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# NOT IN MY BACKYARD: ON THE MORALITY OF RESPONSIBILITY SHARING IN REFUGEE LAW

*Tally Kritzman-Amir\**

## INTRODUCTION

Dawid is an asylum seeker from Eritrea who fled his country of nationality, the country where he was born and raised and in whose army he served.<sup>1</sup> Dawid inarguably meets the definition of a refugee: a person outside of his or her country of origin who has a “well-founded fear of persecution” on account of his or her “nationality, race, religion, membership in a particular social group, or political opinion.”<sup>2</sup> In Dawid’s case, he qualifies as a refugee based on evidence that he suffered extreme human rights abuse in Eritrea due to his membership in a religious minority group. Like most of the tens of thousands of Eritrean asylum seekers, Dawid migrated from Eritrea to Sudan.<sup>3</sup> Conflict-stricken, impoverished Sudan is both a country of origin for many refugees and a country of asylum for others. In Sudan, Dawid can expect to gain refugee status, but it will be virtually meaningless, given that he will likely live impoverished in a refugee camp or elsewhere, or perhaps find undocumented employment. He will face restrictions preventing him from practicing his religious beliefs and eventually risk refoulement to

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1. Interview with Dawid, in Tel-Aviv, Isr. (June 26, 2008). Dawid eventually left Sudan for Egypt and then went to Israel, where he is now seeking asylum along with a few thousand other Eritreans who escaped political or religious persecution, or evaded the draft. I met Dawid in the course of my work with the Refugee Rights Clinic at Tel-Aviv University School of Law. Dawid’s situation is emblematic of many of the problems described and discussed in this Article.

2. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137 [hereinafter *Convention*].

3. According to the United Nations High Commissioner for Refugees (“UNHCR”), at the end of 2007, there were approximately 160,500 Eritrean refugees in Sudan. See UNHCR GLOBAL REPORT 2007, SUDAN 205–11 (2007), available at <http://www.unhcr.org/publ/PUBL/4848fd3e2.pdf>.

Eritrea.<sup>4</sup> Nearly 200,000 Eritrean asylum seekers have faced the difficult decision of where to flee. For many morally arbitrary, yet practical reasons, which have to do with geographical proximity and the fact that the Sudanese border is easier to cross, most Eritrean refugees flee to Sudan. Alternatively, other Eritrean asylum seekers escape to Ethiopia,<sup>5</sup> a destitute neighboring country against which Eritrea has been waging an ethnic war.<sup>6</sup> A small minority flees to Italy, the former colonizer of Eritrea and a far wealthier option.<sup>7</sup> In other words, Dawid, like most asylum seekers, sought refuge in a neighboring country that is the least likely place for him to find substantive protection and the ability to exercise his human rights. Only a small percentage of refugees manage to reach countries that have the resources to provide them with adequate protection.

The story of Dawid exemplifies one of the most pressing questions in the context of refugees' rights: when refugees leave their country of nationality, which country is responsible for protecting and providing for them? It is generally undisputed that refugees are legally and morally entitled to at least some rights and that States have a legal<sup>8</sup> and moral<sup>9</sup>

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4. Nick Wadhams, *Rights Group Accuses Sudan, Eritrea of Deporting Eritrean Refugees from Sudan*, VOICE OF AM. NEWS, Dec. 10, 2007, <http://www.voanews.com/english/archive/2007-12/2007-12-10voa35.cfm?CFID=18690007&CFTOKEN=98990357>.

5. After Sudan, Ethiopia is home to the highest concentration of Eritrean asylum seekers. See UNHCR, 2007 GLOBAL TRENDS, REFUGEES, ASYLUM-SEEKERS, RETURNEES, INTERNALLY DISPLACED AND STATELESS PERSONS 15 (2008), available at <http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf>.

6. On the war between Ethiopia and Eritrea, its ethnic and national dimensions and its economic effects on both countries, see UNFINISHED BUSINESS: ETHIOPIA AND ERITREA AT WAR (Dominique Jacquin-Berdal & Martin Plaut eds., 2005).

7. About 7000 Eritrean refugees were present in Italy at the end of 2007, according to UNHCR statistics. See *supra* note 3.

8. The legal basis of States' obligation toward refugees is found in the Convention, *supra* note 2, and the 1967 Protocol Relating to the Status of Refugees, 606 U.N.T.S. 8791 (entered into force Oct. 4, 1967) [hereinafter Protocol]. Some of the principles of both have been recognized as principles of customary international law. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 126–27 (2d ed. 1996). In addition, this obligation is set forth in “soft law” norms such as UNHCR guidelines and handbooks, and various human rights conventions and regional treaties, including the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR], and the African Union's Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45 (Sept. 10, 1969), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b36018>.

9. There are innumerable discussions of the nature and the source(s) of the duty of States toward refugees. Most are based on distributive justice theory, but some also adopt utilitarian, critical race theory, or feminist perspectives. See, e.g., THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS*

obligation to protect these rights. Despite this agreement, States generally prefer that refugees *apply* for asylum, rather than having refugees *end up* “in their backyard.” The disagreement begins when we ask the following questions: Which State will be responsible? Whose budget will bear the costs of protecting and assuring the socio-economic rights of refugees? And which State must divert resources traditionally dedicated to securing the rights of its nationals in order to secure the rights of refugees?

In a different context, David Miller discusses an analogous hypothetical in which a person has collapsed on the street.<sup>10</sup> Miller argues that the victim is more likely to receive assistance if there is a single person, rather than several, passing by.<sup>11</sup> This is true for several reasons, the most important of which, according to Miller, is that with several bystanders, there is no clear allocation of responsibility and no one is solely at fault should the victim die.<sup>12</sup> The same phenomenon can be observed with the international community’s response to the challenge of refugee policy. Refugees from State B may seek asylum in State A, rather than in States C or D. While it is possible to provide explanations as to why State A has a moral responsibility to the refugees fleeing from State B, in a world of multiple States, it is more difficult to account for and allocate this responsibility. Where there are several state actors, why should State A have any more responsibility for the flight of the refugees from State B than would States C or D?

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116–17 (2002); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 35–51 (1983); Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987) [hereinafter Carens, *Aliens and Citizens*]; Joseph Carens, *Immigration, Welfare and Justice*, in JUSTICE IN IMMIGRATION 1 (1995); Howard F. Chang, *The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory*, 40 CORNELL INT’L. L.J. 1, 11–17 (2008); Jules L. Coleman & Sarah K. Harding, *Citizenship, the Demand of Justice and the Moral Relevance of Political Borders*, in JUSTICE IN IMMIGRATION 18, 38 (Warren F. Schwartz ed., 1995); David Miller, *Justice and Global Inequality*, in INEQUALITY, GLOBALIZATION AND WORLD POLITICS 187, 188 (Andrew Hurrell & Ngaire Woods eds., 1999) [hereinafter Miller, *Justice and Global Inequality*]. I will elaborate on these discussions in Part III of this Article.

10. David Miller, *The Responsibility to Protect Human Rights* 4 (Dept. of Pol. & Int’l Relations, Oxford Univ., Working Paper No. SJ006, 2007), available at [http://www.politics.ox.ac.uk/research/working\\_papers/Human\\_rights\\_Miller.pdf](http://www.politics.ox.ac.uk/research/working_papers/Human_rights_Miller.pdf).

11. *Id.* at 4–5.

12. *Id.*

There are three main reasons to consider the roles of States C and D, rather than just assuming that State A is responsible for providing for refugees.<sup>13</sup> As Daniel Steinbock has noted:

First, refugees do not move evenly around the globe, both because refugee-producing events are concentrated in particular countries or regions, and because most refugees cannot seek sanctuary far from their countries of origin. Second, despite the benefits individual refugees might ultimately bring, refugee-receiving countries regard refugees as an unwanted burden in just about every way imaginable. Third, countries vary widely in their ability to cope with refugees in their territory.<sup>14</sup>

This Article examines the roles that States A, B, C, and D should play in the refugee-protection scheme. I assume that each State's legal<sup>15</sup> and moral<sup>16</sup> obligations to refugees are substantiated enough and do not require further elaboration. The term "refugee" will apply loosely, referring to both persons defined as refugees according to the 1951 Convention Relating to the Status of Refugees ("Convention")<sup>17</sup> and the 1967 Protocol Relating to the Status of Refugees ("Protocol"),<sup>18</sup> as well as persons in refugee-like situations. Part I explains why the provision of assistance to and protection of refugees is a responsibility-sharing problem. Part II discusses the moral considerations that ground responsibility-sharing efforts in the context of refugee migration, and then Part III offers specific criteria to govern the allocation of responsibility among countries. Part IV attempts to explain the basis of responsibility sharing in international law and international relations. Part V suggests some theoretical models of how the policy of responsibility sharing can be conducted. Finally, Part VI explores the institutional aspect of responsibility sharing, examining which institutions are best equipped to regulate responsibility-sharing frameworks and outlining what their potential role could be.

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13. Daniel J. Steinbock, *The Qualities of Mercy: Maximizing the Impact of U.S. Refugee Resettlement*, 36 U. MICH. J.L. REFORM 951, 985 (2003).

14. *Id.* at 985.

15. ICCPR, *supra* note 8.

16. *See supra* note 9.

17. Convention, *supra* note 2.

18. Protocol, *supra* note 8.

I. PROTECTING AND PROVIDING FOR REFUGEES: A PROBLEM OF INTERNATIONAL RESPONSIBILITY SHARING<sup>19</sup>

The immigration of refugees imposes a responsibility on host societies. This type of immigration is uninvited and often unwelcome, and carries a high price. To ensure their assimilation and protection, States receiving refugees must expend resources by providing them with housing, jobs, education, etc.<sup>20</sup>

The States from which refugees originate are essentially creating an externality borne by the States that allow the immigrants to enter their borders. When States fail or are unable to provide for their citizens, their citizens seek provision elsewhere. Therefore, the policies or natural conditions of the refugees' home States create a cost not internalized by the States themselves, but rather assumed by others. Unlike other externalities produced by States, this externality has critical long-term social consequences for the countries bearing it. These consequences serve as a justification for the urgent need to resolve the externality or, at the very least, to minimize its burdens.<sup>21</sup>

Usually, there is no particular moral justification as to why State A—and not States C or D—should bear the externality of the refugees from State B. However, more often than not, most refugees from State B will end up migrating to State A rather than States C or D for any number of reasons: State A is closer to State B, making it easier and less expensive to travel; there is already an existing community of State B's immigrants in State A, which might assist in assimilation; or there are cultural, religious, and linguistic links between the populations of State B and State A.<sup>22</sup>

In one sense, State A might often be forced to receive the refugees of State B due to an externality of States C and D. This will occur when these States implement a policy, either intentionally or unintentionally,

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19. In most current discussions on refugees or immigrants, the term "burden sharing" is used instead of "responsibility sharing." This Article uses the latter term, though; the former is potentially offensive, as it reduces refugees and immigrants to an encumbrance. For a discussion of this term, see Gregor Noll, *Risky Games?: A Theoretical Approach to Burden Sharing in the Asylum Field*, 16 J. REFUGEE STUD. 236, 237 (2003).

20. Susan Martin et al., *The Impact of Asylum on Receiving Countries*, in POVERTY, INTERNATIONAL MIGRATION AND ASYLUM 99, 103–05 (George J. Borjas & Jeff Crisp eds., 2005).

21. See Astri Suhrke, *Burden-Sharing During Refugee Emergencies: The Logic of Collective Versus National Action*, 11 J. REFUGEE STUD. 396, 399 (1998).

22. For a detailed description of the different theoretical explanations of immigration patterns, see Douglas S. Massey et al., *Theories of International Migration: A Review and Appraisal*, 19 POPULATION & DEV. REV. 431 (1993).

that does not allow the entry of or does not attract immigrants from State B, thereby causing them to seek entry into State A alone.

Another way to frame the dynamics among States A, C, and D is to view them as a “chicken game.”<sup>23</sup> As immigration occurs throughout the world, most States prefer that others accept and provide for refugees. The second best option is for all of them to cooperate and distribute responsibility for immigrants in a fair manner. And the least preferable option for most States is that the individual State alone has to bear responsibility for the immigrants. In this chicken game, State A, which is usually the immigrants’ preferred destination, is likely to restrict entry and withhold support and protection to signal to other States that it has no intention of providing for the immigrants.<sup>24</sup> This could potentially lead to a race to the bottom and create incentives for States C and D to apply more restrictive measures.<sup>25</sup>

Interestingly, State A is often not much better off than State B and, even more likely, State A has less resources compared to States C or D. Most refugees immigrate to poor and unstable neighboring countries,<sup>26</sup> imposing an additional burden on their politics and economies.<sup>27</sup> This burden could be devastating to some countries, especially given the fact that refugee crises both arise suddenly and are vast in scope.<sup>28</sup> For example, crises in Africa, Asia, and Latin America have resulted in a mass

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23. For additional perspectives on the “chicken game” in the context of international law and international relations, see, for example, Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT’L L. 384, 390 (1996).

24. For example, in an effort not to attract additional Eritrean asylum seekers, the Israeli government implemented a series of harsh policy measures, including arbitrary status changes, restrictions on freedom of movement, and imprisonment. See, e.g., *Israel: Eritrean Asylum Seekers Told to Leave Tel Aviv Area*, INTEGRATED REGIONAL INFO. NETWORKS, Aug. 11, 2008, available at <http://www.unhcr.org/refworld/publisher,IRIN,,ISR,48a14919c,0.html>. This has led neighboring governments like Egypt to take even harsher measures against Eritrean asylum seekers, such as deportation and barring access to the UNHCR. See, e.g., Press Release, Human Rights Watch, *Egypt: Don’t Return Eritrean Asylum Seekers at Risk, Allow UNHCR Access to Detained Migrants* (Dec. 19, 2008), available at <http://www.hrw.org/en/news/2008/12/19/egypt-don-t-return-eritrean-asylum-seekers-risk>.

25. It should be noted that, at least in theory, there may be circumstances where States do not have such incentives, for example, if States seek to achieve or maintain a strong track record for human rights.

26. However, this situation could change in the future as globalization is spreading and it becomes easier and less expensive to move from one place to another.

27. James L. Carlin, *Significant Refugee Crises Since World War II and the Response of the International Community*, 3 MICH. Y.B. INT’L LEGAL STUD. 3, 12–21 (1982).

28. Peter Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT’L L. 243, 273 (1997).

influx of immigrants from one poor country in turmoil to another poor country in turmoil.<sup>29</sup> Consequentially, the least politically and economically capable countries are forced to provide for the neediest immigrants and to share the greatest part of the responsibility in caring for them.<sup>30</sup> This phenomenon is coupled with the trend of Western countries toughening their immigration and asylum laws.<sup>31</sup>

The immigration of refugees to impoverished countries carries a sociopolitical price. Uneasy feelings, which may amount to xenophobia, sometimes arise among the citizens of host States because of the uneven distribution of the responsibility.<sup>32</sup> Additionally, the immigration of refugees may raise security concerns in host States as conflicts cross borders along with refugee movements. The economic impacts of refugee movements affect both the country's nationals and refugees, who are unable to enjoy sufficient access to resources or to realize their rights. Perhaps one of the most striking examples is the immigration of hundreds of thousands of people from Rwanda to Tanzania, which has caused much political instability and additional poverty, and raised security concerns in Tanzania.<sup>33</sup>

Under the current legal regime, it is almost impossible to "correct" the disproportionate allocation of responsibility imposed by initial and secondary refugee flight patterns. Refugees are expected to find safety and

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29. This is evident from a close inspection of the UNHCR statistical reports, which show migrations from countries of origin to neighboring and equally poor countries of asylum. See 2005 UNHCR STATISTICAL YEARBOOK, CHAPTER II: POPULATION LEVELS AND TRENDS 2-4 (Apr. 2007), available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?id=464049e53&tbl=STATISTICS>. See also Benjamin Cook, Note, *Methods in Its Madness: The Endowment Effect in an Analysis of Refugee Burden-Sharing and Proposed Refugee Market*, 19 GEO. IMMIGR. L.J. 333, 344 (2004).

30. Cook, *supra* note 29.

31. Suhrke, *supra* note 21, at 397. Suhrke argues that Western States that seek to minimize the number of refugees on their territory are actually "free-riders" in the collective effort to maintain global security. *Id.* at 400.

32. MATTHEW J. GIBNEY, *THE ETHICS AND POLITICS OF ASYLUM: LIBERAL DEMOCRACY AND THE RESPONSE TO REFUGEES* 246-47 (2004).

33. James Milner, *Sharing the Security Burden: Towards the Convergence of Refugee Protection and State Security* (Refugee Studies Cent., Working Paper No. 4, 2000), available at <http://www.rsc.ox.ac.uk/PDFs/workingpaper4.pdf> (detailing the burdens that Tanzania has assumed as a result of the forced migration of hundreds of thousands of Rwandans fleeing genocide). Another current example is the flight of Sudanese refugees to Chad, which resulted in the spillage of the conflict from Sudan into Chad and the devastation of Chad's economy. See also UNHCR, *Real-time Evaluation of UNHCR's IDP Operation in Eastern Chad*, PDES/2007/02 - RTE 1 (July 2007) (prepared by Khassim Diagne and Enda Savage), available at <http://www.unhcr.org/publ/RESEARCH/46a4ad450.pdf>.



settle in the first country to which they move.<sup>34</sup> The motivation behind this policy is to prevent refugees from “asylum shopping,” the underlying assumption being that “shopping” for one’s favorite country is inconsistent with the concept of a refugee: a person fleeing for his or her life would apply for asylum in the first available State.<sup>35</sup> Moreover, many wealthier nations employ policies preventing secondary flight in order to contain refugees in States neighboring their countries of origin, which are usually developing countries.<sup>36</sup> In many cases, refugees who move to a third country must justify why they did not seek permanent refuge in the last country, and risk being denied asylum on this basis.<sup>37</sup> Therefore, although immigrants initially seek refuge in State A for no morally compelling reason, States C and D are unlikely to assume responsibility in any way for the well-being of the immigrants flooding into State A.<sup>38</sup>

I would argue that the responsibility of protecting and providing for refugees must be solved through cooperation rather than allowing it to become the problem of a few random States. Responsibility for the well-being of refugees must be shared internationally.<sup>39</sup> Assuming a shared responsibility for refugee migration not only is fair and just, but also would be beneficial to world order and global security and help States to better plan their immigration policies. Moreover, this planning would benefit refugees, who could rely on a more organized and substantial system of protection. In the following sections, I will describe the relevant moral and legal bases for this argument.

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34. Kay Hailbronner, *The Concept of “Safe Country” and Expeditious Asylum Procedures: A Western European Prospective*, 5 INT’L J. REFUGEE L. 31, 35 (1993).

35. See, e.g., Eiko R. Thielemann, *Why EU Policy Harmonisation Undermines Refugee Burden-Sharing* 9, 33 (Nat’l Europe Ctr. Paper No. 101, 2003), available at <http://dspace-dev.anu.edu.au/bitstream/1030.58/12325/2/Thielemann.pdf>.

36. Hailbronner, *supra* note 34, at 36–48.

37. For more on the “Safe Third Country” policy in Europe and elsewhere, see, for example, *id.*

38. Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT’L J. REFUGEE L. 567, 570–71 (2003) (explaining how, on the one hand, States C and D are unlikely to grant protection to immigrants from State A and, on the other hand, are unlikely to consider the scope of protection they receive in State A).

39. Cook, *supra* note 29, at 337–38. For a discussion of the general need to institutionalize responsibility sharing with respect to other displaced persons, see generally J.P.L. Fonteyne, *Burden Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees*, 8 AUST. Y.B. INT’L L. 162 (1980).

## II. THE MORALITY OF RESPONSIBILITY SHARING AMONG STATES IN THE CONTEXT OF REFUGEE MIGRATION

Despite innumerable moral discussions about the duty of States towards immigrants, there are relatively few and only brief discussions about the morality of responsibility sharing with respect to immigration. Most scholars discuss responsibility sharing among States in economic terms, as a collective action problem or a public goods distribution problem.<sup>40</sup> There seem to be two reasons for the lack of moral discussion on this issue. First, it is almost too obvious to assert that it is morally better and far fairer for States to cooperate and share responsibility instead of imposing costs on certain States in an arbitrary way. Second, States are disinclined to formalize a responsibility-sharing mechanism<sup>41</sup> and, therefore, discussing the morality of responsibility sharing is seen as irrelevant. Consequently, most schools of thought and scholars theorizing about justice in immigration have not dealt with the question. Extrapolating scholars' general position on this subject, however, we can develop a view of responsibility sharing that would conform to existing principles of migrant justice. In the following three Sections, I will explain the moral foundations of responsibility sharing according to several existing schools of thought.

### *A. The Feminist Critique of International Law and the Ethics of Care*

The concepts of the feminist critique of international law shed light on the issue of responsibility sharing in refugee law. This school of thought argues that international legal concepts that appear gender neutral, such as States, boundaries, and sovereignty, are actually very male oriented and have a particularized impact on women.<sup>42</sup> As Charlesworth, Chinkin, and Shelley Wright observe:

A feminist account of international law suggests that we inhabit a world in which men of all nations have used the statist system to establish economic and nationalist priorities to serve male elites, while basic

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40. See, e.g., Cook, *supra* note 29; Fonteyne, *supra* note 39; Noll, *supra* note 19; Schuck, *supra* note 28; Suhrke, *supra* note 21; Eiko R. Thielemann, *Burden-Sharing or Free-Riding? Explaining Variations in States' Acceptance of Unwanted Migration*, available at <http://aei.pitt.edu/423/01/EUSA2003-JRS-Thielemann.html>.

41. See, e.g., David Miller, *Immigration: The Case for Limits*, in CONTEMPORARY DEBATES IN APPLIED ETHICS 193, 203 (Andrew I. Cohen & Christopher Heath Wellman eds., 2005) (“[T]he best we can hope for is that informal mechanisms will continue to evolve which make all refugees the *special* responsibility of one state or another . . .”).

42. Hilary Charlesworth et. al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 614–15 (1991).

human, social and economic needs are not met. International institutions currently echo these same priorities.<sup>43</sup>

Although the feminist critique of international law encompasses a wide variety of views, I specifically examine the ethics of care approach, as it is the most relevant to our discussion. The ethics of care approach is based on the psychological research of Carol Gilligan,<sup>44</sup> who analyzed the problem-solving attitudes of women and men in the hopes of determining whether women have a different “voice”—or approach—than men.<sup>45</sup> Gilligan concluded that women apply an ethics of care approach and perceive things in terms of caring, context, communication, relationships, and responsibility.<sup>46</sup> Men, however, apply an ethics of rights or an ethics of justice approach, which leads them to conceive of problems in binary terms of right and wrong, or winners and losers, while applying logic and rationality, without taking into account context and relationships.<sup>47</sup>

The ethics of care approach also serves as a basis for the promotion of women’s interests.<sup>48</sup> This theory recognizes the validity and potential of that “different voice,” finding that the ethics of care approach, with its relational, flexible, and caring notions, is often more appropriate and more moral than the ethics of rights approach.<sup>49</sup> In the context of international law, the promotion of the former has far-reaching consequences with respect to not only women, including refugee women, but also other subordinate groups, thereby revolutionizing international law and its fundamental concepts.<sup>50</sup> Indeed, this approach has been used to critique and analyze various phenomena in international law and international relations: colonialism, international norms and the norm-making process, sovereignty, the treatment of Third World countries, and transnational institutions.<sup>51</sup>

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43. *Id.* at 615.

44. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

45. *Id.* at 1–3.

46. *Id.*

47. *Id.* at 64–74, 164, 174.

48. See *Charlesworth*, *supra* note 42, at 618–19 (discussing this in terms of incorporating a feminist perspective into international law discourse).

49. *Id.* at 615–16

50. For example, the feminist theory was applied to the context of third world countries and their populations. *Id.* at 618–19.

51. For an overview of the “ethics of care” approach to international relations, see Fiona Robinson, *Methods of Feminist Normative Theory: A Political Ethic of Care for International Relations*, in *FEMINIST METHODOLOGY FOR INTERNATIONAL RELATIONS* 221 (Brooke A. Ackerly et al. eds., 2006).

With respect to immigration, the ethics of care approach diminishes the binary distinction between citizens and aliens, between “us” and “them.” This approach rejects a strong understanding of sovereignty and nationalism and points to the fact that countries are interrelated and interconnected.<sup>52</sup> Embracing a more humanist-oriented approach, the ethics of care model supports a “relational” attitude to immigrants that opposes criminalizing many categories immigrants and that offers them protection, especially those who are vulnerable, such as refugees.<sup>53</sup> The ethics of care approach upholds these positions both as a general policy recommendation and in recognition that women constitute a large, and often unheard and undocumented, percentage of immigrants.<sup>54</sup>

The ethics of care approach acknowledges that much like children in certain circumstances, some immigrants cannot survive without care. In so doing, this approach challenges myths of self-sufficiency.<sup>55</sup> From this conclusion derives the responsibility of States to protect refugees and provide for them.

Feminist theorists adopting the ethics of care approach would perceive the responsibility-sharing debate in the context of refugees to be erroneous in that it maintains an “us” versus “them” distinction, rather than looking at the responsibilities of all States for all the world’s immigrants. Such theorists argue for a “softer” perception of States as units for the redistribution of wealth.<sup>56</sup> In fact, they would claim that this discussion distances countries that receive immigrants, the North, from the immigrants’ countries of origin, the problematic South, without acknowledging the North’s complicity in the environmental, economic, and political

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52. J. ANN TICKNER, GENDER IN INTERNATIONAL RELATIONS: FEMINIST PERSPECTIVES ON ACHIEVING GLOBAL SECURITY 64–66 (1992).

53. On the need for greater protection of women in refugee law, see, for example, Amy M. Lighter Steill, *Incorporating the Realities of Gender and Power into U.S. Asylum Law Jurisprudence*, 1 TENN. J.L. & POL’Y 445 (2005).

54. Saskia Sassen, *Rätt väg?—Immigration I en Global Era [Is This the Way to Go?—Handling Immigration in a Global Era]* 4–5 ORD&BILD (2002), translated in 4 STAN. AGORA 1, 5 (2003) (constructively adopting the “ethics of care” approach). On the role of women in immigration law, see Nancy Ann Root & Sharyn A. Tejani, *Undocumented: The Roles of Women in Immigration Law*, 83 GEO. L.J. 605 (1994).

55. Virginia Held explores this issue further in the context of counterterrorism policy. Virginia Held, *Morality in International Relations* (Feb. 1, 2007) (unpublished manuscript, on file with the author).

56. For example, perhaps echoing this perspective, one theorist has argued for a “softer” perception of States as units for the redistribution of wealth. Robinson, *supra* note 51, at 236–39.

destabilization of the South.<sup>57</sup> Responsibility, they would argue, need not be divided among States in a mathematical manner using set criteria, but rather should be shared by States in a more generous and flexible fashion.

### *B. Utilitarianism*

Utilitarianism provides additional insights regarding the importance of responsibility sharing. The utilitarian point of view measures moral value according to whether it increases or decreases the total amount of benefit.<sup>58</sup> Applying this school of thought, utility is likely to increase in the most significant manner if States cooperate with each other to share responsibility for protecting refugees.<sup>59</sup> In other words, cooperation could lead to a regime under which responsibility for each refugee would be borne by the State whose utility declines the least as a result.<sup>60</sup> Generally speaking, due to the principle of diminishing marginal utility, utility will, in fact, accumulate under a fairer regime of responsibility sharing in refugee protection.<sup>61</sup> This is also, as Joseph Carens puts it, because “the utilitarian commitment to moral equality is reflected in the assumption that everyone is to count for one and no one for more than one when utility is calculated.”<sup>62</sup> Thus, utilitarianism seems to support responsibility sharing in the context of refugee protection based on the relative costs different States potentially face and their impact on the overall utility.

From a utilitarian point of view, one potential problem with immigration is “the tragedy of the commons.”<sup>63</sup> If responsibility for the protection of refugees is shared, it may discourage a country from improving

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57. See, e.g., Nahla Valji, *Women and the 1951 Convention: Fifty Years of Seeking Visibility*, 19(5) REFUGE 25, 31 (2001), available at <http://www.yorku.ca/crs/Refuge/Abstracts%20and%20Articles/Vol%2019%20No%205/Valji.pdf>.

58. See generally JOHN STUART MILL, UTILITARIANISM (1895).

59. See James L. Hudson, *The Philosophy of Immigration*, 8 J. LIBERTARIAN STUD. 51, 52–53 (1986).

60. Thielemann, *supra* note 40.

61. Economic research has been inconclusive regarding the economic effects of immigration. See George J. Borjas, *Introduction*, in ISSUES IN THE ECONOMICS OF IMMIGRATION 2 (George J. Borjas ed., 2000). The same is likely true if we consider the marginal utility of noneconomic factors, such as culture and national identity.

62. Carens, *Aliens and Citizens*, *supra* note 9, at 263. This commitment to principles of equality has led Howard F. Chang to conclude that discrimination between noncitizens and citizens is as morally unjust as, for example, discrimination between African Americans and whites. Howard F. Chang, *The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory*, 40 CORNELL INT'L L.J. 11, 17 (2007) [hereinafter Chang, *The Economics of International Labor*].

63. For further reading on the concept of “tragedy of the commons,” see Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968).

its own economic situation; since such improvement may result in a more significant portion of the responsibility for refugees. This might affect the incentives of individuals to contribute to their State, which might, in turn, affect the utility.<sup>64</sup> With respect to refugees, the most commonly expressed concern is that they cause a drop in national income, as they benefit from the good of a society to which they did not contribute. To some extent, national utility correlates with national income. It should be noted, though, that utility and income are not identical, since utility is comprised of nonfiscal parameters.

However, research has demonstrated that States will have incentives to increase their share of the responsibility because it may increase national income.<sup>65</sup> Even without considering the income increase of new immigrants, there is reason to expect an income increase for the natives of the State to which these immigrants arrive.<sup>66</sup> The only negative economic effects of immigration are on the incomes of low-wage native employees, but these can be corrected through distributive measures, such as taxation.<sup>67</sup>

It should be noted that although maximizing utility is an important consideration in immigration debates,<sup>68</sup> other political and moral consid-

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64. This is comparable to efficiency arguments made in the context of property law theory, particularly domestic takings law. With regard to takings law, it has been argued that full compensation is crucial in providing incentives for owners to invest in their property. The concern raised is that giving people a share of someone else's property through a taking without fully compensating the property owner will discourage people from investing in their private property, as they will fear losing it to others, who did not invest. However, research shows that full compensation fails to provide as much of an incentive as a progressive compensation regime does. See Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 748–56 (1999).

65. See Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. REV. 1147, 1149 (1997) [hereinafter Chang, *Liberalization Immigration*].

66. Chandran Kukathas, *The Case for Open Immigration*, in CONTEMPORARY DEBATES IN APPLIED ETHICS 207, 212 (Andrew I. Cohen & Christopher Heath Wellman eds., 2005); Chang, *The Economics of International Labor*, *supra* note 62, at 4–5.

67. A comprehensive discussion of the measures for redistributing income and other profits among high- and low-wage native employees and immigrants is beyond the scope of this Article. For such a discussion, see Chang, *Liberalization Immigration*, *supra* note 65. According to Chang, the concern sometimes raised that increasing the share of responsibility and admitting more immigrants will impose a greater burden of taxation can be refuted by the fact that immigrants will also be taxed on their income as soon as they are employed in their State of immigration. Additionally, the burden of taxation does not have to be increased if immigrants are not fully integrated into the State's welfare system. *Id.* at 1155.

68. See Robert W. McGee, *Essay: Some Thoughts on the Relationship Between Property Rights and Immigration Policy*, 42 CLEV. ST. L. REV. 495, 496–500 (1994).

erations should also be taken into account when forming immigration policies.

### C. Distributive Justice Theory

Finally, distributive justice theory provides a more complex analysis of the significance of responsibility sharing with respect to refugees. Since there are countless discussions on immigration and distributive justice, I will focus on the analyses that are most substantially relevant to responsibility sharing.<sup>69</sup>

One interesting approach is that of “cosmopolitan egalitarianism,” the roots of which can be traced back to the writings of John Rawls.<sup>70</sup> Rawls puts forth an original position on how to form just social institutions.<sup>71</sup> These institutions are characterized by the fact that their decisions should be made using “a fair procedure so that any principles agreed to will be just.”<sup>72</sup> According to Rawls, parties should shield themselves behind “the veil of ignorance” so that they are unaware of their own traits and are not biased by self-interest when deciding which option is fairer.<sup>73</sup> The parties are to have no knowledge of morally arbitrary factors, such as ability, class, political situation, and social status.<sup>74</sup> They should know, however, the key characteristics of their society and culture, though not about the implications of these factors for themselves.<sup>75</sup> Rawls claims that these conditions would guarantee just resolutions.<sup>76</sup> In Rawls’ hypothetical, parties choosing among options behind the “veil of ignorance” are expected to apply the “maximum rule for choice under uncertainty.”<sup>77</sup> In other words, parties will adopt “the alternative . . . [according to which] the worst outcome . . . is superior to the worst outcome of others.”<sup>78</sup> As posited by Rawls, two principles of justice are bound to the result. The first position is that “each person is to have an equal right to the most

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69. For additional discussions on distributive justice aspects of immigration, which coincidentally touch upon responsibility-sharing issues, see, for example, SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS* 9–12 (2004); WALZER, *supra* note 9, at 46–48; Coleman & Harding, *supra* note 9, at 38;

70. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *JUSTICE*]; JOHN RAWLS, *THE LAW OF PEOPLES* (1999) [hereinafter RAWLS, *PEOPLES*].

71. See generally RAWLS, *JUSTICE*, *supra* note 70, at 136.

72. *Id.*

73. *Id.*

74. *Id.* at 136–37.

75. *Id.* at 137.

76. *Id.* at 136–37.

77. *Id.* at 152.

78. *Id.* at 152–53.

extensive basic liberty compatible with a similar liberty for others.”<sup>79</sup> The second position is that “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.”<sup>80</sup>

Although Rawls did not intend for this notion of justice to be applied internationally,<sup>81</sup> his ideas were further developed by cosmopolitan egalitarians,<sup>82</sup> who argue that since nationality is a morally arbitrary trait and therefore should remain behind “the veil of ignorance,” States have the same compelling duty towards noncitizens as they have towards their own citizens.<sup>83</sup> This theoretical paradigm can also ground claims for open borders. Such theorists claim that States interact in the most significant ways, especially in terms of participation in institutions, economy, and commerce, and are not independent of each other or isolated.<sup>84</sup> If, unlike Rawls seems to imply, States are not perceived as “self-contained,” then there is support for thinking of an international original

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79. *Id.* at 60.

80. *Id.*

81. Rawls applies his principles of justice within a “self contained national community,” meaning a national community self-sufficient and territorially defined by borders. *Id.* at 457. Rawls attempts to distinguish States from peoples in a manner that I find rather unconvincing, though I will not dwell upon this issue. It should be noted that Rawls seems to think that “peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.” *Id.* at 37. Thus, “well-ordered societies have a duty to assist burdened societies in their attempt to” achieve order. Wilfried Hinsch, *Global Distributive Justice*, in *GLOBAL JUSTICE* 54, 62 (Thomas W. Pogge ed., 2001). It does not appear, however, that Rawls believes wealth should be transferred from richer to poorer societies. For a detailed critique of Rawls’ position, see, for example, *id.* at 62–66. Other philosophers support Rawls’ conclusion stated above. Nevertheless, much like Rawls, his supporters maintain that this duty should not be interpreted to support “ethical egoism,” but rather assume the form of humanitarian assistance by governments or by international nongovernmental organizations to minimize global poverty, regardless of one’s conception of justice. See, e.g., Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 *PHIL. & PUB. AFF.* 257 (2001); Stephen Macedo, *What Self-Governing Peoples Owe to One Another: Universalism, Diversity and the Law of Peoples*, 72 *FORDHAM L. REV.* 1721, 1723 (2004); Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFF.* 113, 118–19, 128, 132 (2005).

82. I refer in the following paragraphs mostly to the ideas of the two most prominent scholars within this school of thought, Charles Beitz and Thomas Pogge. For others’ discussions of the application of distributive justice in the global sphere, see, for example, Carens, *Aliens and Citizens*, *supra* note 9; Joseph Carens, *Immigration, Welfare and Justice*, in *JUSTICE IN IMMIGRATION*, *supra* note 9, at 1.

83. Timothy King, *Immigration from Developing Countries: Some Philosophical Issues*, 93 *ETHICS* 525, 527 (1983).

84. Charles R. Beitz, *Social and Cosmopolitan Liberalism*, 75 *INT’L AFF.* 515, 518–21 (1999).



position similar to the one described by Rawls above, where the same principles of justice apply.<sup>85</sup> In the international sphere, wealth would be distributed to maximize the benefit for the least well-off persons and States.<sup>86</sup> As such, this point of view is a sophisticated twist on egalitarianism, protecting substantial, rather than formal, equality.

By extension of the theories outlined above, cosmopolitan egalitarians would support a responsibility-sharing regime that works to the advantage of the least prosperous countries and the least prosperous refugees. According to this school of thought, if States remain behind the hypothetical "veil of ignorance" and do not consider the risks that they will incur as a result of disasters in other States, they will likely promote and contribute to a responsibility-sharing regime.<sup>87</sup>

David Miller offers a rather different take on responsibility sharing, presenting it as a distributive justice problem. Although his discussion is general and not specific to immigration, Miller offers rather concrete guidelines for responsibility sharing. Calling this a problem of "remedial responsibility" he argues that

agents should be held remedially responsible for situations when, and to the extent that they were responsible for bringing those situations about . . . . [W]e look to the past to see how the deprivation and suffering that concern us arose, and having established that, we are then able to assign remedial responsibility.<sup>88</sup>

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85. THOMAS W. POGGE, *REALIZING RAWLS* 241 (1989).

86. CHARLES BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 150–53 (1979).

87. Compare this with the idea of insurance introduced by Dworkin. RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 331–40 (2000). Dworkin addresses the possibility of insurance as a substitute for welfare policies, although his discussion is entirely unconnected to immigration. The decision to take out insurance is made without awareness of the actual risk to one's employment, only with respect to one's fears and willingness to take risks. The idea of insurance can be applied at the international level, with each country deciding how willing it is to risk a mass influx of immigrants, without knowing the likelihood that such an influx will occur. Japan, which values its social homogeneity, would likely be willing to pay more to insure itself against migrants. Israel, which values its Jewish character, might do the same. Other countries might not. For further discussion on the concept of insurance in the context of responsibility sharing, see, for example, Thielemann, *supra* note 40.

88. The rationales behind the principle of remedial responsibility are somewhat similar to those of tort law. David Miller, *Distributing Responsibilities*, 9 *J. POL. PHIL.* 453, 455 (2001).

Miller believes that moral responsibility, rather than merely causal responsibility, should affect the assignment of remedial responsibility.<sup>89</sup> For example, a specific State should assist refugees if its policies contributed to their situation, either by acting affirmatively or by refraining from taking positive action.<sup>90</sup>

Furthermore, Miller maintains that remedial responsibility should be assigned to a specific agent based on its superior capacity to end a morally concerning situation.<sup>91</sup> Miller would therefore argue that in the context of refugee policy, the most appropriate State to bear the responsibility of assisting refugees is the one that has the best capacity to do so. Since using State capacity as a criterion is both complex and problematic in creating disincentives,<sup>92</sup> Miller would suggest applying this principle only after identifying those agents that have a special responsibility for causing refugee flight.<sup>93</sup>

Miller offers an additional principle according to which responsibility should be assigned to a particular State. Under the communitarian principle, Miller assumes that agents feel a greater sense of responsibility towards those with whom they share communal ties as compared to those with whom they do not.<sup>94</sup> However, Miller recognizes that this principle cannot be used for all responsibility-distribution purposes because there may be circumstances where no specific agent has communal ties with the victim population and there may be occasions in which an agent with no communal ties is the only one in a position to assist.<sup>95</sup> Additionally, this principle does not help to determine which State within a community is in the best position to be held responsible.<sup>96</sup> So, in many occasions, applying the communitarian principle could prove to be not very useful. In order to determine which agent or agents should bear remedial responsibility, Miller suggests that, in any specific situation, we should weigh their capacity and their communal ties.<sup>97</sup>

As we can see, distributive justice literature contributes significantly to this discussion. While the principles of cosmopolitan egalitarianism provide general support for burden sharing, Miller's writing offers more

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89. Miller explains that the concept of moral responsibility is one of causal responsibility. *See id.* at 457.

90. Often it is difficult to draw the line as to what constitutes moral responsibility. *See id.* at 457–59.

91. *Id.* at 460–61.

92. *Id.* at 460–62.

93. *Id.* at 462.

94. *Id.*

95. *Id.* at 462–64.

96. *Id.* at 463.

97. *Id.* at 468.

concrete and specific factors. I will elaborate on these and other considerations in the following Part.

### III. CRITERIA TO DETERMINE THE DIVISION OF THE RESPONSIBILITY

Given the above-mentioned moral considerations, in particular those discussed by David Miller, a critical question remains: how should responsibility be apportioned among States? Several criteria are relevant to this determination. This Part of the Article will review the main criteria, explaining why they should be the central considerations for responsibility sharing. Interestingly, these factors are very similar to those affecting the scope of States' duty to accept immigrants, as discussed in Part I.<sup>98</sup>

Perhaps the most important factor in determining responsibility sharing is what I would like to call a country's "absorption capacity," which is, by and large, a socio-economic criterion.<sup>99</sup> Here absorption capacity refers to a State's ability to endure additional responsibility in a way that, from a functionalist point of view, will not dramatically affect the State or will not radically influence its economy. This is an umbrella term that can be measured by assessing several indicators, such as a country's gross national product ("GNP"), average life expectancy, demand for employment, and land reserves.<sup>100</sup> A country that lacks financial resources or suffers from low life expectancy, widespread unemployment, or scarcity of land resources is likely to be unable to provide for its own citizens, let alone for additional persons.<sup>101</sup>

In many cases, it is possible to draw a correlation between the general willingness of States to welcome immigration or to extend foreign aid, and their absorption capacity. Countries such as Canada or Australia, whose absorption capacities are high given their GNPs, strong demands

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98. See Part I.

99. This consideration links well to David Miller's capacity criterion, because a State's capacity to take in immigrants is closely connected to its economic capabilities. See discussion *supra* Part II.C. In some cases, absorption capacity may also be connected to the moral responsibility criterion if a GNP has risen as a result of the exploitation of refugees' States of origin and this exploitation caused their immigration. See discussion *supra* Part II.C.

100. These are the economic criteria scholars often mention when considering factors that should inform responsibility sharing. However, they are certainly not exclusive. Other examples of economic criteria include "population density and the quality of the environmental infrastructure." See Jonathan Seglow, *The Ethics of Immigration*, 3 POL. STUD. REV. 317, 330 (2005).

101. Grahl-Madsen has referred to this as the "refugee per GNP" criterion, suggesting that there should be a correlation between a country's economic situation and its share of responsibility for the protection of refugees. Atle Grahl-Madsen, *Ways and Prospects*, 21/30 AWR BULL. 278 (1983). See also Noll, *supra* note 19.

for labor, and vast land reserves, have demonstrated interest in receiving additional immigrants.<sup>102</sup> Accordingly, they could be assigned a large share of the responsibility for the protection of refugees.<sup>103</sup>

Geographic proximity is currently one of the dominant considerations for deciding which country should bear such responsibility. This is because a geographically proximate country is likely to be the first country of asylum and, as such, will likely have to provide for the refugees who arrive at its borders. This practice in itself is not sufficiently morally justifiable. Geographical proximity is only a viable consideration if we assume that neighboring countries generally tend to have some sort of special solidarity bonds among them or to be particularly responsible for each others' situation. This assumption is oftentimes true, since in many cases neighboring countries are members of regional organizations and parties to regional covenants.<sup>104</sup> While proximity relates well to Miller's above-mentioned communitarian principle or remedial responsibility principle,<sup>105</sup> this is not always the case.

The underlying logic behind this criterion is "special solidarity bonds." Special solidarity bonds do not always exist among neighboring countries, but may exist among geographically distant States. For example, these bonds may exist between former colonial powers and former colonies,<sup>106</sup> States with strong financial or cultural ties, and countries that are

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102. For more on the connection between Australia's economic situation and resettlement program, see Glenn Nicholls, *Unsettling Admissions: Asylum Seekers in Australia*, 11 J. REFUGEE STUD. 61 (1998).

103. It should be noted that using a country's absorption capacity as a factor for apportioning responsibility should follow the same logic as implementing a relative or progressive taxation system.

104. As I will demonstrate in the following sections, the issue of geographical proximity is central to the proposal made by Hathaway and Neve. See 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 (1997). It is not the case that all States share bonds of solidarity with neighboring countries. For example, the State of Israel is surrounded by enemy countries and does not belong to any of the region's bodies or covenants. In such cases, geographical proximity does not justify imposing responsibility on a State.

105. See discussion *supra* Part II.C.

106. Jürgen Habermas argues that First World States have an obligation to absorb Third World immigrants as a way of atoning for the evils of colonialism. Jürgen Habermas, *Struggles for Recognition in the Democratic and Constitutional State*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 107, 141 (Shierry Weber Nocholsen trans., Amy Gutmann ed., 1994). To the extent that colonial powers are morally responsible for the immigration of refugees, Habermas' position corresponds with Miller's moral responsibility criterion. See *supra* note 89 and accompanying text. The special connection of asylum seekers and former colonizers is also apparent from the example given in the introduction to this Article; many Eritreans flee to Italy, which colonized Eritrea.

otherwise in an alliance. This notion correlates with the ethics of care justification to responsibility sharing.<sup>107</sup>

Responsibility may also be attributed to a State when it has an exploitative relationship with the refugee's State of origin.<sup>108</sup> For example, one State may exploit the natural resources or work power of another, resulting in the immigration of refugees. Such a case would comport with Miller's argument on remedial responsibility's connection to moral and causal responsibility.<sup>109</sup> If a State is responsible in some other way for the immigration of refugees, then it should also bear the responsibility of providing for them. The exploiting State would also internalize the costs of its exploitation. For instance, a State could be responsible for negligently polluting the air, water, or land of another State, prompting the immigration of persons in a refugee-like situation due to ecological damages. Much like the case of exploitation, the State should bear the costs of its actions by providing for the refugees. It should be observed that this consideration 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.

In this context, it is also important to consider the effect of a responsibility-sharing regime on the incentives of countries of origin. For example, more generous protection policies, which may result from a better responsibility-sharing regime, could, in some sociopolitical circumstances, discourage a State of origin from adopting more efficient policies or more just rules of resource distribution. Thus, it could be argued that policymakers should consider the effects of responsibility-sharing modalities among receiving States on the incentives and behavior of States of origin. For example, these modalities could try to incorporate the State of origin as one of the States shouldering part of the costs and burdens involved.<sup>110</sup> We might consider a related scenario, in which, under a generous protection regime, a State of origin might create policies designed to cause mass flight as a means of putting pressure on the receiving State(s). Responsibility-sharing mechanisms should create incentives to prevent such behavior.

Other relevant criteria relate to cultural and ethnic considerations. Countries resisting immigration may claim that they are culturally distinct; maintain a certain demographic structure; are too homogenous, resulting in a low assimilation rate for foreigners; or have special cultural

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107. See discussion *supra* Part II.A.

108. See Miller, *Justice and Global Inequality*, *supra* note 9, at 204–09.

109. See discussion *supra* Part II.C.

110. See *infra* Part V.E.

or ethnic characteristics that should be protected from foreigners.<sup>111</sup> These issues relate back to Miller's capacity criterion,<sup>112</sup> as the cultural and demographic profile of a State closely tracks its ability to assimilate incoming refugees. Comparing the capacities of different States is challenging, however, as capacity is a very abstract concept; accordingly, it is difficult to form policy recommendations based on this set of criteria. A theory should be developed to determine when a country's cultural or ethnic claim is justified and when it should be rejected,<sup>113</sup> though this is beyond the scope of my inquiry.<sup>114</sup> On the other hand, if a specific group of refugees has some cultural or ethnic affinity or other type of a relationship with a particular State,<sup>115</sup> then it might be justifiable to require that State to take a larger share of the responsibility.<sup>116</sup> For example, it might make sense for Israel to take a larger share of the responsibility towards Jewish refugees, as it was designed to be a Jewish State and Jewish immigrant are most likely to fit into its society.

In sum, it seems that a fairer responsibility-sharing system using established criteria should replace the current, arbitrary distribution of responsibility. As mentioned above, in the majority of cases, the most important criterion according to which responsibility should be distributed is wealth related, since providing for refugees is mainly perceived as a serious economic burden. Yet, wealth is not the only consideration. I have attempted to offer a concise list of additional criteria that should be considered when forming a responsibility-sharing regime, elaborating on Miller's use of capacity and solidarity. Over all, wealthier countries with stronger absorption abilities should bear more responsibility than poorer countries. In addition, countries that have a specific bond of solidarity with countries of origin should bear more responsibility than those that do not. Finally, countries responsible for the immigration should be required to internalize some, if not all, of the costs of providing for the immigrants. As Miller concludes, these different considerations should

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111. See Schuck, *supra* note 28, at 280.

112. See discussion *supra* Part II.C.

113. This approach might contradict that of cosmopolitan egalitarianism, though. See *supra* Part II.C.

114. Schuck uses the example of Japan in his writing, without morally judging its tendency to close its borders to refugees. See Schuck, *supra* note 29, at 274–75. The immigration policy of Israel, which almost exclusively allows only Jewish people to immigrate, has been the subject of much theoretical debate. See, e.g., CHAIM GANS, *THE LIMITS OF NATIONALISM* (2004). See also DWORKIN, *supra* note 87.

115. See discussion *supra* Part II.A.

116. Exploring cases where a State and immigrants share an ethnic affinity, Matthew Gibney argues that the State will not be as prone to barring immigrants to enter, even if it bears some economic price as a result. See GIBNEY, *supra* note 32, at 216–19.

be applied simultaneously and balanced against each other.<sup>117</sup> Criteria should be applied in a flexible and generous manner, through negotiation and discussion, rather than imposition or mathematics.<sup>118</sup>

#### IV. RESPONSIBILITY SHARING IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

This part of the Article moves beyond the moral issues raised by responsibility sharing to the more legal and practical aspects of the problem. While discussions on the moral issues of responsibility sharing are rare, international law does touch upon them, albeit in rather general terms. International law cites the need for responsibility sharing in addressing the problems of climate change, pollution, security, peacekeeping, and even immigration specifically.<sup>119</sup> International legal norms establish general principles of responsibility sharing, but almost always refrain from providing specifics, leaving it to the States to determine the important considerations and responsibility-sharing mechanisms.

Responsibility sharing as a general, fundamental principle in international law is reflected in Articles 55 and 56 of the Charter of the United Nations. Article 55 commits Member States to promote “higher standards of living, full employment and conditions of economic and social progress and development.”<sup>120</sup> In Article 56, Member States also pledge “to take joint and separate action in co-operation with the Organization” in order to achieve these ends.<sup>121</sup> These principles are further elaborated in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,<sup>122</sup> the 1966 International Convention on Economic, Social and Cultural Rights,<sup>123</sup> and the 1986 Declaration on the Right to Development.<sup>124</sup>

The Convention Relating to the Status of Refugees also emphasizes the importance of international responsibility sharing. In its preamble, the

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117. Miller, *supra* note 88, at 467–68.

118. See discussion *supra* Part II.A.

119. Eiko R. Thielemann & Torun Dewan, *Why States Don't Defect: Refugee Protection and Implicit Burden-Sharing 2* (Apr. 14–18, 2004), <http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/upsala/ws16/Thielemann.pdf> (paper prepared for presentation at European Consortium for Political Research's Joint Session of Workshops, Uppsala, Sweden).

120. U.N. Charter art. 55.

121. *Id.* art. 56.

122. G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. No. 28 (Oct. 24, 1970).

123. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

124. G.A. Res. 41/128, U.N. Doc. A/41/53 (Dec. 4, 1986).

Convention specifically recognizes the principle of responsibility sharing with respect to refugees.<sup>125</sup> Moreover, the key principle of the Convention, the principle of nonrefoulement,<sup>126</sup> prevents States from deporting persons to other countries where their lives, physical safety, or freedom would be at risk. This principle arguably forces States to negotiate responsibility sharing because it bars States from “dumping” refugees in other countries.<sup>127</sup> Since 1951, there have been some efforts to promote additional agreements on responsibility sharing for specific refugee crises, however they were unsuccessful, as there were insufficient incentives to cooperate and the agreements were not enforced.<sup>128</sup> This seems to have been the result of the fact that, instead of cooperating with other States and sharing the responsibility, some countries prefer to adopt stricter asylum laws, which lower their responsibility for assisting refugees, thereby shifting it to other countries.<sup>129</sup>

Despite the rhetoric of many governments and international organizations,<sup>130</sup> and the general norms of international laws that display a *prima facie* commitment to responsibility sharing,<sup>131</sup> the responsibility of providing for refugees remains unevenly distributed.<sup>132</sup> Some countries avoid accepting refugees in the hopes that other countries will assist them instead.<sup>133</sup> Ad hoc international responsibility-sharing efforts have been undertaken in the past, but historically, they have only been sporad-

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125. Convention, *supra* note 2, pmb1.

126. *Id.* art. 33. For an explanation of the principle of nonrefoulement, see Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 89 (E. Feller, V. Türk & F. Nicolson eds., 2003), available at <http://www.unhcr.org/publ/PUBL/419c75ce4.pdf>.

127. Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT'L L. 503, 505 (1993).

128. Suhrke offers the examples of the post-World War II resettlement program, the Vietnamese resettlement program, and burden sharing in Europe in the 1990s to illustrate ad hoc responsibility-sharing efforts. Suhrke, *supra* note 21, at 405. See also Schuck, *supra* note 28, at 272.

129. Cook, *supra* note 29, at 342–43.

130. Hathaway & Neve, *supra* note 104, at 117.

131. For recent discussions on the need to share the responsibility of providing for refugees, see, for example, *EU 'Must Share Burden of Asylum'*, BBC NEWS, June 6, 2007, <http://news.bbc.co.uk/2/hi/europe/6727637.stm> (examining the issue of offering assistance to countries like Malta and Spain, which bear a disproportionate burden); Press Release, Human Rights Watch, *US/Australia: Refugee Deal Trades Human Lives* (Apr. 11, 2007), <http://www.hrw.org/en/news/2007/04/17/usaustralia-refugee-dealtradeshuman-lives>.

132. Schuck, *supra* note 28, at 246–47.

133. Cook, *supra* note 29, at 342–43.



ically successful because these efforts were not tied to a strong moral sense of duty.<sup>134</sup> Regional instruments, while playing a significant role in the geographic area of their parties, fail to offer a comprehensive resolution to the problem of responsibility sharing.<sup>135</sup> Therefore, international mechanisms based on the principles of need and equity must still be established.

#### V. MECHANISMS OF RESPONSIBILITY SHARING

Given that international law refrains from defining the specifics of responsibility sharing, this task is left to the States. The promise behind crafting responsibility-sharing mechanisms is that they will assist in allocating responsibility among the different States.<sup>136</sup> Developing such mechanisms is difficult, mostly because the States that do not presently bear their share of responsibility have little incentive to participate. Moreover, countries currently bearing a lesser burden are the developed countries, which tend to have a significant influence on the establishment of international institutes and regimes.

Nevertheless, several types of international responsibility-sharing mechanisms are possible. Generally, these mechanisms should seek to promote a more just distribution of responsibility, according to the moral principles outlined in Parts II and III of this Article. Some mechanisms would also aim to decrease the burden on host States by decreasing the number of refugees.<sup>137</sup> In the following Sections, I will first describe six possible responsibility-sharing mechanisms and illustrate the possible impacts on hypothetical States A, B, C, and D. Then, I will discuss how each of these options interrelates.

##### *A. Quotas per Country*

The first mechanism of responsibility sharing is for States to have quotas for refugees. This means that States C and D will have to absorb some of the refugees from State B who have reached State A. Under this regime, States A, C, and D will predetermine the specific percentage of refugees that they will each accept, irrespective of the tendency of the majority of immigrants to flee to State A. Essentially, this solution phys-

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134. See Cook, *supra* note 29, at 340–41; Suhrke, *supra* note 21, at 397.

135. The most notable regional instrument regulating responsibility sharing is the Convention Determining the State Responsibility for Examining Applications for Asylum Lodged in One of the Member States of the European Community, June 15, 1990, 30 I.L.M. 425 (1991) [hereinafter Dublin Convention].

136. See discussion *supra* Part II.C.

137. See discussion *infra* Part IV.E–F.

ically redistributes the immigrants among the different countries in a fairer way.<sup>138</sup>

To some extent, this mechanism has already been implemented. Some countries allow the resettlement of refugees coming from a different first State of asylum.<sup>139</sup> However, these countries are few and far between, and they do so merely due to their sense of responsibility or for self-interested reasons, and not due to any formal arrangement.<sup>140</sup>

This proposed solution, though, is somewhat problematic, as it requires uprooting persons from the countries to which they fled and exposing them to the trauma of a second migration. In fact, when systematically and bureaucratically applied, this mechanism could result in additional human rights violations in the form of institutionalized, large-scale forced removal.<sup>141</sup> According to James Hathaway, this approach could be dangerous; it allows governments to move persons from one State to another without regard to the quality of protection they might receive.<sup>142</sup> Refugee quotas are likewise destructive to immigrant communities, which provide a huge source of comfort and assistance. These communities are shattered when the immigrants are distributed among different countries.<sup>143</sup>

Additionally, it is unclear whether this proposed solution will eventually lead to an even distribution of responsibility. For example, although State C may receive a proportionate number of refugees from State B, depending on the education, skills, and wealth of the migrant population itself, the refugees may benefit and contribute to State C, rather than exhaust its resources. In this circumstance, State C absorbs a population that triggers fewer costs, while State A must still incur the costs of refugees unable to bring assets to the State. To the degree that it is possible, the distribution of immigrants should take into consideration the special characteristics of the persons and countries in a way that minimizes the responsibility and maximizes the efficiency. However, this optimization might be too complicated to actualize.

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138. See Grahl-Madsen, *supra* note 101 (proposing a similar scheme for the European Community).

139. On the scope and limitations of the U.S. resettlement program, see, for example, David A. Martin, *A New Era for U.S. Refugee Resettlement*, 36 COLUM. HUM. RIGHTS L. REV. 299 (2005).

140. Suhrke, *supra* note 21, at 397–98.

141. Joanne Thorburn, *Transcending Boundaries: Temporary Protection and Burden-Sharing in Europe*, 7 INT'L J. REFUGEE L. 459, 476–77 (1995).

142. Hathaway & Neve, *supra* note 104, at 143–46.

143. Under this regime, special care should be taken to ensure that family members are not separated from each other.

*B. Regional or Group Responsibility-Sharing Solutions*

Hathaway and Neve argue that regional or group arrangements for responsibility sharing are the most effective solution.<sup>144</sup> They believe that the pattern of cooperation should be “common but differentiated responsibility.”<sup>145</sup> Under this mechanism, each group of States will

agree in advance to contribute to protect refugees who arrive at the territory of any state member of the group. States will cooperate in a manner akin to participation in an insurance scheme . . . [and] minimize their particularized risks by joining with others to make protection feasible throughout the territories of all interest-convergence group member states.<sup>146</sup>

Hathaway and Neve maintain that regional or group mechanisms would allow States to contribute honestly to the responsibility-sharing efforts according to each State’s particular constraints and resources.<sup>147</sup> Cooperation within such groups could be achieved more easily through an international arrangement, mostly because smaller groups can better coordinate their efforts and have a greater incentive to do so, as the costs of refugee flight are felt more locally.<sup>148</sup> Also, this mechanism is more efficient in dissociating the site of first arrival from the place of asylum, creating an incentive for States to take an interest in the treatment of refugees in other countries.<sup>149</sup> This approach has been adopted in Europe, where, in 2000, the European Refugee Fund (“ERF”) was formed to assist responsibility-sharing efforts among the European States.<sup>150</sup> Also, the

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144. Hathaway & Neve, *supra* note 104, at 143–46.

145. *Id.* at 144.

146. *Id.* at 145. This solution is offered by Hathaway and Neve with respect to the question of international responsibility sharing for temporary protection mechanisms, which they believe should be promoted. *Id.* However, regardless of the scheme of protection, this mechanism is worth considering. For a detailed explanation on the link between responsibility sharing and temporary protection, see Thorburn, *supra* note 141.

147. Hathaway & Neve, *supra* note 104, at 143–46.

148. *Id.* at 187–212.

149. *Id.* at 150–51.

150. Council Decision Establishing a European Refugee Fund, 2000 O.J. (L/596) 12, available at [http://eurlex.europa.eu/LexUriServ/site/en/oj/2000/l\\_252/l\\_25220001006en0120018.pdf](http://eurlex.europa.eu/LexUriServ/site/en/oj/2000/l_252/l_25220001006en0120018.pdf). The resources of the European Refugee Fund support “reception, integration and voluntary repatriation of people in need of asylum and humanitarian protection.” EUROPEAN COMM’N, THE EUROPEAN REFUGEE FUND: PROMOTING SOLIDARITY AND BURDEN-SHARING IN THE AREA OF EU ASYLUM POLICY 1, available at [http://ec.europa.eu/justice\\_home/key\\_issues/refugee/refugee\\_1104\\_en.pdf](http://ec.europa.eu/justice_home/key_issues/refugee/refugee_1104_en.pdf) (“The ERF aims to promote solidarity within the European Union in matters of asylum, by supporting and encouraging the efforts of Member States in receiving and bearing the consequences of accepting refugees and displaced persons. The first ERF, operating from January 2000

Dublin Accord regulates responsibility sharing among members of the European Union.<sup>151</sup>

Although groups of States or neighboring States will sometimes have more incentive to cooperate regarding refugees, Hathaway and Neve are unable to explain why States would be willing to form these collective arrangements for responsibility sharing.<sup>152</sup> Moreover, they themselves criticize this mechanism for imposing additional burdens on developing nations.<sup>153</sup> It seems that this mechanism is, therefore, unlikely to redistribute the responsibility more fairly, and might even result in institutionalizing an unfair redistribution of responsibility.<sup>154</sup> The European example cited above only illustrates the point that although some countries are willing to form group responsibility-sharing mechanisms, they do so with countries that have similar economic resources and encounter a similar risk in having to protect and provide for refugees. We can anticipate that most countries will be reluctant to join group mechanisms with countries that face a larger risk or have lesser socio-economic resources.

### *C. Funding Assistance or Global Taxation*

An alternative mechanism of international responsibility sharing simply accepts the fact that immigrants tend to favor certain countries. This mechanism seeks to facilitate a fairer division of the costs and responsibilities associated with refugees by transferring funds from one State to another. One way of implementing this idea is to have the States that bear a disproportionately small amount of the responsibility proportionally compensate the States that bear a disproportionately large percentage of the responsibility.<sup>155</sup> This solution requires States to cover the costs of providing for refugees even if they did not receive any immigrants. Essentially, it is a mechanism for distributing the costs of providing for refugees through a system of global taxation.

Calculating these costs is somewhat difficult, as they should not only take into account the out-of-pocket money spent on needy migrants. The

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until 31 December 2004, was allocated [EUR] 216 million. In June 2004, political agreement was reached on a Decision establishing a second phase of European Refugee Fund for the period 2005–2010.”).

151. Essentially, the Dublin Convention prevents the submission of asylum applications in several countries. The morality of this goal, though, is objectionable. See Dublin Convention, *supra* note 135.

152. Deborah Anker et al., *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 300–03 (1998).

153. Hathaway & Neve, *supra* note 104, at 145–46.

154. Anker et al., *supra* note 152, at 304–10.

155. Noll, *supra* note 19, at 239–40.

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.<sup>156</sup> Otherwise, over- or under-compensation might occur. Due to the complexity of a compensation regime, it seems somewhat impractical. An additional variation of this mechanism, as offered by Schuck, is that assistance to refugee-hosting countries should not be limited to monetary contribution, but rather should include political assistance, transference of commodities, and so on.<sup>157</sup>

#### *D. The Trading of Quotas*

Schuck provides yet another possible mechanism for responsibility sharing, which, in one sense, is a combination of a few of the above-mentioned solutions.<sup>158</sup> This mechanism seems to be inspired by the Coase Theorem.<sup>159</sup> The principles of the mechanism, as described by Schuck, are as follows:

- (1) agreement by states in a region on a strong norm that all ought to bear a share of temporary protection and permanent resettlement needs proportionate to their burden-bearing capacity;
- (2) a process for determining the number of those who need such protection;
- (3) a set of criteria for allocating this burden among states in the form of quotas;
- (4) a market in which states can purchase and sell quota compliance obligations; and
- (5) an international authority to administer the quota system and regulate this market.<sup>160</sup>

The idea is that countries will determine proportional refugee quotas among themselves, and if they are unable or unwilling to assume their share of the responsibility, they can then trade it to another country.<sup>161</sup> Under this regime, countries that highly value cultural homogeneity, for example, might prefer not to accept refugees, but prefer to financially support refugee resettlement elsewhere.<sup>162</sup> Schuck makes the point that some countries have already adopted this solution to some extent, since

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156. See Cook, *supra* note 29, at 337–38.

157. Schuck, *supra* note 28, at 284.

158. *Id.*

159. See Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

160. *Id.* at 270–71.

161. Schuck, *supra* note 28, at 283–84.

162. Schuck cites to the case of Japan, which, in order to preserve its homogeneity, may prefer to sell its quotas to other countries less concerned about their composition and more willing to receive refugees. *Id.* at 284.

in certain refugee crises States that do not wish to accept refugees have instead supported the countries of first asylum.<sup>163</sup>

The critics of this approach, namely, Anker, Fitzpatrick, and Shacknove, claim that this proposal is not feasible.<sup>164</sup> Furthermore, critics argue that this is yet another way of confining refugees to the developing States, not a meaningful opportunity for responsibility sharing.<sup>165</sup> The idea that States will be able to bargain effectively and equitably over quotas is unrealistic, given the imbalance of power among States.<sup>166</sup> Finally, this solution can be criticized for treating refugees like commodities<sup>167</sup> as well as for being derived from a utilitarian, rather than a distributive justice point of view.<sup>168</sup> Although Schuck has rejected or addressed these critiques, he admits that his proposal is somewhat problematic and that it should be given more thought.<sup>169</sup>

#### *E. State of Origin Liability*

Another approach of responsibility sharing proposes that the States of origin should be held liable for their externality, in the sense that refugees' host countries could demand compensation from them.<sup>170</sup> While hosting States provide only surrogate protection, this mechanism returns to the principle that a State's primary responsibility is towards its own nationals, a fundamental idea in international law.<sup>171</sup>

Scholars and experts in refugee law have previously recognized the need to hold States liable for the causes of refugees flight, arguing that refugees should receive compensation from their countries of origin.<sup>172</sup> Unfortunately, this idea, while receiving some attention during the 1980s and early 1990s, has since received little scholarly attention. At first, it was linked exclusively to the idea of repatriating refugees.<sup>173</sup> Eventually,

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163. *Id.* at 285 (referencing the United States' willingness to pay other countries to grant temporary protection for 9000 refugees fleeing Cuba in the 1990s).

164. Anker et al., *supra* note 152, at 300–03.

165. *Id.* at 303.

166. *Id.* at 305.

167. See Cook, *supra* note 29, at 349 (offering an economic critique of this issue).

168. Anker et al., *supra* note 152, at 305.

169. Peter Schuck, *A Response to the Critics*, 12 HARV. HUM. RTS. J. 385, 388 (1999).

170. Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM J. INT'L L. 532 (1986) [hereinafter Lee, *Right to Compensation*].

171. For an analysis of compensation schemes, see *id.* at 536–37. See also Int'l Law Comm'n [ILC], *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter ILC, *Draft Articles on the Responsibility of States*].

172. See Lee, *Right to Compensation*, *supra* note 170.

173. *Id.* at 533–36.

it was also understood to be a notion supported by human rights norms in domestic and international laws.<sup>174</sup>

This proposal materialized when the International Law Association drafted the Cairo Declaration of Principles of International Law on Compensation to Refugees in 1992 ("Cairo Declaration").<sup>175</sup> The Cairo Declaration stipulates, *inter alia*, 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>176</sup> However, the framers were concerned that if refugees were given the right to seek compensation from their States of origin, then host Governments would be reluctant to assist them. Therefore, another principle of the Cairo Declaration specifies the following:

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 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>177</sup>

The idea that a State is also liable to other States that provide for its nationals compliments the aims of the Cairo Declaration to protect all refugees and negates the aforementioned risk that host Governments will be disinclined to aid immigrants. According to the Declaration's rationale, States of origin have a duty to refrain from acts that would cause injury or damage to persons or property situated in the territory of other States, in this case, host States.<sup>178</sup> Naturally, the States of origin should not be unfairly burdened; thus, governments should not be required to compensate both the host States and the refugees for the same damages. The concept of State of origin liability was implemented in the context of the Geneva Accord, a model peace agreement proposed to resolve the Israeli-Palestinian conflict.<sup>179</sup> Article 7(3) of the Geneva Accord asserts that

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174. *Id.* at 538–46.

175. LUKE T. LEE, THE INTERNATIONAL LAW ASSOCIATION: REPORT OF THE SIXTY-FIFTH CONFERENCE 429 (1993).

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

177. *Id.* at 159.

178. Lee, *Right to Compensation*, *supra* note 170, at 553–54.

179. See Geneva Accord: A Model Israeli-Palestinian Peace Agreement, *available at* <http://www.geneva-accord.org/mainmenu/english> (last visited Mar. 25, 2009).

“[t]he Parties recognize the right of states that have hosted Palestinian refugees to remuneration.”<sup>180</sup>

Typically, in circumstances resulting in refugee flight, the State of origin is liable for the externality where the government fails to protect the refugee.<sup>181</sup> However, some events causing refugee and refugee-like situations cannot be attributed to the State of origin, rather the immigration is the result of a *force majeure*.<sup>182</sup> This is the case, for example, with natural disasters, outside coercion or aggression like war or occupation, or conditions the State is unable to protect against.<sup>183</sup>

Generally speaking, though, the liability of the State of origin to the host State could be justified on several grounds. First, the country of origin has breached the sovereignty of the host State by forcing it, so to speak, to accept its nationals, as well as disrupting the “order” of nationality in the world.<sup>184</sup> Second, one could argue that a “quasi-contractual” relationship exists between the host State and the State of origin, which establishes grounds for compensation.<sup>185</sup>

Through a liability rule, the State of origin would internalize the cost of its externality, which cannot be accomplished through any of the other mechanisms proposed. It should be stressed that in this context a liability rule is necessary and that any other property allocation rules would be insufficient, since the transaction costs are immense and the parties are not necessarily rational.<sup>186</sup>

State of origin liability has several positive and negative aspects. Regarding the former, State of origin liability creates incentives for both host States and States of origin, thereby optimizing the protection of the rights of refugees. In particular, it seems that this mechanism would create the proper *ex ante* incentives for States of origin to prevent the flight of refugees. This 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

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180. See *id.* art. 7(3). “Refugees shall be entitled to compensation for their refugeehood and for loss of property. This shall not prejudice or be prejudiced by the refugee’s permanent place of residence.” *Id.* art 7(2).

181. This is accomplished in the Convention through the requirement of “well-founded fear of being persecuted.” See Convention, *supra* note 2, art 1.

182. Cf. ILC, *Draft Articles on the Responsibility of States*, *supra* note 171, art. 23 (relating to the responsibility for wrongful acts that are a result of force majeure).

183. See *id.* arts. 18, 20–27.

184. Lee, *Right to Compensation*, *supra* note 170, at 555–56.

185. *Id.* at 556–58. Lee argues that “[s]ince refugees are, by definition, those forced to leave their countries by their own governments, a quasi-contractual relationship exists between their governments and those of the countries of asylum.” *Id.* at 557.

186. Coase, *supra* note 159.



conditions of their citizens, thereby discouraging immigration in a constructive manner. Hence, if applied correctly, the liability rule may not only distribute the responsibility of providing for refugees more fairly, but also decrease the number of refugees in the world. It is important to stress that, under this compensation regime, States of origin cannot excuse themselves from compensating host States by claiming that the host States could have applied stricter immigration policies. Such reasoning does not conform to the basic principles of human rights.<sup>187</sup>

While promising, the liability rule raises some questions. There is a risk that, in some cases, this mechanism could lead States to impose restrictions on the freedom of movement in order to prevent some individuals from emigrating. Consequently, this mechanism should be applied only if the right to exit a country is protected and there are serious sanctions for States that create such restrictions in an attempt to avoid liability.<sup>188</sup>

Enforcement could also be a difficult.<sup>189</sup> States of origin may be reluctant to be held liable. The ability to collect compensation from impoverished, developing countries is problematic, although there may be ways around this.<sup>190</sup>

Additionally, this compensation system could, in fact, serve as a means of preserving the unjust distribution of wealth, as the countries of origin would have to pay money to the host countries, which are frequently

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187. Lee, *Right to Compensation*, *supra* note 170, at 554–55.

188. Although some of the totalitarian regimes in the early twentieth century infringed on this right, currently, the right to leave a country is relatively well recognized and protected. Many international treaties and declarations support the right to leave one's state. For example, Article 13(2) of the Universal Declaration on Human Rights provides that "[e]veryone has a right to leave any country, including his own." G.A. Res. 217A (III) art. 13(2), U.N. Doc A/810, at 71 (1948). This right is also included in the International Covenant on Civil and Political Rights. ICCPR, *supra* note 8, art. 12(2). Although it is subject to some restrictions, the right to leave a State is also considered a customary international norm. Yaffa Zilbershats, *The Right to Leave a Country* 17–26 (Jul. 7, 1991) (unpublished Ph.D. dissertation, on file with the Brooklyn Journal of International Law).

189. Lee proposes how this liability regime should be applied. First, he argues that the host country should protest the fact that it has to deal with the immigrants of the State of origin. If its protest does not lead to resolution of the problem, then peaceful solutions under Chapter VI of the U.N. Charter should be sought, including diplomatic negotiations or judicial proceedings at the International Court of Justice. Finally, if all else fails, sanctions should be applied. Lee, *Right to Compensation*, *supra* note 170, at 560–65.

190. For example, if a country of origin is unwilling to compensate the host State, its assets in foreign institutes could be confiscated or these institutes could withhold financial support.

wealthier.<sup>191</sup> Imposing additional financial obligations on countries of origin could cause their domestic situations to deteriorate further, which, in turn, could cause another mass outpouring of refugees. Therefore, this compensation mechanism should only be applied with care and after close consideration of each country of origin's situation and capabilities.

*F. Addressing the Core of the Problem*<sup>192</sup>

The final responsibility-sharing proposal is to address problems in the countries causing the immigration of refugees and to offer assistance in resolving them.<sup>193</sup> This could be accomplished in various ways, including offering financial aid, transferring knowledge, providing military assistance, or engaging in humanitarian intervention.<sup>194</sup> Of course, some of these measures risk violating a State's sovereignty, but at times they might be more effective than attempts to regain control over a deteriorated situation. As each of these measures can be costly, they should be borne by the different countries in a proportionate manner.<sup>195</sup> Thielemann and Dewan suggest that this mechanism is most effective when it utilizes each country's competitive advantage. For example, a country with a strong military force could undertake military intervention or peacekeeping, whereas a country with a great deal of vacant land and a small population could absorb many immigrants, while a country with many investment resources could assist the country of origin in furthering development.<sup>196</sup> In sum, countries can shield themselves from the responsibility of providing for refugees by directly assisting the countries of origin.

Although desirable, it is often very difficult to address the root causes of immigration. While this discussion is complex and beyond the scope of this Article, it suffices to say that, unfortunately, States have been relatively reluctant to offer foreign aid to countries of origin and the aid that has been offered has seldom been helpful.<sup>197</sup> Also, it is unclear whether improving conditions in the States of origin will have an impact

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191. This is likely due to the fact that internalizing the costs of immigrants from a specific country is not inherently a mechanism of redistribution.

192. GIBNEY, *supra* note 32, at 247–49.

193. *Id.*; Schuck, *supra* note 28, at 261–63.

194. See generally AID IN PLACE OF MIGRATION? SELECTED CONTRIBUTIONS TO AN ILO-UNHCR MEETING (W.R. Bohning & M.L. Schloeter Paredes eds., 1994).

195. Suhrke, *supra* note 21, at 401–02.

196. Thielemann & Dewan, *supra* note 119, at 3.

197. On the limited ability of aid, in its various forms, to solve problems in States of origin, see AID IN PLACE OF MIGRATION? SELECTED CONTRIBUTIONS TO AN ILO-UNHCR MEETING, *supra* note 194.

on the migration figures, both in the short-term and long-term.<sup>198</sup> Therefore, while foreign aid is generally morally commendable, it may not always efficiently serve as a means of sharing responsibility for refugees.

#### *G. Choosing Among Mechanisms*

The mechanisms of responsibility sharing detailed above each offer costs and benefits. Ideally, a number of factors should be considered when choosing among these approaches. The first, and most important, consideration should be which mechanisms States are more willing to accept and apply, with respect to their political constraints and preferences.<sup>199</sup> Feasibility is particularly critical. A State's ability to adopt one mechanism over another may change over time, depending on various constraints, including the preferences of its citizens. Therefore, there should be some flexibility allowing States to utilize different mechanisms at different times. Another consideration is the extent to which the chosen mechanism protects the human rights of the refugees. Finally, responsibility should be assigned in a manner that is sensitive to the different, and often contradicting, moral considerations discussed in Parts II and III of this Article.

#### *H. Applying Several Responsibility-Sharing Mechanisms*

It is possible to apply more than one responsibility-sharing mechanism simultaneously. For instance, in some parts of the world, one mechanism may provide the answer to the responsibility-sharing problem, whereas another mechanism may be preferable elsewhere. Mechanisms can also overlap to some extent. For example, state of origin liability could generally apply in conjunction with another mechanism of responsibility sharing serving as a backup in cases where the State of origin cannot be held liable. Again, the key in combining the different mechanisms should be feasibility as well as the human rights of the refugees.

Instead of establishing one mechanism to fit all immigration crises, it is advisable to develop a general understanding among States that there is an international responsibility to solve these crises through cooperation and to fit the particular responsibility-sharing mechanism(s) with the specific characteristics of a given refugee crisis. The need to foster such understanding is supported, for example, by the position of some scholars that States are wary of long-term cooperation regimes.<sup>200</sup>

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198. *But see* Helena Gaytan-Fregoso & Sajal Lahiri, *Foreign Aid and Illegal Immigration*, 63 J. DEV. ECON. 515, 526 (2000).

199. Schuck, *supra* note 28, at 271.

200. Suhrke, *supra* note 21, at 402.

There are several disadvantages to a policy of tailoring a responsibility-sharing mechanism to a specific immigration crisis. Defining the scope of responsibility and assigning it on an individual basis takes time and involves substantial transaction costs, as it requires studying the patterns of migration and their causes, and estimating the costs of protecting refugees. As mentioned above, the duty of nonrefoulement affords time to evaluate the situation and develop an appropriate burden-sharing mechanism.<sup>201</sup> Nevertheless, due to the complexity of refugee crises, it is necessary to match a specific solution to a specific crisis, while taking into account the criteria discussed in Parts II and III. For example, with each new refugee crisis, responding States would have to determine which countries have sufficient wealth and solidarity with the State of origin, as well as which countries possibly bear moral responsibility for the crisis.

#### VI. COORDINATING THE EFFORTS OF INTERNATIONAL RESPONSIBILITY SHARING

An outstanding question is who should select and implement the chosen responsibility-sharing mechanism(s). Efforts to coordinate responsibility sharing tend to be complicated and costly. While States play an important role in negotiating and tailoring them, they are usually unwilling to assume further liabilities and responsibilities. As we cannot rely on individual States to switch voluntarily to a more just responsibility-sharing regime, it is important that this effort be coordinated by an international organization like the United Nations.

The United Nations and its subordinate organizations are the most appropriate bodies to determine which responsibility-sharing mechanisms best fulfill the above-mentioned moral obligations. The United Nations is comprised of many States, each with different constraints and priorities, and therefore, it constitutes the most suitable forum in which to make such decisions. In addition, the United Nations is the appropriate authority to monitor the application of burden-sharing mechanisms. This is true for a number of reasons, including, as stated above, the fact that, in several legal documents, the United Nations has embraced the principle of promoting and improving economic stability through international assistance.<sup>202</sup> If the United Nations were in charge of coordinating responsibility sharing, then States would have a duty to comply with responsibility-sharing efforts as a part of their good-faith duty to cooperate and sup-

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201. Neuman, *supra* note 127, at 505.

202. See discussion *supra* Part V.E.

port the actions of the United Nations.<sup>203</sup> In fact, the UNHCR already facilitates responsibility-sharing mechanisms in the context of refugees and displaced persons.<sup>204</sup> The UNHCR collects donations from States and private donors and uses these resources to provide for such persons around the world, thus implementing a model of responsibility sharing.

Defined according to its statute as a nonpolitical, humanitarian, and social body, the UNHCR has substantive expertise and an apolitical character that make it the most appropriate entity to oversee the distribution of responsibility.<sup>205</sup> Some may be skeptical that the UNHCR, which is comprised of representatives from different States, would remain strictly apolitical and humanitarian. This concern is unfounded when one considers that all U.N. Member States are represented in the UNHCR, including those that have an interest in actualizing a fairer responsibility-sharing regime. Moreover, under some of the proposed mechanisms, the States would have incentives to cooperate and strengthen the UNHCR.<sup>206</sup>

It should be noted, however, that presently the UNHCR system for distributing resources does not necessarily resolve the unfairness of the current responsibility-sharing situation. In fact, due to various financial constraints, resources are disproportionately used to assist refugees in the European countries, which are usually better off and receive fewer refugees than Africa and Asia.<sup>207</sup> The UNHCR itself has expressed concern on several occasions that responsibility is currently not fairly distributed,<sup>208</sup> and has made efforts to harmonize immigration norms in the hopes of increasing cooperation.<sup>209</sup> Nonetheless, discussions within the UNHCR about responsibility sharing fail to account for moral considerations in a conscientious manner.

Some scholars have proposed increasing UNHCR involvement such that refugees could only seek protection in "international territories of asylum," areas that do not belong to any specific country, but are leased

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203. Fonteyne, *supra* note 39, at 180.

204. For example, the UNHCR participated in responsibility-sharing efforts that responded to the refugee crisis during the civil war in the former Yugoslavia. *See* Suhrke, *supra* note 21, at 406–08.

205. Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V), ¶ 2, U.N. Doc. A/1775 (Dec. 14, 1950), *available at* [http://www.unhcr.ch/html/menu3/b/o\\_unhcr.htm](http://www.unhcr.ch/html/menu3/b/o_unhcr.htm).

206. Schuck, *supra* note 28, at 288.

207. *See, e.g.*, UNHCR GLOBAL APPEAL 2006, WESTERN EUROPE: RECENT DEVELOPMENTS 332–35 (2006), *available at* <http://www.unhcr.org/publ/PUBL/4371d19f0.pdf> (revealing how a lot of the donations received by the UNHCR are earmarked to be spent on the Western-European region).

208. Legomsky, *supra* note 38, at 588.

209. *Id.* at 603–06.

by the UNHCR.<sup>210</sup> Although this proposal may avoid the difficulty of assimilating refugees in specific States, it is a highly problematic approach. It is likely that the UNHCR would be unable to provide a territory of asylum accessible to all immigrants, and this scheme runs the risk of creating “ghettos” of refugees around the world. These problems demonstrate the consequences of ignoring the moral considerations that must be an element within any responsibility-sharing regime.

A detailed description of how the UNHCR should or could implement responsibility-sharing mechanisms to handle refugee crises is beyond the scope of this Article. However, it is nevertheless important to describe, in general terms, the main roles the UNHCR would have in applying the aforementioned responsibility-sharing mechanisms. Generally, with respect to any approach, the UNHCR would have to facilitate the process of weighing the different considerations outlined in Parts II and III to determine which responsibility-sharing mechanism is most appropriate, delineate its specifications, and enforce the agreement. For example, with respect to the option of setting quotas and establishing regional agreements or trading quotas, the UNHCR would oversee the process of establishing these options and see that countries fulfill their responsibility. If the options of trading quotas, taxation, or compensation were preferred, then the UNHCR would determine the appropriate amount of money that should be transferred. 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.<sup>211</sup>

Regardless of the particular role the UNHCR would play in a future responsibility-sharing regime, it would have to develop a stronger political presence in international relations<sup>212</sup> to establish and enforce the mechanism(s). In order to be effective, the UNHCR would have to gather information about the needs of asylum seekers, state capacity, and compliance, all of which fall well within its province. Moreover, it would need to assume the authority to enforce the agreed-upon norms.<sup>213</sup>

In addition to the UNHCR, international and domestic courts could play a significant role in coordinating and supervising responsibility sharing. When reviewing individual cases of asylum seekers or principle cases of asylum policy, courts could examine each States’ restrictive migration policies within the broader context of global migration trends,

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210. Terje Einarsen, *Mass Flight: The Case for International Asylum*, 7 INT’L J. REFUGEE L. 551, 551–52 (1995).

211. See also Lee, *Right to Compensation*, *supra* note 170, at 563–65.

212. Schuck, *supra* note 28, at 288–89.

213. *Id.* at 288.

rather than viewing the immigration of refugees to the country as an isolated event. Evidence of the willingness of some courts to take general migration patterns into consideration can be found in domestic court decisions already handed down.<sup>214</sup> Additionally, domestic and international courts could have jurisdiction to review responsibility-sharing agreements among States. Although these agreements are diplomatic in nature and courts often refrain from examining them, because they touch heavily upon human rights issues and constitutional questions, courts in jurisdictions well versed in these subjects may be well-equipped to consider them.<sup>215</sup>

In addition, it is possible to expect some cooperation among courts in unifying protection standards and preventing government attempts to evade them by overburdening other States. As Eyal Benvenisti recently noted in a different context, domestic courts might be willing to “join forces to offer meaningful judicial review of government action, even *intergovernmental* action.”<sup>216</sup> In other words, courts could work together to provide coordinated judicial review over questions of responsibility sharing brought before them, considering each others’ decisions and creating a unified standard of protection. Despite the substantive difficulties in coordinating such actions, recent decisions in refugee law indicate that courts might be willing to resist their own States’ policies in favor of a unifying judicial principle.<sup>217</sup>

#### CONCLUSION

Host countries must allocate resources to provide for refugees. There is no moral justification for these costs to be disproportionately borne by some countries and not others. Yet, there have not been enough incentives for States to create fair responsibility-sharing mechanisms. This is primarily the result of the fact that the countries that bear the majority of

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214. See, e.g., HCJ 4542/02 Kav Laoved Workers Hotline v. Gov’t of Israel [2006] IsrLR 1 260 (considering general information on immigration patterns, costs, and risks, in deciding matters related to Israel’s immigration policy).

215. An interesting, current example is the 2007 case where a Canadian court intervened in a responsibility-sharing agreement between Canada and the United States and essentially struck it down as unconstitutional. Canadian Council for Refugees v. Canada [2007] F.C. 1262, available at <http://www.canlii.org/en/ca/fct/doc/2007/2007fc1262/2007fc1262.pdf>.

216. Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241, 243 (2008).

217. The importance of coordinating judicial policy on and promoting independent judicial review of refugee law matters was recognized with the founding of the International Association of Refugee Law Judges. For more on this subject and for examples of well-coordinated national court decisions on refugee law issues, see *id.* at 262–67.

the burden are not very politically influential, and cannot compel other countries to assume some of the responsibility. In this Article, I have discussed several mechanisms of responsibility sharing. While there is no one perfect solution for the problem, it seems that one or more of these mechanisms should be applied, albeit with an awareness of the risks that each carries. Since all of the responsibility-sharing mechanisms are imperfect, and no solution achieves just distribution in all potential refugee crises, there is a need for additional research.

It should be noted, though, that in no time in our history has humankind been more technologically equipped than today to apply mechanisms of responsibility sharing. Given the moral duty and the ability to carry out responsibility-sharing plans, at present, it is reasonable to aim for a fairer system. However, without dismissing the significance of international responsibility sharing and the urgent need to establish mechanisms for immigration crises, States are nevertheless obligated to respond in circumstances where such mechanisms have yet to be formed: States cannot excuse themselves from fulfilling their obligations towards needy refugees merely because other States fail in their duties. Even in today's world, which lacks efficient responsibility-sharing mechanisms, there is a morally compelling reason for all States to recognize their obligation to protect refugees.