

COMMENT ON BLOCHER & GULATI,
“COMPETING FOR REFUGEES: A MARKET-
BASED SOLUTION TO A HUMANITARIAN
CRISIS”

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The authors have graciously asked me to comment on their interesting and welcome proposal, and I am happy to do so. One must applaud all efforts to ameliorate the horrendous problem of refugee flows, one that is vastly greater today than in 1997 when I advanced my own “modest proposal” for refugee burden-sharing.¹ The current Syrian refugee crisis alone demonstrates the utter bankruptcy of the international system of refugee protection. Alas, there are all too many other such crises, albeit on a smaller scale that receive far less publicity.

The Blocher-Gulati proposal, then, is both welcome and provocative. As readers appraise it, I reiterate a point that I made about my own at the time: “[a]lthough the proposal entails many problems, virtually all of those problems already exist, sometimes to an even greater degree, in the current system. For this reason, I urge readers to keep the “compared to what” question firmly in mind as they ponder these problems.”²

In my brief comments, I shall begin by making several small points and then turn to what I regard as the most serious flaw in their proposal.

First, their scheme might be more feasible if it were (first) instituted on a regional basis where it could be tested and where the diverse interests among states, which will be an impediment to any

1. Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal, Fifteen Years Later*, in *THE NATION STATE AND IMMIGRATION: THE AGE OF POPULATION MOVEMENTS* 72 (Anita Shapira et al. eds., 2015).

2. Peter H. Schuck, *Refugee-Burden Sharing: A Modest Proposal*, 22 *YALE J. INT'L L.* 243, 250 (1997).

reform, may be somewhat less (and less daunting) than they are at the global level.³

Second, Blocher and Gulati mention “a combination of altruism and reputational benefits” as the incentives for receiving states. I would add that domestic politics—in the form of pressures by organized ethnic, human rights, social service, and religious groups with self-interested as well as altruistic motives for welcoming refugees—can be an important factor here, as in immigration policy more generally.⁴ Relatedly, I share the authors’ insouciance about a possible “crowding out” effect,⁵ and suspect that their compensation scheme would allay some opposition to receiving refugees, compared with the uncompensated current system.

Third, their list of costs borne by receiving states—“perceived threats to [their] security, cohesion, and political stability”⁶—should also include the resentment by the states’ own citizens and other refugees who are resident there, who must compete with the newcomers for resources of various kinds as well as for the government’s attention and moral energy.

Fourth, their discussion of the EU’s consideration of burden-sharing proposals deserves elaboration; at this writing, they have failed miserably and the reasons for that failure are instructive.

Fifth, their ardent embrace of customary international law (CIL) should be viewed with greater skepticism. Many prominent international law scholars such as Professor Jack Goldsmith have argued strongly against giving CIL more weight than it warrants.

Sixth, the authors claim that their proposal “rewards” host nations for accepting refugees,⁷ but whether it is a reward depends on

3. See Schuck *supra* note 1 at 71 (“A regionally-structured system would possess . . . advantages It could exploit a tradition of regional responsibility . . . the commonality of interests and values . . . and the more intense patterns of interaction It would minimize the . . . costs . . . [to] relocate refugees over long distances [S]ize and . . . character would . . . make it . . . more manageable”).

4. See Peter H. Schuck, *The Disconnect Between Public Attitudes and Policy Outcomes in Immigration*, in *DEBATING IMMIGRATION* 17 (2007); see also PETER H. SCHUCK, *ONE NATION UNDECIDED: CLEAR THINKING ABOUT FIVE HARD ISSUES THAT DIVIDE US* ch. 3 (forthcoming 2017).

5. Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 *COLUM. HUM. RTS. L. REV.* 53, 65 (2016).

6. *Id.* at 67.

7. *Id.* at 103.

the amount of payment they receive, specifically whether it exceeds the state's costs of accepting the refugees.

Seventh, the authors' dismissal of sovereign immunity as little more than a "legal fiction," a kind of fig leaf for injustice, strikes me as dangerously simplistic. President Obama's veto of the Justice Against Sponsors of Terrorism Act (overridden by an institutionally parochial Congress) was based on serious concerns about the perverse consequences of creating such an exception to sovereign immunity, concerns that the authors mention nowhere.

But as I said, these are small points, relatively minor cavils that do not go to the fundamental merits of the authors' scheme. Unfortunately, there is one problem that I fear infects the core of the scheme. This is the problem of proving what caused the flight of each "refugee." I put the word refugee in scare quotes to call attention to the deep difficulty of assessing whether one who has fled her country is indeed a refugee under international law, a difficulty that has dogged the international system of refugee protection ever since its founding, and one that is not easily resolved. In this system, legal refugee status is reserved only for those who satisfy the legal refugee definition. We commonly speak of refugees as a group because we imagine that those who feel compelled to leave their homes and cross their nation's borders in search of safety and a better life deserve our solicitude and we seldom inquire into their precise circumstances and motivations. For us, it is enough that they are suffering among the greatest human losses imaginable.

For better or worse, however, the legal regime governing refugee flows rejects this simple moral calculus in favor of an exceedingly complex body of refugee and asylum law⁸ consisting of detailed and demanding criteria for protection eligibility and of administrative-adjudicatory systems for making the requisite determinations. The authors note that international law standards "do not cover people fleeing horrors *other* than persecution" (emphasis original), and state that "we would limit liability to acts or omissions that are imputable to the state concerned. This would exclude things like natural disasters and famine, as well as invasions or occupation, for which states bear no responsibility."⁹ Unfortunately for their scheme, however, the categories they would exclude are in some ways the clearest, most easily identifiable cases. The harder cases—the

8. The authors do not differentiate the two categories, but the legal and operational systems of protection in the U.S. and elsewhere treat them differently.

9. Blocher & Gulati, *supra* note 5, at 76.

ones that fill the filing cabinets and dockets of immigration lawyers, human rights groups, asylum hearing officers, immigration judges, the Bureau of Immigration Appeals, and the federal courts—require decision-makers to grapple with intricate, fact-specific determinations. Ultimately, the key question is—what are the precise circumstances that caused them to flee? Getting the right answer may literally be a question of life or death.

How does this legal-institutional reality affect the authors' scheme? I fear that it may fatally undermine it. Putting aside all of the other reasons why countries of origin will refuse to pay for their departed citizens, they will insist on essentially replicating the current system of asylum and refugee law, forcing the receiving countries to prove that the departure was caused by their persecution (as defined by that law) rather than by a host of other reasons that might have motivated their citizens to depart. Their obligation to pay, in short, is far less clear—and thus far harder to prove—than the authors seem to realize.

I hope that I am wrong about this and that there is indeed some sword that will enable the authors to cut this Gordian knot. If so, I will continue to applaud their important effort to ameliorate (not solve, as they make clear) this catastrophic human dilemma.