THE FACT OF XENOPHOBIA AND THE FICTION OF STATE SOVEREIGNTY: A REPLY TO BLOCHER & GULATI

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INTRODUCTION

For any given refugee crisis, securing equitable and sustainable arrangements for refugee protection and assistance remains a fundamental problem.[1] An instructive example is the ongoing and deliberate regional containment of most Syrian refugees to countries neighboring Syria.[2] Four countries in the Middle East currently bear a disproportionate and unsustainable share of the responsibility and cost, hosting over 4.5 million Syrians. Yet, many wealthy European Union ("EU") states are working tirelessly to keep Syrian refugees out of their territories,[3] despite the capacity of this

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1. For detailed treatment of this problem see E. Tendayi Achiume, *Syria, Cost-Sharing and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687 (2015).

2. The facts with respect to the Syrian refugee crisis and related, on-going events are current as of February 28, 2017 unless otherwise indicated.

3. Examples include the agreement between the European Union and Turkey to prevent Syrian refugees from entering the former and the construction of border walls across eastern Europe. Elizabeth Collett, *The Paradox of the EU-Turkey Refugee Deal*, MIGRATION POLICY INSTITUTE (Mar. 2016), http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal; Laurence Norman & Emre Peker, *European Union Reaches Deal With Turkey on Migration*, WALL ST. J. (Nov. 29, 2015), http://www.wsj.com/articles/eu-turkey-strike-deal-to-stem-flow-of-refugees-1448803008. Regional containment strategies are by no means a new phenomenon. *See* B.S. Chimni, *The Law and Politics of Regional Solution of the Refugee Problem: The Case Of South Asia*, RCSS POLICY STUDIES 4 (1998) (describing U.S. and European de facto and de jure regional containment strategies in earlier periods) [hereinafter Chimni, *Law and Politics*]. At the same time, international financial and other assistance to the regional hosts remains dismal, as evidenced by the U.N. inter-agency response, which in collaboration with countries in Syria's vicinity seeks to provide protection and assistance to millions of Syrian refugees in the Middle East. Notwithstanding the serious global implications of continuing neglect of the Syrian refugee crisis, this regional protection and assistance plan remains only 59% funded by the world's states. *See*

relatively large and objectively well-resourced regional community to host far more than the 1.2 million Syrian refugees currently seeking protection there.[4] Elsewhere, the Kenyan government is threatening to close the world's largest refugee camp, in part due to the disproportionate share of the responsibility of assisting refugees it currently bears.[5]

Despite these and other examples, the existing international refugee regime provides no widely accepted legal obligation for third states to assist refugee hosting states with the cost and responsibility of hosting refugees.[6] This is the case notwithstanding the scale or causes of the refugee crisis. The current international response to massive contemporary refugee crises is untenable, and addressing this problem calls for, among other things, international legal and policy innovation.[7]

As such, the concern motivating Joseph Blocher and Mitu Gulati's ("the authors") proposal in *Competing for Refugees* is urgent and their engagement timely. I will argue in this Essay, however, that the authors' market-based proposal ("the Proposal") faces a formidable challenge to its feasibility in the form of xenophobia. Furthermore, I argue that even if this pragmatic concern is set aside, the world the Proposal would create would be deeply problematic on normative grounds.

The authors locate the solution to addressing the unmet need for refugee protection as lying in decreasing incentives of countries of

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Syria Regional Refugee Response, UNHCR, http://data.unhcr.org/syrianrefugees/regional.php (last visited Feb. 21, 2017).

4. *Syria Regional Refugee Response: Europe: Syrian Asylum Applications*, UNHCR, http://data.unhcr.org/syrianrefugees/asylum.php (last visited Feb. 21, 2017). This figure includes Syrian refugees in Switzerland and Norway, which are not part of the European Union.

5. Karanja Kibicho, *As the Kenyan Minister for National Security, Here's Why I'm Shutting the World's Biggest Refugee Camp*, THE INDEPENDENT (May 9, 2016), http://www.independent.co.uk/voices/as-the-kenyan-minister-for-national-security-heres-why-im-shutting-the-worlds-biggest-refugee-camp-a7020891.html. *See also* Chimni, *Law and Politics*, *supra* note 3, at 4 ("The lack of the Western world's commitment to burden sharing is the principle reason why African States no longer display the same kind of solidarity with refugees as they did in the past.").

6. Achiume, *supra* note 1, at 689.

7. Even in the absence of new law or formal policy, robust political commitment to equitable and responsibility sharing would solve many of the problems confronting the international refugee regime. Nonetheless, as I have explained in more detail elsewhere, international legal regimes can serve as influential frames for achieving responsibility sharing. *Id.* at 687, 704–06.

origin to create refugees, and increasing incentives for refugee hosting countries (receiving states) to accept more refugees. According to the authors, "[t]he challenge is to make someone want the unwanted."[8] Their proposal for doing so is specifically to target and increase the economic and reputational incentives that states have for accepting refugees. For my purposes, it is important to highlight that the Proposal's intervention specifically seeks to increase *refugee admissions* as opposed to other refugee protection and responsibility sharing measures such as third state funding for countries already hosting refugees. Starting from the premise that a non-trivial barrier to states accepting refugees is economic cost,[9] the authors advance a market-based proposal that would give receiving states enforceable financial claims against countries of nationality of any refugees these receiving states accepted on their territories.[10] Essentially, the rationale is that by granting receiving states a financial claim enforceable against refugees' countries of nationality, states across the globe will have an economic incentive to admit refugees into their territories.

The authors stipulate that any compensation that receiving states might claim from countries of nationality is unlikely to fully offset the economic costs of accepting refugees. Instead, a vital component of the incentive structure is the "good global citizen" reputational effects that receiving states would accrue by accepting refugees.[11] According to the authors: "[t]he fact that 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

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8. Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 COLUM. HUM. RTS. L. REV. 56 (2016).

9. *Id.* ("[f]rom the perspective of host nations, accepting refugees typically means feeding, clothing, and sheltering them, and giving them access to social services like education.").

10. More precisely, "[t]he international community would give persecuted refugee groups financial claims enforceable against the countries that expelled them". *Id.* at 59. But these financial claims would effectively rest with the receiving state as a means of incentivizing that state to provide refuge to individuals fleeing persecution.

11. *Id.* at 64. ("[t]he incentive comes in the form of a financial claim against the nations who are responsible for creating the problem in the first place, and 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 others as being a good global citizen.").

standing up for international norms, rather than simply pursuing self-interest."[12]

Conversely, the Proposal is designed to create displacement disincentives for refugees' countries of nationality. By creating a "financial claim running in favor of the refugees and against their parent nation[,]" the authors propose that states from which refugees originate are less likely to produce refugee flows. For those concerned that "quintessential bad actor" refugee-producing countries would simply ignore refugee debt held by receiving states, the authors propose a range of pathways to enforcement, largely relying on countries of nationality's dependence on international financial markets, especially their need for access to credit.

According to the authors, refugees' countries of nationality would be unable to ignore refugee debt for as long as the market were willing to recognize it.[13] In that respect, receiving states could seek enforcement of refugee debt much like any other sovereign debt in domestic jurisdictions such as New York and London where these sovereigns have assets.[14] Furthermore, private actors such as vulture funds could be relied upon to ensure enforcement, which might also take the form of conditioning access to capital markets on repayment of refugee debt. In sum, the authors bill their Proposal as exploiting two attributes of sovereignty—"the erosion of sovereignty in cases involving human rights violations, and waivers of sovereign immunity in international markets"[15]—in order to help refugees. The authors argue that what I would characterize as the effective commodification of refugees—notwithstanding the serious moral and pragmatic reservations some might associate with it—is justified when its potential benefits are considered in light of the far from ideal status quo.

There is a lot one might say in response to this provocative, though ultimately disquieting, Proposal. Its greatest value is, arguably, the deep reflection it engenders regarding the existing international refugee regime and the difficult, sobering tradeoffs and realities that genuine efforts to alleviate human suffering in this

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12. *Id.* at 66.

13. *Id.* at 98–99.

14. "So long as the *market* recognizes the refugee debt as valid, the oppressive nation cannot ignore it. 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." *Id* at 98.

15. *Id.* at 85.

context may entail. Readers of the Proposal will encounter much to ponder.[16] In this Essay, however, I confine myself to interrogation of three aspects of the Proposal. First, I introduce important nuance to the problem the Proposal addresses. Doing so helps clarify the class of states that ought to be the priority targets of its strategy for increasing refugee admissions. Secondly, I question the Proposal's feasibility by arguing that the problem of xenophobia, especially in priority target states, makes it highly unlikely that the changes in rational incentives at the heart of the Proposal would result in a corresponding increase in refugee admissions. Finally, setting aside questions of feasibility, I challenge the normative appeal of the world the Proposal would create. I do so by bringing into view the dangerous ways the Proposal's operative legal fiction of state sovereignty (and other features of statehood) interact with the geopolitics of refugee displacement to undermine the Proposal's goals of holding responsible sovereigns liable and culpable for this displacement. I argue that these dangers are only compounded by the Proposal's injection of private financial actors such as vulture funds into the international refugee regime. In sum, my view is that the Proposal's costs far outweigh any benefits we might associate with it.

I. SPECIFYING THE PROBLEM: THE GLOBAL DISTRIBUTION OF REFUGEES

The Proposal seeks to increase state intake of refugees, but it is important to specify that the core of the problem with the status quo has far less to do with absolute global intake and much more to do with *distribution*. Where territorial admission of refugees is the issue, the real problem today is that countries beyond the regions where refugee displacement is immediately concentrated continue to refuse to play a meaningful role in accepting refugees into their territories. This is the case even where these geographically distant sovereigns are actively and militarily engaged in the conflicts producing these refugees in the first place. Instead, the cost and responsibility of hosting refugees is disproportionately borne by states neighboring the countries to where refugees flee.

16. The narrow focus of my Essay leaves to others engagement with, for example, questions regarding the persuasiveness of the legal building blocks that underlie the claim of refugee debt, or regarding technical and operational details of the Proposal.

Displacement statistics reflect this reality—at the end of 2015 *eighty-six percent* of the global refugee population or 13.9 million refugees resided in the global south, confined largely to regions housing the majority of conflicts and persecutions driving refugee movements.[17] Consider the fact that fifty-four percent of the global refugee population comes from Syria, Afghanistan, and Somalia.[18] Correspondingly Turkey, Pakistan, Lebanon, Iran, Ethiopia, Kenya and three other global south countries host almost sixty percent of the global refugee population. According the UN Refugee Agency, "the Least Developed Countries—those least able to meet the development needs of their own citizens, let alone the humanitarian needs associated with refugee crises—provided asylum to over four million refugees [in 2015]."[19] The reasons that neighboring states accept refugees differ. They range from solidarity with vulnerable refugees, on one end of the spectrum, to lack of sufficient territorial control so that refugees fleeing conflict successfully cross porous borders in significant numbers, on the other. In important respects, the vitiated territorial sovereignty of global south countries means that many often have no choice as to whether or not refugees enter their territories.[20] My point here is that typically when these global south countries neighboring conflict cite legitimate capacity or equity concerns as a basis for refusing to accept additional refugees, it is neither equitable, sustainable nor pragmatic to push for further refugee admissions on their part as the solution.[21]

As a result, on the question of intake, generally speaking, it is the global north that is resoundingly failing refugees.[22] A key means through which refugee populations are geographically redistributed under the international regime is the resettlement of refugees from

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17. *UNHCR Global Trends*, UNHCR 2 (2015), http://www.unhcr.org/576408cd7.pdf [hereinafter *Global Trends*]. This is a trend that has been in effect at least for the last decade and a half.

18. *Id.* at 3.

19. *Id.* at 18.

20. *See e.g.*, Chimni, *supra* note 3, at 6 (noting lack of control over national borders in South Asia as a factor in refugee admissions).

21. The conditions confronting refugees and their hosts in countries neighboring Syria offer a sobering case in point. *See* Achiume, *supra* note 1, at 695.

22. Scholars responding to earlier market-based refugee responsibility sharing proposals emphasized then, too, the vital role of global north countries in precipitating crises in refugee responsibility-sharing. Deborah Anker, Joan Fitzpatrick & Andrew Shacknove, *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV.HUM. RTS. J. 295, 297–98 (1998).

the countries that have granted them refugee status to third states that *volunteer* to relocate these refugees on their territories. In 2015, the number of these resettled refugees collectively admitted by countries such as the United States, Canada, Australia and Norway amounted to a grand total of 107,100[23] in a year when 1.8 million refugees were newly displaced.[24] This amounts to a mere *6%* of the global total of newly displaced. The key targets of the author's proposal, therefore, and the targets with the capacity to make a meaningful difference are countries in the global north and other hegemons,[25] the most powerful of which are also often implicated in producing the most intractable refugee flows. These observations are especially relevant because for global north countries—the appropriate priority targets of the Proposal—capacity and other economic calculations are proving to be firmly secondary to other considerations that remain impervious to the Proposal's market-based solution.

II. MARKET-BASED INCENTIVES AND THE PROBLEM OF XENOPHOBIA

A fundamental premise of the Proposal is that state resistance to refugee admission is connected in a non-trivial way to the actual economic implications of hosting refugees.[26] The authors argue that any marginal increase in economic incentives should lead to a marginal change in refugee admissions.[27] In my own work, I have argued that strategic national interest and norm-based appeals are equally crucial in improving refugee protection more broadly.[28] Although I support the need to account for economic or reputational national interest when seeking to improve global refugee responsibility sharing, there is good reason to doubt the efficacy of

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23. *Global Trends*, *supra* note 17, at 26.

24. *Id.* at 2.

25. The non-global north hegemons to which I am referring include the Gulf Cooperation Countries, many of whose financial and other assistance to global and regional refugee crises remains difficult to determine as it largely occurs outside of the United Nations framework.

26. Jaya Ramji-Nogales challenges this sort of assumption arguing that for the United States, Australia and countries in the European Union resistance to refugees is not objectively based in capacity concerns when the relevant data is brought to bear. *See* Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L. J. __ (forthcoming 2017).

27. Blocher & Gulati, *supra* note 8, at 74.

28. Achiume, *supra* note 1, at 747–59.

such an approach in the context of the Proposal, which seeks specifically to promote refugee *admissions*.[29]

Of all forms of refugee protection, the admission of refugees into a given state's territory is arguably the most susceptible to opposition rooted in xenophobia and other anti-foreigner attitudes that seem largely immune to objective economic and reputational incentives. This is the especially the case in the global north where such attitudes are ascendant in many of the countries that are delinquent in terms of refugee admissions. A significant barrier to higher refugee admissions in EU, the United States, and Australia, for example, is xenophobic discourse and rhetoric which legitimate existing and growing policies of refugee exclusion.[30] In reference to the EU, even the head of the World Bank has publicly stated that excluding refugees is economically counter-productive for European countries in the throes of demographic decline, and he has gone so far as to describe Europe's exclusion of refugees as xenophobic.[31] Consider that the entire European Union, which comprises twenty-eight countries has admitted about 1.2 million Syrian refugees,[32] whereas the four regional host countries are hosting over

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29. International cooperation to protect and assist refugees can take other forms such as financial or other contributions to international agencies responding to refugee movements, or to other countries that have admitted refugees but require assistance to address the needs of these admitted refugees.

30. *See e.g.*, Jaya Ramji-Nogales, *History, Hysteria, and Syrian Refugees*, JUST SECURITY (Nov. 12, 2015), https://www.justsecurity.org/27803/history-hysteria-syrian-refugees/. The Government of Poland has, for example, accused refugees of "bringing 'various parasites and protozoa' to Europe." *See* Matt Broomfield, *Poland Refuses to Take a Single Refugee Because of 'Security' Fears*, THE INDEPENDENT (May 9, 2016), http://www.independent.co.uk/news/world/europe/poland-refuses-to-take-a-single-refugee-because-of-security-fears-a7020076.html. They have also accused refugees "of 'bringing in all kinds of parasites, which are not dangerous in their own countries, but which could prove dangerous for the local populations' in Europe." *Id,* All of this rhetoric has supported resounding exclusion of Syrian refugees.

31. Phil Thornton, *Bank Slams European 'Xenophobia' As It Sets Out New Refugee Strategy*, GLOBAL CAPITAL (Oct. 11, 2015), http://www.globalcapital.com/article/yvxxm9tv88zb/bank-slams-europeanxenophobia-as-it-sets-out-new-refugee-strategy (quoting the World Bank's President as saying "[m]any advanced economies have increasingly advanced aged populations, a rapidly shrinking workforce and very low birth rates so they need migrants and it should be part of their economic strategy to recruit the kind of immigrants that will help them[.] . . . Xenophobia is actually a very bad economic strategy[.]").

32. *See supra* note 4. This figure includes Syrian refugees in Norway and Switzerland, which are not EU countries.

4.5 million.[33] Or consider the fact that the United States has admitted a total of 10,000 Syrian refugees,[34] and Australia 2,000, whereas Lebanon, a far smaller and more fragile state has admitted the equivalent of a *quarter* of its population in Syrian refugees.[35]

The authors acknowledge that xenophobia may diminish the viability of their Proposal, but relegate this and related problems to the margins[36] when in fact it presents one of the most daunting challenges to increasing refugee admissions today. Notwithstanding economic and reputational incentives, anti-refugee motivated popular and political assertions of the sovereign right to exclude have undercut attempts by executives to admit refugees.[37] In short, there is good reason to doubt that marginal changes in economic or other incentives will result in more *refugee admissions* in particular, given that this form of refugee assistance is arguably the most susceptible to override by xenophobic and other discourses notably ascendant in countries across the globe that arguably should be doing more to ease the regional containment of refugees.[38] It is conceivable that monumental increases in economic incentives above some threshold might overcome xenophobic resistance, but the Proposal does not advocate refugee debt at levels that would even be sufficient merely to offset costs of admission. In my view, it's unlikely that economic

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33. *Syria Regional Refugee Response*, *supra* note 3.

34. This figure is current as of August, 2016. Haeyoun Park and Rudy Omri, *U.S. Reaches Goal of Admitting 10,000 Syrian Refugees. Here's Where They Went.*, N.Y. TIMES (Aug. 31, 2016), http://www.nytimes.com/interactive/2016/08/30/us/syrian-refugees-in-the-united-states.html.

35. *Australia Resettles Only a Sixth of Promised Syrian Refugee Intake,* THE GUARDIAN (Sept. 1, 2016), https://www.theguardian.com/australia-news/2016/sep/02/australia-resettles-only-a-sixth-of-promised-syrian-refugee-intake.

36. Blocher & Gulati, *supra* note 8, at 74 ("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.").

37. Angela Merkel is one example of a leader whose pro-refugee policies have been undercut by political and popular backlash. *See, e.g.*, Stefan Wagstyl, *Angela Merkel Defends Germany's Open-Door Refugee Policy*, FINANCIAL TIMES (Nov. 25, 2015), https://www.ft.com/content/3a4c96ea-8a27-11e5-90de-f44762bf9896.

38. My RtoP-based proposal for enhanced global refugee responsibility sharing is more immune to the problem of xenophobia because it calls for funding and other assistance to countries already hosting refugees in addition to advocating refugee resettlement. To be clear, *all* proposals for refugee protection and responsibility-sharing are threatened at some level by the problem of xenophobia. However, those seeking to enhance refugee *admissions* are especially vulnerable.

benefits insufficient to offset admission costs would counter xenophobic opposition to refugee exclusion.

III. BUT WHAT IF IT WORKED?

What if pragmatic concerns regarding the Proposal's implementation, such as the one I raise above, are set aside? Accepting the Proposal on its face, I deeply question the soundness of its normative implications, specifically in the context of geopolitics that not only constrain the operation of international law and cooperation, but that also inform international law's fundamental concepts.[39]

At the heart of the Proposal is the presumption that the country of a refugee's nationality is also the sovereign that ought to be held liable and culpable for producing refugee flows.[40] Depending on context, in international law the terms liability and responsibility may be used interchangeably to mean the same thing, and need not connote the fault or moral blameworthiness that culpability implies.[41] The evolving international doctrine of the responsibility to protect (RtoP), which I have argued could play a beneficial role in enhancing international refugee responsibility sharing, offers an example of responsibility divorced from culpability.

The Proposal, however, trades heavily on liability and responsibility as strongly connoting blameworthiness and normative condemnation laid solely at the feet of refugees' countries of nationality. It identifies the country of nationality as the "quintessential bad actor" and this seems the case irrespective of where true culpability lies for refugee displacement.[42] For the

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39. *See generally*, ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004) (examining the relationship between imperialism, racism, cultural subordination, and economic exploitation and the development of international law).

40. Refugee debt claims run against the country of nationality. *See* Blocher & Gulati, *supra* note 8, at 75.

41. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL Law 254 (7th ed., 1997). The evolving international doctrine of the responsibility to protect (RtoP), which I have argued could play a beneficial role in enhancing international refugee responsibility sharing, offers an example of a case where responsibility is divorced from culpability. Significantly, RtoP offers a basis for tying responsibility for refugee protection to the hosting *capacity* of states within the international order.

42. Blocher & Gulati, *supra* note 8, at 90 ("[t]he financial claim against the country of origin is the fuel for our proposal[.]").

Proposal, a critical, operative legal fiction is, thus, that of territorial state sovereignty. Because of it, the authors are willing to presume countries of nationality have near total or at least sufficient control over their territories to be held financially and normatively accountable for displacement due to persecution and violence.[43]

In this regard, the Proposal goes further than international refugee law as embodied in the 1951 Refugee Convention and its Protocol. International refugee law conditions international protection of refugees on the inability or unwillingness of a person's country of national to protect her from persecution and from certain forms of human rights violations.[44] However, it does not create financial liability or legal culpability for the territorial sovereign (irrespective of that sovereign's actual role in producing refugees),[45] as the Proposal seeks to do. In so far as international human rights law or customary international law support this extra step to

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43. "[W]e 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." *Id.* at 110. The principle of territorial state sovereignty under international law establishes a state's "exclusive competence to take legal and factual measures within [its] territory and prohibit[s] foreign governments from exercising authority in the same area without consent." MALANCZUK, *supra* note 41, at 75. It presumes the state sovereign has full control of its territory. *Id.*

44. This position was articulated in clear terms in 2011 by the U.N. Refugee Agency's Director of International Protection, Volker Türk:

> In armed conflict or violent situations, whole communities may be exposed to persecution for 1951 Convention reasons, and there is no requirement that an individual suffers a form or degree of harm which is different to others with the same profile. Furthermore, many ordinary civilians may be at risk of harm from bombs, shelling, suicide attacks or improvised explosive devices. These methods of violence may be used in areas where civilians of specific ethnic or political profiles reside or gather, and for this reason, come within the scope of the 1951 Convention.

Volker Türk, *Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalized Violence*, UNHCR (Jan. 18, 2011), http://www.unhcr.org/4d3703839.pdf.

45. Other scholars have noted that from an international refugee law "perspective, what matters is where the conflict itself takes place, with little concern for the location of its causes[,]" even though some might view the international definition of a refugee as tacitly locating the causes of refugee flows within the refugees' country of nationality. *See* Aristide R. Zolberg, Astri Suhrke & Sergio Aguayo, *International Factors in the Formation of Refugee Movements*, 20 INT'L MIGRATION REV. 151, 152 (1986).

attribute culpability and financial liability to the territorial sovereign, it is a retrograde development to make this a salient feature of the international refugee regime, as the Proposal would. As written, the Proposal imposes culpability and financial liability solely on the territorial sovereign even where a non-state actor, a foreign sovereign, or complex structural factors beyond the territorial sovereign's control play a pivotal role in precipitating international displacement. This approach is at odds with the geopolitics of the most intractable refugee crises of our time, which reveal both the danger that the Proposal's reliance on the legal fiction of territorial state sovereignty introduces, and also who stands to lose the most from the Proposal's implementation.[46]

As I have mentioned, international refugee law is widely understood to grant protection from persecution (including from non-state actors, where the state has failed for reasons of inability or unwillingness to provide such protection),[47] and from certain forms of violent conflict[48] that are a fundamental driver of global refugee displacement. Such violence often implicates sovereigns other than the refugees' country of nationality. Indeed, research suggests that refugee-producing conflict is often strongly correlated with foreign sovereign intervention.[49] As a result, many individuals who qualify as

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46. For a brief discussion of the traditional dominance of positivist approaches to international refugee law, and a brief discussion of some of the costs associated with limited engagement with the politics of refugees see B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 J. REFUGEE STUD. 330, 352-355 (1998) [hereinafter Chimni, *Geopolitics*].

47. Türk, *supra* note 44, at 6.

48. *Id.* at 5.

49. *See, e.g.*, Zolberg et al., *supra* note 45, at 151, 153 (arguing that because factors external to the regime of the country of nationality such as direct and indirect foreign intervention constitute "the norm rather than the exception, it is appropriate to think of refugee formation as a transnational process."); Mark Gibney, *U.S. Foreign Policy and the Creation of Refugee Flows, in* REFUGEE POLICY: CANADA AND THE UNITED STATES (Howard Adelman ed., 1991) (examining the role of the United States in refugee displacement from South Asia, and of Russia in displacement from Afghanistan). *See also* Hannah R. Garry, *The Right to Compensation and Refugee Flows: A "Preventative Mechanism" in International Law*, 10 INT'L J. REFUGEE L. 97, 111 (1998) ("For example, 2,500,000 and 780,000 Afghan refugees in Pakistan and Iran respectively were indirectly caused by political and military intervention by the USSR[.]"); Gil Loescher & James Milner, *The Long Road Home: Protracted Refugee Situations in Africa*, 47 SURVIVAL 9 (2005) (arguing the direct and indirect pivotal role of Cold War super powers in civil conflicts that resulted in massive refugee flows in Africa through the mid-70s and 80s, and noting for example that "[s]uperpower

refugees under international law owe this status to circumstances where the cast of "quintessential bad actors" does not meaningfully or exclusively comprise the government of the refugees' country of nationality. My point here is not that territorial sovereigns from which refugees originate are blameless, but rather that they often constitute one of many non-trivially culpable sovereigns.[50]

Returning to the three biggest refugee-producing conflicts—Syria, Afghanistan, and Somalia—multiple sovereigns beyond the territorial sovereigns in all three cases have been complicit in the conflict and violence that has driven displacement on the scale the world is currently witnessing.[51] The Syrian conflict illustrates this poignantly as that conflict cannot be understood absent recognition of the full-fledged proxy war that regional hegemons such as Saudi Arabia and Iran and more distant hegemons such as Russia and the United States are waging in that country. Even from a historical perspective, the production of mass refugee flows has typically been a multi-sovereign affair.[52] Yet under the Proposal, receiving states accepting refugees from these countries would hold debts enforceable, for example, *only* against the Syrian government, debts generated on the theory that that as the territorial sovereign, Syria is the "producer" of refugees.[53]

Whatever one might conclude about President Assad's regime, attributing to it full moral culpability and financial liability for the displacement of Syrian refugees is to elide the significant role of many other sovereigns directly instrumental to the production of refugee flows. Furthermore, under the Proposal, nothing would bar

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engagement accelerated local arms races and prolonged the conflicts, dramatically increasing the number of refugees in Africa, which rose to over 4m by 1980.").

50. As B.S. Chimni writes, "[w]hile internalist explanations are relevant, they are one-sided and do not capture the complex reality of the root causes of refugee flows." Chimni, *Geopolitics*, *supra* note 46, at 360.

51. TIM BIRD, AFGHANISTAN: HOW THE WEST LOST ITS WAY (2011) (describing Afghanistan from 2001 to 2011 and the destabilization resulting from foreign intervention of NATO forces and the alignment with Western interests); Teresa Krug, *The Trap of International Intervention: How Somaliland Succeeded where Somalia Failed*, 36 SAIS REV. INT'L AFFAIRS 121–31 (2016) (contrasting the stabilization of Somaliland to Somalia, focusing on external influences and intervention by international actors in Somalia).

52. See *supra* note 49 and accompanying text.

53. B.S. Chimni has described and criticized the sort of approach the authors take as "an internalist interpretation of the root causes of refugee flows which squarely [lays] the blame at the door of post-colonial societies and states, underestimating the significance of external factors." Chimni, *Geopolitics*, *supra* note 46, at 351.

the perversity of Russia, the United States, or Saudi Arabia from presenting themselves in the queue to enforce refugee debt against a post-conflict Syria, for any Syrian refugees in their territories, notwithstanding these foreign sovereigns' complicity in the Syrian conflict. Russia could even do the same with respect to Ukraine for the at least 312,000 thousand Ukrainians that have sought asylum in its territory,[54] notwithstanding Russia's central role in the creation of Ukrainian refugees.[55]

The authors suggest that a variation on their proposal might seek the functional equivalent of joint and several liability for all sovereigns implicated in refugee flows[56] but this, too, should raise concerns. Even if it were possible accurately to apportion liability and culpability among sovereigns for international displacement driven by complex, opaquely waged conflicts,[57] it is difficult to imagine an international forum—agreed to by the world's states—that would have and exercise the de jure and de facto authority to hold global

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54. *Russian Federation*, UNHCR, http://unhcr.ru/index.php?id=5 (last visited Feb. 21, 2017).

55. The same dynamics might play themselves out where a receiving state seeks to enforce refugee debt against a country in which it exerts non-military influence that nonetheless may have an impact on refugee flows. Consider the following example. In the wake of political, economic and violent turmoil in Zimbabwe in the 2000s, many Zimbabweans sought refuge in South Africa where they claimed refugee status. *See* Andrew Meldrum, *Refugees flood from Zimbabwe*, THE GUARDIAN (June 30, 2007), https://www.theguardian.com/world/2007/jul/01/zimbabwe.southafrica. During this period, South Africa played a key role in mediating the political conflict at the root of the displacement, and commentators questioned South Africa's incentives in its mediation role given the economic benefits that country gained from the implosion of Zimbabwe's production economy. One could argue that giving South Africa enforceable refugee debt against Zimbabwe would have introduced further questionable incentives to its role of mediator.

56. "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 case, fault—and therefore obligation—could lie outside the borders of the country where the refugees originated." Blocher & Gulati, *supra* note 8, at 110.

57. On this point an article by Hannah Garry, in which she explores the international legal bases for holding sovereigns liable for refugee displacement, is instructive. She argues that the United Nations Draft Articles on State Responsibility can be read to support legal liability for non-territorial states complicit in refugee displacement. *See* Garry, *supra* note 49, at 110. Her article also details the complex legal elements that would have to be satisfied to sustain a claim of state liability for refugee flows, and this complexity only makes it less likely that any version of the Proposal would reliably allocate accountability to the multiple sovereigns implicated in refugee displacement.

hegemons liable for refugee debt. Despite the formal equality of all states under international law, state sovereign equality is in reality a myth. Consider the numerous ways that powerful countries such as the United States can and have shielded themselves from liability for international crimes before the International Criminal Court by relying on geopolitical hierarchies entrenched in the international order.[58] There is little reason to think the UN Security Council or even the UN Refugee Agency (which relies on voluntary donations by powerful countries to fund its activities) would step in to hold hegemons liable and culpable for refugee debt in the manner the authors envision, given the geopolitics that frame and inhere in the international system.

The result, in effect, would be a system that holds weak sovereigns exclusively financially liable and morally culpable for refugee flows, notwithstanding the complicity of foreign powerful sovereigns that would likely not be barred from cashing in on refugee debt for which they themselves ought to be accountable. In sum, the fictions of territorial sovereignty and of sovereign equality as deployed by the Proposal risk reproduction of the very dynamic that compromises global refugee protection today: global south countries would continue disproportionately to bear the cost of global refugee protection, while hegemons and other countries in the north escape liability for (and perhaps even profit from) their direct involvement.[59]

Collapsing liability and culpability, and (de jure or de facto) exclusively attributing both solely to refugees' countries of nationality masks complex causes of refugee flows, and also raises the risk of facile approaches to difficult problems. For example, the authors argue that even if their Proposal risks compounding the financial debilitation of refugees' countries of nationality, it is the citizens of these states that are positioned to overthrow the oppressive territorial regimes presumed to bear full responsibility for

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58. *See* S.C. Res. 1422, ¶ 1, S/RES/1422 (July 12, 2002); S.C. Res. 1487, ¶ 1, S/RES/1487 (June 12, 2003). These resolutions shielded nationals of a subset of countries not party to the Rome Statute (such as the United States) from ICC prosecutions, despite U.N. Security Council referrals subjecting nationals of Sudan and Libya (neither of which are parties to the Rome Statute) to international criminal liability.

59. Indeed another scholar has made the case that obscuring the role of non-territorial sovereigns in producing refugee flows makes it easier to undermine efforts to persuade those sovereigns to resettle refugees in their territories as a means of accounting for their complicity. *See* Chimni, *Geopolitics*, *supra* note 46, at 361.

displacement of its citizens.[60] Once the role of foreign sovereigns is brought into view, for example, the dangers of such an approach is evident. U.S. and Russian citizens arguably could do far more to change the fate of potential, future Syrian refugees, than could most Syrians in Syria right now. The power actors relevant for ending conflict and persecution are not reliably located within the territory from which refugees are displaced.

Even where neither direct nor proximate intervention of a foreign sovereign or non-state actors beyond the control of the country of nationality are implicated in causing international displacement, there may be structural or historical factors that make it inappropriate to attribute full culpability and financial liability to the country of nationality. [61] The authors' chosen candidate—the Rohingya refugee crisis—illustrates this. The Burmese government's leading role in persecuting Rohingya is undeniable. However, the historical and political origins of this persecution, and of the sectarian violence against and severe marginalization of Rohingya are rooted firmly in that country's colonial past.[62] Where patterns of exclusion, discrimination and persecution are the product of colonial or other historical political projects, these factors must significantly complicate the contemporary accountability balance sheet for continuing discrimination and persecution along the same lines, especially where financial liability is at stake. It is worth noting that the Proposal's recommended commodification of Rohingya would likely give Myanmar greater incentive to prevent Rohingya from crossing international borders (violently, if necessary) than it would for that state to address the complex political, historical, and social factors underlying Rohingya displacement.

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60. Blocher & Gulati, *supra* note 8, at 101.

61. *See e.g.*, B.S. Chimni, *Geopolitics*, *supra* note 46, at 360–63 (highlighting the role of structural and historical factors central to understanding the production of refugees and using the example of refugee displacement from the Rwandan genocide as a case in point); B.S. Chimni, *Law and Politics*, supra note 3, at 7–8 (citing studies on displacement from genocide Yugoslavia and Rwanda as rooted in "an economic environment shaped by structural adjustment policies recommended by international financial institutions.").

62. *See e.g.*, Elaine Coates, *Sectarian Violence Involving Rohingya in Myanmar: Historical Roots and Modern Triggers*, MIDDLE EAST INSTITUTE (2014), http://www.mei.edu/content/map/sectarian-violence-involving-rohingya-myanmar-historical-roots-and-modern-triggers; *Fears of a New Religious Strife*, THE ECONOMIST (July 27, 2013) ("The animosity between the Rohingya and the local Arakanese in this remote corner of Myanmar is a consequence of colonial and pre-colonial patterns of settlement."), http://www.economist.com/news/asia/21582321-fuelled-dangerous-brew-faith-ethnicity-and-politics-tit-tat-conflict-escalating.

There may be examples where persecutions that produce refugees are solely and appropriately attributable to the governing regimes of refugees' countries of nationality. I posit, however, that a persecution meeting this criterion does not produce the type of refugee flows for which more equitable and sustainable global responsibility is sorely needed. In other words, the Proposal may be normatively sound for an existing class of refugee situations, but it is deeply unsound for the class of refugee situations causing the problem the Proposal seeks to address.

Furthermore, the Proposal risks compounding the debilitation of the fragile countries that even oppressive territorial regimes complicit in international displacement typically preside over. By introducing into the international refugee regime the largely unregulated force of private financial markets via sellable refugee debt, and applying it to countries such as Myanmar, Burundi, the Democratic Republic of Congo and other refugee producing states, the Proposal threatens to create larger problems than it might solve. The authors argue, for example, that private actors such as vulture funds would be relied upon to ensure the enforcement of refugee debt.[63] Yet vulture funds are rightfully much maligned for the human rights implications of their sovereign debt enforcement tactics, reportedly recovering returns on the debt they purchase of 300% to 2000%, including against countries designated by the World Bank as heavily indebted poor countries (HIPCs).[64] Vulture funds "grind down poor countries in cycles of litigation"[65] and precisely because of their successful and mercenary approach to sovereign debt collection, the United Nations Independent Expert on the Effects of Foreign Debt has advocated strongly against them for their crippling effect on poor

63. According to the authors, the benefit of vulture funds is they "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." Blocher & Gulati, *supra* note 8, at 94.

64. According to the African Development Banking Group, "[v]ulture funds buy debt often at deep discounts with the intent of suing the debtor for full recovery. Vulture funds have averaged recovery rates of about 3 to 20 times their investment, equivalent to returns of (net legal fees) 300%–2000%. The vulture fund modus operandi is simple: purchase distressed debt at deep discounts, refuse to participate in restructuring, and pursue full value of the debt often at face value plus interest, arrears and penalties through litigation, if necessary." *Vulture Funds in the Sovereign Debt Context*, African Development Bank Group, http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context/ (last visited Feb. 21, 2017).

65. *Id.*

countries.[66] The prospect of ballooning refugee debt borne largely by the global south territorial sovereigns that would reliably find themselves the target of refugee debt is deeply disturbing.

CONCLUSION

Some might say, and the authors suggest that an imperfect system that seeks to punish some if not all "quintessential bad actors" and to relieve host governments of some of the cost of hosting refugees in the manner of the Proposal is better than the status quo. The crux of my critique is that this is not at all the case. I have offered one significant reason (xenophobia) to question the added pragmatic value of economic and reputational incentives for increasing refugee admissions among states that under the status quo are not doing enough on this front. The thrust of my normative critique is that the Proposal's central innovations, if successful, threaten to deliver a less desirable world than the prevailing status quo. The interaction of the geopolitics of international displacement with the legal fiction of state sovereignty means that what marginal additional refugee admissions the Proposal might secure would come at too high a price.

The Proposal would promote decontextualized demonization of global south states that would be saddled with refugee debt even after complicit territorial regimes were replaced with post-conflict regimes bearing no responsibility for incurring refugee debt in the first place.[67] The Proposal would simultaneously permit elision of powerful states' complicity in conflict and instability in the global south, and even permit these states to enforce refugee debt against territorial sovereigns. And those paying the highest price for this arrangement would be the populations remaining in refugees' countries of nationality, even long after any territorial regime complicit in refugee flows had been replaced. To be clear, my Essay

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66. Juan Pablo Bohoslavsky, *Vulture funds and human rights*, Human Rights Council Advisory Committee, 14th Sess. (Feb. 25, 2015), http://www.ohchr.org/Documents/Issues/Development/IEDebt/VultureFundsAndHumanRights2014.pdf. ("[V[ulture funds are frequently not only trying to accumulate wealth through speculative means to the detriment of indebted countries and their populations, but that they are likely to avoid or evade taxation by hiding their gains in secret jurisdictions. In doing so, they are impairing so to speak twice the ability of States to mobilize necessary resources for public spending and the realisation of economic, social and cultural rights."). *Id* at 3.

67. Under international law, the obligations of a state are typically not affected by a change in government. MALANCZUK, *supra* note 41, at 81–82.

ought not to be read as a defense of oppressive territorial regimes that preside in refugee-producing countries. It ought to be read as a brief accounting of some of the costs of reducing the complex culpability matrix for global refugee displacement solely to refugees' countries of nationality via the fiction of territorial state sovereignty and sovereign equality. Even if there exist refugee crises for which this move is legitimate, the benefits of the Proposal are not severable from the overall implications it has for it is precisely the large conflicts that make the status quo in global refugee admissions untenable.