

Domination and Misframing in the Refugee Regime

Introduction

The global distribution of responsibility for refugees is structured primarily by a lack of international cooperation. As Alexander Betts points out, ‘the principle of asylum is strongly institutionalized, while burden-sharing is largely discretionary’ (Betts, 2015, p. 370). Yet it was foreseen from the beginnings of the refugee regime that a lack of cooperation over burden-sharing would lead to some states being systematically disadvantaged. The preamble to the 1951 *Convention Relating to the Status of Refugees* recognises this problem:

The grant of asylum may place unduly heavy burdens on certain countries...a satisfactory solution...cannot therefore be achieved without international cooperation. (*Convention Relating to the Status of Refugees*, 1951, preamble)

Today, these unduly heavy burdens primarily fall on those states which are already the least advantaged. According the United Nations High Commissioner for Refugees (UNHCR), the states hosting the most refugees relative to the size of their economies at the end of 2016 were South Sudan, Chad, Uganda, Niger and Lebanon (UNHCR, 2017, p. 21).

Part of the reason for this maldistribution is that the norm of *non-refoulement*, at least without supplementary international cooperation, requires refugees to be territorially present in order to claim asylum. The principle of *non-refoulement* prescribes that ‘no refugee should be returned to any country where he or she is likely to face persecution, other ill-treatment, or torture’ (Goodwin-Gill and McAdam, 2007, p. 201). The predominant interpretation of this principle is that once an asylum seeker has presented herself at a state’s border, she cannot be returned unless it has been determined that she is *not* a refugee (Goodwin-Gill and McAdam, 2007, p. 208). The principle of *non-refoulement* has been identified as a *jus cogens* norm of

international law, meaning that there is broad recognition amongst states that they are prohibited from violating its provisions (Allain, 2001).

The principle of *non-refoulement* provides a bulwark against states shirking their obligations to refugees and creates a safeguard against refugees being returned to circumstances where their basic human rights are under threat. Without supplementary international coordination, however, it creates a distribution of obligations governed by what Matthew Gibney (2004, p. 195) has called the ‘tyranny of geography.’ It is easier for asylum-seekers to reach the borders of some states than of others. As such, those states which are geographically proximate to refugee-producing regions bear the primary responsibility for hosting refugees.¹ In 2016, Turkey, Pakistan and Lebanon hosted the highest overall numbers of refugees, reflecting the fact that their neighbours, Syria and Afghanistan, were the states producing the highest numbers of refugees (UNHCR, 2017, pp. 15-17). For their part, many Northern states exploit the territorial presence required by *non-refoulement* by using ‘non-arrival measures’ to prevent asylum-seekers from reaching their territory (see Gibney, 2006).

Forms of international cooperation to combat this maldistribution based on norms of fairness have not developed. Rather, most cooperation has been *ad hoc* and based on politically

¹ The distribution of responsibility generated by the tyranny of geography should not be naturalised. Borders have been shaped by historical processes of state-formation, including unjust processes of state-formation in which colonial powers have played a significant role. As such, the dynamics in the distribution of responsibility to refugees are at least in part a legacy of that historical injustice. Even if state borders had been formed in just ways, however, the problem presented by the tyranny of geography – that states’ obligations to refugees are determined by morally arbitrary facts about where refugees can physically present themselves to state authorities – would remain. I thank an anonymous reviewer for raising this point.

expedient trade-offs. For example, Betts describes one of the more successful burden-sharing arrangements, the Indo-Chinese Comprehensive Action Plan (CPA), as being made possible through ‘issue-linkage.’ The United States’ willingness to engage was ‘underpinned by structural interdependence between the refugee crisis and its strategic interests in the region’ (Betts, 2011, p. 71). More recently, we might think of the EU-Turkey agreement, where European states’ perceived interest in keeping Syrian refugees outside of their territories led to an arrangement which promoted Turkey’s strategic interests in the EU. Such arrangements should trouble us – even where they are effective, they not only depend for their effectiveness on the alignment of interests between states, but they also reinforce an international order centred on a narrow conception of national self-interest, rather than one based on the mutually justifiable principles of cooperation.

There is, however, broad recognition of the need for agreement upon burden-sharing arrangements based on norms of fairness. On September 19th 2016, the United Nations General Assembly adopted resolution 71/1, *The New York Declaration on Refugees and Migrants*:

We underline the centrality of international cooperation to the refugee protection regime. We recognize the burdens that large movements of refugees place on national resources, especially in the case of developing countries. To address the needs of refugees and receiving States, we commit to a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees, while taking account of existing contributions and the differing capacities and resources among States. (United Nations General Assembly, 2016, article 68)

From the standpoint of justice, such an agreement is necessary in order to avoid unfairly disadvantaging states which are victims of the ‘tyranny of geography.’

Proposals for principles to govern the distribution of responsibilities for refugees between states have been elaborated in the literature. In this paper, I focus on two such proposals: a market in asylum services, and a principle of comparative advantage. I argue that these proposals suffer from two problems in common when examined from the standpoint of justice. First, they enable relations of domination to obtain between states by ignoring the background conditions of inequality upon which they are premised for their effectiveness. Second, they *misframe* the distribution of responsibility for refugees as *only* a matter of justice between states. In doing so, they ignore the legitimate claims of refugees vis-à-vis particular states. This neglect constitutes, in Nancy Fraser's (2008a; 2008b) terms, an injustice of *misframing*.

The paper proceeds as follows: first, I outline the market approach and the principle of comparative advantage and explain their *prima facie* attractive qualities. Next, I demonstrate how both proposals enable relations of domination between states. Then I show how both proposals institute an injustice of misframing. Finally, I offer some reflections on how the failings of these two approaches can provide some theoretical desiderata for a positive account of justice in the distribution of responsibilities for refugees.

The Market

One proposal for governing the distribution of obligations owed to refugees is through a market mechanism. Several such schemes have been proposed, the most prominent of which was elaborated by Peter Schuck (1997). At its core, Schuck's proposal is relatively simple: each state is allocated a quota of refugees according its relative ability to bear the burdens of refugee protection (on his proposal, captured by the indicator of national wealth) and then states then are permitted to buy and sell asylum services to each other.

Schuck's proposal has five main structural elements:

(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. (Schuck, 1997, p. 271)

Not all proposals for market mechanisms share all of these features. For example, Johannes Himmelreich (2019) has recently proposed a market in asylum services which omits the quota element, which he argues is more politically feasible. Here, however, I focus on market mechanisms which include a quota element, as they represent a stronger target for my critiques. Market approaches which use a quota system are comparatively more defensible from the standpoint of justice because they begin, at least in principle, with a fair distribution of costs between states. Departures from that distribution are then justified by reference to their being mutually beneficial for the states involved. Absent a quota element, the market mechanism begins with a distribution which leaves the burdens of refugee protection to lie where they fall according to the 'tyranny of geography.'

There are several purported advantages to the market system. The first is that it would increase the *efficiency* of refugee protection. It would give the refugee protection system 'more bang for the buck' (Schuck, 1997, p. 285). Schuck argues that it would shift the locus of protection from higher-cost states to lower-cost states, minimise the costs of moving refugees from a state of first asylum to another state, reduce incentives for long-term protection and expand them for more efficient temporary protection. States would have an interest in keeping protection temporary, since the market price 'would reflect the risk that

protection, initially meant to be temporary, would evolve into more costly situations of long-term custody and permanent resettlement' (Schuck, 1997, p. 285). Enabling states to trade asylum services with each other would be efficient because it would channel their self-interest productively. Rather than using non-arrival measures, states facing nativist backlashes against hosting refugees would purchase asylum services abroad, and states able to accommodate refugees would gain revenue from doing so – meaning that the overall provision of refugee protection would be expanded at a lower cost. Schuck uses the example of Japan as a country which would be assigned a high quota due to its national wealth but which we would expect to buy asylum services abroad because of its relatively homogenous population and lack of a tradition of refugee protection (Schuck, 1997, p. 284).

Another purported advantage of the market system is that it would expand states' freedom by providing them with flexibility as to how they discharge their obligations to refugees. Jaakko Kuosmanen elucidates this advantage:

If an institutional scheme dedicated to the protection of a human right can take into consideration duty-bearers' desire to voluntarily change places with one another without this leading to any moral problems, it seems reasonable to suggest that the scheme is superior to a scheme that—*ceteris paribus*—does not include the same flexibility. (Kuosmanen, 2013, p. 108)

These two advantages provide initial reasons to favour a market system. Efficiency and the promotion of freedom are virtues of a system of refugee protection. It remains to be seen, however, whether these virtues are being purchased at the price of justice.

The Principle of Comparative Advantage

Another proposal is to govern the distribution of responsibilities to refugees by a principle of comparative advantage. The principle of comparative advantage has recently been explicitly defended by Alexander Betts and Paul Collier (2017), but they draw on an older proposal from James Hathaway and Alexander Neve (1997). Although Hathaway and Neve use the language of ‘common but differentiated responsibilities’ in describing their proposal, the organising principle that they use in determining the distribution of obligations can be understood in terms of the principle of comparative advantage (Hathaway and Neve, 1997, p. 145).

The basic idea of the principle of comparative advantage is that the distribution of responsibilities to host refugees and to bear the costs associated with hosting refugees should be organised according to states’ relative strengths. Hathaway and Neve argue that their approach ‘recognizes that it is unrealistic to expect all states to make an identical contribution both to receiving refugees and to financing the costs of the protection regime.’ Rather, they propose, our principles should ‘take account of real differences in the relative abilities and circumstances of states and seek to maximize the overall commitment to protection by drawing on the comparative strengths of each member government’ (Hathaway and Neve, 1997, p. 145). Similarly, Betts and Collier argue that a distribution of responsibilities ought to play to the relative strengths of each participating state. They argue that a reformed refugee regime should use ‘the potential of different capabilities to harness the gains from *comparative advantage*’ (Betts and Collier, 2017, p. 103 – emphasis original) and that ‘all states can be better off if there is a degree of specialization, with states focusing on making contributions that they are relatively best placed to make’ (Betts and Collier, 2017, p. 208).

Specialization, in the context of the refugee regime, is understood as meaning that some states are more able to *host* refugees, whilst some states are more able to *pay* for the

protection of refugees. Richer states in the Global North pay to finance protection elsewhere, in states which are more geographically and culturally proximate to refugee-producing regions. Hathaway and Neve outline the criteria for decision-making about the locus of refugee protection:

First and foremost, responsibility sharing allocations should be predicated on a careful assessment of implications for physical security. Second, functional compatibility between refugees and their potential host communities is of vital importance. Third, attention should be paid to cultural harmony. The existence of ethnic, religious, or other bonds between refugees and the population of a particular host state is often indicative of a situation in which refugees are most likely to be most readily accepted. Fourth, geographical proximity between the state of asylum and the country of origin is desirable to allow for ongoing contact between refugee and stayee communities, and ultimately to facilitate repatriation. (Hathaway and Neve, 1997, p. 204)

This, as they recognise, will lead to a distribution where most refugees are hosted in the Global South. Northern states, by contrast ‘would more often contribute by a combination of fiscal transfers and residual resettlement opportunities’ (Hathaway and Neve, 1997, p. 205). Betts and Collier build on Hathaway and Neve’s proposal by arguing that refugees in the Global South can be turned into productive assets for hosting states’ economies and refugees’ autonomy enhanced by the creation of ‘special economic zones’ (SEZs) for refugees built up by foreign investment (Betts and Collier, 156-181).² Indeed, a pilot project along these lines has now been set up in Jordan. The distribution of obligations to refugees on this proposal remains structured by the principle of comparative advantage. As Betts and Collier put it: ‘the

² See also Betts and Collier (2015, 2016). The creation of SEZs also raises important moral questions about the possibility of protecting refugees against labour exploitation, which I do not pursue here.

countries that are spatially and culturally proximate provide the location for the havens, but the rich countries provide the jobs' (Betts and Collier, 2017, p. 107).

The main purported benefit of the principle of comparative advantage is also that it is efficient. It is efficient, it is argued, since it also channels states' self-interest productively. It would, according to Hathaway and Neve (1997, pp. 145-146), respond to Northern states' desires to avoid fraudulent asylum seekers entering their territory whilst addressing Southern states' concerns about the sustainability and fairness of hosting the lion's share of the refugee population. The result of such a congruence of interests is that a stable system of refugee protection, unmarred by non-arrival measures and chronic funding gaps, can be maintained to the benefit of both refugees and states upholding the regime.

A second purported advantage of the principle of comparative advantage is that it works to the benefit of refugees, since refugees have an interest in being in states which are culturally or geographically proximate to their home state, or so the defenders of the principle of comparative advantage claim (Betts and Collier, 2017, p. 107). Hathaway and Neve write:

Refugees often make choices about where to flee based on the very factors that we believe should guide the interest-convergence groups' decisions about apportioning the responsibility to afford temporary protection: security, functional compatibility, cultural harmony, and geographical proximity. (Hathaway and Neve, 1997, p. 205)

Again, it is worth noting that these purported advantages, if they can be upheld, are important. Efficiency is important in that it means protecting a greater overall number of refugees. If refugees' own interests are also advanced by the locus of protection, then this is also to the credit of the structure of the regime.

It is also worth noting, however, that there is nothing about the principle of comparative advantage itself which guarantees that both of these advantages will coincide. Unlike in the market system, where efficiency and freedom are linked structurally, efficiency and refugees' interests are aligned only contingently. The principle of comparative advantage itself only directs the refugee regime to play to states' relative strengths in order to harness the gains in efficiency. Even if this aligns with refugees' interests at the moment, nothing guarantees that it will align with refugees' future interests. In the case of a trade-off between refugees' interests in a particular location and states' relative strengths, the principle prioritises the latter over the former.

Domination

Both the market mechanism and the principle of comparative advantage represent significant departures from a distribution of obligations governed by the 'tyranny of geography' and seek to address the problem of the maldistribution of the burdens of the refugee regime. In doing so, however, they enable relations of domination between states. The complaint of domination between states has been most forcefully articulated by partisans of 'republican internationalist' views about global justice (e.g. Laborde and Ronzoni, 2016). For our purposes, however, the critical force of the complaint of domination is that it reveals flaws which are internal to the market mechanism and the principle of comparative advantage. The market mechanism purports to expand states' freedom, but it depends upon an impoverished conception of freedom. The principle of comparative advantage purports to further states' interests, but it depends on a narrow view of the short-term interests of disadvantaged states which accedes to existing injustices in the international order. We need not take on the

commitments of republican internationalism wholesale for the complaint of domination between states to have critical force.³

Theorists of domination have generally taken relations of domination to be social relationships upon which a participant is dependent, where one social actor (an individual or a collective) wields arbitrary power over the dependent participant. Frank Lovett, for example, takes persons or groups to be subject to domination ‘to the extent that they are dependent on a social relationship in which some other person or group wields arbitrary power over them’ (Lovett, 2010, p. 119). Clearly, the concepts of a *social relationship*, *dependence*, *power* and *arbitrariness* permit multiple interpretations, and I cannot do justice to the extensive debates over these concepts in the literature. Following Lovett (and Max Weber), I understand a social relationship as one in which ‘the action of each account of that of others and is oriented in these terms’ (Lovett, 2010, p. 35; Weber, 1978, p. 26). A person or group’s dependence on a social relationship can be understood in terms of the expected costs of exiting such a relationship; one’s dependence on a social relationship is high to the extent that the net expected costs of exiting that relationship are high (Lovett, 2010, pp. 38-40). The concept of power is the subject of extensive debate in the literature.⁴ For our purposes, a rough-and-ready conception of power, according to which having *power over* another means being able to induce another to do something that they otherwise would not do, will suffice. Roughly, power is ‘arbitrary’ when it is wielded according to the will of the power-holder. Some suggest that this is so when it is wielded without regard to the interests of those affected, whilst others suggest that it is so when effective and appropriate procedural

³ I thank an anonymous reviewer for pushing me to clarify the status of the critique of domination.

⁴ Important contributions here include Dahl (1957), Barry (1980), Dowding (1991), Lukes (2005) and Forst (2015).

constraints are not in place.⁵ Others have argued that it is not arbitrariness *per se* which obtains in cases of domination, but rather that domination obtains when one party's exercise of power over another takes place in a way which expresses disrespect to the dominated party (Vrousalis, 2013, p. 139). Here, I remain agnostic between these positions, and in the case at hand, power does not track the interests of those over whom it is wielded, is not procedurally constrained, and is wielded in ways which express disrespect.

With this all-too-brief sketch of what is meant by 'relations of domination,' we can now consider how the market system and the principle of comparative advantage enable relations of domination between states. To see this, we must first recognise that it is not states' 'negative' sovereignty, understood as freedom from interference in internal affairs, which is at stake here. Rather, what Miriam Ronzoni calls the 'positive' aspect of state sovereignty, which concerns 'the substantive problem-solving capacity of states' and 'the ability to make meaningful and genuinely discretionary choices on a range of issues,' (Ronzoni, 2012, p. 574) is at stake. The modern state is not an autarkic unit; states depend on wider relations of trade, governance (and so on) in order to be able to make meaningful policy choices. As David Held has ably demonstrated, developments such as human rights, the internationalisation of security, environmental changes, the communications revolution and the deregulation of capital markets have 'combined to create forms of regional and global interconnectedness which are unique, which are more intensive and extensive than ever before, and which are challenging and reshaping our political communities and, in particular, aspects of the modern state' (Held, 2000, p. 396). This is not to say that the modern state is defunct and that all power now rests in the hands of transnational networks. Rather, it is to say that for the modern state to achieve positive sovereignty, understood as institutional 'self-

⁵ For the former view, see Pettit (1997, p. 55). For the latter, see Lovett (2010, pp. 113-117).

mastery,' non-interference is not enough (Ronzoni, 2012, p. 577). States depend on wider relations with others, and can be blocked from making meaningful and genuinely discretionary choices when they are dependent on the arbitrary will of other states. The state's capacity to achieve positive sovereignty is dependent not *only* on non-interference, but on the 'background justice' of the international order – the regulations and lack of regulations which constrain the actions of others and which make it possible for states to make genuinely meaningful policy choices.⁶

Neither the market system nor the principle of comparative advantage, unless it were coercively imposed, would involve direct interference in the state's internal affairs. Rather, both undermine the ability of disadvantaged states to make meaningful and genuinely discretionary choices. Consider first the market. It is unlikely that any agent would compel a disadvantaged state to enter the asylum market as a seller under the threat of coercive force. However, states are not on equal terms when it comes to choosing whether to enter into contractual relations in buying and selling asylum services under background conditions of inequality. Poorer states which lack resources crucially needed for their own development would likely have no effective choice but to host refugees, whereas richer and more powerful states would have effective choice. Though poorer or less powerful states may not be coercively interfered with, achieving positive sovereignty may become conditional on their accepting offers to sell asylum services. Successful relations in, for example, trade or visa liberalisation may become a *quid pro quo* for entering the asylum market as a seller. Or, poorer or less powerful states may simply enter the asylum market with the expectation that this will help them to maintain the relationship that they need in order to achieve positive sovereignty in some domain in the future. As Cécile Laborde and Miriam Ronzoni argue,

⁶ For the notion of 'background justice' in the international order, see Ronzoni (2009).

‘when poor countries ingratiate themselves to please the richer states they depend on, without stronger states making any explicit demand or threat, we have a paradigmatic case of international domination without interference’ (Laborde and Ronzoni, 2016, p. 289). Once this becomes clear, the apparent virtue of freedom in the market system seems to ring hollow. Under the market system, perhaps richer and more powerful states have the genuine and effective ability to make choices in buying or selling asylum services, but poorer and less powerful states certainly do not.

The principle of comparative advantage operates similarly. It is highly unlikely that a scheme based on this principle would be implemented coercively. Rather, it would likely be the subject of an international agreement, such as the *Global Compact for Refugees*. Because the principle of comparative advantage takes national wealth to be a particular ‘strength’ that a state might have, akin to geographical and cultural proximity, it becomes a *de facto* way of assigning responsibilities for hosting refugees to those states in refugee-producing regions and allowing states in the Global North to buy their way out of hosting refugees. The principle of comparative advantage appeals to the interests of states in the Global North in keeping refugees outside of their territory. For Southern states, although it takes their interests into account in that it represents an improvement on the presently unjust *status quo*, it does not pay any attention to what their interests would be *were it not for the present unjust background conditions*. It represents the interests of states under conditions of an imbalance of power, not the interests of free states. Why would poorer and less powerful states agree to an international agreement along these lines? They would do so for exactly the same reasons that they would enter the asylum market as a seller – because of a practical need for financial resources or because of an expectation that their acquiescence would lead to successful relations in other domains needed for them to achieve positive sovereignty.

The forms of power that richer and more powerful states may exercise over poorer and less powerful states in these contexts may be narrowly economic forms of power – for example, where transfers of development aid or trade liberalisation agreements are made conditional on poorer states acceding to the demands of richer states. In such cases, the relation between richer and poorer states might be plausibly described as a relation of exploitation, at least according to some conceptions of exploitation.⁷ In other cases, the forms of power that more powerful states exercise will not be narrowly economic – for example, where accession to regional associations, diplomatic goodwill or the benefits of military security are made conditional on less powerful states acceding to the demands of more powerful states. In either case, however, the relationships between states that would obtain under either the market system or the principle of comparative advantage can be characterised as ones of domination on the basis of the criteria set out above. Poorer and less powerful states are dependent on their social relationships with richer and more powerful states, because they need to be engaged in such relationships in order to achieve positive sovereignty. The ‘exit costs’ of leaving such a relationship would be high, given the difficulties of operating autarkically in

⁷ According to Nicholas Vrousalis’ (2013, p. 132) account of exploitation, which he restricts to the economic sphere, ‘A exploits B if and only if A and B are embedded in a systematic relationship in which (a) A instrumentalizes (b) B’s vulnerability (c) to extract a net benefit from B.’ In the case at hand, (a) richer states instrumentalise (b) poorer states’ economic vulnerability (c) in order to extract the benefit of achieving their narrowly self-interested goal of refugees being located elsewhere. If this is best understood as a case of exploitation, then this appears to lend support to Vrousalis’ claim that exploitation is a form of domination. However, other plausible accounts of exploitation are available, and nothing in my argument hangs on this being a form of exploitation. Important contributions on exploitation include Roemer (1982), Steiner (1984), Werthermeier (1996). For an overview, see Vrousalis (2018).

the context of a globalised international order. The states upon which they are dependent are generally the richer and more powerful states, which are able to determine the range of options available to poorer states. They have power over these poorer and less powerful states because they are able to induce them to choose options that they would otherwise not choose, were the background conditions not ones of inequality. Finally, the wielding of this power in the context of the refugee regime would be arbitrary; it would issue from the will of the more powerful states, fail to track the genuine interests of the less powerful states, and would not be constrained by appropriate and effective procedures. Such exercises of power would also express disrespect, in that they could not be mutually justified in what Vrousalis calls an ‘embarrassment-free dialogue amongst interested parties’ (see Vrousalis, pp. 139-140). As such, the relations engendered by market system and the principle of comparative advantage would be ones of domination between states.

The problem of domination becomes worse if we recognise that, under some conditions, refugees can be *produced* by the activities of richer states. Consider, for example, those made refugees by the impacts of climate change. Under current international law regulating refugee status, those displaced by the impacts of climate change are not eligible for refugee status, which is rather ascribed on the basis of a well-founded fear of persecution (*Convention Relating to the Status of Refugees*, article 1). This basis, however, is contested in the literature, with some arguing for an expansion of the grounds of refugee status (e.g. Shacknove, 1985; Gibney, 2004; Carens, 2013).⁸ According to one plausible reconstruction of the normative rationale for the refugee regime, refugees are those whose basic rights are unprotected in their own state and who must appeal to the international society of states for

⁸ For accounts which defend the relevance of persecution, see Cherem (2016), Lister (2013) and Price (2009).

their protection (Owen, 2016a, p. 280). The refugee has an ‘*exceptional*’ status in the international order, in that she is ‘entitled to the *protection of a state which is not their own*, in the context of a predominant norm of global governance that states are fundamentally responsible to, and for, their own citizens’ (Owen, 2016, p. 271 – emphasis original). It is entirely plausible that the impacts of climate change will render some individuals unable to avail themselves of the protection of their own state, and in need of protection by the international society of states. Consider, for example, the effects of slow-onset events such as sea-level rise, sudden-onset extreme weather events, or cases of civil unrest and generalised violence where climate change has had some causal role in creating resource scarcity.⁹

In this context, the domination of poorer and less powerful states by richer states compounds itself. In fossil fuel economies, the production of wealth is systematically related to increasing greenhouse gas emissions. The cumulative impact of these emissions is that some are rendered refugees. Richer states are able to outsource the protection of refugees to poorer and less powerful states precisely because of their wealth – wealth that they have generated through fossil fuel economies. As such, through their production of wealth, they both contribute to the growing numbers of refugees and keep those refugees outside of their borders. The increased burden on the refugee regime brought about by the production of wealth in fossil fuel economies is, on this picture, a negative externality. Richer states, at least as long as they maintain fossil fuel economies, can simply pay poorer states a portion of their growing wealth in order to be able to ignore the consequences of their energy-intensive economies. In doing so, they create a greater burden for the system as a whole and privatise the benefits of doing so. Richer states are able to gain wealth and influence, further strengthening their bargaining position, but poorer and less powerful states are unable to

⁹ For a good overview of the dynamics of climate-induced displacement, see Kälin (2010).

similarly benefit from the production of wealth since they are unable to induce richer and more powerful states to host refugees. The market system and the principle of comparative advantage ignore this dynamic in the relation between the production of wealth and the assignment of refugee hosting obligations to poorer and less powerful states.

Both Hathaway and Neve and Schuck recognise that their proposals would lead to a distribution of refugees where most are hosted in the Global South. Hathaway and Neve (1997, pp. 205-206) argue that this is acceptable because states in the Global North currently maintain this dynamic through their usage of non-arrival measures, and their proposal would make the responsibility sharing more equitable. Their proposal is supposedly defensible because it represents an improvement on the already unjust *status quo*. Similarly, Schuck writes:

Although the proposal entails many problems, virtually all of those problems already exist, sometimes to an even greater degree, in the current system. For this reason, I urge the reader to keep the “compared to what” question firmly in mind as she ponders these questions.

(Schuck, 1997, p. 250)

Both the principle of comparative advantage and the market system represent an improvement on the current situation, it is argued, since they both involve redistribution which would offset some of the burden currently being borne by those states most affected by the ‘tyranny of geography.’

Claiming that the relevant point of comparison is the *status quo*, however, presumes that there are no other possible burden-sharing arrangements that might be put in place. Clearly, a proposal can be better than the *status quo* without it being a proposal that we ought to endorse from the standpoint of justice. A more promising argument would be to argue that these proposals are the most just alternatives in the set of feasible alternatives. If this defence

is to be upheld, then proponents of these accounts owe us an explanation of why their proposals are not only improvements on the *status quo*, but of why they are the most just feasible arrangements whilst other proposed alternatives are either unjust or infeasible.¹⁰ It is worth noting, however, that proponents of these approaches would also face the difficulties of convincing states which benefit from a currently unjust scheme to uphold a scheme which is less to their immediate advantage.

Misframing

Thus far, we have only engaged with the question of the fair distribution of obligations to host refugees in terms of justice *between* states. In this section, however, I put this focus into question. I argue that both the market system and the principle of comparative advantage institute an injustice of *misframing*. The complaint of misframing is conceptually distinct from the complaint of domination between states. Both, however, identify important injustices in the proposals for a market mechanism and a principle of comparative advantage. Where the complaint of domination between states focuses on the relations of power that obtain between states in the international order, the complaint of misframing focuses on the relations of justification and participation that obtain between refugees and the global institutions of refugee protection.

The crux of the criticism is that both the principle of comparative advantage and the market system limit the claims of justice which determine how obligations are distributed to those made by would-be hosting states. They take it to be the case that, aside from the obligation to be provided with asylum, refugees themselves have no claim as to the *way* in which obligations are distributed. Both schemes neglect the possibility that the refugee may have a

¹⁰ On the feasibility of reforming the refugee regime, see Ferracioli (2014).

legitimate claim that the split between financial and hosting obligations be altered with respect to her particular case. The refugee's claim could be one to be hosted in a particular state or set of states, or *not* to be hosted in a particular state or set of states. These claims may be based on a wide range of reasons, as David Owen identifies:

refugees may have reason to favour a given range of states on the basis of its proximity to their home state, the language(s) they speak, its cultural similarity to their home state, the existence of a significant diaspora from their homeland in the state, the range of opportunities it offers given their education or occupational skills, its religious composition, or a number of other factors, where refugees may order and weight such factors quite heterogeneously.

(Owen, 2018, p. 36)

There are also other important claims that refugees might raise against a particular state to argue that that state has a particular obligation to host them. For example, the relationship between refugees from former colonies and former colonial powers might be mobilised to argue that a particular state owes a particular refugee admission. The colonial experience has been central to the formation of the contemporary international order, and continues to importantly structure the relations between states, and between individuals and former colonial powers, today (see Getachew, 2019; Anghie, 2004). This history, and its enduring effects, may well give rise to special transnational claims of justice. Lea Ypi, Robert Goodin and Christian Barry, for example, have argued that the political association constituted by colonial rule can give rise to enduring associative duties even after colonial ties have been severed (Ypi, Goodin and Barry, 2009). Though they focus on duties of distributive justice, we might think that the same reasons might ground a special obligation on the part of former colonies to host refugees from former colonies. Sara Amighetti and Alasia Nuti have argued that historic colonial relations can have an important role in the mutual constitution of the identities of those in former colonial powers and former colonies (Amighetti and Nuti, 2016).

Claims based on identity, shaped by the histories of colonialism, may similarly ground special obligations on the part of former colonial powers to host refugees from former colonies.

To these weighty claims, we may even add apparently less weighty claims that refugees might make, such as the desire to see a particular style of architecture. The immediate point is not the weight of these claims, though many of them are likely to bear significantly on the prospects for refugee integration and inclusion, as Owen points out (Owen, 2018, pp. 36-37). Rather, the point is that both the market system and principle of comparative advantage rule out these claims from the outset. At best, refugees' own choices can only be a secondary concern used to locate particular refugees *after* the split of hosting and financial obligations between particular states has been determined.¹¹

This problem has recently been identified as 'The Choice Question' by Mollie Gerver, who takes it to be a 'moral cost' to markets in asylum services (Gerver, 2018, p. 58). Gerver uses the example of a Syrian poet and journalist, Yazan, being able to continue his poetry career by reaching out to poet friends in Paris and arranging to be granted asylum in France.

According to Gerver, Yazan's asylum is 'morally preferable' to a system which does not give him the same choice, such as a market mechanism (Gerver, 2018, p. 54). We might also consider a refugee making a claim to family reunification in a state which has been determined to have no obligations to host, and only obligations to pay, according to either the

¹¹ If a market system allows states to buy and sell asylum for *particular* refugees, rather than merely asylum 'spots', then refugees' choices would not even be able to operate as a secondary determinant of where they are to be hosted. Schuck's proposal would allow for states to make decisions based on information such as 'refugees' social class, level of education, ethnicity, age, religion, family status' and so on (Schuck, 1997, p. 286).

principle of comparative advantage or through a market mechanism. Although the refugee retains a right to be hosted *somewhere*, her claim to alter the distribution of hosting and financial obligations in virtue of her interest in reunification with her family cannot be heard, since the distribution determined by the market or the principle of comparative advantage already rules out the possibility of her being reunited with her family.

According to both the market system and the principle of comparative advantage, however, hosting and financial obligations are fungible. If this is the case, then different splits between financial and hosting obligations can equally satisfy distributive justice between states. The refugee appears to have a compelling claim that the split between hosting and financial obligations should be altered, about which we should be indifferent when considering distributive justice between states. Yet, according to these proposals, states owe her no justification for the particular split of financial and hosting obligations that they have chosen. Of course, states may have their own reasons for preferring a particular distribution of hosting and financial obligations which might compete with, and perhaps outweigh, the claims of particular refugees. But the market system and the principle of comparative advantage exclude refugees' claims from the outset. This exclusion cannot be based on the goal of distributive justice between states, which provided the initial rationale for these approaches.

Failing to consider these kinds of claims constitutes a particular kind of injustice: an injustice of *misframing*. Misframing, as Nancy Fraser understands it, 'occurs when political boundaries and/or decision-rules function wrongly to deny some people the possibility of participating on a par with others in social interaction – including, but not only, in political arenas' (Fraser, 2008a, p. 18). Most complaints of injustice focus on injustices which Fraser has called 'the "what" of justice,' which are first-order claims of injustice made on the basis

of ‘redistribution, recognition and representation’ within established frameworks for political claims-making (Fraser, 2008b, p. 405). Misframing, by contrast, is a second-order injustice which focuses on ‘the “who” of justice’ (Fraser, 2008b, p. 407). Misframing is a ‘*metapolitical* injustice, which arises as a result of the division of political space.’ Injustices of misframing occur when political boundaries ‘are drawn in such a way as to wrongly deny some people the chance to participate at all in its authorized contests over justice’ (Fraser, 2008b, p. 408). Fraser has in mind the presumption that political decisions should be taken within the ‘frame’ of the territorial state, which ‘insulates extra- and non-territorial powers’, such as multinational corporations, ‘from the reach of justice’ (Fraser, 2008a, p. 23). In the case of the distribution of obligations to host refugees, the frame is not that of the territorial state, but of the international order. The market system and the principle of comparative advantage conceive of the question of how to distribute obligations to refugees as being exclusively a matter of *international* justice (i.e. one which regulates claims of justice between states) and neglect that it also has a *transnational* aspect (i.e. it concerns claims of justice made across state borders). They ignore that refugees have legitimate claims of justice vis-à-vis particular states which concern where they ought to be hosted.

Now, one might object that the international frame is in fact the appropriate one – that is, one might deny that these approaches *wrongly* divide up political space. This argument could be advanced on two possible grounds. First, one might argue that since hosting refugees engenders costs, the distribution of obligations to refugees must be justified to the cost-bearers, which are the states upholding the regime. Second, one might argue that we can legitimately exclude refugees’ claims since they only have a right to the provision of asylum and not to a particular *locus* of asylum.

In response to the first objection, note that there are at least two questions which need to be addressed by an account of justice in the refugee regime:

- (1) Where should (particular) refugees be hosted?
- (2) Who should bear the costs of hosting refugees?

As my opponent might point out, these questions are related, in that where refugees are hosted affects the distribution of costs. If the distribution of obligations to host refugees is altered, so is the distribution of costs, on the assumption that hosting refugees engenders costs (in infrastructure, public services, and so on).

However, it is also possible to *redistribute* resources between states to alter how costs associated with hosting refugees are distributed. This means that we can address these questions separately, since we can determine what the distribution of costs should be and hold this constant through redistribution whilst determining separately where refugees should be hosted. This claim should be accepted by the proponents of both the principle of comparative advantage and the market system, because they also rely on it. In the market, the locus of refugee protection is decided by states buying and selling asylum services. When they engage in these transactions, the cost of hosting refugees does not transfer along with the obligation to host because, in the act of *buying* asylum services, the buyer assumes the cost of hosting refugees. On the principle of comparative advantage, states in the Global North directly finance the provision of asylum in refugee-producing regions. Here, transfers and in-kind agreements such as the provision of jobs in SEZs offset the costs of hosting refugees. So, the proponent of the market system and the principle of comparative cannot claim that the costs of hosting refugees must accompany physical presence.

My opponent may be right to suggest that (2) should be addressed to states in the international community, since they are the cost-bearing agents in upholding the refugee regime. For this question, the relevant ‘frame’ may well be international. Any answer to (1), however, must be justified not only to states, but to individual refugees as well. Individual refugees make apparently compelling claims of justice vis-à-vis particular states or groups of states, as we have seen in the case of Yazan and the case of family reunification highlighted above. As Owen puts it, failing to consider refugees’ choices means failing to treat them as ‘autonomous sources of claims to justification’ (Owen, 2018, p. 36). This is to say that refugees are part of the justificatory community when it comes to question (1) and may advance claims of justice. States are also part of the justificatory community and may themselves make claims of justice vis-à-vis particular individuals, or vis-à-vis the society of states as a whole. For example, a state might claim that its population density means that it is more difficult for it to host refugees, and appeal for other states to host more whilst it pays more on this basis.¹² Given that both kinds of claims advance relevant reasons, it would seem that the relevant ‘frames’ are both international and transnational.

My opponent might object that (1) and (2) cannot be *entirely* separated, since the *total* cost of protection in the refugee regime will be increased if more refugees are hosted in states where protection is costlier. Assuming that the costs associated with hosting refugees are higher in states with larger economies, then the total cost of protection will be higher the more refugees are hosted in higher-cost countries. States might thus object that if refugees’ claims to be

¹² Population size is one of the indicators of a state’s ‘integrative capacity’ on Gibney’s view, alongside its gross national product (GNP). See, Gibney (2015). In earlier work, Gibney included other factors, such as a state’s immigration history (Gibney, 2004). For a good discussion of these factors as reasons for determining the differential responsibilities of states, see Owen (2016b).

hosted in particular loci of protection are satisfied (and if refugees generally choose to be hosted in higher-cost states), then the total costs of the refugee regime will be higher. This, however, does not justify an approach which excludes refugees' participation in determining the distribution of obligations to host refugees. At most, it shows that states collectively have a claim against too many refugees being hosted in high-cost states. The relative weight of this claim and refugees' own claims to a particular locus of protection is yet to be determined. But it is important to recognise that these are precisely competing *claims* which can be settled by reference to a public and mutually justifiable set of rules.

Understanding that both refugees and states might advance claims for or against particular loci of protection helps us to understand why the second argument also fails. The second argument is that refugees have no *right* to choose the locus of their protection, only a right to asylum *somewhere*. This is a common claim in the broader literature on refugees (e.g. Carens, 2013, p. 216; Miller, 2016, p. 86). Hathaway and Neve accept that it is 'humane and pragmatic' to take a refugee's choice as a 'source of data' in decision about the location of protection, but argue that ultimately states can distribute responsibilities between themselves since 'the right of refugees to decide where to solicit protection is not absolute, but follows from the risk of *refoulement*' (Hathaway and Neve, p. 205, p. 145).¹³ Defenders of the market explicitly claim that refugees have no right to choose where they are protected. Schuck writes that 'refugees...have no rights *qua* refugees to be protected in one state rather than in another' (Schuck, 1997, p. 295) and Himmelreich writes that 'the traditional justification for the right to asylum does not yield the choice-right [to choose where one's application is considered]' (Himmelreich, 2019, p. 226). The refugee has no right to choose where she is

¹³ Betts and Collier argue that there is no general 'right to migrate' but do not engage directly with this argument (Betts and Collier, 2017, pp. 110-117).

protected, they argue, and so states may decide the locus of protection between themselves through a market system.

Even if it is true that there is no general right for refugees to choose where asylum is provided, it does not follow that the location of refugee protection is only a matter of justice between states. Refugees may still have important claims of justice vis-à-vis particular states which need to be considered in determining a just distribution of obligations to host refugees. We need not say anything as strong as that refugees have a *right* to choose in order to recognise these claims. Ultimately, it could be determined that many such claims have little weight. The problem with market schemes and comparative advantage, then, is not that the claims of refugees are not *satisfied*, but that they are not *considered*. Joseph Carens elucidates this point:

Refugees have a moral right to a safe place to live, but they do not have a moral entitlement to choose where that will be...this does not mean that refugees' preferences about where they relocate carry no moral weight, but rather that their preferences should not be regarded as the only relevant consideration. (Carens, 2013, p. 216)

Under the market system and the principle of comparative advantage, it is not even possible to consider the claims of refugees. This is what it means for the debate to be *misframed* as a matter of justice only between states.

The complaint of misframing might be pushed further. Both the market mechanism and the principle of comparative advantage presuppose a background view of the international order which Fraser (2008b, p. 400) calls the 'Westphalian frame,' which sees the international order as being comprised of discrete, mutually exclusive territorial states, and which sees the territorial state as the primary 'context of justice' (Forst, 2011, p. 188) in which claims of justice can be raised by individuals. The complaint of misframing might be further employed

to criticise this background assumption.¹⁴ If institutions based on the ‘Westphalian frame’ systematically frustrate the ability of individuals to raise first-order claims of (in)justice, then those institutions may well institute an injustice of misframing. It certainly seems plausible that the contemporary international order constitutively involves the denial of claims of injustice based on, for example, race and ethnicity, and that such injustices are not aberrations in an otherwise benign institutional order.¹⁵ Here, however, I do not pursue this further line of criticism. My aim in this section has been more limited: I have sought to demonstrate that *even if* we take for granted the background assumptions that the defenders of the market mechanism and the principle of comparative advantage presuppose, their proposals *still* institute an injustice of misframing. As with the criticism of domination, we need not endorse Fraser’s view of the requirements of justice wholesale in order for the criticism of misframing to have critical force. Rather, by showing that this criticism applies to the market mechanism and the principle of comparative advantage, even taking for granted the background normative view that they share, we can see that the criticism has force even for those who do not subscribe to Fraser’s broader view of the requirements of justice.

Conclusion

Both the market system and the principle of comparative advantage share two features which are objectionable from the standpoint of justice. First, they enable relations of domination

¹⁴ I thank an anonymous reviewer for raising this point.

¹⁵ Both the manifest historic injustices that have shaped the formation of the contemporary international order and developments of globalisation identified in the previous section may give us reason to think that the contemporary international order systematically frustrates individuals’ claims of justice which reach across borders.

between states. Second, they misframe the question of the distribution of obligations to host refugees as only a matter of justice between states, thereby excluding the legitimate claims of refugees. These conclusions point towards important lessons for constructing a positive account of justice in the distribution of obligations to refugees.

The first lesson of these critiques is that it is crucial to go beyond a narrow ‘negative’ conception of sovereignty and to examine relations of power between states. Insofar as we value states being able to make meaningful policy choices on some range of issues, then it is important to ensure that the global institutional arrangements which govern the distribution of obligations to refugees do not render the ability to make such choices contingent on acceding to the demands of richer and more powerful states. The market system and the principle of comparative advantage, by ignoring positive sovereignty, take states to be essentially isolated units and ignore the wider domains of trade, governance and so on in which states exercise power. They are unable to recognise the ways in which their proposals differentially affect poorer or less powerful states.

The second lesson is that an account of just distribution of obligations to host refugees will be incomplete if it fails to consider individual refugees’ claims vis-à-vis particular states. Both the market system and the principle of comparative advantage only consider the international context of justice and fail to consider the transnational aspects of justice in the distribution of obligations to host refugees. Interestingly, one upshot of the discussion of this point was that the distribution of *costs* may well be a matter of justice between states, since it is states who bear these costs, but that the locus of protection has a transnational element.

One implication of this is that it is plausible for an account of justice in refugee regime to separate these two elements, and to regulate them according to different principles. For example, we might think of the provision of refugee protection as something like the

provision of a global public good, which must be regulated by norms of fairness in order to avoid the problem of some states free-riding by reneging on their commitments.¹⁶ A reasonable distribution of costs might be one which is equally burdensome for each state, with departures from equality being justified by reference to particular states having responsibilities to bear the costs of particular refugee flows.¹⁷ This does not yet say anything about the locus of refugee protection. The locus of protection might be better determined by another scheme where refugees rank their preferences (e.g. Jones and Teytelboym, 2017), or one where connections to particular states such as family ties or shared language bear the same relative weight in decision-procedures.

Disaggregating these questions also helps us to explain our moral intuitions in some cases. For example, in cases of wars of foreign aggression, we might think that belligerent states have responsibilities to bear the *costs* of hosting the refugees they create, but that it may nonetheless be inappropriate for refugees to be actually *hosted* in the belligerent state. While these remarks remain speculative, the point is to recognise that the question of which states should bear the costs and the question of the locus of protection are distinct. A full account of the just distribution of obligations to host refugees must provide convincing answers to both of these questions, but the answers to these questions need not determine each other.

One final point to note is that although the market system and the principle of comparative advantage face serious objections from the standpoint of justice, they do represent important

¹⁶ For a discussion of the ‘global public good’ model of the refugee regime, see Suhrke (1998).

¹⁷ The idea that states bear special responsibility for those who they have caused to become refugees appears to have widespread appeal. See, for example, Walzer (1983, p. 49), Carens (2013, p. 195), Miller (2016, p. 90). It is rarely made clear, however, whether that responsibility is best understood in terms of an obligation to bear costs, or an obligation to host.

departures from the current distribution of obligations to host, governed as it is by the ‘tyranny of geography.’ If we take seriously our collective obligations to protect refugees, then it is imperative that we find a way of meeting our obligations on terms which are fair to all. From the standpoint of justice, leaving the distribution of obligations to lie where they fall is not an acceptable option.

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