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Assigning Protection: Can Refugee Rights and State Preferences be Reconciled?

by

James C. Hathaway*

The theoretically global responsibility to protect refugees is today heavily skewed, with just ten countries – predominantly very poor – hosting more than half of the world’s refugee population. Refugee protection has moreover become tantamount to warehousing for most refugees, with roughly half of the world’s refugees stuck in “protracted refugee situations” for decades with their lives on hold. Both concerns – the unprincipled allocation of responsibility based on accidents of geography and the desperate need for greater attention to resettlement as a core protection response – cry out for a global, managed system to protect refugees.

Keywords: refugees, asylum, burden sharing, preference matching, international administration

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The international refugee regime presents a conundrum. On the one hand, 149 countries have formally assumed a common duty to recognize and protect refugees in line with the requirements of international law – including respect for a common definition, and ensuring refugees a common catalog of rights.¹ But in practice, just ten – mostly quite poor – countries host more than half of the world’s refugees.² Less than 15 % of refugees are living in all of the countries of the developed world combined (UNHCR, 2017, p. 2). Put simply, resources are presently inversely correlated with protection responsibilities.³

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¹ Convention relating to the Status of Refugees, 189 UNTS 2545, done July 28, 1951, entered into force April 22, 1954 (Refugee Convention). The definition of a refugee is contained in Art. 1, and the rights owed to refugees are found in Arts. 2–34. For a list of state parties, see <http://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>, accessed October 30, 2018.

² The top ten refugee-hosting countries are (in order) Turkey, Pakistan, Uganda, Lebanon, Iran, Germany, Ethiopia, Jordan, Sudan, and Democratic Republic of Congo (UNHCR, 2018a, p. 9).

³ The ten countries that host the most refugees relative to their “fair share” are (in

This mismatch between capacity and responsibilities is in part the product of accidents of geography: most refugees originate in the less developed world and for mainly logistical reasons seek protection in neighboring states.⁴ But even if the skewed distribution of protection responsibilities is in this sense “natural,” the specter of a theoretically global responsibility being assumed de facto by a small minority of comparatively disadvantaged states raises concerns about interstate equity. That case is made stronger by the fact that wealthier countries have for many years pursued a variety of *non-entrée* policies intended to bar refugees from accessing their territory (see Gammeltoft-Hansen and Hathaway, 2015), thereby exacerbating the challenges faced by poorer states.⁵

This is not to say that intraregional asylum is a bad thing for most refugees. To the contrary, there is a greater likelihood of cultural and functional compatibility of the kind that enables refugees more quickly to get back on their feet, meeting their own needs and even contributing to the welfare of their host communities.⁶ This both avoids the prospect of debilitation and reduces the cost of providing asylum. Equally important, proximity to the country of origin facilitates the ability of refugees to go home. Making it easier for refugees to go home if and when conditions allow replenishes asylum capacity, thus aligning with the preferred outcome of the refugee regime.⁷ This is particularly important given that the main countries of asylum have typically faced recurring refugee arrivals.

Given the advantages of protection closer to home, Alex Betts and Paul Collier (2017) have recently proposed a creative model for enhancing refugees’ economic autonomy in ways that enable them to serve as engines for development in poorer host states. Their vision is oriented to reinvigorating asylum by shifting the locus of resources and attention to the less developed world. Regional host states would both

order) Jordan, Lebanon, Tanzania, Turkey, Iran, Bangladesh, Ecuador, Egypt, Venezuela, and Algeria (Reynolds and Vacatello, 2017).

⁴ The top ten refugee countries of origin are (in order) Syria, Afghanistan, South Sudan, Somalia, Sudan, Democratic Republic of Congo, Myanmar, Central African Republic, Eritrea, and Burundi (UNHCR, 2018a, p. 8).

⁵ It has been argued that causal responsibility, moral responsibility, capacity, and community are all factors relevant to determining the existence of a remedial responsibility (Miller, 2001).

⁶ “In four-fifths of the world, state borders are the result of the legacies of colonialism. People across borders often have as much in common as that which divides them: language, culture, and extended family networks, for example [:::] There are often historic, ethnic and linguistic overlaps and cultural affinities. And the legal frameworks that apply to their own citizens on employment and certification are usually well suited to what is required for refugees to earn a living: the regulatory problem is exclusion, not mis-design” (Betts and Collier, 2017, pp. 133–135).

⁷ Under Arts. 1(C)(5–6) of the Refugee Convention, refugee status ends when there is a fundamental change of circumstances that restores protection. While it cannot be assumed that all refugees prefer this result (see, e.g., Kainz and Buxton, 2017), there is evidence that most do. For example, a recent survey of more than 1100 Syrian refugees conducted by Professors Kristin Fabbe (Harvard), Chad Hazlett (UCLA), and Tolga Sinmazdemir (Bogazici) determined that some 90 % planned to return to Syria when the war is over, with only 6 % aspiring to live in Europe (Howden, 2017).

keep their borders open and discourage onward movement of refugees in return for a solid system of international financing, private-sector investments, and interstate trade concessions. They argue that under such a system refugee autonomy can be dramatically enhanced, drawing on compelling test pilot programs in Jordan and Uganda. They also sketch an innovative plan in which the same market-based ideas can be applied to stabilize the refugees' countries of origin, thereby both enabling repatriation and averting future displacement.

Despite its many strengths, Betts and Collier's model has one major flaw: it is likely to leave many refugees stuck in a situation of indefinite temporariness. Although they appear to agree that respect for the psychosocial needs of refugees demands that there be a 5-year switch point at which time interim protection gives way to a permanent solution,⁸ they offer no concrete plan to ensure this outcome. This is a problem because recent history suggests that only about one-fourth of refugees will be able to reestablish themselves in their country of origin within that time frame.⁹ Providing host countries with the investment and markets they need as a reward for respecting refugee rights (as Betts and Collier advocate) may also enhance the prospects for an alternative solution – local integration.¹⁰ But even if – and this is a *very* optimistic if – another one-fourth of refugees could be offered local integration by the 5-year switch point, that still leaves about half of the world's refugees who would under their model be left without a durable solution.

The likely scenario is that the millions of refugees unable either to go home or to integrate locally by the 5-year switch point would join the ranks of what the United Nations refers to as persons in “protracted refugee situations”¹¹ – meaning that they have been kept in limbo for at least 5 years, with no solution in sight.

⁸ Betts and Collier (2017, p. 121), though they later suggest that the switch point could be “between five and ten years” (p. 205).

⁹ The statistical analysis is necessarily approximate. In the time frame 1998–2007, an average of 1.14 million refugees returned to their home country each year (Bradley, 2013, p. 3). But over both a longer (1974–2013) and more recent (2003–2013) time frame, the average number of returns per annum has been 650,000–700,000 (UNHCR, 2015, pp. 49–50). Taking the average of the latter two statistics – 675,000 returns per annum – and mapping that onto the most recent statistic for new refugee arrivals of 3.4 million in 2016 (UNHCR, 2017) suggests that about 20 % of refugees are likely to reestablish themselves in their country of origin.

¹⁰ For example, when affirmative steps such as providing refugees with access to land and markets were taken, “[r]efugees in Cameroon, Tanzania, and Zambia have experienced considerable success in local integration, especially when compared to most of the countries in the desk review portion of this evaluation” (U.S. Department of State, 2014, p. 30). But see Howden, Patchett, and Alfred (2017).

¹¹ UNHCR has defined a “protracted” refugee situation as “one in which refugees find themselves in a long-lasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years of exile” (UNHCR, 2004, p. 1); a “major protracted refugee situation” involves 25,000 or more refugees, has lasted more than 5 years, and shows no prospect of a solution (p. 2).

The prospect of millions of people forced to put their lives indefinitely on hold¹²—many “warehoused” in camps—is a disaster at the personal, economic, and political levels. It is also a disaster that can—and in my view, should—be avoided by integrating a broad optic on sharing responsibility in a reformulation of the refugee protection regime.

Yet Betts and Collier do not advocate a meaningful duty to resettle refugees, consigning refugee resettlement to be only “a relatively minor component” (Betts and Collier, 2017, p. 212) of the responsibility of wealthier extraregional countries. In taking this position, they posit no real shift from the status quo under which extraregional states engage in resettlement at their discretion and to the extent they wish. The result has been that an average of fewer than 100,000 refugees are resettled each year, less than 0.5 % of the total number of refugees in the world.¹³ While the most obvious consequence of this failure to pitch in is to exacerbate the demands on poorer countries, these states not infrequently effectively pass those costs along to refugees in the form of denials of refugee rights. Not only are frustrated and overtaxed poorer states increasingly emulating the deterrent practices of wealthier countries, but denials of even the most basic refugee rights—to freedom of movement, the work, to educate their children—are regrettably rampant even when refugees are allowed to enter.¹⁴ Focusing on resettlement as a core component of a reformulated global refugee regime is therefore not only a matter of interstate equity, but could also be a critical means of leveraging the dignified protection of millions of refugees.

So why would Betts and Collier (2017) neglect this obvious means to realize their commitment to ensuring that all refugees secure a return to “pre-flight normality” (p. 124) by the 5-year switch point? Their commitment to “working within the constraints of the contemporary world” (p. 234) likely convinced them that reform that requires powerful states to do everything presently required by international refugee law and then adds a duty to resettle into the mix is politically unviable. I agree. But this links to what I see as a second flaw in their proposal: it “does not exclude preserving a space for asylum elsewhere” (pp. 135–136). True, they believe that fewer refugees are likely to travel far from home if solid protection is available nearby. But they insist that what they refer to as “spontaneous-arrival asylum” outside the region of origin be preserved “as a symbolic commitment to reciprocity” and “as a last resort” (p. 136).

This combination of a token asylum system and a minor role for refugee resettlement seems clearly to amount to a very thin commitment to (human) responsibility-

¹² There are presently some 11.5 million refugees in protracted refugee situations; of these, 4.1 million have been in that situation for twenty or more years (UNHCR, 2017). This backlog of refugees in need of a solution will of course also require a solution, perhaps staggered over a decade so as not to undermine the efficacy of the reformulated protection system.

¹³ UNHCR (2018b), noting that in 2017 only about 75,000 refugees were resettled, down from more than 160,000 in 2016.

¹⁴ See generally Hathaway (2005).

sharing by developed countries. I believe that there is a better approach. Rather than making a *symbolic* commitment to reciprocity, extraregional countries could be persuaded to make a *substantive* commitment to sharing the responsibility to provide protection. There is no need, however, for that contribution to take the form of traditional asylum adjudication and reception, nor to replicate the protection for duration of risk that is most sensibly undertaken in regions of origin. Specifically, my proposal is to dispense with any duty of extraregional states to process the claims of those arriving at their borders or to admit those arrivals found to be refugees. Arrival would instead lead to entry into a common international protection system (with the UNHCR or another agency operating a speedy, normally group-based, status assessment system). Those found to be refugees would be assigned and relocated to a regional state where they would receive asylum. The sharing undertaken by extraregional countries could instead take the form of a binding obligation to resettle refugees unable to go home or to be integrated locally at the 5-year switch point.

Would states outside regions of origin find this an attractive option? I believe they would.

Under such a system, there would be *no immigration consequence* from an arrival to seek protection and hence no reason for wealthy countries to spend billions of euros every year in a desperate effort to keep refugees away. Developed countries crave control and manageability and have been prepared to pay massively to get it. For example, Australia gladly spends about €250,000 per annum to detain a single refugee in an offshore partner state as part of its notorious deterrence regime (Higgins and Tishler, 2017), while the European Union has authorized a €6 billion payout for Turkey to keep Syrian and other refugees from entering Europe.¹⁵ My point is not that we should encourage the financing of deterrence; to the contrary, it is that deterrence is very, very costly. Yet it is a cost that wealthier countries have been prepared to bear because they place such a high value on securing their borders.¹⁶ Why not provide them with an alternative that achieves the same goals in a way that is both more cost-effective and more humane?

Such a system would have two critical advantages over Betts and Collier's model. First, a shift of this kind would allow us to harvest massive sums of money that could be applied to enabling in-region asylum. OECD states (OECD, 2017) presently spend an average of €10,000 to process and support a single refugee for one year. Since an average of about 1.65 million asylum claims are presently made each year in OECD states,¹⁷ the cost of maintaining asylum systems in wealthy countries – serving less than 15 % of the world's refugees – is an astronomical

¹⁵ "EU and Turkey Reach Refugee Deal," *Politico*, March 20, 2016.

¹⁶ "From the perspective of states, refugee flows are chaotic, unpredictable and widely regarded as socially disruptive and destabilising" (Jones and Teytelboym, 2016, p. 80).

¹⁷ In 2015, 1,661,490 asylum claims were made; in 2016, there were 1,639,940 claims (OECD, 2018, Statistical Annex, p. 329, Table A.3).

€16.5 billion each year.¹⁸ By way of comparison, the entire UNHCR budget that funds material assistance to the 85 % of refugees in the less developed world comes to less than 35 % of that amount.¹⁹ By not calling for the dismantling of domestic asylum systems in wealthier countries, Betts and Collier have not only reduced the political viability of their model, but also sacrificed billions of euros that could have funded what they rightly see as the more sustainable response of in-region protection (Betts and Collier, 2017, p. 134). That seems to me an unconscionable waste.

Second and most important, the offer to extraregional states of a role under which the chaos and perceived security risks of direct arrivals would be dramatically curtailed could be leveraged to secure a binding commitment from these countries to significantly higher levels of residual resettlement for refugees at the expiration of their 5-year in-region protection period. Specifically, the system would be designed to include a commitment that refugees unable to reestablish themselves in their home country or to be locally integrated would, at the 5-year switch point, be entitled to resettle in an extraregional state. Ironically, the average number of resettlement spots that would be needed each year is nearly identical to the number of asylum claims currently being processed by OECD states.²⁰ Under this approach, extraregional states would remain very much engaged in (human) responsibility-sharing for refugees. Indeed, they would arguably be undertaking a more critical variant of responsibility-sharing than they do under their current individuated asylum systems: they would be providing a desperately needed answer to the protracted refugee problem, harnessing their comparative advantage in providing permanent, rather than temporary, opportunities for refugees.

I have elsewhere sketched in some detail the full scope of such a reform.²¹ In essence, my approach is predicated on the planks of eliminating barriers to access; a shift to internationally run, normally group-based and hence speedy status assess-

¹⁸ This is likely a conservative estimate. While states aim to process asylum claims in the first year, backlogs and appeals mean that procedures and hence support costs may extend into a second or subsequent year (ECRE, 2016). Indeed, extrapolating from data on costs in Germany, Betts and Collier (2017, p. 129) suggest that “the world spends approximately \$75bn a year on the 10 % of refugees who moved to developed regions and only about \$5bn a year on the 90 per cent who remain in developing regions.”

¹⁹ The agency’s 2017 assistance budget was €5.72 billion per annum (based on program expenditures, not including global programs and headquarters costs); see <http://reporting.unhcr.org/financial>, accessed October 30, 2018.

²⁰ Based on current arrivals numbers, the number requiring resettlement would be about 1.7 million refugees per annum, i.e., 50 % of the 3.4 million new refugees each year (UNHCR, 2015, pp. 49–50). This is roughly the same as the average number of asylum claims made in OECD countries in 2015–2016 (1.65 million per annum) (OECD, 2018, Statistical Annex, p. 329, Table A.3).

²¹ See Hathaway (2016) and, by the same author, “Responding to the Refugee Crisis,” <https://www.opendemocracy.net/>, February 29, 2016, republished in <http://www.reflaw.org/>, February 29, 2016, and in *Verfassungsblog*, March 1, 2016. These build on the results of a multiyear collaborative study summarized in Hathaway (1990); social science background studies for this initiative were published in Hathaway (1997).

ment; no constraints on freedom of movement or other rights once an assignment to protection for duration of risk occurs; guaranteed funds to poorer receiving states (contingent on their respect for refugee rights), both to offset the costs of protection and to ensure development synergies between refugees and their hosts; and firm guarantees of access to a durable solution within 5 years. All state parties would commit themselves to both (financial) burden-sharing and (human) responsibility-sharing for refugees. Drawing on principles of common but differentiated responsibility pioneered in such fields as environment and development, different countries could commit themselves to different contributory mixes. But critically, *all* states would make *both* a financial and a human contribution to refugee protection.

This shift would not require any renegotiation of the UN's Refugee Convention; to the contrary, the reform I suggest would be a means of implementing that treaty, precisely as its drafters hoped would occur (Refugee Convention, Preamble, para. 4). International law would readily accommodate a system under which the place of a refugee's arrival is divorced from the place in which he or she is protected. So long as refugees are fairly recognized and their rights honored, a refugee may be required to accept asylum in a state party not of their choosing (Hathaway and Foster, 2014, pp. 30–49) – this is, after all, a human rights system, not a migration regime.

Like Betts and Collier, I believe that the only viable international reform is one that speaks to the self-interests of states even as it betters the lot of the world's refugees – and that this proposal meets that test.

The poorer countries that host more than 85 % of the world's refugees would no longer be required to beg for the charity of wealthier states, but would be guaranteed the funds needed to protect refugees. Those protection funds would not go just to refugees, but would also fund start-ups linking refugees to their host communities, so that everyone benefits from the presence of refugees. And regional host states would not face the possibility of indefinite hosting as a perverse punishment for keeping their doors open to refugees. To the contrary, refugees unable safely to go home or for whom local integration is not possible would be resettled to another state.

The system would also be better for the developed world. The assignment mechanism would not only promote national security, but also undermine the smuggling market (since no immigration benefit would accrue from arrival in any particular state) and reduce the use of the refugee channel for economic migration. The more managed nature of the system and its focus on protection by resettlement would more generally give wealthier countries a role that is an easier social fit than temporary presence and give them the sort of planned, orderly role they crave.

Most critically, the proposed system would be better for most refugees. Refugees would not have to put their lives on the line to get access to a place in which solid protection is on offer. Protection would really be the empowering, rights-regarding protection that the Refugee Convention calls for – not the purgatory of refugee camps or urban slums. And most important, every refugee would get a durable solution within a reasonable period of time.

The Practical Challenges. Even if I am right that such a shift is in principle mutually beneficial, it faces a number of practical challenges.

First, there would need to be agreement on the formulae that would define a fair sharing of both (financial) burdens and (human) responsibilities, and that would ground the proposed system of common but differentiated responsibility. In particular, and in contrast to all existing proposals, there in my view needs to be a disaggregation of factors that define a state's capacity to contribute to (financial) burden-sharing from those relevant to the ability to receive refugees either for a period of years or permanently.²²

Second, assuming agreement on the formulae, there needs to be a strong central actor able and willing to administer the quota and assignment program. But who would this be? Even if states could be persuaded that there is little if any benefit to state-by-state management of what is fundamentally a transnational concern, the UN's refugee agency (UNHCR) has shown little interest in assuming what would clearly be a more politically charged role that might imperil its institutional interests. Indeed, Betts and Collier (2017) argue that UNHCR is "not currently equipped" (p. 6) to manage a new refugee regime, as its institutional strengths "are no longer the primary skills needed to ensure refugee protection in the twenty-first century" (p. 38). But if not UNHCR, who might play this role?

Third and perhaps most fundamental, a critical shift of this kind – even one not involving formal amendment of the Refugee Convention – requires a champion. The dearth of political leadership on refugee protection at the present moment is, however, extreme. There have of course been moments when leaders have risen to the challenge of protection: Canada's Justin Trudeau, Germany's Angela Merkel, Jordan's King Abdullah, and Tanzania's Jakaya Kiwete come to mind. An effort to bridge the leadership gap – a "world refugee council" co-chaired by former leaders from Canada, Germany, Pakistan, and Tanzania – seemed to hold promise, but has thus far offered only vague directions to guide reform.²³ And the failure of any

²² The European Union formula adopted in September 2015 merges measures of financial and human capacity; it is based on GDP (40 %), population size (40 %), unemployment rate (10 %), and number of asylum applications (10 %). The latter two factors, however, may not exceed 30 % of the population size and GDP effects (http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm, accessed October 30, 2018). The refugee scholar Atle Grahl-Madsen, the first to propose a distribution key for refugee protection, also merged such considerations, suggesting that a formula based on $GNI \times 1.5 / \text{population}$ was the appropriate measure (Grahl-Madsen, 1982, p. 74). The proposal circulated by Oxfam's Sarnata Reynolds is perhaps the most sophisticated (though still a single formula), merging consideration of GDP with rank on both the Human Development Index and the Fragile States Index. The possibility of tradable quotas is discussed more generally in Betts, Costello, and Zaun (2017, p. 57).

²³ See <https://www.worldrefugeecouncil.org>. In its most recent report, the Council limited itself to vague recommendations for increased accountability; better mobilization of funding; and governance reform and responsibility sharing. Only modestly more concretely, it did embrace the notion of refugee protection as a "common public good" and advocated reliance on "common but differentiated responsibility" to frame a new approach to sharing (World Refugee Council, 2018).

political leader to invest his or her political capital in the UN's current effort to draft a comprehensive global compact on refugees²⁴ should surely give us pause.

The Principled Challenges. Three questions about the underlying *issues of principle* arising from a proposal to abandon classical state-by-state asylum in favor of a managed system of global refugee responsibility sharing are typically raised.

A first question is whether it is inherently unseemly (indeed, some might say unethical) to establish a system that would essentially distribute refugees – initially to safe havens and, if residual resettlement is required, to permanent home countries. This critique is usually framed as directed to the “commodification” of refugees (see, e.g., Chimni, 2007) – treating human beings as though they were bales of wheat to be shipped around the world.

The most convincing riposte is, I believe, rooted in utilitarianism: while it may be suboptimal to structure asylum opportunities, surely this is less bad than the result produced by the current system under which massive resources are expended on the 15 % of refugees able to reach the developed world – disproportionately young, male, and mobile – while comparatively derisory resources are made available to the 85 % of refugees who remain closer to home. In particular, the fact that nearly 12 million refugees in the global South are in protracted refugee situations – long-term indeterminacy, with no solution in sight – argues strongly for the importance of sacrificing some of the relative privilege of refugees able to reach asylum in wealthier states in order to do right by the massive majority of refugees consigned to dramatically more difficult circumstances. Put simply, the equal moral worth of all refugees requires that we pay as much attention to those we do not see as to those who are in our midst.

Second, even if the utilitarian logic holds, ought we really to buy into a system that sacrifices refugee agency altogether? I find this concern quite compelling, at least if it is made on behalf of *all* refugees – not just those who make it to the developed world. The importance of maximizing refugee agency is also a matter of pragmatism, since, as Joris Schapendonk has recently noted, “[i]f you deprive refugees completely of choice, we will have a flourishing industry specialized in ‘reintroducing’ agency, consisting of [:::] brokering service, smugglers and traf-fickers” (Schapendonk, 2018, p. 66).

A promising means of maximizing refugee agency within a managed system of responsibility sharing is the concept of *preference matching*. The types of approach adumbrated by Fernández-Huertas Moraga and Rapoport (2013), Jones and Teytelboym (2016), and the Stanford Immigration Lab (Bansak et al., 2018) suggest that an algorithm could be developed that would allow refugees to have some influence over where they are assigned for protection. The beauty of this approach is that it offers the prospect of preserving efficiency – especially critical for the initial assignment to protection up to the 5-year switch point when time is of the essence –

²⁴ <http://www.unhcr.org/en-us/towards-a-global-compact-on-refugees.html>, accessed October 30, 2018.

even as it enhances refugees' own choices about the protection destination. While work to date has focused on preference matching as a component of local or regional systems, there seems to be no reason in principle to see the principles as inapplicable to, or inoperable in, the global system.

Third, and undoubtedly most contentious, if refugees are allowed to express their preferences, ought the algorithm to be two-sided, allowing states (and perhaps even localities) of destination to express their preferences for particular qualities of a refugee seeking a home? The argument against doing so is perhaps obvious: there is a clear risk that a state might seek to avoid receiving less talented or educated (but equally needy) refugees, or even those with disfavored racial, political, or other characteristics. It seems to me, however, that there are answers to this concern.

To start, one might strictly limit the factors a state may identify as relevant to matching by reference to the international legal duty of nondiscrimination. Importantly, that duty proscribes not just direct discrimination, but also indirect (effects-based) discrimination²⁵ – so, for example, a country actually motivated by race but defining its preference by reference to achievement of a given educational level that

only a favored racial group can attain would still be in breach of the duty of nondiscrimination. Nondiscrimination as a constraint is imperfect in that it requires a judgement call about what counts as “reasonable and objective” differentiation;²⁶

but it is nonetheless a norm that enjoys an especially privileged status in international law²⁷ and thus is unlikely to be thought objectionable at the level of principle.

Assuming that nondiscrimination limits the range of acceptable matching criteria, pragmatism seems to me to argue for allowing destination countries to have their preferences factored into a two-sided algorithm. Critically, it is likely to make the prospect of shifting to a managed system of protection less confronting for states. For example, major refugee resettlement countries already rely on referrals based on vetting by the UNHCR, and then apply their own selection criteria to decide which refugees within the pool of persons deemed to be in need of relocation will be admitted by them.²⁸ There is, in other words, a preparedness to entrust critical aspects of the decision-making process to an international agency *because* the state is still allowed to assess suitability for resettlement against its own metrics.

Ensuring that destination country preferences are built into the algorithm would likely prove a comparable confidence-inducing measure.

²⁵ United Nations Human Rights Committee (2004, p. 148, para. 12), indicating that international law prohibits discrimination “in law or in fact in any field regulated and protected by public authorities.”

²⁶ As Pobjoy (2010, p. 209) observes, “[t]he ‘reasonable and objective’ standard [:::] should not be viewed as creating an *exception* to the prohibition on discrimination. Rather, the standard is built into the concept of discrimination itself.”

²⁷ It has been considered a *jus cogens* norm (see, e.g., Inter-American Court of Human Rights Advisory Opinion OC-18/03 of 17 September 2003, “Juridical Condition and Rights of Undocumented Migrants,” at 101.

²⁸ <http://www.unhcr.org/en-us/partnership-resettlement.html>, accessed October 30, 2018.

At least as interesting, one might imagine a system in which expressed state preferences might actually facilitate a more robust and flexible form of responsibility-sharing. A state that has had an especially good experience with refugees from a given country, or that has labor market needs attuned to a particular refugee profile, might be willing to accept more such refugees than would be required under its quota.²⁹ There could thus be a bargaining mechanism built into the responsibility-sharing system that would allow states to bid within their quotas, e.g., treating the admission of one easy-to-receive refugee as only a fraction of a quota refugee. This would in turn enable the supervisory agency to offer a state willing to receive a less easy case – for example, a disabled refugee in need of rehabilitative support or an unaccompanied minor requiring guardianship – with a premium reflecting the additional contributions required of the receiving country.

In sum, the arguments for a shift to a more managed system of refugee protection predicated on responsibility sharing at each of two stages strike me as compelling. If the practical challenges on reaching agreement on a suitable formula, empowering a supervisory agency, and garnering the political will to make the transition can be addressed, I see no reason in principle to persist with the present ad hoc, beggar-thy-neighbor system. Indeed, if designed to include a serious commitment to two-sided preference matching, a global refugee responsibility-sharing system subject to the constraint of respect for the duty of nondiscrimination seems to me to hold the promise of not only doing more good for more refugees, but doing so in a way that is consonant with the importance of maximizing the agency of both refugees and of the communities that receive them.

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²⁹ The “identified lives effect” suggests a stronger inclination to assist known persons and groups (see Cohen, Daniels, and Eyal, 2015).

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