



Principles of Morals, Natural Law, and Politics in dealing with Refugees

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Doubtless the political issue that has received the most attention in Germany, and probably in several other European countries, in 2015/16 is the issue of how appropriately to deal with the refugees looking for shelter in Europe. (I use the term “refugee” at the beginning of this paper and occasionally later to refer to all people who flee to another country in order to escape from great hardships, not in the more narrow juridical sense). This issue is not only explosive on a political level, having the ability to end the current coalition government in Berlin, to accelerate the disintegration of the European Union, and to create increasing dissent among nations in the future; for one does not need prophetic abilities to hazard the guess that the problem will intensify in the next decades. Beyond its practical dimensions, the problem is also theoretically extraordinarily complex, and I must confess that I do not know sufficiently precise answers. Much more than in the case of many other moral-political issues, the aporetic nature of the problem resists attempts at clear-cut solutions. I can only reject some simple solutions and offer some general reflections that must be taken in consideration when dealing with the issue. I do not claim at all that I have been able to muster all the relevant categories and even less that I know how to weigh the various arguments pro and con. I will begin by addressing the problem on moral grounds, that is, considering the duties that moral individuals should recognize with regard to refugees (I). I will then look at the issue from the point of view of natural law. Natural law, as I intend it, is the proper subset of moral norms that, on moral grounds, may, and often even ought to, be enforced by institutions with the monopoly of the legitimate use of physical force, that is, states. It is a proper subset, since not everything that is morally obligatory ought to be enforced; for it is morally decisive that free decisions to engage in moral activities not prescribed by the state remain possible. Natural law is thus narrower than the realm of moral norms; but it transcends positive law, since it offers a standard against which the latter can be measured. This does not mean that positive law has to be deficient. On the contrary, fortunately a large amount of the international law dedicated to the rights of refugees is inspired by moral principles and the tradition of natural law, and thus we can find in these texts important insights into what natural law ought to demand – texts, which furthermore enjoy the two advantages of being quite precise and of being valid law. But the political compromises to which they inevitably owe their existence render it a priori likely that they deviate in part from what natural law would ask for in an ideal world (II). Third, moral policies have to be implemented in the political arena; and it is quite obvious that the difficulties of the political process will be higher than usual when the fate of refugees is at stake. This will be so for two reasons. First, the refugees do not vote in the state that welcomes them; thus, politicians working for their interests are not helped by them in the next election. On the contrary, they have to convince their voters why they are allocating resources to other persons that otherwise would flow to the voters. Second, refugees can travel to different countries; and thus their settlement easily becomes an issue of international politics. In this context, I want to look more in detail at some of the problems that the new politics of the German government concerning refugees has faced since the spectacular changes in 2015 (III).

I.

A sign of the intricacy of the moral problem that refugees represent is the following fact. When Peter Singer published in 1979 the first edition of *Practical Ethics*, certainly one of the theoretically most debated and practically most influential books in applied ethics from the last few decades, it did not yet contain a chapter on refugees. This was added, together with a chapter on “The Environment”, in the second edition of 1993. It bears the title “Insiders and Outsiders” and draws on a paper co-authored by Peter and Renata Singer in 1988. But the third edition of 2011, while adding a new chapter on “Climate Change”, no longer contains the chapter on refugees (it dropped as well the appendix “On Being Silenced in Germany”). Peter Singer justifies his decision in a lengthy passage, which is well worth quoting: “This is not because the issue of admitting refugees has become any less important than it was in 1993. On the contrary, it is probably more significant now and will become more significant still, in coming decades, as we begin to see increasing numbers of ‘climate refugees’ – people who can no longer live where their parents and grandparents lived, because rainfall patterns have

changed or sea levels have risen. But I had become dissatisfied with the chapter as it stood. This is partly because the issue is one to which the facts – for example, about the possibility of a country taking in large numbers of refugees without this leading to a racist backlash that would harm minority groups within the country – are highly relevant. I had also become more aware of differences between countries that are relevant to this issue... If the issue cannot be treated adequately and in a properly nuanced way, I decided, it would be better not to include it in this book, especially as it is one of those issues on which governments must set policy rather than one on which individuals <sic> actions can make a significant difference". But even if Singer now rejects the argument of the second edition, I want to begin by sketching it, for it is enticing, and the analysis of the simplifications that characterize it can help us to develop a more complex view.

Singer starts his essay with a thought experiment. After a nuclear war in 2002, there is a fortunate group of people who own shares in fallout shelters built before the catastrophe, whither they have fled and where they have the capacity of controlling access to their facility. Each such underground village has enough food for the next twenty years for the 10,000 people that own shares. But new research shows that already after eight years people may safely return above the ground. Since the villages were conceived as luxury facilities, they also have enough space for an additional 10,000 people who could be reasonably fed over the eight years, even if this means limiting the luxury of the inhabitants. Should they let in additional 10,000 people, none, or only 500? Clearly, Singer suggests, only the first answer is the morally correct one. Analogously, he argues, if we give equal consideration to the interests of all people, we should recognize "that more pressing or more fundamental interests take precedence over less fundamental interests". Therefore, a rich country should allow access to refugees, for their often miserable life can be considerably improved with only a modest diminution of the standard of living of the people hosting them. It is wrong to consider generosity to refugees an *ex gratia* approach – or, as we could say with a term not used by Singer, a *supererogatory* act that goes beyond our strict moral duties. It is morally obligatory to act in this way. "So there is a strong case for Australia to double its refugee intake. But there was nothing in the argument that relied on the specific level of refugees now being taken by Australia. If this argument goes through, it would also seem to follow that Australia should be taking not an extra 12,000 refugees, but an extra 24,000 refugees a year. Now the argument seems to be going too far, for it can then be reapplied to this new level: should Australia be taking 48,000 refugees? We can double and redouble the intakes of all the major nations of the developed world, and the refugee camps around the world will still not be empty". But, Singer argues, this can never show that the original argument is invalid – even if it is true that at some point – "perhaps when the refugee intake is four times what it now is, or perhaps when it is sixty-four times its present level – the adverse consequences that are now only speculative possibilities would become probabilities or virtual certainties".

My own metaethical stance is quite different from Singer's utilitarianism: I defend a material value ethics, centered on the concept of person, on the basis of the principle of universalizability, an ethics inspired by both Kant and Max Scheler. But I do share the concrete starting point of Singer, concerning both this and other issues, that it is morally wrong to satisfy luxury needs when, with some limitations of one's consumption, human lives can be saved. Singer's famous essay "Famine, Affluence, and Morality" remains inspiring: living in affluence while other people are starving is not morally respectable. While in earlier times there was hardly any technical possibility to help out in famines or refugee crises occurring in distant countries, the new information and transportation technologies render an omission of help in cases of severe distress deeply immoral. For doubtless morality cannot limit itself to condemning evil actions, it must also condemn culpable omissions. If the prohibition on killing humans ultimately rests on the value of human life, this value must also justify the moral command to save human lives whenever possible. Still, there is little doubt that there are crucial differences between actions and omissions and, within omissions, between omissions of a concrete duty that one owes due to one's own earlier behavior and omissions of generic duties. For while the idea has to be condemned that helping starving people is *supererogatory* in the same sense in which giving a particularly generous tip to a waiter is (for the goods at stake are of different relevance), it is true that even helping the poorest is subordinated in urgency to other acts. We have first to repay our debts before we can begin to think about being generous; for concrete obligations toward our creditors, which we voluntarily undertook, are more urgent than the unspecific ones toward people in need of help. Even the obligation toward our parents, although not based on a voluntary contract (for we were not asked before we were born), has the nature of a debt; for we would not be what we are if they had not invested energy and money during the time of helplessness in our childhood, and it is only fair that we repay their help during the time of their helplessness in old age.

Similarly, if we have caused damage, we have first to pay compensation for it before we can begin to think about other duties; for we have violated our duty to refrain from positive damage and thus owe to the victims of our action something more than what we owe to people for whose suffering we are not responsible. When we have children, our duties toward them, for whose existence we are directly responsible (even if the latter is not damage), trump our duties toward other people. (This claim is compatible with morally favoring the decision to have less children in order to be able to be more generous toward unfortunate people). Still, balancing our

duties toward people for whom we have a specific responsibility with our duties toward distant persons whose misery asks for help remains a crucial moral task; and it is certainly morally right to refuse buying luxury goods for one's children in order to help people in dire misery (also, but not only, because this will help one's children grow morally).

We have preferential duties also concerning people to whom we are bound by promises, even more if these have been reciprocal. Do fellow citizens also enjoy such a preferred status? One can plausibly argue that we are connected to each other by an implicit social contract, and that the common duty to risk one's life in the case of an attack by a foreign power is a strong bond that trumps more generic duties. Yet when my fellow citizens are no longer plagued by unsatisfied elementary needs, it is not only permissible but morally obligatory to help people whose needs are far more urgent.

While a prohibition on actions – “do not kill” – can easily be satisfied by refraining from actions of killing, a prohibition on generic omissions – “do not omit to help humans in dire need” – is much more difficult to implement. If it means “Help all indigent people”, there is no way anyone could satisfy it; and if it means “Help as many people as possible”, the question remains: What does “as possible” mean? We may for example ask: in the short term or in the long term? If Bill Gates had early on distributed all his disposable income to the poor and had not saved and invested money in order to co-found Microsoft, he would not have become the billionaire, who, with the Bill & Melinda Gates Foundation, has created the largest private foundation in the world. But even such a wealthy foundation must select among potential beneficiaries, and the discretion that it enjoys in its choice distinguishes its situation morally from the cases previously mentioned. While it is clearly absurd to claim that one should not give to anybody since one cannot give to everybody, it is important to look at moral criteria that partially justify one's selections. The following criteria seem to me morally relevant, even if they benefit different people and I am not able to recognize any clear rank ordering among them. First, help should be directed to those most desperately in need, whose life, for example, is in danger. For by helping them, one decreases the probability of premature deaths; and one diminishes the most exorbitant forms of inequality. This is in accordance with John Rawls's difference principle, even if the extension of it to the international order transcends the author's intention. But if we assume that the situation in which the principles of justice hold must be based on the high number of interactions, one can argue that with increasing globalization these principles have to extend beyond one's state.

Second, one should help those who by the help afforded will be rendered able to help themselves. These people will only rarely coincide with the members of the first group; but it is reasonable to help them for three reasons. First, by doing so, one can reach with the same resources more people than in the case in which long term help has to be allocated for a longer time to the same individuals; second, the persons who become able to help themselves may then also, motivated by their own life story, become able to help other people; and, third, it is good also for the person who has been helped to become autonomous and no longer be in need of support from others. The third criterion simply states that people who are not responsible for their difficult situation deserve more help than those who are. This seems in itself fair; and it furthermore has the positive consequence that it creates a disincentive against bringing oneself into a situation where help is needed.

Since our resources and our altruism are limited, we ought to strive for efficiency in allocating our help. Some people may object to introducing economic categories while speaking about moral issues, but there is no moral alternative to it. Probably misconceptions about economy play a role here. Some people conceive the economic realm as the sphere of rational egoism and rightly insist that moral obligations cannot be reduced to egoistic interests. But the economic system serves the satisfaction of material needs, and while it often uses the appeal to rational egoism to achieve its ends, nothing in the concept of the economic excludes the orientation toward self-transcending goods. Every charitable institution that does not limit itself to fostering good feelings among its members wants to change something in the outside world; and clearly it is better if, given the resources that it has, it can achieve more rather than less of the goods at which it aims. Thus every respectable charitable foundation must check its performance and try to enhance its efficiency. The refusal to do so shows indifference concerning the ends one pretends to achieve. A mature person must furthermore recognize that, under conditions of scarcity, every action has opportunity costs because it prevents us from embarking upon the second best alternative.

After this general introduction to the ethics of helping in cases of distress, let us look at the concrete issue particularly at stake today, the refugees arriving in Europe. Is a benevolent individual duty bound to prioritize their help? No doubt, many of them are plausible candidates for help. They often flee from terrible hardships and even life-threatening situations; for otherwise they would not undergo their journey, which often enough is dangerous and not rarely ends with death, particularly if travel occurs by sea but also when they have to traverse a desert. Only in few cases can the suspicion arise that they are responsible for their plight. (One exception would be members of a criminal political party that abused a country and has now been overthrown). Regarding the other two criteria, however, the issue becomes more complex, and their appeal to help does

not necessarily trump the appeal of possible competitors. Let us look at the first criterion. Many of the people left behind in a war-torn country are usually worse off; for they could not afford the flight. Without a military intervention, which, however, is rarely advisable, there are limited possibilities to help them. So unfortunately some of the victims are not real competitors. Yet compared with the Syrians who managed to get to Germany, not only those Syrians who could not escape from the civil war ravaging their country, but also those Syrians who could cross the border to the neighboring countries but did not make it to a camp of the UN Refugee Agency (UNHCR) and even the ones who live in these scandalously underfunded camps are, albeit in decreasing degree, considerably worse off than those who have arrived in Western Europe. On purely moral grounds, it is not immediately clear why the latter are more entitled to help than other groups. This applies also when we confront them with other people living in very poor countries who cannot afford basic health services or primary education. It is not at all evident that we should decrease developmental aid in order to help refugees, as, for example, Sweden and the Netherlands (but not Germany and France) have done in 2015. Sweden and the Netherlands belong with the United Kingdom, Denmark, and Luxembourg to those countries that in 2015 gave 0.7% of their GDP to developmental aid. Germany gave only 0.52%, although a higher level of developmental aid will bring us more quickly to the implementation of the first two goals of the 2030 Agenda of Sustainable Development, namely, to eradicate extreme poverty and hunger everywhere. In the long run, developmental aid will furthermore diminish the causes that drive people out of their countries, even if in the short term it probably will increase the number of people who can think about, and pay for, leaving their country. (Similarly, the reduction in infant mortality first raises but relatively soon helps stabilize the birth rate).

Psychologically, of course, it is true that we find ourselves more bound to help the person who knocks at our gates and whose face we have seen than people who are far away, anonymous, and without their faces visible to us. But it is not evident that following moral instincts instead of general principles is the best solution. If one can save more human lives by investing in refugee camps than by hosting refugees in one's own country (which is likely, given the fact that the costs of maintaining people are considerably less in such camps), it could be morally legitimate to do so. Singer's thought experiment suffers considerably from the fact that he discusses only three possible alternatives, which indeed vary considerably in their moral value. But in real life there are far more; and opening the borders, even if it were politically feasible, may not be the one by which we achieve most good.

Second, concerning the issue of achieving the capacity to help oneself, an indiscriminate admission of refugees is not necessarily the best strategy either. Two more targeted approaches are, first, letting in people according to the criterion that they have the capacity to integrate themselves quickly in the new society, based, for example, on linguistic knowledge and the professional skills needed by the new country, and, second, investing in the educational system, either of the countries of origin in the case of potential migrants motivated by economic hardships, or of the neighboring countries that already host them in the case of war refugees. (It may be, however, that the concerned states for whatever reasons resist or are unable to deal with offers of help). But is the first approach not often in the interest of the country to which the refugees want to go? It usually is but it is an error to believe that it therefore cannot achieve something objectively good. While we should ascribe a specific value concerning the subjectively moral dimension to an act that is absolutely disinterested, it is a fallacy to believe that only such acts can achieve something which is objectively good. On the contrary, often enough institutions based on mutual interest prove to be more lasting than those that are built on self-effacing altruism, which occurs not too frequently among humans. When we discuss the political dimension, we will see that it is crucial to distinguish between immigration policies based on the self-interest of the country and those that are primarily altruistically motivated. While moral persons should not limit their actions to what is in their rational self-interest, moral politicians who want to change the world should realistically recognize that they will be more successful if they can connect moral demands with the concrete interests of the people to whom they owe their support.

There is a further issue ignored in Singer's shelter scenario. Singer himself recognizes that unlimited immigration cannot be allowed, even if his remarks about the amount of migrants a country like Australia could afford are deliberately vague. But a politics of letting in people without naming clear criteria beforehand, which would help them predict the success of their asylum request, awakens the desire to reach that safe haven in millions of other people. Since it is economically unfeasible to accept all of them, one elicits a behavior that is very risky (also because human trafficking is often in hands of criminal gangs) and, even if it leads to a safe arrival followed by a quick repatriation, hardly helps the poor country to develop and also causes the person who made the long journey to deplete his or her means. Important resources have been wasted for nothing. Preventing dangerous and useless journeys by precise information on who will, and who will not, be allowed entry and by allocating developmental aid is therefore more moral than the vague and unfulfillable promise that everyone is welcome.

II.

I have spoken about the moral duties that we have toward people unable to help themselves, among whom refugees are a particularly relevant class because they are no longer protected by their own state; in some cases they are even stateless, statelessness usually being a result of gaps in nationality laws, emigration, the collapse of states, and even specific laws depriving ethnic groups (like the Rohingyas in Burma in 1982) or political enemies (like the Russian émigrés in the 1920s) of citizenship. At the same time, one has to face the fact that almost all states of the world control their borders and do not allow entry to all who seek it. Why is it so? Is this merely a brute fact, or is there a rational justification for it? On a first level, one can argue that, physically, not all people fit into a specific country, even if it is perhaps the most popular one on earth, so that most people of our planet would like to live there. There is no way to house the entire population of China in a country like Luxembourg. And even when the physical space is vast enough to absorb people, the economic resources are never enough to give all the people who want to come the benefits that are one of the reasons why they wish to come. (In fact, the more generous the welfare state is, the more costly it is to extend it to newcomers). In some cases, one can even have the justified fear that an influx of people from very different cultures could endanger the local community's cultural capital, which alone made it so successful economically.

There is a still more important and more subtle level. Simply developing a list of what is morally desirable is ultimately unsatisfying – we want to transform the normative realm into something that has achieved social reality. The idea of natural law is exactly this – it demands that certain norms be enforced, for example by threatening to punish their violators, and thereby achieve a guaranteed reality denied to purely moral norms. But the enforcement of certain norms is possible only if there are subjects that recognize the duties correlated to the rights that should be enforced. Nor is it sufficient that they recognize it; they must organize themselves in such a way that the norms can be implemented. A state is exactly this – it is an organization of people on a given territory with the task of maintaining a certain legal order (which also encompasses the norms dealing with the organization of the state). In the extreme case, this task may involve the sacrifice of one's own life. The pride that people take in belonging to a state is justified: without the state, the moral norms would remain mere wishes; within the state, they can achieve the status of experienced reality, shared by the members of a community, who trust that most members of the state accept the common legal norms and therefore can plan their lives with much greater ease. The cultural cohesion and the social architecture without which a state cannot operate are not something that goes without saying; on the contrary, the relative frequency of civil wars shows that the presuppositions of a state's functioning are fragile. And even when two states are stable on their own, it does not at all follow that the combination of their populations would create a functioning polity. This is true even if one of the groups would only enjoy the rights of resident aliens; it is even more true if both groups were united in a common citizenship, and particularly if the polity were a democracy. For democracies presuppose a greater agreement among the population than the traditional multicultural empires, since people not only have to live peacefully together but also have to engage in common political decision-making, which is hardly possible if there is no agreement on basic values. For all these reasons, states defend their borders and define the criteria of admission as an inalienable part of their sovereignty. As long as humanity does not develop a universal state (and perhaps even afterwards, for such a universal state will be some form of federation, not necessarily granting free movement to everybody), this feature can hardly change (even if it may well be that nowadays "the worldwide crackdown on extralegal migration is a reaction to state perceptions of a loss of control over policy initiatives in other areas"). Michael Walzer has compared the state to a club insofar as both states and clubs have rules for admission but ought not to prevent people from leaving them (except in extraordinary circumstances, when the survival of the state is at stake). "Immigration and emigration are morally asymmetrical. Here the appropriate analogy is with the club, for it is a feature of clubs in domestic societies – as I have just suggested it is of states in international societies – that they can regulate admissions but cannot bar withdrawals". The asymmetry between emigration and immigration does not at all entail an inconsistency, even if it is true that there is a difference between clubs and states: one can live well without being a member of a club but one diminishes one's survival chances considerably if one forsakes the protection of one's state. But, after all, that is not so different from quitting a job, since it does not entitle one to find a new one either – even if living without a job is quite risky too.

But although the rights of humans can only be protected in states that cannot open their borders indiscriminately, particularly in an age of extreme mobility, this does not mean that from a moral point of view humans have their rights only thanks to the power of their states. On the contrary, states are legitimate because they are the only way to guarantee humans their rights, which follow from the dignity of the human person. This, however, leads to a moral antinomy. As humans, we all have certain basic rights; but as members of different political communities that have different ways of organizing our legal systems based on different cultures and histories, we inevitably treat some humans, the citizens of that community, unlike the outsiders. Fortunately, this does not mean that the outsiders are without rights or at least without a moral and religious recognition

of their claims. Already Plato – who certainly did not recognize universal human rights, as his support for slavery amply demonstrates – insists in the *Nomoi* (Laws) that crimes against foreigners (*xenoi*) and especially suppliants (*hiketai*), who come closest to our refugees, are heinous to a supreme degree, even if he clearly thinks that duties hold only after agreements and promises have been made. “As to foreigners, one should regard agreements made with them as particularly sacrosanct. Practically all offenses committed as between or against foreigners are quicker to attract the vengeance of God than offenses as between fellow citizens. The foreigner is not surrounded by friends and companions, and stirs the compassion of gods and men that much more... The most serious of offenses against foreigners or natives is always that affecting suppliants...”.

In fact, of the thirty-one completely preserved Greek tragedies there are two pairs that have the same title. One title, shared by a tragedy of Sophocles and Euripides, is the name of a heroine, Agamemnon’s daughter, Electra; the other name, shared by a tragedy of Aeschylus and Euripides, signifies a group of people: The Suppliants. (Even some other tragedies with different names deal with refugees). This points to the fact that, first, the suffering of suppliants moved the Athenian public and, second, that they were aware of the tragic conflicts to which their claims could expose a political community. In Kant’s *Metaphysik der Sitten* (Metaphysics of Ethics), the first part, “The Doctrine of Right”, is divided into two sections, dealing with private and public law; the second of which is further subdivided into chapters on law of the state, international law, and cosmopolitan law (*Weltbürgerrecht*). The last chapter is short and consists only of one paragraph (§ 62). It states that every human person has the right to visit every other country, for the spherical nature of the globe constitutes an original community of all humans concerning land. However, they have to respect existing property rights, and the right to settlement can only be granted by an explicit agreement of the people that already live in that country. Still, the rights to visit other countries and not to be treated as enemies when doing so, according to Kant, are rights; that is, they are not simply philanthropic principles.

It is tempting to see herein one of the seeds of the development of universal human rights, which is certainly one of the most important innovations of international law in the 20th century. After the atrocities of two world wars, the Universal Declaration of Human Rights of 1948 as well as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of 1966, have been the most general expressions of recognition of basic human rights by international positive law. Only the two Covenants, however, are binding treaties for the signatories; the Declaration, which was only adopted by the General Assembly of the United Nations, is not legally binding. But it has inspired legally binding treaties. Furthermore, it is to be understood as an elaboration of the appeal to human rights and fundamental freedoms, universal respect for, and observance of which, “for all without distinction as to sex, race, language, and religion”, must be promoted by both the United Nations and its member states according to Art. 55 and 56 of the UN Charter. It is therefore a constitutive document of international law, to which the status of customary international law perhaps can be ascribed. The International Covenant on Civil and Political Rights explicitly states in its preamble that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and “that these rights derive from the inherent dignity of the human person”: a remarkable acknowledgment of the idea that the rights granted to humans are based on a structure preexisting states and their positive law. Concerning the specific issue of refugees, which today has to be interpreted in the light of the two Covenants, peculiar rights were ascribed to them already after the First World War.

In the historical chapter of his excellent study *The Rights of Refugees under International Law*, James C. Hathaway sees the League of Nations codifications of refugee rights as a third step after aliens law – which put limits to the right of states to treat persons within their jurisdiction in the manner they liked but was only supervised on a bilateral level – and the League of Nations system for protection of national minorities, where the international community assumed a collective responsibility for the supervision of the rights of those who were not sufficiently protected by their own national governments. “The legal framework for an international refugee rights regime draws on the progressive refinements achieved under these two systems”. After the radical transformation of the political landscape at the end of the First World War, the world was confronted with millions of people who were at the mercy of a foreign state and could no longer appeal to diplomatic protection of their own state. The solution that the international system found was the following: “Refugees did not become the holders of particular rights, but were entitled to benefit from actions taken for them by a succession of League of Nations High Commissioners. In particular, the League of Nations was empowered by various treaties and arrangements to respond to the legal incapacity of refugees by providing them with substitute documentation, which states agreed to treat as the functional equivalent of national passports”. This was the famous Nansen passport, devised by the great explorer, scientist, and humanitarian Fridtjof Nansen, who in 1921 had become High Commissioner for Refugees, an activity that won him the Nobel Peace Prize in 1922. In 1938, the Nobel Peace Prize went to the Nansen International Office for the Refugees, which was established after Nansen’s death in 1930 by the League of Nations and which made an important contribution to the Convention relating to the Status of Refugees of 1933. Even if in its content the Convention signifies a true

progress – I mention the exemption of reciprocity in Art. 14, which disconnects the individuals' rights from the policies of the states of the refugees –, it was ratified by only eight states, sometimes with reservations, so that unfortunately it did not have a great impact on social reality. The failure of the international community to deal with the plight of the Jewish refugees persecuted by Hitler, as it became visible during the Évian conference of 1938, when only Costa Rica and the Dominican Republic increased their quotas, shows how little reliance there could be on what international law had achieved by then. It was the enormous increase of refugees in Europe after the Second World War that led to the Convention relating to the Status of Refugees of 1951, whose geographic limitations to Europe were overcome in the Protocol relating to the Status of Refugees of 1967. Both Convention and Protocol have been signed by now by a vast majority of states – by some with astute reservations, such as, for example, Turkey, which recognizes refugee status only to refugees from members of the Council of Europe (people coming from other countries enjoy only temporary asylum). Also in 1951, the UNHCR was founded as the successor of the International Refugee Organization, which had begun to operate in 1946. The UNHCR received the Nobel Peace Prize twice, both in 1954 and in 1981.

Three issues are crucial in this context. First, the status of refugee is granted only to people who, being outside the country of their nationality or, in the case of stateless people, the country of their former habitual residence, are unable or unwilling to return “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”. Note that this does not include everyone whose life is in danger, such as potential victims of wars or even of many civil wars. That is the reason why the European Directive 2004/83/EC grants subsidiary protection, for example to people who face serious and individual threat to their life and person by indiscriminate violence in situations of international or internal armed conflict (art. 15 c). (Migrants motivated by economic reasons do not even enjoy subsidiary protection). Since the Convention represented a remarkable progress, it would be unfair to criticize its definition of “refugee”; but from a moral standpoint, it is not clear what distinguishes the lethal danger facing a child based on its race from that based on indiscriminate violence in a war. Doubtless a persecution based on race in most cases will be even more heinous, if we look at the agent, but for the victim it hardly makes a difference. It was the deliberate purpose, however, of the Convention to find a compromise between the right of states to control access to their territories and the recognition of the duty to help some people in dire need; and the definition of “refugee” was explicitly motivated by the wish to limit the number of people entitled to help. It is worth mentioning that the right of asylum that the constitutions of some countries grant independently of their duties resulting from international treaties is often even more restrictive: I mention the French Constitution of 1946, which in its preamble (which remained valid even after the new Constitution of 1958) grants the right of asylum only to persons persecuted because of their actions in favor of liberty. Only few people qualify for this criterion; and even if one cannot deny that persons who have deliberately undergone considerable risks themselves are particularly deserving, the limitation of the right to asylum to them is hardly generous.

Second, the Convention of 1951, building on the one of 1933, but extending it considerably, granted substantial rights to refugees (besides the formal right to non-discrimination based on race, religion or country of origin, art. 3). They are not to be penalized for seeking protection, even if by means of illegal entry from the country where they are persecuted (art. 31), they cannot be expelled without strong reasons once lawfully in the country (art. 32), and under no circumstances, as long as they have not been convicted in a final judgment of a particularly serious crime, may they be sent back to the frontiers of the territories where their life and freedom would be threatened on the grounds that define a refugee (art. 33). As crucial as this prohibition of refoulement is, perhaps even more important is the granting of rights not only to freedom from interference but also of rights to positive benefits and to procedure, such as to housing, public education, public relief, or administrative assistance for those lawfully staying. Note that the rights mentioned depend on the status of the refugees – whether they are only physically present, lawfully present (for example, while their claim of refugee status is being verified), or lawfully staying (for example, because they have been recognized as refugees and granted asylum or because they enjoy temporary protection). But even the least protected group has basic rights to positive benefits due to the International Covenant on Civil and Political Rights. Its art. 6 grants a right to life, and it is plausible to interpret this as meaning a right not only not to be killed by the state but also to be protected by the state against attacks and even given a bare subsistence minimum (food, shelter, basic healthcare). Needless to say, the understanding of what a subsistence minimum is varies strongly according to the possibilities of the country hosting the refugees. Refugee status comes to an end when the refugee is repatriated, resettled, or naturalized.

Third, the Convention, while specifying the rights of refugees, does not oblige any state to accept refugees.

This is one of the reasons why it found so many signatories. Once they have crossed the border, even illegally, the refugees have important rights, as just mentioned, but this does not at all entail that states have the legal duty to open their borders to let them in, and even less to help the refugees to reach them. This is exactly what most states do: they bar access either physically, for example by border fences, but also legally, by requiring visas from certain states, by first country of arrival and safe third country rules, by declaring entire populations

as not at risk, and even by creatively interpreting parts of their territories as being outside their own territory, in order to avoid the legal consequences attached to entry in the territory. Sometimes parts of an airport are declared “international zones”, and Australia in 2001 “excised” several islands from the migration zone so that people landing there could not apply for visas, including protection visas. But since refugees then tried to land on the mainland, in 2013 Australia declared the whole mainland excised. It is not difficult to see an enormous moral tension between the relatively generous regime of the Convention and the obvious fear that most states have that too many refugees may benefit from it. If I may draw a humorous comparison concerning a deadly serious matter, the situation reminds me of Buster Keaton’s *Our Hospitality*. The hero, who has returned to his birth town to claim an inheritance, through a series of accidents becomes the guest of a family who, as they find out, was involved in a deadly feud with his father and thus has the duty to kill him – yet of course not when he is in the house, for there he enjoys “our hospitality”. But whenever he leaves even for the garden, they try to shoot him.

Recognizing moral duties to people while, at the same time, trying everything to prevent them from getting into a situation in which they would obtain legal rights corresponding to those duties is hardly convincing. But we have already examined the enormous moral difficulties of the situation. Concerning Australia, one must recognize that there are few other OECD countries with such a high percentage of foreign-born population – in 2013 it was more than 27% (only Luxembourg, Switzerland, and New Zealand had more), while in Germany it was less than half that (12.8%), in the Slovak Republic only 3.2%. Also the first country of arrival and safe third country rules are not *prima facie* absurd. No country could check billions of people claiming refugee status, and it is particularly clear that refugees cannot have the right to choose their homestead – otherwise the most popular countries would have to shoulder an unbearable burden. “Asylum shopping” demands administrative resources that cannot be delivered to needy persons. One can also argue that the first country of arrival is usually (even if not always) culturally closer to the country of origin so that integration is less demanding. And yet it is also clear that the first country of arrival rule disadvantages the poorest countries – for in the current historical situation, unlike after World War II, they are most likely to be neighbors of countries from which refugees flee. In the UNHCR mid-year trends June 2015 report the ten countries that hosted the most refugees – 57% of those under UNHCR mandate – were, in the following order, Turkey, Pakistan, Lebanon, Iran, Ethiopia, Jordan, Kenya, Uganda, Chad, and Sudan, only Turkey being an OECD country. If we look at the number of refugees per 1,000 inhabitants, of the OECD countries only Sweden and Turkey belonged to the ten countries at the top of the list – with 15 and 24 compared to the 209 of Lebanon. All this cannot be called fair, no more than the Dublin III Regulation within the European Union, which put the burden of refugees only on its southern members, Spain, Malta, Italy, Greece, and to a lesser degree Hungary, whence by far the majority of the refugees enter the EU. That the EU omitted to help Syria’s neighboring countries before the physical movement of refugees toward Europe obliged it to act, contributed to the mass exodus and was certainly not a sign of a provident and moral politics.

What can a fair solution be? Since neither the first country of arrival rule nor the choice of a country by a refugee are ultimately acceptable, in the long term the only way will be an international agreement on mechanisms of distribution of the burden that refugees doubtless represent. When I speak about distribution I do not necessarily mean that all countries have to accept refugees on their territory, based on non-relational criteria such as size of the country, lower density of population, GDP etc. The integrability of refugees into a specific country is a relevant criterion, and since such a criterion will continue to disadvantage poorer countries, it is a demand of justice that the richer countries that carry a far lesser burden based on their geography accept responsibility for a considerable part of the expenses. Of course, it will be crucial to have a system of accountability in place which forces states to respect the obligations undertaken. For a more distant future, one might even imagine a large area leased by the United Nations where most refugees are housed for a time of transition. In order to create an incentive for states to join such an agreement, one might add that refugees from states that sign it will be treated preferentially. At least in democracies, the majority of people have a partial responsibility for their government’s decisions; and so treating people from countries that refused to sign less generously than others is compatible with the third criterion of the ethics of help I mentioned at the beginning. The return of the Cold War may convince even European nations that the fate of becoming a refugee is not necessarily precluded from their own future. But a lot of diplomatic work will be necessary. For it is unfortunately true that “following the emergence of the crisis in refugee law and refugee protection, States have not demonstrated any interest in extending the rights of refugees. In the absence of a body at the international level, which has responsibility for creating international refugee law, or even an administrative body that could adopt interpretative decisions on refugee law issues, the adoption of new universal refugee law treaties has come to a standstill”.

Even if I do think that the decision of even the most generous state to accept refugees has a discretionary element – for the simple reason that there are more people who deserve help than can be helped – there is at least one group of refugees to which a state has a specific responsibility comparable to that of paying off a debt or compensating for a damage, that is, which is not discretionary. I have in mind those refugees for whose

suffering the country has a concrete responsibility. We should first mention persons who have collaborated with the country when it colonized or occupied their territory and who are in danger from their fellow citizens when the foreign power withdraws. Refusing to help those who have worked for the country is a violation of a much more direct duty to help than in the case of people coming from areas of the world that have not been affected by that country. But I go further: when the violence in a country has been triggered by another country's unjustifiable intervention, the latter is morally bound to help the victims of this violence even if they have not specifically worked for it. Since the current problems in Iraq are a consequence of the illegal, immoral, and politically stupid invasion of 2003, the USA has a specific duty to harbor persons from Iraq whose life is at concrete risk. Another relevant category of refugees (already mentioned by Singer) are climate refugees. Since the climate change that affects them and deprives them of their sustenance has as one of its causes the emissions of greenhouse gases by the developed countries, it is only fair that these countries help to reallocate the people who are losing their homelands or seeing their value drastically reduced. Needless to say, the enormously complex interplay of causes renders it easy to disentangle oneself from one's moral responsibility. In fact, while art. 8 of the 2015 Paris agreement within the UNFCCC at least addresses the loss and damage question and refers to the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, paragraph 52 of Draft Decision -/CP. 21 explicitly states that "Article 8 of the Agreement does not involve or provide a basis for any liability or compensation". We are thus still far from a legal recognition of a duty to transfer or host victims of climate change. It would be good if the international community began to elaborate concrete criteria for dealing with them before the problem overwhelms morally, economically, and politically unprepared countries, as did the European refugee crisis of 2015.

III.

The uncommonly generous reception of refugees (mainly from Syria) by Germany in the summer of 2015 was certainly a historic event, which enormously lifted the international reputation of both the German government and the German people, who at the beginning supported the changes with enthusiasm, extraordinary volunteer work, and a remarkable "Willkommenskultur". The courage shown by Chancellor Angela Merkel in doing something utterly unexpected given the practices of the European states in the last few decades surprised many people, who had interpreted her as a cool strategist of power. Was her ultimate motive a humanitarian concern for the plight of refugees, as emotionally presented to her when she met the young Palestinian-Lebanese girl Reem Sahwil, or was she primarily working for her place in history books after the US-American ambassador to Germany, Philip Murphy, had called her "risk-averse and rarely creative" (according to the November 2010 WikiLeaks release of US State Department diplomatic cables)? By the way, in mass democracies this is usually a necessary condition for rising to power, since this combination is perceived as a warrant of stability. Nobody knows. And since even for the agent motives are murky, it is completely sufficient to state that Merkel thought and thinks that a more generous attitude to refugees is morally the right thing to do. That this conviction led the daughter of a Lutheran minister to a new "Here I stand; I cannot do otherwise" in the conflict with her coalition partners was hardly surprising.

Since I do think that greater generosity to refugees than internationally practiced is indeed morally obligatory, both for individuals and – albeit to a far lesser degree – for states, I admire Merkel for her decision of 2015. At the same time, I am afraid that the way the issue was handled was politically not the most prudent and that the moralistic wave that Germany experienced in 2015 will have less lasting results than a more sober approach could have had. I just used the word "moralistic", and the context shows that it was not intended as praise. How come, since I myself used the term "morally obligatory" in the previous sentence? There are two very different ways of criticizing moralism. One is based on an amoral, ultimately cynical view of those who are in power and want the status quo preserved. The other is itself inspired by moral values; what it reproaches in moralism are three things. First, moralism follows sentiments instead of a rational analysis of the situation and of the moral alternatives at stake; second, in the enthusiasm of its sentiments it refuses to recognize that most people fall quite short of what is morally obligatory (and some are even truly evil); third, it proves unable to build lasting institutions. The three criticisms are obviously connected, for even the strongest sentiments, alas, are no durable basis for institutions (not even for a marriage!), particularly when they are not based on a realistic view of human beings. Note that if in the following I criticize political decisions, I do it from the armchair position of a pure intellectual, who recognizes that under pressure decisions have to be taken that seem problematic in hindsight. My criticism does not aim at belittling the past but at trying to learn for the future.

Based on several of Merkel's speeches, I presume that one of her motives in allowing refugees to enter the country was the desire to overcome the xenophobia of many Germans and to make the country more open to the world. I completely agree that this is a very important aim; in fact already in 1997 I called it "depressing that

Germany still has not reached consensus about an adequate immigration law". Twenty years later we are, despite some limited progress, in the same depressing predicament. But is not the acceptance of refugees a step in that direction? I am afraid not. On the contrary, it will render the passing of an intelligent immigration law modeled on the Canadian Immigration and Refugee Protection Act more difficult, because the mostly irrational fears that the presence of refugees has created among large strata of the population will prove a strong obstacle. In my eyes it would have been more politically prudent first to let in more foreigners whose utility for the German economy could easily be understood, particularly since the population would shrink considerably without immigration (and the impact of pronatalist policies has proven quite limited). In the context of such an immigration law, but based on different, namely, purely humanitarian grounds, far more generous quotas for refugees should have been included. In the actual situation, the influx of foreigners is perceived by many as exclusively a burden; and such a situation is not likely to last.

Second, the government should have informed the population about the concrete content, the extent, and the duration of its measures and the moral reasons for its decision. Germans were not told clearly by their government basic things such as the difference between migrants and refugees, and refugee and subsidiary protection and their temporal limits; and some legal grounds given for the decision were invalid. Neither art. 16a of the Grundgesetz nor the Convention of 1951 nor the European Convention on Human Rights, in force since 1953, obliged Germany to accept refugees coming from other EU countries. Suggesting that there was no legal alternative misled the public. This became obvious when even Austria and Sweden set limits to the influx of refugees and the German government was the last to claim that every refugee had a right to enter. I repeat that I admire the decision of 2015 on moral grounds; but Merkel should have, in a great speech to the nation, explained why Germany here assumed a moral responsibility that transcended its legal obligations. Probably the widespread phobia of moral pathos in postmodern societies, the Chancellor's lack of oratory skills, and the decreasing capacity of the German public to listen to remarks longer than the usual talk show contribution were the causes of this procedure. But the great danger of this situation is that politics in such situations will oscillate between cynical power struggles and sudden surges of sentimentalism. Neither the famous slogan "Wir schaffen das" – a German translation of Barack Obama's "Yes, we can", already appropriated in 2014 by the new Spanish party Podemos – nor the innumerable talk shows were able to replace such a speech. Whoever has studied great speeches from antiquity to Bismarck and Churchill must regret the decline of the genre, both on literary and moral-political grounds.

Third, a worrisome aspect of the decision of the government was the fact that there was no parliamentary authorization – and perhaps even more worrisome is the fact that there was no quick uproar, either in parliament or outside of it, about this lack of legitimacy. I do not have the competence to determine whether this was a violation of the German Constitution; but I can understand why authorities on constitutional law expressed their opinion that the decision on an "essential" matter, which inevitably entailed large costs, ought to have been made by parliament and that the bypassing of it was unconstitutional. I can also imagine a situation in which an irregular entry of refugees in high numbers would endanger the constitutionally guaranteed rights of the member states that have to host them. But whatever the constitution may demand, politically an involvement of parliament in such a momentous decision would have been highly appropriate. It may be useful to look at Aeschylus' and Euripides' Suppliants. Aeschylus' king Pelasgus, when asked by the suppliants to host them, finds himself in a moral dilemma, which is admittedly greater than the contemporary one, since he must face war to protect the suppliants (v. 379 f.). Even when the chorus asks him to make his decision alone, since he is the state (375 ff.), he adamantly refuses before he gets the assent of the people (368 f., 397 ff.). Only after it is given, he undertakes the obligation to protect the suppliants. Similarly, Euripides' Theseus (who is asked not to receive refugees but to retrieve corpses after a battle) insists that he can only proceed if the people agree (349-353). The distinctive features of Attic democracy are carefully set out also in the discussion with the herald from Thebes (399-443).

At the same time, there is no doubt that some of the arguments used in this debate against more generous immigration policies themselves contradict the German Constitution, for it explicitly grants the same status to all the religions (art. 4). As it is not the business of the government to prevent people from converting to Buddhism, Islam etc. and the current majority religion, from a constitutional point of view, is nothing more than a contingent historical fact, the state should not choose migrants and refugees based on their religion. To treat them differently once they have entered the country would be in any case a blatant contradiction of the 1951 Convention (art. 3 and 4). What is, however, possible and even advisable is to look at the integrability of migrants and refugees, and certain strands of certain religions that reject basic rights guaranteed by the Grundgesetz, such as the legal equality of men and women, may be considered hard to integrate – again, not because of their specific religious ideas but because of legal ideas that they infer from their religious assumptions. Note that the compatibility with the Constitution of a country has very little to do with geographic or genetic proximity; therefore, the appeal to the category of Kulturkreis is misleading. Doubtless, the Russians are closer linguistically and religiously to the Germans than the Japanese or the South Koreans, but this does

not entail that they are more easily integrated into a democratic state based on the rule of law, because their experience of this state form has been less extensive than that of the two Eastern Asian countries. Whenever integrability is a given, attracting people from different background cultures in most cases enriches a country considerably, exposing it to new ideas and forms of culture, as the example of the Anglo-American countries proves. Security is doubtless of particular relevancy. A state must defend its citizens, and while a general suspicion against a group that flees from terror is unjustified, the state that lets refugees in has to subject them to security checks. Even the prohibition of expulsion in the 1951 Convention explicitly does not hold for a refugee "whom there are reasonable grounds for regarding 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". (art. 33 (2)) The duty to protect its citizens entails an appropriate defense budget; helping refugees by its abridgment in a dangerous security situation can hardly be recommended, since a visible lack of the capacity to defend oneself may provoke aggressive actions that will cause many more refugees.

The fourth objection concerns the international dimension. While Germany's generosity was mostly admired by the countries outside of the European Union, which she partially relieved of a burden, the situation within the European Union could not help being different. This was not to be expected otherwise. The central idea of the Schengen area, the abolition of border controls at mutual borders, can function only if the control of the external borders is maintained. Giving up the usual procedures at external borders inevitably endangered the continuation of the Schengen area, and thereby a crucial idea of the European Union. Asking for more solidarity from the other EU countries was understandable, given Germany's support to other countries within the EU redistribution mechanisms; but it was not surprising that most of the other countries insisted that they would do no more than what was their contractual obligation, a policy pursued by Germany herself for a long time, since she had refused to reform the Dublin III Regulation, which, as I already mentioned, strongly disadvantaged the poorer Southern member states. From a bargaining point of view, it was not smart to let the refugees in first and then ask the neighbors to share the burden; for they had not been consulted in that decision, and so were not morally obliged to comply on any such ground. I agree that the pressure was such that a decision could not be postponed easily; but if Germany had offered the other European states to carry the lion's share of the burden under the condition that they committed themselves, in a binding way, to accept part of it, then it is far more probable that they would have been willing to say yes. Now the issue has proven extremely divisive, doubtless with the potential to drive the EU more and more apart. In fact, it is not unlikely that the vote for Brexit became possible because of this conflict.

I now come to the last issue, that of upper limits to the refugee numbers. Obviously both sides in this political controversy are right. The German right to asylum does not have an upper limit, and there are only very vaguely defined limits that would perhaps allow the expulsion of refugees. But as I already said, this does not entail a duty to let people enter the country. To do so is a political decision, inspired by a moral principle of solidarity and as such it is very respectable. But since the country cannot accept everybody, and since suggesting it could would only activate more human trafficking worldwide and xenophobic reactions inside Germany, there is no alternative but to formulate quotas. They should be part of an immigration law based on the self-interest of the country and should be generous toward refugees. To send back persons whose life is not threatened in order to let in more people whose life is endangered is morally completely justified. Help for refugees in one's own country should not endanger developmental aid or a strong increase in contributions to UNHCR and to refugees in poorer countries. In order to protect borders, collaboration with countries separated only by sea is crucial, for there is no other reliable way to prevent navigation. In the case of land frontiers, the EU should be able to protect its own borders, without having to shift that responsibility to neighboring countries.

I can only reiterate what I said at the beginning: The problem remains aporetic. The conflict between political necessities and the desire to grant every person basic human rights is heart-rending, and we can only hope that through further development, world trade, and controlled migration we will be able to achieve in the next few decades a world in which no one's basic rights are denied. This, however, is not guaranteed, for we see in many countries a backlash against universalism and a resurgence of nationalism and chauvinism, which is even turning against that form of universalism that was based on mutual interests, namely, globalization. Since economic, ecological, and security issues can only be solved globally, this backlash is an enormous threat to world peace. Despite the concrete limits of the policies just analyzed, Germany's commitment to political decisions inspired by a universalist ethics remains something of which Germans can and should be proud.