3 *"Safe Third Country" Democratic Responsibility and the Ends of International Human Rights*

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International cooperation for the adequate protection of refugees remains an essential endeavor. Yet its foundations are fragile and, increasingly, its structure is confused. One source of fragility and confusion alike is the web of international agreements that apply the "safe third country" concept, which permits as lawful the return of refugees to jurisdictions where protection already has or might already have been found. Focusing on effects of safe third country rules in European and North American law, this chapter develops a critique of this practice. It does so, in part, on a different plane of analysis than the one that has predominated the literature thus far. While most scholars have criticized the safe third country concept as undermining individual rights protection, I argue that it is implicated in a preceding and more foundational harm: It deforms the possibility of democratic responsibility. I argue that we would do well to see the violations of refugee rights in question as more than privatized harms inflicted on an individual. They are relational and structural wrongs that concern the objective relationships guaranteed by domestic constitutional and administrative law. Perceiving this harm illuminates not only how the safe third country concept has corrupted international refugee law, but also why international human rights should be understood, more broadly, to protect the political agency of democratic citizens. This conclusion might seem counterintuitive in relation to the long-held notion that asserting human rights occurs at a level more abstract and different than, if not opposed to, national schemes of rights protection. But it yields an important analytic shift, in which we see commitments to international human rights and humanitarian ideals to align, constructively and in new form, with the public integrity of democratic states.

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The safe third country concept has a distinctive genealogy, originating as the "country of first asylum" in Scandinavian legal systems in the 1980s (see Kjaerum, 1992; Shachar, 2022). Its principal aim, now more widely codified in bilateral and multilateral agreements around the world, is to constrain the irregular movement of refugees and asylum seekers who have secured or could have secured protection in one country but choose thereafter to travel without authorization to seek protected status in another (see Executive Committee of the High Commissioner's Programme, 1975–2004b; Moreno-Lax, 2015: 668). This aim to constrain movement is effectuated in a number of ways at various points and forms of contact between state and refugee: at the admissibility or merits phase of the asylum process as grounds for exclusion; or as legal justification for the interdiction and removal of those attempting entry for the purpose of seeking asylum. The concept is accordingly more than an anchor of asylum policy but informs and enables the border management systems writ large in Europe and the Global North (Moreno-Lax, 2015: 665). Its consequences for refugee rights, for the posture of the state to refugee claims, and for the coercive measures deployed by the state are substantial and far-reaching.

The view that an asylum seeker may be returned to another state, as long as that state is considered safe, has become all but intuitive, but it is not self-evident. It is worth pausing to reflect upon its presuppositions. To penalize secondary movement is to assert that it is somehow less deserving and more spurious than "direct" movement (Hailbronner, 1993). This opens the door to the flawed inference that refugees who move on from the first place of possible safety thereby lose their status and become mere migrants, searching not for international protection but (merely) a better life or economic opportunity; they engage in abusive "asylum shopping" and do not flee as a result of "genuine need" (see Moreno-Lax, 2015: 669–670).

Accordingly, the safe third country concept permits a state to exclude or remove these individuals without considering the content of their claims to protection. The state assumes a hastened and confrontational posture to the suffering of others, as attention shifts from assessment of refugee status to determining whether the individual can be removed from a jurisdiction safely (Costello, 2005). Here, procedures for appellate review are rushed or highly abbreviated, and legal remedies often lack assurance for the automatic suspension of removal decisions (see, e.g., Council Resolution of 20 June 1995 on Minimum

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Guarantees for Asylum Procedures, 1996, cited in Moreno-Lax, 2015: 671). Because an individual removed from one state must be accepted into another, the safe third country concept needs to be systematized into bilateral and multilateral readmission agreements that coordinate the forced removal and render it permissible.

Consolidated in the 1990s, the EU's Dublin Regulation is one such agreement to secure, in its own terms, "effective access to the procedures for determining refugee status" (Dublin II Regulation, Recital 4). It elaborates "the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States" (Article 1) and projects as given that "Member States, all respecting the principle of *non-refoulement*, are considered as safe countries for third-country nationals" (Dublin II Regulation, Recital 2; Dublin III Regulation, Recital 3). Broadly imitating this architecture, the United States and Canada similarly codified the safe third country concept in their 2002 bilateral Safe Third Country Agreement (Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, 2002).

As a contemporary reminder of the concept's relevance and creative adaptation, in June 2021, the Danish Parliament passed legislation allowing it to establish asylum centers overseas where claims would be processed and asylum itself would potentially be given extraterritorially (BBC News, 2021). Earlier in May, Denmark signed a Memorandum of Understanding concerning cooperation on migration and asylum with Rwanda (The Local [DK], 2021), the first of several possible partner states along migration routes that might host camps and agencies to administer asylum access far from European shores. The United Kingdom in April 2022 proposed, to much controversy and constitutional challenge, to do the same; and only recently has the newly elected Labour government promised to end the pursuit of such plans.

International institutions and scholars have scrutinized the integrity and legality of the concept since its inception (Executive Committee of the High Commissioner's Programme, 1975–2004a, 1975–2004b; United Nations High Commissioner for Refugees [UNHCR], 1995, 2003), yet the conclusions have been mixed and their emphasis somewhat obliquely placed. Violeta Moreno-Lax (2015) makes the revelatory argument that the focus of both scholarly and institutional inquiry has been foremost on the propriety of the concept's application, with

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its legality being all but presumed as a general and theoretical matter. The dilemma posed by the safe third country attribution is accordingly understood to concern the particular expectations of what it means for a given country to be considered "safe" in light of obligations under the 1951 Refugee Convention (Moreno-Lax, 2015: 666; Gil-Bazo, 2015b: 44). Once this frame of analysis is in place, the only remaining scholarly inquiry is whether such conditions are indeed empirically satisfied – and, if they are not, what legal argumentation can be most effectively crafted to challenge the legality of transfer (see Abell, 1999; Mathew, 2003). Some scholars have extended this argument from practicality: Because a removing state has no possibility to guarantee that refugee rights will be protected by a third state, the notion of a safe third country is simply not viable (Durieux, 2009; Selm, 2001; see Moreno-Lax, 2015: 666).

Yet arguments from workability are not yet judgments about essential rectitude or lawfulness. Analyses that critically assess the legality of the concept from a holistic perspective – spanning refugee, human rights, and public international law – are relatively recent and still exceptional (see Gil-Bazo, 2015b; Moreno-Lax, 2015). Most studies remain equivocal, seeing the possibility of a lawful safe third country concept to be at least theoretically and conceptually coherent (Byrne & Shacknove, 1996; Goodwin-Gill & McAdam, 2007; Kjaergaard, 1994; Vedsted-Hansen, 2000). Conclusions tend ultimately toward permissiveness: "[T]he 1951 Convention neither expressly authorizes nor prohibits reliance on protection elsewhere policies" and the safe third country concept, although often abused, is not essentially unlawful (Foster, 2007) (see also Hathaway, 2005, cited in Moreno-Lax, 2015).

These prevailing trends of the scholarly literature have largely traced and informed juridical developments. The United Nations High Commissioner for Refugees (UNHCR) for its part has accepted that returns under the safe third country concept are lawful insofar as the third state affords "effective protection" for the individual returned, which is seen to include nonrefoulement protection, adequate procedural protections for fair and efficient status determination, access to means of subsistence sufficient to maintain an adequate standard of living, and general observance of fundamental human rights in accordance with international law (UNHCR, 1997; see Moreno-Lax, 2015: 671).

This approach has been endorsed by regional and national judiciaries as well. The European Court of Human Rights (ECtHR) ruled in 2011 that Belgium's transfer of an Afghan asylum seeker to Greece

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violated the ECHR's protections against inhumane and degrading treatment (*MSS v Belgium and Greece*, January 21, 2011). In light of their nonrefoulement obligations under Article 3 of the Convention, EU member states applying the Dublin Regulation "must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces" (*MSS v Belgium and Greece*, para. 342).

The Court of Justice of the European Union (CJEU) that same year similarly affirmed in the joined cases *NS and ME* that a member state's discretion to refuse a transfer under the Dublin system in fact becomes an obligation in cases where rights of the applicant under Article 4 of the EU Charter of Fundamental Rights are in question and when "they cannot be unaware that systemic deficiencies in the asylum procedure" in the receiving state (*NS and ME*, 2011, paras. 98, 106). Like the ECtHR, the CJEU emphasized that "the presumption underlying the Dublin mechanism, … that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable," notwithstanding the fact that the "Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted" (*NS and ME*, 2011, paras. 104, 75). Unlike the ECtHR (*Hirsi Jamaa and Others v. Italy*, 2012), however, the CJEU ruled that "minor infringements" of European asylum law fail the threshold for requiring the suspension of a Dublin transfer and has effectively maintained as its floor the violation of the prohibition against torture (*NS and ME*, 2011, paras. 82 *et seq.*).

Early challenges in Canada to its negotiated safe third country agreement with the United States ultimately came to naught before the Canadian Supreme Court in 2009, and present litigation has met only preliminary success in demanding more careful Canadian scrutiny of the adequacy of U.S. asylum procedures for protecting particularly vulnerable persons (see *The Canadian Council for Refugees et al v Minister for Immigration and Minister for Public Safety*). However, in March 2011, the Inter-American Commission on Human Rights (IACHR), by light of the same reasoning submitted in European jurisprudence, held that Canada's return of three individuals to the United States under its "direct-back policy" violated the right to seek asylum, protections against indirect refoulement, and rights of due

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process (Inter-American Commission on Human Rights [IACHR], 2011: 128). Like European courts, the IACHR's decision turned on the "automatic application" of removal under the safe third country concept and required justiciable assessments of the risks posed to an individual by the other state's asylum system, of the likelihood of exposure to refoulement, and of the availability of the right to an effective remedy (Gil-Bazo, 2015b: 73).

How are we to read these lines of jurisprudential development? In one respect, the rulings in Europe and the Inter-American system secured or articulated a higher level of rights protection for those seeking asylum in the procedures of safe third country systems. Following the *MSS* ruling, for example, most EU member states indeed suspended their transfers to Greece. After the decision in *NS/ME*, that halt became nearly universal, and the prohibition on transfers to states with "systemically deficient" asylum protections was later incorporated into the Dublin Regulation's recast, Dublin III (Arts. 26, 27 and 29) (see Fratzke, 2015).

Yet, in another respect, the responsibility for a state's coercive measures and the integrity of human rights protection continues to be in essential matters vague and contested. While Dublin III reflected the CJEU's language in *NS and ME*, it failed to provide further administrative or legal guidance on the meaning of "systemic deficiencies" that require prohibition of transfer. Substantially divergent interpretations among member states of what "systemic deficiencies" entail have meant that states have hesitated to apply the prohibition to other cases that nevertheless bear similarity to Greece – including inadequate processing and reception capacity in Italy or Bulgaria (Fratzke, 2015). Dublin's recast erected a new legal presumption that forestalled critique of state practice and instead served to entrench state prerogatives anew (Linden-Retek, 2021).

This retention of state prerogative soon carried over to the EU itself as a state actor. In 2016, the EU released a statement in which it formalized with Turkey a readmission agreement to return any "irregular migrant" found to have entered the EU through Turkey without already having applied for asylum. Also eligible for return are those who submit claims to asylum in the EU but have arrived from any other safe third country or first country of asylum where they could have previously received protection (European Council, 2016). As part of the agreement, the EU committed in exchange to increase resettlement (one for one) of Syrian refugees residing in Turkey; to accelerate

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Turkey's negotiations to accede to the EU and the visa liberalization process; and, finally, to offer additional financial aid packages to support Turkey's aid to Syrian refugee communities.

In 2019, the Trump administration responded to the substantial rise of Central American asylum applications by seeking bilateral "asylum cooperation agreements" with Mexico, Guatemala, El Salvador, and Honduras (O'Toole). At the same time, circumventing conventional statutory requirements for negotiating the full terms of safe third country agreements, the Trump administration adopted new asylum regulations unilaterally. On July 16, 2019, the US Department of Homeland Security posted an interim final rule (IFR) on Asylum Eligibility and Procedural Modifications that prohibited asylum applications at the southern border from those who transited a third country on their way to the United States but failed to seek asylum there (Asylum Eligibility and Procedural Modifications, 2019). In February 2023, the Biden administration announced plans to renegotiate a "transit ban" with Mexico and to reinstate bars to the right to seek asylum for those refugees who pass through yet fail to apply for protection in third countries (Miroff, Sacchetti, & Sieff, 2023).

These developments suggest that safe third country arrangements are remarkably resilient and, further, that analyzing their harm in the frame of individual rights protection risks a rather limited form of critique. The concept's complicated resilience suggests, specifically, that a renewed verification of individual protection risks formalism; it addresses only part of what makes the safe third country framework harmful and only part of the role that principles of human rights and refugee law arguably should play in a normative order of global justice and accountability. A focus on the effect of the safe third country concept on individual rights is an analysis of what would make the concept lawful in application, but this does not yet speak to the lawfulness of the concept's philosophical and political foundations.

The Danish example is in this regard telling, for it is not immediately apparent as a matter of substantive protection why such measures would necessarily violate human rights commitments. One can indeed imagine, given the wealth and expertise of the Danish state, that sophisticated, well-funded measures might be established such that the minimal human rights of refugees could indeed be satisfied elsewhere. In principle, the prospect is not out of the question. And

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yet the threat of such an arrangement to the spirit, purpose, and structure of the international human rights regime would, I suspect, remain acute in the minds of many advocates and scholars (see Motomura, Chapter 1; Schmalz, Chapter 4; Mégret, Chapter 5). But why, exactly? What is the source of this intuition? Answering this question, I argue, requires a new theoretical perspective. The individual rights frame of analysis is, on its own, insufficient.

Focusing on the safety of the transfer, as the individual rights frame would have us do, concedes too much to the worldview that posits the state as a stable point of origin – for analysis, normativity, and decision-making. It accepts categorically that the state is in the first instance entitled to decide to initiate a transfer, in light of its own determinations of the safety of others and what this safety requires. While these determinations might be frustrated or proven incorrect should safety not in fact be guaranteed, the presumptive structure of that decision – the sovereign prerogative to impose a vision of safety upon others beneath the veneer of international asylum law – is not similarly frustrated. The rectitude of the state's desire to transfer is left unchallenged by this law; and states have continued to act upon this desire, irrespective of and unconcerned with its rectitude.

The harm of this pretense is that it permits a deeper form of withdrawal from the space of responsibility for human welfare and human recognition. Appreciating this harm requires a distinctive philosophical and analytic frame, one I call the frame of *democratic responsibility*.

The anxiety one feels when contemplating safe third country schemes stems only partially from the human rights violations they foreseeably might cause. It stems also from an antecedent, more foundational concern: the notion that an exercise of discretionary coercion might instrumentalize life for the purposes of the state and thereby render the agency of that life illegible to the state. This concern is more foundational not because it necessarily contemplates greater physical consequence to the asylum seeker but because, before its physical consequences are evident, it distorts and prejudges the relational perceptions at work in the encounter between the state and the refugee (see Moreno-Lax & Lemberg-Pedersen, 2019). As effects of this relational harm, the individual rights violations that might come do not reveal the most vital dynamics of the concept – nor why, even should its applications be made to satisfy individual rights minima, it would remain immoral and unlawful.

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This argument rests not on a theory of domination or legitimate coercion but, instead, upon a theory of democratic agency and democratic personhood that, in taking the task and burdens of such agency seriously, binds the fates of the citizen and refugee together. The deception that ensnares the refugee is in truth a self-deception that ensnares the state. The dilemma posed is in one sense far narrower than consideration of the adequacy of "protection elsewhere"; it is oriented closely to the relationship between the state and the refugee. But in another sense it is thereby far broader – leading to consideration of the structures of power and relations of influence that characterize and inflect the encounter between state and refugee. In centering the immediate moral dilemma posed to any bounded political community by the claim of another's personhood, this analytic frame better apprehends the moral complexity that attends the "porousness" of borders – and it suggests why refugee law is a body of law directed not simply at "others" – to them "outside" – but also to the polity, to "us" already here (see Linden-Retek, 2021).

Witness to immensely turbulent periods of forced human migration, Hannah Arendt argued in 1951 – precisely at the birth of the Refugee Convention – that the international system and the modern democracies that comprise it fail to secure for large numbers of people of the earth the right to belong to a political community, one so organized such that they are treated as equals within it. This right was so foundational to democracy and to humanity that Arendt famously termed it the "right to have rights" ([1951] 2004: 376). The new political institutions that were consequently created to manage statelessness and migration – from the 1951 Convention through to Dublin and the American asylum cooperation agreements – speak to this fact, and to its endurance. Arendt's words suggest that it is far from coincidental that modern polities struggle with the integrity and meaning of their borders or continue to find the refugee and the migrant making appeals to safety and inclusion. The refugee and the stateless person are not victims of natural scarcity but products of a particular political form: the state whose people imagine themselves to be sovereign, separate from others, and sovereign strictly by virtue of their separation (see Näsström, 2014: 547). The problem that results, inevitably, is that when one loses, for whatever reason, membership in one's own country, there is nothing to guarantee that one will secure admission to another. "What is unprecedented," Arendt writes, "is not the loss of a home but the impossibility of finding a new one" ([1951] 2004: 372).

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Political theorist Sofia Näsström has argued, in light of this problem, that we ought to see the "animating principle" behind the "right to have rights" as the burden of responsibility. "The reason," she writes, "is that it is only by sharing this burden that human beings can take it on, and this is precisely what membership in a democracy does. By making us into an equal among others it limits and defines a responsibility we cannot plausibly shoulder on our own" (Näsström, 2014: 547). To be deprived of the right to have rights – to be stateless – is to be deprived of this common experience of assuming human responsibilities; that is, of the political structures that make the burden of responsibility possible.

Because the human capacity for the assumption of responsibility can take hold only among one's fellows, those deprived of political community will be "perceived as the most *irresponsible* person on earth" (Näsström, 2014: 560, emphasis in original). The stateless are "the absolutely innocent ones," Arendt writes, "and it is precisely this absolute innocence that condemns them to a position outside, as it were, of mankind as a whole" (2003: 150). Unable to apportion responsibility for one's acts among others intelligibly, one is in effect removed from the realm of humanity altogether; one is dehumanized: To be stateless, of course, is indeed to be human, but it is to exist without the means to live out one's humanity.

Seeing the connection between humanity and the shared burdens of responsibility helps explain Arendt's valorization of membership in a political community as something essential not just to democratic self-government. It is through citizenship that we remain human beings who articulate and make sense of our lives through action and judgment in concert with others (see Näsström, 2014: 560–561). Arendt writes that the refugee has indeed been deprived of shelter and of security, of the protection of the state; but foremost the refugee's deprivation is of "a place in the world which makes opinions significant and actions effective" ([1951] 2004: 372–376). It is a fascinating formulation because it suggests that the loss of human rights signals a deeper void within political life that implicates more than the individual whose particular rights are at the moment in question. It is a problem in which others are implicated, as well. For it is they who decide to acknowledge another's opinions and actions – or not; which is to say, they decide whether they, too, will live out their humanity, or not.

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Following Arendt, Étienne Balibar (2014) and Seyla Benhabib (2018) have elaborated the fragile, iterative imbrication of freedom and equality, captured in Balibar's term *égaliberté* and Benhabib's 'democratic iterations', by which the inclusion of the stranger denotes the very possibility of creating institutions which would establish and recognize equality. This possibility restores to political agency its attunement to the democratic burden of responsibility. The "right to have rights" is a reminder of – and a means to affirm – this relational form of agency (Benhabib, 2018: 103–109; Gündoğdu, 2015). While implicating the state's legitimate claim to democratic authority, it reaches beyond the state as an image of peoplehood and beyond statist institutions that claim the exercise of public power. The right might be addressed formally to the state's agents, its border guards, asylum officers, or immigration judges; but it attaches, too, to the broader civil engagements of citizens: those who act solidaristically without prior state sanction, perhaps, or in generative networks of mutual aid and legal assistance. Such acts call to mind, contest, and accordingly expand the consciousness of the democratic society for which the state otherwise seeks to speak, on whose behalf it purports to take responsibility.

A key consequence follows: Absent the moment when the state can respond to the refugee and her claim to asylum, both are in fact in a position of irresponsibility. The refugee, owing to the deprivation of a political community; and the democratic state, because denying human beings inclusion in political life degrades the "normative basis of democracy" (Näsström, 2014: 561). The state, too, risks presuming to place itself outside human power and law – and thus losing its own humanity. Conversely, when the state attempts to sustain, revive, and respond to the agency of the other, it restores that humanity, democracy's normative basis. What refugees seek is the assumption of human responsibility. Counterintuitively, this is what they can themselves provide to those from whom they seek it. This is the philosophical frame of democratic responsibility; in it we find the nature of relational harm and the possibility of relational repair.

Reflecting on Arendt's work, Itamar Mann in his study of maritime migration and the foundations of international human rights, writes that speech is the "most rudimentary expression of freedom"; "[refugees] must be able to speak who they are" (2016: 130). In the possibilities of speech there lies that spontaneous, unpredictable transition from the bare life of stateless irresponsibility to the birth of potential

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membership in a community. At stake in the refugee's agency is therefore a relational responsibility of those who hear the refugee's claim. Speech as freedom requires that someone listen. It requires a relationship to be established. Freedom is, with Näsström, a democratic quality. While it exceeds membership in any one particular state, it remains predicated on a democratic form of community – and thus on finding democratic relationality anew. This new community must therefore understand itself to be responsible for the agency of the refugee, not merely for her protection (see Mann, 2016: 130). It requires sensitivity to the conditions under which her estrangement from responsibility might fall away.

The implication is that protecting individuals from refoulement – the heart of the individual rights concern with the safe third country concept – concerns not only their survival but also their agency. What safe third country arrangements risk at the most fundamental level is this relational harm – a disregard for this dimension of responsibility and what it requires.

With this concern in mind, we can better trace – and more fruitfully critique – the mechanisms by which the safe third country concept deforms the democratic freedom of refugees. If the reception of refugees is perhaps the paradigmatic encounter (see generally Mann, 2016) when the burden of democratic responsibility is disclosed, the application of the safe third country concept compromises this disclosure. So how, more precisely, does this deformation of the character of human agency occur?

In the first instance, we can scrutinize the subtle but consequential shifts in asylum procedures that alter the nature of the speech that is heard. Rights to due process under asylum procedures – those ensuring translation and transcription, the right to request additional time and to appeal, the right to request the presence of a doctor or social worker, the right to legal assistance, and so on – align well with protecting the agency for those seeking asylum. Indeed, the structure of the interview, normatively reconstructed, aims to preserve and protect the narrative intelligibility of the story the asylum seeker tells. It structures a narrative space. The encounter is not merely with a human being in pain, but a person with a story and the capacities to tell it, to hear our own, to intertwine their tale with ours.

This space of agency contracts, however, along with its procedural rights, when the safe third country concept is employed. The questions

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one asks when the safe third country concept operates are simply not those one would ask without it being in place. In different ways, these distortions enforce crucial disjunctions in the refugee's story – and thus undermine the integrity of her agency. There are two variants of this, characteristic of different implementations of the safe third country logic. The first is the inclusion of a prior admissibility interview; the second is the raising of the standard of proof for successful asylum claims. Let me detail each variant and its consequences in turn.

Illustrative of the first variant are the terms and purposes of the readmission agreement between the EU and Turkey. Under the EU–Turkey deal, the safe third country concept requires a prior admissibility interview before what would otherwise be the eligibility interview inquiring into the grounds for asylum (see European Parliament & European Council, 2013). The question of admissibility tracks whether the state receiving the application claims is indeed the one lawfully responsible. It thus becomes a precondition for any further review of the asylum claim. What is asked of asylum seekers in an admissibility interview, however, changes the posture of the state to their claims and privileges certain lines of inquiry over others. The procedures that previously were meant to secure the asylum seeker's narrative agency now displace such agency.

Admissibility questions asked by EU asylum officers first concern the conditions of the applicant in Turkey and why the applicant felt it necessary to leave Turkey for the EU. The disposition of the interview – understood to scrutinize the appropriateness of applications in Europe – is to rebut the presumption that Turkey is a safe third country. It is not on the merits of the claim to asylum. The European state here assumes a defensive posture, not an exploratory one; and the burden of proof is placed on the applicant to establish the inadequacy of conditions in Turkey and whether there is indeed reason to fear persecution, serious harm, or the risk of refoulement there. At no point is the asylum seeker asked about the conditions in her country of origin and the many reasons she initially sought the protection of the international community elsewhere. The focus is to scrutinize her "secondary movement."

Secondly, admissibility interviews also focus on an applicant's general vulnerability (Zimmermann, 2015), namely whether they fall into certain categories that would make them eligible for special protection notwithstanding their movement from Turkey. This question is

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important, but it also comes with its own risks, being posed as it is apart from the broader narrative of the asylum seeker's decision to flee. It can easily be a dangerous exercise in dehumanization and, in some cases, of retraumatization of the applicant. For some categories of protection that can be ascribed with less difficulty (unaccompanied minors, handicapped or elderly persons, pregnant woman or those who recently gave birth, for example), this concern is perhaps less grave. But for those seeking protection under categories concerning victims of torture, rape, or other kinds of assault or exploitation, including human slavery or trafficking, the process of proving oneself worthy of this protection by affirming one's severe vulnerability is immensely fraught.

The point is not that one should avoid speaking of vulnerabilities; these are indispensable to understanding the import of admission. But there is a danger of perceiving asylum seekers merely as victims when such admissibility questions are taken apart from the eligibility review through which the applicant could share their full story. As Arendt understood, for the retelling of vulnerabilities not to reproduce the characterization of "bare life" (Agamben, 1998; Arendt, [1951] 2004: 302), they must be held close to the political collapse (the loss of home) that is their ultimate cause. Vulnerabilities spoken about in isolation from the context in which they are felt and lived risk essentializing asylum-seekers' experiences and their personhood.

The second variant by which asylum procedures under safe third country logics displace refugees' agency is in the shift of the standard of proof and the more stringent dismissal of claims. Consider here the Trump administration's modification to asylum procedures in the United States with its 2019 IFR. The IFR claims to conform with obligations under international refugee law because it presents no bar to the right to apply for withholding of removal under the Immigration and Nationality Act (INA) (IFR, 2019: 834–835). The INA's withholding of removal standard requires an applicant to make a showing that it is "more likely than not that he would be subject to persecution" in his country of origin (*Huang v. Holder*, 2014: 1152). Under the prevailing interpretations of the INA, however, asylee status requires merely the lesser showing of a well-founded fear of persecution or past persecution, which entails demonstrating "to a reasonable degree that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition [of a refugee] or would for

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the same reasons be intolerable if he returned there" (*Immigration and Naturalization Service v. Cardoza-Fonseca*, 1987: 439). The result is that the IFR's imposition of a higher standard of proof effectively risks denying asylum and perhaps even protection from refoulement to a refugee otherwise able to satisfy the "well-founded fear of persecution" standard normally required (see United Nations High Commissioner for Refugees [UNHCR], 2019). This elevated threshold is more consequential given that many asylum-seekers filing applications in the United States are not afforded legal representation.[1]

While the EU–Turkey deal effectively foreclosed initial discussion about the reasons for fleeing the country of origin, the IFR commits the opposite distortion: It heightens the import of the reasons for fleeing, while neglecting the reasons for not seeking asylum in a country of transit. That the latter could and should have happened is presumed beneath the categorical determination that transit countries are safe. Such juridical forms that raise the standard of proof conceive the personhood of refugees in an equally impoverished light, often in terms of what Didier Fassin calls "humanitarian reason," which scrutinizes precarious lives, emphasizing and evaluating the likelihood of their suffering (Fassin, 2012; see also Gündoğdu, 2015: 78ff, 111, 157). The higher this bar is, the more exaggerated its effect in reducing the political subject to the status of victimhood alone. This obscures the needed acknowledgments rooted in history and politics – those historical entanglements and particular responsibilities of public institutions. It obscures what the state owes and why it owes it.

The foregoing analysis has attempted to reorient the debate about the legality of the safe third country practice in international asylum law. It has parsed the legality and morality of the concept by formulating a critique within a new frame of analysis: democratic responsibility. The relational parsing of harm suggests far more serious deformations to human personhood than were legible to the analysis of individual human rights violations. Moreover, as failures to take up the burden of responsibility, these deformations implicate the personhood of both citizen and refugee.

[1] Compiled data suggest that represented individuals are five times more likely to prevail in their claims than those without the assistance of an attorney. Transactional Records Access Clearinghouse (TRAC), *Immigration Court Asylum Decisions: Cases with Representation*, fig. 3 (November 28, 2017).

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My argument here is inspired by the exhortation of Paul Weis that "[t]he development of the law on asylum is inextricably bound up with the general development towards the greater recognition and protection of the human rights and fundamental freedoms of the individual by international law" (1966: 194, cited in Gil-Bazo, 2015a). In offering a critique of the manner by which democratic states fail to affirm the worth of human agency, I have aimed to say something about international human rights as a political and democratic project in the register of responsibility in a world of shifting borders.[2]

More than a project of claims to individual rights, human rights seek at heart to correct the failure of the modern democratic polity to honor its own vision of responsible political life. By seeking to control and truncate the agency of the refugee, we also inhibit our own. This is why we should understand human rights to have democratic ends. The normative horizon of international human rights law is not, as counterintuitive as it might be, the protection of the individual. Instead, it is the protection of the democratic judgment that we make as members of a nascent, ever-anticipated community of humanity. While the protection of human life is necessary for this judgment, it is not its exhaustive purpose. For human life finds meaning in the human capacity for action and understanding – the ability to take responsibility, among others, for what one does. This renders the individual no less valuable; quite the opposite, it finds within the individual the expression of all political possibility: hope for ending the conflict a refugee flees, for perceiving the many dangers that attend her journey, for making a new country a new home; even for judging what it would mean, finally, to make a third country safe.

[2] This chapter is in this sense part of a response to the need, identified by Samuel Moyn (2016), to reclaim a balance in international human rights discourse between rights and duties.

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