

# COMPETING FOR REFUGEES: A MARKET-BASED SOLUTION TO A HUMANITARIAN CRISIS

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## ABSTRACT

*The current refugee crisis demands novel legal solutions, and new ways of summing the political will to implement them. As a matter of national incentives, the goal must be to design mechanisms that discourage countries of origin from creating refugees, and encourage host countries to welcome them. One way to achieve this would be to recognize that persecuted refugee groups have a financial claim against their countries of origin, and that this claim can be traded to host nations in exchange for acceptance. Modifications to the international apparatus would be necessary, but the basic legal elements of this proposal already exist. In short, international law can and should give refugees a legal asset, give host nations incentives to accept them, and give oppressive countries of origin the bill.*

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## INTRODUCTION: THE WORLD'S LEAST WANTED

We are living in “an age of unprecedented mass displacement,”<sup>1</sup> and although the crisis is not new,<sup>2</sup> it seems to be worsening. In 2015, the number of displaced people rose to an all-time high of 65 million.<sup>3</sup> Millions of those people are what international law calls refugees: people fleeing persecution in their home countries.<sup>4</sup> Many of them have nowhere else to go. As a result, some of “the world’s least wanted”<sup>5</sup> are literally floating between countries that persecute or reject them.

Consider the Rohingya, a Muslim minority residing primarily in Myanmar, who some observers have called the most persecuted people in the world.<sup>6</sup> Despite their numbers—around 1.3 million Rohingya live within the nation’s borders—they lack some of the most basic legal protections. Since the passage of a nationality law in 1982, they are not even recognized as citizens.<sup>7</sup> Many Burmese regard them

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1. Somini Sengupta, *60 Million People Fleeing Chaotic Lands, U.N. Says*, N.Y. TIMES, June 18, 2015, at A1 (quoting United Nations High Commissioner for Refugees Antonio Guterres).

2. Two decades ago, Peter Schuck wrote, “The world is awash in refugees.” Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT’L L. 243, 244 (1997) [hereinafter Schuck, *Modest Proposal*]; see also Stephen H. Legomsky, *An Asylum Seeker’s Bill of Rights in a Non-Utopian World*, 14 GEO. IMMIGR. L.J. 619, 619 (2000) (“It is becoming trite to observe that in recent years few issues have been as wrenching or as intractable as the refugee crisis.”).

3. Somini Sengupta, *Record 65 Million Displaced by Global Conflicts, U.N. Says*, N.Y. TIMES, June 20, 2016, at A1. 2014’s total of 60 million had been the previous record. Sengupta, *supra* note 1.

4. The 1951 Refugee Convention defines a refugee as a person with a “fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, [who] is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.” Convention Relating to the Status of Refugees, *adopted* July 28, 1951, art. 1 ¶ A(2), 19 U.S.T. 6259, 189 U.N.T.S. 137, 150 (entered into force Apr. 22, 1954) [hereinafter Convention]. Those terms, and our proposal, do not reach economic migrants, internally displaced persons, and those fleeing civil war and natural disasters.

5. Mark Dummett, *Bangladesh Accused of ‘Crackdown’ on Rohingya Refugees*, BBC (Feb. 18, 2010), <http://news.bbc.co.uk/2/hi/8521280.stm>.

6. *The Rohingyas: The Most Persecuted People on Earth?*, THE ECONOMIST (June 13, 2015), <http://www.economist.com/news/asia/21654124-myanmars-muslim-minority-have-been-attacked-impunity-stripped-vote-and-driven>; Katrin Kuntz, *Burma’s Stateless Muslims: The World’s Most Persecuted Minority*, SPIEGEL ONLINE (June 3, 2015), <http://www.spiegel.de/international/world/an-account-of-the-flight-of-the-rohingya-minority-from-burma-a-1036589.html>.

7. Jane Perlez, *Rise in Bigotry Fuels Massacre Inside Myanmar*, N.Y. TIMES

as illegal settlers from Bangladesh,<sup>8</sup> and the nation's former president—a democratic reformer, in many other respects—has said that they should be deported.<sup>9</sup>

There is, however, no place for them to go. An outbreak of riots in 2012 resulted in deaths, the internal displacement of more than 100,000 Rohingya (most of them now living in camps), and a declaration of emergency that has permitted the Burmese military to exercise control of the Rakhine State, where the Rohingya are concentrated.<sup>10</sup> In 2015, thousands of Rohingya began to flee to Malaysia, Thailand, Indonesia, and other nearby countries, which have been reluctant to accept them.<sup>11</sup> Although it is surely not the sole motivation,<sup>12</sup> cost is a primary reason that these nations have given for turning the Rohingya away.<sup>13</sup>

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(Mar. 1, 2014), [http://www.nytimes.com/2014/03/02/world/asia/rise-in-bigotry-fuels-massacre-inside-myanmar.html?\\_r=0](http://www.nytimes.com/2014/03/02/world/asia/rise-in-bigotry-fuels-massacre-inside-myanmar.html?_r=0); MOSHE YEGAR, BETWEEN INTEGRATION AND SECESSION: THE MUSLIM COMMUNITIES OF THE SOUTHERN PHILIPPINES, SOUTHERN THAILAND, AND WESTERN BURMA/MYANMAR 59 (2002).

8. Kate Hodal, *Trapped Inside Burma's Refugees Camps, the Rohingya People Call for Recognition*, THE GUARDIAN (Dec. 20, 2012), <https://www.theguardian.com/world/2012/dec/20/burma-rohingya-muslim-refugee-camps>.

9. *Myanmar's Rohingyas: No Help, Please, We're Buddhists*, THE ECONOMIST (Oct. 20, 2012), <http://www.economist.com/news/asia/21564909-when-offending-muslim-world-seems-small-price-pay>. Unfortunately, it is unclear whether the recent victory of Nobel Peace Prize Winner Aung San Suu Kyi's National League for Democracy in November 2015 will do much to change things. Jennifer Rigby, *Aung San Suu Kyi Aide: Rohingya Are Not Our Priority*, THE TELEGRAPH (Nov. 19, 2015), <http://www.telegraph.co.uk/travel/destinations/asia/burma/12006208/Aung-San-Suu-Kyi-aide-Rohingya-are-not-our-priority.html>; *Aung San Suu Kyi Tells UN that the Term 'Rohingya' Will be Avoided*, THE GUARDIAN (June 20, 2016), <https://www.theguardian.com/world/2016/jun/21/aung-san-suu-kyi-tells-un-that-the-term-rohingya-will-be-avoided>.

10. Hodal, *supra* note 8.

11. *See, e.g.,* Beh Lih Yi, *Malaysia Tells Thousands of Rohingya Refugees to "Go Back to Your Country"*, THE GUARDIAN (May 13, 2015), <https://www.theguardian.com/world/2015/may/13/malaysia-tells-thousands-of-rohingya-refugees-to-go-back-to-your-country> (discussing Malaysia's recent declaration that Rohingya refugees are not welcome and will be turned away or deported upon arrival).

12. VITIT MUNTARBHORN, THE STATUS OF REFUGEES IN ASIA 16–17, 68, 98, 116, 143 (1992) (arguing that many Asian states seek to avoid the arrival of refugees with differing ethnic and cultural backgrounds).

13. *See* Bill Powell, *No Rest for the Rohingya*, NEWSWEEK (May 25, 2015), <http://www.newsweek.com/no-rest-rohingya-refugees-myanmar-335187> (noting that, upon temporarily accepting a limited number of refugees, "Malaysia and

In short, the Rohingya face persecution at home and rejection abroad. Leadership in Myanmar has a history of hostility toward the ethnic group and has explicitly described them as “ugly ogres.”<sup>14</sup> At the same time, neighboring states are reluctant to take on a sizeable burden not of their own making. As for the Rohingya, the very wrongs they have suffered make it hard for them to improve their lot—they have had few opportunities to accumulate the skills or resources that would make them desirable to other nations.

As the plight of the Rohingya suggests, refugees fleeing persecution face an unfriendly world. The Rohingya’s tragedy is extreme, but such “unwanted” people abound from Pakistan to South Sudan, and Central African Republic to Syria. The historical causes of any refugee crisis are complicated and unique, often rooted in religious difference, ethnic tension, or the scars of colonialism. But the problem can also be partially understood through the lens of economic incentives: the challenge is to make countries want the unwanted.<sup>15</sup>

From the perspective of host nations, accepting refugees typically means feeding, clothing, and sheltering them, and giving them access to social services like education. The costs of providing these services can be high, are heavily concentrated among the countries that can least afford them<sup>16</sup> (not to mention the refugees themselves<sup>17</sup>), are compounded when the refugees come from different

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Indonesia . . . insisted that the international community needed to get involved to bear some of the resettlement costs . . .”).

14. *Envoy calls refugees ‘ugly as ogres’*, SYDNEY MORNING HERALD (Feb. 14, 2009), <http://www.smh.com.au/world/envoy-calls-refugees-ugly-as-ogres-20090213-8759.html> (reporting that a senior foreign official put this insulting observation in writing).

15. Robert J. Shiller, *Economists on the Refugee Path*, PROJECT SYNDICATE (Jan. 19, 2016), <https://www.project-syndicate.org/commentary/economic-research-contribution-to-asylum-reform-by-robert-j--shiller-2016-01> (“Under today’s haphazard and archaic asylum rules, refugees must take enormous risks to reach safety, and the costs and benefits of helping them are distributed capriciously. It does not have to be this way. Economists can help by testing which international rules and institutions are needed to reform an inefficient and often inhumane system.”).

16. Sengupta, *supra* note 1 (“When refugees flee their own countries, most of them wind up in the world’s less-developed nations, with Turkey, Iran and Pakistan hosting the largest numbers.”); James C. Hathaway, *Moving Beyond the Asylum Muddle*, EJIL: TALK! (Sept. 14, 2015), <http://www.ejiltalk.org/moving-beyond-the-asylum-muddle/> [hereinafter Hathaway, *Asylum Muddle*].

17. Dan Bilefsky, *Denmark Moves to Seize Valuables from Refugees*, N.Y. TIMES, Jan. 14, 2016, at A11.

ethnic or religious groups than those in the host country, and are especially unpalatable when they are the result of some other nation's malfeasance.

These costs and their impact on national incentives drive a wedge between the goals of international refugee law and the reality of its enforcement.<sup>18</sup> International refugee law provides refugees with legal entitlements: direct prohibitions on persecution, remedies for displaced individuals, and the rule of *non-refoulement*, which forbids nations to send them back to situations of persecution. These rules occasionally have bite, such as when the international community intervenes to prevent or remedy the kinds of situations that create refugees in the first place. And some countries accept refugees (sometimes permanently<sup>19</sup>) out of a sense of moral, political, or legal obligation. There are also rare occasions when compensation is paid to victims of persecution.<sup>20</sup> The current regime has saved or improved millions of lives and deserves to be celebrated. But the size of the problem is such that millions still need help, as the current crisis vividly demonstrates.

Our starting point, therefore, is a system that is falling short.<sup>21</sup> Its shortcomings provide a benchmark against which to compare our proposal and its own potential weaknesses.<sup>22</sup> In an ideal

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18. For a thoughtful treatment of how the desire to treat migration in economic terms interacts with other developments in immigration policy, see CATHERINE DAUVERGNE, *THE NEW POLITICS OF IMMIGRATION AND THE END OF SETTLER SOCIETIES* (2016).

19. James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 119 (1997) (“Even though international law presently requires no more than the provision of rights-regarding temporary protection, Northern states, in law or in practice, have historically afforded refugees permanent status.” (internal citation omitted)).

20. See *infra* notes 95–100 and accompanying text.

21. Alexander Betts, *The Political Economy of Extra-territorial Processing: Separating ‘Purchaser’ from ‘Provider’ in Asylum Policy* 1 (Eval. & Policy Analysis Unit UNHCR, Working Paper No. 91, 2003) (explaining that both the UNHCR and the UK are actively working to develop new approaches to refugee policy); see also Schuck, *Modest Proposal*, *supra* note 2, at 247 (arguing that the system “fails to afford adequate protection to the enormous and growing number of people fleeing from what seem to be, and often are, intolerable conditions—and that it needs fixing”).

22. Cf. Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal Fifteen Years Later?*, in *THE NATION STATE AND IMMIGRATION: THE AGE OF MULTICULTURALISM* (Anita Shapiro et al. eds., 2014) (recognizing as a starting point the inadequacies of the current regime and using those weaknesses to build alternative proposals).

world, nations would neither create nor reject refugees, and rules to that effect would be perfectly enforced.<sup>23</sup> In our imperfect world, however, nations—armed with the shield of sovereignty—respond not only to moral obligations, but to economic and political incentives as well.<sup>24</sup> Solutions to the refugee crisis must do more than reiterate aspirations; they must give countries of origin and host nations reasons to behave well.<sup>25</sup>

Some scholars have proposed market-based approaches to the refugee problem, including proportional sharing of burdens among host nations (especially within a region), tradable quotas held by those nations, and compensation for refugees and host nations.<sup>26</sup> But these proposals generally have not caught on, in part because host nations do not have enough reason to share the burdens. Instead, each has incentives to free-ride on others' acceptance of refugees. Indeed, it has been difficult to engineer a burden-sharing treaty even within the European Union (EU), where the nations in question are already sharing burdens and therefore could readily make tradeoffs.<sup>27</sup>

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23. Hathaway & Neve, *supra* note 19, at 115 (“Even as armed conflict and human rights abuse continue to force individuals and groups to flee their home countries, many governments are withdrawing from the legal duty to provide refugees with the protection they require.”).

24. Hathaway, *Asylum Muddle*, *supra* note 16 (“[A]s an interstate regime, refugee protection should be operationalized in a way that maximizes its compatibility with state interests.”); Legomsky, *supra* note 2, at 620 (“The world we inhabit consists of sovereign states that jealously guard their territories, their wealth, and their ethnic composition. In this world, there is economic, cultural, environmental, ethnic, and political resistance to the admission of refugees.”).

25. Ahilan T. Arulanantham, *Restructured Safe Havens: A Proposal for Reform of the Refugee Protection System*, 22 HUM. RTS. Q. 1, 29 (2000) (“There is . . . no *quid pro quo* that could induce the [global] North to dismantle all barriers to access and to grant temporary protection, much less routine permanent admission, to all refugees who arrive at its borders. Ready access to durable asylum in the North is simply not on the table.”); Hathaway & Neve, *supra* note 19, at 206 (“Ready access to durable asylum in the North is simply not on the table, and an approach to refugee law reform that assumes otherwise is bound to fail.”).

26. Hathaway & Neve, *supra* note 19, at 118; Schuck, *Modest Proposal*, *supra* note 2, at 270–88; Guy S. Goodwin-Gill & Selim Can Sazak, *Footing the Bill: Refugee-Creating States’ Responsibility to Pay*, FOREIGN AFFAIRS (July 29, 2015), <https://www.foreignaffairs.com/articles/africa/2015-07-29/footing-bill>.

27. See Ullrich Fichtner et al., *Migration Crisis: The EU’s Shipwrecked Refugee Plan*, SPIEGEL ONLINE (June 23, 2015), <http://www.spiegel.de/international/europe/how-eu-promises-to-introduce-refugee-quotas-failed-a-1040226.html>; Dan Bilefsky & Alison Smale, *Dozens of Migrants Drown as Europe Is Pressured to Act*, N.Y. TIMES, Jan. 23, 2016, at A7 (“Despite the evidence that migrants from the Middle East and Africa are continuing to flee war and poverty

In view of these challenges, we ask whether there is a market-based solution through which host nations can be given better incentives to accept refugees, countries of origin can be discouraged from oppressing them, and the refugees themselves can be empowered. Our proposal is as follows: the international community would give persecuted refugee groups financial claims enforceable against the countries that expelled them.<sup>28</sup> The groups could then trade those claims to other countries as a way to offset the costs of acceptance. The new host nations could then seek to enforce the claims directly, use them to offset any debts owed to the refugee-creating nation, or sell the debt to a third party such as a hedge fund specializing in the enforcement of sovereign debts.

This mechanism would give bad countries another reason not to create refugees and good countries another reason to accept them. If accepting refugees carried with it a financial claim, then countries would have more incentive to welcome them and—depending on the size of the claim—even to compete for them. The possibility of these financial claims might be a better deterrent to oppression than censures or unenforceable legal judgments. Moreover, and unlike prior market-based proposals, this approach would give agency to the refugees themselves, rather than just treating them as costs on a ledger. Our plan would only reach a subset of refugees (those facing persecution in host nations against whom viable financial claims could be made), but it could form part of a larger and more comprehensive plan.<sup>29</sup>

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in their home countries and will strike out to Europe again in huge numbers this year, European leaders have taken no major new steps to curb the flow.”)

28. Oxford scholar Guy Goodwin-Gill recently advanced a proposal along similar lines, advocating the seizure of the frozen assets of refugee creating states so as to provide compensation to those nations providing refugees with shelter. Goodwin-Gill & Sazak, *supra* note 26. We are in full agreement with the goal of forcing the refugee creating states to internalize some of the costs of the problem it has created. The proposal, though, is limited. It would only work when the refugee-creating state in question had frozen assets that could be seized. That situation is likely to be rare.

29. For example, our focus on the use of sovereign debt to incentivize acceptance of refugees would mesh well with proposals that would use bond financing for that purpose. See George Soros & Gregor Peter Schmitz, *The EU Is On the Verge of Collapse—An Interview*, N.Y. REV. OF BOOKS (Feb. 11, 2016), <http://www.nybooks.com/articles/2016/02/11/europe-verge-collapse-interview/>. It might also facilitate the creation of a “matching” market for refugees and host nations. See, e.g., Will Jones & Alexander Teytelboym, *Choices, Preferences and Priorities in a Matching System for Refugees*, 51 FORCED MIGRATION REV. 80 (2016).

We see three basic and interlocking principles in international refugee law: a prohibition on the kind of oppression that creates refugees in the first place, an obligation of other nations to protect the refugees they receive (*non-refoulement*), and—more tentatively—a right to compensation for those refugees. Right now, none of these is fully effective. We are trying to make the third of these rights, compensation, more effective. That, we hope, would improve the first two rights as well. Our proposal will not solve the global refugee crisis. But if we can use existing legal tools to help countries see refugees as more of a benefit than a burden, we might generate some improvement.

## I. HOW IT CAME TO THIS

The tragedy of the current situation is so apparently senseless that it is worth asking how we got here in the first place. Past efforts to explain and address the problem hold lessons—some cautionary—about future solutions.

### A. The Promise and Limits of International Refugee Law

Basic international law, embedded in foundational legal instruments, prohibits the kind of persecution that generates refugees.<sup>30</sup> When violated, international refugee law provides a secondary set of rights designed to protect those fleeing persecution.

These rights are reflected in various instruments of international humanitarian and human rights law, and in regional agreements, but their foundation is the United Nations Convention Relating to the Status of Refugees,<sup>31</sup> which emerged in 1951 as a way of managing post-war refugee flows in Eastern Europe. That situation, however, differed from crises elsewhere and afterwards. Because post-war refugees were primarily European, their cultural assimilation was regarded as relatively straightforward, and recipient nations often found them useful to “meet acute post-war labor shortages.”<sup>32</sup> In 1967, the Convention was amended to recognize

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30. See *infra* Part II.A.

31. Convention, *supra* note 4.

32. James Hathaway, *Can International Refugee Law Be Made Relevant Again?*, in U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 14, 15 (1996).



the global nature of the problem and the need for corresponding global solutions.<sup>33</sup>

Thus amended, the Convention provides refugees with a range of legal rights,<sup>34</sup> the “most critical” of which is the right of *non-refoulement*,<sup>35</sup> which forbids nations from returning refugees to countries of origin where they would face continuing persecution.<sup>36</sup> These rights have saved or improved the lives of millions, and we see no reason to attempt total renegotiation of the Convention today.<sup>37</sup>

Yet, the law has failed to save millions of others who might be thought to fall within its purview. In part this is because, aside from the rule of *non-refoulement*, refugee law does not always make especially strong claims on receiving states.<sup>38</sup> More fundamentally, however, the international regime “does not impose these duties on any *specific* state.”<sup>39</sup> Refugees gain legal rights only against whatever country they are able to reach.<sup>40</sup> Recognizing this, potential host nations, especially wealthy ones,<sup>41</sup> sometimes try to prevent refugees

33. United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 622-24, T.I.A.S. No. 6577, 606 U.N.T.S. 268 (entered into force Oct. 4, 1967).

34. See generally RECONCEIVING INTERNATIONAL REFUGEE LAW (James C. Hathaway ed., 1997) (discussing, *inter alia*, states of reception’s legal obligation to provide refugees some form of durable protection where safe repatriation is impossible).

35. Hathaway & Neve, *supra* note 19, at 160.

36. Convention, *supra* note 4, at 176 (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

37. Hathaway, *Asylum Muddle*, *supra* note 16 (“The moment has come *not* to renegotiate the Refugee Convention, but rather at long last to *operationalize* the treaty in a way that works dependably, and fairly.”).

38. Schuck, *Modest Proposal*, *supra* note 2, at 252–53.

39. Tally Kritzman-Amir & Thomas Spijkerboer, *On the Morality and Legality of Borders: Border Policies and Asylum Seekers*, 26 HARV. HUM. RTS. J. 1, 6 (2013) (emphasis added).

40. Hathaway & Neve, *supra* note 19, at 141 (“Under the present protection system, the government of the asylum state is solely responsible for delivering and funding the protection of all refugees who arrive at its jurisdiction.”).

41. Ryan Bubb et al., *The Economics of International Refugee Law*, 40(2) J. LEG. STUD. 367, 379 (2011) (“Since it was adopted in 1951, the convention regime has become less attractive to wealthy states, which have made it increasingly difficult for refugees to claim their rights under the convention.”).

from ever setting foot on their territories and thereby gaining legal claims against them.<sup>42</sup>

The most prominent way of doing so is “interdiction,” wherein nations intercept refugees before they set foot on sovereign soil. The instances of such behavior abound.<sup>43</sup> Potential host nations also use “visa requirements, carrier sanctions, ‘safe third country’ jurisdictional barriers to asylum claimants, ‘readmission agreements’ leading to chain refoulement, . . . and [refugees’] summary removal at the border.”<sup>44</sup> For similar reasons, nations like Hungary, Croatia, and Slovenia are currently taking extreme measures to help refugees get to other more attractive host nations like Austria, Sweden, and Germany, so that they will not stay and burden them.<sup>45</sup>

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42. Randall Hansen calls this a process of “thickening borders.” See Randall Hansen, *State Controls: Borders, Refugees, and Citizenship*, in THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES 253, 260–61 (Elena Fiddian-Qasmiyeh et al. eds., 2014).

43. Hathaway & Neve, *supra* note 19, at 124–25 (noting examples from Vietnam, Cote d’Ivoire, Tanzania, and Zaire); Rick Lyman, *Hungary Seals Border With Croatia in Migrant Crackdown*, N.Y. TIMES, Oct. 16, 2015, at A1 (describing Hungary’s 216-mile razor wire fence); *Australia Has Hit “New Low” Amid Claims of Payment to People Smugglers*, THE GUARDIAN (June 13, 2015), <http://www.theguardian.com/australia-news/2015/jun/13/pressure-on-abbott-over-claims-people-smugglers-were-paid-to-turn-back-boats> (reporting allegations that Australian government paid refugee smugglers to turn back). See also *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, ¶¶ 9, 13, 40 (Eur. Ct. H.R., Feb. 23, 2012) (declaring illegal Italy’s “push back” policy with regard to African migrants); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993) (upholding U.S. interdiction policy against challenges involving both domestic law and the Convention).

44. Deborah Anker et al., *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 297 (1998); Betts, *supra* note 21, at 2 (“[M]any states . . . are engaged in a race-to-the-bottom in asylum standards, increasing entry restrictions while reducing their level of welfare provision to claimants as a means of reducing their relative and absolute burden of asylum-seekers.”); Arulanantham, *supra* note 25, at 15 (discussing domestic manipulation of refugee definition); Savitri Taylor, *The Pacific Solution or a Pacific Nightmare?: The Difference Between Burden Shifting and Responsibility Sharing*, 6 ASIAN-PAC. L. & POL’Y J. 1, 23–25 (2005) (describing Australian agreements with Nauru in 2001 and Papua New Guinea in 2002).

45. Hungary is seeking to close its borders, since even the burden of allowing refugees passage through it appears to be too much. See William Booth & Michael Birnbaum, *Asylum Seekers Confront Repeated Rejection as Europe Puts Up Roadblocks*, WASH. POST (Sept. 18, 2015), [https://www.washingtonpost.com/world/europe/as-europe-tightens-borders-germany-mulls-tougher-rules-at-end-of-refugee-trail/2015/09/18/6cb66596-5c93-11e5-8475-781cc9851652\\_story.html](https://www.washingtonpost.com/world/europe/as-europe-tightens-borders-germany-mulls-tougher-rules-at-end-of-refugee-trail/2015/09/18/6cb66596-5c93-11e5-8475-781cc9851652_story.html).

Nations engaging in these practices argue that doing so falls within the basic sovereign prerogative of controlling borders.<sup>46</sup> This has traditionally been a powerful argument. Although sovereignty's grip may have slackened somewhat in recent years and many have argued that national sovereignty must give way to refugees' rightful needs,<sup>47</sup> such claims of sovereignty regularly trump refugees' claims.<sup>48</sup>

But this does not mean that refugees' rights under international law are irrelevant. The fact that nations go to great lengths to prevent refugees from setting foot on their shores suggests that those nations would respect the obligations they would incur as a result.<sup>49</sup> And yet their willingness to take such actions in order to avoid those obligations demonstrates that the goals of international refugee law are ultimately subject to national incentives.

International refugee law can be conceptualized as a global public good, akin to clean air.<sup>50</sup> In its pure form, it has the characteristics of public goods, such as being non-rivalrous and non-excludable. No citizen of the world can be excluded from it and its use by one refugee does not diminish the right of another to use it.

The reality, however, is quite different. While there is little dispute that host nations have a legal obligation to comply with the doctrine of *non-refoulement*, those same nations can take significant steps to avoid taking on that obligation in the first place. For example, nations have leeway in deciding who gets to land on their soil, whose fears of persecution are legitimate, and so on.<sup>51</sup> In

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46. Hathaway & Neve, *supra* note 19, at 117 (“[G]overnments increasingly believe that a concerted commitment to refugee protection is tantamount to an abdication of their migration control responsibilities.”).

47. Veit Bader, *The Ethics of Immigration*, 12 CONSTITUTIONS 331, 340 (2005) (arguing that state sovereignty must yield in cases of “well-founded fear of being persecuted”).

48. Schuck, *Modest Proposal*, *supra* note 2, at 247 (“[T]he nation-state has indeed impeded and confounded human rights goals . . .”). On this general phenomenon, which stands as an obstacle to all of international human rights law, see ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014).

49. See Hathaway & Neve, *supra* note 19, at 128 (“In most cases, though, Northern governments have respected the human rights of refugees who manage to enter their territories, no doubt prompted by legal cultures receptive to holding states formally accountable to their treaty obligations.”).

50. Bubb et al., *supra* note 41, at 367; Astri Suhrke, *Burden-sharing During Refugee Emergencies: The Logic of Collective Action Versus National Action*, 11(4) J. REFUGEE STUD. 396, 400 (1998).

51. For a discussion of these problems and citations to materials discussing them in detail, see notes 43–45 and accompanying text.

economic terms, while the citizens of all nations benefit from the fact that the international system provides them with a kind of insurance in case they ever were to become refugees, individual countries and their citizens have an incentive to try and shirk their responsibilities to provide shelter to refugees.<sup>52</sup> The more that countries try to free ride on the efforts of their fellow nations, the higher the burden on those that are complying and the greater their incentive to also shirk.

The challenge—as for any plan involving a “team” setting where individual members have an incentive to shirk<sup>53</sup>—is setting conditions in which an equilibrium can be reached where the team members (host nations) bear appropriate costs (accepting the right number of refugees). As noted, individual nations will have incentives to avoid their duties to accept refugees, because—as in any balanced budget sharing scheme—they want to be able to claim a share of the benefits without fully bearing the costs.

We make no claim to having a perfect or complete solution to this category of problems.<sup>54</sup> But our proposal may help ameliorate it by altering the “budget” itself.<sup>55</sup> By creating a new pot of money (the liabilities of countries of origin), we can both incentivize more host nations to participate (thus increasing the size of the “team”) and alter the incentives of those that do.

In our proposal, the incentive comes in the form of a financial claim against the nations who are responsible for creating refugees in the first place. These financial claims would supplement the factors that drive nations to accept refugees in the current system—likely a combination of altruism and reputational benefits that go with nations showing themselves to be good global citizens.<sup>56</sup>

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52. The free rider problem that exists in the international context with public goods such as clean air has been much discussed. *E.g.*, William Nordhaus, *Climate Clubs: Overcoming Free-riding in International Climate Policy: Presidential Address to the American Economic Association*, 105 AMER. ECON. REV. 1339 (2015).

53. *Cf.* Bengt Holmström, *Moral Hazard in Teams*, 13 BELL J. ECON. 324 (1982).

54. The best-known solution to this problem is to establish one actor—a “budget-breaker”—who has control over the budget, and can solve the potential free-rider problem by imposing team penalties sufficient to align incentives properly.

55. Schuck, *Modest Proposal*, *supra* note 2, at 279 (“Protective capacity is largely, though not exclusively, a function of national wealth.”).

56. On the importance that altruism likely plays in the current system, see Bubb et al., *supra* note 41. Researchers have studied the importance to nations of maintaining reputations as good global citizens in a variety of settings ranging

A critic might ask whether the addition of financial incentives in a situation where actors were previously motivated by altruism will “crowd out” those altruistic tendencies.<sup>57</sup> This should not be a problem, so long as the incentive scheme is designed to make sure that participants perceive the incentives as supporting existing altruism and enhancing both their sense of self worth and others’ perceptions of it. Rather than “crowding out,” such a system can lead to “crowding in”—increasing altruism as a result of financial incentives.<sup>58</sup>

Taking in refugees will still fundamentally be an act of altruism (and seen as such) because any compensation that the host nation receives is unlikely to fully offset the actual and perceived costs. And litigating the refugee claim (or selling it) will, at worst, be a way of lessening the burden on the altruistic population that is taking them in. At best, it could be seen as a way of enabling host nations to provide an even better level of hospitality to the refugees than they were providing otherwise. Put differently, it would be as if the international community were providing a matching contribution for the charitable contribution made by the host nation.<sup>59</sup>

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from sovereign debt repayment to compliance with human rights treaties. *See, e.g.,* Amanda Murdie & David R. Davis, *Shaming and Blaming: Using Events Data to Assess the Impact of Human Rights INGOs*, 56 INT’L STUD Q. 1 (2012); Beth A. Simmons, *Treaty Compliance and Violation*, 94 AMER. POL. SCI. REV. 273 (2010); MICHAEL TOMZ, REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT THROUGH THREE CENTURIES (2007). In the current crisis itself, for example, many view Germany as seeking to establish itself as a global leader through its generosity. *See, e.g.,* Gavin Hewitt, *Germany: Moral Leader or Misguided?*, BBC (Sept. 8, 2015), <http://www.bbc.com/news/world-europe-34185970>; *Why Germany is Taking in so Many Refugees*, CBCNEWS (Sept. 14, 2015), <http://www.cbc.ca/news/world/why-germany-is-taking-in-so-many-refugees-the-benefits-and-risks-1.3226962>.

57. For a survey, see Agnes Festre & Pierre Garouste, *Theory and Evidence in Psychology and Economics About Motivation Crowding Out*, 29 J. ECON. SURV. 339 (2015).

58. For an explanation, see Bruno Frey, *Crowding Out and Crowding In of Intrinsic Preferences*, in REFLEXIVE GOVERNANCE FOR GLOBAL PUBLIC GOODS 78–79 (Eric Brousseau et al. eds., 2012). For supportive empirics in a different context, see Nicola Lacetera et al., *Economic Rewards to Motivate Blood Donations*, 340 SCIENCE 927 (2013).

59. On the use of matching contributions in tackling the crowding out problem, see James Andreoni & Abigail Payne, *Is Crowding Out Entirely Due to Fundraising?*, 95 J. PUBLIC ECON. 334 (2009).

Further, to the extent the altruism in question is at least partially motivated by the desire to signal good citizenship,<sup>60</sup> pursuing the claim on behalf of the refugees might have the effect of revealing to other nations in the international community and to the domestic population, in a credible fashion, information about the efforts the host nation has made to be a good global citizen. It would therefore be responsive to national incentives while also strengthening international norms. Because the debt here would be owed by an oppressive country of origin—a quintessential bad actor—even the act of collecting it could be seen as a way of standing up for international norms, and not simply pursuing self-interest.<sup>61</sup>

## B. National Incentives

There are many reasons why nations reject refugees, but perhaps the most straightforward and commonly invoked reasons involve lack of capacity.<sup>62</sup>

Nations that accept refugees have a basic legal and moral obligation to provide them with essentials such as food and shelter.<sup>63</sup> Many host nations also find it necessary in practice to expend further resources on jobs, education, and the like.<sup>64</sup> National budgets

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60. The literature on altruism identifies two sources of altruism: pure altruism and warm glow. Warm glow encompasses signaling benefits, which includes concerns about self-image, reputation, and esteem. *See generally* James Andreoni & B. Douglas Bernheim, *Social Image and the 50-50 Norm: A Theoretical and Experimental Analysis of Audience Effects*, 77 *ECONOMETRICA* 1607 (2009); Roland Benabou & Jean Tirole, *Incentives and Prosocial Behavior*, 96 *AMER. ECON. REV.* 1652 (2006).

61. *See generally* Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935 (2002).

62. Selim Can Sazak, *An Argument for Using Frozen Assets for Humanitarian Refugee Situations*, 68(2) *J. INT'L AFF.* 305, 306 (2015) (“The world’s collective response capacity and resources are being stretched to the limit.” (quoting Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Valerie Amos)); Peter H. Schuck, *A Response to the Critics*, 12 *HARV. HUM. RTS. J.* 385, 387 (1999) [hereinafter Schuck, *Response*] (“To deny the burdens that refugees sometimes impose on first asylum states is to blink reality and put one’s head in the sand.”).

63. Schuck, *Modest Proposal*, *supra* note 2, at 252 (describing the “minimum” relief to refugees as including “food, clothing, shelter, and information”).

64. Tally Kritzman-Amir, *Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law*, 34 *BROOK. J. INT'L L.* 355, 359 (2009); *see also* Eiko Thielemann, *Editorial Introduction*, 16 *J. REFUGEE STUD.* 225, 227 (2003) (“Recipient states . . . appear to be as aware about direct costs of

typically do not set aside money for these purposes, so resources are often diverted from the needs of the domestic population.

Other costs may emerge over time, such as perceived threats to the host nation's security, cohesion, and political stability.<sup>65</sup> Countries will go to great lengths to avoid these costs. To take one example, in 1995 the government of Tanzania ordered its army to turn away refugees from Rwanda and Burundi, arguing that “[p]rotecting and assisting refugees has brought new risks to national security, exacerbated tensions between states and caused extensive environmental degradation.”<sup>66</sup>

It is not simply the size of the burdens that is problematic, but the way in which they are distributed—not based on fault or capacity, but on proximity and accessibility.<sup>67</sup> As a result, the burdens

subsistence, schooling, healthcare or the determination process as they are about the more indirect costs of social integration.”)

65. U.N. High Comm'r Refugees, *Note on International Protection: International Protection in Mass Influx*, ¶ 18, U.N. Doc. N/AC.96/850 (Sept. 1, 1995) (“Many low-income developing countries whose resources are already strained face destabilizing social and economic effects from a sudden, mass influx of refugees.”); Amitav Acharya & David B. Dewitt, *Fiscal Burden Sharing, in RECONCEIVING INTERNATIONAL REFUGEE LAW*, *supra* note 34, at 111, 123 (noting that refugees challenge host nations’ “capacities to ensure social cohesion and economic and political management in the face of such intrusion.”); Hathaway & Neve, *supra* note 19, at 138 (“Particularly in the North, resistance to honoring duties owed to refugees follows from a growing resistance on the part of governments to externally imposed changes to the composition of their societies.”); Legomsky, *supra* note 2, at 620 (“Refugees often come from cultures far different from those of the host populations; real frictions can result. There can also be both domestic political reasons and foreign policy reasons not to welcome particular groups.”).

66. Augustine Mahiga, *A Change of Direction for Tanzania*, REFUGEES MAG. (1997), <http://www.unhcr.org/en-us/publications/refugeemag/3b6960009/refugees-magazine-issue-110-crisis-great-lakes-change-direction-tanzania.html>.

67. Hathaway & Neve, *supra* note 19, at 117 (“[N]either the actual duty to admit refugees nor the real costs associated with their arrival are fairly apportioned among governments. There is a keen awareness that the states in which refugees arrive presently bear sole legal responsibility for what often amounts to indefinite protection.”); E. Tendayi Achiume, *Syria, Cost-sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687, 689 (2015) (“[G]eographic proximity to conflict and porousness of borders remain the primary determinants of which nations bear the heaviest cost, with disastrous effects.”). Similar equity-based objections arise with regard to non-persecuted refugees as well—it is, for example, at the root of the debate in Europe about how to respond to “economic refugees” from North Africa, or those fleeing conflict in the Middle East. Hathaway, *Asylum Muddle*, *supra* note 16 (“[I]n all of the talk about the European refugee crisis, we have lost sight of the fact that just three countries

of refugee-hosting are concentrated in the global South,<sup>68</sup> often among the countries least financially able to bear them.<sup>69</sup> This is, in part, a result of the fact that refugees tend to originate in the global South and seek refuge in the nearby countries that are most accessible to them.<sup>70</sup>

Although the scale and horror of today's refugee crisis may be unique, it involves problems of incentives that are common to other areas of law and international cooperation.<sup>71</sup> Refugee protection, as noted earlier, has the characteristics of a global public good. And as with any public good, each potential host nation, responding to its own domestic legal pressures and perceived self-interest, has an incentive to avoid paying its share.<sup>72</sup> Countries of origin, meanwhile, have insufficient *disincentive* to oppress their own people because

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bordering Syria – Jordan, Lebanon, and Turkey – have received *more than ten times* as many Syrian refugees as the rest of the world combined.”). Because our focus here is on persecuted refugees only, we hold aside the questions raised by these other classes of people.

68. Hathaway & Neve, *supra* note 19, at 146 (noting that eighty percent of the world's refugee population is already protected in the less-developed world); Schuck, *Modest Proposal*, *supra* note 2, at 252 (noting that the distribution of refugee flows is “decidedly lumpy” and not concentrated in Europe).

69. Hathaway & Neve, *supra* note 19, at 141 (“States closest to countries of origin and those least able to afford systematic border controls or technologies of deterrence will inevitably receive the most refugees. Consequently, the poorest countries of the South are legally required to meet the needs of most of the world's refugees.”).

70. Bubb et al., *supra* note 41, at 371 (“Under the 1951 convention, the burden of hosting refugees largely falls on states that are geographically proximate to refugee producers.”).

71. Alan O. Sykes, *International Cooperation on Migration: Theory and Practice*, 80 U. CHI. L. REV. 315, 320 (2013) (noting a “familiar” proposition in “economic analysis of international law—national governments acting noncooperatively tend to consider the benefits of policy to their own citizens and constituents but tend to ignore or discount the effects of their policy choices on foreigners”).

72. Betts, *supra* note 21, at 5 (citing M. Gibney, *Liberal Democratic States and Responsibilities to Refugees*, 93(1) AM. POL. SCI. REV. 177 (1999)); RICHARD B. LILLICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 66 (1984) (“As the ‘system’ malfunctions, the politics of refugee assistance and settlement are rather a diplomatic prisoner's dilemma. Any state unilaterally deciding to be generous thereby eases pressure on non-cooperating states and reduces the incentive on the international community to develop the type of strong machinery for cooperation which is needed.”).



they do not bear the full costs of their actions.<sup>73</sup> As for the refugees themselves, they are often given legal “rights” that have little chance of enforcement without state cooperation. Any successful solution must therefore take government incentives—including financial ones—into account.<sup>74</sup>

Our proposal is premised on the assumption that nations respond to incentives. Of course, there are some underlying causes of migration—famine, extreme poverty, ecological disaster—over which countries of origin do not always have control (and therefore have no financial responsibility in our scheme), and for which changed incentives will have little impact. Our proposal is unlikely to help in those scenarios, but neither is it likely to worsen them.<sup>75</sup>

### C. Prior Market-Based Solutions

In an effort to address national incentives, some scholars and reformers have proposed market-based solutions to the refugee crisis, with varying levels of conceptual and political success.

The most prominent market-based approaches to the refugee problem involve “burden-sharing” among potential host nations.<sup>76</sup> Details vary, but the basic idea behind these proposals is to pool responsibilities and resources in order to smooth risk, avoid shirking, and achieve a more equitable distribution of costs.<sup>77</sup> Typical elements of the plans include quotas based on the ability of host nations to

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73. Kritzman-Amir, *supra* note 64, at 359 (“[T]he policies or natural conditions of the refugees’ home States create a cost not internalized by the States themselves, but rather assumed by others.”).

74. Arulanantham, *supra* note 25, at 4 (“[T]hat states provide for the protection of refugees at all is quite remarkable. . . . [The fact] that the system is one constructed by states, and therefore, *for* states, imposes substantial restrictions on any realistic proposal for refugee reform.”); Hathaway & Neve, *supra* note 19, at 137.

75. See *infra* Section III.B.

76. See, e.g., G.J.L. COLES, PROBLEMS ARISING FROM LARGE NUMBERS OF ASYLUM-SEEKERS: A STUDY OF PROTECTION ASPECTS 36–40 (1986); GERASSIMOS FOURLANOS, SOVEREIGNTY AND THE INGRESS OF ALIENS 155, 159–61 (1986); Atle Grahl-Madsen, *Ways and Prospects*, 21/30 AWR BULL. 278 (1983); Michael J. Parrish, *Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection*, 22 CARDOZO L. REV. 223, 224 n.3 (2000) (noting “a paradigm shift from conceiving of refugee law as primarily emphasizing the resettlement and asylum of refugees, to focusing on burden sharing between receiving states, temporary protection, and ultimate repatriation”).

77. Betts, *supra* note 21, at 6.

accept refugees<sup>78</sup> (sometimes with attention to the particular refugee group at issue<sup>79</sup>), regional cooperation,<sup>80</sup> off-shore processing of refugees,<sup>81</sup> cross payments between countries (typically from rich nations in the North to poorer nations in the South<sup>82</sup>), and using some form of trade in order to benefit from comparative advantages with regard to responsibilities like processing, protection, and long-term hosting. The authors of some plans argue that they could be largely funded with the money that industrialized states would no longer need to spend policing their own borders against refugees.<sup>83</sup>

Following five years of consultation with leaders in international refugee law and policy, James Hathaway and Alexander Neve proposed an approach that would focus on “common but differentiated responsibility” within regional groups. In this plan, all states would have a duty to provide asylum and to contribute *something* to the financial and human burdens, but could assume a range of protection roles based on their own resources and circumstances.<sup>84</sup> Another such plan, created at around the same time, is the market in tradable<sup>85</sup> refugee quotas described by Peter Schuck in a series of articles and *New York Times* op-eds.<sup>86</sup> In this system, states could satisfy their quotas either by providing physical

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78. Atle Grahl-Madsen, *Refugees and Refugee Law in a World of Transition*, 3 MICH. Y.B. INT'L LEGAL STUD. 65, 74 (1982).

79. Steven H. Atherton, *International Moral Obligations: An Integrated Approach*, 3 GEO. IMM. L.J. 19, 34–35 (1989) (“[A]n ideal method would determine the relative costs for each country associated with admitting a given alien and direct that alien to the country where the costs are least.”).

80. Hathaway & Neve, *supra* note 19, at 143–44.

81. Betts, *supra* note 21, at 2.

82. Bubb et al., *supra* note 41, at 367.

83. Hathaway & Neve, *supra* note 19, at 147 (“Most, or even all, of the funds required could be garnered from the savings realized by the dismantling of *non-entrée* mechanisms and from the significant reduction in the number of fraudulent claims to be processed in the North.”); *see also id.* at 153 (noting that industrialized nations spend far more money on *non-entrée* mechanisms than on direct aid to refugees in the global South).

84. *Id.*, at 143–45.

85. Arulanantham, *supra* note 25, at 26 n.90 (describing this as “[t]he most important difference between them”).

86. Schuck, *Modest Proposal*, *supra* note 2, at 248; Schuck, *Response*, *supra* note 62, at 385–88; Peter H. Schuck, *Creating a Market for Refugees in Europe*, N.Y. TIMES (June 9, 2015), <http://www.nytimes.com/2015/06/09/opinion/creating-a-market-for-refugees-in-europe.html>; Peter H. Schuck, *Share the Refugees*, N.Y. TIMES (Aug. 13, 1994), <http://www.nytimes.com/1994/08/13/opinion/share-the-refugees.html>.

protection for refugees or by paying other nations that are better suited to do so, most likely those in the region of origin.

Burden-sharing proposals have arguably gained some traction in practice,<sup>87</sup> but by and large they have stalled. Indeed, the EU was considering a burden-sharing proposal when Schuck, Hathaway, and Neve made their proposals two decades ago.<sup>88</sup> That consideration continues today, with little indication that it will come to fruition soon.<sup>89</sup> The bottom line is that “there have not been enough incentives for States to create fair responsibility-sharing mechanisms.”<sup>90</sup>

A second set of market-based solutions advocates compensation payments to refugees (and sometimes to host nations),<sup>91</sup> usually from repressive countries of origin<sup>92</sup> but also because many states recognize some sort of obligation to support

87. Schuck, *Modest Proposal*, *supra* note 2, at 254–59 (pointing to the Comprehensive Plan of Action developed in response to refugee flows in Southeast Asia in the 1970s); G.A. Res. 2312 (XXII), art. 2.2, U.N. Declaration of Territorial Asylum (Dec. 14, 1967) (“[W]here a State finds itself in difficult in granting or continuing to grant asylum, states individually or jointly through the UN shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.”).

88. See Karoline Kerber, *Temporary Protection: An Assessment of the Harmonisation Policies of European Union Member States*, 9 INT’L REFUGEE L. 453, 455 (1997).

89. See, e.g., Nils Muiznieks, *You’re Better Than This, Europe*, N.Y. TIMES (June 28, 2015), <http://www.nytimes.com/2015/06/29/opinion/youre-better-than-this-europe.html>; Hathaway, *Asylum Muddle*, *supra* note 16 (“Despite the fact that consensus on a comprehensive means to operationalize the [burden-sharing] treaty was reached, no action was taken by either the UNHCR or governments to move the project forward on the international stage.”).

90. Kritzman-Amir, *supra* note 64, at 392; see also Ronald C. Smith, *Outsourcing Refugee Protection Responsibilities: The Second Life of an Unconscionable Idea*, 14 J. TRANSNAT’L L. & POL’Y 137, 137–38 (2004) (“[C]reating an international market to trade refugee protection responsibilities is . . . foolhardy because it is not even in the selfish best interests of nations to export this responsibility . . .” (criticizing Betts, *supra* note 21)).

91. Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT’L L. 532, 533 (1986) (“State responsibility for the creation of refugees includes compensation for both refugees and countries of asylum.”).

92. Goodwin-Gill & Sazak, *supra* note 26; Yoav Tadmor, *The Palestinian Refugees of 1948: The Right to Compensation and Return*, 8 TEMP. INT’L & COMP. L.J. 403, 403–04 (1994) (arguing that “refugees should have a limited right to return, and that their primary remedy ought to be compensation”); R.Y. Jennings, *Some International Law Aspects of the Refugee Question*, 20 BRIT. Y.B. INT’L L. 98, 113 (1939).

those in need.<sup>93</sup> The most prominent advocate of compensation in recent decades was Luke Lee, a scholar and US State Department adviser on Population, Refugees and Migration.<sup>94</sup> Lee argued that international law establishes a duty on the part of countries of origin to compensate both the refugees they create and the countries that must care for them.<sup>95</sup>

As described below, there is some support in international law and practice for the notion that countries of origin owe such a debt.<sup>96</sup> As Grotius himself put it, albeit in a different context, “fault creates the obligation to make good the loss.”<sup>97</sup> And in the past few decades, major developments in international human rights law have clarified that victims of human rights violations have a right to remedy, which includes compensation and other forms of reparation like restitution, rehabilitation, satisfaction, and guarantees of non-repetition.

And yet, as with burden-sharing, the right to a remedy in general (and to compensation in particular) has not provided anything like a broad-based solution. The reasons for this are easy to

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93. See, e.g., Jurgen Habermas, *Struggles for Recognition in the Democratic and Constitutional State*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 107, 141-42 (Amy Gutmann ed., Shierry Weber Nocholsen trans., 1994) (arguing that First World states are obligated to accept refugees from the Third World, in part due to the consequences of colonialism); THOMAS W. POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* 97, 201 (1st ed. 2002) (arguing that rich nations owe an obligation to help those in poverty, because of the costs that the current global financial system imposes on them); James Souter, *Towards a Theory of Asylum as Reparation for Past Injustice*, 62 POL. STUD. 326, 326 (2014) (“[There is a] special obligation on the part of states to provide asylum to refugees for whose lack of state protection they are responsible, whether through their military inventions, support for oppressive regimes or imposition of damaging economic policies.”).

94. In addition to his academic writing, Lee was chair of the International Law Association the year that it issued a Declaration on the matter of refugee compensation. See International Law Association, *Draft Declaration of Principles of International Law on Compensation to Refugees and Countries of Asylum (Report of the 64th Conf., 1991)*, 64 INT’L L. PROC. 333 (1991).

95. Lee, *supra* note 91, at 532; see also Sazak, *supra* note 62, at 307 (proposing a system that would use the frozen assets of a refugee-producing nation to help pay for the refugees it produces); Kritzman-Amir, *supra* note 64, at 374 (noting that responsibility considerations “could be applied to impose responsibility on States of origin, when their own harmful, negligent, or oppressive policies cause refugees to flee to other countries”).

96. See *infra* Section II.B.1.

97. Lee, *supra* note 91, at 536 n.23 (citing H. GROTIUS, *DE JURE BELLI AC PACIS* 430 (Carnegie Endowment trans., 1646 ed. 1925)).

imagine. Imposing costs on countries of origin might further radicalize them. Refugees are usually in no position to sue their countries of origin, let alone collect a judgment. Gaining a *right* to a remedy is only one step towards realizing it. Our goal is to suggest a better mechanism of implementation.

#### D. The Need for a Holistic, Incentives-Based Approach

We distill a few lessons from these past efforts.

First, the debate over market-based approaches has sometimes proceeded as if the choice is between refugee “markets” and refugee rights. However, market approaches need not displace other legal mechanisms for the protection of refugees, including particularized national obligations like the right of *non-refoulement*.<sup>98</sup> Market solutions can help provide remedies for rights violations that the current regime has been unable to address.

Second, any approach to the refugee problem depends in large part on giving potential host nations sufficient incentive to participate.<sup>99</sup> The market proposals described above attempt to do so by, for example, permitting rich and poor nations to capture gains from trade. We go a step further. Instead of creating a tradable *obligation* of nations to accept or pay for refugees, we create a tradable *asset* that refugees can give to those nations. Better still, if the core of that asset can be an obligation on the part of the nation that created the refugee problem, we can increase the disincentives for nations to create such problems in the first place.

Third, one of the strengths of market approaches is that they take sovereignty and national incentives seriously.<sup>100</sup> We assume that states act largely out of self-interest.<sup>101</sup> Reform proposals are therefore likely doomed to failure unless they satisfy the

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98. Hathaway & Neve, *supra* note 19, at 169 (“While each state party assumes particularized obligations under the Refugee Convention, nothing in the current legal regime prevents governments from working together and sharing resources to meet those duties.”).

99. Kritzman-Amir, *supra* note 64, at 381 (arguing that “Hathaway and Neve are unable to explain why States would be willing to form these collective arrangements for responsibility sharing”).

100. Asha Hans & Astri Suhrke, *Responsibility Sharing*, in RECONCEIVING INTERNATIONAL REFUGEE LAW, *supra* note 34, at 159 (“[A]ny burden sharing scheme must be based on the *realpolitik* assumption that legal obligations and humanitarian considerations alone rarely suffice to persuade states to admit refugees . . .”).

101. *Cf.* Anker et al., *supra* note 44, at 299 (criticizing this view).

governments' concerns, and in particular their concern to not be seen as transferring large amounts of resources from their voting public to new migrants. Overcoming the cost objection will not result in acceptance of all refugees—many will still be rejected because of security concerns, xenophobia, or other reasons. But any marginal change in incentives should lead to a corresponding marginal change in outcomes.

Fourth, while we would welcome the resolution of these issues through treaties, we suspect that, at least in the short term, customary international law will continue to play a prominent role.<sup>102</sup> The fact that nations have been unable even to agree on regional burden-sharing proposals suggests that broad agreement is not yet feasible. Renegotiation of the Refugee Convention and its Protocol could be disastrous,<sup>103</sup> but even those instruments do not have universal assent. This is true, for example, of the major nations involved in the Rohingya crisis—Indonesia, Malaysia, Myanmar, and Thailand—none of which have ratified the Convention or Protocol.<sup>104</sup> At least in the meantime, then, we think that the answers will lie beyond the specific text of treaties.

Fifth, most existing market approaches tend to ignore an aspect of the refugee creation equation that we think is key. The refugee crisis involves at least three categories of actors: countries of origin, host nations, and the refugees themselves.<sup>105</sup> Burden-sharing proposals generally focus on the relationships and incentives among host nations vis-à-vis refugees; compensation proposals generally focus on the relationships and obligations among countries of origin

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102. See *infra* Section II.A (describing basis in CIL for proposition that creation of refugees represents a legal violation).

103. Hathaway & Neve, *supra* note 19, at 156.

104. Eleanor Albert, *Background: The Rohingya Migrant Crisis*, COUNCIL ON FOREIGN RELATIONS (June 17, 2015), <http://www.cfr.org/burmamyanmar/rohingya-migrant-crisis/p36651>.

105. This connection has been noticed before. In the 1990s, “[w]hile responding to refugee situations in countries of asylum, the [UNHCR] also started focusing activities in countries of origin, seeking to prevent and contain refugee movements . . . . Invoking the human right to remain in one’s country of origin, the [UNHCR] sought to ensure that people were not forced to flee from their homes in the first place.” *Rep. of the United Nations High Commissioner for Refugees*, U.N. GAOR, 48th Sess., Supp. No. 12, ¶ 3, U.N. Doc. A/48/12, at 4 (1993); see also Nafees Ahmad, *Refugees: State Responsibility, Country of Origin and Human Rights*, 10 ASIA-PAC. J. ON HUM. RTS. & L. 1, 2 (2009) (noting the “complex triangular relationship” among the country of origin, refugee, and receiving state).

and refugees. A comprehensive approach would recognize the connections between all three groups and would design legal rules to coordinate and balance their sometimes-competing interests and obligations, while making refugees *actors* in the market, rather than the objects of it.<sup>106</sup>

## II. CREATING AN ASSET FOR THE REFUGEES

Our proposal is based on a few basic propositions regarding international law. First, nations violate international law when they create refugees through persecution. Second, international law can provide a remedy for this violation in the form of a financial claim running in favor of the refugees and against their parent nation. Third, the international community can and must put in place the enforcement mechanisms that give value to the refugees' asset.

This is partly an argument for reform and partly an argument for better recognition and enforcement of existing principles. Many of these key elements exist already or can largely be implemented using existing institutions. In situations where those rules or institutions are already working, we do not seek to displace them. But we recognize that our scheme would demand a great deal of existing law and institutions, and perhaps even the creation of a new international body. Given that legal and institutional reform are so strongly in focus at the moment, we do not think of this as a fault.

### A. The Legal Violation

A state violates international law—including international human rights law—when it persecutes a subset of its people to such a degree that causes them to have to flee to another state.

In claiming as much, we rely on the existing international standards for who counts as a refugee.<sup>107</sup> These standards have

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106. Indeed, our proposal could also be read to implicate a fourth category—*potential* host nations. In the current system, actual and potential host nations engage in some economic negotiation, for example, when actual host nations (Germany, say) use the political capital they gain by accepting refugees to extract contributions, often financial ones, from potential host nations. Our proposal would not displace this kind of negotiation, but would create something like an exchange rate between receiving refugees and making payments in lieu of receipt.

107. See *supra* note 4 and accompanying text.

important limits. They do not cover people fleeing horrors *other* than persecution, nor do they reach those who are internally displaced within their home countries.<sup>108</sup> Further, in keeping with existing principles, we would limit liability to acts or omissions that are imputable to the state concerned.<sup>109</sup> This would exclude things like natural disasters and famine, as well as invasions or occupation, for which states bear no responsibility. (Of course, states' responses to those shocks—discriminatory distribution of aid, for example—can create or contribute to refugee flows and would be subject to the rules.)

Both forms of international law—treaties and customary law—provide support for our basic proposition. Relevant treaties and conventions include the 1951 U.N. Convention on the Status of Refugees, the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights, and the International Law Commission's 1980 Draft Articles on State Responsibility, each of which prohibits the kind of persecution that creates refugees.<sup>110</sup> As Luke Lee argued three decades ago, "the country that turns its own citizens into refugees is in violation of *all* the articles of the Universal Declaration of Human Rights."<sup>111</sup>

Even so, treaty law is likely unable to provide a fully satisfactory solution. First, oppressive nations might not have signed the relevant treaties. Second, the treaties might not have provisions

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108. The seeming arbitrariness of these distinctions has long been noted. See, e.g., MICHAEL WALZER, SPHERES OF JUSTICE 31–32, 51 (1983) ("Why mark off the lucky or the aggressive, who have somehow managed to make their way across our borders, from all the others?"); Arulanantham, *supra* note 25, at 9 n.25 ("A valid criticism of the current refugee system is that it works best for those who have the money or political connections to travel far away from their countries of origin."); Hathaway & Neve, *supra* note 19, at 179 ("Stayee communities are composed of persons who are not displaced from their homes. Some may not have been affected by the events that forced the refugees and internally displaced from their homes, while others may have been directly affected, but were unable to flee or were fiercely determined to remain.").

109. See *Report of the International Law Commission on the work of its thirty-second session: Draft Articles on State Responsibility* [1980], 2 Y.B. INT'L L. COMM'N 30, U.N. Doc.A/CN.4/SER.A/1980/Add.1 (Part 2).

110. Lee, *supra* note 91, at 536–40. A complete list of citations would include nearly all forms of hard international human rights law embodied in the basic human rights treaties.

111. *Id.* at 539.



for the kind of damages we describe below.<sup>112</sup> And third, the terms of the treaties might allow individual nations to withdraw easily.<sup>113</sup>

Where treaties fail, customary international law (CIL) may offer a better solution.<sup>114</sup> CIL uses treaties as a foundation and fills gaps in the treaties where formal, written consensus is unclear or impossible.<sup>115</sup> Unlike with treaties, the traditional understanding is that states cannot withdraw from CIL, especially not for CIL rules falling within the human rights rubric.<sup>116</sup>

As a formal matter, a legal norm reaches the status of CIL upon meeting a two-part test. First, the norm must “result from a general and consistent practice of states,” and second, states’ adherence to this widespread practice must stem “from a sense of legal obligation” known as *opinio juris*.<sup>117</sup> Our proposal does not fully satisfy the formal definition, if it is followed strictly.<sup>118</sup> But in practice, international tribunals almost never comply with the formal definition of CIL. Instead, tribunals applying CIL engage in a process akin to common law decision-making. They typically consult international treaties and conventions for evidence that nations aspire towards fixing a particular problem in a particular fashion.<sup>119</sup>

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112. See *infra* Section II.B.

113. See generally Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005) (describing the reasons for and mechanisms to enable unilateral exit of treaties by states).

114. A third possibility lies with “general principles” of law, referenced in Article 38(1) of the ICJ Statute, which apparently can be found extrapolating from widely shared *domestic* legal principles. Although we do not pursue it in depth here, the general principles approach is likely to have particular appeal to those who think of international law as being consent-based.

115. See Andrew Guzman & Jerome Hsiang, *Reinvigorating Customary International Law*, in *CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 275, 275–76 (Curtis A. Bradley ed., 2016) [hereinafter *CUSTOM’S FUTURE*] (emphasizing that CIL is “a tool that can promote cooperation in situations where consent-based rulemaking proves impractical”).

116. See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 208 (2010).

117. Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

118. For this reason, Hathaway is skeptical regarding the usefulness of custom as a source of refugee rights. See JAMES HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 25–26 (2005). On the empirics that suggest that this skepticism might not be warranted, see Stephen J. Choi & Mitu Gulati, *Customary International Law: How do Courts do it*, in *CUSTOM’S FUTURE*, *supra* note 115, at 117.

119. Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication*, in *CUSTOM’S FUTURE*, *supra* note 115, at 34; see also

To the extent possible, they may also look to the practices of states to find confirmation of the aspirations they find articulated in the treaties, although this kind of evidence is often sparse.<sup>120</sup> There is no magic formula in terms of the numbers of pieces of evidence or the types of evidence that would satisfy a tribunal as to the existence of a new rule of CIL. That said, the breadth and strength of treaties and conventions supporting the rule we describe far exceed that available in most cases where CIL claims have been accepted by international tribunals.<sup>121</sup>

Our claim regarding the violation of international law seems straightforward enough. And it would be, except for the principle of sovereignty. Although norms of sovereignty have eroded in the second half of the twentieth century,<sup>122</sup> they remain among the strongest in international law and have often frustrated the goals of international human rights and refugee law.<sup>123</sup> More challenging than establishing a violation, then, is describing a remedy.

## B. The Remedy

Where a violation of international law has been established, the next question is whether that violation can be translated into a legal right to compensation for refugees.

### 1. The Legality of Compensation

Under the current system, even when a breach of international law is recognized, it is host nations—not the countries of origin—that end up providing a remedy, in the form of protection

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Brian Lepard, *Customary International Law as a Dynamic Process*, in *CUSTOM'S FUTURE*, *supra* note 115, at 62 (emphasizing the forward looking or aspirational aspect of CIL determination, from the perspective of solving collective action, coordination, and public goods problems); John Tasioulas, *Custom, Jus Cogens and Human Rights*, in *CUSTOM'S FUTURE*, *supra* note 115, at 95 (making a similar claim in the human rights context, albeit from a moral perspective).

120. See Choi & Gulati, *supra* note 118, at 117.

121. See *id.*

122. On the erosion of sovereign immunity on both the commercial and human rights sides, see W. Mark C. Weidemaier & Mitu Gulati, *The Relevance of Law to Sovereign Debt*, 11 ANN. REV. L. & SOC. SCI. 395 (2015); Andrea Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, 10(2) EUR. J. INT'L L. 237 (1999).

123. POSNER, *supra* note 48; Schuck, *Modest Proposal*, *supra* note 2, at 247.

for refugees. Morally and politically, this is backwards.<sup>124</sup> While nations sometimes have a moral or legal duty to remedy harms they did not cause, that should not absolve the initial wrongdoer. Of course, the opposite is also true: the inability or unwillingness of a persecuting nation to make things right does not absolve other nations of their duty to help. The question for our purposes is who has the primary duty to *pay*. As a legal matter, a wide range of international sources (again, more than enough to satisfy a finding of CIL) suggest that states that create a refugee problem must be responsible for the costs.<sup>125</sup>

Such sources are at least as old as international refugee law itself.<sup>126</sup> For example, the 1948 Progress Report of the United Nations Mediator on Palestine provided that “payment of adequate compensation for the property of those choosing not to return[] should be supervised and assisted by the United Nations conciliation commission,”<sup>127</sup> a return-or-pay theme that would be echoed in later

124. Ahmad, *supra* note 105, at 2 (“[W]hy should the burden be entirely on other States? Should it not in the last analysis fall back on the country of origin?”); Lee, *supra* note 91, at 536 n.23 (citing GROTIUS, *supra* note 97).

125. Schuck notes a similar possibility, albeit in the limited context of inter-state suits designed to deter bad conduct rather than to incentivize acceptance: “The norm [of state sovereignty] also prevents a state that has borne the costs of another state’s refugee-generating policies or practices from suing the source state to recover those costs. Establishing such a cause of action could—assuming that the source state’s causal responsibility could be proved and the resulting judgment could be enforced—render a root cause strategy far more effective.” Schuck, *Modest Proposal*, *supra* note 2, at 262 n.72.

126. Lee, *supra* note 91, at 536 n.23 (citing GROTIUS, *supra* note 97). See also Jennings, *supra* note 92, at 113 (noting, in the context of refugee flows, that “[i]f the conduct of the state of origin be in the first place illegal, it seems to follow that it is under a duty to assist settlement states in the solution of the problem to which it has given rise.”).

127. Supplement to Part III of Progress Report of the United Nations Mediator on Palestine, 17 ¶ 3, U.N. Doc. A/648, 3 U.N. GAOR Supp. (No. 11), (1948). This text was essentially adopted in Resolution 194(III) of December 11, 1948, which “resolve[d]” among other things that “compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.” G.A. Res. 194 (III), 3 U.N. GAOR, pt. 1, Res. 21, 24, U.N. Doc. A/810 (1948). The U.N. Conciliation Commission for Palestine (CCP) pursued the issue, albeit with limited success, throughout the 1950s, and the same basic ideas emerged in the Geneva Accord, which provided both that “[t]he Parties recognize the right of states that have hosted Palestinian refugees to remuneration” and also that “[r]efugees shall be entitled to compensation for their refugeehood and for loss of property.” Don Peretz, *Palestinian Refugee Compensation 2* (The Center for Policy Analysis on

documents, including the Bosnian accords.<sup>128</sup> In 1981, the General Assembly “[e]mphasize[d] the right of refugees to return to their homes in their homelands and reaffirm[ed] the right, as contained in its previous resolutions, of those who do not wish to return to receive adequate compensation.”<sup>129</sup> In more general terms, Article 2(3) of the International Covenant on Civil and Political Rights guarantees a right to remedy,<sup>130</sup> and Article 14(6) says that a person who has been the victim of a miscarriage of justice “shall be compensated according to law.”<sup>131</sup>

A related line of argument under international law suggests that countries of origin owe compensation not only to the refugees they create, but to the nations that—because of practical necessity, as well as their own legal and moral obligations—must house them.<sup>132</sup> By pushing refugees into other nations, the argument goes, countries of origin violate the sovereignty of those other nations by forcing them to accept people within their borders (and, consequently, to pay for them).<sup>133</sup>

Palestine, Info. Paper No. 3, May 1995); Geneva Accord: A Model Israeli-Palestinian Peace Agreement, arts. 7(3), 7(2).

128. Eric Rosand, *The Right to Compensation in Bosnia: An Unfulfilled Promise and a Challenge to International Law*, 33 CORNELL INT’L L.J. 113, 115–16 (2000) (“One of the foundational principles of the peace negotiated at Dayton was that all refugees and displaced persons would be given the right to return to their pre-war homes or receive compensation for their home should they choose not to return . . .”).

129. G.A. Res. 36/148, ¶ 3 (Dec. 16, 1981) (creating the U.N. Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees).

130. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 2(3), S. Exec. Doc. E 95-2, 999 U.N.T.S. 171, 174 (entered into force Mar. 23, 1976) (obligating parties “[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy”).

131. *Id.* art. 14(6), at 177.

132. S.C. Res. 687, ¶ 16 (Apr. 8, 1991) (finding Iraq “liable under international law for any direct loss, damage . . . or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait”).

133. Christian Tomuschat, *State Responsibility and the Country of Origin*, in *THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES* 59, 71–72 (Vera Gowlland-Debbas ed., 1996) (“If [a state] pushes . . . its own citizens out of its territory, fully knowing that the victims of such arbitrariness . . . will eventually have to be admitted somewhere else on purely humanitarian grounds, it deliberately affects the sovereign rights of its neighbors . . .”).

This theory of liability was articulated as early as 1891, when U.S. President Benjamin Harrison claimed:

The banishment, whether by direct decree or by not less certain indirect methods, of so large a number of men and women is not a local question. A decree to leave one country is, in the nature of things, an *order* to enter another—some other. This consideration, as well as the suggestions of humanity, furnishes ample ground for the remonstrances which we have presented to Russia. . . .<sup>134</sup>

The logic behind such country-to-country claims for compensation has been accepted in other legal contexts. One example is the famous *Trail Smelter* arbitration, which involved pollution across borders but has been used (somewhat apologetically) to analyze the refugee problem as well.<sup>135</sup> In *Trail Smelter*, the tribunal held that

under the principles of international law, . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>136</sup>

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134. Lee, *supra* note 91, at 555 (quoting U.S. DEP'T STATE, 1891 FOREIGN RELATIONS OF THE UNITED STATES: MESSAGE OF THE PRESIDENT xiii (1891)). That same year, the Institut de Droit International reported:

A state cannot, either by administrative or judicial procedure, expel its own nationals whatever may be their differences of religion, race, or national origin. Such an act constitutes a grave violation of international law when its international result is to cast upon other territories individuals suffering from such a condemnation or even placed merely under the pressure of judicial proscription.

Lee, *supra* note 91, at 555–56 (quoting 11 ANNUAIRE INSTITUT DE DROIT INTERNATIONAL 278–79, art. XI (1891)). See also Règles Internationales sur l'Admission et l'Expulsion des Etrangers, adopted by the Institut on Sept. 12, 1892, 12 ANNUAIRE at 219 (1892)).

135. See, e.g., Ahmad, *supra* note 105, at 21.

136. Trail Smelter (U.S. v. Can.), 3 R.I.A.A 1905, 1965 (1938 & 1941).

Damages were awarded as a result of the breach.<sup>137</sup>

The complication is sovereign immunity—a state might be in breach of its obligations and yet immune to claims for money damages. As noted above, state sovereignty and related concepts like immunity have long been serious obstacles to the enforcement of international refugee law. This point was recently driven home by the ICJ's decision in the *Jurisdictional Immunities* case, which held that Germany might have violated international law (even *jus cogens*) through the actions of its military during World War II, but that no remedy was available to the plaintiffs in the domestic courts of Italy and Greece.<sup>138</sup> If the country being sued is one that has consented (via a treaty) to the jurisdiction of an international tribunal that has been set up to tackle these issues, sovereign immunity is not an issue since the country has waived it for conflicts within the treaty's scope. But if not, or if no such tribunal exists, then suit is likely to be brought in a domestic court and the question of immunity will be central, as it was in the *Jurisdictional Immunities* litigation.

The possible assertion of sovereign immunity presents an obstacle, but there is nothing essential or inevitable about it. After all, sovereignty and sovereign immunity are legal fictions that are given by the international legal community to groups of people with territory so as to enable the functioning of the international legal system.<sup>139</sup> When a sovereign invoking the power of that legal fiction uses it in a way that undermines the system, the benefit of the fiction can (and perhaps should) be forfeited. In some ways, this seems to be happening already.

After the failure of the international community to prevent the horrors of World War II, and in light of the dramatic increase in cross-border commerce over the past few decades, sovereignty's grip has weakened in at least two ways. First, on the human rights front, international law now contains more significant prohibitions against countries committing human rights abuses against their citizens, including prohibitions on genocide and torture. There is also growing

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137. See generally John D. Wirth, *The Trail Smelter Dispute: Canadians and Americans Confront Transboundary Pollution, 1927-41*, 1 ENVTL. HIST. 34 (1996).

138. For a discussion of the case, see Stefan Talmon, *Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished*, 25 LEIDEN J. INT'L L. 979 (2012); Carlos Esposito, *Jus Cogens and Jurisdictional Immunities of States at the International Court of Justice: A Conflict Does Exist*, 21 ITALIAN Y.B. OF INT'L L. 161 (2012).

139. See Weidemaier & Gulati, *supra* note 122, at 6.

support for the position that countries cannot rely on sovereignty to shield themselves from remedies for these violations. Indeed, some of these basic human rights rules fall under the rubric of what are called *jus cogens* norms, which are treated as more fundamental than sovereignty itself.<sup>140</sup>

Consider the growing support for two remedial principles that would alter the traditional conception of sovereignty in cases of serious human rights violations. First, under the principle of remedial secession, regions subject to widespread humanitarian abuse are entitled to secede from their nations.<sup>141</sup> Second, and along the same lines, the “Responsibility to Protect” would *require* the international community to intervene in cases of severe oppression, despite the territorial integrity of the oppressive nation<sup>142</sup>—one recent proposal extends the Responsibility to the refugee context.<sup>143</sup> Acceptance of these principles is far from universal and their implementation is far from perfect. The point is simply that sovereignty is not absolute, and that abuse of one’s own citizens can be a justification for removing the entitlements that sovereign status brings with it.

A case can be made that international law does not recognize sovereign immunity as a defense to claims of compensation for the

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140. See, e.g., Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT’L L. 491, 491 (2008) (discussing the almost intrinsic relationship between human rights and *jus cogens* norms).

141. LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 220–23 (1978); T.M. Franck, *Postmodern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3–27 (Catherine Brölmann et al. eds., 1993); ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 335 (2004). *But see* Jure Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, 6 ST. ANTONY’S INT’L REV. 1, 37 (2010).

142. See, e.g., G.A. Res. 60/1, 2005 World Summit Outcome (Oct. 24, 2005) (vesting responsibility to the U.N. Security Council, and other regional organizations as appropriate, to protect citizens from genocide, war crimes, ethnic cleansing, and crimes against humanity, when national authorities have failed to protect their own populations); *see also* U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009) (outlining the intervening steps the international community should take when a sovereign nation has failed to protect its population); *cf.* Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT’L L. 319, 319 (2012) (expressing disappointment in the implementation of this responsibility).

143. See generally Achiume, *supra* note 67.

kinds of violations described here.<sup>144</sup> The Declaration of Human Rights, for example, states that every person has “the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law.”<sup>145</sup> Scholars have noted that the principle of compensation has “developed and, arguably, [is] implicit in conventions such as the Hague Convention IV, Respecting the Laws and Customs of War on Land and Annexed Regulations, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.”<sup>146</sup>

These are not simply abstract legal principles; nations have claimed (and occasionally succeeded in obtaining) such compensation in the past. The US claimed compensation from Russia based on Russian persecution of Jews in the late 1800s; India did likewise with Pakistan and refugees from Bangladesh in the 1970s.<sup>147</sup> Along these lines, the International Law Association’s 1990 Draft Declaration of Principles of International Law on Compensation to Refugees and Countries of Asylum notes multiple cases where nations paid compensation for creating refugees or their equivalent. The most prominent example involved payments that were made by the German government to the state of Israel for the resettlement of refugees after World War II.<sup>148</sup>

A critic could argue that many of these are instances where the country paying the reparations did so out of a sense of moral obligation rather than legal obligation. This is a fair point. The compensation scheme we have in mind would arguably require a change in international law by making such payments mandatory. Our point here is to show that it would not be a wholesale change. We envision developing the evidence of voluntary practice and of aspirational norms into a doctrine of CIL, as is the case in so many other areas of international law.

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144. Sazak, *supra* note 62, at 307 (“[T]here exists within the Charter of the United Nations, a legal and doctrinal basis for such a practice [of seizing national assets to pay for refugees’ care] to be adopted under the auspices of the UNSC.”).

145. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. GAOR, 3d Sess. U.N. Doc. A/810 (Dec. 10, 1948).

146. Tadmor, *supra* note 92, at 433; see Eyal Benavisti & Eyal Zamir, *Private Claims of Property Rights in the Future Israeli–Palestinian Settlement*, 89 AM. J. INT’L L. 295, 330 (1995) (“[T]he principle that refugees are entitled to compensation for their lost property is gradually gaining recognition.”).

147. Lee, *supra* note 91, at 561.

148. See International Law Association, *supra* note 94, at 339–43.



The second major set of changes in the traditional conception of sovereignty comes in the commercial arena. Countries engaging in cross-border commercial transactions are deemed to have waived their immunity to suit in foreign courts.<sup>149</sup> When a sovereign uses the power of that legal fiction in a fashion that undermines the legal system, it should no longer be entitled to it. This was, after all, the basic logic behind the shift from absolute sovereign immunity to restrictive immunity in international law. Restrictive immunity came into being as a doctrine during the Cold War era because sovereigns did business as private actors (usually via state-owned firms from socialist nations) and then attempted to claim sovereign immunity when some counterparty pursued a claim of damages against them.<sup>150</sup> This is also what we see happening in sovereign veil-piercing cases where a sovereign in default might be trying to do business through a subsidiary so as to avoid exposing its assets.<sup>151</sup>

Our goal is to take these two developments—the erosion of sovereignty in cases involving human rights violations, and waivers of sovereign immunity in international markets—and marry them in a way that would help refugees.

## 2. Who Can Claim Compensation?

The next question is *who* can claim the compensation. As an initial matter, our system would award the claim to groups of refugees, rather than to individuals.

Almost by definition, and certainly in practice, mass persecution tends to involve situations wherein people are oppressed as members of a group. It seems sensible to begin considering remedies at the same scale. Moreover, from a forward-looking perspective, preserving groups as such can help facilitate durable solutions, including repatriation,<sup>152</sup> while helping refugees preserve

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149. W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 68, 69 (2014).

150. See, e.g., STEPHEN MCCAFFERY, UNDERSTANDING INTERNATIONAL LAW 191–92 (2006); see also *supra* notes 90–93 and accompanying text.

151. Weidemaier & Gulati, *supra* note 122, at 7–8; see generally Brandon Rice, *States Behaving Badly: Sovereign Veil Piercing in the Yukos Affair* (Oct. 12, 2015) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2673335](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2673335) (describing the difficulties of trying to enforce an arbitral award against the Russian Government due to the veil of sovereignty).

152. Hathaway & Neve, *supra* note 19, at 140 (“[R]epatriation will often be unsuccessful when family and collective social structures of refugees have not been preserved during the period of protection abroad, when refugees are denied

their own distinct social identities and structures. An effective group-based refugee scheme could also allow the rules and institutions of asylum law to focus more directly on individual asylum seekers.

There are downsides to this group-based approach. As a practical matter, it might be hard to identify groups or to impute collective decisions to them. But these are not insurmountable problems. The country of origin's own actions will often define the group in need of compensation—one can, for example, begin by asking who Myanmar defines (and oppresses) as Rohingya. Though refugees sometimes disperse, they often “flee to bordering states or to more distant states to which their access is facilitated by transport and existing migration networks, or where they have valuable contacts such as family members.”<sup>153</sup> Partly as a result, it will sometimes be possible to identify the equivalent of democratic leadership within refugee communities.<sup>154</sup> (Of course, this will have to be done with care, so that the refugees' own leadership structures do not themselves become instruments of marginalization.)

Another way to resolve this complication about decision-making would be for the relevant body (perhaps the UNHCR) to appoint trustees for the refugees. The trustees could then make decisions for the group, focusing especially on the interests of the weakest and least desirable refugees. The strongest and most “valuable” refugees—the strong, wealthy, and young—are more likely to find a country willing to accept them.<sup>155</sup>

Even as it solves a potential collective action problem, however, this solution would not fully resolve tension between the group's interests and those of the individual. Too strong of a focus on groups could distract from the fact that the Refugee Convention

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opportunities to develop their skills and personalities in the asylum state, or when the place of origin sees the return of refugees as a threat or burden.”).

153. Anker et al., *supra* note 44, at 298–99.

154. Hathaway & Neve, *supra* note 19, at 174 (citing proposal by Robert Gorman and Gaim Kibreab that formal standing be given to a “Refugee Development Council (RDC), which would become both a means of reflecting needs and interests, and of unleashing the community's skills and energies”); *id.* at 179 (further proposing “Country of Origin Development Councils (CODCs)” to serve a corresponding role in countries of origin).

155. *Refugees: The Numbers*, UNITED NATIONS, <http://www.un.org/en/globalissues/briefingpapers/refugees/> (last visited Nov. 9, 2016) (“Children constitute about 41 percent of the world's refugees, and about half of all refugees are women.”).

creates individual rights.<sup>156</sup> But individual rights, such as *non-refoulement*, can co-exist with group-based remedies.<sup>157</sup> As in other areas of law, our goal is to seek aggregate solutions to individual wrongs. Individual refugees could choose to opt out of the group remedy by seeking asylum elsewhere. This choice would mean partially forfeiting their share of the claim,<sup>158</sup> but for some (the strong and desirable), that might be a reasonable choice to make. If this seems unfair, consider that immigrants likewise cannot cash out their interests in the countries they leave.

### 3. How to Calculate the Compensation

The crux of our remedy is a financial claim. For our proposal to work, such a claim must be quantifiable.

Calculation of the remedy would be contested and complicated, but not necessarily any different in character from other valuations incorporated in law. In the course of passing regulations, governments regularly “put a price on life.”<sup>159</sup> Class actions and mass tort suits apportion compensation across a broad range of people whose injuries vary in their particulars. And inter-sovereign disputes over matters like post-conflict reparations are just as politically charged and hard to quantify as the matters we have in mind here. Moreover, current refugee-focused policies and proposals already have to face difficult questions of quantification: how many troops or aid shipments are needed to avert genocide, what “quota” of refugees to allocate,<sup>160</sup> or how many refugees a state can accept.<sup>161</sup> Indeed,

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156. Anker et al., *supra* note 44, at 306; *id.* at 308 (“These studies are out of step, in important respects, with the development international human rights law after World War II, which emphasizes individual rights under the rule of law.”).

157. Lee, *supra* note 91, at 552 (“This is not meant to condone the creation of *individual* refugees. Rather, deplorable as the creation of even a single refugee may be, it entails no serious injury to or ‘burden’ on countries of asylum other than a shared outrage at man’s inhumanity to man.”).

158. There is no reason why they would have to give up their direct, individual claims to lost property and the like.

159. In the United States, the going rate appears to be roughly \$9 million. Cass R. Sunstein, *The Mischievous Science of Richard Thaler*, THE NEW RAMBLER (2015), <http://newramblerreview.com/book-reviews/economics/the-mischievous-science-of-richard-thaler>.

160. Schuck, *Modest Proposal*, *supra* note 2, at 277 (“The overall burden is defined as the number of refugees who need to be offered protection . . . during a given time period. This number would be calculated by an international agency to be described below, and would be adjusted as unanticipated refugee emergencies occurred.” (internal citation omitted)).

Turkey and the EU recently did a trade where the rights of refugees were explicitly quantified. Turkey agreed to take back refugees who had passed through the country and into Greece illegally, and promised to constrain the flow of new refugees towards the EU, in exchange for approximately 6 billion Euros, visa-free travel for Turkish citizens into the EU area, and revived EU accession talks.<sup>162</sup> Put differently, while quantification of the precise value of refugee might be difficult, crass, and imprecise, it can be (and is) done. Plus, the alternatives to attempting such calculations may well be leaving the cost—whatever its size—on the refugees themselves.

Calculating the debt owed to persecuted refugees would therefore be similar in kind to other well-established remedial practices. But, like any other remedy, it should be crafted with specific goals in mind. At least three goals are crucial: compensation, deterrence, and incentive. The first is focused on refugees, the second on countries of origin, and the third on host nations.

The first goal is to compensate refugees for what they have lost. In this respect, we build on existing legal principles, including the international law rules discussed above. Indeed, the “most common remedy for the breach of an international obligation is adequate compensation, which may be defined as ‘the payment of such a sum as will restore the claimant to the position the claimant would have enjoyed had not the breach . . . occurred.’”<sup>163</sup> The most straightforward aspect of this compensation would be for lost property, denial of livelihood, and other “direct” costs to the refugees.<sup>164</sup>

In general, international actors have been more comfortable with these kinds of compensation than with other less tangible

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161. Kritzman-Amir, *supra* note 64, at 372.

162. See *Europe's Murky Deal With Turkey*, THE ECONOMIST (May 28, 2016), <http://www.economist.com/news/europe/21699466-eu-gambling-its-reputation-secure-its-borders-europes-murky-deal-turkey>; Jonathan Stearns, *EU's Refugee Pact With Turkey May Collapse Over Visa Dispute*, BLOOMBERG (Aug. 25, 2016), <http://www.bloomberg.com/news/articles/2016-08-25/europe-s-refugee-pact-with-turkey-may-collapse-over-visa-dispute>.

163. Lee, *supra* note 91, at 536–37 (citing Covey T. Oliver, *Legal Remedies and Sanctions*, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 61, 71 (R. Lillich ed., 1983)).

164. See generally ANNEKE SMIT, THE PROPERTY RIGHTS OF REFUGEES AND INTERNALLY DISPLACED PERSONS: BEYOND RESTITUTION (2012) (describing how protection of property rights can help to provide durable solutions for refugees).

costs.<sup>165</sup> Conceptually, however, there is no reason why compensation must be limited to such “economic” losses. The heart of the refugee crisis is not simply the obvious economic harm that refugees endure, but the emotional suffering, terror, and anguish they suffer along the way.<sup>166</sup> As Schuck puts it, refugees “are of special humanitarian concern because they were compelled to abandon the only protections and solaces that can render the harsh vicissitudes of life endurable: the assistance (however minimal) of their own governments and the social supports of their customary communities.”<sup>167</sup> The compensable harm done to refugees is not only a denial of property and livelihood, but of citizenship itself.

The second function that a damages award could serve—and which should therefore guide its calculation—is as a punishment for the country of origin, and thereby a deterrent to future wrongdoing by that nation or others. The legality of this function under existing international law may be more questionable because it goes beyond immediate humanitarian needs<sup>168</sup> and presents a more direct challenge to the sovereignty and dignity of countries of origin. Yet, as other scholars have noted, compensation awards could help deter the kind of legal violations described above.<sup>169</sup>

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165. Lee, *supra* note 91, at 546 (“[T]he General Assembly has refrained from passing judgment on whether countries of origin are obliged to compensate refugees for such other losses as deaths; personal injuries and indignities; wrongful arrest, detention or imprisonment; and emotional or mental anguish.”).

166. Hannah R. Garry, *The Right to Compensation and Refugee Flows: A Preventative Mechanism in International Law?*, 10 INT’L J. REFUGEE L. 97, 114 (1998) (discussing need to “determine monetary compensation for non-material damages such as certain human rights violations”); John Quigley, *State Responsibility for Ethnic Cleansing*, 32 U.C. DAVIS L. REV. 341, 380 (1999) (“While international organs have not addressed this matter, it would seem to include compensation for the indignity and hardship of the departure, for loss of property left behind, and for reduced income if, as is typically the case, a person loses income as a result of being taken from her native area.”).

167. Schuck, *Modest Proposal*, *supra* note 2, at 246.

168. Sazak, *supra* note 62, at 310 (“[C]ompensation should be remedial, not punitive, and designed to assist in humanitarian relief.”).

169. Kritzman-Amir, *supra* note 64, at 385–86 (noting that compensation “could positively translate into increased efforts by these States to achieve economic growth and promote the just distribution of resources in order to provide for and ensure the adequate living conditions of their citizens, thereby discouraging immigration in a construction manner”); Lee, *supra* note 91, at 566 (“What could be a more fitting sanction than requiring countries of origin to pay compensation to refugees and countries of asylum? In addition to serving the end of justice, such a sanction would inevitably have a deterrent effect. Such is the purpose and function of law.”).

The third function of the financial claim would be to induce potential host nations to accept refugees in exchange for the right to pursue the claim. Since part of the goal here is to provide an effective incentive to host nations, the amount of the claim could involve consideration of the expected cost of accepting the refugees—not only the direct costs of feeding and sheltering them, but social costs and indirect burdens.<sup>170</sup> The focus here would be on capacity rather than on harm or moral responsibility,<sup>171</sup> and it would be unnecessary if the compensatory and punitive amounts already met or exceeded the capacity cost.

#### 4. How to Trade

Our goal is to give refugees an asset that they can trade to potential host nations in exchange for accepting them. This objective distinguishes our proposal from the standard compensation model and provides a link between refugees and would-be host nations. Doing so represents an improvement over the first wave of market-based proposals, under which “asylum-seekers would largely be removed from the realm of law and consigned to the realm of political bargaining.”<sup>172</sup>

What it would mean for a host nation to “accept” refugees could vary, and we are inclined to avoid imposing mandatory terms other than those that already exist in international refugee law.<sup>173</sup>

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170. Kritzman-Amir, *supra* note 64, at 381–82 (noting that such a calculation “should not only take into account the out-of-pocket money spent on needy migrants. The calculation should also consider the social costs and indirect burdens, which include long-term and short-term costs as well as the benefits the host country will enjoy as a result of the refugees’ immigration.”). Precise figures are unlikely. Gregor Noll, *Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field*, 16(3) J. REFUGEE STUDS. 236, 244 (2003) (“While it is comparatively easy to determine the costs of food and housing in money terms, putting figures on the costs of integration is much more difficult, if not impossible.”).

171. David Miller, *Distributing Responsibilities*, 9(4) J. POL. PHIL. 453, 460 (2001) (arguing that a principle of moral responsibility “looks too exclusively to the past in assigning remedial responsibilities” rather than to the future and the principle of capacity); *id.* at 468 (“[W]e might conclude that *capacity*, and to some extent *community*, are relevant principles when immediate responsibilities are being distributed because these are criteria that tell us who is best able to relieve P’s condition quickly and effectively.”).

172. Anker et al., *supra* note 44, at 305.

173. See generally MICHELLE FOSTER & JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* (2d ed. 2014) (arguing that states party to the Refugee

The most straightforward cases would be those in which a host nation offers permanent resettlement and fully takes over the refugees' claims as a result. But permanent resettlement is not the norm,<sup>174</sup> and indeed "[t]emporary refuge is the keystone of the refugee protection structure."<sup>175</sup> This is not simply because host nations seek to get rid of the refugees they have accepted, but because those refugees often seek repatriation,<sup>176</sup> which has long been a central goal of international refugee law. If this durable solution can be achieved,<sup>177</sup> there may be reasons to pursue it.

Timing presents a thorny problem as well. Refugees are by definition fleeing persecution, often in desperate need and hardly in a good position for protracted bargaining with potential host nations. The need for immediate shelter and the potential imbalances between refugees and nations raise serious concerns about whether the "trade" should happen before or after the refugees find refuge—as a prerequisite for acceptance and protection or as something more akin to a post hoc remedy.

We think it can be both. We support the rule of *non-refoulement*, so we believe that refugees should be legally entitled to protection in whatever country they happen to reach (and to which they might then trade their asset). But, as the crisis in Europe shows, refugees do not always choose to *stay* in the place where they first arrive, which opens up the possibility for some *ex ante* bargaining with other countries. Moreover, the protracted nature of many refugee crises indicates, unfortunately, that there is time to identify potential welfare-enhancing trades.

In these cases, the size of the claim would have to be adjusted accordingly. It does not make sense to compensate refugees (or their host nations) identically for temporary stays and permanent ones. Just as others have suggested that refugees' duration of stay in a host nation could be pegged to the seriousness of the threat faced in the

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Convention are bound to provide refugees with a catalog of civil and socio-economic rights).

174. Schuck, *Modest Proposal*, *supra* note 2, at 269.

175. *Id.* at 268.

176. UNHCR, *Preface to VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION*, Preface (1996) (noting that the purpose of international protection is not permanent refugee status, but "renewed membership of a community and the restoration of national protection, either in the homeland or through integration elsewhere").

177. Hathaway, *Asylum Muddle*, *supra* note 16 (suggesting that repatriation should be made within seven years, if at all).

country of origin,<sup>178</sup> under our plan the claims and debt would need to be divided or prorated accordingly. Importantly, just as is in the current system, the host nation's agreement would be monitored to ensure that it holds up its end of the bargain.<sup>179</sup>

### C. Enforcement

The financial claim against the country of origin is the fuel for our proposal, and in order for the mechanism to work, that claim must have value, which means that it must be enforceable.

It has not always been easy to collect debts from sovereigns. Indeed, one of the major problems with prior proposals for refugee compensation is that they do not provide realistic enforcement mechanisms. Refugees, in particular, are typically not in a good position to demand payment from a sovereign,<sup>180</sup> even assuming that they can establish legal standing in the first place.

Our proposal ameliorates this problem by incentivizing the transfer of the asset to a party that is in a better position to collect it: namely, the host nation—a sovereign—that accepts the refugees. The debt is likely to be more valuable to the host nation, which has better options for enforcing it. In some cases, the host nation may be able to simply offset any existing obligations it has to the country of origin. This option is attractive because it does not require anyone to write a check; rather it treats existing debts as the relevant “pool” of money. And because refugee flows and trade relationships are usually regionally concentrated, there should be an overlap between the

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178. Hathaway & Neve, *supra* note 19, at 139 (“We believe that it makes sense to define the duration of stay for refugees as a function of the risk that gives rise to the duty to admit them.”); Lee, *supra* note 91, at 566 (“There is, in general, an inverse relationship between voluntary repatriation and compensation; namely, the greater the opportunity for refugees to be repatriated, the less the need for compensation, and vice versa.”); UNHCR, *supra* note 176, at 9 (providing that Repatriation is permissible when the “root cause” of flight has been resolved by a fundamental change in the country of origin that is substantial, effective, and durable).

179. Schuck, *Modest Proposal*, *supra* note 2, at 292 (“[M]onitoring compliance should not be particularly difficult, as UNHCR can readily count refugees, verify their destinations, and record transaction among states.”).

180. Peretz, *supra* note 127, at 18 (“[C]ompensation is unlikely to consist of large amounts of cash or promissory obligations to individuals. It will no doubt be based on some form of global payment taking into account claims that parties to the conflict have against each other . . .”).



countries to which refugees flee and the countries that have obligations available for offset.

Where offsets are unavailable, the host nation could pursue the debt through other means, including litigation. A money judgment against a sovereign is a liability, just like any other sovereign debt. The nature and value of sovereign debts are directly tied to the mechanisms available for enforcing them. If, for example, the holder of the judgment is stuck going to the local courts of the misbehaving sovereign to try to get the judgment enforced, he or she is unlikely to find success. By contrast, a judgment enforceable in New York or London, denominated in US dollars or Euros, is, in general, more valuable.

Few modern sovereigns, North Korea aside, are willing or able to function without access to international financial and commercial markets. Even the weakest nations are constantly engaged in cross-border transactions. And the weaker those nations are, the more likely they are to need the assistance of financial institutions in New York and London. What would have to happen for the judgment to be given teeth, then, is for courts in these jurisdictions to use their considerable power to say that until the judgment is paid, the misbehaving nation will be constrained from using those jurisdictions for its commercial activities.

The federal courts in New York did precisely this when Argentina blatantly ignored its contractual obligations on prior debts by paying some creditors and ignoring others. The courts ruled that *any* party under their jurisdiction that accepted payment from Argentina in violation of Argentina's obligation to pay all its equally ranked creditors on a proportional basis was risking contempt sanctions.<sup>181</sup> The result is that Argentina has essentially been closed out of the international financial markets.<sup>182</sup> A critic might point out that Argentina avoided paying its creditors for more than a decade of litigation in New York and elsewhere. For present purposes, the point is that creditors who can bring claims in foreign jurisdictions, particularly in the financial capitals, have the ability to impose

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181. See generally *NML Cap. v. Rep. of Arg., Ltd.*, 699 F.3d 246 (2d Cir. 2012).

182. For details, see Anna Gelpern & W. Mark C. Weidemaier, *Injunctions in Sovereign Debt Litigation*, 31 *YALE J. ON REG.* 189 (2014).

powerful sanctions on misbehaving sovereigns. And higher sanctions mean a higher likelihood of recovery.<sup>183</sup>

All that is necessary is for a few key jurisdictions—the ones in the world’s financial centers—to pass laws allowing enforcement.<sup>184</sup> And these key jurisdictions have strong incentives to help find ways to ameliorate the current refugee crisis, in part because they are typically the places where refugees want to go the most. A useful analogy here is the United Nations Commission on International Trade Law (UNCITRAL) model law on cross-border insolvency, which provides that certain insolvency restructurings will be recognized and given effect by the courts of countries that adopt the model law. The UNCITRAL model has only been adopted by a handful of countries with the strongest incentives to make this work, but it has been remarkably effective because those countries—including the US and UK—are among the handful of jurisdictions containing the world’s major financial centers. In practice, enforcement by the local courts of the world’s financial centers *is de facto* global enforcement.<sup>185</sup>

The jurisdictional obstacle is not the only impediment to full recovery. Even if courts in jurisdictions like New York and London are aggressive in constraining the sovereign from doing business there, a sovereign can hold out for a long time if it is determined enough. The result has been that litigating against a sovereign tends to only be worthwhile either for people that specialize in such actions or those who are owed debts by the sovereign in question. In the case of the former, these specialists (often referred to as “vulture funds”) tend to have both the legal expertise and financial resources to pursue the recalcitrant sovereign’s assets in whichever jurisdictions around the world that those assets might show up.<sup>186</sup> NML, the most

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183. Many sovereigns faced with lawsuits on unpaid debts have paid. Still others, including Greece in 2012, have refrained from defaulting on disfavored creditors out of a fear of being subject to Argentine-style litigation.

184. The Security Council could perhaps facilitate this—it has previously passed binding resolutions regarding Iraqi oil revenues and debt, for example. See Lee C. Buchheit, G. Mitu Gulati & Ignacio Tirado, *The Problem of Holdout Creditors in Eurozone Sovereign Debt Restructurings*, BUTTERWORTHS J. OF INT’L BANKING & FIN. L. 191 (2013).

185. For an illustration of this point in a different context by an eminent practitioner, see Francis Fitzherbert-Brockholes, Letter to the Editor, *Model Law is Key to Protecting “Unprotected” Debt*, FIN. TIMES (Dec. 7, 2014), <https://www.ft.com/content/1e7f9980-7be6-11e4-a695-00144feabdc0>.

186. Indeed, these hedge funds sometimes assert that their goal is to promote the rule of law by helping to hold corrupt governments accountable (while making appropriate profits). See, e.g., David Bosco, *The Debt Frenzy*,

famous of these funds, has pursued a wide range of Argentine assets in courts in Paris, New York, London, Hong Kong, Accra, and Las Vegas.<sup>187</sup>

Mechanisms are available to facilitate such enforcement. Assets with uncertain future value can be converted into assets with immediate value using financial engineering. Sovereigns have, for example, converted their highly uncertain expectation of future oil revenues into present assets using what are called oil warrants. In the case of refugee compensation, the judgment could be put into a Special Purpose Vehicle (SPV). The management of the SPV could issue bonds against its asset so that the bond proceeds would immediately be available for the refugees.

To the extent the UNHCR and the international community were willing to supplement the SPV's assets, they might provide the SPV with additional pots of capital to support it financially. Alternatively, friendly sovereigns or the UNHCR could provide guarantees during the initial few years that the SPV makes its interest and principal payments. These types of guarantees of principal were used to great effect during the restructurings of Latin American sovereign debt in the 1980s in what are often referred to as the Brady Bonds.<sup>188</sup>

Because municipal courts should be sufficient to handle the claims we have described, the establishment of a new international forum is not crucial to our proposal, though (as with the creation of a treaty implementing the system) we would not be opposed to it, either as a general matter or for particular refugee scenarios. This, however, would require a change in law. For despite the plethora of international materials—treaties, conventions, statements, practice, and academic treatments—saying that the creation of refugees by a nation violates international law,<sup>189</sup> the international community has not provided a dedicated forum to adjudicate such violations.

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FOREIGN POLY (Dec. 13, 2009), <http://foreignpolicy.com/2009/10/13/the-debt-frenzy/>.

187. See, e.g., Jacob Goldstein, *Why A Hedge Fund Seized An Argentine Navy Ship In Ghana*, NPR (Oct. 22, 2012), <http://www.npr.org/sections/money/2012/10/22/163384810/why-a-hedge-fund-seized-an-argentine-navy-ship-in-ghana> (reporting that NML filed suit in Ghana to seize an Argentine Navy ship docked in that country as partial repayment of Argentina's debt).

188. Salomon Smith Barney, *A Primer on Brady Bonds*, HARV. BUS. SCH. (Mar. 9, 2000), <http://www.people.hbs.edu/besty/projfinportal/ssb%20brady%20primer.pdf>.

189. See *supra* Section II.A.

There are, however, some guideposts available. The conceptual foundations of such a forum could be laid using the expertise that has been developed in setting up expert tribunals such as the International Criminal Court, which is the court of last resort for alleged perpetrators of genocide, war crimes, and crimes against humanity.<sup>190</sup> There are also a number of human rights tribunals such as the European Court of Human Rights, and those of the Organization of American States and the African Union.<sup>191</sup> Perhaps more importantly, a wide range of tribunals and compensation commissions have been established in order to make the kinds of determinations we describe above. Consider, for example, the United Nations Compensation Commission in Iraq, the US-Iran Claims Tribunal, and the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina. The same could be done for refugees, either as a general matter or—as with Bosnia—on an ad hoc basis.<sup>192</sup>

In the case of refugees, there already exists a respected international body, the UNHCR, which has expertise in the matter.<sup>193</sup> The UNHCR has been hampered by a lack of funding,<sup>194</sup> a byproduct of the fact that the vast majority of its financial support is voluntarily provided.<sup>195</sup> But it has long been the central institution of

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190. See generally Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (outlining the factors that could lead to effective supranational adjudication).

191. These include the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court on Human and People's Rights, and the International Criminal Court.

192. Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1, 38 (2000) ("Where large numbers of persons suffer quantifiable losses, an international tribunal or compensation commission might be established to award compensation.").

193. Hathaway & Neve, *supra* note 19, at 196 ("[The] UNHCR is, of course, the primary intergovernmental organization charged with the responsibility for refugee protection . . . ."); Achiume, *supra* note 67, at 729 ("[S]uccessfully promoting international cooperation for refugee cost-sharing under [the Responsibility to Protect] requires a central issue-linking actor . . . and a natural choice for this role is the UN Refugee Agency.").

194. Arulanantham, *supra* note 25, at 46 ("Spending constraints in the current system unduly restrict the UNHCR's ability to fulfill its protection responsibilities.").

195. Sazak, *supra* note 62, at 309 ("The agency receives around 2 percent of its funds from the UN general budget and the remainder, exceeding \$1 billion, is raised through voluntary contributions from UN member states and other donors."); Hathaway & Neve, *supra* note 19, at 141 ("[A]ny fiscal assistance

international refugee law and policy, and could play—perhaps not simultaneously—many of the roles required by our proposal. It could, for example, help establish and staff the forum. It could perform the valuation described above. Or, perhaps most usefully, it could serve as a kind of trustee for refugee groups. After all, the UNHCR has a comparative advantage vis-à-vis refugees when it comes to establishing their right to compensation in the first place.<sup>196</sup> As a group, the refugees themselves are ill-suited to bring a claim,<sup>197</sup> let alone enforce it. They are likely to be a dispersed, impoverished, and uncoordinated group. Allowing the UNHCR to bring the claim on behalf of both the refugees (who need assistance because their statehood has been taken from them) and the international system (which bears the responsibility and costs of relocating the refugees) would facilitate enforcement.<sup>198</sup> As in other trustee contexts, the UNHCR would essentially serve as a representative with a fiduciary duty to the refugees, taking advantage of its expertise, standing, and resources. This would entail a shift in role for the organization, and, if that role would be better played by some new international refugee agency, that would be just as well.

### III. OBJECTIONS AND FURTHER CONCERNS

There are many possible objections to our proposal. Below, we address the ones that commenters bring up most often: workability, undermining existing protections, and commodification.<sup>199</sup>

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received from other countries of the UNHCR is a matter of charity, not of obligation, and is not distributed solely on the basis of relative need.”)

196. Kritzman-Amir, *supra* note 64, at 391 (“With respect to State of origin liability, the UNHCR would facilitate compensating the host countries. Efforts to claim the compensation could be made either directly by the host country or through the UNHCR.”).

197. Lee, *supra* note 91, at 552 (“[R]efugees lack the procedural capacity to institute proceedings against their own governments.”).

198. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 180 (Apr. 11) (suggesting in an advisory opinion that the United Nations can bring a claim against a state for damages caused “[t]o the interests of which it is the guardian”).

199. See Schuck, *Modest Proposal*, *supra* note 2, at 289 (noting the same three objections: unworkability, quality of protection, and commodification).

## A. Workability

One might object to the workability of our proposal on at least two dimensions: the difficulty of enforcement and possible systemic costs to the refugee-creating nation.

### 1. Enforcement

As a historical matter, it has been hard to get sovereigns to fulfill their humanitarian obligations.<sup>200</sup> This is especially true when those obligations run to a set of people who are neither taxpayers nor voters, are lacking in capital, and do not have powerful allies advocating their causes. For our proposal to work, this problem of enforcement must be surmountable.

We have noted the imperfect enforcement of obligations under international refugee law. But in the context of sovereign debt, a contrasting pattern emerges. Those studying the sovereign debt market have puzzled for years about why countries adhere so strongly to their obligations to pay, even where the creditors have minimal enforcement options and the sovereigns have strong legal and moral grounds to refuse.<sup>201</sup>

Scholars disagree about why sovereigns are so diligent about paying their debts, but some explanations are easy enough to imagine. Because nations depend on international financial markets, and specifically on access to credit, they cannot simply ignore their international debt obligations. The best case result of doing so would be an increase in the cost of credit; the worst case would be exclusion from the market altogether. So long as the *market* recognizes the refugee debt as valid, the oppressive nation cannot ignore it. A natural question here is whether increasing the size of a nation's debt will make it less likely that the sovereign will pay as a general matter. Undoubtedly so (higher debt means a higher likelihood of default), but that is no reason to deny the refugees their debt claim

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200. POSNER, *supra* note 48.

201. See, e.g., Mark Aguiar & Manuel Amador, *Sovereign Debt*, in THE HANDBOOK OF INTERNATIONAL ECONOMICS 647, 647 (Gita Gopinath et al. eds., 2014) (discussing the mechanisms which induce countries to fulfill the terms of their contracts, even when creditors have "limited legal resources"); LEE C. BUCHHEIT ET AL., BROOKINGS INSTITUTE, REVISITING SOVEREIGN BANKRUPTCY (2013) (arguing that sovereign states should accept international reform proposals despite creditors and debtors feeling that "there were sufficient instruments for addressing debt crises ad hoc"), <http://www.brookings.edu/research/reports/2013/10/sovereign-debt>.

and effectively privilege other claims. If anything, a priority claim should go to the refugee debt since it was thrust on them, not voluntarily contracted.

Another factor is that the courts of other nations, while often reluctant to sanction fellow nations for humanitarian misbehavior, have been increasingly willing to engage in even extra-territorial enforcement against other nations when it comes to delinquency on debt payments. The fact that US courts have essentially shut down Argentina's access to the international financial markets for more than a decade now, despite Argentina's need for foreign currency, is Exhibit A. It is also possible that the authority of the General Assembly or the Security Council could be brought to bear. The General Assembly can, in theory, collect the debt by withholding funding that would otherwise be distributed through agencies; and the Security Council (through instructions to members) can order assets freezes or seizures.<sup>202</sup>

For our purposes, the specific reasons are not essential. The point is that governments work hard to pay their sovereign debts. Simultaneously, they sometimes ignore or avoid their international legal obligations vis-à-vis refugees. In part, our goal is to achieve the latter by converting them into the former—by, in part, monetizing humanitarian obligations.

Regardless of the mechanisms of enforcement, some nations will be more attractive targets than others and some will effectively be judgment proof.<sup>203</sup> This could introduce inequalities, since host nations will be more willing to accept refugees from countries of origin against which a debt is likely to be enforceable. For example, a relatively rich nation that has extended credit to its neighbors *and* is generating refugees through oppression would be a good target, because the neighbors could accept the refugees coming across their borders and thereby free themselves from existing obligations.

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202. Lee, *supra* note 91, at 547–48; *see also* Goodwin-Gill & Sazak, *supra* note 26 (using the example of the actions taken by the U.N. Security Council during the first Gulf war to ensure compensation to victims of the Iraqi invasion of Kuwait).

203. Jack I. Garvey, *The New Asylum Seekers: Addressing their Origin*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S* 181, 194 (David A. Martin ed., 1988) (“[I]n some situations of refugee flow, particularly the flow that is all too common from poor third world countries, actual compensation will not be practicable.”).

The foregoing may not be aesthetically pleasing, but it is a reality of the existing system. Nations already “rank” refugees according to their desirability, economic or otherwise.<sup>204</sup> (Witness the United States’ differing responses to refugees from Haiti and from Cuba.) Our hope is simply that our proposal would make it easier for more refugees to find protection.

Although it is not strictly necessary for our proposal, the establishment of a standing fund would facilitate its success. Such a fund could be used to provide timely payment to host nations who accept refugees—lessening the perceived risk of delayed enforcement—and then be replenished by whatever funds can eventually be collected from countries of origin.

## 2. Further Destabilizing the Refugee-Creating Nation

A second face of the workability objection is the risk of further destabilizing the country of origin. Efforts to impose financial damages can contribute to radicalization or further systemic costs—one need look no further than inter-war Germany or present-day Greece. Moreover, it might simply be unfair to saddle the nation with a debt because of the oppressive behavior of its government, particularly if that government is undemocratic in the first place. Doing so would put the remaining citizens of the country—who might themselves have been victims of oppression—on the hook for payments to the refugees created by the prior malefactor government.

We have no quarrel with the general point that it is problematic for democratic successor governments to be liable for the debts of a prior oppressive and unrepresentative regime. And perhaps the international legal system should put in place a mechanism to obviate some of these debt obligations. But even if the international legal system recognizes a category of odious debts that do not have to be paid, refugee debts should be among those *least* likely to fall within this category. Creditors who contract with an oppressive regime know (or should know) what they are doing. By contrast, refugees are akin to tort victims. They have little choice in becoming creditors, and their condition was forced upon them—in violation of international law—because they were weak.

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204. Schuck, *Modest Proposal*, *supra* note 2, at 287 (“The political reality is that states would be even more reluctant to accept refugees for protection if they could not pick and choose in this fashion.”).



Preserving the debt is even less troubling if the oppressive government has targeted a minority population and forced it into refugee status in order to curry favor with its majority population. If our proposed reform helps deter that instinct, all the better.

More generally, in a situation where oppression is occurring, someone is going to get stuck with the “cost.” The current system leaves that cost with the refugees themselves, and to a lesser extent with the other nations that might or might not choose to let them in. This is both unfair and inefficient—the costs are not necessarily imposed on culpable parties or on the least cost avoiders. Putting the cost on the other citizens of the oppressive nation would at least give them an increased incentive to depose their government before their fellow citizens are forced to become refugees. Those other citizens are, in all likelihood, better positioned to do so than those forced into refugee status.

It is worth noting, however, that our proposal might very well reduce the likelihood of repatriation, both by weakening countries of origin and by heightening tensions between them and host nations (which would be pursuing the debts). In this regard, however, we are in keeping with the general trend in international refugee law and policy over the past few decades, which has seen increasing acceptance of durable solutions other than repatriation.

Importantly, the debt we describe would be different both in design and operation from a traditional sanctions regime. Sanctions are punitive in nature—a way to punish bad-behaving nations and hopefully deter bad behavior in the future. The refugee debt would have a punitive character, but that is not its main function. It is more like a judgment for compensatory damages—one owed by the oppressor nation to the refugees directly, but which is to be used to mitigate the costs to whatever nation takes them in. It would have to be calculated with those functions in mind and with sensitivity to the country’s circumstances. The goal is not to contribute to weakness and instability nor to create the conditions for a renewed dictatorship or a failed state.

## B. Undermining Refugees’ Protection

Potentially more serious than the workability concern is the claim that our proposal weakens refugees’ already-precarious

protections.<sup>205</sup> Like the authors of previous market-based proposals, we believe “the kinds of reform we propose can be undertaken without amending the formal legal obligations owed to refugees.”<sup>206</sup> But because we are relying on incentives, we must address them directly.

### 1. Bad Incentives for Countries of Origin

Because the debt we have described here would only attach if and when a persecuted people reached another nation, countries of origin would have more reason to prevent people from escaping, and instead would, for example, round them up and trap them in camps, as Myanmar did with more than 100,000 Rohingya.<sup>207</sup>

Our proposal, however, incorporates existing international obligations and principles, including prohibitions on genocide and the still-aspirational norm of the responsibility to protect.<sup>208</sup> A nation that massacres its people or forbids them to leave would be subject to those rules and principles in our system no less than in the current system.<sup>209</sup> Indeed, our proposal simply does not apply in cases of genocide, when the more pressing questions will involve the permissibility of intervention or the applicability of the responsibility to protect.

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205. Anker et al., *supra* note 44, at 296 (“[D]espite the authors’ good intentions, the proposals will have the practical effect of de-emphasizing the existing protection responsibilities of states toward refugees under international law, and thus risk aggravating the failures of protection that the authors wish to cure.”).

206. Hathaway & Neve, *supra* note 19, at 156.

207. Thomas Fuller, *Myanmar to Bar Rohingya From Fleeing, But Won’t Address Their Plight*, N.Y. TIMES (June 12, 2015), <http://www.nytimes.com/2015/06/13/world/asia/myanmar-to-bar-rohingya-from-fleeing-but-wont-address-their-plight.html>; *cf.* Hathaway & Neve, *supra* note 19, at 130–31 (“Refugee protection frequently amounts to a system of prolonged ‘warehousing’ in which refugees are denied the right to integrate in the asylum state, yet are unlikely to be restored to meaningful membership in their home community.”).

208. Legomsky, *supra* note 2, at 621 (“I am not resistant to dreams, and I would never suggest that it is futile to aim high. In the meantime, however, we must design asylum procedures for the world we actually inhabit, not for the world we wish we had.”); Schuck, *Response*, *supra* note 62, at 388 (“I am all for reiterating these pieties and exhortations (I really am), even though governments have consistently ignored them ever since the Flood.”).

209. G.A. Res. 217A (III) art. 13(2), U.N. Doc A/810, at 71 (1948) (“Everyone has a right to leave any country, including his own. . . .”). *See also* Kritzman-Amir, *supra* note 64, at 386 n.188 (“[C]urrently, the right to leave a country is relatively well recognized and protected.”).

Our story is one of incentives, so it is not satisfactory to rely completely on existing obligations as a safety net. There are, however, ways to use our debt-centered system to further discourage this kind of internal oppression. One possibility would be to extend the system to internally displaced peoples. This would represent a larger imposition on the sovereignty of the country of origin, which would now be financially liable for things it does within its own borders. But nations that fall into this category are *already* violating international law and simply are not facing any sanctions for it.

Another way to disincentivize genocide would be to say that the oppressive country's debt would remain in place if it massacred the targeted group. This raises practical questions—who would get to enforce the “benefit” of the debt, if there are no refugees to accept?—but these are no more insurmountable than the kinds of questions that arise in the current system. There would be no host nation in this scenario, but perhaps the claim could be allocated to whatever nation accepts a related class of refugees or takes on some other responsibility relating to their care.

## 2. Bad Incentives for Host Nations

Our system rewards host nations for accepting refugees, but provides no additional incentive to treat them well.<sup>210</sup> The concern remains that host nations could use their positions to bargain unfairly with needy refugees, or perhaps accept them, collect their debts, and then neglect or harm them.

The latter concern arose during discussions of the 1992 Cairo Declaration of Principles of International Law on Compensation to Refugees, which provides that “[a] State is obligated to compensate its own nationals forced to leave their homes to the same extent as it is obligated by international law to compensate an alien.”<sup>211</sup> The Declaration went on to reiterate, as we do:

The possibility that refugees or UNHCR may one day successfully claim compensation from the country of origin should not serve as a pretext for withholding humanitarian assistance to refugees or refusing to

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210. See, e.g., Arulanantham, *supra* note 25, at 36–37; Schuck, *Modest Proposal*, *supra* note 2, at 294 (discussing “Quality-of-Protection Objection”).

211. Luke T. Lee, *The Cairo Declaration of Principles*, 87 AM. J. INT’L L. 157, 158 (1993).

join in international burden-sharing meant to meet the needs of refugees or otherwise to provide durable solutions, including mediation to facilitate voluntary repatriation in dignity and security, thereby removing or reducing the necessity to pay compensation.<sup>212</sup>

Nations would therefore have a continuing legal duty not to return refugees to a country where they would face persecution.

It is worth emphasizing that we would not lessen, let alone erase, nations' existing palliative duties. Our proposal would, however, give better incentives for performing those duties. Host nations could not hold out for a tabulation of debt as a condition of *non-refoulement*, but they could essentially send the bill to the relevant countries of origin.

Analogous rules exist in other areas of law, albeit not on an international scale.<sup>213</sup> Some tort doctrines require individuals to assist those in need, but also permit them to file suit for the costs of the aid, which might be collected directly from the needy party, or—directly or indirectly—from the person who created the need. Luke Lee points to the law of quasi-contractual relations and quotes Corbin's example: "Under compulsion of law, . . . A makes payment of money that it was B's legal duty to pay. In spite of any express refusal, B is under a quasi contractual duty to reimburse A."<sup>214</sup>

It is true that nothing in our system that directly penalizes a host nation if, for example, it provides refugees with substandard care. We hope, however, to further disincentivize such treatment. We suspect that host nations mistreat refugees when they are seen as a costly burden; alleviating the burden should therefore improve the treatment. If our system works well, countries might even compete to take in refugees. Instead of housing them in makeshift prison-like camps rife with disease, violence, abuse, and the like, they might plan ahead by building the kinds of structures that would provide at least minimally decent conditions. Instead of running advertisements

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212. *Id.* at 159.

213. It should be noted, though, that "[i]n general, international applications of the basic principle of compensatory damages follows the common usages of municipal legal system in this regard." Oliver, *supra* note 163, at 71.

214. Lee, *supra* note 91, at 557 (quoting 1 Corbin on Contracts 47–48 (1963)). Schuck also points to the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48, which requires the federal government to reimburse state and local governments for the cost of complying with some federally-imposed requirements. See Schuck, *Modest Proposal*, *supra* note 2, at 262 n.72.

trying to deter them from seeking refuge by telling them that they will be unwelcome,<sup>215</sup> perhaps the converse could occur. (One might even argue that if the proposal works “too well” then potential host nations would have incentive to destabilize their neighbors so as to cash in on valuable refugee flows. This strikes us as far-fetched, though, and in any event a blameless country of origin would not be liable under our rules.)

The risk of unequal bargaining is a serious one. Host nations might lowball refugees, taking advantage of their immediate and pressing needs and thereby depressing the value of their asset. But because nations would not be freed of their existing obligations, the risk of such a holdout should not be any higher than the current incentive nations have to refuse refugees outright. If a group of refugees managed to reach Country A, thereby gaining protection, it could then try to bargain with Countries B, C, and D for a more permanent status. Country A might even be willing to pitch in, as demonstrated in the EU-Turkey deal (which, because it did not take the refugees’ own preferences into account, offered less protection than our proposal would).

Ongoing monitoring and periodic payments (rather than a lump sum) can help incentivize this behavior. As long as nations can count on compensation for satisfactorily hosting refugees, they would have increased incentive to build their reputations for being good rather than bad places to land.

### 3. Bad Incentives for Potential Refugees

Finally, we reach the extreme conclusion of the cynical approach: the possibility that our system would give perverse incentives to potential refugees. If nations with a better standard of living are willing to grant homes to refugees, but not other types of immigrants, then some subsets of people might have an incentive to exaggerate the degree of their persecution so as to fit into the category of refugee.<sup>216</sup> Worse, these people might actually exacerbate the problem in their home nations by “courting genocide.”<sup>217</sup>

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215. See, e.g., *Denmark Advert in Lebanon Newspapers Warns Off Refugees*, AL JAZEERA (Sept. 17, 2015), <http://www.aljazeera.com/news/2015/09/denmark-advert-lebanon-newspapers-warns-refugees-150907225146384.html>.

216. Hathaway & Neve, *supra* note 19, at 142 (“[S]ome persons who are not at risk in their own country make asylum claims in developed countries as the

The last scenario strikes us as implausible under most conditions. But more to the point, our system envisions a legal determination by a tribunal of the degree to which a particular nation bears responsibility for a refugee problem. Exaggerated claims are bound to show up on both sides in this context. Sorting through those claims will be the task of the tribunal that hears the claims.

### C. Commodification

Prior market-based proposals in this area have been met with criticism from those who oppose the very idea of market-based approaches to humanitarian crises. Such proposals have been called “unconscionable,”<sup>218</sup> “repugnant,”<sup>219</sup> “morally troubling,”<sup>220</sup> and so on.

Schuck, who put forth a prior market-based proposal, responded by saying that “‘commodification’ and ‘placing a price upon the fate of refugees’ are simplistic, unhelpful labels that avoid the tragic choice” between “the total amount of protection and the quality of protection.”<sup>221</sup> We agree, although to some degree, we *do* seek to avoid this tragic choice by increasing the total incentives for host nations to provide protection, and thereby making the pie bigger.

That is not to say that we can entirely avoid the commodification objection. Critics might argue that the very act of commodifying refugee protection will undermine our goal. Perhaps countries of origin will now see oppression as a priced option, and potential host nations will come to see protection of refugees as an optional service, rather than as an obligation.<sup>222</sup>

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basis for securing at least physical admission into their desired country of immigration.”).

217. Jide Nzelibe, *Courting Genocide: The Unintended Effects of Humanitarian Intervention*, 97 CAL. L. REV. 1171, 1172–73 (2009) (“Because humanitarian interventions tend to increase the chance that rebel leaders are going to achieve their preferred political objectives, rebel leaders might have an incentive to engage in the kinds of provocative actions that make atrocities against their followers more likely in the first place.”).

218. Smith, *supra* note 90, at 137.

219. *Id.* at 149.

220. Anker et al., *supra* note 44, at 306 (“While we recognize the burdens mass influx can impose on asylum states, we find this characterization [of refugee flows being like insurable risk] to be morally troubling.”).

221. Schuck, *Response*, *supra* note 62, at 387 (“These are epithets designed to end this debate rather than enrich it.”).

222. Anker et al., *supra* note 44, at 304 (“By encouraging developed states to treat physical protection of refugees as an object for bargaining, these proposals may jeopardize the safety of asylum-seekers.”).

In any event, that ship has sailed.<sup>223</sup> Refugees are *already* commodified, except that in the current regime they are usually treated as nothing but a cost, as the very label “burden-sharing” suggests.<sup>224</sup> Rich nations in the North pay nations in the South to keep them away.<sup>225</sup> Potential host nations—Thailand, Indonesia and Malaysia, in the case of the Rohingya—perceive acceptance of refugees as costly and, as a result, turn them away. The current system treats refugees as a cost. We want to make them into more of an asset.<sup>226</sup>

At root, we suspect that the commodification criticism is motivated by a sense that it is inappropriate—and at the least, unseemly—for rich nations to buy and sell their obligations without any input from the refugees themselves. The burden-sharing proposals exemplify this characteristic: to the degree that they represent a market solution, the buyers and sellers are all host nations. Our proposal avoids this potential fault. For while we do introduce a market by making the debt tradable, ultimately the refugees themselves have a voice. This is not direct democracy, but it gives refugees a kind of agency that is lacking in the current system or in other proposals.

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223. Hathaway & Neve, *supra* note 19, at 205–06 (“[T]he suggestion that the shift proposed here would somehow ‘allow’ powerful governments to ‘buy their way out’ of providing refuge takes no account of the fact that there is very little left to buy. The developed world has already off-loaded most obligations onto the South, but without paying anything for the privilege.”).

224. Noll, *supra* note 170, at 237 (“The term ‘burden-sharing’ is a problematic one. It appears to suggest that refugee protection is necessarily burdensome.”); Smith, *supra* note 90, at 151.

225. Schuck, *Modest Proposal*, *supra* note 2, at 282–83 (“Would states be interested in paying others to protect refugees? The short answer is that they already are doing so. In some refugee crises like Rwanda, some relatively wealthy states contribute funds to the first-asylum state to support its protection efforts *in situ*.”).

226. *Cf.* Betts, *supra* note 21, at 22 (“[T]he very concept of assuming that asylum-seekers universally represent a ‘cost’ or ‘burden’ rather than a potential ‘benefit,’ ignores the possibility that the extant *perceived* costs might be reconstructed within the developed ‘purchasing’ states.”); Hathaway & Neve, *supra* note 19, at 177 (“The objective should therefore be to treat refugees as empowered agents *for* development instead of burdens *on* development.”).

## CONCLUSION: A PILOT PROGRAM AND FURTHER APPLICATIONS

Our goal has been to offer a partial solution to the refugee crisis by improving the incentives that international law presents to countries of origin and potential host nations. We do not suppose that our proposal would solve the global refugee crisis. Rather, it is a tool that we think could help ameliorate the horror of *some* ongoing tragedies. Let us therefore conclude where we began—with the plight of the Rohingya, the “world’s least wanted” people.<sup>227</sup> Could the three-part mechanism we have described help ameliorate their situation? In broad terms, what would a pilot program look like?

The first step in our proposal is establishing that a state has violated international law when it persecutes a subset of its people to such a degree that it causes them to have to flee to another state. We think it plausible that Myanmar has done exactly that.<sup>228</sup>

The second step in our proposal is translating that violation into a remedy. We have already described the legal steps needed to make this happen and identified the factors that would go into the actual calculation of compensation.<sup>229</sup> As a practical matter, one challenge for a pilot program would be identifying the relevant group to receive the claim. This would be a surmountable obstacle because the Rohingya are identifiably distinct from the rest of Burma. They are geographically concentrated in the Arakhan/Rakhine state, they speak Bengali rather than Burmese, and are Muslims in a majority Buddhist nation (and region).<sup>230</sup> Perhaps more relevantly, the Burmese government has been able to single them out, so a remedial scheme can simply follow the markers already laid down.

The third element is enforcement. Given the scale and complexity of the Rohingya’s situation, it might make sense to establish a new tribunal, roughly akin to the Commission for Real

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227. Dummett, *supra* note 5.

228. Observers have argued that the situation is so bad as to trigger the international community’s “responsibility to protect.” See, e.g., GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, PERSECUTION OF THE ROHINGYA IN BURMA/MYANMAR AND THE RESPONSIBILITY TO PROTECT 2 (Mar. 5, 2015) [hereinafter GLOBAL CTR.] (positing that the government “has allowed widespread human rights violations, sometimes reaching the scale of mass atrocities, to continue to be perpetrated against Rohingya”).

229. See *supra* Part II.B.

230. Thomas K. Ragland, *Burma’s Rohingyas in Crisis: Protection of “Humanitarian” Refugees Under International Law*, 14 B.C. THIRD WORLD L.J. 301, 305 (1994).



Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina. In the absence of such a tribunal, the International Court of Justice would be a possible forum.

In the particular case of Myanmar, the Paris Club could also serve as a readily available forum. The Paris Club is an informal international forum run under the auspices of the French *Trésor* where, since 1956, countries—usually developing countries that are seeking to reenter global financial markets—have gone to clear their obligations vis-à-vis other nations (typically the rich nations who have claims against them for prior loans).<sup>231</sup> Myanmar, because it was seeking to reenter the international financial system, went to the Paris Club voluntarily only a few years ago.<sup>232</sup> Our guess is that it is now hoping to tap the private debt markets using the clean bill of health that it has received as a result of clearing its arrears with other nations. If countries that accepted Rohingya refugees had debt claims against Myanmar, those would have to be settled at the Paris Club. Indeed, if the global community were to recognize those claims today, those claims could still be put on the table. We suspect that Myanmar would work quite hard to make sure that it does not have to clear more Paris Club claims from countries like Australia and New Zealand before it can access the private markets. This would give Myanmar a strong and concrete incentive to treat the Rohingya better.<sup>233</sup>

If the Paris Club option is not available for whatever reason, claims could either be paid from the coffers of the Asian Development Bank or World Bank in the form of deductions from loans that would otherwise have been paid to Myanmar.<sup>234</sup> Or, even more simply, nations receiving the refugee flows—Thailand and Malaysia, for example—could offset their own existing debts to Myanmar. It is not coincidental that inter-sovereign economic relationships tend to

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231. For the basics on the Paris Club, see ALEXIS REIFFEL, *RESTRUCTURING SOVEREIGN DEBT: THE CASE FOR AD HOC MACHINERY* (2003).

232. Gwen Robinson, *Myanmar Signs Deal with Foreign Creditors*, *FIN. TIMES* (Jan. 28, 2013), <https://www.ft.com/content/9b2d6e4c-68b2-11e2-9a3f-00144feab49a>.

233. Other refugee-creating nations have also been to the Paris Club trying to clear their arrears to fellow nations in recent years. For details on the roughly ninety countries who have sought to renegotiate their official debts at the Paris club, see PARIS CLUB, <http://www.clubdeparis.org>.

234. GLOBAL CTR., *supra* note 228, at 5 (noting that in 2013 the Asian Development Bank and the World Bank approved major loans worth \$512 and \$440 million, respectively, and that in January 2014 the World Bank announced plans for a \$2 billion multi-year development program).

overlap with refugee flows. After all, nations tend to trade most with their neighbors, just as refugees tend to flee to them.

To fully describe a pilot program proposal would require far more detail and expertise than we have at our disposal. The foregoing is meant to sketch the outlines and to suggest that such a proposal may well be feasible. If in doing so we are able to facilitate acceptance of even one existing group of refugees, we will consider the project a success. But significant questions remain.

First, we have adopted international law's focus on territoriality, and made countries of origin a major player in our framework—in some sense, they are the antagonists in the story. But the logic of our proposal might be read to support a different kind of right to remedy, one whose duty belongs not necessarily to the country of origin, but to the nation *responsible* for creating the refugees in the first place. In some cases, fault—and therefore obligation—could lie outside the borders of the country where the refugees originated.

Second, again following the basic structure of international law, we have limited our focus to refugees fleeing persecution. The notion of culpability at the heart of our compensation proposal does not translate directly into situations involving, for example, economic migrants. The basic structure, however, may be applicable to those scenarios, and we pursue it in related work.<sup>235</sup>

Third, we have focused our attention on the incentives *currently* facing nations with regard to contemporary refugees. But the logic of our proposal would seem to support a system of reparation for past injustice as well. Could refugees claim a debt from a country of origin they left decades ago? Likewise, the logic of our proposal might extend to other costs that nations incur as a result of others' bad behavior. Should peacekeeping countries be able to send a bill to the countries whose peace they keep, or—more directly relevant—count their peacekeeping contributions against their refugee obligations?<sup>236</sup>

Some readers will remain unconvinced by our efforts to address the details. Others might be able to figure out better ways to

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235. Joseph Blocher & Mitu Gulati, *A Market for Sovereign Control*, 66 DUKE L.J. (forthcoming 2017); see also Joseph Blocher & Mitu Gulati, *Forced Secession*, 81 L. & CONTEMP. PROBS. (forthcoming 2017).

236. Suhrke, *Burden-Sharing*, *supra* note 50, at 408–09 (noting that France and the UK argued as much with regard to Yugoslavia).

make refugees into more of an asset than a burden. We welcome those interventions. We also suspect that some readers will reject or even be outraged by our use of concepts like financial obligations, sovereign debt trades, and the value of credit when discussing what is, at root, a humanitarian crisis of the first degree. Perhaps it would be a better world in which nations stopped treating refugees like widgets to be distributed or warehoused,<sup>237</sup> and instead accepted refugees without regard to the cost they impose. But in the world we live in, ignoring this reality only compounds the tragedy.

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237. Alvin E. Roth, *Migrants Aren't Widgets*, POLITICO.EU (Sept. 3, 2015), <http://www.politico.eu/article/migrants-arent-widgets-europe-eu-migrant-refugee-crisis/>.