights, guaranteed in the Refugee Convention and other human rights instruments, and by customary international law. Rights may be justified on both instrumental and non-instrumental grounds—and the extent to which they contribute to dignity and refugee agency.

It is remarkable how important rights—a particular conception of rights as providing a bulwark against material deprivation and inequality—were at the origins of the international regime, and how infrequently invoked they are today. Targeted assistance long ago supplanted rights protection as the *raison d’être* of the (Southern) refugee regime; and now development-for-self-reliance, which seeks to replace the assistance paradigm, is proceeding with little attention to rights (other than the right to work and freedom of movement *within* the hosting state, which, while crucial, are insufficient to prevent exploitation of refugee labor or the confinement of refugees within the lowest ranks of the global working poor). In a sense, development-for-self-reliance runs the risk of becoming not an enhancement of protection but of protection-in-reverse: small amounts of development aid can be used to justify the withdrawal of humanitarian assistance and the transfer of the costs of protection onto impoverished displaced persons themselves.

Rights cannot exist only on paper. They must be a part of the lived world of displaced persons; they must bite. So there must be methods of enforcement. In some hosting and resettlement states, claims may be pressed in the courts—under international and domestic law.²¹⁷ International funding for displacement situations could (and should) be conditioned on respect for rights (indeed, respect for rights and inclusion in economies and

welfare systems should be the only non-fiduciary conditions attached to displacement-related development aid).²¹⁸ But such methods cannot succeed so long as they remain ancillary.

Agency and mobility

The current state of affairs fails refugees because it denies them agency and dignity and condemns them to lives of poverty. Any reform effort must be directed at ending the second exile in the hosting state and enhancing mobility among the states that constitute the international refugee regime. Inclusion in the hosting state would mean the right and opportunity to enter the workforce, to have children educated in school, to be protected by labor laws, and to be eligible for programs of social protection. Significant progress—at the conceptual level—has been made along some of these lines. UNHCR’s programing is moving in this direction, and at least some major development funders appear to be on board.²¹⁹

A very simple idea seems to be beyond the pale: let refugees move to where they can best rebuild their lives. As described in chapter four, this can be thought of as “movement within the regime”—that is, among states that constitute the international system of protection. The Nansen Passport of the early twentieth century, recall, did not guarantee entry into another state; rather it provided documentation upon which receiving states could rely and it facilitated return to the state in which the refugee had received asylum. But it did more than this. Based on the idea that refugees should be able to travel to other states in search of life-sustaining work, the Nansen Passport helped to construct a collaborative multilateral enterprise of refugee protection. That is, states recognized a common obligation both to help refugees make their way in providing for themselves and their families and to ensure that countries and communities of first asylum do not bear a disproportionate responsibility due to morally dubious phenomena such as proximity and happenstance.

Now take this forward a century. Under current practice, there is no perceived common obligation to enhance refugee agency and to help them find a place of safety where they can best rebuild their lives. As noted, refugees are virtually stuck in the country of first asylum and must find routes as (illegal) migrants to other states. This means that a Syrian refugee who leaves Turkey for Germany is treated either as an asylum seeker in Germany or as a migrant looking for work. A well-functioning system would recognize that the person remains a Syrian refugee so long as he or she is not able or willing to return safely to Syria. There should be no need for Germany to re-adjudicate the asylum claim; nor should the person have to qualify under rules constructed for migrants. That is, refugees should be able to move among members of the regime to find decent work, rejoin family, access necessary health care, or pursue educational opportunities. This perspective is appropriately skeptical of the self-serving idea that displaced persons are best helped closest to home. This may be true for many (and if true, then we need not be worried in the first place that a right to inter-state movement would lead to “floods” of displaced persons moving North). But why not, so to speak, test the hypothesis and in doing so materially advance the rights and interests of the displaced while ending the inequitable and unsustainable system of “responsibility by proximity”?

It should be apparent that this kind of mobility within the system benefits all members. Refugees are able to regain agency and attain self-reliance; hosting states benefit if refugees who are unable to find work there can find it in another state; and states of destination gain from having refugees link to employers who seek their labor. This kind of mobility would have the added benefit of undercutting smuggling and trafficking activities,

which would surely decrease exploitation and abuse of refugees and prevent deaths at sea. Indeed, as suggested earlier in this volume, mobility can itself be a “solution” to the refugee situation—one that does not demand of states that they extend membership.

We are not so naïve as to think that systemic mobility can be adopted immediately. There would be strong opposition from third countries that would (correctly) believe that they would receive large numbers of refugees. This would not constitute fair burden-sharing any more than the current situation of “responsibility by proximity.” So states may want to ease into mobility, perhaps establishing annual quotas, or requiring refugees to establish that there is an employer who has offered them a job. Or mobility could be established at a regional or sub-regional level—as in the EU and among ECOWAS states.²²⁰

Responsibility-sharing

We have repeatedly stressed the need for robust responsibility-sharing. This is the unfinished work of the 1951 Convention. And we have argued in chapter four that state members of the regime have a responsibility to solve protracted refugee situations. A number of proposals for responsibility-sharing have focused on distribution of the world’s refugees, suggesting that each state be assigned a “share” of the burden, based on such factors as GDP, population size, and unemployment rate.²²¹ States could meet their obligations in a variety of ways: through resettlement programs, funding refugee relief efforts, or “selling” their shares to other states.²²² An international organization—UNHCR is often proposed—would assign shares annually and monitor compliance.

We have a less rigorous proposal in mind. Here we bow to political feasibility: it seems highly unlikely (at least in the near- or medium-term) that states would commit *ex ante* to such shares;²²³ but even if they did, there would be no way to hold them to their commitments: “Yes, we said we’d take 10,000 refugees in the next emergency, but we didn’t mean refugees from [country X].” What the international refugee regime has lacked from the start is an institutional structure that brings states, multilateral organizations, civil society and other actors together to craft a comprehensive plan for emergency or protracted situations. There have been occasional ad hoc conferences, some yielding important results (such as the CPA for Southeast Asian “boat people”). But it would be far more sensible to have in place a standby arrangement that can be invoked when circumstances demand.

Thus we propose the establishment of a Global Action Platform on Forced Displacement. The Platform would be a multi-stakeholder organization, constituted by UN organizations, donor and hosting states (in equal proportion), development banks and other development actors, representatives of displaced communities, the private sector, and civil society. (An executive secretariat could be established, led by UNHCR.) Through a triggering mechanism—perhaps a formal call from the High Commissioner for Refugees or the Secretary General—the Platform would convene a conference of its members to respond to a particular displacement situation, either an emergency or a protracted situation. The conference would construct a comprehensive, global plan adequate to the circumstances before it. Such a plan would provide parameters for the response of the international community in the country hosting refugees (including respect for refugee rights) and also establish responsibilities for actors elsewhere (in terms of funding, resettlement, other avenues for mobility).²²⁴ There would be no pre-assigned “shares”; participating states and other members would allocate and agree to responsibilities for the particular situation. But the starting point would be that such allocations be equitable and be based on criteria far less

arbitrary than proximity—preferably those outlined above: rights, agency and mobility, additional and redistributive development aid, and genuine responsibility-sharing.

To be successful, the Platform would need to tap into new sources of financing, from development funding, foundations, and other innovative vehicles such as the issuance of bonds. By establishing a fund up-front, the Platform would have ready resources to meet a new emergency or to launch a significant initiative to resolve a protracted situation, including by supporting the onward movement of refugees.²²⁵ At the country-level, it would provide funding for the response in the hosting state. Crucially, such a response would move beyond the traditional mix of loans and austerity and corporate guarantees at the macro-level and targeted self-reliance activities at the micro-level. It would aim to provide a genuine stimulus—a New Deal for Refugees and their Hosts—for host states that agree to include refugees in their welfare and education systems and labor markets. Members of the platform could also consider additional policies now seen as outside the international refugee regime, such as debt relief for hosting states and action to combat capital flight and corporate tax evasion in and from host states.

It seems entirely plausible that the global response to the Syrian displacement crisis would have been different if the Platform had been in existence. Early on, a number of states, development agencies, private sector actors, civil society, and UN organizations would have convened at the global level to develop a comprehensive response—one that would have included coordinated work of development and humanitarian agencies in the neighboring states, including the provision of macroeconomic relief; and a plan for permitting entry of refugees into other states (whether through formal resettlement, labor visas, family unification or other humanitarian pathways). Had such a plan been implemented, the massive unauthorized movements over several years—with all the well-known tragic consequences—could well have been avoided.²²⁶

C. From proposals to progress

In accepting, more or less, the current North-South status quo, the New Liberal Consensus approaches the international refugee regime not as a system but as a series of bilateral and multilateral bargains. We believe that the arc of protection should describe more than one-off arrangements entered into for the mutual advantage of individual states. It is, rather, the dynamic behind a collaborative effort to respond to and resolve situations of displacement. The states that have signed up to the project—by ratifying the Convention, serving as members of UNHCR’s Executive Committee, approving the annual General Assembly resolution on refugee protection—have obligations toward displaced persons to support the system. This plainly means respecting the rights of refugees and helping and urging other member states to do so as well. And it means adequately funding the international organizations and NGOs that respond to emergencies and help refugees rebuild their lives. But, as we have shown in the previous chapter, states also have responsibilities toward other states to take those measures that can reasonably be expected of them to further the goals of the regime. That includes providing host states with the resources—and the policy space—necessary not only to absorb refugees into their welfare systems and labor markets but also to ensure that those systems and markets are equitable and sustainable.

But how, it might fairly be asked, can states be persuaded to undertake the collective work necessary to fix the system they have put in place and now allowed to fail—to respect the rights of the displaced and to stay true to the commitments they have made to each

other in constructing the regime? Some have tried to argue that it is in states' best interests to adopt significant measures to reform and repair the existing system.²²⁷ But, as we have suggested before, it seems unlikely to us that we are better at understanding state interests than the states themselves. Thus we are hardly surprised that earlier impressive proposals for reform, written to appeal to state interests, have not gained traction.

For these kinds of situations, recourse is sometimes made to “political will”: all we need are a few courageous leaders who could motivate us to do the right thing (that all reasonable people would recognize as needing doing). But we are quite skeptical, in our current historical moment, that such leadership will come from the top ranks of politicians. The influence (or fear) of populist politics, mixed with virulent forms of Islamophobia, appears to be playing a larger role in domestic political debates than the number of its proponents should merit. The German government walked back from its welcoming and generous policies towards Syrian refugees after facing significant opposition from right of center political groups (and from its fellow European states). And the election of the Trump administration led to an executive order that suspended the U.S. refugee program for 180 days and ultimately cut refugee admissions by more than 50 percent.

There may be space, however, at lower levels of government for progressive reform. This may seem like a curious argument, but we base it on this reasoning. Entire bureaucracies in states in the global North exist to handle refugee matters, and they are filled with many people who are dedicated to the refugee cause. Many senior staff (quietly) reject the anti-refugee policies of political leaders. Because much policy development and most program implementation is carried out at these quieter levels, steps can be taken—not in contravention of publicly announced government policies, but in areas with significant import for refugees and reform of the system. Career officials are likely to be more open to proposals based on claims from morality than political leaders; it is part of the mission of their agencies and often the reason they sought employment there.

Examples of policy-making at the mid-level could include funding for NGOs to pursue refugee rights agendas; urging UNHCR to establish a global refugee congress that would choose representatives to attend UNHCR Executive Committee meetings; development agency support for efforts to create a “merchant bank” to promote private sector investment in refugee-hosting communities.²²⁸ As we have repeatedly suggested, the claim of a “refugee crisis” is overblown. The “refugee problem” is actually a manageable set of issues, if high politics would permit it to be handled at regular politics levels. That is, it is at these quieter levels of government that most refugee policy should and could be constructed.²²⁹

It might well be that states—at whatever level—are not willing to pursue an appropriately ambitious reform agenda. If so, two possibilities present themselves: (1) to work with entities other than (powerful) states; and (2) to induce reform by holding states accountable for the failing system they have created and maintain.

Beyond states

We have noted historical examples of successful regional approaches to refugee situations, including the Marshall Plan, the Southeast Asian CPA, and CIREFCA. The 2017 Nairobi Declaration signed by Intergovernmental Authority of Development (IGAD) member states does not provide a solutions strategy in the sense of binding commitments for return, resettlement, and local integration. It is more of an agreement paving the way to solutions—emphasizing investment and debt relief in Somalia, voluntary return, and inclusion of

refugees in hosting state economies. But it is a strong example of how regional processes can serve as platforms for agreements that push individual states toward policies that they have been hesitant to adopt on their own. (It is somewhat remarkable to see Kenya—in the same year it announced its decision to close the Dadaab refugee camp and send refugees home—sign a document with a stated objective of “maintaining protection and promoting self-reliance” for Somali refugees in Kenya.) Similar efforts are now underway in Central America regarding forced migrants from the Northern Triangle countries of El Salvador, Guatemala and Honduras.²³⁰

Progress may also be possible at the subnational level. Officials at the local level have, in many states, adopted policies more inclusive toward refugees than national policy makers. A number of “networks” of mayors have been established (dealing with broader migration issues as well as the reception and integration of refugees); and city-to-city refugee resettlement initiatives have been proposed. Local policies, of course, will not be able to conflict with national laws and regulations that may be less favorable to displaced populations. But—as for career officials in state bureaucracies—there is likely to be sufficient space for development of programs more welcoming to refugees.²³¹

State accountability

Inducements, incentives, and moral arguments may be unsuccessful in influencing state, regional, and subnational policy and action. To state this frankly, it is likely that states will have to be challenged and pressured to live up to existing commitments, to recognize that they have *regime responsibilities* that transcend their narrow interests, and that regime success is very much within their broader interest. That is, we must think hard about how to enforce state accountability to repair the regime that states and their institutions have permitted to fall into disrepair.

At the global level

The current system is remarkably thin on accountability. One of the High Commissioner’s responsibilities, according to UNHCR’s Statute, is “supervising” the application of “international conventions for the protection of refugees.” However this authority is rarely invoked in any formal way.²³² No international court hears claims that states are violating the Convention or other applicable human rights norms, and no treaty body has been established to monitor and report on member state compliance.²³³ Major donors to UNHCR request detailed reports on how money is spent, but that kind of fiscal oversight, to the extent it is effective, invariably pushes the agency’s programs further into alignment with donor interests. Meanwhile, accountability in the other direction—that is, accountability of states to UNHCR or to each other (let alone to refugees)—is virtually nonexistent. The Executive Committee receives a large amount of documentation from UNHCR but it rarely probes into member state behavior.

A number of interesting proposals for enhancing accountability have been made. B.S. Chimni has recommended establishing a “Refugee Rights Committee,” with states required to report on a regular basis.²³⁴ A similar proposal is included in a model international convention on mobility drafted by the Columbia Global Policy Initiative, which has extensive provisions relating to the rights of forced migrants. It would require states to file regular reports with the Secretary General, for review by a committee established under the convention.²³⁵ But, while these ideas (and others) are intriguing, and are certainly steps in

the right direction, they focus attention almost exclusively on hosting states.²³⁶ Absent a robust regime of responsibility-sharing, such initiatives could have the effect of absolving third states and the wider international community of their role in creating the status quo of rightless refuge and inequitable responsibility-sharing and their correlative obligation to solve it.

Rather than, or in addition to, monitoring host states, another idea would be to bring developing host states together as a negotiating bloc. In recent years, European states have been able to prevent refugee influxes through harsh enforcement policies and practices at their borders and by negotiating deals with individual hosting states that condition development and other financial assistance on cooperation with deterring flows.²³⁷ Negotiating as a bloc, hosting states might well be able insist on a significant expansion in responsibility-sharing among states of the global North. There is a risk that hosting states might wield such power in ways deleterious to refugees. But the risk of a race to the bottom is far greater under the status quo. Indeed, it is no coincidence that just weeks after the EU-Turkey deal came to fruition, Kenya threatened to close the Dadaab refugee camp—the implicit point being made was that hosting states could use their (mis)treatment of refugees as a bargaining chip for enhanced aid. A united front among host states could lead, by contrast, to movement in the opposite direction: toward a global system of responsibility-sharing.

At the national level

Accountability at the national level can be pursued through legal and political means. As noted above, lawsuits—perhaps supported by international organizations and NGOs—can be brought on behalf of refugees in hosting state courts. Courts in many states may not be open to refugees or may present decidedly unfavorable venues for such claims. But where courts are open, a legal campaign can and should be launched. In a world that well understands the potential benefits of human rights litigation, this is surprisingly unexplored territory.²³⁸

A second strategy is political organization and pressure. It is common, in today's world, to remark on the influence of populist objections to refugees and migrants in general. But hand-wringing is not a substitute for political action. A politics of exclusion and repression must be met with a political movement for inclusion and rights. We have seen small but important examples: a convoy of cars from Vienna to Budapest to transport Syrian refugees to more friendly spaces; spontaneous demonstrations at U.S. airports in response to the Trump executive orders that sought to suspend the admission of Muslim migrants and all refugees to the United States; a march of thousands of persons in Madrid to commemorate World Refugee Day and call for increased admissions of refugees to Spain; an Ai Weiwei installation that shrouded the pillars of the Berlin Opera House with life preservers discarded on Greek beaches by Syrian refugees.

These beginnings will need to be organized into a larger transnational movement for refugee rights. Importantly, it can and should be organized by refugees themselves. As we have suggested in chapter three, recognizing the role of refugee voices is a vital principle of reform of the system. Here, new technologies can amplify voice, connect refugees around the world, and facilitate the creation of a global political movement.

D. Concluding reflections

In an ideal world, persons would not be forced to flee their homes; and those who did flee would receive care and then return home when the fighting stops or the water recedes. This of course is not our world. Most who flee never return to their homes—and many not to their home countries. Those who cross international borders (about one-third of all fleers) will find succor in neighboring states for a while, but will live lives in limbo for years with decreasing assistance from the international community. A very few will be permitted to rebuild their lives in a third state. Decisions to flee are difficult decisions; and the human costs of flight are obvious, most particularly to the displaced persons themselves. Family life, livelihoods, schooling, communities all are disrupted. This shattering of everyday life is complicated enormously by the political arrangements that constitute a regime of nation-states. Borders, in this world, mean much—providing safety to fleers but also subjecting them to national and international technologies of aid and discipline. Loss of agency is, too often, the price paid for sustenance.

Those assisting fleers know all this. They understand the objectification of the displaced—reduced to numbers in order to support appeals for funding, characterized as “illegal migrants” to justify harsh measures of control, redefined as sources of cheap, commodified labor in order to incentivize policies conducive to self-reliance. Humanitarianism saves lives, but it does not restore the humanity of refugees. Neither do development approaches that chiefly serve ulterior purposes (from border management to business interests to counterinsurgency). The refugee “problem” is a political one. The solution to it is as well.

So we conclude this volume with some reflections on states, refugee agency, and politics. Without the pressure of political action, states are likely to do little to promote and restore refugee agency.

Of states

Refugees are not simply people forced to flee their homes; they are people who, forced to leave their homes, come into contact with the power of other states. In this way, the refugee reaffirms rather than challenges “stateness”—of the expelling state, the states through which the refugee transits, and the destination state on whose door the refugee knocks. States are present in every part of the displacement story: they create refugees; the international community of states fails to stop conflicts that produce flight across borders; hosting states deny rights to displaced persons; and other states prevent onward movement that would significantly enhance refugee prospects. States may give international humanitarian organizations funding to provide tents and blankets, but they hold the keys and the guns.²³⁹

We tend to see the existence of refugees as evidence that the state system has failed.²⁴⁰ Thus political theorists have seen the protection of refugees as a necessary part of a better functioning system of states. David Owen has argued that refugee protection is a form of “legitimacy repair” for the international regime of states.²⁴¹ Evan Criddle and Evan Fox-Decent have written that “[p]rovision of asylum is the juridical price of statehood.”²⁴²

But it just may be that the state system finds refugees more useful than delegitimizing. In every camp, on every boat, at every border, states run the game—showing beneficence or a harder edge, they make clear that they will define legality and illegality. In the sovereign control of their borders, they may admit the needy and the persecuted—for political or moral reasons that serve state interests. If too many people flee hardship across

borders, states can label such mass movements “crises” that justify strong assertions of state authority: Australia “excised” islands from its “migrant zone” in order to adopt measures that repelled asylum seekers; the EU and Turkey reached a deal to keep Syrian refugees from European shores (the refugees were not consulted); Hungary built fences; Kenya and Ethiopia keep refugees in camps; the United States provided significant funding to Mexico to return Central Americans from Mexico’s southern border. At the end of day, states are stronger when there are refugees in the world.

Of agency

The current refugee regime gets agency wrong in both directions, failing to recognize agency where it exists and tolerating structures and practices that severely restrict it.

Flees of necessity have in fact more agency than is usually acknowledged under a system of aid that figures them primarily as victims. Although their freedom to act is often quite constrained, ultimately they choose when and how to leave and (often but not always) where to go. Once they have arrived elsewhere, they begin to develop ways of surviving that inevitably link them to their place of settlement. If permitted, they would contribute to hosting or resettlement communities, and would move to places where they could be productive members of society.

At the same time, refugee agency is subject to significant restraint. It is limited by hosting states that restrict refugees’ movement and exclude them from social programs and economic opportunities, and by other states that deter their arrival, put them in long-term detention, label them terrorists and freeloaders, or simply let them die at sea. International organizations undermine refugee agency by “caring for” them rather than seeking to empower them. In few areas of human life is human dignity more at risk.

Restoring agency serves values of human dignity and freedom, giving refugees space to make their own choices about how to remake their lives. It lies at the core of international protection, properly conceived, and is materially advanced by a regime of rights, properly enforced.

We have suggested that mobility must be seen as a central aspect of refugee agency. The general path of a refugee today is from forced mobility (flight) to forced immobility (the second exile). The central problem facing the international refugee regime is not the movement of refugees toward Europe or the United States. It is the failure to construct a system of responsibility-sharing that would promote lawful movement beyond countries of first asylum and support inclusion of the displaced in the economic and social life of hosting and receiving states.

Were refugee rights respected and mobility facilitated, we can see a post-Arendtian world where other “solutions” for refugees are imaginable beyond those that call for permanent membership in a political community. As we have suggested, the international community is deeply wedded to the traditional three durable solutions. This is not surprising: in a world of discrete states with discrete populations and no means beyond states for enforcing rights and providing opportunities, membership remains the *ne plus ultra*. But this world—if it ever truly existed—is not today’s world. Movements of people, interpolations of transnational legal norms into domestic systems, the global reach of commercial relations, easy transfers of huge sums of money, the reach of the internet—to mention only a few of the forces that both define and buffet the nation-state—put paid to notions that territorial limits determine life outcomes. It is not necessary to be able to predict the future of the international system to consider solutions to “the refugee problem” that are not grounded in

state membership. In such a world, forced migrants might still be considered “exiles”—yearning for a day of return. But with rights and mobility, they would no longer be in need of international protection as refugees.

Of aid and politics

Refugee assistance and protection are largely seen as emanating from a humanitarian impulse. A crucial aim of humanitarianism is to take the politics out of international assistance to displaced persons: persons forced to flee over international borders are to be cared for whatever the politics of the state they were leaving or the politics of the state in which they were arriving. Seen this way, humanitarianism is not concerned with accountability or with power or with injustice. When we see a drowning child, we want to rescue her; and in providing that assistance we rarely stop to ask: how do we hold responsible those who exposed her to danger, who is accountable so that her suffering is healed, how do we prevent similar harms in the future? “[H]umanitarianism is about feelings rather than rights,” Miriam Ticktin has written; “It is about compassion, not entitlement. Humanitarian exceptions are precisely that—exceptions to regular laws. And they are usually made on the basis of certain kinds of emotion. When migrants are spoken of as humanitarian victims, we take them out of the range of the law to where they have the right to be free from violence.”²⁴³

Development assistance—despite its longer time horizons and greater resources than humanitarian aid—poses similar problems. Cloaked in the rhetoric of technical expertise, development aid seeks to “alleviate” poverty, in effect rendering poverty as a scientific rather than a political problem. Livelihoods programs, microfinance, and other approaches intended to improve the lives of the poor are not directed at ameliorating the structural causes of poverty in the first place. In many ways, such approaches reinforce the latter by rendering systems of mass disenfranchisement slightly more palatable.

These are legal and political issues—ones that are rarely addressed anywhere in the international system of refugee protection. The appearance of neutrality and non-discrimination and expertise is vital to sustaining support for the international aid system. But this appeal to the non-political nature of humanitarian relief and development assistance is surely carried too far if it is used to argue against a political approach to securing and supporting international protection.²⁴⁴ Neutrality in the face of inequity is not neutral.

The principles of protection are not self-enforcing. They must be asserted and fought for. That requires more than the enlightened or self-regulating actions of international organizations. It calls for avowedly political action—and perhaps new kinds of political imagining—at all levels of governance.²⁴⁵

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 Ruadel, “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 Humanitarian Action 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>.

⁴³ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, (New York City: Basic Books, 1983), p. 48.

⁴⁴ See E. Padilla and P. Phan, eds., *Theology of Migration in the Abrahamic Religions*, (New York City: Palgrave Macmillan, 2014).

⁴⁵ See Art. 55, Section C; Preamble, 1951 Convention Relating to the Status of Refugees; Preamble, International Covenant on Economic, Social, and Cultural Rights, 1966.

⁴⁶ See James C. Hathaway, “Why Refugee Law Still Matters,” *Melbourne Journal International Law*, no. 8 (2007): pp. 89-103.

⁴⁷ Aristide R. Zolberg, Astri Suhrke, Sergio Aguayo, *Escape from Violence: Conflict and Refugee Violence in the Developing World*, (Oxford: Oxford University Press, 1989), pp. 258-262; Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*, (Ithaca: Cornell University Press, 2013), pp. 12-15.

⁴⁸ Atle Grahl-Madsen, “Protection of Refugees By Their Country of Origin,” *Yale Journal of International Law*, no. 11 (1986): p. 3, <http://digitalcommons.law.yale.edu/yjil/vol11/iss2/3>; Louise Holborn, *Refugees, a Problem of Our Time: the Work of the United Nations High Commissioner for Refugees, 1951-1972*, (Lanham: Scarecrow Press, 1975), pp. 23-70.

⁴⁹ Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees of May 12, 1926.

⁵⁰ For Arendt, the refugee was “an outlaw by definition.” Here is her classic description:

The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion—formulas which were designed to solve problems *within* given communities—but that they no longer belong to any community whatsoever . . . The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective. Something *much more fundamental* than freedom and justice, which are the rights of citizens, is at stake when belonging to the community into which one is born is no longer a matter of course and not belonging is no longer a matter of choice . . . They are deprived not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion. Privileges in some cases, injustices in most, blessings and doom are meted out to them according to accident and without any relation whatsoever to what they do, did, or may do. We became aware of *the existence* of the *right to have rights* (and that means to live in a *framework* where one is judged by *one’s actions* and *opinions*) and a right to belong to some kind of *organized* community.

Hannah Arendt, *The Origins of Totalitarianism*, (New York City: Harcourt, 1973), p. 297.

⁵¹ John Hope Simpson, *The Refugee Problem: Report of a Survey*, (Oxford: Oxford University Press, 1939), p. 45.

⁵² The Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees was ratified by 54 states. Louise Holborn, *Refugees, a Problem of Our Time: the Work of the United Nations High Commissioner for Refugees, 1951-1972*, (Lanham: Scarecrow Press, 1975), pp. 7-9.

⁵³ Claudena M. Skran, *Refugees in Interwar Europe: The Emergence of a Regime*, (Oxford: Clarendon Press, 1995), p. 122.

⁵⁴ The traditional three durable solutions are: repatriation to the country of origin; local integration in the country of asylum; or resettlement to a third country. See Chapter 4.

⁵⁵ Atle Grahl-Madsen, “Identifying the World’s Refugees,” *The Annals of the American Academy of Political and Social Science*, no. 467 (1983): pp. 11–23.

⁵⁶ 1933 Convention, Article 3 League of Nations, *Convention Relating to the International Status of Refugees*, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663, available at: <http://www.refworld.org/docid/3dd8cf374.html>. As the British delegate to the conference, J. L. Rubinstein, insisted, it was “an instrument of the first importance”:

It betters the Nansen certificate system, it restricts abuses in the practice of expulsion, and it regulates certain points of private international law. Furthermore, it secures for refugees freedom of access to the law courts, and the most favorable treatment in respect of social life and assurance and of taxation; it exempts them from the rule of reciprocity, it provides for the optional institution of refugee committees in every country, and it secures certain modifications of the measures restricting unemployment.

J. L. Rubinstein, “The Refugee Problem,” *International Affairs*, no. 5 (September 1936): p. 738.

⁵⁷ Louise Holborn, *Refugees, a Problem of Our Time: the Work of the United Nations High Commissioner for Refugees, 1951-1972*, (Lanham: Scarecrow Press, 1975), p. 15.

⁵⁸ Thus the 1938 Convention stated: “[T]he term ‘refugees coming from Germany’ shall be deemed to apply to: (a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or in fact, the protection of the German Government.” Article 1, League of Nations, *Convention concerning the Status of Refugees Coming From Germany*, February 10, 1938, League of Nations Treaty Series, Vol. CXCII, No. 4461, page 59, available at: <http://www.refworld.org/docid/3dd8d12a4.html>.

⁵⁹ Hannah Arendt, *The Origins of Totalitarianism*, (New York City: Harcourt, 1973), pp. 279-281.

⁶⁰ In its first session, the General Assembly declared “the problem of refugees and displaced persons of all categories is one of immediate urgency.”

⁶¹ United Nations, *Constitution of the International Refugee Organization*, 15 December 1946, United Nations, Treaty Series, vol. 18, p. 3, available at: <http://www.refworld.org/docid/3ae6b37810.html>.

⁶² Gervase J.L. Coles, “The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry,” in *Human Rights and the Protection of Refugees under International Law*, edited by Alan E. Nash (Montreal: Institute for Research on Public Policy, 1988), pp. 195-209.

⁶³ Quoted in UN High Commissioner for Refugees (UNHCR), “Refugees and Stateless Persons and Problems of Assistance to Refugees,” *Report of the United Nations High Commissioner for Refugees*, January 1952, A/2011, para. 48, available at <http://www.unhcr.org/en-us/excom/unhcrannual/3ae68c3d8/refugees-stateless-persons-problems-assistance-refugees-report-united-nations.html>.

⁶⁴ IRO Constitution, Annex 1 1-2. United Nations, *Constitution of the International Refugee Organization*, 15 December 1946, United Nations, Treaty Series, vol. 18, p. 3, available at: <http://www.refworld.org/docid/3ae6b37810.html>.

⁶⁵ IRO Constitution Annex 1 Part 1(A)(3). United Nations, *Constitution of the International Refugee Organization*, 15 December 1946, United Nations, Treaty Series, vol. 18, p. 3, available at: <http://www.refworld.org/docid/3ae6b37810.html>.

⁶⁶ Id. 1(C)(1)(a)(i).

⁶⁷ Art 2(1).

⁶⁸ Louise Holborn, *Refugees, a Problem of Our Time: the Work of the United Nations High Commissioner for Refugees, 1951-1972*, (Lanham: Scarecrow Press, 1975), pp. 66-68; UN General Assembly, “Refugees and Stateless Persons,” *Report of the Secretary-General*, October, 26 1949, A/C.3/527, para. 21 (reporting IRO’s views on “disabilities” relating to conditions of residence, international travel and

legal status in countries of residence to which refugees are subject in states of asylum and for which protection is needed), available at: <http://www.refworld.org/docid/3ae68bf00.html>.

⁶⁹ The United States prevented further reauthorization of the IRO, sought establishment of a different refugee agency and only reluctantly came to support establishment of UNHCR. Louise Holborn, *Refugees, a Problem of Our Time: the Work of the United Nations High Commissioner for Refugees, 1951-1972*, (Lanham: Scarecrow Press, 1975), p. 40; and Louise Holborn, *The International Refugee Organization: A Specialized Agency of the United Nations, Its History and Work 1946–1952*, (Oxford: Oxford University Press, 1956), p. 200.

⁷⁰ UNHCR Statute, II(8).

⁷¹ According to a 1949 report of the Secretary General, which considers questions relating to an organization to succeed the IRO, the purpose of protection was to “ensure that refugees . . . shall not be subject to legal and social disabilities arising from their peculiar status.” IRO had provided to the Ad Hoc Committee a categorization of such disabilities under the headings of: (1) conditions of residence (e.g., residence permits; temporary asylum), (2) international travel (lack of national passport), and (3) legal status of refugees in countries of residence (personal status, inability to benefit from reciprocity agreements, eligibility for relief, social security, family allowances). UN General Assembly, *Refugees and Stateless Persons: Report of the Secretary-General*, October 26, 1949, A/C.3/527, para. 21, available at: <http://www.refworld.org/docid/3ae68bf00.html>.

⁷² E.g., Atle Grahl-Madsen, *The Status of Refugees in International Law: Refugee Character*, (The Hague: A.W. Sijthoff, 1966), pp. 7-15.

⁷³ Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, September 10, 1969, 1001 U.N.T.S. 45, Art. 1:

The term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

When the U.S. Congress adopted the 1980 Refugee Act, whose purpose was to bring U.S. law into conformity with the Refugee Convention and the Protocol, it left out the Convention’s use of the term protection:

The term refugee means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Immigration and Nationality Act, sec. 101(a)(42).

⁷⁴ Interestingly, the rights provided were in the “comparative” form of the 1933 Convention (refugees shall have the same right to X as provided to [citizens or foreign nationals]), not the universalistic language of modern human rights conventions.

⁷⁵ See Report of the Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons—Memorandum by the Secretary General, January 3, 1950: noting that:

The abolition of the International Refugee Organization will herald a new phase of the refugee problem. This phase . . . will be characterized by the fact that the refugees will lead an independent life in the countries which have given them shelter. With the exception of the “hard core” cases, the refugees will no longer be maintained by an international organization as they are at present. They will be integrated in the economic system of the

countries of asylum and will themselves provide for their own needs and for those of their families. This will be a phase of the settlement and assimilation of the refugees. Unless the refugee consents to repatriation, the final result of that phase will be his integration in the national community which has given him shelter. It is essential for the refugee to enjoy an equitable and stable status, if he is to lead a normal existence and become assimilated rapidly.

UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General*, January 3, 1950, E/AC.32/2, available at: <http://www.refworld.org/docid/3ae68c280.html>.

⁷⁶ See generally T.A. Aleinikoff, "The Mandate of the Office of the High Commissioner for Refugees", in, *Research Handbook on International Law and Migration*, edited by Vincent Chetail and Celine Bauloz (Cheltenham: Edward Elgar Publishing, 2014) pp. 389-416.

⁷⁷ James C. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law," *Harvard International Law Journal*, no. 31 (1990): p. 129, p. 157, and p. 165.

⁷⁸ As quoted in, "Possible Shift in Emphasis in Program of UNHCR," *Despatch from the Mission in Geneva to the Department of State*, Department's Airgram G-190 rptd USUN New York G-74, Geneva, April 6, 1961, <https://history.state.gov/historicaldocuments/frus1961-63v25/d311>.

⁷⁹ Atle Grahl-Madsen, "Refugees and Refugee Law in a World in Transition", *Michigan Journal of International Law*, no. 3 (1982): p. 67, <https://repository.law.umich.edu/mjil/vol3/iss1/4>.

⁸⁰ B.S. Chimni, "The Geopolitics of Refugee Studies: A View from the South," *Journal of Refugee Studies*, no. 11 (January 1998): p. 350, and pp. 355-360.

⁸¹ UN High Commissioner for Refugees (UNHCR), Opening Statement by Mr Poul Hartling, United Nations High Commissioner for Refugees, at the Consultations on the Arrivals of Asylum-Seekers and Refugees in Europe, Geneva, May 28, 1985, <http://www.unhcr.org/en-us/admin/hcspeeches/3ae68fd028/opening-statement-mr-poul-hartling-united-nations-high-commissioner-refugees.html>.

⁸² See e.g., UNHCR, *Report on International Protection (Submitted by the High Commissioner)*, March 3, 1964, A/AC.96/227, available at: <http://www.refworld.org/docid/3ae68bff8.html>.

⁸³ Unless a security risk or convicted of a particularly serious crime. Art 33(2).

⁸⁴ It is difficult to locate a consistent and comprehensive definition of international protection in UNHCR documents. Sometimes the concept of "surrogate protection" is invoked (incorrectly, in our view). In its 1993 Note on Protection, UNHCR states: "International protection as provided by countries of asylum in cooperation with UNHCR is an effort to compensate for the protection that refugees should have received in their own countries, and its objective is not fulfilled until refugees once again enjoy protection as full-fledged members of a national community." UN General Assembly, *Note on International Protection (submitted by the High Commissioner)*, August 31, 1993, A/AC.96/815, available at: <http://www.refworld.org/docid/3ae68d5d10.html>. At other times the organization seems to get it just about right. Here is UNHCR's definition in a 2005 self-study module, An Introduction to International Protection, at 17:

International protection can be defined as all actions aimed at ensuring the equal access to and enjoyment of the rights of women, men, girls and boys of concern to UNHCR, in accordance with the relevant bodies of law (including international humanitarian, human rights and refugee law).

The international protection of refugees begins with securing their admission to a safe country of asylum, the grant of asylum and ensuring respect for their fundamental human rights, including the right not to be forcibly returned to a country where their safety or survival are threatened (the principle of non-refoulement). It ends only with the attainment of a durable solution.

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- ⁸⁵ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html>; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, December 18, 1979, A/RES/34/180, available at: <http://www.refworld.org/docid/3b00f2244.html>; UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>; UN General Assembly, *International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families: resolution / adopted by the General Assembly*, December 18, 1990, A/RES/45/158, available at: <http://www.refworld.org/docid/3b00f2391c.html>.
- ⁸⁶ We rely on Antonio Fortin's account. Antonio Fortin, "The Meaning of "Protection" in the Refugee Definition," *International Journal of Refugee Law*, no. 12 (October 2000): pp. 548–576.
- ⁸⁷ See Fortin, describing this as a move from "external" to "internal" protection.
- ⁸⁸ One can raise the analysis to the metaphorical level by holding that persecution severs the bonds of the state-citizenship relationship. See Andrew Schacknové, "Who is a Refugee?" *Ethics*, no. 95 (Jan 1985): pp. 274-284; thus, surrogate protection is necessary for persons who have been rendered virtually stateless due to persecution.
- ⁸⁹ Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*, (Ithaca: Cornell University Press, 2013), pp. 1-10.
- ⁹⁰ James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, (Cambridge: Cambridge University Press, 1991); James C. Hathaway, "Reconceiving Refugee Law as Human Rights Protection," *Journal of Refugee Studies*, no. 4 (January 1991): pp. 113–131; James C. Hathaway, *The Rights of Refugees Under International Law*, (Cambridge: Cambridge University Press, 2005), pp. 659-695.
- ⁹¹ *Islam v. Sec'y of State for the Home Dept.*, House of Lords, [1999] 2 A.C. 629, relying on Gender Guidelines for the Determination of Asylum Claims in the UK, and the work of James C. Hathaway, "Reconceiving Refugee Law as Human Rights Protection," *Journal of Refugee Studies*, no. 4 (January 1991): pp. 113–131; and James C. Hathaway, *The Rights of Refugees Under International Law*, (Cambridge: Cambridge University Press, 2005).
- ⁹² Antonio Fortin, "The Meaning of 'Protection' in the Refugee Definition," *International Journal of Refugee Law*, no. 12 (October 2000): pp. 548–576.
- ⁹³ Susan Kneebone, "Refugees as Objects of Surrogate Protection: Shifting Identities," in *Refugee Protection and the Role of the Law: Conflicting Identities*, edited by Susan Kneebone, Dallal Stevens, Loretta Baldassar, (Oxon: Routledge, 2014), pp. 98–121.
- ⁹⁴ Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime*, (Ithaca: Cornell University Press, 2009), pp. 5-8, and pp. 25-27; Alexander Betts, Gil Loescher, and James Milner, *UNHCR: The Politics and Practice of Refugee Protection*, (Abingdon: Routledge, 2012), pp. 83; UN High Commissioner for Refugees (UNHCR), *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, March 15, 2016, HCR/EG/SLV/16/01, p. 43, available at: <http://www.refworld.org/docid/56e706e94.html>.
- ⁹⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence Under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions*, 2 December 2016, HCR/GIP/16/12, available at: <http://www.refworld.org/docid/583595ff4.html>.
- ⁹⁶ Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*, (Ithaca: Cornell University Press, 2013), pp. 173-188.
- ⁹⁷ Aristide R. Zolberg, Astri Suhrke, Sergio Aguayo, *Escape from Violence: Conflict and Refugee Violence in the Developing World*, (Oxford: Oxford University Press, 1989), pp. 29-36.
- ⁹⁸ See the Nansen Initiative's Agenda for Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf; UNHCR Policy Brief, Displacement Related to Climate Change, United Nations Framework Convention On Climate

Change (UNFCCC) 22nd Conference Of Parties (COP 22), Marrakesh, Morocco available at <http://www.unhcr.org/en-us/protection/environment/581870687/policy-brief-displacement-at-cop-22.html>; IPCC, “IPCC Fourth Assessment Report (AR4),” *Ipac* 1 (2007): 976. Informal group on Migration/Displacement and Climate Change of the IPCC 2008. “Climate Change, Migration and Displacement: Who Will Be Affected?”; Angela Williams, “Turning the Tide Recognizing Climate Change Refugees in International Law,” *Law & Policy*, no. 30 (2008): pp. 502-529; B. Docherty and T. Giannini, “Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees,” *Harvard Environmental Law Review*, no. 33 (2009): pp. 349-403; Tiffany T.V. Duong, “When Islands Drown: The Plight of “Climate Change Refugees” and Recourse to International Human Rights Law,” *Journal of International Law—Penn Law*, no. 31 (2010): p. 1239; Etienne Piguet, “Climate Change and Forced Migration,” *Change, New Issues in Refugee Research*, no. 153 (2008): pp. 1–13; Michael B. Gerrard, Gregory E. Wannier, *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate*, (Cambridge: Cambridge University Press, 2013).

⁹⁹ See Alex Aleinikoff, “The Mandate of the Office of the High Commissioner for Refugees,” in *Research Handbook on International Law and Migration*, edited by Vincent Chetail and Celine Bauloz (Cheltenham: Edward Elgar Publishing, 2014), pp. 389-416.

¹⁰⁰ *Convention Governing the Specific Aspects of Refugee Problems in Africa (“OAU Convention”)*, September 10, 1969, 1001 U.N.T.S. 45, available at: <http://www.refworld.org/docid/3ae6b36018.html>; Regional Refugee Instruments & Related, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, November 22, 1984, available at: <http://www.refworld.org/docid/3ae6b36ec.html>.

¹⁰¹ IDP Guiding Principles, Introduction, sec. 2.

¹⁰² UNHCR’s mandate does not extend to more than five million Palestinian refugees under the mandate of UNRWA.

¹⁰³ Internal Displacement Monitoring Center and the Norwegian Refugee Council, *Global Estimates 2015: People displaced by disaster*, <http://www.internal-displacement.org/library/publications/2015/global-estimates-2015-people-displaced-by-disasters/>

¹⁰⁴ Consider the example of displaced Somalis. Hundreds of thousands of Somalis fled in 2011, facing targeted attacks by Al-Shabaab, generalized violence and the consequences of extreme drought. Indeed, these “causes” are interrelated to each other: the harm of the drought was magnified by the insecurity occasioned by the violence; and violence is likely to increase in situations of life-threatening scarcities. Persons fleeing civil violence no doubt are desperately concerned for their physical safety and their livelihoods; and yet many (perhaps most) people in similar circumstances do not flee.

¹⁰⁵ For some time, scholars have suggested broader categories of protection. In an influential treatment, Andrew Schacknove argues that concept of refugee should apply “to persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible.” Andrew Schacknove, “Who is a Refugee?” *Ethics*, no. 95 (Jan 1985): pp. 274-284. In a similar vein, Alexander Betts has developed the concept of “survival migrant” to bring within international concern “persons outside their country of origin because of an existential threat to which they have no access to a domestic remedy or resolution.” Betts further defines “existential threat” to include “core elements of dignity,” perhaps grounded in the concept of “basic rights.” Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*, (Ithaca: Cornell University Press, 2013): pp. 188. The concept of “fleeer of necessity” is similar to these proposals—in moving considerably beyond the Convention’s definition of refugee and by taking into account “new drivers” of displacement (to use Betts’ term). But we would not add the extra step of having to demonstrate the abridgment of a “basic need” or “basic right.” (Note that these terms are different from a better-defined category of fundamental human rights.) In situations of mass flows, a number of basic needs and rights will be plainly at stake—there will be no need for showing which person has fled due to the violation of which particular need or right. (Furthermore, we have difficulty

understanding the need for Schacknové's additional element of a person being "so situated that international assistance is possible." The ability to help, it seems to us, is distinct from a duty to help.) David Owen's thoughtful consideration of the issue also relies upon a breach of basic rights by the home state. David Owen, "In Loco Civitatis: On the Normative Structure of the International Refugee Regime," in *Migration in Political Theory: the Ethics of Movement and Membership*, edited by S. Fine and L. Ypi (Oxford: Oxford University Press, 2016), pp. 269–90 (a refugee as "one whose basic rights are unprotected by their state and can only be protected through recourse to the international community acting *in loco civitatis*, where it can so act without breaching the constitutive norms of the regime of governance").

Betts appears to be moving beyond his earlier formulation of "survival migrant." In a recent book, he and his co-author with Paul Collier suggest a "*force majeure* standard." For persons with a "fear of serious harm" upon return, the test would be "when would a reasonable person not see her/himself as having a choice but to flee." Alexander Betts and Paul Collier, *Refugee: Rethinking Refugee Policy in a Changing World*, (Oxford: Oxford University Press, 2017), p. 52. This is getting close to our analysis of "flee of necessity"—particularly in its jettisoning of both a requirement of demonstrating fear of *persecution* and violation of a "basic right." But it still falls short of the mark by seeing the fleeer to be protected as one who does not have a choice. Fairly applied, that test would not reach most of the forcibly displaced whom Betts and Collier seek to protect and assist. In our view, the relevant question is whether flight is a reasonable response, not whether it is the only choice available.

¹⁰⁶ Jessica Lehman, "Environmental Refugees: The Construction of a Crisis," UHU-EHS Summer Academy (2009), p. 1; Etienne Piguet, "Climate Change and Forced Migration" no. 4 (UNHCR, 2008); Camillo Boano, Roger Zetter and Tim Morris, "Environmentally Displaced People: Understanding the Linkages Between Environmental Change, Livelihoods and Forced Migration," Refugee Studies Centre, Forced Migration Policy Briefing No. 1 (2008); Diane C. Bates, "Environmental Refugees? Classifying Human Migrations Caused by Environmental Change," *Population and Environment*, no. 23 (2008): p. 465.

¹⁰⁷ Jane McAdam, *Climate Change, Forced Migration, and International Law*, (Oxford: Oxford University Press, 2012); Jane McAdam, "Refusing 'Refuge' in the Pacific: (De)Constructing Climate-Induced Displacement," *International Law*, no. 6, University of New South Wales Faculty of Law Research Series Paper 27, (2010).

¹⁰⁸ Aristide R. Zolberg, Astri Suhrke, Sergio Aguayo, *Escape from Violence: Conflict and Refugee Violence in the Developing World*, (Oxford: Oxford University Press, 1989), pp. 260-262 (extreme poverty as form of violence for which international protection is warranted).

¹⁰⁹ The World Bank has noted the special vulnerabilities of displaced persons that justify a differentiated development response. World Bank, "Forced Displacement and Development," Washington DC, March 25, 2016, pp. 8-10

<http://siteresources.worldbank.org/DEVCOMMINT/Documentation/23713856/DC2016-0002-FDD.pdf>

¹¹⁰ 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.

¹¹¹ 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>

¹¹² 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.

¹¹³ See Alexander Betts and Paul Collier, *Refuge: Rethinking Refugee Policy in a Changing World*, (Oxford: Oxford University Press, 2017), p. 196.

¹¹⁴ See Peter Nyers, *Rethinking Refugees: Beyond States of Emergency*, (Oxon: Routledge, 2006), pp. 47-48.

¹¹⁵ 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”).

¹¹⁶ UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), available at: <http://www.refworld.org/docid/3b00f05a2c.html>.

¹¹⁷ 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>.

¹¹⁸ “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.

¹¹⁹ Article 8(1) (emphasis supplied), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&qid=1487456102470&from=FR>.

¹²⁰ *Ibid.* Art. 9.

¹²¹ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (Oxford: Oxford University Press, 2007), p. 117.

¹²² 1933 Convention, Art. 3.

¹²³ 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”).

¹²⁴ 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).

¹²⁵ 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”).

¹²⁶ 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 subsidiary protection. (Kälin was UN rapporteur on IDPs and advisor to the Nansen initiative.) <http://www.unhcr.org/4f33f1729.pdf>.

¹²⁷ *Ibid.* at 66.

¹²⁸ And, as previously mentioned, the right “to seek and to enjoy” asylum. Art. 16.

¹²⁹ 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).

¹³⁰ 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.)

¹³¹ 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.

¹³² 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*).

¹³³ 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>.

¹³⁴ 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.

¹³⁵ 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>.

¹³⁶ See e.g., S.P. Chablani, “The Rehabilitation of Refugees in the Federal Republic of Germany,” *Weltwirtschaftliches Archiv*, Bd. 79 (1957), pp. 281-304.

¹³⁷ 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>.

¹³⁸ (High Commissioner) G.J. van Heuven Goedhart, “People Adrift,” *Journal of International Affairs*, no. 7 (1953): pp. 7-29, at p. 9.

¹³⁹ S.P. Chablani, “The Rehabilitation of Refugees in the Federal Republic of Germany,” *Weltwirtschaftliches Archiv*, Bd. 79 (1957): pp. 281-304.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² 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.

¹⁴³ P. Chablani, “The Rehabilitation of Refugees in the Federal Republic of Germany,” *Weltwirtschaftliches Archiv*, Bd. 79 (1957): pp. 281-304.

¹⁴⁴ 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>.

¹⁴⁵ *Ibid.*

¹⁴⁶ 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>.

¹⁴⁷ 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>.

¹⁴⁸ “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>.

¹⁴⁹ 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.

¹⁵⁰ 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.”

¹⁵¹ 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.

¹⁵² 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>.

¹⁵³ Fact Sheets on the European Union (2018), 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%20FREE%20MOVEMENT%20OF%20PERSONS.pdf

¹⁵⁴ 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.

¹⁵⁵ 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 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.

¹⁵⁶ Hannah Arendt, *The Origins of Totalitarianism*, (New York City: Harcourt, 1973), pp. 290-292.

¹⁵⁷ UN High Commissioner for Refugees (UNHCR), *UNHCR’s Dialogues with Refugee Women*, 14 February 2013, available at <http://www.unhcr.org/511d160d9.pdf>.

¹⁵⁸ 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).

¹⁵⁹ UNHCR, Dadaab Refugee Complex, <http://www.unhcr.org/ke/dadaab-refugee-complex> (data as of November 30, 2017).

¹⁶⁰ See Core Group on Durable Solutions, UNHCR, Framework for Durable Solutions for Refugees and Persons of Concern (May 2003), <http://www.refworld.org/docid/4124b6a04.html>. UNHCR Exec. Comm., Conclusion on Protracted Refugee Situations, 61st Sess., December 8, 2009, UN Doc. A/AC.96/1080, No. 109(LX)-109 (December 22, 2009), <http://www.unhcr.org/4b332bca%209.html>. However, for statistical purposes, UNHCR defines “major protracted refugee situations” as “refugee populations of 25,000 persons or more who have been in exile for five or more years in developing countries” while nonetheless cautioning that this “crude measure of 25,000 refugees in exile for five years should not be used as a basis for excluding other groups.” UNHCR, *The State of the World’s Refugees 2006: Human Displacement in the New Millennium 106-08* (April 20, 2006) [hereinafter UNHCR, *State of the World’s Refugees*], available at <http://www.unhcr.org/4a4dc1a89.html>. Indeed, for certain purposes, such as resettlement policy and panning, UNHCR defines a PRS more generally as “any situation ‘in which refugees and find themselves in a long-lasting and intractable state of limbo.’” UNHCR, *UNHCR Resettlement Handbook* 41, 288 (July 2011), available at <http://www.refworld.org/docid/4ecb973c2.html>; see also UNHCR Exec. Comm. of the High Comm’r’s Program, Standing Comm. 30th meeting, Protracted Refugee Situations, UN Doc. EC/54/SC/CRP.14 (June 10, 2004), <http://www.refworld.org/docid/4a54bc00d.html>.

¹⁶¹ UNHCR *Global Trends*, p. 22; see *Forcibly Displaced: Toward a Development Approach Supporting Refugees, the Internally Displaced, and Their Hosts* (World Bank Group 2017), PRS remained fairly constant 1991-2015, at 5-7 million (p. 25). Now that the Syrian situation has passed the five-year mark, the total number of refugees in protracted situations exceeds 10 million. UNHCR, *Global Trends: Forced Displacement in 2016*, June 12, 2017, available at: <http://www.refworld.org/docid/594aa38e0.html>; World Bank. *Forcibly Displaced: Toward a Development Approach Supporting Refugees, the Internally Displaced, and Their Hosts*, (Washington, DC: World Bank, 2017).

¹⁶² UNHCR 2015 Statistical Yearbook (Table 5).

¹⁶³ <https://www.unhcr.org/en>.

¹⁶⁴ UNHCR *Global Trends 2016*, p. 37. UN High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2016*, June 21, 2017, available at: <http://www.refworld.org/docid/594aa38e0.html>.

¹⁶⁵ See, e.g., G.A. Res. 64/127, 22, UN Doc. A/RES/64/127 (January 27, 2010) (The General Assembly “[e]xpresses concern about the particular difficulties faced by the millions of refugees in protracted situations, and emphasizes the need to redouble international efforts and cooperation to find practical and comprehensive approaches to resolving their plight and to realize durable solutions for them, consistent with international law and relevant General Assembly resolutions”); UNHCR, *State of the World’s Refugees*, supra note 12, at 105 (“The majority of today’s refugees have lived in exile for far too long, restricted to camps or eking out a meagre existence in urban centres throughout the developing world”); UNHCR, *Protracted Refugee Situations*, UNHCR/DPC/2008/Doc. 02 (November 20, 2008), available at <http://www.unhcr.org/492ad3782.html> (supporting the implementation of the High Commissioner’s Special Initiative on Protracted Refugee Situations); UNHCR Exec. Comm., supra note 12 (noting the harms of protracted refugee situations and urging further action).

¹⁶⁶ The case for IDPs is weaker, as there is no binding IDP Convention from which the arguments we make on behalf of refugees could arise.

¹⁶⁷ Erika Feller, “Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come,” *International Journal of Refugee Law*, no. 18 (September 2006): pp. 509-536. See also

Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (Oxford: Oxford University Press, 2007), pp. 264-266 (refugee movement necessarily has an international dimension, but neither general international law nor treaties require states to provide durable solutions).

¹⁶⁸ Hannah Arendt, *The Origins of Totalitarianism*, (New York City: Harcourt, 1973), p. 295, she elaborates:

The conception of human rights . . . broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships—except that they were still human. The world found nothing sacred in the abstract nakedness of being human.

Id. at 299. See also Gervase Coles, “The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry,” in *Human Rights and the Protection of Refugees under International Law* edited by Alan E. Nash (Montreal: Institute for Research on Public Policy, 1988), pp. 195-221. The United States Supreme Court has also described the right of citizenship as “the right to have rights.” *Trop v. Dulles*, 356 U.S. 86, 101–02 (1958) (Warren, C.J.).

¹⁶⁹ In this way there is an interesting parallel between the weakness of claims to physical entry and political membership. States are bound to respect the *non-refoulement* principle but not bound to permit entry that would make assertion of the principle secure; likewise, states are bound to respect human rights of all persons but not bound to grant membership which would permit the better securing of such rights.

¹⁷⁰ There is an obvious echo here of the Responsibility to Protect (R2P), which itself was a shift from the “right of humanitarian intervention” in cases of mass atrocities. See INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY (ICISS), THE RESPONSIBILITY TO PROTECT 1–3 (2001), at <http://www.responsibilitytoprotect.org/ICISS%20Report.pdf>. The right of humanitarian intervention and R2P both start with recognition of the fundamentality of human rights and limits on sovereignty in cases of massive abuse of human rights. *Id.* at 12–16. But R2P is thought preferable because it foregrounds the responsibility of states to respect human rights while at the same time refashioning the role of the international community when states are unwilling or unable to do so. *Id.* at 17. The proffered R2S differs from R2P in important respects: the former does not override national sovereignty or propose coercive action; rather it represents a collective act of sovereignty, so there is no doubt about the legitimacy of concerted action.

¹⁷¹ See, e.g., UN High Commissioner for Refugees (UNHCR), “Refugee Education: A Global Review” (November 2011) <http://www.refworld.org/docid/5142ee1c2.html> (noting a Gross Enrollment Ratio (GER) of 56 percent for primary-age children in Dadaab and 21 percent at the secondary level; the average primary school GER for refugees of 6 to 11 year-olds was 76 percent, in comparison with a global GER of 90 percent for the primary school in the same age-group).

¹⁷² The “human security” concept aims to shift debates on security from a state-centered focus on “state security” to an understanding of security that includes individuals’ “freedom from fear and freedom from want.” 2005 World Summit Outcome, G.A. Res. 60/1, UN Doc. A/RES/60/1 (September 16, 2005) [hereinafter UNGA, 2005 World Summit Outcome], available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/1. Its current iteration derives from a 1994 UN Development Programme report and encompasses seven security components: economic, food, health, environmental, personal, community, and political security. UNDP, HUMAN DEVELOPMENT REPORT 1994: NEW DIMENSIONS OF HUMAN SECURITY 22 (1994), <http://hdr.undp.org/en/reports/global/hdr1994/>. As Alice Edwards notes, the human security concept has the potential to contribute to refugee protection debates by focusing policymakers on the link between human harms and global security and the need for a multilateral solution. Alice Edwards, “Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders,” *Michigan Journal of International Law*, no. 30, (2009): pp. 763-807.

¹⁷³ See *infra*. See also, Kevin J. Kelley, “UN Pushes Refugee Self-Reliance as Donor Funding for Kenya Dwindles,” *Daily Nation* (November 25, 2017), <http://www.nation.co.ke/news/UN-refugee-donor-funding-Kenya-dwindles/1056-4202704-n3a88oz/index.html>.

¹⁷⁴ 2030 Agenda, para. 4.

¹⁷⁵ Article 56 of the UN Charter commits member states to take “joint and separate action” to achieve the goals declared in Article 55, namely:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

¹⁷⁶ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), UN Doc. A/6316; 21 GAOR Supp. No. 16, at 49 (December 16, 1966), 993 UNTS 3, pt. 3, arts. 6, 11, 12, 13, 14, *entered into force* January 3, 1976 [hereinafter ICESCR].

¹⁷⁷ Coles, *supra* note 44, at 209. Similarly, Guy Goodwin-Gill defines refugee protection as “the use of legal tools to secure the rights, the security and the welfare of refugees,” and states that the objective “beyond the immediate needs of refugees, is solutions, either the voluntary return of refugees to their country in conditions of security; or assimilation in a new national community.” Guy Goodwin-Gill, “UNHCR’s Duty to Provide International Protection,” UNHCR (January 1987). Thus he concludes that there exists a “symbiosis of protection and assistance and protection and solutions.” *Id.* p. 17.

¹⁷⁸ Since adopting UNHCR’s Statute, the General Assembly has repeatedly reiterated the urgency and importance of UNHCR’s mandate to provide solutions. See, e.g., International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees, G.A. Res. 832 (IX), UN Doc. A/RES/832 (IX), 1 (October 21, 1954), [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/832\(IX\)&Lang=E&Area=RESOLUTION](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/832(IX)&Lang=E&Area=RESOLUTION); International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees, G.A. Res. 1166 (XII), UN Doc. A/RES/1166 (XII), 1(a), 2 (November 26, 1957), *available at* [http://www.un.org/en/ga/search/view_doc.asp?symbol=%20A/RES/1166\(XII\)&Lang=E&Area=](http://www.un.org/en/ga/search/view_doc.asp?symbol=%20A/RES/1166(XII)&Lang=E&Area=)); Office of the United Nations High Commissioner for Refugees, G.A. Res. 65/194, 20, U.N. Doc. A/RES/65/194 (February 28, 2011), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/res/65/194 (explaining that “international protection of refugees is a dynamic and action-oriented function that is at the core of the mandate of the Office of the High Commissioner and that it includes . . . the ensuring of durable, protection-oriented solutions”).

¹⁷⁹ UNHCR Executive Committee Conclusions 22, 29, 33, 41, 89, 95 all reiterate the importance of durable solutions. UNHCR Exec. Comm., Protection of Asylum Seekers in Situations of Large-Scale Influx, I.3, No. 22(XXXII)-1981, (October 21, 1981) [hereinafter UNHCR Exec. Comm., Protection of Asylum Seekers], <http://www.unhcr.org/3ae68c6e10.html>; UNHCR Exec. Comm., General Conclusion on International Protection, (l), No. 29(XXXIV)-1983, (October 20, 1983), <http://www.unhcr.org/3ae68c6818.html> (noting the “essential need” for durable solutions); UNHCR Exec. Comm., General Conclusion on International Protection, (k), No. 33(XXXV)-1984 (October 18, 1984), <http://www.unhcr.org/3ae68c6e20.html>; UNHCR Exec. Comm., General Conclusion on International Protection, (c), No. 41(XXXVII)-1986 (October 13 1986), <http://www.unhcr.org/3ae68c9514.html>; UNHCR Exec. Comm., Conclusion on International

Protection, 8, No. 89(LI)-2000 (October 13, 2000), <http://www.unhcr.org/3ae68c7e0.html>; UNHCR Exec. Comm., General Conclusion on International Protection, (i)–(j), (p)–(s), No. 95(LIV)-2003 (October 10, 2003), <http://www.unhcr.org/3f93aede7.html>.

¹⁸⁰ UNHCR Exec. Comm., Conclusion on Protracted Refugee Situations, 15, No. 109(LXI)- 2009 (December 22, 2009), <http://www.unhcr.org/4b332bca9.html>. See also *See* UNHCR Exec. Comm., Conclusion on International Protection, (d), No. 85(XLIX)-1998 (October 9, 1998), <http://www.unhcr.org/3ae68c6e30.html>. The general commitment to burden-sharing was made specific in a 2013 the Executive Committee declaration regarding Syrian refugees. UNHCR Exec. Comm., Report of the Sixty-fourth Session of the Executive Committee of the High Commissioner's Programme, Annex 1, UN Doc. A/AC/96/1132 (October 9, 2013), available at <http://www.unhcr.org/525baeae9.html>.

¹⁸¹ UNHCR Exec. Comm., Annual Theme: International Solidarity and Burden-Sharing in all its Aspects: National, Regional and International Responsibilities for Refugees, 8, U.N. Doc. A/AC.96/904 (September 7, 1998), at <http://www.unhcr.org/refworld/docid/4a54bc2f0.html>.

¹⁸² UNHCR, Sixty-first Session of the Executive Committee of the High Commissioner's Programme, Agenda Item 5(a), at 1 (October 6, 2010) (statement of Erika Feller, Assistant High Comm'r concerning Protection: Rule of Law 60 Years On), available at <http://www.unhcr.org/4cac7f2f9.pdf>.

¹⁸³ Art 35.

¹⁸⁴ UNHCR Statute, I.8(a) 1951 Convention, preamble; *id.* art. 35(1); *see also* Volker Turk, *UNHCR's Supervisory Responsibility* 20 (UNHCR Working Paper No. 67, October 2002), available at <http://www.unhcr.org/3dae74b74.html> (analyzing UNHCR's supervisory role and arguing that it “needs to be consolidated and strengthened”).

¹⁸⁵ International Conference on Central American Refugees (CIREFCA), Guatemala City, Guatemala, May 29–31, 1989, *Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons*, CIREFCA 89/13/Rev. 1 (May 30, 1989), available at <http://www.refworld.org/docid/3fbb5d094.html>.

¹⁸⁶ Ron Redmond, *The Human Side of CIREFCA*, *Refugees Magazine*, UNHCR, Issue 99. <http://www.unhcr.org/en-us/publications/refugeemag/3b5426de4/refugees-magazine-issue-99-regional-solutions-human-side-cirefca.html>.

¹⁸⁷ UN Secretary-General, *Office of the United Nations High Commissioner for Refugees: International Conference on Indo-Chinese Refugees: Report of the Secretary General*, Annex, UN Doc. A/44/523 (Sept. 22, 1989), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=a/44/523 (Declaration and Comprehensive Plan of Action). W. C. Robinson, “The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck,” *Journal of Refugee Studies*, no. 17, (September 2004): pp. 319–333.

¹⁸⁸ This acronym is used more generally than the organization's official name: the Intergovernmental Authority for Development. It includes eight states from the Horn of Africa, Nile Valley and Great Lakes region of Africa.

¹⁸⁹ Part IV, paras 4, 5.

¹⁹⁰ Part VII, paras 2, 3, 9.

¹⁹¹ See, for instance, Kevin Sieff, “What Other Choice Do I Have?” How Debt-Ridden Refugees are being Forced to Return to a War Zone,” *Washington Post*, December 15, 2017, http://www.washingtonpost.com/sf/world/2017/12/15/how-refugees-are-being-forced-back-to-a-war-zone-to-repay-their-debts/?utm_term=.496547b740c3.

¹⁹² Moreover, in the absence of broader macroeconomic relief in host states, together with continued rights enforcement (including of rights beyond the right to work), the emphasis on self-reliance can end up shifting the costs of protection onto refugees themselves. Of course, where refugees have access to decent employment, good schools, and affordable healthcare, self-reliance can be (at least for refugee adults who can work) a pathway to prosperity. But for the majority of refugees who are children, home-bound caregivers, elderly or infirm, and for the vast majority who live in places like

eastern Chad or northern Kenya, a singular focus on self-reliance is too often a pathway into structural poverty—an invitation for refugees, among the most vulnerable and exploitable persons in the world, to join the lowest rungs of the global precariat. Indeed, even in middle-income countries such as Jordan and Lebanon, nine in ten refugees are surviving below the poverty line, the vast majority are in debt (\$1,000 per household on average), few have access to decent and affordable housing, and more and more are turning to “negative coping mechanisms,” including child labor and child marriage, just to survive. See e.g., Care International, “7 Years into Exile: How Urban Syrian Refugees, Vulnerable Jordanians, and other Refugees in Jordan are being Impacted by the Syria Crisis,” <https://reliefweb.int/report/jordan/7-years-exile-how-urban-syrian-refugees-vulnerable-jordanians-and-other-refugees>; WFP, Unicef, UNHCR, “Vulnerability Assessment of Syrian Refugees in Lebanon 2016,” <https://reliefweb.int/report/lebanon/vulnerability-assessment-syrian-refugees-lebanon-2016>; Laura Pitel, “A day on the factor floor with a young Syrian refugee,” *Financial Times* (September 20, 2017), <https://www.ft.com/content/abd615a4-76d7-11e7-a3e8-60495fe6ca71>.

¹⁹³ See Katy Long, “Extending Protection? Labour Migration and Durable Solutions for Refugees,” UNHCR Research Paper No. 176 (2009), available at <http://www.unhcr.org/4ad334a46.pdf>.

¹⁹⁴ James C. Hathaway, “Refugee Solutions, or Solutions to Refugeehood?,” *Refugee*, no. 24, (2006): pp. 3-10; see also James C. Hathaway, “Forced Migration Studies: Could We Agree Just to ‘Date?’” *Journal of Refugee Studies*, no. 20, (2007) pp. 349-369 (arguing that “as we join in the call to ‘find solutions,’ we impliedly acquiesce in official efforts to ‘derefugee’ the refugee population, and to turn them into little more than persons to be managed”).

¹⁹⁵ Of course, refugees are not being safely provided for, as evidenced by how many have chosen in recent years to risk their lives to travel North rather than stay where they are. Meanwhile, as we argued in the preceding chapter, “safety” is not the only principle that necessitates international support. That only makes our job harder: the funds needed to enable refugees to “enjoy” asylum in the countries to which they initially flee are orders of magnitude greater than those needed to (under)fund humanitarian programs.

¹⁹⁶ Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*, (Ithaca: Cornell University Press, 2013), pp.160-170.

¹⁹⁷ 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>.

¹⁹⁸ World Bank, “Forcibly Displaced: Toward a Development Approach Supporting Refugees, the Internally Displaced, and Their Hosts,” (2017), pp. 1-2, <https://openknowledge.worldbank.org/bitstream/handle/10986/25016/9781464809385.pdf?sequence=11&isAllowed=y>.

¹⁹⁹ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html>; UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence Under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions*, December 2, 2016, HCR/GIP/16/12, available at: <http://www.refworld.org/docid/583595ff4.html>.

²⁰⁰ *International Convention for the Safety of Life At Sea*, November 1, 1974, 1184 UNTS 3, available at: <http://www.refworld.org/docid/46920bf32.html>.

²⁰¹ See e.g., Kevin Sieff, “‘What Other Choice Do I Have?’ How Debt-Ridden Refugees are being Forced to Return to a War Zone,” *Washington Post*, December 15, 2017, http://www.washingtonpost.com/sf/world/2017/12/15/how-refugees-are-being-forced-back-to-a-war-zone-to-repay-their-debts/?utm_term=.496547b740c3, (explaining the link between the volatility of aid and the surge in debt among Somali refugees in Kenya). See also, a December 2017 survey finding that nearly 90 percent of Syrian refugee households in Lebanon—a major focus-country of international interventions—are indebted, and almost 80 percent are living below the poverty line. (The survey, conducted by WFP, UNHCR, and UNICEF, is available here:

https://data2.unhcr.org/en/documents/download/61312#_ga=2.76103189.1095955734.1515005727-270738478.1465743137.)

²⁰² 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>.

²⁰³ See e.g., Denmark’s Aliens (Consolidation) Act, No. 863, June 25, 2013, https://www.nyidanmark.dk/NR/ronlyres/2A42ECC8-1CF5-4A8A-89AC-8D3D75EF3E17/0/aliens_consolidation_act_863_250613.pdf; Refugee Council of Australia, “Australia’s Detention Policies,” May 17, 2016, <https://www.refugeecouncil.org.au/getfacts/seekingsafety/asylum/detention/key-facts/>; Bill Frelick, “U.S. Detention of Asylum Seekers and Human Rights,” *Migration Policy Institute*, March 1, 2005, <https://www.migrationpolicy.org/article/us-detention-asylum-seekers-and-human-rights>; UNHCR, *UNHCR Observations on Amendments to the Danish Aliens Act as Set Out in Lovforslag nr. L 62*, January 2016, <http://www.refworld.org/docid/5694ecf64.html>.

²⁰⁴ UNHCR, Guidelines on International Protection No. 12, Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions (2016), <http://www.unhcr.org/en-us/publications/legal/58359afe7/unhcr-guidelines-international-protection-12-claims-refugee-status-related.html>.

²⁰⁵ See e.g., Alexander Betts and Paul Collier, *Refuge: Rethinking Refugee Policy in a Changing World*, (Oxford: Oxford University Press, 2017).

²⁰⁶ UN Secretary-General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, paras. 80-82, UN Doc. A/70/59 (Apr. 21, 2016),

<https://reliefweb.int/sites/reliefweb.int/files/resources/N1611262.pdf> [<https://perma.cc/M8XA-FX4X>]; Alexander Betts, Louise Bloom, Josiah Kaplan, and Naohiko Omata, *Refugee Economies: Rethinking Popular Assumptions*, (Oxford: Humanitarian Innovation Project, 2014), <https://www.rsc.ox.ac.uk/files/files-1/refugee-economies-2014.pdf>; World Bank Group, “Forcibly Displaced: Toward a Development Approach Supporting Refugees, the Internally Displaced, and Their Hosts,” Washington, DC (2017), [https://openknowledge.worldbank.org/bitstream/handle/10986/25016/Forcibly%20Displaced_Overview_Web.pdf?sequence=6&isAllowed=y](https://openknowledge.worldbank.org/bitstream/handle/10986/25016/Forcibly%20Displaced%20Overview%20Web.pdf?sequence=6&isAllowed=y).

²⁰⁷ Alexander Betts, Louise Bloom, Josiah Kaplan, and Naohiko Omata, *Refugee Economies: Forced Displacement and Development*, (Oxford: Oxford University Press, 2017). Aleinikoff has supported this view as well. T. Alexander Aleinikoff, “From Dependence to Self-Reliance: Changing the Paradigm in Protracted Refugee Situations,” Policy Brief, Migration Policy Institute, (May 2015), <https://www.migrationpolicy.org/research/dependence-self-reliance-changing-paradigm-protracted-refugee-situations>.

²⁰⁸ UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.refworld.org/docid/438c6d972.html>.

²⁰⁹ James Hathaway, “The Emerging Politics of Non-Entrée,” *Refugees*, vol. 91, (1992): p. 40; UNHCR, “Don’t confuse refugees with terrorists,’ says Guterres,” 2005, <http://www.unhcr.org/en-us/news/latest/2005/7/42e0df204/dont-confuse-refugees-terrorists-says-guterres.html>; UNHCR, *Opening Statement by Mr Antonio Guterres, United Nations High Commissioner for Refugees, at the Fifty-Sixth Session Executive Committee*, October 3, 2005, <http://www.unhcr.org/en-us/admin/hcspeeches/43411aa54/opening-statement-mr-antonio-guterres-united-nations-high-commissioner.html>; William Maclean, “Rich world angst about foreigners threatens refugee aid: UN refugee chief,” *Reuters*, November 20, 2016, <https://www.reuters.com/article/us-migrants-nationalism-unhcr-idUSKBN13F0S3>; United Nations, “In hard-hitting speech, UN human rights chief warns against populists and demagogues,” September 6, 2016, <https://news.un.org/en/story/2016/09/538432-hard-hitting-speech-un-human-rights-chief-warns-against-populists-and>.

²¹⁰ In the New York Declaration and Annex I: refugee camps as exception; role of development and private sector (paras. 73, 80, 86); resettlement/pathways (para. 77-79); opening up local labor markets to refugees (para. 84; Annex I, 13(b)); welcoming increased engagement of the World Bank and multilateral development banks (para. 86); combating xenophobia (para. 39).

²¹¹ As one example, a recent report from the Freedom Fund highlights the growing ubiquity among Syrian refugees in Lebanon of child labor (with an estimated 60-70 percent of refugee children working), child marriage, “survival sex,” and forced labor. See “Struggling to Survive: Slavery and Exploitation of Syrian Refugees in Lebanon,” Freedom Fund, available at:

<http://freedomfund.org/wp-content/uploads/Lebanon-Report-FINAL-8April16.pdf>.

²¹² See e.g., Kevin J. Kelley, “UN pushes refugee self-reliance as donor funding for Kenya dwindles,” *Daily Nation*, November 25, 2017, available at: <http://www.nation.co.ke/news/UN-refugee-donor-funding-Kenya-dwindles/1056-4202704-n3a88oz/index.html>.

²¹³ See the Model International Mobility Convention, available at

<http://globalpolicy.columbia.edu/mobility-convention>.

²¹⁴ See, UNHCR and *Climate Change, Disasters, and Displacement*, May 2017, available at:

<http://www.refworld.org/docid/59413c7115.html>.

²¹⁵ Information on the Platform on Disaster and Displacement can be found here:

<http://disasterdisplacement.org/the-platform>.

²¹⁶ See e.g., UNHCR, *Climate Change and Disaster Displacement: An Overview of UNHCR’s Role*, 2017,

[http://www.unhcr.org/en-us/protection/environment/5975e6cf7/climate-change-disaster-](http://www.unhcr.org/en-us/protection/environment/5975e6cf7/climate-change-disaster-displacement-overview-unhcrs-role.html)

[displacement-overview-unhcrs-role.html](http://www.unhcr.org/en-us/protection/environment/5975e6cf7/climate-change-disaster-displacement-overview-unhcrs-role.html); Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, vol. I, 2015,

[https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-](https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf)

[VOLUME-1.pdf](https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf); Mary Robinson Foundation—Climate Justice, *Protecting the Rights of Climate Displaced People*, June 2016, <https://www.mrfcj.org/wp-content/uploads/2016/07/Protecting-the-Rights-of-Climate-Displaced-People-Position-Paper.pdf>.

²¹⁷ Kenya National Commission on Human Rights & another v. Attorney General & 3 others, February 9, 2017, <http://kenyalaw.org/caselaw/cases/view/131173>; “Landmark Victory for Refugee Rights in Ecuador,” Asylum Access, September 15, 2014, asylumaccess.org/landmark-victory-for-refugee-rights-in-ecuador/; see also Asylum Access Malaysia Submits Shadow Report to CEDAW regarding the Rights of Refugee Women in Malaysia, January 15, 2018;

<http://asylumaccess.org/asylum-access-malaysia-submits-shadow-report-cedaw-regarding-rights-refugee-women-malaysia/>; James Cavallaro, Diala Shamas, Beth Van Schaack, et al., Communiqué to the Office of the Prosecutor of the International Criminal Court Under Article 15 of the Rome Statute: The Situation in Nauru and Manus Island: Liability for Crimes Against Humanity, February 14, 2017, <https://law.stanford.edu/publications/communique-to-the-office-of-the-prosecutor-of-the-international-criminal-court-under-article-15-of-the-rome-statute-the-situation-in-nauru-and-manus-island-liability-for-crimes-against-humanity/>. Not all succeed: *Sale v. Haitian Centers Council, Inc.*, 509 US 155 (1993).

²¹⁸ Center for Global Development, *Refugee Compacts: Addressing the Crisis of Protracted Displacement*, April 2017, <https://www.cgdev.org/sites/default/files/Refugee-Compacts-Report.pdf>. 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>.

²¹⁹ See e.g., UN High Commissioner for Refugees (UNHCR), *Comprehensive Refugee Response Framework: From the New York Declaration to a Global Compact on Refugees*, December 5, 2016, available at:

<http://www.refworld.org/docid/589332a90.html>; World Bank, *Forcibly Displaced: Toward a Development Approach Supporting Refugees, the Internally Displaced, and Their Hosts*, 2017, available at:

<https://openknowledge.worldbank.org/handle/10986/25016>; European Parliament, “Labour

Market Integration of Refugees: Strategies and Good Practices,” (March 2016)

[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578956/IPOL_STU\(2016\)578956](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578956/IPOL_STU(2016)578956)

[EN.pdf](#); European Commission, “Development, Refugees, and IDPs,” *Issue Paper*, 2016, available at: http://ec.europa.eu/echo/files/policies/refugees-idp/dev_refugees_idps_issues_paper_en.pdf.

²²⁰ Importantly, mobility among states is included as an Outcome and Indicator in the implementation of IGAD’s plan for Somali refugees.

²²¹ The Model International Mobility Convention, Article 211(2), available at <http://globalpolicy.columbia.edu/mobility-convention>; Alexander Betts and Paul Collier, *Refuge: Rethinking Refugee Policy in a Changing World*, (Oxford: Oxford University Press, 2017); James C. Hathaway and R. A. Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection,” *Harvard Human Rights Journal*, vol. 10, (1997): pp. 115-211.

²²² Peter H. Schuck, “Refugee Burden-Sharing: A Modest Proposal,” *Yale Journal of International Law*, vol. 22, (1997): pp. 243-297

http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2691&context=fss_papers.

²²³ Hathaway argues that it is only ex ante that states will sign up (“you don’t buy insurance in the middle of a fire”); we disagree.

²²⁴ The Platform could function as a kind of globalized, multi-stakeholder CRRF. See UNHCR, “Comprehensive Refugee Response Framework: From the New York Declaration to a Global Compact on Refugees,” (December 2016), available at: <http://www.refworld.org/docid/589332a90.html>. It might also consider how a response plan would contribute to the meeting of the Sustainable Development Goals for displaced populations and hosting communities.

²²⁵ GAVI, the Vaccine Alliance, is an example of a platform that focuses on both financing and delivery. It draws together traditional direct contributions and “innovative” financing mechanisms, with the latter including the International Finance Facility for Immunization (IFFIm); the Advance Market Commitment (AMC); and the GAVI Matching Fund. The IFFIm issues bonds to accelerate GAVI-financed vaccination campaigns on the basis of legally binding multiyear pledges made by GAVI’s donor partners. Under the AMC, donors commit to guarantee the prices of vaccines once they are developed.

²²⁶ The “Regional Refugee and Resilience Plan” (3RP) is sometimes cited as an example of this kind of joined up planning, but in fact it falls far short. Separate humanitarian and development plans have been combined and published in a single document. But it did not undertake the joint analysis or planning or establish the collective responsibility that could significantly advance response to the Syrian refugee crisis.

²²⁷ Alexander Betts and Paul Collier, *Refuge: Rethinking Refugee Policy in a Changing World*, (Oxford: Oxford University Press, 2017); Hathaway.

²²⁸ A proposal of the World Commission on Forced Displacement.

²²⁹ The mobility agenda would be harder to push forward at these mid-levels.

²³⁰ For information on UNHCR’s CRRF pilots, see <http://www.unhcr.org/en-us/comprehensive-refugee-response-framework-crrf.html>.

²³¹ In addition, cities are also in charge of many if not most of the public services that refugees utilize or have need of. Their empowerment could therefore be a crucial step toward a more progressive approach to refugee development and integration.

²³² Volker Turk, “UNHCR’s Supervisory Responsibility,” UNHCR, *New Issues in Refugee Research*, Working Paper no. 67, Geneva (October 2002), ISSN 1020-7473, available at: <http://www.refworld.org/docid/4fe405ef2.html>.

²³³ Compare institutions established under various other international agreements: CAT, CCPR, CERD, CEDAW; see Michael Doyle’s draft Mobility Treaty which would establish a treaty body for refugee issues.

²³⁴ B. S. Chimni, “Reforming the International Refugee Regime: A Dialogic Model,” *Journal of Refugee Studies*, no. 14, (June 2001): pp. 151–168.

²³⁵ International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States they Leave, Transit or Enter, Art. 202.

²³⁶ See Volker Turk, “UNHCR’s Supervisory Responsibility,” UNHCR, New Issues in Refugee Research, Working Paper no. 67, Geneva (October 2002), ISSN 1020-7473, available at: <http://www.refworld.org/docid/4fe405ef2.html>.

²³⁷ Ibid.

²³⁸ For a positive example see the case challenging the closure of the Dadaab refugee camp in Kenya, cite in note 19 *supra*.

²³⁹ To see the power and presence of states, consider the way displaced Syrians are categorized and regulated throughout their flight. In Turkey, Syrian refugees are labeled “Syrians under Temporary Protection”; on the Mediterranean, they are “smuggled” or “trafficked” migrants; upon arrival in Europe, they may be “detainees,” “illegal migrants” or “asylum seekers.” Eventually they may be recognized as “refugees” or granted “tolerated status.” Cf. Michel Agier, *Managing the Undesirables: Refugee Camps and Humanitarian Government*, (Cambridge: Polity, 2011), p. 6.

²⁴⁰ Joseph H. Carens, “Refugees and the Limits of Obligation,” *Public Affairs Quarterly*, no. 6, (1992): pp. 31-44; Carens, Joseph H. “Aliens and Citizens: The Case for Open Borders,” *The Review of Politics*, no. 49, (1987): pp. 251–273.

²⁴¹ David Owens, “*In Loco Civitatis*: On the Normative Basis of the Institution of Refugeehood and Responsibilities for Refugees,” in *Migration in Political Theory: The Ethics of Movement and Membership*, edited by Sarah Fine and Lee Ypi (Oxford: Oxford University Press, 2016), pp. 269-290.

²⁴² A “fiduciary” interpretation of international law; states are recognized as legitimate by the international community when they fulfill obligations as fiduciaries to persons over whom they exercise authority. Evan J. Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority*, (Oxford: Oxford University Press, 2016), p. 282.

²⁴³ Miriam Ticktin, “[Thinking Beyond Humanitarian Borders](#),” *Social Research: An International Quarterly*, special issue on “Borders and The Politics of Mourning,” edited by Alexandra Delano and Benjamin Nienass, no. 83, (Summer 2016): pp. 255-271, at p. 264.

²⁴⁴ Doubtful whether humanitarianism in fact is non-political. See B. S. Chimni, “Globalization, Humanitarianism and the Erosion of Refugee Protection,” *Journal of Refugee Studies*, no. 13, (September 2000): pp. 243–263.

²⁴⁵ Miriam Ticktin, “[Thinking Beyond Humanitarian Borders](#),” *Social Research: An International Quarterly*, special issue on “Borders and The Politics of Mourning,” edited by Alexandra Delano and Benjamin Nienass, no. 83, (Summer 2016): pp. 255-271, at p. 266 (“We need a different form of political care—beyond care as welfare, which is tied to the sovereignty of nation-states, and includes the enforcement of borders—and beyond humanitarianism, which is tied to innocence, emergency and compassion. That is, we need to think beyond care as a very particular array of moral sentiments and social arrangements. Political work to this end must be a shared act, which involves rethinking what political action and justice mean for everyone, not just for those who are understood as needing help or care, or for those who want to migrate. We all must rethink what an equitable world would look like, as it will affect us all”).