4 *The Role of Proximity for States' Obligations toward Persons Seeking Protection*

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The different treatment of Ukrainian refugees in Europe, in comparison with other groups of refugees, has been the object of much debate recently: Is the higher willingness to welcome refugees from Ukraine in comparison to those from African or Middle Eastern states due to the geographic proximity? Does it relate to the circumstances of the war that affects Europe more immediately than other military conflicts?

There are legal factors to the different treatment, especially the fact that Ukrainian citizens already enjoyed visa-free travel in the Schengen states for up to ninety days, which meant that crossing the border and entering the European Union was possible for all those in possession of a passport. Yet beyond the legal situation, the political reaction clearly differed. European Union member states quickly decided to activate, for the first time ever, the Temporary Protection Directive.[1] And the public support for refugee reception, at least in the first months, was exceptionally high, with widespread civil society initiatives.

Witnessing the reception of Ukrainian refugees, some commentators have stressed the positive example that should inform refugee protection more broadly, while others have expressed criticism about the inequality of treatment. What is clear is that instances of discrimination (Akinwotu & Strzyżyńska, 2022) at the borders are inacceptable. More intricate is the question if the different treatment of refugee groups is justified. Some have argued that it reflects the role of racism in the perception of the war and in the attitude toward refugees (Połońska-Kimunguyi, 2022; Ramasubramanyam, 2022). Others

[1] Council implementing decision (EU) 2022/382 of March 4, 2022, establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

have called the reference to Ukraine being in the direct neighborhood of the European Union a "fallacy of geographic proximity" (Lacy & van Houtum, 2022).

This is but one recent example of discussions about the legitimate response of states to different groups of forced migrants and, more generally, about conditions for a legitimate regime of international protection. A core aspect of these debates is the role of geographic proximity. Is the proximity of refugees' places of origin a legitimate criterion for different access to, and levels of, protection? The role of geographic proximity is a familiar object of debate in refugee law also from another angle: The basic rule of nonrefoulement is interpreted by several states to only apply if the refugee arrives directly from the state they flee from. Together with visa policies and carrier sanctions, this has limited protection obligations largely to neighboring states of refugees' places of origin. This restrictive interpretation of nonrefoulement through the safe third country principle is criticized as harming the overall function of the international protection regime.[2] It leads to problems of responsibility-sharing among states and contributes to increasingly hostile conditions for those seeking protection.

Here, too, the legitimate role of proximity is at stake: Is proximity a workable criterion for distributing responsibility among states? Can such restrictive interpretation of nonrefoulement be reconciled with the overall goal of an effective protection system? Whereas the debate about Ukrainian versus other refugees concerns the legitimacy of more favorable treatment, the debate around the scope of nonrefoulement concerns the legitimacy of states seeking to limit their obligations.

Against the background of these debates, the present contribution seeks to systematically explore the role of proximity and arguments about its legitimacy. The first part analyses how physical proximity of a state of origin and of a person's location matter in international refugee law and in human rights law regarding refugees. It observes how states have increasingly narrowed down obligations in interpreting refugee law, and how de facto the ability to "come into proximity" of a host state is often decisive for persons' access to protection. In a second part, the chapter then asks about the conditions for claiming and enforcing rights. Rights guarantees are object of constant processes of interpretation, especially so rights at the border. The scope of state

[2] See for a detailed and critical discussion also Paul Linden-Retek (Chapter 3).

obligations toward forced migrants is continuously contested, and even where rights are recognized, it is difficult to hold states accountable for violations. The physical location of claimants affects those conditions of making rights effective.

Overall, the first two parts show that proximity is significant for migrants' rights to international protection and underline how this role of proximity bears problematic effects on the system. A third part turns to considerations about the legitimacy of the proximity criterion. Proximity can be, at its basis, a reflection of the concrete link that assigns universalist obligations to particular states. This requirement of a concrete link will be hard to forego in a world structured by territorial political communities and limited freedom of movement. Yet proximity is by far not the only possible way of establishing a concrete connection. For a viable system of protection, states must base their responsibility on these different forms of concrete links. The role of proximity does not have to be negated entirely, as long as it is coupled with effective access to territory and protection, and complemented with other bases for state obligations, taking into account links of causation and refugees' explicit choices.

1 How Proximity Impacts Protection: International Refugee Law and Human Rights Law

International refugee law and human rights law operate as exceptional constraints to states' otherwise discretionary rules on admitting noncitizens. We can call these rules the law of international protection, which includes foremost the 1951 Geneva Refugee Convention with the 1967 Protocol, and human rights guarantees that are applicable in the context of forced migration. The law of international protection is concerned with rights of persons vis-à-vis states they are not a member of. In that sense, it structurally raises questions about how universalist rights can be translated to obligations of particular states. How to assign or distribute the responsibility for protection is an issue not explicitly regulated: Refugee law and human rights law contain rules about the rights of persons and state obligations toward them, but not about the relationship between states in securing those rights. This distribution of responsibility results indirectly through the application and interpretation of the laws of international protection.

a Nonrefoulement as a Rule of Proximity?

International refugee law is built around the norm of nonrefoulement, the prohibition to expel or return refugees to "the frontiers of territories where [their] life or freedom would be threatened."[3] The principle of nonrefoulement looks at the bilateral relationship between an individual and a state, specifying obligations of the state vis-à-vis the individual seeking protection. The obligations arise once a state *could* effectively expel or return a refugee. In general, that means the refugee has arrived at the border or on the territory of the respective state. It does not mean, however, that the obligation of nonrefoulement is per se limited to states bordering the place a person flees. The Refugee Convention does not compel refugees to request asylum in the first state they enter, and it does not specify which state is responsible for providing protection.

However, in cases where refugees arrive via a transit state that also guarantees nonrefoulement, it can be argued that rejecting a person at the border to that transit state, or returning them to the transit state, is not a violation of the rule of nonrefoulement since the return does not place the refugee at risk. States have interpreted the obligation in that narrow way, with the safe third country principle or the rule of first country of asylum (Hurwitz, 2009: 45). These concepts have proliferated since the end of the 1970s. Carrier sanctions and readmission agreements with transit states underpin this approach. Even with that interpretation, the principle of nonrefoulement still requires any state to examine the situation of a person who has come to its border or territory. To exclude the risk of chain-refoulement, the state, before returning a person seeking protection to the transit state, has to assess their specific circumstances and expected treatment in that transit state (Foster, 2007: 263; Freier, Karageorgiou, & Ogg, 2021: 518).

The restrictive approach to nonrefoulement with the safe third country principle has been widely criticized (Arbel, 2013: 65; Gil-Bazo, 2015b; Moreno-Lax, 2015: 665). It results in an unfair distribution of refugees and corresponding costs of reception among states, and in consequence often contributes to lower reception standards and higher reluctance of states to admit refugees.[4] Moreover,

[3] Article 33 para. 1 of the 1951 Geneva Refugee Convention (GRC).
[4] See, for the case of Turkey, Sibel Karadağ, Chapter 12.

Article 3 of the GRC stresses that states shall apply the provisions to refugees "without discrimination as to race, religion or country of origin." The prohibition of discrimination based on country of origin can seem strange in a system in which refugees are only allowed to flee to their neighboring state(s). The Convention rather paints a picture where refugees from different places arrive in a state, which suggests that the combination of cutting of airways for refugees and returning them to a transit state when coming over land was not the idea of the drafters. Despite this criticism, the interpretation of nonrefoulement leads in practice to a "responsibility by proximity,"[5] in which states close to the place of origin will be primarily responsible for offering protection.

b Proximity and Human Rights: The Interpretation of Jurisdiction

In addition to the rule of nonrefoulement from the Geneva Refugee Convention, human rights law prohibits states to expel or reject persons if this would cause a serious violation of their human rights. In that regard, the International Covenant on Civil and Political Rights (ICCPR) enshrines the right to life and the prohibition of torture or cruel, inhuman or degrading treatment or punishment.[6] The Convention against Torture (CAT) equally serves as a source for protection, explicitly prohibiting states to "expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."[7] Regional human rights conventions contain corresponding provisions, such as the European Convention on Human Rights (ECHR or Convention) in Article 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"). Those provisions are particularly significant where they allow for individual complaints, and I will focus in the following on the case law from the European Court of Human Rights (ECtHR or Court) that resulted from such individual complaints.

[5] Cf. for the expression with a critical take: UN News Center, Interview with Peter Sutherland, October 2, 2015, www.un.org/apps/news/story.asp?NewsID=52126#.V5YPuFc7TTo.

[6] Article 7 ICCPR. [7] Article 3 CAT.

Human rights protection in the context of migration often hinges on the question whether the Convention is applicable. In cases in which the life of persons is at risk or in which they live under cruel conditions, there is little doubt that circumstances cross the threshold of severity for a violation – however, it needs to be established if a Convention state is responsible for safeguarding the persons' rights. The relevant provision is Article 1 of the Convention, which obliges contracting parties to "secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I" [my emphasis]. It is generally accepted that jurisdiction is at its basis territorial but can extend extraterritorially under specific conditions.[8] The reach of extraterritorial jurisdiction is a field of contentions, for which the wording of Article 1 alone offers hardly any guidance.

In general, the Court has interpreted extraterritorial jurisdiction along physical control. In the Medvedyev case, it held that there had been extraterritorial jurisdiction.[9] A French warship had intercepted a merchant ship that was suspected to traffic drugs. The Court ruled that even though the events took place on board a ship not flying the French flag, the French officers exercised full and exclusive control over the persons in that situation.[10] In the Hirsi case, the Court equally found that extraterritorial jurisdiction existed when Italian officers intercepted and returned a group of migrants.[11] The Italian government had argued that there had been no jurisdiction since, unlike in the Medvedyev case, no violence had been employed. The Court disagreed, holding that "the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities", since the officers exercised control, even absent direct force, over the migrants.[12]

With the Court also ruling that extraterritorial jurisdiction existed in cases of military operations,[13] it could seem that it was moving toward a broad interpretation with a comprehensive notion of control. In the

[8] ECtHR, *Bankovic and Others v. Belgium and Others*, Application no. 52207/99, Grand Chamber decision as to the admissibility, December 12, 2001, para. 59, 67.
[9] ECtHR, *Medvedyev v. France*, Application no. 3394/03, Grand Chamber decision, March 29, 2010.
[10] Ibid., paras. 66, 67.
[11] ECtHR, *Hirsi Jamaa et al v. Italy*, Application no. 27765/09, Grand Chamber decision, February 23, 2012.
[12] Ibid., para. 81.
[13] ECtHR, *Al-Skeini et al v. United Kingdom*, Application no. 55721/07, and *Al-Jedda v. United Kingdom*, Application no. 27021/08, both Grand Chamber decisions, July 7, 2011.

case *M.N. and others v. Belgium*, however, the Court made clear that it was not willing to adopt a concept of jurisdiction that includes administrative control. The case concerned a Syrian family with young children who had applied for a visa at the Belgian embassy in Lebanon. The situation in Syria was dire, there were no prospects for staying in Lebanon which had stopped registering refugees, and the land borders to Turkey were closed. Their situation was such that returning anyone from safety into those conditions would have constituted a violation of Article 3 ECHR. The question was whether refusing their visa, in line with the general rules that required an intention to leave within ninety days, brought them under Belgium jurisdiction, making the refusal a human rights violation. The Court offered an extensive reasoning, concluding that the applicants had not been under Belgian jurisdiction.[14] It stressed that control required for extraterritorial jurisdiction is essentially "physical power and control over certain persons."[15]

This emphasis on physical control makes access to protection a question of physical access and proximity. States seeking to hinder access of migrants learn from instances such as the Hirsi case and adapt their measures in ways that avoid effective control and thus jurisdiction. Those ever more militarized border structures push migrants onto more dangerous routes or lead to desperate collective attempts of still overcoming the fences.[16] The broad rules of human rights protection around access to territory, especially with the prohibition of collective expulsion, have in recent rulings of the Court increasingly been reduced to a minimum obligation of providing an access point where persons can apply for asylum.[17]

c Summary: Proximity as Prerequisite for Protection

All this turns physical proximity into the most significant factor for protection obligations. De jure, the proximity of the state of origin

[14] ECtHR, *M.N. et al v. Belgium*, Application no. 3599/18, Grand Chamber decision, May 5, 2020, para. 125.
[15] *M.N. et al v. Belgium*, para. 106.
[16] Cf. the events in ECtHR, *N.D. and N.T. v. Spain*, Applications no. 8675/15 and 8697/15, Grand Chamber decision, February 13, 2020.
[17] Cf. the decision in N.D. and N.T. v. Spain, and most recently ECtHR, *A.A. and others v. North Macedonia*, Application no. 55798/16, Chamber decision, April 5, 2022.

is relevant since obligations under the Refugee Convention as well as under human rights treaties are largely limited to nonrefoulement. De facto, the physical proximity of the migrant seeking protection is significant. Given the dominant interpretation of extraterritorial jurisdiction, it is the ability to make it to the territory or into close proximity, which might lead to extraterritorial jurisdiction, that is decisive for access to protection. Proximity of origin and proximity of location are linked since the strict control of migration keeps asylum seekers in their region of origin. This is doubled up by measures of externalization, where states participate in the migration control beyond their own borders (Spijkerboer, 2018: 452; Shachar 2020b).

All this leads to a harsh selection of who is able to access protection, and it contributes to problems of responsibility sharing between states (Schmalz, 2017: 23). The current interpretation of jurisdiction with regard to global mobility is criticized to amount to a regime of racial exclusion (Achiume, 2022: 473). There have been arguments for a different approach to extraterritorial jurisdiction, which focuses on impact and decisive influence, instead of allowing states to circumvent responsibility by cooperation (Moreno-Lax, 2020: 411). It remains to be seen if future decisions of the Court might move toward such an approach.[18]

2 Claiming and Enforcing Rights: The Quandary of Distant Claimants

Proximity plays a role not only at the foundation of what is considered a right to protection but also in the conditions for claiming rights. This is true, first, on the level of claiming rights through legal procedures. Access to procedures is not formally dependent on the location of claimants; in practice, however, it often is. Persons whose rights were potentially violated will have difficulties to challenge acts in court if by the very same acts they were physically expelled or returned to another place (Spijkerboer, 2018: 464). It is telling that nearly all significant cases before the ECtHR regarding migrants' rights in recent years resulted from strategic litigation.[19] In other words, it was not

[18] Particularly in the pending case ECtHR, *S.S. and others v. Italy*, Application no. 21660/18.

[19] E.g., *N.D. and N.T. v. Spain* (Fn. 19) and *A.A. and others v. North Macedonia* (Fn. 20) were supported by the European Center for Constitutional and Human Rights.

migrants themselves who decided to litigate against state agents who had rejected them at the border without procedure, or expelled them from the territory without identification.

Apart from factors such as lacking resources to approach lawyers and to find one's way through national and international court procedures, there are more specific aspects that complicate the access to court procedures for migrants at distance: A system that requires individual, clearly identifiable claimants to assess the legality of state acts also means a dependence on documentation. In many instances, while the state acts are of continuous and documented nature, it is a major challenge to prove that a specific person was subjected to that treatment at a specific occasion. In the procedure before the ECtHR, this requirement forms part of the condition of victim status. Proving their presence at a specific time and incident is often difficult for those who by the acts in question were removed to another place.

Notably, distance also affects the processes of claiming rights politically.[20] In scholarship on the foundation of rights, often centered around the Arendtian notion of the "right to have rights," this role of proximity has remained largely unaddressed. In recent years, there have been important contributions underlining the role of political struggles for human rights, especially in the context of migration. These contributions sought to explain how universal rights remained precarious despite the existence of international human rights treaties. They shifted the focus from a discussion on the foundations of human rights to the practices of political founding (Butler & Spivak, 2007: 44; Gündoğdu, 2015: 171). Historically, it took political movements and experiences of prior rights violations for the adoption of rights treaties, and for persons gaining recognition as rights holders. Also once achieved, rights require political support to remain effective.

In the context of migration, this focus on "politics on the streets" is particularly relevant given the structural lack of citizenship and therefore a lack of access to institutionalized forms of participation (Johnson, 2014; McNevin, 2011; Ahlhaus, Chapter 15). The political

[20] See in that context also Frédéric Mégret, Chapter 5, which discusses how the legal conditions for access and protection frame what asylum seekers can say about their motives and preferences, and how it tends to hide their agency regarding destinations.

claiming of rights is in that sense linked with questions of visibility and collective action rather than formal vote. However, those political struggles depend, in general, on presence. The idea that rights are founded and claimed through political action tends to rely on a picture of persons already being copresent.

Jacques Rancière has offered an influential conception of the process of becoming a political subject and a subject with rights. According to Rancière, the possibility of politics is grounded in the capacity of speech and appearance. While the persons excluded from political action may first not be recognized as "capable of speech" (Rancière, 1999: 22), through the acts of "claiming rights they have and do not have" (Rancière, 2004: 305), persons constitute themselves as political subjects. His conception relies on a picture of politics as "climbing the scene" (Rancière, 1999: 25). While being of explanatory value, this also raises the question how or whether such processes of gaining rights can take place in constellations of absence and distance.

Migrants claiming rights from afar lack physical presence and to some extent also visibility. Those kept at distance through acts the legality and legitimacy of which stand in question, can rarely address the responsible state organs, and the responsible publics, directly. There are mediated forms visibility, through public media or decentralized ways of communication, that can mitigate the effects of distance. Yet the absence of personal encounter impacts the possibility to claim rights. Martina Tazzioli (2015) has criticized the focus on appearance in public as a "citizen-model of politics." The model illustrates that copresence, or proximity, is often at the basis of politics (cf. Waldron, 2011). Is the "presence-model of politics" just one that begins from the concrete interpersonal encounter rather than a given definition of what counts as political questions? It is hard to deny, however, that border regulations are genuinely political questions: They determine the delimitation of, and access to, the political community; they concern those included and those excluded. As such, the quandary of rights of those still distant, or removed to distance, remains.

3 Proximity, Affinity, Vulnerability: Grounding Specific Protection Obligations

It has been shown in Sections 1 and 2 that proximity constitutes a central criterion for assigning protection obligations to states, and

that this focus on proximity creates problems of distribution and of effective access to protection. In this section, I argue that, nonetheless, proximity should not be condemned as an entirely illegitimate criterion but rather be complemented with other bases for protection obligations. In developing this argument, I look at different approaches from legal and political theory that discuss the basis of protection obligations. Two qualifications are due: First, it is my premise that states regulate immigration and territorial access. There are notable approaches which dispute that states are free to limit territorial access (e.g., Cassee, 2016), but I will not discuss those and start from the situation of controlled international borders and limited mobility rights. Secondly, my interest is not justifications of protection rights as such, but more specifically the discussion about toward whom a state has obligations. In a world of limited mobility, criteria are necessary to link refugees' rights to protection with obligations of specific states, and my focus is on what those criteria should be.

At the outset, proximity reflects a basic link between persons, and between a person and a state. In that sense, Jeremy Waldron suggests that proximity is the basis on which people form political communities (Waldron, 2011: 2). His account is based on a reading of Kant, holding that human relations, and consequently law and politics, emerge from people sharing a space. To think of rights and politics as based on physical proximity contrasts with accounts of communities based on shared religion or history. Waldron in that sense juxtaposes his conception with a conception of community based on affinity. In practice, most states will have elements of a shared history that connects people, but also major elements of a community based on living together. The vast majority of states allow noncitizen residents to become naturalized after a certain number of years.

This says nothing so far about protection obligations. In Waldron's understanding, it does not follow from the principle of proximity that states could not control entry: Even for a community built on proximity, self-determination is relevant, and with that, rules on membership and entry (Waldron, 2011: 18). What can be drawn from the understanding of political community as based on proximity is the idea that proximity is an enabler of political relationships.

Looking at an understanding of community that puts more emphasis on affinity, we can turn to the writings of Michael Walzer. His

understanding of political communities being based on shared histories and culture also informs his proposition regarding criteria for protection obligations. Walzer stresses that states have obligations toward refugees, detailing some cases of when such obligations arise. At the center of his account stands the notion of "affinity." First, affinity results – and the most far-reaching duties – from having caused what turned persons into refugees (Walzer, 1983: 49). In addition to this "affinity by causation," Walzer sees special duties based on ideological as well as ethnic affinity toward persons in need of protection. Beyond those relationships of affinity, he recognizes a right to protection, but argues that such right cannot be enforced against particular states (Walzer, 1983: 50). Walzer acknowledges the prohibition to return people once they have found safety.

In Walzer's account, geographic proximity does not explicitly matter for special obligations to offer protection. While he includes the principle of nonrefoulement, he does not primarily envisage a system where refugees seek protection by arriving at the border. Instead, he stresses elements of causation, and of ethnic, religious, or ideological affinity.

David Miller offers an alternative conception which puts the choices of refugees and the notion of vulnerability at the center. Miller starts from a collective responsibility that states have toward refugees, a responsibility which is then assigned to particular states. This happens, he suggests, through the acts of refugees themselves, "making a visa application at a distance, […] turning up at the border, or […] entering illegally and then asking for asylum" (Miller, 2016: 83). While this may seem arbitrary since it does not distribute responsibility equally among states, Miller argues, it is not unusual that responsibilities arise in a somewhat arbitrary manner. What establishes in his view the *specificity of the claim* of refugees (unlike other people whose human rights are at risk), and at the same time the claim against *a particular state* is their act of "making themselves vulnerable" to that state (Miller, 2016: 84).

The concept of vulnerability has an established place in the context of refugee protection, for instance regarding prioritized resettlement or relocation, and with view to positive human rights obligations (for a general account Besson, 2014: 75). Specific in David Miller's conception, however, is that it is not the vulnerability as such but the combination with an act of those seeking protection. Refugees have

a claim against the state they have approached "by virtue, first, of having established a physical connection to that state and, second, of having become vulnerable to the decision" that the state will take in response (Miller, 2016: 85). In that sense, Miller's approach differs from one that would view vulnerability as the better alternative over the place of arrival for prioritizing refugee claims (e.g., Welfens & Bekyol, 2021). Miller's conception relies not on a given proximity but on a created connection, which can be based on arrival at the border as well as on an application over distance.

Itamar Mann's concept of the encounter goes in a similar direction. Mann's approach is reconstructive; he does not describe an ideal regime but identifies threads of meaning from historical developments and legal cases. His focus is not on legislative bodies or courts in creating law, but on situations of border controls and enforcement, in which human rights are negotiated. In those moments of encounter, especially at sea, Mann (2016: 48) argues, migrants invoke their humanity, together with an act of putting themselves in the hands of those who can save their lives (Mann, 2016: 47). Those situations of encounter move the acts from the level of state responsibility to the interhuman level. Mann's approach binds back the role of physical proximity to the foundational moment of human encounter. Rather than an abstract *criterion* why *a state* should have an obligation toward a particular person, proximity is the *reason* why *a person* feels a concrete obligation. In that sense, it shows how proximity is decisive – not original proximity of the state of origin but the physical proximity in a moment of encounter. Unlike in Miller's conception, the act of making oneself vulnerable here does not focus on vulnerability arising from dependence on state decisions but more physically on the dependence on an immediate act. In that sense, the physical proximity plays a role. While many types of encounters can take place without physical proximity – mediated by videos, calls, writing – the resulting link of dependence differs. In that sense, Mann's reconstruction underlines the role physical encounter can have in making rights and obligations real and robust.

Mann's account is closer to the existing legal regime, focusing on rights at the border. Yet it shows the link to the political dimension of claims to protection. While these can be legally assessed, they are also politically negotiated, by bringing refugees' motives and actions into the focus. With this link to the political, the approach relates to

Waldron's principle of proximity. None of the mentioned approaches argues that the proximity of a person's state of origin should be the main criterion for offering protection. However, Waldron's general account of proximity as a mode of founding a political community and Mann's concept of the encounter show how far proximity and contact can be relevant criteria.

The approaches of Walzer and Miller offer cues for which additional criteria could be viable in grounding protection obligations. Neither vulnerability nor affinity seems to be a workable criterion alone, and the authors do not suggest this. In Miller's account, a person seeking protection choses the contact with a particular state, and this can happen at the border as well as from afar in an embassy. While courts have rejected the derivation of such a system from existing human rights obligations,[21] state legislators would be free to establish procedures to apply for humanitarian visa at embassies. Certainly, the reception of refugees from distance, whether through special visas or through resettlement, is an important addition in an international protection system that strives for better responsibility-sharing between states (Doyle, 2018a; Schmalz, 2019). Such a system cannot rely solely on financial contributions of states but must create avenues for refugee reception in other than the neighboring states (Aleinikoff & Owen, 2022: 464).

Finally, Walzer's notion of "affinity by causation" can be read as a radical idea for advancing reception obligations that account for historical injustices, be they colonial histories, military operations, or involvement in the destruction of the environment. Tendayi Achiume has coined in that connection the idea of "migration as decolonization," which includes economic migrants (Achiume, 2019). There are increasing efforts to find legal answers to the growing phenomenon of displacement in the context of climate change (McAdam, 2021). While it is difficult to single out states in that regard, as at least industrialized states share the responsibility for climate change, the focus on causation can nonetheless inform the debate. In that sense, protection obligations based on affinity should be seen as an important addition, which opens up new forms of mobility and responsibility.

[21] See ECtHR, case M.N. et al (Fn. 21); CJEU, Case C-638/16 (X. and X. v. Belgium), March 7, 2017, ECLI:EU:C:2017:93.

Conclusion

International protection is largely guided by a "rule of proximity": States seek to limit secondary migration and to keep refugees in the countries bordering their country of origin. Human rights obligations toward migrants are limited to those who make it "into proximity" too. The interpretation of jurisdiction has followed an idea of states' responsibility to begin with physical, rather than administrative or other indirect, control over persons. Distance affects not only the legal rights to protection, but also the capacity to protest against rights violations: Those who were illegally pushed back or denied access often lack the avenues for claiming their rights. Overall, the current restrictions of protection obligations are deeply problematic. Limiting non-refoulement to states of refugees' first arrival might be in line with the wording of the 1951 Refugee Convention but it is not in line with the underlying idea of effective protection and a system built on cooperation between states.[22] Narrow interpretations of human rights standards, some states' open disregard for international legal rules, and the limited scope of control have given room to frequent violence and impunity at borders.

The picture of the current regime with the rule of proximity at its core is somber. Yet what are alternative criteria for structuring protection obligations in the current world of limited mobility? The chapter has argued in Section 3 that we should not abolish proximity as a criterion for protection altogether. At the outset, the current system is dysfunctional not because it allows persons to claim asylum when reaching the territory, but because it allows states so generously to hinder persons to reach the territory (Benhabib 2020; Shachar 2020b). In that sense, the concept of seeking protection at the border should be complemented by additional forms of grounding protection obligations. This could happen along an interpretation of jurisdiction that includes forms of indirect control and thereby extends the human rights obligations of states toward migrants. It could happen through legislative acts that introduce access to humanitarian visa at embassies. And it could add causation as a criterion for protection obligations, viewing forced migration as embedded in a global context, in which states have contributed to reasons for flight.

[22] Cf. the Preamble of the 1951 Geneva Refugee Convention.