COMPARATIVE ETHNIC POLITICS IN THE UNITED STATES: Beyond Black and White

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Abstract  The study of race in American politics has largely been confined to the examination of African-Americans and their relations with whites. Demographic changes in the American population necessitate that we broaden this perspective to include other nonwhite groups. In this essay, we examine the similarities and differences between African-Americans on the one hand and Latinos and Asian-Americans on the other. In particular, we identify factors that are likely to distinguish the political experiences of these groups, focusing particularly on the roles of immigration and group identity. We also examine the state of knowledge regarding circumstances under which intergroup competition and cooperation are likely to occur. We suggest that neither competition nor cooperation is inevitable; rather, the emergence of either will be contingent on the specific historical and demographic circumstances of the community and the choices and attitudes of both political elites and mass publics.

INTRODUCTION

In 1930, O. Douglas Weeks, a professor of government at the University of Texas, published an article in the American Political Science Review entitled “The Texas-Mexican and the Politics of South Texas.” Weeks (1930) examined the political orientations of the residents of 13 South Texas counties who, today, we would identify as Mexican-Americans, and described their political interactions with Anglos and with governmental institutions. It would be 74 years before the APSR would publish another article—the only other article—specifically focused on the politics of Latinos or Hispanics in the United States. Similarly, there have been four articles in the entire history of the American Journal of Political Science and three in the Journal of Politics. These tiny numbers are emblematic of the paucity of minority politics inquiry, for much of the discipline’s history, that is not specifically focused on the politics of African-Americans and black-white interactions.

Owing in part to pioneering work by early African-American scholars and thinkers, the centrality of the “race question” to Southern politics specifically and...
American politics more broadly, and the determination of early African-American political scientists and the National Conference of Black Political Scientists, scholarship on African-Americans has existed for a century and flourished within the boundaries of contemporary political science for several decades. Debates by black scholars over the place of African-Americans in American life and over the path to full-scale social and political inclusion predate emancipation (e.g., Frederick Douglass’s famous 1852 address “What, to the Slave, is the Fourth of July?”) and emerged more fully around the turn of the twentieth century, with the publication of Washington’s *Up from Slavery* (1901) and DuBois’ *The Souls of Black Folk* (1903). Political scientists—both white and black—have long examined issues of race in American politics, beginning most notably with Myrdal’s (1944) seminal work. Since then, numerous scholars have addressed questions of racial identity and mobilization, representation, African-American political thought, empowerment in cities and school boards, and coalitional politics, among countless other topics (see, e.g., Cohen 1999; Dawson 1994, 2003; Jennings 1992; McClain 1993; McClain & Karnig 1990; and Tate 1993, 2003; and countless others.).

By contrast, few scholars devoted any attention to Hispanics or Asian-Americans prior to 1970. Even today, scholars of Latino politics are present on the faculty of only two Ivy League institutions and only one of the Big Ten institutions. They are absent from Chicago, Rochester, Duke, MIT, North Carolina, Virginia, Berkeley (indeed, all but two of the University of California’s eight general-service campuses), and every doctoral program in Washington, DC. The scarcity of faculty severely constrains the growth of expertise and the training of graduate students for inquiry on this sector of American society. Some of these institutions have, from time to time, sought scholars in this field or even had faculty members in the past. Nevertheless, it is fair to say that serious inquiry on the politics of Latinos is not as widespread among top-tier doctoral institutions as we might expect, and the circumstances for the study of Asian-Americans are perhaps even more difficult.

As a consequence of both the historical demography of the United States and the relative paucity of research on other racial groups, scholarly understandings of race and its consequences for American politics have been achieved largely through the analytic lens of a black-white dynamic. That is, this society and the scholars who study it and its politics arguably have an historical construction of a racial dynamic that is almost exclusively binary, i.e., black and white. When discussions move beyond these groups, political scientists often mistakenly presume that arguments and findings with respect to African-Americans extend to other racial and ethnic groups. Moreover, racial and ethnic interactions between Anglos and other minority groups are assumed to mimic—to some degree—the black-white experience.

**THE CHALLENGE OF A CHANGING DEMOGRAPHY**

In mid-2003, the U.S. Census Bureau officially confirmed what most observers had suspected and expected since the release of the 2000 decennial census. Latinos had surpassed African-Americans as a share of the national population to become
the largest “minority” group in the country. In addition, the growth rate of the Latino population exceeded that of Asian-Americans, who, at the time of the 2000 census, had been the fastest growing population. By the Census Bureau's estimations, Latinos will comprise one third of the national population by the end of this century, and the Asian-American population will have grown sufficiently to reach parity with that of African-Americans at ~13% of the population. Non-Hispanic whites, by comparison, will have declined as a share of the national population from ~69% today to just over 40% at century’s end.

The political and social realities reflected in this demographic shift have become increasingly apparent in the past several years, particularly with respect to the growth of the Latino population. Latino cultural influences, from cuisine to music, have become more prevalent, and the Spanish language is used with greater frequency, including in advertisements on English-language major networks as far back as 1989.1 Latinos are actively courted by both political parties, a luxury that African-Americans have not enjoyed since the end of the 1950s. And Latino elected officials have occasionally displaced African-Americans. For example, black political power in Los Angeles has waned considerably in the face of Latino population growth, and even well-recognized black political leaders such as Maxine Waters (D-CA) have substantial Latino constituencies.

This demographic change presents three important challenges to political science. First, African-American political and intellectual elites may perceive Latino population growth as a serious threat to the place African-Americans hold in the nation’s conscience and self-conception. If the race problem has always been a “black” problem, the presence of a new (or at least newly powerful and sizable) player is sure to change that conception, and in unpredictable ways. Political science, then, is called upon to respond to this change by exploring what race and ethnicity might mean in a multiracial or multiethnic American future.

Second, findings regarding the nature and extent of racial animus among whites, electoral behaviors, attitudes, partisanship, group mobilization, and other aspects of racial-group politics cannot be presumed to extend from African-Americans to the emerging groups (Leighley & Vedlitz 1999). There are any number of important points of distinction between African-Americans on the one hand and Latinos or Asian-Americans on the other, beginning with the historic experience of slavery on the part of African-Americans in contrast to the proximity of the immigration experience to most generations of Latinos and Asian-Americans, as well as the greater ethnic diversity of these more recent groups. These and other distinctions directly affect the political experiences of each group and shape both their own political outlooks and their interaction with the larger society.

Finally, the presence of two sizable and politically important minority groups raises questions about their relationships with one another. Whether we are more interested in African-Americans’ relations with white America or in Latinos’ relations with white America, we can no longer ignore the importance and implications

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1The singer Chayanne appeared in an exclusively Spanish-language PepsiCo ad on CBS during the broadcast of the Grammy Awards in 1989.
of Latinos’ and African-Americans’ relations with one another, nor the place of Asian-Americans in these intergroup dynamics.

In this essay, we look beyond the large body of research on African-Americans to explore the recent explosion of work on the politics of nonblack minority groups that address these three challenges. There has been considerable recent growth in our knowledge about nonblack minority groups, aided by the emergence of new and valuable data sets and a generation of (largely) younger scholars whose interests in race and ethnicity extend far beyond the black-white paradigm. This literature speaks directly to how the experiences of Asian-Americans and Latinos differ from that of African-Americans, individually and in their relations with Anglos. Furthermore, we explore the important question of interminority conflict and cooperation and prospects for coalitional politics in the coming years.

BEYOND BLACK AND WHITE: WHAT’S THE DIFFERENCE?

Many of the problems of African-Americans, political and social, are replicated to some degree among Latinos. Residential segregation, social distrust, political exclusion, poor-performing public schools and associated rates of educational attainment, poverty, and a variety of social ills affect both Latinos and African-Americans alike. Only some of these have come to characterize Asian-American populations, who have been relatively more economically and educationally successful (with considerable variation across groups) but continue to face segregation, stereotype, and political marginality. It is commonplace to assume that many of the findings within the literature on African-Americans, then, would extend naturally to other minority groups.

There are, however, key points of distinction between African-Americans and these other groups, differences that have meaningful impact on a variety of political and social phenomena (Leighley & Vedlitz 1999). For the purpose of this essay, we focus on two distinctions we consider particularly salient: immigration and group identity. It is on these dimensions, among others, where the political experiences of other minority groups depart substantially from those of African-Americans.

Immigration

In large measure, immigration and its attendant issues of legal status, naturalization, assimilation, language policy, and the like are absent from the black experience. By contrast, they have profound effects on the political incorporation and political experiences of both Latinos and Asian-Americans (Ramakrishnan 2005).

That immigrants are not citizens complicates their claim to inclusion in the American polity and to societal resources. For example, racial hostility toward Latinos and Asians can be couched in anti-immigrant language, thereby ostensibly deracializing the hostility and simultaneously constructing the target population as
alien to the society and, therefore, not entitled to its protections. There are countless examples of this approach, most notably the anti-immigrant and English-only laws (Schmidt 2000) and ballot propositions that have proliferated across the states. California’s Proposition 187, which prohibited the provision of state services—including education and health care—to undocumented aliens, also allowed state workers to withhold services from applicants suspected of being undocumented. Although the basis of such suspicion was left unclear in the legislation, Latino activists logically concluded that apparent ethnic identity would be the most likely candidate (Sierra et al. 2000). That is, legislated suspicion between state workers and Latino residents was adopted under the race-neutral guise of fighting undocumented immigration.

The experience of immigration as proximate to the lives of most Asian-Americans and Latinos raises questions of whether these populations represent threats to American national identity (Huntington 2004). Immigrants, the argument goes, neither speak English nor wish to learn, and do not subscribe to political, social, or even religious norms that are deeply constitutive of the national culture and have contributed to the nation’s success. As such, their presence and rapid increase threatens to undermine national consensus and commitment to these norms and, by extension, the economic, military, and social achievements that followed from them.

Such a charge is more difficult to raise against African-Americans, whose presence in the cultural fabric dates back to before the nation’s founding and who cannot in any way be described as newcomers. This is not to say that no such charges are ever leveled at African-Americans. Kinder & Sanders (1996) show how antiblack bias may masquerade as a defense of “American values,” including individualism and self-reliance, which, they suggest, some whites believe African-Americans do not share. Nevertheless, immigrant populations are uniquely vulnerable to suspicions that they constitute an unassimilable “other.”

Evidence for these claims is largely, or in some cases entirely, missing (Segura 2005). A flurry of recent books, most notably those by Portes & Rumbaut (1996), Alba & Nee (2003), Ramakrishnan (2005), and Wong (2006), examine the process of assimilation and social integration among contemporary immigrants, both on its own terms and with specific reference to political action. Although each offers a unique and important take on the immigrant experience in this era, collectively they portray a process of incorporation that is far more complex than the false dichotomy of straight-line assimilation on the one hand or long-maintained separatism on the other. Rather, the immigrant experience varies considerably across generations, racial groups, and national-origin groups. This variation is partly a consequence of the unique national histories of donor countries, partly due to the patterns and constancy of immigrant flow into the United States, and, importantly, in large part driven by the social, economic, and political conditions immigrants face upon arrival (Fraga & Segura 2006).

Perhaps nowhere is the issue of immigration more important than with respect to political participation (Ramakrishnan 2005). The ineligibility of noncitizens
and the obstacle presented by the naturalization process contribute to significantly lower levels of political mobilization among both Latinos and Asian-Americans. Even among those who have successfully naturalized, new citizens have generally been found to vote far less often than other Americans (DeSipio 1996). This low turnout further undercuts the political impact of Asian-American and Latino political preferences.

Low rates of political participation among immigrants can be attributed, at least in part, to their resource disadvantages, particularly with respect to socioeconomic resources and political information. Newcomers often find themselves near the bottom of the economic ladder, and the absence of income, time, and most importantly education handicap them in any effort to gather and act on useful political information. Alternatively, Tam Cho (1999) has argued that what is at issue is really the political socialization of new citizens. Socioeconomic resources, though critical, are only brought to bear with the appropriate norms of political participation. Foreign-born persons, particularly those whose formal education took place outside of the United States, may not have accumulated sufficient political information, nor acquired the social expectations, necessary to turn resources into action.

However, some more recent work (Barreto & Woods 2005, Pantoja et al. 2001) has found unusually high turnout among the newly naturalized—particularly Mexican-Americans—as a result of the presence and passage of ethnically targeted ballot initiatives in California and elsewhere. In some instances, newly naturalized Latinos voted at rates exceeding both native-born Latinos and groups with historically high rates of turnout, particularly middle-class non-Hispanic whites. It is not yet clear if this phenomenon represents a permanent shift or can be generalized beyond locales where Latino immigrants perceive themselves to have been targeted.

Complicating this analysis is the observation, for which there is a growing body of evidence, that the determinants of political behavior for these immigrant populations differ from those of other Americans, African-Americans included. For example, Alvarez & Garcia-Bedolla (2003) find that models of partisanship vary significantly across racial groups. Hajnal & Lee (2006) go further and suggest that existing models of partisanship do not help us understand the relationship between Asian and Latino immigrants and the two major parties. Both Lien (1994) and Leighley & Vedlitz (1999) are persuasive that models of political participation vary as well. Santoro & Segura (2004) suggest that even types of political participation will vary substantially across generations of Mexican-Americans; voting probability increases in a nearly linear fashion across generations, whereas the probability of more group-based action—after initially increasing between the foreign-born and the first-generation U.S.-born—actually declines among third- and fourth-generation Latinos.

It is indisputable that immigration and national origin have meaningful political effects on the political attitudes, participation, enfranchisement, and policy challenges of both Asian-Americans and Latinos. Moreover, the very issue of immigration is an important context that frames the entire political environment.
of both groups. These social realities have not been accounted for—and logically should not have been—in the study of African-Americans, at least until very recently (Rogers 2001). The extension of findings regarding African-American politics to other minority groups, we suggest, is severely constrained by this key distinction.

Group Identity

Literature directly addressing the question of voter turnout has drawn distinctions between resource-based models, built on the traditional predictors of socioeconomic status (SES) and political information, and more group consciousness-oriented models, in which ethnic identity and solidarity predict greater action. Resource models are well founded in the literature; the positive relationship of age, income, and education to voting is well established, and neither Latinos nor Asian-Americans are exceptions (DeSipio 1996, Tam Cho 1999). Brady et al. (1995) reaffirmed the relationship of these factors to political activity while differentiating the effects of specific resources across various modes of participation. Because resources are poorly distributed across racial and ethnic groups in America, some (Uhlener et al. 1989, Verba et al. 1993) have suggested that this is the dominant explanation for racial and ethnic inequalities in political participation. These authors have demonstrated that if researchers control for these socioeconomic effects, differences in participation rates across groups disappear. This finding seems a powerful demonstration that resources are driving behavior. Ethnicity, some scholars have argued (Leighley & Vedlitz 1999), does not have as important an effect apart from the resources associated with group membership.

Persistence of interethnic differences, even after controlling for SES (Nelson 1979, Rosenstone & Hansen 1993), has raised an important challenge to these findings. In addressing persistent differences, an alternative explanation for political participation has emerged, rooted in the sense of group identity and solidarity expressed by members of racial and ethnic minorities (Lien 1994, Nelson 1979), particularly African-Americans. Disadvantaged by their relative lack of resources, African-Americans may be brought to the polls on the basis of strong in-group affinity and a sense of group purpose. That is, as Dawson (1994) has carefully described, political incorporation among African-Americans benefits from a collective solidarity or “linked fate,” which serves as a resource for mobilization. For many African-Americans, the salience of their racial identity, the emotional and social importance of their “blackness,” and the sense that the entire group faces collective obstacles to economic and political power, can be activated by elites, advocacy groups, and candidates for the pursuit of collective ends (Bobo & Gilliam 1990, Uhlaner 1989).

Moreover, African-Americans use this collective identity as an important information shortcut to simplify and organize the political world (Dawson 1994). When faced with a new issue or policy proposal, African-Americans can make sense of it through the use of the “black utility heuristic,” i.e., evaluating alternatives on the
basis of how they might affect the collective interests of black citizens (Bobo et al. 2001). Racial identity, then, serves as a proto-ideology to impose what Converse (1964) would have understood as “constraint” on African-American policy attitudes. This coherence in policy attitudes further serves the goal of mobilization, in that internal divisions on matters of policy are seldom—though clearly not never (see Cohen 1999)—able to derail efforts at mobilization and electoral impact.

Consequently, levels of political participation among African-Americans far exceed what we might expect on the basis of a socioeconomic model of participation (Uhlaner et al. 1989). Apart from the usual resources of education and income, black voters and candidates can draw on the resource of group consciousness and solidarity to mobilize turnout and accumulate votes behind a single preference or candidate.

This notion of collective identity and its implications are a second critical distinction between African-Americans and other minority groups. Although there have clearly been efforts at group-based appeals for political participation, usually emanating from advocacy organizations or elected officials, it is fair to say that neither Asian-Americans nor Latinos enjoy anywhere near this level of group-based solidarity from which to build a political movement (Masuoka 2006). In fact, the very “group-ness” of Latinos and Asian-Americans (Espiritu 1992, Tam 1995) is still a subject of considerable contestation.

The principal obstacle for both groups (to different degrees) is the fundamental mismatch between the pan-ethnic identifier as a political concept and a social reality that, in fact, is primarily driven by ethnic identity and national origin. Most work on pan-ethnic identity among Latinos, for example, has found that Latinos strongly identify with their national-origin group, whereas their attachment to the pan-ethnic identity “Latino” is far less strong and often missing altogether (Jones-Correa & Leal 1996). This is partly because of the considerable heterogeneity, both political and experiential, across Latino national-origin groups (Garcia 1982, Stokes 2003). In addition, until fairly recently, the Latino social experience had been segmented by geography as well as national origin; Puerto Ricans were a predominantly northeastern population, Cubans were in South Florida, and Mexican-Americans lived in Texas, California, and the southwest. Pan-ethnicity as a concept is not particularly meaningful when the totality of an individual’s social connections to other Latinos is confined to a single national-origin group.

Not surprisingly, pan-ethnicity, as an identity or political resource, becomes more relevant in enclaves where individuals from multiple national-origin groups live in close proximity. Padilla (1986) identified such a process in metropolitan Chicago, where the proximity of Mexican and Puerto Rican populations and their shared histories of political and economic exclusion made the conditions particularly favorable to the emergence of a pan-ethnic Latino identity with political meaning.

In 1986, however, Padilla’s Chicago was unusual. By contrast, population increase and geographic dispersion throughout the past two decades have substantially increased the likelihood that Latinos of multiple national-origin groups...
live and work in close proximity. Cubans, for example, now represent only about one third of Florida’s Latinos, having been joined by substantial Puerto Rican, Dominican, Colombian, Venezuelan, and even Mexican populations. Both Mexicans and Dominicans have joined New York’s pre-existing Puerto Rican population in large and politically significant numbers. Central Americans, primarily Salvadorans, Guatemalans, and Nicaraguans, are present in large numbers in Southern California, where they must coexist and possibly cooperate with Mexican-Americans, and in the Washington, DC, area, where the local community includes substantial South American (especially Colombian) populations. There are many more places in this society today, then, where Latino populations are sufficiently diverse to make pan-ethnic identification and cooperation a relevant issue. Pan-ethnicity is more likely to matter as an aspect of group identity when national-origin identity is no longer sufficient to capture the locally relevant population.

In such environments, a pan-ethnic identity and an accompanying political consciousness improves the likelihood that disparate national-origin groups of Latinos will claim shared political and social circumstances and interests. Importantly for political purposes, pan-ethnic identity and political consciousness also enlarge the group making the claim. Candidates with Hispanic surnames can seek and receive support across communities in a pan-ethnic paradigm that they could not if the relevant and dominant political identities were ethnicity specific. Similarly, voting rights claims under the Gingles standard—the prevailing judicial interpretation of the conditions necessary to demonstrate minority vote dilution established in *Thornburgh v. Gingles* (1986)—require groups of sufficient size and political unity, a threshold more easily reached when pan-ethnic Latino unity is a political reality.

Can a pan-ethnic identity serve as a political resource for Latinos to the same degree that racial identity and solidarity do for African-Americans? For now, we the answer is no. A recent exploration of this question finds that although there is some evidence of a connection between identity and political participation, it is modest and varies considerably in form and process across the different Latino national-origin groups (Stokes 2003).

It is important to note that pan-ethnic sentiments are not necessarily a sine qua non of mobilization and representation when subgroup members are present in sufficient numbers. For example, Puerto Rican activism in New York politics, Cuban dominance of Miami, and Mexican-American influence in Los Angeles did not historically depend on pan-ethnic identity, since each group was sufficiently strong in its specific local context to flex political muscles on its own (Hero 1992). In these contexts, strong national-origin identities are sufficient as a resource for political action. But for Latinos to exert power on a national stage as African-Americans do, such an effort would no doubt be easier if Cubans, Puerto Ricans, Mexican-Americans, and other Latino subgroups saw themselves as part of a larger identity with shared interests.

Pan-ethnicity as a politically useful identity is even more problematic for Asian-Americans (Aoki & Nakanishi 2001, Tam 1995). Though ethnically and even
racially diverse, Latinos have a common language and, in large measure, common religious identity. The globalization and integration of Spanish-language media provide common cultural mileposts. The terms Latino and Hispanic convey both cultural and geographic proximity. By contrast, the population of Asian-Americans contains numerous languages, traditions, religious identities, and even histories of national conflict. What Asians primarily share in common is signified by the pan-ethnic terminology used—geography. As a consequence, pan-ethnic identity has historically not been politically relevant to Asian-Americans. Models of political participation, preferences, and partisanship all demonstrate substantial differences across Asian national-origin groups (Lien 2001). Moreover, the significantly smaller population size, when compared with Latinos or African-Americans, makes these internal differences an even greater problem for Asian-Americans than for Latinos because there are seldom sufficient subgroup populations to allow national identity to substitute for a racialized one in making claims on the political system.

INTERGROUP CONFLICT AND COOPERATION

The body of work on racial conflict is large and growing. Much of it, of course, focuses on conflict between various racial and ethnic minority groups and the white majority. We do not recount that extensive scholarship here. Recent pieces have examined the role of racial context in attitudes toward target groups (Oliver & Wong 2003), including minority attitudes about race (Gay 2004); orientation toward the political system in general, captured through partisan realignment (Valentino & Sears 2005); and attitudes toward specific policy issues perceived to affect minority populations more directly (Branton & Jones 2005, Feldman & Huddy 2005, Frymer 2005, Tolbert & Hero 1996, Soss et al. 2003). A central debate in this literature is the issue of threat (Marcus & MacKuen 1993). It remains an open question whether social and geographic proximity is more likely to be understood as threatening and precipitate hostile policy stances, or rather to ameliorate stereotypes through positive social interaction and precipitate more supportive policy stands. An even more complex possibility is that racial context interacts with racial views to polarize opinion on the policy issue, that is, strengthen preferences in both directions (Soss et al. 2003).

A second thread of research has examined emerging conflict between whites and Latinos, a conflict more pressing and salient as the number of Latinos has increased rapidly. Among the most critical elements exemplifying these emerging tensions are ballot initiatives—usually addressing social services for immigrants, English-language instruction and formal establishment, and affirmative action—perceived to target Latinos and immigrants. These initiatives, which have appeared in California, Colorado, Arizona, Washington, and elsewhere, have manifested clearly racial patterns in preference formation (Tolbert & Hero 1996) and have been found to alter the partisan sentiments of Latinos (Segura et al. 1996) and
moderate whites (Bowler et al. 2006). The creation of a hostile political context or environment has been found to mobilize affected parties; this is evidenced by increases both in voter turnout (Pantoja et al. 2001) and in political sophistication, as captured by the accumulation of significantly greater political information (Pantoja & Segura 2003).

As indicated above, the overall notion of racial conflict and animus between whites and nonwhites is well-trodden ground in political science. By contrast, and probably because of the relatively recent emergence of Latinos and other racial groups in sizable numbers alongside African-Americans, less attention has been directed toward interminority competition and cooperation. We know comparatively little about what Latinos, African-Americans, Asian-Americans, and others feel toward each other, and we lack a clear theory for developing expectations regarding the circumstances that make intergroup relations likely to be competitive and conflictual—or cooperative. We devote the remainder of this essay to these issues.

What is the nature of black-brown relations in America? What is the future? Are Latinos and African-Americans likely to emerge as two players on the same political team, or will their relationship prove more complex? Are Asian-Americans likely to be partners or opponents in “rainbow coalition” efforts?

Observers across the political spectrum see Latinos and African-Americans as likely, even inevitable, coalition partners in American minority-group politics. They may be right. Latinos and African-Americans share a number of politically relevant common characteristics. These include education and income levels significantly below the national averages, with all of the attendant correlates, such as lower home-ownership rates, higher than average unemployment rates, higher likelihood of being victimized by both violent and nonviolent crime, and often significant residential segregation in inner cities or inner-ring suburbs. Occasionally, this residential concentration is co-located, that is, African-Americans and Latinos live in shared or adjacent neighborhoods. In addition, both groups face historically high obstacles to election to public office, not the least of which is racial hostility among non-Latino whites.

Latinos and African-Americans are more Democratic in partisanship than nonminority Americans (except in Florida, where Cubans are loyal Republicans). More than 60% of non-Cuban Latino voters are stable Democrats (DeSipio & de la Garza 2002). Democratic identification seems to be positively associated with duration of residence in the United States, and partisan strength increases with age (Cain et al. 1991). Latino Democratic partisanship favors the formation of biracial coalitions with African-Americans because, of all the partisan social groups in the United States, African-Americans are the most loyal to the Democratic Party (Rosenstone et al. 1984, pp. 169–170). This loyalty is consistent across gender, region, and a variety of demographic categories (Tate 1993).

But many factors—political, social, and economic—may well undermine this commonality. Recent political events provide anecdotal evidence for both viewpoints. Recent mayoral races in America’s two largest cities offer excellent
examples of both Latino/African-American cooperation and rivalry. And com-
petition for economic resources and the attention of political parties and actors
may well pit the interests of each group against the other’s.

Evidence of Extant Cooperation?

There are a variety of anecdotal accounts of cooperation across racial and ethnic
groups. For example, a recent news story documented the formation of an alliance
between local chapters of the League of United Latin American Citizens (LULAC)
and National Association for the Advancement of Colored People (NAACP) in, of
all places, Spokane, Washington (Graman 2004). It is clear that there are occasions
where leaders or members of the two groups cooperate. It is less clear how pervasive
this cooperation is.

There is a modicum of literature examining whether and when black-brown
coolitions have emerged. In perhaps the first scholarly attempt to discuss the for-
mation of these coalitions, Henry (1980) describes how both groups “suffer” sim-
ilar social inequalities, such as median household incomes, unemployment, and
college competition rates. These similar inequalities should naturally lead to the
formation of political alliances, Henry argues, but he finds that Latinos have lit-
tle interest in forming an alliance with African-Americans (Ambrecht & Pachon
1974).

Most studies of political context and the creation of interethnic coalitions have
focused on whether the demographic or institutional circumstances were likely to
result in cooperative or competitive behavior. For example, some municipal-level
case studies have focused on elections and candidates and detailed the success
or failure of biracial coalitions (Falcon 1988, Henry 1980, Sonenshein 1989). Others
have identified factors predicting the formation of black-brown coalitions

According to Sonenshein (1989), visionary group leaders, especially those who
supervise strong community organizations, are essential for developing and sus-
taining multiracial political coalitions between African-Americans and Latinos.
Furthermore, the most effective coalitions are those that begin in communities
with strong political organizations already in place. Kaufmann (2003), like Sonen-
shein, argues that the prospects for future coalitions between African-Americans
and Latinos rely in part on the role that Latino leadership and political organizations
play, in this case by promoting strong pan-ethnic identities.

In a more recent discussion of the prospects for coalition between African-
Americans and Latinos, Vaca (2004) argues that few formal or even informal
coolitions exist between these two disenfranchised groups because they should
not be presumed political allies. Using case studies from New York, Los Angeles,
Miami, Washington, DC, Compton, and Houston, Vaca describes how language
barriers, competition over affirmative action, and disregard for the contributions of
Latinos during the American civil rights movement have prevented the formation
of coalitions. African-Americans, Vaca suggests, view Latinos and their growing
numbers as a threat to their social, economic, and political benefits. Furthermore, Latinos do not view African-Americans as an oppressed group in the same way other Americans may view them. Such contrasting perceptions inevitably lead to strained relations.

Other work offers a similar perspective. Despite similar histories of inequality, African-Americans and Latinos have forged only tenuous partnerships. If the comparison of histories is contentious, focusing political activity specifically on racial and ethnic issues raises the salience of those contested histories and potentially further undermines the strength of the coalition. For example, Hochschild & Rogers (2000, pp. 6–7) argue that when a multiracial coalition focuses on issues of racial and ethnic equality, it is likely to fragment into competitive factions. Furthermore, the benefits of biracial coalitions are sometimes unattainable because of past political disagreement, individual attitudes about the other group, and fear that the other minority group might gain the political upper hand (Tedin & Murray 1994).

Guinier & Torres (1999), however, disagree and reason that the most effective way to involve minorities in racially inclusive coalitions is to organize them around political issues that are explicitly race specific. Racial minorities are less likely to respond to calls for coalition building, Guinier & Torres maintain, if their leaders do not first speak to them about matters that relate to their racial experiences. Only then would it be possible to get racial minorities to expand their concerns and embrace issues that interest all groups.

Meier et al. (2004) draw the important distinction between scarce or zero-sum outcomes, such as employment and electoral success, and common outcomes as public goods, such as favorable policy. They argue that competition emerges when the focus is on the former; no form of sharing or log rolling can accommodate two groups with claims on specific resources, be they school board seats or principal’s jobs. By contrast, cooperation is more likely when political efforts are focused on policy. Policy outcomes can conceivably be favorable to both groups and occasionally lend themselves to log-rolling practices in a way that employment and electoral competition do not.

Cooperation and biracial coalitions are most likely to emerge between two groups of the same status and class (Giles & Evans 1985). If the two groups are unbalanced in size or relative political power, the racial or ethnic group with the most representation in city and county government is likely to fare better than the others in terms of public service jobs and other government benefits. Thus, the better-positioned group might reasonably be less than eager to form a coalition (Deutsch 1985; see also Browning et al. 1984, Butler & Murray 1991, Meier & Stewart 1991, Sonenshein 1986, Warren et al. 1986). In fact, they may attempt coalition with whites, and may themselves be attractive to whites as a coalition partner. Such an environment will produce far more interminority competition than cooperation.

Not surprisingly, there is significant evidence of competition. For instance, Latinos have been found to make less progress in terms of socioeconomic
well-being and political power in cities with black majorities or pluralities (McClain & Karnig 1990). Furthermore, African-American and Latino municipal employment outcomes covary negatively with Anglo municipal employment, which suggests even more competition for these jobs (McClain 1993).

Competition also extends to political representation and the drawing of electoral districts. Election results from 118 large, multiracial school districts indicate that as the black population increases, political representation of Latinos increases, but the reverse is not true. When the population of Latinos grows, blacks lose political representation (Meier & Stewart 1991). With respect to the drawing of district lines, the lack of cooperation might intensify because of redistricting, particularly in states such as New York and Texas where black and Latino leaders have debated the vote dilution of Latinos and the drawing of new majority-black districts (Tate 1993).

How do Asian-Americans fit into this structure? The foundation of cross-group coalitions—presumed to be shared socioeconomic circumstances for Latinos and African-Americans—is largely missing for substantial subgroups within the Asian-American population (Lien 2002). Asian-Americans have, at least in the aggregate, achieved a far higher level of economic mobility and educational attainment than the other two groups. Beyond mere absence of socioeconomic similarity, there is a well-documented history of troubled intergroup relations. Kim (2003) has documented the sometimes violent conflict between African-Americans and Asian-Americans, particularly Koreans. Focusing on the Flatbush Boycott of Korean-owned markets in New York City, Kim offers a theory of between-group minority conflict that assesses the blame in the direction of white Americans, whose imposition of the racialized social hierarchy creates conditions conducive to intergroup conflict. Kim & Lee (2001) offer a framework for understanding conditions under which conflict or cooperation are likely to emerge. These authors suggest that the proximity of Latinos to Asian-Americans in the racial hierarchy serves to mitigate conflict and enhance cooperation between these two groups, in comparison with Asian-black relations. Lien (2002, p. 55) chronicles how whites’ beliefs about Asians differ from their beliefs about other minorities; whites evaluate Asians more positively and thereby implicitly create a competitive relationship between Asian-Americans and other nonwhite groups. Scholars of Asian-American politics frequently refer to this as the “model minority” problem, and its effects on cross-group coalition formation could be devastating.

Future Prospects for Cooperation or Conflict

America’s minority groups will cooperate if, at the mass or elite level, they perceive that it is in their interest to cooperate—and not otherwise. We see significant evidence that points of commonality between the groups and their political positions are sufficient to make a carefully orchestrated coalition possible. We also see, however, sufficient evidence of affective indifference or distance, a general lack of affinity—particularly on the part of Latinos and Asian-Americans toward
that this coalition is not inevitable, nor, in some cases, even likely. These outcomes, of course, are endogenous to more than individual attitudes and elite strategies, but will result from the interaction of those attitudes and strategies within each group and between the groups. Outcomes will clearly be affected by the policy actions and political strategies of Anglos in the system, with interests of their own.

The importance of political elites in shaping the preferences and attitudes of the mass public is, by now, well known if not well understood (Ginsberg 1986, Kuklinski & Segura 1995, Page & Shapiro 1992, Stimson 1990, Zaller 1992). However, political coalitions must operate at the mass level, at least instrumentally, in order to influence electoral and policy outcomes. Antipathy or indifference among the people can severely undermine efforts at coordination agreed to at the elite level.

Economic circumstances and attitudes are most often identified as the foundation of minority coalitions. Tedin & Murray (1994), for example, have found that individuals’ concern about economic conditions, such as poverty and unemployment, is associated with support for biracial coalition activities among both African-Americans and Latinos, though to different degrees. These expectations have their limits, however. Although the most vulnerable individuals in each group, for instance those with less material wealth and political resources, may, by virtue of greater commonality, be more supportive of biracial cooperation, this may not be the case if competition over scarce jobs and resources comes to characterize a particular environment. In that instance, poorer and less-educated respondents are less likely to favor coalitional strategies (Jackson et al. 1994). Issues such as competition for resources and status, stereotypes, and cultural differences have already been found to influence the perceptions and behaviors of African-Americans and Latinos (Robinson 2002). These same forces may even trigger hostile rhetoric and outright economic discrimination at the elite level. At the opposite end of the SES scale, middle- and upper-class Latinos and African-Americans have historically used their newfound resources to augment both power and opportunity for themselves and their respective group (Dawson 1994, Jennings 1992, Landry 1987), but this opportunity need not facilitate biracial cooperation. In fact, the coalitional efforts are likely undermined if an influential leader of any group advances only the interests of one group to the exclusion of others (Betancur & Gills 2000).

Attitudes, however, are quite distinct from political actions, and supportive attitudes—if they exist—are not sufficient to ensure cooperative actions. For example, Latino and African-American voters might agree on a wide variety of issues yet still choose to support different candidates at any level of government. The 2001 New York and Los Angeles mayoral elections demonstrate how attitudes and actions are occasionally disconnected and whether black-brown coalitions can or will emerge. In New York in 2001, Latino and African-American voters united to support Bronx Borough President Fernando Ferrer in the Democratic primary. His loss to Mark Green, in what was perceived as a racially polarized campaign, prompted majorities of both groups to abandon the Democratic
nominee and ensured the election of Michael Bloomberg in the general election. By contrast, in the Los Angeles election of 2001, African-American and Latino voters backed rival candidates, each of whom made it to the general election in the nonpartisan system. In the end, white Democrat James Hahn was elected on the strength of African-American and Republican support, defeating a Latino candidate with a primarily Latino and liberal base. Attempts by the Latino candidate, Antonio Villaraigosa, to deracialize the election proved spectacularly unsuccessful (Wright-Austin 2004). Yet, just four years later, black-brown rivalry in Los Angeles was significantly ameliorated, if not replaced with cooperation. Again James Hahn faced Antonio Villaraigosa, but this time disenchanted African-American voters helped elect the Latino challenger. In this second election, racial distinctions did not effectively separate Latino and African-American voters.

We have no reason to believe that policy preferences or attitudes varied widely across the settings. Presumably, in both locations and across time, both African-American and Latino voters preferred candidates of their own ethnicity, or at the very least, candidates with significant loyalty to their own community. Rather, the manner in which choices were structured—available candidates and the nature of the local electoral system—resulted in different actions in the two cities. It is likely that voters from both groups in Los Angeles shared many policy preferences, but did not agree on who could best actualize those preferences. A second distinction between the cases is the strategic conditions faced by minority voters. African-Americans and Latinos are both sizable communities in New York, whereas in Los Angeles, Latinos are on the verge of becoming an outright majority in a city whose black population (and their political influence) is perceived to be shrinking. Although both minority groups in New York felt their interests would be served jointly with a Ferrer mayoralty, the 2001 election in Los Angeles was perceived as a zero-sum game. In short, the prospects for political coalition will be inexorably tied to the relative size of two groups, their joint local political history, the perception of rivalry or cooperation with respect to resources, and the available candidates.

Political circumstances vary widely across the United States and over time. The cases of New York and Los Angeles illustrate how context shapes the individual and collective political decisions of minority voters and their elites (Bowler & Segura 2005). Scholars seeking to explore the mechanics of black-brown or other transracial coalitions will, therefore, have to address whether emerging cooperation is the product of genuinely shared values and preferences or, rather, the result of circumstances and structured choices. Similarly, when points of conflict emerge, we will need to differentiate whether that conflict really emanates from divergent values and preferences or, rather, from more tactical or strategic considerations by community leaders.

CONCLUSION

Scholarship on African-Americans and their role, experiences, and obstacles in the American political system has been foundational. This large, growing, and multifaceted body of work has provided significant insights on questions of
exclusion, marginality, and disadvantage and, in many ways, provided a roadmap regarding what questions are worth asking in minority politics. However, rapid and ongoing demographic change has triggered the evolution of a multiracial and multicultural America where the black-white paradigm is no longer sufficient to provide genuine understanding of the political circumstances and experiences of all nonwhite groups.

We have sought to show that the extension of findings and research claims about African-Americans to other communities of color is fraught with difficulties, which extend directly from the unique aspects of the Asian-American and Latino experience. We have suggested—and the literature has, we believe, demonstrated—that the open question of ethnic and pan-ethnic identity among these emerging minorities, and the recency and proximity of the immigration experience, both distinguish Asian-Americans and Latinos from African-Americans. Furthermore, these distinctions have important implications for orientation to—and incorporation in—the political system and their collective ability to shape political outcomes.

Substantial changes in the demography of America also raise the important question of between-group relations. Racial and ethnic minority groups often share similar circumstances and interests, particularly with respect to economic concerns, but there are as many good reasons to expect conflict as there are to anticipate coalition. Although the literature on this issue is both new and relatively small, what we can say is that there is no obvious determinant of whether minority groups are more likely to cooperate or experience conflict. Rather, we contend that conflict and cooperation will inevitably be a function of the interests of each group—as they are perceived at both the mass and elite levels—and the specific strategic circumstances structuring choices.

Political science faces an important challenge, both to broaden the study of minority politics beyond the black-white paradigm and to incorporate the emerging findings into a broader understanding of American politics.

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ERRATA
An online log of corrections Annual Review of Political Science chapters (if any, 1997 to the present) may be found at http://polisci.annualreviews.org/
The publication of Samuel Huntington’s *Who Are We? The Challenges to America’s National Identity* provides an opportunity to consider several distinct underlying assumptions about American national identity, and to evaluate the claim that this identity is threatened by growth among native-born and immigrant populations of Latin American origin, particularly—but not exclusively—Mexicans.

It is certainly the case that Latin American migrants and their descendents make up a large and growing share of the nation’s population, and that Mexicans and Mexican-Americans are the overwhelming majority of this group. The timeliness of Huntington’s work is apparent when one considers that the 2002 Current Population Survey conducted by the U.S. Census Bureau estimated that Latinos surpassed African Americans as the nation’s largest identifiable ethnic/racial group comprising 13.5 percent of the national population. This growth is fueled by both higher fertility rates and continued immigration. And while others would debate this (see Alba in this symposium), we are inclined to accept Huntington’s characterization of this migrant flow as unlikely to stop or even slow anytime in the immediate future. As a result, population projections of the Census Bureau estimate that Latinos may comprise as much as 25 percent of the national population in 2050, when people of primarily European ancestry are estimated to comprise only 52 percent.

In this essay, we use Huntington as a jumping off point. We first examine the question of immigration and threats to national identity within the history of American political development. We consider what current and potential challenges the United States faces as it accommodates population shifts and prepares for a future where Caucasians are a far smaller proportion of the national population than may ever have been the case in our history. Further, we compare the relative abilities of Anglos and Latinos to shape that future, and whether and how those power inequalities inform competing claims regarding resistance to assimilation, cultural segregation, and national disunity. Finally, we offer some thoughts on how America might cope with its demographic evolution without resorting to xenophobia, isolationism, or cultural nationalism.

**How New Are the Current Threats to American National Identity?**

Concerns regarding the threat posed by newer immigrants to the Anglocentric nature of the United States are not new. In fact, they predate the Declaration of Independence. Among the earliest recorded expressions of such concern was contained in a commentary written by Benjamin Franklin in 1751. Although the central focus of the essay was the nature of economic growth in the colonies, with a special emphasis on rates of population...
increase, at the end of the essay Franklin interestingly spends a considerable amount of space describing the threat posed by German and other immigration to the British character of Pennsylvania. Franklin wrote:

And since Detachments of English from Britain sent to America, will have their Places at Home so soon supply’d and increase so largely here; why should the Palatine Boors be suffered to swarm into our Settlements, and by herding together establish their Language and Manners to the Exclusion of ours? Why should Pennsylvania, founded by the English, become a colony of Aliens, who will shortly be so numerous as to Germanize us instead of our Anglifying them, and will never adopt our Language or Customs, any more than they can acquire our Complexion.  

In this quote, Franklin has reaffirmed the English nature of his society, denounced immigration and ethno-linguistic enclaves, expressed the classic fear of demographic change, and even attempted, with his reference to “complexion” to conceptualize these “swarm[ing]” and “herding” Germans as, what today we would term, a “racialized other.” To us, these words sound eerily familiar to language used in much of the contemporary argument.

Franklin’s view is distinct to that of French writer Michel Guillaume Jean de Crèvecoeur (pseudonym J. Hector St. John) whose view is more often referenced than Franklin’s to characterize the foundations of American national identity. In his Letters from an American Farmer first published in 1782 he wrote:

What, then, is the American, this new man? He is either an European or the descendant of an European; hence that strange mixture of blood, which you will find in no other country. I could point out to you a family whose grandfather was an Englishman, whose wife was Dutch, whose son married a French woman, and whose present four sons have now four wives of different nations. He is an American, who, leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds. He becomes an American by being received in the broad lap of our great Alma mater. Here individuals of all nations are melted into a new race of men, whose labours and posterity will one day cause great changes in the world.  

To Crèvecoeur, the most important element of American identity was its capacity to be built through the successful synthesis of people with nationally diverse origins into a new American identity. There is no sense of threat posed by immigrants, provided they leave old customs and beliefs behind and embrace a “new” American identity.

A more recent characterization of the ways in which American national identity can be threatened by the desires of subgroups of its population to maintain identities different from its Anglocentric origins is provided by Arthur Schlesinger, Jr. In his The Disuniting of America: Reflections on a Multicultural Society, he writes that American national identity is under threat from those who would place sub-national racial and ethnic group identity before, and especially in opposition to, a more unifying understanding of national identity. He states,

A cult of ethnicity has arisen both among non-Anglo whites and among nonwhite minorities to denounce the idea of a melting pot, to challenge the concept of ‘one people,’ and to promote, and perpetuate separate ethnic and racial communities.  

Although Schlesinger’s primary concern is with the promotion of Afro-centric and other racial-ethnic specific histories in secondary school curricula at the expense of more traditional versions of American history, his concerns, like Huntington’s, lie in the threat this can pose to American society and its sense of nationhood. He continues,

the cult of ethnicity has reversed the movement of American history, producing a nation of minorities—or at least of minority spokesmen—less interested in joining with the majority in common endeavor than in declaring their alienation from an oppressive, white, patriarchal, racist, sexist, classist society.

How, then, are we to understand the roles of ethnic diversity and the pressure for assimilation in their effects on national identity? It is Rogers M. Smith who, in his analysis of the evolution of American citizenship laws, provides one of the most insightful frameworks to best understand how the evolution of national identity in American political development has often depended on both exclusion and inclusion, that is, identifying a group for exclusion from the rights and privileges of full citizenship because of its perceived threat to national interests while, at the same time, calls are made for the inclusion of other groups to be added to the aggregation of interests that comprise the national interest. According to Smith, it is useful to characterize “American civic identity” as being comprised of three coexistent civic ideologies or myths of civic identity: 1) individual liberalism that acknowledges individual rights and limited government; 2) democratic republicanism that gives importance to collective fate; and 3) ascriptive inegalitarianism that uses law to define who is included in the body politic, and by necessity, who is excluded. These three traditions compete with one another in the extent to which they drive which groups and interests, often times including immigrant groups, are included as legitimate parts of the American nation. The need for elected leaders to receive support from majorities of the electorate, he argues, gives political leaders opportunities to manipulate whose interests are—and, by extension, are not—legitimate in the body politic. It is this constant tension between the need to include and the simultaneous benefits of exclusion, that has directly contributed to the evolution of American national identity. Smith states:

First, aspirants to power require a population to lead that imagines itself to be a ‘people’; and, second, they need a people that imagines itself in ways that make leadership by those aspirants appropriate. The needs drive political leaders to offer civic ideologies, or myths of civic identity, that foster the requisite sense of peoplehood, and to support citizenship laws that express those.
What Is the American Creed?

It is hard to dispute that Anglo-Protestant culture has played a central role in the development of American national identity. However, this claim subsumes several smaller contentions that are actually more controversial—that a national culture in the ethno-linguistic and religious sense is necessary for the formation of a successful democratic polity, that the Anglo-Protestant culture is uniquely normatively good, that the religious portion of that identity is a generally positive force in American national life, and that this culture has been historically characterized by remarkable stability, varying only modestly from its beginnings.

How important is a single national culture for the preservation of democratic institutions? Perhaps more importantly, which are the specific components of that “culture” that provide the binding ties of nationhood, ethno-religious and linguistic traditions, or the more complex civic culture understood by Smith, Schlesinger, and others? Proponents of the primacy of Anglo-Protestant culture appear to argue that the most critical ties are ethno-linguistic and religious. Further, they also argue for the unique contribution of Anglo-Protestantism—the foundation for arguments of Anglo-American exceptionalism—and suggest that the erosion in the dominance of Anglo-Protestant culture is inherently destabilizing to contemporary American society.

We question the accuracy of each of these arguments. The relative success of multi-cultural states whose populations are sufficiently committed to specific constitutional principles is frequently brushed aside or entirely overlooked. This raises at least the possibility that civic attachments can—under some circumstances at any rate—transcend ethno-cultural and linguistic differences. Huntington, for example, holds up the Canadian and Belgian examples as instructive (in the negative) without acknowledging that both of those societies have more than held together but actually prospered, and have engaged in struggles over national identity entirely through democratic processes. No mention is made of numerous other consolidated democracies with substantial ethno-linguistic diversity including Spain, France, Finland, Switzerland, and India, to name a few.

Moreover, there is significant discussion of this issue in the theoretical literature that raises serious questions about the twin claims that a national ethno-linguistic culture is a sine qua non of stable and successful democracy, and that American national success was the product of its remarkable cultural unity. Morone, for example, contends that the claims made by Huntington in an earlier work, Greenstone, and others should be considered in light of counter-claims that American cultural unity was, in fact, cultural hegemony, where the voices of the powerful suppressed other views. For Morone, American political culture “is a perpetual work in progress. Americans are fighting over it now. The have fought over it since the first Puritan stepped ashore.”

Likewise, flattering portraits of the Anglo-Protestant value set might benefit from a bit more skepticism. It is frequently individualism, a work ethic, belief in “English”...
legal traditions, religious commitment, and the English language that are identified as central components of this “culture,” all while a number of other well documented aspects of American national character are left unmentioned. For example, Puritanism, xenophobia, moralistic intolerance, traditionalism, and authoritarianism have often played destructive roles in our history and have been identified as widespread, at least within particular regions or social classes and potentially endemic to the American character. The results almost always include important political and social implications—ominous implications—for individuals from socially subordinate groups. Often, these views or less-than-noble aspects of American identity are closely intertwined with some of the other elements generally seen as good, for example the embracing of slavery by the Southern Baptist Convention, a view not officially repudiated by America’s largest Protestant denomination until 1995. Indeed, Huntington himself highlights some less than flattering practices and events in U.S. history—particularly with respect to how some of these character flaws might have been visited upon immigrants, non-Protestants, and non-Anglo-Saxons—but without any apparent willingness to evaluate what these events might mean in terms of the innate goodness or attractiveness of the national character as he has imagined it.

With respect to religion, Huntington repeatedly asserts the Christian nature of American society and dismisses any concern that such an identity might be problematic for non-Christians. Referencing court cases regarding the Pledge of Allegiance or the display of Christian symbols to the exclusion of others on public land, he basically suggests that the plaintiffs’ perceptions of exclusion or alienation are correct, but not in any way problematic. Rather, this is viewed with some approval. “America is a predominantly Christian nation with a secular government. Non-Christians may legitimately see themselves as strangers because they or their ancestors moved to this ‘strange land’ founded and peopled by Christians.”

To claim as unproblematic a description of the United States as a “Christian nation” with a secular government is surely to invite the institution of the former and the abolition of the latter. Phenomena such as tax-funded religious institutions (under the name of “faith-based initiatives”), school vouchers for parochial schools, or the political power and agenda of evangelical Christians give testimony to our unease. While there is certainly wide disagreement over the degree to which each threatens to undermine the secular nature of civil authority in the United States, surely the issue deserves some consideration, if the secular nature of government authority, and the avoidance of “capture” by any particular religion or church, is of importance to American democracy. All of which is to say that a fairer and more nuanced reading of American history and contemporary circumstances would substantially undermine claims that American democracy owes its existence to the relative homogeneity of its ethno-linguistic and religious traditions and the primacy of Anglo-Protestantism in shaping them.

**Change and the American Creed**

Huntington’s understanding of the origins and dimensions of American national identity and the American Creed has one glaring omission. Several historians and scholars of American political development place the capacity for change and especially the centrality of self-critique as fundamental to the uniqueness of the American Creed. In fact, it may be that both self-critique and the capacity for change have been more fundamental to the longevity of the American republic than has the maintenance of Anglo-Protestant cultural domination.

Though we take issue with many facets of his argument, we return to Schlesinger for a succinct and insightful characterization of this aspect of the American Creed, minimized by Huntington. In writing his critique of multiculturalists and multiculturalism, Schlesinger notes that a distinction of much Western thought is that it produced the ideas that challenged its own practices and American society has been better for those challenges. He states that the crimes of the West have produced their own antidotes. They have provoked great movements to end slavery, to raise the status of women, to abolish torture, to combat racism, to defend freedom of inquiry and expression, to advance personal liberty and human rights.

Whatever the particular crimes of Europe, that continent is also the source—the unique source—of those liberating ideas of individual liberty, political democracy, the rule of law, human rights, and cultural freedom that constitute our most precious legacy and to which most of the world today aspires. Schlesinger’s characterization of this aspect of the American Creed, and especially the capacity of its precepts and related practices to accommodate change, is in direct contradiction to a characterization of the Creed as unchanging, that is, surprisingly static and permanently rooted in only one set of cultural traditions. Even before his arguments in this most recent book, Huntington has long seen the path of American political development as rooted in its first principles, that is, fixed at its core with only incremental changes brought to the periphery. Morone characterizes Huntington’s view as follows: “American political history reads like the inexorable (although bumpy) march of liberal democracy.”

As we have noted, major changes have occurred as to who was included as full and participating citizens in American society. Changes such as the elimination of the property requirement to vote, the abolition of slavery, the passage of the constitutional amendment allowing women to vote, the extension of civil rights (as uneven as that extension has been and continues to be) to African Americans and others, and the historical decline of anti-Semitism and
anti-Catholicism, clearly demonstrate, we think, the capacity for American society to change within the American Creed. It seems both unnecessarily nostalgic and inaccurate to insist that all changes, no matter how sweeping, were both modest in their overall effect and rooted in the first principles, as they are imagined.

Moreover, the glacial pace at which these and other changes occurred can even be interpreted as among the primary factors allowing change to occur at all. That is, gradual change, inconsistent change, change that moves only with important subsets of public opinion, is change nonetheless. This different reading of American history removes the hyper-urgency of contemporary demographic shifts that characterize anti-immigration alarms. It may be, in fact, that there is little urgency at all.

Multiculturalism, immigration, and internationalism have always been part of American society. Their capacity to present new challenges to past practices deriving from the American Creed, including cultural practices in Huntington’s sense, may be more transforming than threatening. If one looks to history as a guide, such challenges have never led to the downfall of the republic. It may even have strengthened the society.

In summary, arguments about the immutability of core American identity, the necessity and unerringly positive contribution of Anglo-Protestant culture to American national life and success, and the omission of any discussion of the capacity of the American Creed to accommodate major change, all represent a very limited reading of American history. A reading that acknowledges the detrimental effects of cultural hegemony, and one that considers the historical tradition of a capacity to accommodate change, provides a more comprehensive foundation upon which to consider contemporary challenges to American national identity.

**Whither Anglo-Protestant Agency?**

Whether or not immigration changes the nature and identity of a people is the product of the collective decisions of two sets of actors—both the immigrants and those in the receiving society. In this instance, determining whether the outcome is assimilation or societal fracturing depends both on whether the Latino migrants are willing to adapt themselves to their new surroundings, and whether Anglo-Protestant society stands ready to accept them. Curiously, however, when reflecting on the alleged dangers to national identity posed by immigrants, there is a peculiar tendency by writers in this line of thought to minimize, or even entirely overlook, the role Anglo-Protestant leaders and citizens have played in the creation of distinct identities, cultural practices, and segregated communities among subsets of the population, the very circumstances Huntington suggests will adversely impact American national identity and adherence to the American Creed.

An example will be useful. In discussing the components of our national identity, Huntington identifies Indians and Puerto Ricans as emblematic of peoples absorbed into the political boundaries of the U.S. without being absorbed into the national identity. He describes them as being “in but not fully of” the American republic, a status he suggests that “is reflected in the arrangements negotiated with them for reservations and tribal government, on the one hand, and commonwealth status, on the other.”

To which negotiations is Huntington referring? Setting aside the tragic history of the treatment of the indigenous population at the hands of the Anglo-Protestants, Puerto Rico’s status under American sovereignty but external to its society is one that was imposed on it through conquest, in the Spanish-American War, and acts of Congress, particularly the Jones Act of March 1917. Puerto Ricans, themselves, had little say in these “negotiations.” So to the extent that Puerto Rico represents a sub-national community not fully incorporated into national life, one has to examine the choices of the Anglo-Protestants to understand the historical causes.

This is just one example of a larger pattern, that is, the frequent portrayal of Anglo-Protestants as merely witnesses to—or at worst, facilitators of—the unraveling of our national identity. In another, Huntington discusses, at length and with some admiration, the Americanization campaigns of the later nineteenth and early twentieth centuries. Moreover, he holds out the negative example of Germany and its Turkish immigrant community, where the receiving nation acts to continue the formal exclusion of its new residents, even generations after the date of first migration. But the apparent lessons to be drawn from these examples do not appear to apply, in Huntington’s thinking, to contemporary circumstances. These Americanization campaigns may, or may not, have had the desired effect at the time. But if we are going to wax nostalgic for them, as Huntington appears to do, then we should at least inquire into the reasons for their absence today.

Nowhere is this more clearly demonstrated than in the phenomena of English-only initiatives, often offered as evidence that the broader American public is resisting pressure to dilute the national identity. None of these pieces of legislation or citizen initiatives have ever included efforts to teach immigrants English. They include no money for English language instruction, no opening of public schools for nighttime courses in English and American civics, indeed none of the efforts reminiscent of the Americanization campaigns in the earlier era. Though some might wish to blame the multiculturalists for the “disuniting” of this society, no such argument can be made here, as the origins and provisions of English-only legislation are firmly located on the right of the American political spectrum. Absent any meaningful effort to create opportunities for acculturation and language acquisition, it is difficult to
view these measures as anything but symbolic, anti-immigrant temper tantrums rather than serious reaffirmations of American cultural identity.

Likewise, the origin of the public school system in the U.S. was related to a conscious attempt at “Americanizing” immigrant children. Huntington and others point to the high concentrations of Hispanic children in the nation’s largest school systems and the high drop-out rates. Nowhere in this line of criticism, however, is there a serious consideration of the state of public schools in the United States today and how they might affect immigrant incorporation—particularly the impact of chronic under-funding, the ideological motives behind school choice and voucher programs, or the impact of white flight on these schools. Each, we suggest, has served to undermine the schools’ historic role in acculturation and immigrant incorporation. So while the importance of public schools in the nineteenth century as an agent for assimilation is celebrated by those sounding the anti-immigrant alarm, their characteristics today are usually unexamined.

If Mexican immigration is to be feared for both its volume and its ongoing nature, which allegedly presents a challenge to national identity, it is urgent then that we pay due attention to its causes, which are well understood. The contemporary political science and economics literatures speak of the forces of “push and pull.”29 Opponents of immigration focus on the former to the complete neglect of the latter, discussing the poor performance of the Mexican economy and the inherent limitations it imposes on economic opportunity for Mexico’s citizens, but nothing of the long-standing economic forces and choices of employers in the U.S. that attract immigrant labor.

The pro-immigration political forces in this country historically were the owners of capital interested in reducing labor costs. The vast majority of immigrants today, legal and illegal, work for non-immigrant employers. There are countless economic beneficiaries of immigrant labor today, including white homeowners who employ domestic and landscaping help, farmers utilizing migrant farm labor, small business owners, construction contractors, and large industrial conglomerates. The legal and regulatory environment actually serves as an incentive for employers to hire illegals. Undocumented laborers are denied even the most basic forms of workplace protection and are beyond the reach of guarantees facilitating organized labor, thanks to the Supreme Court’s decision in Hoffmann Plastics v. NLRB,30 making them a particularly attractive category of employee. In short, immigration is attractive to the potential migrant in large measure because of plentiful jobs and a preference for immigrant—and even undocumented—labor among some employers.

Finally, it is hypocrisy to bemoan the persistence of ethnic neighborhoods and residential segregation without acknowledging that such segregation is only possible in association with the companion phenomenon of “white flight.” In the end, we cannot dispute that large-scale immigration has, in fact, raised a variety of important issues including language acquisition, undocumented migration, segregation, public education, assimilation, or many other challenges. We suggest, however, that we are remiss if we fail to assess honestly the role played by the dominant (read “Anglo-Protestant”) forces in American society who wield tremendous power in shaping these and other outcomes.

Are Latinos Doing It Wrong?

With Anglos curiously missing from the story of how current circumstances came to pass, we are left then with only Latinos and their behavior at issue in these arguments. We are told that Latinos are not assimilating. Rather, the story goes, Mexican and other Latino immigrants are naturalizing at extremely low rates, these immigrants and native-born Latinos, especially Mexican Americans, maintain their mother tongue even for generations, concentrate in particular regions and neighborhoods, and perhaps are even strategizing to take over sections of the U.S. by building upon historical claims to the Southwest. As a consequence of these bad choices and the resulting failure to take substantial advantage of the opportunities provided by American society, Latinos, and especially Mexican Americans, experience economic deprivation, educational under-achievement, and persisting social isolation.

Economic and social outcomes of marginalized groups are not useful indicators of the group’s adherence to values and norms. Such a claim assumes that the groups possess an unexpected amount of power to negotiate their place within contemporary American society, an assumption at odds with the prevailing research and common understanding. Unlike some previous research that characterized Mexicans and Mexican Americans as largely subservient and fatalistic, this argument perceives Latinos as having an overwhelming sense of agency. That is, they are largely assumed to be in control of their destiny in the U.S.

Such an understanding completely discounts the many barriers Latinos have historically faced in attaining upward mobility in the U.S. There is the history of statutory discrimination against people of Mexican origin in Texas and California, the many ways in which Mexicans and Mexican Americans have always been part of an exploited class of laborers in agriculture, mining, manufacturing, and today’s service industries, and the complex way that immigration and racialization have always reinforced one another to deny opportunities to Mexicans and Mexican Americans in sections of the Southwest.31

This is not to say that Latinos have not attempted to control their destiny. Some Mexican American organizations, since at least 1929 and the founding of LULAC,32 have advocated the path of full integration into American
society on its own terms, including learning English, becoming participating American citizens, and in this way proving one's worthiness to be respected and treated equally in American society. Choices and opportunities available to Latinos, however, have been constrained by decisions of the powerful, public and private, who have chosen to exclude, rather than include, Latinos and their interests as an integral part of American society, as they have envisioned it.

The traditional practices of disenfranchisement and vote dilution have always limited the capacity of many Latinos to become fully integrated within American political institutions. This did not begin to change substantially until 1975 and the extension of the Voting Rights Act. According to the National Association of Latino Elected and Appointed Officials (NALEO), in 2002 there were 4,464 Latinos serving in elective office. Of these 36 percent held office at the school board level and another 34 percent served at the municipal level. One can certainly see this as a sign of the further “Hispanization” of American society. It is not difficult to see it also as a sign of ultimate, and growing political integration, i.e., the acceptance of the responsibilities of public policy-making in the most mainstream of institutions. One need not look too far to find compelling evidence of Latinos choosing to become full participants in American society.

How Should America Respond to These Challenges to Its American Identity?

It seems odd that the only prescription provided by Huntington as to how Americans should respond to his described challenges to American national identity is to look to our past and somehow reify our country's culture as English-speaking, Anglo, and Protestant. This is a clearly nationalist, in Huntington's terms, response. And, we think, the one his analysis pushes us to make. It seems, however, that this response is fundamentally disempowering to all Americans. It requires little creativity; we simply look to the past to know who we are. It requires no intellectual or personal growth, although it may require a recommitment to a renewed sense of Protestantism. Huntington is very clear in saying that a response that is largely based on a reflection of the principles of the American Creed including “liberty, equality, democracy, civil rights, nondiscrimination, [and the] rule of law” is insufficient. It seems that cultural homogeneity, of the Anglo Protestant kind, is the only way to begin to forge an appropriate response to these current challenges.

Again, Schlesinger is instructive for an alternative view. Building on the thought of Croly (1909), he argues that the American democratic faith . . . is an ever-evolving philosophy, fulfilling its ideals through debate, self-criticism, protest, disrespect, and irreverence; a tradition in which all have rights of heterodoxy and opportunities for self-assertion. The Creed has been the means by which Americans have haltingly but persistently narrowed the gap between performance and principle. It is what all Americans should learn, because it is what binds all Americans together.

Unlike Huntington, Schlesinger looks to find solutions in political competition and compromise, and not so much on an imagined past. It may be that Huntington is simply pushing us to this point of national discourse as well. He does say that “the choices Americans make will shape their future as a nation and the future of the world”. His analysis, however, suggests that the range of choices must, of necessity, begin with a reification of and recommitment to our nation's Anglo-Protestant cultural origins.

Smith provides an insightful discussion of the challenges to current thinking about the relationship between national identity and political development that is also grounded in political competition and compromise, and especially the choices made by political leaders and voters. However, he goes beyond Schlesinger in arguing that commitment to civic ideals is unlikely to be sufficient to hold the nation together during times of perceived challenges to traditional understandings of its civic identity. His interpretation of the way these limits are apparent in the writings of scholars promoting democratic cultural pluralism, liberal pluralism, and multicultural liberal citizenship lies in the way they do not address the need of all nations to have a strong, consensus-driven commitment to a “shared [national] civic identity and purposes”. What is significant in Smith's discussion of how this identity and purposes can be attained is that they are rooted in continuous contestation, especially when that contestation is driven by what he terms “rational or reflective liberty”.

We agree with Smith, in part with Schlesinger, and with others that a more informed starting point for developing a strategy for how America should deal with perceived challenges to its traditional American identity is an honest read of American history. Such a reading would acknowledge that America's undoubted Anglo-Protestant origins were the source of the promise of American democracy, for some, but its active denial to other substantial segments of the American population, throughout much of our national development. However, it would also recognize that out of political necessity, a desire to maintain social control, or a genuine commitment to make more inclusive that promise of American democracy, those same leaders and institutions have at times, however grudgingly, expanded the number of immigrant-derived and native-born ethnic-racial groups included as contributing members of American society, thus forging changes in both American national identity and the American creed.

What this honest reading also tells us is that expansions in liberty and opportunity in the United States for groups with histories of statutory exclusion have rarely come during times of nationalistic reifications of our
nation’s Anglo-Protestant origins. It would be unfortunate if Huntington’s recent work were to serve to further marginalize segments of America’s current population, especially more recent immigrants, who are among the most vulnerable in our society. Questions of nationhood and national identity are of their nature complex, value-laden, and contested. It is important, nonetheless, that they be raised in national discourse. It is perhaps even more important that scholars avail themselves of a full range of historical and contemporary evidence before reaching conclusions of threat, potential threat, and crisis in national identity. Fully informed discourse is, we think, more likely to help the nation meet the challenges of complexity, values, and contestation that considerations of national identity demand. It is much more likely to help the nation meet the challenges of demographic change in an increasingly interdependent world than are calls for a nation to return to a more simple, and more imagined, past.

Notes
1 “Latino” here is a category of self-identification for persons living in the United States who are descended from, or themselves are, migrants from any of the Spanish-speaking nations of the Americas.
2 It is worth noting that the Census Bureau separates the concept of race from the question of whether the resident identifies as Hispanic or Latino. As a consequence, self-identified Latinos can be of any race, according to the census. African Americans were estimated at 12.7 percent of the national population in 2002.
3 We well recognize that such projections are based on assumptions of continuing immigration rates, birth rates, and death rates. We make no claim about the precise social or political relevance of ethnic identity in the future.
5 Ibid., 234, italics original.
8 Ibid., 112.
9 Smith 1997, 4–7. In addition to immigrant groups, Smith’s analysis focuses on white males, white women, African Americans, and native peoples.
10 Ibid., 6.
11 Ibid.
12 See Smith 1997 for the most comprehensive discussion of the variation in these patterns of inclusion and exclusion for the colonial period through 1920. See Stephen Steinberg (1981) for a linkage to these varying patterns that relates national receptivity to groups based upon their conditions of initial incorporation to the U.S.
13 Huntington 2004, 159.
14 We well acknowledge that the specific origins and political development in each of these countries varies. We are suggesting, however, that the experiences of these countries shows that there is no inherent contradiction between ethno-cultural and linguistic diversity and viable national government.
15 Abizadeh 2002.
16 Morone 1996.
18 Morone 1996, 429
22 Huntington 2004, 83.
24 Ibid., 426.
25 Huntington 2004, 45, emphasis original.
26 Ibid., 45–46, emphasis added.
27 The Jones Act established Puerto Rico as a territory of the U.S., granted Puerto Ricans U.S. citizenship, and provided for the establishment of local government on a U.S. model. Puerto Rican independence, unlike Cuban and, eventually, Filipino independence, was never seriously considered, despite the existence of independence movements in Puerto Rico, under Spanish rule, since the 1870s.
31 Montejano 1987; Camarillo 1979; Barrera 1979; Gutiérrez 1995.
32 League of United Latin American Citizens.
33 Márquez 1993.
36 Huntington 2004, 338.
38 Huntington 2004, 366.
40 Ibid., 1997, 496.
41 Ibid., 502.

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On Silences: Salvadoran Refugees Then and Now
Submission for “El Foro” section of Latino Studies

Abrego Bio Sketch
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Abstract
US military and economic intervention in El Salvador has set the conditions for mass migration since the 1980s. Both then and now, despite well-documented human rights abuses, the US government refuses to categorize Salvadorans as refugees. Weaving in personal and political narratives, this essay examines the parallels of violence against refugees in the 1980s and the present. It also analyzes the silences created through the denial of state terror and the political and collective consequences of these silences for Salvadorans in the US.
On Silences: Salvadoran Refugees Then and Now

In a recent conversation during a visit to my grandmother’s house, my mother mentioned that one of her Facebook friends who lives in San Martín, our hometown in El Salvador, had posted alarming information the night before. Her friend, Amanda, updated her status to relay that a series of gunshots were being fired nearby as opposing gangs were attacking each other. The drama unfolded on Facebook as Amanda continued to post on this thread, asking for prayers and describing how she and her kids hid under the bed to wait out the shooting.

Like many people who fled war in a previous era, my mom rarely shared stories with her kids about the state terror she had witnessed. Her Facebook friend’s posts, however, got her to reminisce out loud about having been in a very similar situation over thirty years earlier. Upon hearing bombs nearby, like Amanda, she hid in the bedroom with her children; my sister was a newborn and I was almost five years old. Still recovering from giving birth days earlier, my mother recounted, she stood up and felt warm globs of blood sliding down her leg. Amid the surrounding explosions, her teeth chattered uncontrollably. She forced herself to pull it together long enough to focus on making us feel safe.

Having opened the door to these memories, her mind led her to more details that she continued to narrate—details that I heard for the first time that day. Inundated with fear, she opted not to leave the house for days. We ate only eggs. As the time passed and the bombings subsided, she finally gained the courage to go out shopping for more food to el mercado (the outdoor market), only to find a single vendor—an older woman—who had braved through the fear to be there. She was selling only tomatoes. Walking next to a pile of lifeless mutilated bodies on the street, my mother came home with nothing but a bag of tomatoes and the resolve to
leave that place as soon as possible. We would be on our way across three international borders within weeks.

I did not grow up hearing these stories. As jarring and injurious as those experiences were for her to live and for me to learn about, I treasure the moments when my mother slips out of the silence. Like many fellow Central Americans, my family’s history is inextricably woven into a national and regional history of multiple layers of state and gendered violence that most humans would prefer to forget. Understandably, survivors and witnesses want to protect loved ones from the haunting memories of such brutally tragic details. My need to learn about our history, therefore, was less pressing than the survivors’ need to suppress it.

It was not until college in a class on Central American Politics that I finally learned more. I read about the deep-seated economic inequalities that historically kept the majority of the population of Central America in debilitating poverty; about the many organized attempts at revolution that aimed to redistribute the unjustly concentrated wealth; and about the many times the United States intervened by repressing popular uprisings to protect business interests (Almeida 2008; Barry 1987; Dalton 2000).

In the 1970s and 80s, US support for the military and elites of El Salvador set the conditions for the immensely devastating consequences of the civil war. Determined to prevent a communist victory in the region that would stand in the way of US corporations’ profits there, as part of its Cold War operations, the Reagan administration armed and trained the military and paramilitary leaders of death squads with the goal of eliminating all opposition (LaFeber 1993). Upon losing to Nicaragua’s Sandinistas, they doubled down to train soldiers in Honduran lands to prevent leftist wins in Guatemala and El Salvador. At the School of the Americas—in the same way they had done with dictators throughout Latin America—they instructed military
leaders on how to commit vicious torture and carry out murder techniques that would also serve the purpose of instilling fear in the rest of the population, all with the goal of deterring attempts at a more equitable redistribution of wealth (Martín-Baró 1983). The military indiscriminately scorched entire villages (Viterna 2006; Weitzhandler 1993). By the end of the 12-year war in El Salvador, at least 75,000 people had been killed (Menjívar 2000).1 Tens of thousands were also tortured and disappeared.

These conditions pushed the population into the conflict—through forced recruitment, because people conscientiously decided to fight, or because violence became unavoidable. People joined the war openly, supported it clandestinely, or aimed merely to survive by following the unspoken rules of silence. Silence during the war entailed not speaking truths about what people witnessed or endured. It was the kind of silence that made families rush out of restaurants in a panic when they heard music by the popular Venezuelan political protest group, Los Guaraguao, play on the jukebox; the same silence that inspired people to carefully build concealed spaces under covered tables, in the back of the house where they hid to read a censored book about social justice; the particular sort of silence that echoed in the whispers of neighbors making everyone wonder who was watching and who was truly trustworthy.

The brutal violence and deafening silence thrust tens of thousands of Salvadorans to leave the country. Fleeing for their lives, in the 1980s they began what would eventually become a long-term migration stream to the United States. Though there was ample documentation to prove that they met the conditions established by the United Nations 1951 Convention and the US Refugee Act of 1980 to qualify for protection, the United States did not recognize them as refugees (Weitzhandler 1993). The lens of the “politics of protection” that makes “visible the politics at play in the existing refugee protection regime” (Casas-Cortes et al. 2014: 70), reveals
that while the United Nations High Commissioner for Refugees (UNHCR) claims to manage
refugees from a non-political stance, in practice, this is impossible whenever nation-states are
making determinations about who counts as a refugee and who does not; when they set
stipulations that label people refugees or categorize them instead as “economic,” or “illegal”
migrants (Hayden 2006)—as though people in the latter categories were less deserving of human
rights protections.

In the case of Salvadorans coming to the United States, refugee status or asylum would
have translated into a much more welcoming and stabilizing entry, helping to increase their
chances of thriving (Coutin 2000). The economic, social, and educational services available to
refugees could have shielded Central Americans at a time when they needed the stability to heal
from emotional scars left by state terror (Martín-Baró 1983). On the contrary, however, the
general US policy response toward Salvadorans—and Guatemalans—was to obstruct them.
Because of the US government’s financial and political support of the war, it refused to
recognize Salvadorans in the 1980s and 90s as refugees (Coutin 1998). In a sense, the US
government opted for silence regarding its extensive role in perpetrating human rights abuses.
This meant that Salvadorans, like Guatemalans, were deemed unauthorized immigrants, or later,
liminally legal inhabitants of this country, unable to plan toward a stable future (Menjívar 2006).
Decades later, this notably hostile context of reception continues to shape many Salvadorans’
inability to attain stable legal status (Menjívar and Abrego 2012), while also officially denying
their history.

The denial of services and protections, as damaging as it was for the day-to-day lives and
long-term stability of Salvadorans in the US (Menjívar 2000), also signaled other less
conspicuous but equally consequential forms of denial. The silence surrounding the US role in
the war served to deny validation of my parents’ generation’s status as survivors and refugees. The trauma they had endured—the memories that some nights still woke them up in an anxiety-ridden sweat—none of it was legally confirmed. The official version of why Salvadorans were in the United States negated their experiences as refugees; failed to register the state terror that drove them to this new place; and denied them a justification for their need to heal.

That denial, in turn, translated into various silences. There is the silence that is the large void in generations of children of Salvadoran immigrants growing up in the United States being denied access to our own histories (Cárcamo 2013). There is the silence that was filled by others who did not know how to understand us, so they used stereotypes and imposed their own experiences to make sense of who we are. And we continue to reproduce the silences when we do not know, cannot locate, have never been told of the structural, political, economic sources of our collective pain, or of our collective resilience.

We fill those voids as best as we can, guided by social expectations that were never meant to be attainable by the most vulnerable among us. Gendered ideals play a critical role here (Abrego 2014). In a heteropatriarchal context, the gendered ideals that govern our lives sneak into our understandings of ourselves and of our place in the world to powerfully communicate to women that they must be mothers who love, protect, and provide stability for their children through daily care work. Similar social and structural forces are at play in gendered ideals that expect men to be effective economic providers for families, earning enough money in desirable jobs to meet all of their material needs. In the context of such deeply rooted inequalities—the very same inequalities that were set in motion and maintained through US military and economic intervention—these ideals are out of reach for most Salvadoran women and men, both in El Salvador and in the United States. It is in a search for a dignified life, then, that Salvadorans—
victims of multiple forms of violence (Walsh and Menjívar 2016)—must find ways to make meaning of life beyond unfulfilled expectations.

In El Salvador, in the aftermath of the war’s devastation, neoliberal policies imposed by the International Monetary Fund and the World Bank did not account for needed investment in education and only promoted the creation of jobs that pay what people there call “sueldos de hambre” – wages that are so low that they can only result in hunger for workers and their families (Almeida 2008; Moodie 2010). Boys who had been forcibly recruited to fight in the war still had access to weapons, yet faced limited opportunities for schooling (Villacorta et al. 2011). Their reintegration to civilian life was structured to block them not only from upward mobility, but also from much needed emotional and psychological healing.

During this period, in the United States, Salvadoran youth who had settled into poor neighborhoods were met with other forms of violence and exclusion (Coutin 2013; Ertll 2009; Zilberg 2004). While their parents worked multiple jobs or dealt with their war trauma in unhealthy ways (Jenkins 1991), youth—especially boys—joined gangs seeking belonging and protection (Vázquez et al. 2003; Zilberg 2004). As a result, many were imprisoned. In the 1990s, after the signing of the Peace Accords, the United States government deported gang members to El Salvador and Guatemala where the limited educational and labor opportunities blocked them from meeting their gendered expectations. Unable to find dignity in the most traditional forms, deportees and other impoverished youth instead devised power and survival in gangs.

Today, in the continued and deepening absence of opportunity for a dignified life, profound poverty, corruption, and a raging US sponsored War on Drugs (The Mesoamerican Working Group 2013), all continue to fuel the proliferation of gangs that force more people to migrate. To be sure, Central American children have been migrating alone or with families since
at least the 1980s (Jonas and Rodriguez 2015), but mainstream media has mainly covered the dramatic increase of Central American “unaccompanied minors” and children with young mothers reaching US borders. Reports reveal that these newest migrants most often cite gang violence as their immediate reason for seeking refuge in the United States (UNHCR 2014; UNHCR 2015). In essence, structural violence is exacerbated when the consequences of unresolved trauma from state terror are made evident in horrific interpersonal violence that now generates new refugees.

The parallels between the refugees of the 1980s and those of the 2010s are noteworthy. In the 2010s, gangs have become the most common representation of Salvadorans and other Central Americans in mainstream US media portrayals – just as paramilitaries and guerrillas represented the refugees of the 1980s. Popular documentaries, as well as films and television shows feature one-dimensional Central American characters (Padilla 2012). Both in the 1980s and today, without sufficient political, economic, or social analysis to contextualize the proliferation of violence, and in the absence of balanced representations, viewers are likely to misunderstand Central Americans as inherently violent and dangerous. But let me be clear: gangs are a legacy of US-funded state terror. When analyzed through a gender lens that makes visible heteropatriarchal gendered ideals, gangs are the result of deep-seated inequalities fed by the kind of massive violence that has generated social trauma in the region for generations (Godoy 2002). Gangs—because they provide men who have been categorically denied opportunities access to social and financial resources and because they enact gendered violence upon women (Martínez 2016)—permit men to achieve an alternative form of masculinity and power.

Violence against women, too, is a central parallel between the two historical moments of Salvadoran exodus. In 2015, the UNHCR published a report titled, “Women on the Run,” about
the conditions women are fleeing in El Salvador and neighboring countries (UNHCR 2015). Domestic, sexual, and other forms of gendered violence forced the women—many of them with small children—to embark on a dangerous unauthorized trek north. It is worth noting that given the ages of the women—many in their 20s and 30s—they were born during the height of the civil war and their lives, therefore, have been framed through multiple forms of violence. Today, the women describe harrowing events of gendered violence that they suffered at the hands of their intimate partners, gang members, and others. Their stories are eerily reminiscent of those recounted by refugees fleeing El Salvador during the 1980s when repressive conditions were set by military and paramilitary groups.

The parallels are disturbingly evident in a 1991 article published in the journal Women's Studies International Forum titled, “The Gender-Specific Terror of El Salvador and Guatemala: Post-Traumatic Stress Disorder in Central American Refugee Women” (Aron et al. 1991). The authors begin by describing the kind of power military soldiers had in targeting victims in gendered ways:

Allegations of guerilla involvement provide a justification for murder, should anyone try to hold a soldier accountable for his deeds; but no suspicion need be present for a woman to be targeted. If she is not politically involved, but is desired as a sexual object by a man in the military, he may allege a guerrilla involvement, secure that his word will prevail over hers. (Aron et al. 1991: 39)

The authors go on to explain that women victims of soldiers, “cannot call for help, cannot press charges, cannot demand justice, cannot find refuge, for any act of resistance becomes a threat to existence” (41). In other words, for women, only silence is acceptable. In such an oppressive context, some women moved to “voluntarily” turn themselves in to individual soldiers “as their
private sexual property, so as to avoid becoming the common property of a whole battalion…” (40). Women’s bodies, then, became “a commodity in a market controlled by officers of the Armed Forces, who truck and barter as they choose, and while men may trade in cigarettes or male prestige when seeking favors, women more often must resort to the coin of the flesh” (40).

Women had to risk their lives to escape, knowing that they would not achieve justice in their country. If they were lucky enough to make it to the United States, they might try to file a claim for political asylum. This process, however, also often involved a re-traumatization:

When a refugee applies for political asylum, the process demands that she retell her painful story, and, as in rape trials, offers no guarantee that her testimony will be respected or believed. If she cites sexual assault as evidence of having suffered persecution, the institutionalized character of the crime may go unrecognized, thereby disqualifying the abuse as a claim for political asylum. The refugee is likely to be deported, and to face reprisals (often death) in her home country. (Aron et al. 1991: 43)

Much like in that period of civil war when the military terrorized the population, today gangs—the very children of war and state trauma—are the most direct and visible victimizers of the people of the northern region of Central America (Martínez 2016). Take, for example, a 29 April 2016 article in a Salvadoran newspaper. The journalist described a common trend now, to find dead, often mutilated bodies with their hands and feet tied behind their back, inside plastic bags, or covered in sheets, thrown on the side of the road in verdant areas. One of the “experts” interviewed for the piece states that while men are killed for strictly gang-related business, “among the women it’s usually due to infidelity to her partner, generally someone in prison who she hasn’t gone to visit in recent months. In some cases, the women have changed partners and that is what angers the previous partner.” Men, therefore, are targeted mostly for their actions
against the gang. Women, on the other hand, are murdered for not following men’s wishes, when they stop behaving like the property they are considered to be. Such descriptions minimize and justify these murders, as they explain why there were a record 954 homicides just during the first 40 days of 2016 alone.  

Fleeing multisided forms of gendered violence in El Salvador and throughout the region (Walsh and Menjívar 2016), women are then likely to experience further victimization during their long trek north to the United States. Along with the risk of losing their limbs and lives by clandestinely riding the freight train that runs through much of the length of the Mexican territory, women migrants are also highly vulnerable to rape and sex trafficking rings run by gangs and drug cartels (Izcara Palacios 2016; Martínez 2016; 2010). Given the high frequency and consistently severe nature of the violence perpetrated against women migrants along this journey, the UNHCR calls for the protection of Central American women seeking asylum outside their countries.

Although the US is a signatory to the 1951 Refugee Convention, an international treaty on refugee rights, the Obama administration has not protected Central American asylum applicants. In its May 2015 press release, US Immigration and Customs Enforcement (ICE) states that, “our borders are not open to illegal migration, and that individuals apprehended crossing the border illegally are a Department priority.” By refusing to recognize them as refugees, ICE deems these women and their children as “illegal” migrants who need not be protected. In the current post 9/11, Homeland Security chapter of this ongoing history of US responses to Central American migrants fleeing the consequences of US policies and interventions in the region, not only are Central Americans denied refugee status, but they are also labeled “illegal migrants” whose presence poses danger to the nation. The latter assertion
creates a false justification for the government’s indefinite detention of dozens of mothers and children as a way to deter future migration from the region.\textsuperscript{10}

In the 1980s, the US government denied Salvadorans refugee status to avoid recognition of its role in countless human rights abuses in El Salvador, all in the name of protecting corporate profits there. Today, denial of refugee status prioritizes the profits of a new set of corporations — for-profit prisons. As David Hernandez explains, the current exodus of Central American refugees is being used as an excuse to vastly expand the practice of family detention: In 2014, there was only one detention center in Berks County, Pennsylvania with 100 beds. After mainstream news covered the appalling detention conditions for children at the border in summer 2014, the government added 1,100 beds in:

… a temporary public facility in Artesia, New Mexico, and a privately run, for-profit facility in Karnes County, Texas. In December 2014, a 480-bed, for-profit facility opened in Dilley, Texas, while a larger 2,400-bed facility is being constructed next door. Also in December, the Artesia facility transferred its final detainees, while simultaneously, the for-profit Karnes County Residential Center agreed to expand its facility by 626 detention beds, making up for the closure of the New Mexico facility. All together, family detention capacity increased thirty-five times over in fewer than six months. (Hernández 2015: 14)

While ICE uses the wrong juridical categories for Central Americans who should be categorized as refugees, it also deceptively uses language to conceal its human warehousing practices. Despite the fact that all detainees refer to detention as prison or jail (Lovato 2016), when women and children are warehoused together, ICE has euphemistically called these “family residential centers.” These family residential centers are minimally disguised former
prisons that have been sites of suicide attempts by both women and children. Detainees get sick from the rotting food, have trouble sleeping, and become depressed at being incarcerated for fleeing violent conditions. As these stories of suffering and victimization are publicized, there has been mounting public pressure in the form of large demonstrations, negative national press coverage, and multiple petitions from a number of organizations, including elected officials. In response to the massive calls to end family detention, ICE has now succeeded in attaining a license in the state of Texas to officially call these “child care facilities” (Preston 2016).

There have been hundreds of asylum-seeking families at Karnes City family detention center. Among them there are at least 20 families who despite passing credible fear interviews were denied bond and held in detention for 10 months or longer because they had a “prior deportation.” ICE has invoked national security concerns to bypass international law—and much of it has been possible precisely because they will not categorize them rightfully as refugees.11

In the current historical moment, the unwillingness to recognize Central Americans as refugees creates new silences that will have lasting repercussions for the newest arrivals and future generations. When we refuse to call people refugees, to name the trauma and locate the source of the violence in the state and its various social structures, we create a void that then is filled, I argue, in ways that can be erroneous and detrimental. This is what I have witnessed in various spaces in Los Angeles, despite the city’s strong immigrant rights movement and its large population of Salvadorans who arrived in previous eras.

In Los Angeles, the silences and misnomers for previous generations have created voids too easily filled with stereotypes and misinformation. In practice, this means that among the general public not well versed in the basics of Salvadoran migration, refugees are lumped together in a single unauthorized, dehumanized category. In my experience, without complex or
balanced representations of Salvadorans or Central Americans in any mainstream media or social institution (whether in English or Spanish language), even well-meaning, well-educated observers do not have a proper framework through which to understand what is happening. To fill these silences, they turn to what is now the too-often empty rhetoric of “comprehensive immigration reform” presumed to solve the problems of anyone without a stable legal status (Gonzales 2013). Without the language to recognize the vast ways the US is implicated in people’s forced migration, or without the words to understand the forced nature of their displacement, even sympathetic members of the public want to “integrate” these newcomers and envelop them in messages of “Sí se puede” that are too simplistic and even problematic for the current circumstances.

In immigrant rights circles in Los Angeles, I have witnessed DACA recipients – young adults who formerly called themselves undocumented “DREAMers” (Negrón-Gonzales 2014) – respond with great compassion to the plight of these new young arrivals. Doing what they do very well, they organized quickly to protest hateful responses, mobilize resources, and offer children various social services. In these community and educational spaces, they tried to motivate the young newcomers with their personal stories of triumph—the same stories that had done wonders to inspire a general US public to support DREAMers politically (Gomberg-Muñoz 2015). The young Central Americans, however, listened with blank stares. The narrative of meritocratic success seems unattainable, perhaps even quixotic, as they recover from the social trauma and massive violence that marked their escape. Among them, the girls seem particularly unmoved.

In the UNHCR report and in countless other journalistic accounts, we hear of unspeakable violence against girls and women in their home countries and as they transit to the
United States. Six out of ten, perhaps as many as eight out of ten, are raped. More recently, we are hearing accounts of sexual abuse in US detention centers, as well. The language of “sí se puede” and “comprehensive immigration reform” does not begin to address their trauma. Even among allies, we do not have the right language or the proper lens to understand how to approach them as refugees. The silences have made it likely that we will draw on more widely dispersed narratives, even when these do not apply.

Growing up in these silences, however, has also made many of us curious, pushing us to find our voices to counter mainstream narratives, and seek social justice. Even in the face of such historically-rooted multisided trauma, Central American women have fought back. They fled in previous generations and do so today when their lives are in danger. Despite facing multiple forms of oppression, even detained women, arguably among the most vulnerable, have managed to organize and draw national and international attention to their plight. In March 2015, timed to take place during Holy Week, some 40 women in Karnes County Residential Center—most of them Central American—went on a hunger strike (Bogado 2015). 78 mothers there also signed a letter demanding to be released. Later that year in October, another group of detained women, this time at the T. Don Hutto detention center in Taylor, Texas, ran another letter writing campaign. Twenty-seven women went on a hunger strike to voice their grievances, telling stories of food that makes them sick, lack of proper healthcare, and psychological, sexual, and physical abuse within detention. They denounced that they are treated as less than human, followed around, or put in solitary confinement for speaking out. Most recently in August 2016, 22 women in Berks County Detention Facility in Pennsylvania also published an open letter and went on a hunger strike to denounce inhumane conditions and demand their release. Through these collective actions, Central American women are once again putting their bodies on the line,
risking their health and their lives to demand humane treatment. They have moved past the silences to make a clear and consistent demand: release everyone immediately.

As the atrocious consequences of neoliberalism and the drug war continue and more people flee from El Salvador and the rest of northern Central America, the United States remains mostly silent around its support of the Central American Free Trade Agreement (CAFTA), the Drug War, and the Central American Regional Security Initiative (CARSI)—the policies that set the conditions for current violence (The Mesoamerican Working Group 2013). Generations of us, however, have been watching. We have been moving between silences, learning, and preparing. Those of us who directly or indirectly suffered the consequences of the violence of the past, the very children of the refugees who were never labeled as such in a previous era, are now ready to break the silence, to fill the voids, to correct the official versions of our history. As coalitions of various social justice seekers unite around the US to demand justice for these most recent newcomers, some of the fiercest activists are precisely Central American women, some of whom are children of previously unrecognized refugees. Esther Portillo-Gonzales, Nancy Zuniga, Suyapa Portillo, Adalila Zelaya, Oriel Siu, Monica Novoa, Jennifer Cárcamo, Kryssia Campos, Lizette Hernandez, Cecilia Menjívar, Cristina Echeverría, Morelia Rivas, Alicia Ivonne Estrada, Ester Hernandez, Cristina Gonzales, Cynthia Santiago, Fanny García, Karina Oliva Alvarado, Arely Zimmerman, Maricela López Samayoa, Ana Patricia Rodriguez, Martha Arévalo, Rocio Veliz, Jacqueline Munguía, Cinthia Flores, Yajaira Padilla, Rossana Perez, Sara Aguilar, Siris Barrios, Dora Olivia Magaña, Carla Guerrero, Maya Chinchilla, Ester Trujillo. These Central American women have moved beyond the silence, using their gendered consciousness and their knowledge of the silenced history of the region to push these conversations in different spaces; to organize the women in detention; to amplify the voices of
refugee mothers who seek justice in their own individual cases, but also more broadly for all women who are fleeing violence. These activists have been able to recognize the humanity of the women because they have not relied on the political vocabulary that is rooted in other struggles and other populations. They have instead centered these women and their status as survivors of gendered violence. As an activist and a child of refugees, I add my name to this list and ask that for the sake of our liberation, you the reader, too, move beyond limited and limiting language, to stop ignoring the silences that currently surround Central American refugees.

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1 Next door in Guatemala, they suffered an even worse fate. By the end of the 36-year genocidal war in Guatemala, at least 200,000 people had been killed (Jonas and Rodríguez 2015).

2 Refugees apply for admission from outside the borders of the country of destination. Asylum seekers apply for legalization from within the desired country of destination.

3 Cuban exiles, for example, were granted refugee status, helping them to translate their various forms of capital to their new home in the United States (Portes and Bach 1985). Refugee status, I understand, is certainly not an all-encompassing solution. Cambodians, Laotians, and Hmong who fled similar state terror as Salvadorans and Guatemalans in their homelands, were granted
refugee status and all the financial and other assistance associated with it. Refugee status alone, however, has not provided sufficient relief to fully counteract the repercussions of trauma (Sack et al. 1999).

4 Northern Central America is also hostage to neoliberal economic policies and drug war efforts that produce structural forms of violence that, while less recognizable as sources of violence (Torres-Rivas 1998), nonetheless cause great generalized harm.


6 Author’s translation.

7 These figures are especially disturbing given that El Salvador is only about 8,000 square miles – almost twice the size of Los Angeles County (4,700 square miles) and about the size of Massachusetts.

8 http://www.unhcr.org/pages/49da0e466.html


Deferred Action for Childhood Arrivals is an executive action that grants a subset of undocumented young people access to state identification and a work permit, while clarifying that they are not a priority category for deportation.


http://www.humanrightsfirst.org/sites/default/files/LettertoSecJohnson-Berkshungerstrike.pdf
ARTICLES

BEYOND PREJUDICE: STRUCTURAL XENOPHOBIC DISCRIMINATION AGAINST REFUGEES

E. TENDAYI ACHIUME*

ABSTRACT

In this Article, I argue that the UN Refugee Agency’s global policy for addressing foreignness or xenophobic discrimination is inadequate. By focusing narrowly on harm to refugees resulting from explicit anti-foreigner prejudice, it ignores pervasive structural xenophobic discrimination—rights violations that result from the disproportionate effect of facially neutral measures on refugees due to their status as foreigners. I argue that the international human rights law that the UN Refugee Agency has used to compel regulation of explicit prejudice-based xenophobic discrimination also requires regulation of structural xenophobic discrimination. As a result, the UN Refugee Agency should adopt an inclusive approach that targets both forms of xenophobic discrimination.

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I. INTRODUCTION

There were 15.4 million refugees\(^1\) in the world at the end of 2012, and global trends suggest that this number will only continue to rise.\(^2\) According to the United Nations Refugee Agency (UNHCR)—the most influential refugee protection actor in the world—xenophobic or “foreignness”\(^3\) discrimination is among the greatest challenges to refugees globally.\(^4\) Sometimes this discrimination is violent. Brutal attacks

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1. Under international law, a refugee is a person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.” United Nations Convention Relating to the Status of Refugees, art. 1, § A(2), Jul. 28, 1951, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx.


3. I use the term foreignness to mean the status of being an actual or perceived outsider to a given political community or nation state.

against foreign nationals threaten the lives of refugees in contexts as varied as Libya, Greece, the United Kingdom, India, Malaysia, Thailand, Ukraine, and even the United States. This is the case regardless of whether they possess legal documentation authorizing their presence in these countries. Refugees are also regular targets of verbal and physical harassment by private citizens and even public authorities, such as police officers. Where xenophobic discrimination is not violent, it can nonetheless be a severe threat to refugee livelihood. Refugees are regularly denied access to vital public services such as health care and basic education on account of foreignness. Even where they have been granted the right to work, as foreigners they also face grave challenges to securing formal employment, regardless of their skills, training, and experience. This often has the effect of threatening their very ability to subsist. Unsurprisingly, UNHCR has placed xenophobic discrimination on its list of strategic priorities for refugee protection.

International law does not explicitly state what constitutes unlawful xenophobic discrimination, and there is no established consensus view. As a result, global actors such as UNHCR, the International Organization for Migration, and even the International Labour Organization have grappled with this question. In doing so, they have identified international human rights law as the most important anchor for the legal prohibition of xenophobic discrimination. However, much conceptual muddiness remains regarding the extent and nature of this prohibition. What constitutes unlawful xenophobic discrimination, and what obligations does this legal standard impose on states with respect to refugees? How should UNHCR, whose policy on such questions affects refugees everywhere, go about formulating a

6. See infra Part II.
8. International human rights law does not use the term “xenophobic discrimination,” but it prohibits a broad spectrum of the harm that refugees and other groups face on account of their status as foreigners. Thus, although this body of law does not define the term “xenophobic discrimination,” it nonetheless regulates conduct and measures that discriminate on account of foreignness. See infra Parts III.B, IV.A.
response? To date, scholars have done little to parse these questions, even though, as I will argue, this lack of clarity weakens the emerging international regime.

In this Article, I argue that UNHCR’s emerging international anti-xenophobic discrimination policy is inadequate because it fails to account for the full scope of xenophobic discrimination. To make this argument, I begin by distinguishing two forms of xenophobic discrimination: (1) explicit prejudice-based xenophobic discrimination and (2) structural xenophobic discrimination. As the name suggests, explicit prejudice-based xenophobic discrimination refers to harm that refugees and other categories of foreigners experience on account of explicit anti-foreigner prejudice. Structural xenophobic discrimination, on the other hand, refers to harm to refugees and other foreigners that results from the disparate effects of various measures on these groups even in the absence of explicit prejudice. Crucially, these effects are the product of interactions among these measures with each other and with the typical circumstances confronting these groups. To tease out the implications of this distinction, consider the following example.

International human rights law provides a right to basic education, and many countries extend this right to refugees. Nonetheless, refugee children still face great difficulties in accessing basic education. In some cases, it may be on account of explicit prejudice-based xenophobic discrimination. This would be the case where a refugee is barred from enrolling in a public elementary school by an administrator who explicitly states the basis for the denial as anti-foreigner prejudice. Alternatively, a refugee may be barred from enrollment because she cannot produce a recent academic transcript and birth certificate. All her documentation was destroyed during her flight from her country of nationality. Furthermore, she cannot seek copies of this documentation from her country of nationality because to do so would jeopardize her asylum claim.

Although the effect is the same as under the first example, the latter

10. South Africa is one example. See Refugees Act 130 of 1998 § 27(g) (S. Afr.).
11. See, e.g., Paloma Bourgonje, Education for Refugee and Asylum Seeking Children in OECD Countries: Case Studies from Australia, Spain, Sweden and the United Kingdom, in EDUCATION INTERNATIONAL 7 (2010) (describing the challenges that refugees and asylum seekers in Australia, Spain, Sweden, and the United Kingdom face in accessing education).
12. In some jurisdictions, even if contacting one’s government is feasible and not threatening to a refugee’s safety, doing so may be a basis for the country of asylum to deny or revoke refugee status.
scenario does not present a case of explicit prejudice-based xenophobic discrimination. The birth certificate and transcript requirements serve the independent and legitimate purposes of identity verification and academic placement assessment, respectively. It is instead a case of what I have called structural xenophobic discrimination. It involves a violation of the right to basic education on account of an admissions policy that disproportionately harms refugees as foreigners, despite the absence of explicit anti-foreigner prejudice. My theory of structural xenophobic discrimination captures discriminatory effects of single laws or policies such as this admission policy. It also encompasses more complex cases where multiple laws, policies, or practices interact with each other cumulatively to cause structural human rights violations against refugees.13

Applying this distinction to contemporary international anti-xenophobic discrimination policy, I argue that UNHCR has implicitly but overwhelmingly taken a prejudice approach to determining unlawful discrimination against refugees. In other words, it has focused almost exclusively on ensuring that states regulate explicit prejudice-based xenophobic discrimination against refugees. This is a problem for at least two reasons. The first is that in much of the world, a significant portion of the harm that refugees experience on account of their status as foreigners involves no explicit prejudice.14 It instead takes the form of structural xenophobic discrimination. This means that UNHCR’s influential global policy fails to account for a category of harms that I will argue substantially compromises the very livelihood of refugees. The second is that research suggests that structural xenophobic discrimination makes refugees more vulnerable to episodes of explicit prejudice-based xenophobic discrimination.15 Thus, even where the concern is primarily to regulate harm from explicit prejudice, it is a mistake to ignore structural xenophobic discrimination.

In addition to identifying the shortcomings of UNHCR’s anti-xenophobic discrimination policy, I argue that international human rights law offers a legal basis for expanding this policy to address structural xenophobic discrimination. UNHCR’s existing policy is anchored in an international human rights law treaty—the International Convention for the Elimination of all forms of Racial Discrimination

13. See infra Part II.C.
14. Id.
15. See infra Part II.D.
Significantly, the Discrimination Convention prohibits conduct or measures as discriminatory that have the purpose or effect of violating international human rights law on the basis of a prohibited classification. The Discrimination Convention does not prohibit all disparate effects. But by recognizing certain disparate effects as prohibited, the Discrimination Convention serves as firm legal basis for requiring states to regulate structural xenophobic discrimination. As a result, I argue that UNHCR’s global policy can and should adopt an inclusive approach that requires states to regulate harm to refugees resulting from explicit anti-foreigner prejudice and harm resulting from structural xenophobic discrimination.

Why does any of this matter? There are serious questions regarding whether the existing international legal framework for refugee protection can address the dramatically changed circumstances to which it now applies. In the view of many, international human rights law does

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16. UNHCR has rightfully conceptualized xenophobic discrimination as occurring at the intersection of multiple categories, even if national origin and nationality are most salient. It has noted that targets of xenophobic harm may be subject to it “on the grounds of race, colour, descent, or national or ethnic origin, including in combination with other grounds, such as religion, gender and disability.” Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance Through a Strategic Approach, UNHCR ¶ 11 (2009) [hereinafter 2009 UNHCR Guidance Note]. UNHCR has also included nationality in this list. Id. ¶ 12. The Discrimination Convention prohibits precisely this kind of discrimination. See infra Section III.B.

17. The International Convention on the Elimination of All Forms of Racial Discrimination (the Discrimination Convention) prohibits racial discrimination, which it broadly defines as: any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. The International Convention on the Elimination of All Forms of Racial Discrimination art. 1, Jan. 4, 1965. (emphasis added). See infra Part III.B. for a discussion of foreignness as a prohibited classification.

18. See infra Part IV.A.

19. Erika Feller, as Director of UNHCR’s Department of International Protection, recalled that “[w]hen UNHCR was established, the problem presented was essentially one of dealing with the approximately one million individuals who had first fled Nazism, and later communism, in Europe.” Erika Feller, The Evolution of the International Refugee Protection Regime, 5 WASH. U. J. L. & POL’Y 129, 131 (2001). As scholars have pointed out, the UN Refugee Convention, which is the cornerstone of international refugee law, was designed “for the purpose of addressing the status of mainly Europeans who had crossed an international border during [World War II].” Margaret G. Wachenfeld & Hanne Christensen, Note, An Introduction to Refugees and Human Rights, 59 NORDIC J. INT’L L. 178, 179 (1990); see also James C. Hathaway, Reconceiving Refugee Law as Human Rights Protection, 4 J. REFUGEE STUD. 113, 114 (1991) (describing the UN Refugee Convention as “premised on a Eurocentric notion of burden-sharing, and defines need in terms which exclude most refugees from the less developed world”).
and will play an important role in the tailoring of refugee protection to contemporary reality. The validity of this belief remains to be seen. But as various legal actors, particularly in countries that do not rely on the international human rights framework for refugee protection—such as the United States—consider increased reliance on international human rights in domestic settings, my evaluation in the Article is useful. And while I focus here on refugees and asylum seekers, my arguments are relevant to those concerned with the rights of other categories of immigrants under international human rights law.

In Section II, I elaborate the distinction between explicit prejudice-based xenophobic discrimination and structural xenophobic discrimination, and the relationship between the two. In Section III, I review global refugee protection policy to reveal the dominance of what I have termed the prejudice approach to fighting xenophobic discrimination. I also note the shortcomings of this narrow approach. In Section IV, I argue that the Discrimination Convention requires regulation of structural xenophobic discrimination against refugees. Given the conditions that refugees face and the fact that the Discrimination Convention provides a basis for addressing these conditions, I argue that UNHCR should shift from its narrow focus on explicit prejudice to an inclusive approach that also regulates structural xenophobic discrimination. In this Section, I also address briefly the biggest challenges to realizing this inclusive approach.

II. Conceptualizing Xenophobic Discrimination

In this section, I examine the challenges that refugees and asylum seekers face on account of foreignness, introducing an important

20. See infra note 138.

21. Scott Cummings has written on the “new interest in human rights among public interest lawyers” in the U.S. domestic context, whom he describes as “now turning to human rights as a master frame for social change.” Scott L. Cummings, The Internationalization of Public Interest Law, 57 DUKE L.J. 891, 970 (2008); see also Caroline Bettinger-Lopez et al., Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice, 18 GEO. J. ON POVERTY L. & POL’Y 337, 347 (2011) (describing the use of international human rights by domestic human rights activists). Bettinger-Lopez et al. note that “these advocates are incorporating with more frequency international human rights norms, language and strategies in their work within U.S. borders.” See Bettinger-Lopez et al., supra, at 345. Scott Cummings notes in particular that lawyers within the U.S. domestic immigrants rights field are among those that have “more readily embraced the human rights framework.” See Cummings, supra, at 996-98.

22. An asylum seeker is a person who claims refugee status, but whose claim has not been formally recognized by a host government or by UNHCR. U.N.H.C.R., U.N.H.C.R. GLOBAL TRENDS 37 (2011).
distinction between explicit prejudice-based discrimination and structural xenophobic discrimination. I use South Africa as my primary case study, and there are several compelling reasons to do so. Over eighty percent of the total global refugee population is in the so-called developing world.\(^23\) Of the 845,800 people that applied for refugee status in 2010, a solid twenty percent of these did so in South Africa.\(^24\) The United States received the next largest number of asylum applications—a distant second, with six percent of total applications.\(^25\) Nonetheless, what little scholarship exists on xenophobic discrimination against refugees and other forced migrants focuses on this phenomenon in the developed world.\(^26\) In light of contemporary patterns of forced displacement, South Africa—an asylum seeker “hotspot” of the global south and, indeed, the world—is an apt starting point.\(^27\)

Furthermore, South Africa has shown notable openness to human rights-based refugee protection. It has an impressive refugee protection regime buttressed by international human rights law and principles enshrined in its domestic constitution and legislation.\(^28\) Finally,

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24. South Africa received eleven percent of global applications in 2011, again remaining firmly in the lead.
26. INT’L LABOUR ORG. ET AL., INTERNATIONAL MIGRATION, RACISM, DISCRIMINATION AND XENOPHOBIA (2003), available at http://www.unesco.org/most/migration/imrdx.pdf (“Research on concrete manifestations of xenophobia and discrimination against migrants, refugees and other non-nationals is still very limited, especially outside Europe and North America. There is very little data that allows for effective comparisons among countries, let alone across regional contexts.”).
27. The experiences of refugees in South Africa can by no means be conflated with those of all others in the global south. South Africa is but one of the many refugee-receiving countries in Africa. Furthermore, although Africa (excluding North Africa) hosted 2.4 million refugees in 2011, the Asia Pacific region hosted 3.6 million and the Middle East 1.7 million. U.N.H.C.R. GLOBAL TRENDS (2011), supra note 22, at 13. I supplement my case study with UNHCR findings based on experiences of xenophobic discrimination across the world. I do this to show that there is strong reason to believe that my conceptual intervention in this Article (a theory of structural xenophobic discrimination) is applicable beyond the South African context. That said, on the basis of South Africa’s context alone, it is possible to reach conclusions of consequence regarding the suitability of UNHCR’s approach to xenophobic discrimination. A global policy that fails to meet the needs of the significant proportion of the global refugee and asylum seeker population in South Africa warrants serious concern, even in the unlikely event that these needs are categorically different from those of refugees in any other countries.
28. See JEFF HANDMAKER, LEE ANNE DE LA HUNT & JONATHAN KLAAREN, ADVANCING REFUGEE PROTECTION IN SOUTH AFRICA 278 (Handmaker et al. eds., 2008) (discussing the basis of South Africa’s refugee protection in international human rights law). For a detailed account of how human rights advocates played a crucial role in the development of this regime, see JEFFREY
South Africa is among the few countries in the global south with a relative wealth of accessible data on xenophobic discrimination against refugees.²⁹

A. Foreignness As a Basis for Discrimination

I define foreignness as the status of being an actual or perceived outsider to a given political community (typically a nation state). What it means concretely to be “foreign” will thus shift depending on context. The particular operational classifications will vary according to how the history, politics, and socio-economics of a given country have shaped its understanding of the appropriate beneficiaries of political membership. A universal feature of foreignness, however, is that its construction rests on multiple, intersecting classifications. As UNHCR has stated, xenophobic harm maybe based “on the grounds of race, colour, descent, or national or ethnic origin, including in combination with other grounds, such as religion, gender and disability.”³⁰ It has also added nationality to this list.³¹

To start with, when refugees and other forced migrants are targeted as foreigners, it is evident that national origin is deeply implicated.³² National origin may refer to country of origin, but it may also refer to ancestry, or the birthplace of those from whom one is descended.³³ In addition to national origin, nationality as a distinct classification may also be at stake. By nationality, I mean the legal status of bearing the

²⁹. The challenge that access to empirical data on this issue outside of the West presents cannot be overstated. See INT’L LABOUR ORG. ET AL., INTERNATIONAL MIGRATION, RACISM, DISCRIMINATION AND XENOPHOBIA 9 (2001).
³¹. Id.
³². The threats of a group that attacked and severely wounded an Afghan refugee in Athens, Greece, illustrate this: “Where are you from? Go back to your country immediately! Leave! Out of here! Go to hell! You are not wanted.” Press Release, UNHCR, Three Face Justice in Athens for Attacks on Foreigners (Sept. 27, 2011) (discussing almost daily attacks on foreign nationals, including asylum seekers, in Athens).
entitlements and responsibilities of full membership in a nation state, and I use this term synonymously with alienage and citizenship. In some cases, xenophobic discrimination against refugees and asylum seekers may be perpetrated on the basis of nationality, to the seeming exclusion of national origin.

Consider an example relating to access to health care. In South Africa, refugees are entitled under law to the same public health benefits as South African citizens. Yet the difficulties that refugees face in realizing these entitlements are myriad. They report that “in many cases when they seek health care, clinics and hospitals either refuse to treat them, terminate their care prematurely, charge them excessive fees, or verbally harass and mistreat them for being foreign.” Even where health care providers are aware of what the law requires, they may refuse to treat refugees because they are foreign. In some cases, foreignness is determined on the basis of national origin, which a health care administrator may attempt to determine using ethnic, linguistic or other traits. But in other cases, nationality may be treated as what is characteristic of foreignness. This is the case, for example, when health care practitioners deny treatment to an un-naturalized refugee but will administer it to a naturalized refugee on presentation of proof of citizenship.

In the case of xenophobic discrimination against refugees, race is a fundamental determinant of who among those of foreign national origin or nationality are deemed deserving of xenophobic harm. In

35. Human Rights Watch, No Healing Here: Violence, Discrimination and Barriers to Health for Migrants in South Africa 2 (2009). In fact, “[a]llegations of discrimination and xenophobic attitudes by health care staff ranked as one of the leading barriers to health care” for migrants, including refugees. Id. at 55.
36. Human Rights Watch quotes a refugee healthcare provider who says: In general, before May 2008 access to treatment was improving, but xenophobia has created a lot of problems. It’s worse now than before the attacks. It’s not the policy that is the problem by now. It is individual discrimination by nurses and others at the hospital. We have lost the ground we won over the last ten years and have to start gain from square one. Id. at 55.
37. At the same time, even where the ostensible grounds of discrimination is nationality, this may be a pretext or a proxy for national origin in light of the overwhelming instances for refugees, and the totality of instances for asylum seekers, where nationality and national origin overlap. Thus, while I highlight the distinction between national origin and nationality in the operation of xenophobic discrimination, I do not mean to overstate it.
other words, not all people of foreign national origin or nationality are equally vulnerable to harm on account of foreignness—vulnerability is a partial but significant function of race.  

This is evident in South Africa, where a white Zimbabwean refugee is unlikely to face the same risk of xenophobic discrimination as a black Zimbabwean refugee, who is an almost certain target, even at the hands of South Africa’s majority black citizens. Here, “the differential experience of discrimination is a function of the intersection of identities.” Israel offers another example. There, black African asylum-seekers are victims of racialized

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38. Here I use the term race to capture both biological conceptions of race that focus on phenotypical differences, as well as social conceptions that describe relations of power among different groups constructed as racially distinct. On the social construction of race, see Ian F. Haney-López, *Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1 (1994); Jayne Chong-Soon Lee, Book Review, *Navigating the Topology of Race*, 46 Stan. L. Rev. 747, 758 (1994). Being black, where black refers broadly to individuals of sub-Saharan African descent, may on its own mark you as of foreign national origin if you are a refugee in Sweden, but not necessarily so in a sub-Saharan African country such as South Africa. In the latter context, however, subtle differences in phenotype are used crudely to distinguish foreign from native. Skin tone or complexion serves as an example—one’s “shade of black” may be one of several traits used to single a person out as foreign. Some South African scholars have described this as part of xenophobic discrimination’s negrophobic qualities in that country: “[d]arker skin betrays foreign African origins and invites persecution by fellow ‘blacks’ who see their lighter skin as the most telling signifier of South African belonging.” Shireen Hassim, Eric Worry & Tawana Kupe, *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa* 16 (Shireen Hassim et al. eds., 2008). Similarly, Somalis, whose typically light complexion sufficiently differs from the shades of black considered native to South Africa, are regularly singled out as targets of xenophobic violence. See, e.g., Press Release, Office of the High Commissioner for Human Rights, Human Rights Commissioner Pillay Highlights Brutal Killing of Somali Family in South Africa, U.N. Press Release (Oct. 7, 2008).

39. Sociologist Alan Morris, for example, reports the findings of his study to show that “being a black foreigner is no protection from racism, especially if you are from a country north of South Africa’s neighbouring states. Instead, black foreigners from these countries can expect to experience the same levels of abuse, discrimination and stereotyping endured by black immigrants in other parts of the world.” Alan Morris, “Our Fellow Africans Make Our Lives Hell”: The Lives of Congolese and Nigerians Living in Johannesburg, 21 Ethnic & Racial Stud. 1116, 1133 (1998).

xenophobic discrimination. This discrimination includes violence as extreme as the firebombing of homes and kindergartens known to be attended by black Africans.

Ecuador, which is home to the largest refugee population in Latin America, provides an example that also illustrates the gendered nature of xenophobic discrimination. Refugees in this country, ninety-eight percent of whom are Colombian, face widespread xenophobic discrimination from their host population. A 2010 study found that 97.3 percent of refugees interviewed had experienced discriminatory incidents on the basis of being Colombian. But Afro-Colombians and Colombian women who were single heads of households were found to be particularly vulnerable to xenophobic discrimination, reflecting the race and gender dimensions of this discrimination.

Beyond national origin, nationality, race, and gender, there are other classifications that operate in the marking of refugees and other foreigners as targets of xenophobic discrimination. UNHCR has identified religion as one such classification. Class is another. South African sociologist Ashwin Desai has contrasted the differential impact of xenophobic discrimination on “denizens”—a more privileged group of non-citizens such as expatriates whose class, among other things, permits them to transcend the limits of the nation state—and “helots”—vulnerable groups such as asylum seekers and other forced migrants whose class, among other things, exposes them to xenophobic exclusion.


42. Israel and Its Black Immigrants, supra note 41.


45. Id.

46. Id.

47. See also Gqola, supra note 40, at 218-21 (discussing the gendered nature of certain forms of xenophobic discrimination in South Africa).


In sum, foreignness is a composite category at the intersection of multiple classifications. Functionally, the classification “foreign” marks the group constructed as such not only as distinct from an in-group designated native, but in the case of refugees, as an out-group deserving of exclusion and of a broad spectrum of harm.

I argue that it is important to distinguish two forms of harm that refugees and other migrants experience on account of foreignness: explicit prejudice-based xenophobic discrimination and structural xenophobic discrimination.

B. Explicit Prejudice-Based Xenophobic Discrimination

References to “xenophobic discrimination” by refugee protection advocates such as the UN Refugee Agency, and even in popular media and public discourse in different parts of the world, typically refer to harm that results from explicit, anti-foreigner prejudice. In its most extreme forms, explicit prejudice-based xenophobic discrimination is violent. A remarkable example that made international headlines was a two-week long spate of xenophobic violence that shook South Africa in

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50. For example, U.S. critical race scholars have done insightful work to unpack the intersecting classifications that have been mobilized to mark Asian-Americans and Native Americans as foreign, citizenship notwithstanding. See, e.g., Saito, supra note 33, at 322 (“To understand discrimination against those perceived as a foreign, we must consider the ways in which race intersects with other classifications, such as ethnicity, ancestry, and citizenship status.”).

51. This is true beyond the refugee protection context. Writing on the construct of foreignness in the United States, Professor Saito offers the example of Native Americans, whom she notes “have consistently been cast as outsiders, labeled foreign in the name of sovereignty, and excluded.” Id. at 289.

52. Accounts focus on the concept of “xenophobia.” In a discussion paper, the International Labour Office (ILO), the International Organization for Migration (IOM), and the Office of the United Nations High Commissioner for Human Rights (OHCHR) consider the definition of xenophobia as “attitudes, prejudices and behavior that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity.” INT’L LABOUR ORG. ET AL., INT’L MIGRATION, RACISM, DISCRIMINATION, AND XENOPHOBIA 2 (2001). The content of this discussion paper, even understood as no more than “a preliminary inter-agency exploration of the subject matter,” indicates current thinking on xenophobia within important international migrant and refugee protection agencies. The South African Human Rights Commission (SAHRC)—an independent national institution mandated by the South African Constitution to promote respect for and protection of human rights—has defined xenophobia as “the deep dislike of non-nationals by nationals of a recipient state.” S. African Human Rights Comm’n, Braamfontein Statement on Xenophobia (Oct. 15, 1998), available at http://www.queensu.ca/samp/migrationresources/xenophobia/responses/sahrc2.htm. Under this formulation, xenophobia is “an irrational prejudice and hostility towards non-nationals” whose “manifestation is a violation of human rights.” Id.
May 2008. This violence began in Alexandra, one of Johannesburg’s oldest townships. During this period, “[v]ictims and witnesses describe[d] chilling attacks: hundreds of people armed with axes, clubs and metal bars going from shack to shack, purging districts of foreigners; victims being clubbed insensible with concrete slabs and then burned, or being locked into their shacks, which were then set alight.”

Attacks during this period left sixty-two dead and over 600 injured. These attacks also displaced over 100,000 people, many of whose homes and property were destroyed in the process. Without a doubt, the targets of the violence were foreign nationals or people perceived to be foreign nationals. At the same time, not all categories of foreign nationals were equally at risk of attack. The race and class dimensions of the violence were stark—violence was targeted at poor, black foreigners. Refugees and asylum seekers, the vast majority of whom in South Africa are black and poor, were among the most vulnerable to the violence.

As earlier examples above have shown, however, explicit prejudice-based xenophobic discrimination need not be violent. Globally, refugees and asylum seekers experience a wide range of harm on account of non-violent explicit prejudice-based xenophobic discrimination. For example, explicit prejudice severely compromises the ef-
forts of refugees in South Africa to access a range of social services to which they are entitled under law, such as health care, basic education, and social grants.

C. Structural Xenophobic Discrimination

In South Africa, and arguably across the world, acts of explicit prejudice-based xenophobic discrimination occur within the context of pervasive structural xenophobic discrimination. By this I mean harm that results from the disparate impact of measures on refugees and other groups on account of foreignness, when these measures interact with each other and with context. Explicit prejudice is not a necessary condition for this form of xenophobic discrimination. And in fact, typically the policies and practices at the heart of structural xenophobic discrimination are not motivated by explicit prejudice. Instead, they are intended to serve an independent, legitimate purpose. A central goal of this Article is to show that despite the absence of any explicit prejudice, structural xenophobic discrimination is fundamental to understanding and remedying the severe hardships refugees face on account of foreignness.

The access to education example in the Introduction was an example of a simple case of structural xenophobic discrimination. I now provide an example of a complex case, where the cumulative effect of a wide range of measures is serious harm to refugees. When considered individually and in isolation from the context within which they operate, the disparate effects of these measures on refugees may seem trivial. But crucially, when they interact and have effect in concrete social contexts, these policies and practices can inflict significant harm on refugees and other foreigners. Specifically, I offer the example of how structural xenophobic discrimination facilitates the severe socio-economic marginalization of refugees, essentially turning this group into a vulnerable underclass.

Like urban refugees and asylum seekers in much of the world, those in South Africa cannot rely on relief aid from host governments or UNHCR for their survival. Such relief, where available, is limited. A

60. See Human Rights Watch, supra note 35, at 54-55.
62. An urban refugee protection policy requires refugees to integrate within a host society, as opposed to a camp policy that requires refugees to remain in a camp managed by the host government or by UNHCR.
primary source of livelihood is thus income they must generate alongside other members of society. South Africa grants refugees the right to work, and the same is true of asylum seekers, who are granted this right from the moment they are issued an asylum seeker permit. Despite work authorization, professional qualifications, and work experience, however, these groups face great difficulty in securing formal employment. This is the case notwithstanding a skills shortage in South Africa’s labor market.

The causes of refugees’ and asylum seekers’ exclusion from formal employment are myriad and include explicitly communicated prejudice on the part of employers who, on the basis of this prejudice, refuse to employ members of these groups. What I wish to highlight here, however, are the structural forces that play an important role in barring refugees and asylum seekers from formal employment but that do not take the form of explicit prejudice-based discrimination.

I propose that structural xenophobic discrimination originates in laws, policies, and practices that fall into two categories. The first contains laws and policies that I term “de jure alienage exclusive.” These laws and policies, for independent and ostensibly legitimate reasons, explicitly exclude refugees and asylum seekers from entire sectors of industry on the basis of citizenship or immigration status.

63. UN HIGH COMM’R FOR REFUGEES (UNHCR), UNHCR POLICY ON REFUGEE PROTECTION AND SOLUTIONS IN URBAN AREAS ¶ 100 (Sept. 2009), http://www.refworld.org/docid/4ab8e7f72.html [hereinafter UNHCR POLICY ON REFUGEE PROTECTION AND SOLUTIONS IN URBAN AREAS].

64. Refugees Act 130 of 1998 § 27(f) (S. Afr.).


66. Loren B. Landau et al., Xenophobia in South Africa and Problems Related to It, 13 Forced Migration Working Paper Series 1, 22 (2004). Karen Jacobsen writes, for example, that in Cairo, Johannesburg and Tokyo studies find that “[w]hile recognized refugees have the right to work, even skilled workers or professionals usually can find only low paid, unskilled jobs, often without work contracts or social benefits.” Karen Jacobsen, Refugees and Asylum Seekers in Urban Areas: A Livelihoods Perspective, 19 J. REFUGEE STUD. 273, 282 (2006).


68. See, e.g., Roni Amit, Winning Isn’t Everything: Courts, Context, and the Barriers to Effecting Change Through Public Interest Litigation, 27 S. Afr. J. HUM. RTS. 8, 30 (2011) (discussing how as a result of prejudice, “asylum seekers are pushed to the margins—they are forced into the informal economy, cannot access health care or social services, and are viewed as illegal and suspect by both the police and society at large”).
The second category contains laws, policies, and practices that I term “de facto alienage exclusive.” These do not explicitly or on their face exclude refugees and asylum seekers from formal economic opportunities. They are, in principle, alienage neutral, but nonetheless subject these groups to requirements or conditions that in effect exclude them on the basis of their nationality or immigration status. Below, I highlight how interaction between these categories results in structural xenophobic discrimination that excludes refugees and asylum seekers from formal employment.

1. Industry Gate-Keeping Law and Policy

Among the greatest contributors to structural xenophobic discrimination are industry laws and regulatory policies that serve a gate-keeping or quality-control function. Whether they are de facto or de jure alienage exclusive, typically their existence is justified on the basis of an interest in ensuring a certain standard of service within a particular industry. South Africa’s Private Security Industry Regulation Act (PSIRA) is a prototypical example of a de jure alienage exclusive law that serves such a gate-keeping function. This Act restricts employment in the private security industry—which employs more people than the national army and police force combined—\(^{69}\) to citizens and permanent residents.\(^ {70}\) Although the law permits a regulatory body to exempt applicants not meeting these criteria, exemptions are discretionary, and refugees and asylum seekers face great difficulties securing such exemptions.\(^ {71}\) Furthermore, refugees face great barriers to acquiring legal permanent resident status.\(^ {72}\) As a result of PSIRA, refugees and asylum seekers are all but foreclosed from taking employment that provides a “security service” broadly defined as “protecting or safeguarding a person or property in any manner.”\(^ {73}\) It bars these groups from

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69. Bertie Van Zyl (Pty) Ltd. and Another v. Minister for Safety and Security and Others 2010 (2) SA 181 (CC), 19 ¶ 34 (S. Afr.).
71. Applicant’s Head of Argument, ¶ 5.6.13, Union of Refugee Women and Others v. Director, Private Security Industry Regulatory Authority and Others 2007 (4) BCLR 339 (CC) (S. Afr.).
72. Id. ¶ 6.3.18.
73. The scope of PSIRA is expansive, and South Africa’s Constitutional Court noted this in Bertie Van Zyl (Pty) Ltd. and Another, ¶ 26, where it stated:
   According to the definition in section 1 of the Act—‘security service’ means one or more of the following services or activities: 1. protecting or safeguarding a person or property in any manner; 2. giving advice on the protection or safeguarding of a person or property, on any other type of security service as defined in this section, or on the use of
what was, for a period, the second most sought after form of employment among all employed refugees and asylum seekers.\(^7^4\)

When PSIRA is considered in isolation from the broader regulatory policies and customary practices that structure the formal employment sector, it is difficult to comprehend the severity of its impact on refugees’ right to work.\(^7^5\) But when PSIRA’s exclusion is mapped onto other de jure and de facto alienage exclusive policies and practices, many of which similarly serve a gate-keeping function, it is necessary to re-evaluate the severity of PSIRA’s disparate impact on refugees and asylum seekers. In broader context, PSIRA is in fact an important building block of a structural barrier to arguably any formal employment at all for refugees and asylum seekers.\(^7^6\)

security equipment; 3. providing a reactive or response service in connection with the safeguarding of a person or property in any manner; 4. providing a service aimed at ensuring order and safety on the premises used for sporting, recreational, entertainment or similar purposes; 5. manufacturing, importing, distributing or advertising of monitoring devices contemplated in section 1 of the Interception and Monitoring Prohibition Act, 1992 (Act No. 127 of 1992); 6. performing the functions of a private investigator; 7. providing security training or instruction to a security service provider or prospective security service provider; 8. installing, servicing or repairing security equipment; 9. monitoring signals or transmissions from electronic security equipment; 10. performing the functions of a locksmith; 11. making a person or the services of a person available, whether directly or indirectly, for the rendering of any service referred to in paragraphs (a) to (j), to another person; 12. managing, controlling or supervising the rendering of any of the services referred to in paragraphs (a) to (j); 13. creating the impression, in any manner, that one or more of the services in paragraphs (a) to (h) are rendered[.]

Each service or activity enumerated in the list above on its own qualifies as a security service. On the text of this definition, a person need only engage in one of these services or activities to be required by the Act to register as a security service provider.

74. Union of Refugee Women and Others, ¶ 122 n.41 (S. Afr.) (O’Regan and Mkgoro, JJ., dissenting) (Langa, CJ and Van der Westhuizen, J concurring).

75. An organization representing the interests of refugees challenged the constitutionality of this law on the basis that the exclusion of refugees was discriminatory on the grounds of alienage and immigration status. Id. ¶ 20. The Constitutional Court of South Africa upheld the law on the basis that, although there is a fundamental human right to work, there is no fundamental human right to choose one’s employment. Id. ¶¶ 46-54. It found that PSIRA did not violate the right to work, as it merely limited this right to the extent that refugees and asylum seekers could not seek employment in the private security industry. The Court found this limitation to be permissible for gate-keeping purposes and deemed PSIRA’s framework to be sufficiently proportionate or narrowly tailored to achieve this purpose. Id. ¶ 67.

76. Id. ¶ 122 (“[T]here is evidence to suggest that the relatively low-skilled work available in the private security industry is a significant source of employment for many refugees. Their exclusion from this form of employment is therefore not negligible and may well have a severe impact on the ability of refugees to earn a livelihood in South Africa.”).
An example of a suite of de facto alienage exclusive gate-keeping policies that detrimentally interact with PSIRA is the rules governing admission to various professions within South Africa. The healthcare profession, despite crippling need in South Africa for skilled, experienced, healthcare professionals, provides an illuminating example. Nurses, who are required by law to register with the South African Nursing Council prior to being permitted to practice their profession, are among the most affected. Year after year, refugee protection advocates report that most refugees “are unable to fulfill registration requirements that require documentary proof of professional qualifications and certificates of good standing from the professional nursing bodies in their home countries.”

Even beyond the field of nursing, the professional qualifications of refugees and asylum seekers are often not readily recognized by professional regulatory bodies, which then typically require prohibitively expensive recertification or training within South Africa that is unaffordable for refugees and asylum seekers. The extenuating circumstances of their flight often mean these refugees arrive in South Africa without proof of their professional qualifications. This is compounded by the fact that refugees and asylum seekers are by definition foreclosed from the assistance of their countries of nationality to verify their qualifications. As a result, many must abandon their professions for unskilled jobs, if they can find formal employment at all. These professional admission policies do not de jure exclude refugees and asylum seekers, but their ultimate effect does so. Further-

77. The Consortium for Refugees and Migrants in South Africa (CORMSA), an umbrella network of refugee protection civil society organizations, notes: “While South Africa faces an extreme skills shortage in employment sectors such as health care, education, engineering, and IT, and there are national programmes to recruit skilled people from abroad (for example doctors from Tunisia), refugees and asylum seekers who are already in the country and possess the needed skills face almost insurmountable obstacles to contributing to their host country.” CORMSA 2007, supra note 67, at 46 (footnote omitted).
78. Id. at 48; CORMSA 2008, supra note 61, at 53 (noting that “there has been no progress over the past year in facilitating registration for asylum seeker and refugee nurses with the Nursing Council, in spite of repeated advocacy attempts”).
79. Landau et al., supra note 66, at 22; see Polzer, supra note 67, at 5.
80. CORMSA 2007, supra note 67, at 48.
81. Id. If an asylum seeker has fled persecution from her government, contacting public authorities is typically too dangerous. Furthermore, any such attempts to establish contact may be used by a host government as a basis for denying or revoking refugee status. This is because a grant of refugee status is contingent on an individual’s inability or unwillingness to seek assistance from her country of nationality.
82. Landau et al., supra note 66, at 22.
more, these policies, which create often-insurmountable barriers for
these groups, are not motivated by explicit xenophobic prejudice.
Instead, they are based on valid concerns for ensuring that only
persons actually qualified to administer medical care are permitted to
do so.

2. Laws and Policies Unrelated to Industry Gate Keeping

Although gate-keeping regulation contributes significantly to struc-
tural xenophobic discrimination, it is by no means the sole avenue
through which the latter operates. Even law and policy that have no
seeming connection to employment within a particular industry can be
instrumental in forming the structural web that compromises refugees’
rights to work. An example of this is a former regulatory policy by
South Africa’s Financial Intelligence Centre (FIC), the authority that
regulates South Africa’s anti-money laundering regime under the
Financial Intelligence Centre Act (FICA). FIC interpreted FICA regula-
tions to prohibit banks from accepting government-issued asylum
seeker permits as proof of identification for opening bank accounts.83
This measure, which is de jure alienage exclusive, was undertaken for
security purposes related to preventing money laundering. As a result,
even the few asylum seekers who might otherwise have received services
from the odd bank could no longer do so.84

Taken in isolation, this regulatory policy might be considered a
mere inconvenience. Yet in the context of other prevalent business
practices that are de facto alienage exclusive, the exclusionary effect of
this banking policy change on an asylum seeker’s livelihood is magni-
fied significantly. For example, many employers in the formal sector
require employees to have a bank account in which wages can be
directly deposited.85 As a result, they will not employ individuals who
do not have bank accounts. Refugee protection advocates have repeat-
edly pointed to inability to open a bank account as a major barrier to
their clients’ ability to secure formal employment.86 Furthermore,
those refugees and asylum seekers wishing to transition from informal
entrepreneurial activities to small businesses such as small corner shops

83. See CONSORTIUM FOR REFUGEES & MIGRANTS IN S. AFRI. (CoRMSA), PROTECTING REFUGEES,
ASYLUM SEEKERS AND IMMIGRANTS IN SOUTH AFRICA DURING 2010 45 (2011).
84. Loren B. Landau, Protection and Dignity in Johannesburg: Shortcomings of South Africa’s Urban
85. S. AFRI. HUMAN RIGHTS COMM’N (SAHRC), REPORT: OPEN HEARINGS ON XENOPHOBIA AND
THE PROBLEMS RELATED TO IT 30 (2006).
86. Landau et al., supra note 66, at 22.
have difficulties doing so in part due to their exclusion from banking services.\textsuperscript{87} Worse still, this particular banking policy had direct subordinating effects beyond employment opportunities. For example, the inability to open a bank account effectively excludes refugees and asylum seekers from accommodation in neighborhoods where landlords require a financial record prior to leasing, which is the case in almost all but the poorest residential areas of South Africa.

The cumulative effect of policies such as those described above is the exclusion of most refugees and asylum seekers from the formal employment sector. Those who can enter it are largely confined to unskilled labor regardless of their qualifications.\textsuperscript{88} And although structural xenophobic discrimination is not the only factor that pushes refugees and asylum seekers out of the formal employment sector, its effect is significant. With no opportunities in the formal sector, refugees and asylum seekers are forced into the informal employment sector.

I use the term “informal employment” to signal the absence of an employment contract or any written commitment on the part of an employer to guarantee safe, equitable employment conditions. Informal employment is often synonymous with unlawful employment conditions and unchecked exploitation of employees.\textsuperscript{89} Unable to secure employment in the formal economy, many refugees and asylum seekers in South Africa work as informal traders, for example, selling small food items, second hand clothing, and other cheap items on inner city streets and in medium and high-density suburbs.\textsuperscript{90} Income within the informal sector is both limited and unreliable, resulting in economic marginality that threatens the livelihood of refugees and asylum seekers. Although my examples are drawn from South Africa, UNHCR has found the structural confinement of urban refugees and asylum seekers to the informal sector to be a global phenomenon.\textsuperscript{91} It is likely,

\textsuperscript{87} SAHRC, supra note 85, at 30; Polzer, supra note 67, at 5.
\textsuperscript{88} Landau et al., supra note 66, at 22.
\textsuperscript{89} UNHCR POLICY ON REFUGEE PROTECTION AND SOLUTIONS IN URBAN AREAS, supra note 63, ¶ 100.
\textsuperscript{90} One estimate is that “approximately a quarter of asylum seekers and refugees in South Africa earn their livelihoods through informal street trading.” CORMSA 2007, supra note 67, at 47 (citing F. BELVEDERE, Z. KIMMIE & E. MOGODI, COMMUNITY AGENCY FOR SOCIAL ENQUIRY, NATIONAL REFUGEE BASELINE SURVEY 51 (2003)).
\textsuperscript{91} UNHCR notes: Urban refugees are often confronted with a wide range of legal, financial, cultural and linguistic barriers in their efforts to establish sustainable livelihoods. In many cases, they have little alternative but to join the informal economy, where they find themselves competing with large numbers of poor local people for jobs that are hazardous and
or at the very least conceivable, that many of these contexts of structural confinement are cases of structural xenophobic discrimination in operation.

The economic marginalization of refugees has profound social effects for this group. In South Africa, it means they are confined to overcrowded neighborhoods, often with no electricity, limited access to safe drinking water, and no functioning sanitation systems. Even though they share these living conditions with South African citizens, the factors that confine refugees to these conditions are unique to their status as foreigners.

D. Connecting Explicit Prejudice-Based Discrimination and Structural Xenophobic Discrimination

Structural xenophobic discrimination is a concern in its own right, but it brings about the social marginalization of refugees in ways that increase their vulnerability (as a class) to explicit-prejudice based xenophobic discrimination. For example, refugees working as informal street traders are regular targets of explicitly bias-motivated violence and property vandalism from private citizens who view them as a competitive threat to be eliminated. Worse still, even the very police force responsible for the equal protection of persons resident in South Africa—foreign and native alike—notoriously prey on foreign informal traders. Police officers have been known to extort money poorly paid. In some cases, employers may actually choose to engage refugees rather than nationals, but only because they are less likely to complain or seek redress if they are treated unfairly.

United Nations High Commissioner for Refugees, Policy on Refugee Protection and Solutions in Urban Areas, supra note 63, ¶ 100.

92. This is consistent with research from Europe that demonstrates how discrimination in the employment sector can subsequently lead to much broader social marginalization manifest in poor living conditions, health services, and educational opportunities. Timo Markonen, Equal in Law, Unequal in Fact: Racial and Ethnic Discrimination and the Legal Response Thereto in Europe 128-49 (2012).

93. Women’s Refugee Comm’n, No Place to Go But Up: Urban Refugees in Johannesburg, South Africa 14 (2011) ("Regardless of wealth group, many forced migrants [in South Africa] live in crowded multifamily dwellings, usually single rooms separated by curtains. Some 40.7 percent of Congolese share a room with four to six people and 38.5 percent share with 7 to 30 people. Similarly, 44.1 percent of Somalis share a room with four to six people and 38.7 percent share with 7 to 30 people. The very poor Congolese are twice as likely and very poor Somalis are three times as likely to live with 7 to 30 people.").

94. See infra Part II.D.

from refugees and asylum seekers working as informal traders, to forcefully and unlawfully remove these traders from their places of work to appease South African informal traders, and to ignore refugee and asylum seeker pleas for protection against violent and non-violent explicit prejudice-based xenophobic discrimination.

Another striking example of how socio-economic marginalization or underclass status of refugees makes them more vulnerable to explicit prejudice-based discrimination relates to the May 2008 xenophobic violence I mention above. This violence began in the township of Alexandra and was confined to places like it—high-density urban settlements and inner cities. These areas are home to South Africa’s poor and predominantly black working classes, and they are the primary and often permanent destination of forced migrants, including refugees and asylum seekers settling in South Africa’s urban areas. Material conditions in much of these areas border on inhumane. Alexandra, for example, has a population of approximately 350,000 inhabitants, eighty-one percent of whom occupy the shockingly small area of two square kilometers.

Most of these inhabitants live in 74,000 informal structures, 34,000 of which are shacks. Others live in grossly over-crowded hostels built during apartheid to house migrant laborers. Some of these hostels have such poor sanitation that raw sewage flows through their corridors. In Alexandra, as in townships across the nation, unemployment is high at twenty-nine percent. Of those that are employed, seventy-one percent works in unskilled or semi-skilled jobs. This results in low levels of income such that twenty percent of households in

96. Landau, supra note 84, at 317.
97. SALLY PEBERDY, ATLANTIC PHILANTHROPIES, SETTING THE SCENE: MIGRATION AND URBANIZATION IN SOUTH AFRICA 2 (2010).
98. See Melinda Silverman & Tanya Zack, Housing Delivery, The Urban Crisis and Xenophobia, in GO HOME OR DIE HERE: VIOLENCE, XENOPHOBIA AND THE REINVENTION OF DIFFERENCE IN SOUTH AFRICA 153 (Tawana Kupe et al. eds., 2008); WOMEN’S REFUGEE COMM’N, supra note 93, at 9.
99. Silverman & Zack, supra note 98, at 147 (describing these areas as “characterized by severe overcrowding, deteriorating services, high levels of poverty, rampant unemployment, ongoing racial segregation and the daily struggles of poor people forced to compete with one another for increasingly scarce resources”).
100. Noor Nieftagodien, Xenophobia in Alexandra, in GO HOME OR DIE HERE: VIOLENCE, XENOPHOBIA AND THE REINVENTION OF DIFFERENCE IN SOUTH AFRICA 65, 68 (Tawana Kupe et al. eds., 2008) [hereinafter Xenophobia in Alexandra].
101. Xenophobia’s Local Genesis, supra note 53, at 125-26 (describing the degrading conditions of these hostels).
102. Xenophobia in Alexandra, supra note 100, at 68-69.
Alexandra earn the equivalent of about $140 a month. Refugees and other forced migrants living in areas such as Alexandra are thus on the front lines of a battle for subsistence and they must engage in it alongside and in competition with South Africa’s predominantly black, poor, and working class citizens. Studies from other parts of the world demonstrate that these conditions are by no means unique to South Africa. Although citizens and non-citizens alike must contend with the hardships of life in Alexandra and places like it, the hardships that confront non-citizens, including refugees, are typically harsher. In so far as structural xenophobic discrimination keeps refugees and asylum seekers confined to areas such as Alexandra, they face the continuing risk of violent and non-violent forms of explicit prejudice-based xenophobic discrimination.

There exists quantitative and qualitative empirical basis for a statistically significant connection between explicit prejudice-motivated acts of xenophobic discrimination, and the structural material conditions within which these acts are embedded. Although much empirical work remains to be done on the precise nature of this relationship, among those scholars who study xenophobia in South Africa, there is consensus that structural material conditions of actual and perceived scarcity are important determinants of explicit prejudice-motivated acts of xenophobic discrimination. A current research focus has been on qualitative and quantitative accounts of the structural triggers

103. Id. at 68.
104. In an editorial introduction to a volume on the livelihood of refugees and asylum seekers in urban areas of Kenya, Egypt, Kampala, Japan, the United Kingdom, and Canada, Karen Jacobsen notes: “In shantytowns and inner cities, host country nationals and refugees alike confront the structural problems associated with urban poverty. Everyone struggles to meet physical necessities (housing, food, clean water) and to access education and health care.” She further notes that the experiences of refugees are exacerbated by their particularized protection needs, including protection from discrimination. Jacobsen, supra note 66, at 276.
105. Id.
106. See, e.g., Devan Pillay, Relative Deprivation, Social Instability and Cultures of Entitlement, in Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa 93 (Shireen Hassim et al. eds., 2008) (arguing that “class inequality is a systemic problem of uneven development (abundance/scarcity, wealth/poverty, stuffed/starved. Insider/outside, power/powerlessness, empowerment/disenpowerment”); Christine Fauvelle-Aymar & Aurelia Segatti, People, Space and Politics: An Exploration of Factors Explaining the 2008 Anti-Foreigner Violence in South Africa, in Exorcising the Demons Within 74, 77 (Loren B. Landau ed., 2011) (“[T]ownships and squatter settlements have remained marginalised spaces where poverty and deprivation are experienced most sharply, and consequently where the struggle over limited resources tends to generate politics of exclusion and fear that undergird xenophobia.”); MINAGO, LANDAU & MONSON, supra note 55.
of xenophobic violence. A recent econometric study conducted by researchers at the African Center for Migration and Society offers empirical evidence of a statistically significant correlation between acts of xenophobic violence and structural material scarcity.\textsuperscript{107} According to ACMS, “empirical analysis shows that violence is more likely when the ratio of the intermediary income relative to the proportion of low income (the inter-poor variable) increases.”\textsuperscript{108} Put differently, an increase in the ratio of people earning between ZAR 12,800 and ZAR 800 (USD 564 – USD 98) to those earning less than ZAR 800 (USD 98) makes violent xenophobic discrimination more likely, providing support for a more nuanced version of the relative deprivation theory.\textsuperscript{109} Importantly, housing type is also a significant explanatory variable: “incidents of violence are more frequent in sites characterised by informal dwellings and shacks.”\textsuperscript{110}

In addition to quantitative studies, qualitative studies provide further support for a structural account of important determinants of explicit prejudice-based xenophobic discrimination. For example, two years after the May 2008 violence, the Centre for Civil Society (CCS) at the University of KwaZulu-Natal published the results of a qualitative study based on interviews with 187 people residing in various sites in the South African city of Durban.\textsuperscript{111} A central thrust of these findings was that civil society’s response to the May 2008 xenophobic violence—including humanitarian assistance following the violence\textsuperscript{112} and public awareness campaigns to promote tolerance\textsuperscript{113}—failed to tackle the root of this violence, which CCS located in structural variables.\textsuperscript{114} Among these were “extremely high unemployment[;] a tight housing market with residential stratification, and service delivery shortfalls[;]”

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\textsuperscript{107} Fauvelle-Aymar & Segatti, supra note 106. \\
\textsuperscript{108} Id. at 74. \\
\textsuperscript{109} Id. at 77. \\
\textsuperscript{110} Id. at 74. \\
\textsuperscript{111} Amisi et. al, Xenophobia and Civil Society: Durban’s Structured Social Divisions, in 38 Politikon 53 (2011) [hereinafter CCS Report]. \\
\textsuperscript{112} Id. at 66. \\
\textsuperscript{113} Id. \\
\textsuperscript{114} Id. at 60-61. According to the CCS Report, [t]he combination of immigrant rightlessness and structural exclusion, amidst a perceived invasion of ‘foreigners’, resulted in organised social activism against individuals perceived as dangerous to the socio-cultural and moral fabric, and as threatening the economic opportunities of poor South Africans, within a system set up by wealthy South Africans to superexploit migrant labour from both South Africa and the wider region. \\
\end{flushright}
Following a baseline study commissioned by the International Organization for Migration (IOM), the African Center for Migration and Society at Witwatersrand University also reported that structural factors were among the determinants of the May 2008 attacks and preceding episodes of violence. The study found high unemployment rates and poor service delivery with respect to housing, water and sanitation to be contributing, though insufficient, explanators of the xenophobic violence.

My point here is not to reduce all the complex factors that result in hardship for refugees to structural xenophobic discrimination. It is instead to illustrate that, despite the visibility of explicit prejudice-based xenophobic discrimination, refugees are also routinely subjected to structural xenophobic discrimination, which substantially contributes to this hardship. Structural xenophobic discrimination itself harms refugees, including by bringing about their socio-economic marginalization. As a socio-economic underclass, refugees are then also more vulnerable to explicit prejudice-based xenophobic discrimination.

It is in response to circumstances such as these that UNHCR and other refugee protection advocates have developed a global anti-xenophobic discrimination policy framework.

III. THE PREJUDICE APPROACH

A. UNHCR and Global Refugee Protection: An Overview

Some context is necessary to highlight the importance of UNHCR’s international anti-xenophobic discrimination policy. Under international law, the primary responsibility for the protection of refugees lies with states. In reality, however, particularly in the global south, this

115. Id. at 63. For further discussion and context regarding the structural determinants identified by this study, see id.

116. Among these were “institutionalised attitudes and practices that dehumanise foreign nationals and/or minority groups and exclude them from access to social protection and rights.” MISAGO, LANDAU & MONSON, supra note 55, at 8. To be clear, this report found structural factors to be necessary, though insufficient, explanators of the xenophobic attacks. The African Centre for Migration and Society (ACMS) was known as the Forced Migration Studies Programme (FMSP) at the time it published this report.

117. Id. at 33. With respect to factors determining the timing and location of the violence, FMSP found that “in almost all cases where violence occurred, it was organised and led by local groups and individuals in an effort to claim and consolidate the authority and power needed to further their political and economic interests.” Id. at 2.
responsibility falls to non-state actors because governments are unable or unwilling to provide this protection. Among these non-state actors, UNHCR is the most important international body, created “(1) to ensure the international protection of refugees; and (2) to find solutions to their plight.” Together, the United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (UN Refugee Convention and its Protocol) form the cornerstone of the international refugee protection framework, and they establish UNHCR as their monitoring body. Under Article 35 of the UN Refugee Convention, states parties are required to cooperate with UNHCR “in the exercise of its functions,” and to “facilitate [UNHCR’s] duty of supervising the application of this Convention.”

UNHCR operates in more than 125 countries with a staff of about 7,685 people. Its 2012 budget was USD 3.59 billion. It uses these resources to provide remarkable humanitarian assistance to displaced persons by administering camps for refugees and internally displaced persons and providing emergency relief outside of the camp con-

118. In many parts of the world, private citizens, too, play a large role in providing assistance to refugees. This has been the case in the ongoing Syrian refugee crisis, where communities in neighboring countries have been instrumental in assisting Syrian refugees. See, e.g., Joelle Tanguy, Under Sec’y Gen., Int’l Fed’n of Red Cross & Red Crescent Soc’ys, Solidarity with Countries Hosting Refugees, Address Before the 64th Session of the Executive Committee of the UNHCR High-Level Segment on Solidarity and Burden-Sharing with Countries Hosting Syrian Refugees (Oct. 1, 2013), available at http://reliefweb.int/report/lebanon/solidarity-countries-hosting-syrian-refugees (noting the crucial role of host communities in Lebanon, Jordan, Iraq, Turkey, Egypt, Bulgaria and Italy in providing assistance to refugees).


120. This is the case even though UNHCR predates these instruments. G.A. Res. 428(V) (Dec. 14, 1949).

121. U.N. Refugee Convention, supra note 1, art. 35. The preamble to the 1951 Refugee Convention recognizes that UNHCR “is charged with the task of supervising international conventions providing for the protection of the refugees.” Unlike the supervisory mechanisms established under various UN human rights conventions, UNHCR does not have a complaints procedure or engage in periodic reviews of states parties to the UN Refugee Convention. Yet its pivotal role as the global leader in refugee protection cannot be overstated. See LEWIS, supra note 119, at 23-49 (documenting the UNHCR’s work).

In cases where states fail to conduct refugee status determination procedures, UNHCR may step in to perform this task and may also take on the task of “monitoring states’ borders to ensure that refugees are not wrongly sent back to their country of origin against their will.”\textsuperscript{124} UNHCR’s international protection mandate requires that it ensure individuals are able to access asylum, and that states respect the rights that attach to refugee status.\textsuperscript{125}

Although UNHCR has limited ability to coerce state compliance with international refugee law, “for much of its history, UNHCR has been a ‘teacher’ of international norms, promoting and disseminating international refugee law, and socializing states into ratifying key conventions and incorporating the main tenets of international refugee law within domestic legislation and policy frameworks.”\textsuperscript{126} For example, UNHCR has in the last three decades adopted a practice of producing authoritative guidance on international refugee protection pursuant to its mandate under the UNHCR Statute, Article 35 of the UN Refugee Convention, and Article II of the Protocol to the UN Refugee Convention.\textsuperscript{127} Among these are the UNHCR Handbook, Guidelines on International Protection, Guidance Notes, Eligibility Guidelines, and even amicus curiae briefs for court interventions.\textsuperscript{128} Some of this guidance is interpretive—providing clarity on international refugee law—and some of it applies international refugee law to particular facts in a country or region.\textsuperscript{129}

These documents are not a source of international law,\textsuperscript{130} but are instead best considered “non-binding ‘soft law,’” deriving their persuasiveness from UNHCR’s unique expertise in refugee protection, and

\textsuperscript{124} Betts, Loesch & Milner, supra note 119, at 86.
\textsuperscript{125} Id. at 85; see, e.g., UNHCR Policy on Refugee Protection and Solutions in Urban Areas, supra note 63, at 8-24 (describing many of UNHCR’s protection strategies).
\textsuperscript{126} Betts, Loesch & Milner, supra note 119, at 94.
\textsuperscript{127} UNHCR’s Department of International Protection produces this guidance. Cecilie Schjøvet, Norwegian Directorate of Immigr., The Making of UNHCR’s Guidance and Its Implementation in the National Jurisdiction of the United Kingdom, Norway and Sweden 20 (2010).
\textsuperscript{128} For discussion of these different document types, see id. at 16-49.
\textsuperscript{129} See id. at 20.
\textsuperscript{130} Id. at 19.
more importantly from the duty that states parties to the UN Refugee Convention have to cooperate with UNHCR. Even as soft law, however, the global influence of UNHCR guidance is far-reaching. Domestic, regional, and international courts regularly rely on UNHCR’s guidance to interpret states’ obligations towards refugees. This guidance is further intended for law and policy-makers, as well as non-governmental advocates engaged in domestic refugee protection.

B. UNHCR’s Anti-Xenophobic Discrimination Policy: International Human Rights Law Foundations

It is only in the last decade or so that UNHCR has officially undertaken a range of global policy and advocacy initiatives to combat xenophobic discrimination. It has chosen to ground these initiatives in international human rights law, and not in the international refugee law regime. For much of its existence, UNHCR maintained what it

131. Id.
132. Professor Ingo Venzke, who has studied UNHCR’s role in the elaboration of refugee law notes: “It is beyond doubt that [UNHCR’s publications] are not binding on states. But this does not exhaust the issue of their standing in the practice of interpretation and their influence in the process of communicative lawmaking. UNHCR claims semantic authority and enjoys such authority in the eyes of others.” VENZKE, supra note 123, at 117. Semantic authority refers to an organization or institution’s ability to serve as an independent source of guidance on the meaning of law, because of the influence it has on important legal actors such as courts.
133. Id. at 109-34.
134. LEWIS, supra note 119, at 78-80. In addition, UNHCR guidance informs the work of its large field staff, which implements international law for the protection of refugees. Id.
135. On its own account, the key initiatives of UNHCR’s global policy and advocacy to combat xenophobic discrimination have been: its contribution to developing the provisions of the 2001 Durban Declaration and Programme of Action that relate to discrimination against refugees and asylum seekers; the 2009 UNHCR Guidelines; an annual consultation with NGOs on strategies for protecting refugees and asylum seekers from xenophobic discrimination; continuous coordination with the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance; and promotion of the strategic use of the international human rights framework, particularly the Discrimination Convention, for refugee protection. UNHCR CERD Thematic Discussion, supra note 4, at 3-4. At the domestic level, UNHCR points to partnerships with national NGOs to promote tolerance via public awareness campaigns.
136. Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance Through a Strategic Approach, UNHCR ¶ 11 (2009) (identifying the Discrimination Convention as the cornerstone for fighting xenophobic discrimination); see also INT’L LABOUR ORG. ET AL., supra note 26, at 3 (“Human rights must be at the centre of any analysis of migration and xenophobia.”). This turn remains noteworthy in the refugee protection context, which at the international level has traditionally been regulated by a separate regime from that of international human rights law: the UN Refugee Convention and its Protocol. These instruments set the
subsequently described as “a deliberate distance” from the international human rights framework.\textsuperscript{137} Thus, although today UNHCR firmly embraces this framework as an important source of complementary protection for refugees, it is necessary to underscore that this shift is both relatively recent and decidedly strategic. It is strategic in the sense that it marks a deliberate choice calculated to enhance refugee protection by aligning two previously discrete international legal frameworks.\textsuperscript{138}

prevailing international legal standard for who qualifies for refugee protection, and enumerate the rights to which such individuals are entitled under international law. For an analysis of these instruments, see James C. Hathaway, The Rights of Refugees Under International Law 91-112 (2005). International protection is supplemented by regional refugee protection frameworks in Africa by the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and in the Americas by the 1984 Cartagena Declaration on Refugees. For most of its existence, this international refugee law framework evolved separately from that of international human rights, notwithstanding the recent, seeming normative convergence between the two. Vincent Chetail, Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law, in Migrations and Human Rights, Collected Courses of the Academy of European Law (R. Rubio Marin ed., forthcoming 2013), available at http://ssrn.com/abstract=2147763 (noting that “from the angle of the content of their respective norms, the border between the two regimes has been steadily blurred,” and pointing to the role of human rights treaty bodies in this process).


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The international human rights law at the center of UNHCR’s policy is the International Convention for the Elimination of Racial Discrimination (the Discrimination Convention). The Discrimination Convention provides a legally binding framework for the elimination\(^{139}\) of racial discrimination, which it defines broadly, as

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\text{[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.}^{140}
\]

The Discrimination Convention prohibits discrimination on the basis of the primary classifications that intersect in the construction of

\[^{139}\text{The Discrimination Convention scholar and former commissioner of the Committee on the Elimination of Racial Discrimination, Michael Banton, is skeptical of the utility of thinking in terms of the elimination rather than the prohibition, holding the view that discrimination is not a phenomenon that can ever be eliminated from human society. Michael Banton, International Action Against Racial Discrimination 50 (1996). While one may question the feasibility of total elimination, I embrace the notion of elimination in so far as it signals a commitment not only to prohibiting discriminatory behavior, but also to addressing its causes and effects.}\]

foreignness. Foreignness. And the Discrimination Convention’s monitoring body, the Committee on the Elimination of Racial Discrimination (the Discrimination Committee) has recognized discrimination that occurs at the intersection of multiple classifications. Thus, although

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141. 2009 UNHCR Guidance Note, supra note 16, ¶¶ 10-11 (stating that refugees may suffer xenophobic discrimination on account of “race, colour, descent, or national or ethnic origin, including in combination with other grounds, such as religion, gender[,] disability” and nationality). The Discrimination Convention does not define the term “national origin,” but it does make clear the distinction between national origin and nationality. Scholarship on the Discrimination Convention’s drafting history reports that, among certain drafters, the term national origin captured linguistic and cultural differences, while among others it connoted a connection to a different country via past citizenship, but it was not intended to mean nationality. Makonen, supra note 92, at 136. Article 1(2) states that the Discrimination Convention “shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.” However, the Discrimination Committee has explained that in the first place, Article 1(2) should not be construed as undermining or detracting from protections afforded to non-citizens under the three instruments that comprise the international bill of rights: the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), and the International Convention on Economic Social and Cultural Rights (ICESCR). More importantly the Discrimination Committee has called attention to Article 5 of the Discrimination Convention, which “incorporates the obligation on states parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights.” UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation 30 on Discrimination Against Non-Citizens ¶ 3 (Oct. 1, 2002). On the basis of this provision, it stated that political rights such as the right to vote or to stand for election may permissibly be limited to citizens, but that states parties “are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of [human rights] to the extent recognized under international law.” Id. ¶ 3. In sum, the Discrimination Committee has determined that under the Discrimination Convention, “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.” Id. ¶ 4. In other words, discrimination on the basis of nationality may in fact constitute discrimination under the Discrimination Convention. Kevin Boyle & Anneliese Baldaccini, A Critical Evaluation of International Human Rights Approaches to Racism, in Discrimination and the Case of Racism 154-55 (Sandra Fredman ed., 2001) (“The inclusion of non-citizens within the reach of Article 4 has never been disputed nor that equality before the law must be guaranteed to everyone.”); Wouter Vandenhole, Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies 91 (2005) (surmising that the Discrimination Committee’s interpretation of Article 1 paragraph 2 implies that “apart from the right to participate in elections, to vote and to stand for elections . . . differentiation between citizens and non citizens with regard to human rights is no longer permissible”).

142. The Discrimination Convention, supra note 140, art. 8.

143. Comm. on the Elimination of Racial Discrimination, Gen. Recommendation No. 25, Gender Related Dimensions of Racial Discrimination, 56th Sess., Mar. 20, 2007, U.N. Doc. A/55/18, annex V ¶ 1 (Mar. 20, 2007). This is important as it avoids the problem identified by Professor Saito, who points out that reliance on separate laws or provisions that individually prohibit
"foreignness" is not a category listed in Article 1, this provision nonetheless prohibits conduct and measures that meet the definition of xenophobic discrimination. As a result, UNHCR has used the Discrimination Convention as the legal basis for its global anti-xenophobic discrimination policy.

C. The Prejudice Approach

UNHCR has fashioned an anti-xenophobic discrimination policy framework that relies on the Discrimination Convention. Review of UNHCR policy and advocacy reveals the predominance of what I call a "prejudice approach," which focuses almost exclusively on regulating explicit anti-foreigner prejudice and the bad actors who are motivated by this prejudice to violate the rights of refugees. Two categories of discrimination on the basis of race or national origin can be dangerous in the context of discrimination on account of foreignness, because these laws may be interpreted restrictively to exclude foreignness discrimination. See, e.g., supra note 16, ¶ 1 ("Xenophobia and racism are often at the root of discrimination and intolerance against asylum seekers and refugees . . . . Many UNHCR offices have identified negative public attitudes towards persons of concern as a significant obstacle to the provision of international protection."); UNHCR, Issues Guidelines to Counter Discrimination, Intolerance, UNHCR Press Release (Dec. 22, 2009). The core of UNHCR's recommended strategic approach to fighting xenophobic discrimination is premised on the belief that it can be defeated "if the psychological elements behind xenophobic discrimination are understood" and society takes up the challenge of combating them. 2009 UNCHR Guidance Note, supra note 16, ¶ 7. On this basis, the guidance note identifies seven elements of a strategic approach fighting xenophobia, all of which focus on combating the "psychological elements" at the core of xenophobia. These seven elements of the strategic approach are:

(i) monitoring signs of racial discrimination, xenophobia and related intolerance, and tracking and reporting hate crimes; (ii) analysing the underlying reasons; (iii) assessing the manifestations of these phenomena and their impact on protection; (iv) understanding legal obligations to protect all individuals from racial discrimination and multiple forms of discrimination; (v) engaging a network of diverse organizations and actors that...
strategies, both central to UNHCR’s anti-xenophobic discrimination policy, bear this out.

The first category focuses on the imposition and enforcement of criminal or civil penalties for rights violations perpetrated by individuals motivated by explicit anti-foreigner prejudice. A central feature is thus advocacy to promote and enforce hate crimes legislation, which occupies a prominent place within UNHCR’s strategic approach to fighting xenophobic discrimination.146

UNHCR has noted that there is no international law definition of a hate crime, but Article 4 of the Discrimination Convention and Article 20 of the International Covenant on Civil and Political Rights provide a legal basis for prohibiting hate crimes. In its Guidance Note for combating xenophobic discrimination, UNHCR offers the following description of hate crimes:

Hate crimes—or bias-motivated crimes—are generally defined as any criminal offence directed at a person(s) or property due to the real or perceived connection, attachment, affiliation, support, or membership of a group associated with that person or property... Criminal offenses motivated by the offender’s bias against an individual based on his/her race, religion, disability, sexual orientation, ethnic or national origin are generally recognized as falling within the category of hate crimes.147

146. See, e.g., 2009 UNHCR Guidance Note, supra note 16, ¶ 7 (listing “monitoring signs of racial discrimination [as broadly defined by the Discrimination Convention], xenophobia and related intolerance, and tracking and reporting hate crimes” as the first element of a strategic approach to fighting xenophobic discrimination). UNHCR offers the example of Human Rights First’s “Ten-Point Plan for Combating Hate Crimes” as a commendable anti-xenophobic discrimination strategy. Id. ¶ 16. UNHCR singles out for commendation human rights bodies such as CERD for calling for punishment of hate crimes. Id. ¶ 17.

147. Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance Through a Strategic Approach, supra note 136, at n.1. For hate crimes emphasis, see id. ¶¶ 1, 13, 16, 17.
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From South Africa\textsuperscript{148} to the Ukraine,\textsuperscript{149} efforts are underway to pursue hate crimes legislation and enforcement for the protection of refugees from explicit prejudice-based xenophobic discrimination.\textsuperscript{150} UNHCR has also underscored the work of international human rights treaty monitoring bodies calling for punishment of perpetrators of prejudice-motivated acts against refugees.\textsuperscript{151} In keeping with UNHCR, other highly influential global refugee protection actors have embraced a similar focus on punishing hate crimes against refugees and asylum seekers.\textsuperscript{152}

\textsuperscript{148} Combating Xenophobic Violence, supra note 5, at 11-12 (describing pursuit of hate crimes legislation and enforcement in South Africa).


\textsuperscript{150} UNHCR has even entered into a memorandum of understanding with the Organization for Security Co-operation in Europe’s Office for Democratic Institutions and Human Rights (ODIHR) to facilitate coordination by the two bodies to combat hate crimes. Memorandum of Understanding Between the OSCE Office for Democratic Insts. and Human Rights and the Office of the United Nations High Comm’r for Refugees (June 22, 2011).

\textsuperscript{151} See 2009 UNHCR Guidance Note, supra note 16, ¶ 17 (highlighting calls by the Discrimination Convention for the prosecution and punishment of prejudice-motivated acts against refugees and asylum seekers).

\textsuperscript{152} These include the International Labor Organization (ILO), the International Organization for Migration (IOM), and the Office of the High Commissioner for Human Rights (OHCHR). ILO, IOM & OHCHR, supra note 52, at III. Human Rights First (HRF), which has worked closely with UNHCR on the issue of xenophobic violence, is among the foremost international NGOs currently advocating on behalf of refugees and asylum seekers facing this form of discrimination. For example, HRF and UNHCR jointly convened a thematic session on xenophobic discrimination at UNHCR’s 2010 Annual Consultation with Non-Governmental Organizations. U.N. High Comm’r for Refugees (UNHCR), UNHCR’s Contribution to the Secretary-General’s Report with Recommendations on Global Trends in the Fight Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance to the General Assembly for its 66th Session Pursuant to A/RES/64/148, 4 (June 2011) [hereinafter UNHCR’s Contribution]. HRF’s strategic approach prioritizes the enforcement of hate crimes legislation, which requires prosecutions of alleged perpetrators, as well as monitoring and reports of attacks. Combating Xenophobic Violence, supra note 5, at 2-3, 30 (Human Rights First’s Ten-Point Plan for Combating Hate Crimes). Another example is the response of international and domestic human rights advocates following the May 2008 violence. Adopting the prejudice approach, these advocates focused on prosecution of perpetrators of xenophobic violence, and failed to consider measures to address human rights violations as a result of structural forms of xenophobic discrimination. For example, South Africa’s premier human rights academic institute published a report detailing South Africa’s international and domestic human rights obligations towards non-nationals affected by the violence. CTR. FOR HUMAN RIGHTS, UNIV. OF PRETORIA, THE NATURE OF SOUTH AFRICA’S LEGAL OBLIGATIONS TO COMBAT XENOPHOBIA (2009). This report found that by failing to protect the victims of violence from non-state actors the South African government had violated their right to liberty and security of person. Id. at 4.
The second set of strategies comprising the prejudice approach involves the use of human rights education initiatives to promote tolerance of refugees and asylum seekers. These strategies are also firmly rooted in international human rights law, including Article 7 of the Discrimination Convention. The Discrimination Convention singles out public education to promote respect for and tolerance of groups that face discrimination, and to disseminate the normative vision of the international human rights framework as crucial for eliminating prejudice. It prohibits the dissemination of ideas based on racial, national, or ethnic superiority, and it outlaws organizations and propaganda activities inciting racial discrimination. The Discrimination Convention also requires states parties to adopt tolerance-promoting measures to combat “prejudices which lead to racial discrimination,” especially “in the fields of teaching, education, culture and information.”

To promote tolerance, UNHCR has advocated public awareness campaigns regarding the human rights of refugees and their reasons for fleeing their countries of nationality, as well as sporting events bringing together foreign nationals and citizens with the goal of forming positive social bonds. Sensitization of media outlets as to their role in the promotion of diversity and tolerance has also been

153. Neil Gotanda offers a useful definition of tolerance and diversity, where tolerance is acceptance of multiculturalism and multiracialism as necessary evils in a given society. Neil Gotanda, A Critique of “Our Constitution is Color-Blind”, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 268 (Kimberle Crenshaw et al. eds., 1995). Diversity, on the other hand, holds racial and cultural pluralism as a positive good in society. Id.

154. The Discrimination Convention, supra note 140, art. 7 (“States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.”).

155. Boyle and Baldaccini note: “Priority has been given under the Convention to legislation intended to suppress propaganda, the dissemination of racist ideas, and the prohibition of organizations that advocate racist violence and hatred . . . . This approach was and remains an essential foundation.” Boyle & Baldaccini, supra note 141, at 164.

156. The Discrimination Convention, supra note 140, art. 4.

157. Id. art. 7.

158. Examples include South Africa’s UNHCR-sponsored “Roll Back Xenophobia” campaign, designed to promote tolerance and diversity through human rights education and sensitization to the plight of refugees and other forced migrants, S. Afr. Human Rights Comm’n, Fourth Annual Report 12 (1998-99); a UNHCR co-sponsored soccer tournament in Ireland—the “Fair Play Football Cup”—intended to promote cultural awareness, and a soccer tournament in
important. Noting the scourge of xenophobic violence in South Africa, for example, UNHCR states that in order to prevent these attacks, it will “continue to commission the services of radio production companies to create messages promoting tolerance and coexistence.”

UNHCR has used similar and other awareness raising or sensitization campaigns in the Americas and Europe.

D. The Limitations of the Prejudice Approach

Punishing individuals motivated by explicit prejudice to violate the rights of refugees and using human rights education to promote tolerance for refugees are both important for protecting refugees against certain forms of xenophobic discrimination. In so far as the prejudice approach (1) holds responsible individuals to account, (2) deters future acts of xenophobic discrimination, (3) affords some material compensation to victims, and (4) fosters more tolerant societies, it has great value. However, it is conceptually inadequate to protect refugees from the full spectrum of discriminatory harm they experience on account of their status as foreigners. Specifically, the prejudice approach’s exclusive focus on xenophobic discrimination involving explicit antiforeigner prejudice completely ignores structural xenophobic discrimination. Given the substantial harmful effects of structural xenophobic discrimination—including turning refugees into a de facto
underclass—an anti-xenophobic discrimination policy that ignores this problem is inadequate.163

Even for those concerned purely with explicit prejudice-motivated xenophobic discrimination, there is good reason to believe that an approach that addresses structural xenophobic discrimination is necessary to achieve their goals. As I argue in Section II.D., empirical evidence suggests that the socio-economic marginalization of refugees that results in part from structural xenophobic discrimination makes refugees more vulnerable to explicit prejudice-based xenophobic discrimination. UNHCR itself has acknowledged structural determinants of xenophobic discrimination in South Africa, stating that: “Competition between refugees and South African nationals for jobs, housing, business opportunities and social services has raised tensions, and aggravated xenophobic attitudes among some in the local community. It is noticeable that poor socio-economic conditions among host communities provide a breeding ground for xenophobia.”164 But this acknowledgement is not reflected in UNHCR’s prejudice approach.165

163. I should be clear that, in calling for an account of xenophobic discrimination that incorporates its structural operation, I do not mean to erase the role of individual and group agency in the perpetration of discriminatory acts. Individual murderers, rapists, looters, and other actors should be held to account for their acts, and indeed there is reason to believe that a reliable individual accountability mechanism is an important part of any regime for eliminating discrimination. MISAGO, LANDAU & MONSON, supra note 55, at 8. However, the acts of these individuals and comprehensive culpability for xenophobic discrimination, even as a legal matter, can only properly be understood and addressed within the broader structural context within which they are embedded.


165. Its strategies for fighting xenophobic discrimination completely fail to engage the structural determinants of xenophobic discrimination. An example that underscores this is a 2010 evaluation of UNHCR’s protection efforts in South Africa. Although this evaluation acknowledged structural determinants of violent xenophobic discrimination (perceived government failure to deliver essential public services, unemployment, income inequality, and increased presence of foreign nationals), it nonetheless revealed that UNHCR’s approach to fighting xenophobic discrimination in South Africa has been to focus on an awareness campaign to promote tolerance and diversity in the country. Jeff Crisp & Esther Kiragu, United Nations High Comm’r for Refugees Policy and Evaluation Serv., Refugee Protection and International Migration: A Review of UNHCR’s Role in Malawi, Mozambique and South Africa, PDES/2010/10, ¶¶ 157-58 (Aug. 2010).
IV. TOWARD AN INCLUSIVE APPROACH

To provide refugees comprehensive protection from xenophobic discrimination, it is vital that the UN Refugee Agency shift from a narrow prejudice approach to an inclusive approach that accounts for structural xenophobic discrimination. This shift would facilitate international human rights law interventions on behalf of refugees to tackle their vulnerable underclass status, and the hardship this status entails.

A. Structural Xenophobic Discrimination as a Violation of Existing International Human Rights Law

Examination of the Discrimination Convention makes clear that the structural blindness of the prejudice approach does not lie with the tools of international human rights law, where we understand “tools” to refer to the legal provisions that articulate the binding obligations on states with respect to refugees and asylum seekers. Instead, I argue that this shortcoming of the prejudice approach is a product of the way that legal actors, such as UNHCR, have chosen to animate the concept of discrimination, quite separately from anything in the text of international human rights instruments. Put differently, this is a case where the fault lies with the workmen and not their tools.

Article 1 of the Discrimination Convention prohibits “direct discrimination,” which is intentional disparate treatment of similar individuals on a prohibited ground.166 This prohibition requires regulation of explicit prejudice-based xenophobic discrimination, which is in essence intentionally disparate treatment of individuals on account of foreignness. Importantly, Article 1 also prohibits indirect discrimination,167 which results from facially neutral measures that disproportion-


167. Under international human rights law, “[i]ndirect discrimination occurs when a neutral measure is having a disparate and discriminatory effect on different groups of people . . . . Indirect discrimination deals with institutional and structural biases.” VANDENHOLE, supra note 141, at 84-85 (emphasis and internal citations omitted). In his comprehensive analysis of the principle of non-discrimination under international human rights law, Professor Wouter Vandenhole finds that jurisprudence from all the international human rights treaty regimes that address discrimination employs the concept of indirect discrimination, even if this concept is not explicitly mentioned in the text of the respective treaties. These regimes are the ICCPR, the Discrimination Convention, ICESCR, CEDAW, and the Convention on the Rights of the Child (CRC). Id. at 36.
ately impact individuals on the basis of a prohibited ground.\textsuperscript{168} It requires the regulation of discriminatory effects even in the absence of explicit prejudice.\textsuperscript{169} The Discrimination Convention thus provides firm legal basis for prohibiting certain instances of structural xenophobic discrimination.

Recall that Article 1 of the Discrimination Convention prohibits

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

I thus propose the following definition of \textit{unlawful} structural xenophobic discrimination: conduct and measures that have the individual or cumulative effect of “nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life,”\textsuperscript{170} on the basis of foreignness. In other words, states are required to protect refugees from simple and complex cases of structural xenophobic discrimination when its impact is the violation of the rights of refugees under international human rights law.

My definition accounts for the fact that under the Discrimination

\begin{footnotesize}
\begin{itemize}
\item 169. The Discrimination Convention, \textit{supra} note 140, art. 1; Boyle & Baldaccini, \textit{supra} note 141, at 157.
\item 170. Timo Makkonen notes that the general term “structural discrimination,” much like the term institutional discrimination has been variously defined among scholars. For example, Makkonen himself defines structural discrimination as “obstacles that prevent or impair the enjoyment of equal rights and opportunities by immigrants and persons belonging to ethnic minorities because of the way some part of the societal make up (rules, policies, practices, criteria, and informal conventions) functions.” \textit{Makkonen}, \textit{supra} note 92, at 38. In this Article, I seek a legally binding definition and thus propose one that draws directly on the language of the Discrimination Convention.
\end{itemize}
\end{footnotesize}
Convention, the non-discrimination principle is not absolute.\textsuperscript{171} Specifically, it does not require states to protect all categories of foreigners from all forms of disparate treatment or disparate effects. The Discrimination Committee has stated that disparate treatment of or impact on non-citizens is permissible if it results from measures that, when considered in light of the purpose and goals of the Discrimination Convention, are proportionately tailored to achieve a legitimate aim.\textsuperscript{172} This means that determining what instances of structural xenophobic discrimination are unlawful will require an examination of (1) the legitimacy of the aims pursued by the measures that result in structural xenophobic discrimination, and (2) the narrow tailoring of these measures to achieve a legitimate aim. Finally, this determination must be meaningfully informed by the purpose and objectives of the Discrimination Convention. Broadly speaking, unlawful structural xenophobic discrimination will only be measures whose disparate harmful effects undermine the goals of the Discrimination Convention.

A fundamental objective of the Discrimination Convention is substantive equality or equality of outcomes.\textsuperscript{173} An important aspect of this is ensuring that vulnerable social groups, such as racial, ethnic, and other minority groups, do not become social under-classes, such that members of these groups are systemically denied human rights under international law.\textsuperscript{174} Refugees are a category of foreigners that are particularly vulnerable to the social underclass status the Discrimina-

\textsuperscript{171} In fact, some scholars have warned that the balancing of interests permitted under international human rights law’s non-discrimination principle are a serious threat to their usefulness for protecting non-citizens from discrimination. See, e.g., Hiroshi Motomura, \textit{Federalism, International Human Rights, and Immigration Exceptionalism}, \textit{70 U. Colo. L. Rev.} 1361, 1383-84 (1999).

\textsuperscript{172} U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination Against Non Citizens (2004), ¶ 4, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2004), available at http://www.refworld.org/publisher,CERD,GENERAL,,45139e084,0.html [hereinafter Discrimination Against Non Citizens] (“[D]ifferential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”).

\textsuperscript{173} Boyle and Baldaccini note that the Discrimination Convention “advocates a notion of equality of outcome, which is sensitive to the starting point of people, to past disadvantages which have created systematic patterns of discrimination in many societies, the effects of which may be continued or even exacerbated by facially neutral policies.” Boyle & Baldaccini, \textit{supra} note 141, at 157. For detailed accounts of the basis of this understanding of the Discrimination Convention, see Theodor Meron, \textit{The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination}, \textit{79 Am. J. Int’l L.} 283, 286-89 (1985).

\textsuperscript{174} Boyle & Baldaccini, \textit{supra} note 141, at 156-58.
tion Convention seeks to regulate. By definition, members of this group are not full members of any political community and typically are a minority group in their host county. As non-citizens in their host countries, refugees cannot attempt to protect their interests through the political process. This makes them more vulnerable than even racial, ethnic, religious, or other minorities who are citizens of the host nation. And relative to other migrants, even forced migrants, refugees are per se cut off from the protection of their countries of nationality. Any determination of whether structural xenophobic discrimination against refugees is unlawful must be made in light of these circumstances.

Many of the policies and practices that result in structural xenophobic discrimination are individually justifiable on the basis of reasonable and even important societal goals. As the examples I offer in Section II illustrate, these policies and practices typically serve a legitimate aim. They are, however, not always proportionately tailored to achieve this end. The example I provide in the Introduction of a

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175. In recognition of this fact, the Discrimination Committee has taken active steps to inform states of their obligations to refugees, asylum seekers and other categories of non-citizens under the Discrimination Convention. Discrimination Against Non Citizens, supra note 172.

176. I do not mean to suggest here that other categories of forced migrants are never cut off from the protection of their countries of nationality. Unauthorized forced migrants fleeing economic collapse may, for example, find themselves essentially unable to rely on their countries of nationality to guarantee their fundamental rights. In this Article, I limit my account of unlawful structural xenophobic discrimination to the case of refugees because the vulnerability of this category of forced migrants enjoys international legal consensus. Their legal status includes formal acknowledgment of the unique predicament of being foreclosed from seeking any benefits of political membership from one’s country of nationality. However, it is just as important, if not more so, to achieve clarity on what constitutes unlawful structural xenophobic discrimination against other categories of forced migrants, even if this task is beyond the scope of this Article.

177. Two examples are bank account restrictions to prevent money laundering and medical professional certification requirements to ensure the quality of healthcare services available.

primary school admissions policy that requires a birth certificate and transcript as unwaivable requirements of enrollment illustrates the case of an overly broad measure with a legitimate aim. It is not that nation states should not be able to protect legitimate interests, but rather that the means by which they do so must not violate the rights of refugees under international human rights law. This is consistent with the general approach the Discrimination Committee has taken with respect to determining unlawful disparate effects under the Discrimination Convention: “In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.” Where structural xenophobic discrimination results in the violation of the rights of refugees under international law, it is unjustifiable.

The Discrimination Convention does not itself grant the substantive socio-economic and civil rights it seeks to guarantee equally to all. Rather, it requires non-discriminatory access to these rights once they have been granted in either domestic or international law. Thus, although the Discrimination Convention offers a firm basis for the

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179. This policy is overbroad in its effect because it unnecessarily excludes all refugees unable to produce these documents, regardless of other means they may have to prove their identity and academic aptitude. An admissions policy that included an exemption for refugees, permitting them to use a refugee ID and to sit a placement examination, would be one way to solve this problem.


181. Comm. on the Elimination of Racial Discrimination, General Recommendation 20, ¶ 1 (1996) (“Article 5 of [the Discrimination Convention], apart from requiring the guarantee that the exercise of human rights shall be free from racial discrimination, does not itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights.”).
prohibition of structural xenophobic discrimination, this protection is limited to rights that the host nation is obligated to provide by its own domestic law, or by an international treaty that it has ratified.\footnote{The Discrimination Committee has explained that: All States Parties are . . . obliged to acknowledge and protect the enjoyment of human rights, but the manner in which these obligations are translated into the legal orders of States Parties may differ. Article 5 of the Convention, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights. The Convention obliges States to prohibit and eliminate racial discrimination in the enjoyment of such human rights.} The rights most at stake for refugees and asylum seekers in solidifying their underclass status are socio-economic rights, although it is possible to provide examples that implicate civil rights.\footnote{For example, protection advocates have identified violations of refugees' rights to due process of law or to be free from arbitrary detention originating in structural forces as opposed to explicit prejudice.} Of particular relevance to this Article, the Discrimination Convention requires states to eliminate discrimination that violates the rights to work, housing, health care, and education.\footnote{The Discrimination Convention, supra note 140, art. 5.} The Discrimination Committee has in fact explicitly affirmed the responsibility of states under the Discrimination Convention to “[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health.”\footnote{Discrimination Against Non Citizens, supra note 172, ¶ 29.}

At the international level, the most comprehensive source of legally binding socio-economic rights obligations is the International Covenant on Economic, Social and Cultural Rights (ICESCR). This treaty is broadly, though not universally, ratified; thus, it is an important anchor for socio-economic legal obligations in much of the world.\footnote{160 of the 193 countries that are members of the United Nations are states party to the ICESCR. ICESCR, supra note 9.}

The ICESCR provides the right to work,\footnote{Id. art. 6.} the right to favorable conditions of work,\footnote{Id. art. 7.} the right to social security,\footnote{Id. art. 9.} the right to an adequate standard of living—which includes the right to adequate food, clothing, and housing\footnote{Id. art. 11.} —and the right to health.\footnote{Id. art. 12.} The monitoring body of the ICESCR has made clear that “[t]he ground of 182. The Discrimination Committee has explained that: All States Parties are . . . obliged to acknowledge and protect the enjoyment of human rights, but the manner in which these obligations are translated into the legal orders of States Parties may differ. Article 5 of the Convention, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights. The Convention obliges States to prohibit and eliminate racial discrimination in the enjoyment of such human rights.

183. For example, protection advocates have identified violations of refugees' rights to due process of law or to be free from arbitrary detention originating in structural forces as opposed to explicit prejudice.

184. The Discrimination Convention, supra note 140, art. 5.


186. 160 of the 193 countries that are members of the United Nations are states party to the ICESCR. ICESCR, supra note 9.

187. Id. art. 6.

188. Id. art. 7.

189. Id. art. 9.

190. Id. art. 11.

191. Id. art. 12.

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nationality should not bar access to Covenant rights . . . . The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.\textsuperscript{192} However, the ICESCR permits certain states differential treatment of citizens and non-citizens under qualified circumstances. Article 2(3) of the ICESCR states that: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the [ICESCR] to non-nationals.”\textsuperscript{193} This would mean that, in developing countries that have explicitly limited economic rights such as the right to work to citizens in their implementation of ICESCR, refugees would be unable to rely on this treaty to pursue a structural xenophobic discrimination claim under the Discrimination Convention.

Further below, I evaluate the challenge this limitation poses for the inclusive approach I advance. However, the practical relevance of Article 2(3) has been called into question, as it has never been invoked by a state.\textsuperscript{194} And in contexts where provision of economic rights to non-nationals is rooted in domestic constitutions or legislation distinct from legislation implementing the ICESCR, these potential limitations are irrelevant. South Africa, which has not ratified the ICESCR, is a case in point. The South African Constitution and certain domestic statutes grant refugees and asylum seekers a range of socio-economic rights.\textsuperscript{195}

The Discrimination Convention not only recognizes structural forms of discrimination, it also provides the basis for robust structural remedies. Under Article 2 of the Discrimination Convention, states parties are required “to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.”\textsuperscript{196} Article 2 also requires states parties to “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating . . . discrimination wherever it exists.”\textsuperscript{197} This is a broad provision that requires states to take active steps to address unlawful structural xenophobic

\textsuperscript{192.} General Comment No. 20, \textit{supra} note 168, at 30.
\textsuperscript{193.} (emphasis added).
\textsuperscript{194.} VANDENHOLE, \textit{supra} note 141, at 143.
\textsuperscript{195.} See JEFF HANDEMAKER, LEE ANNE DE LA HUNT & JONATHAN KLAAREN, ADVANCING REFUGEE PROTECTION IN SOUTH AFRICA 304 (Handmaker et al. eds., 2008).
\textsuperscript{196.} (emphasis added).
\textsuperscript{197.} The Discrimination Convention, \textit{supra} note 140, art. 2.1.
discrimination. Significantly the Discrimination Committee has stated that the Discrimination Convention requires states to: “Take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects.”

The Discrimination Convention applies both to public conduct (by the State and civil servants acting in their official capacity) and to conduct by private parties. Thus, regardless of whether public or private actors trigger structural xenophobic discrimination, the Discrimination Convention would require states to provide redress. Importantly, Article 2 of the Discrimination Convention mandates affirmative action “in the social, economic, cultural and other fields” to bring an end to discrimination where such action is required. It thus places an explicit burden on governments to take positive steps to protect vulnerable groups from discrimination, even if these measures single out affected groups for special treatment that under other legal frameworks might be prohibited as reverse discrimination.

B. Resetting the Global Anti-Xenophobic Discrimination Agenda: Using the Discrimination Convention to Chart an Inclusive Approach

My goal in this Article has been to make the case for resetting the normative and legal underpinnings of global anti-xenophobic discrimi-
nation policy. Here, I propose some concrete ways in which this goal might be realized. I also offer some examples of the potential implications of this resetting in the domestic contexts where refugees need them the most.\textsuperscript{203}

As a first step toward resetting global anti-xenophobic discrimination policy, I propose the re-articulation of the concept of xenophobic discrimination: the concept should include harm that results from explicit anti-foreigner prejudice, and harm that results from the disparate impact of facially neutral measures on account of foreignness. Concretely, this re-articulation could begin with the monitoring bodies of the international refugee law regime (UNHCR), and of the Discrimination Convention (the Discrimination Committee). UNHCR could issue a new Guidance Note (1) elevating structural xenophobic discrimination to the same priority level as acts of discrimination motivated by explicit anti-foreigner prejudice, and (2) recalling the obligation of states to remedy both forms of discrimination under the Discrimination Convention. The Discrimination Committee could adopt a General Recommendation similarly (1) calling attention to the phenomenon of structural xenophobic discrimination against refugees and asylum seekers, (2) delineating the circumstances under which the Discrimination Convention prohibits this form of discrimination, and (3) highlighting states parties’ responsibilities under the Convention to eliminate it.\textsuperscript{204}

These two proposals have international and domestic ramifications. At the international level, a UNHCR Guidance Note incorporating structural xenophobic discrimination would re-orient the manner in which UNHCR officers in the field engage host nation governments on the question of xenophobic discrimination. It would provide these officers with a framework for lobbying governments to take action to fight the conditions of structural xenophobic discrimination on the basis of binding international human rights law. In various existing publications, UNHCR already draws attention to the fact and implications of the economic and social marginalization of refugees and

\textsuperscript{203} It is nonetheless beyond the scope of this article to drill down into specific case studies to illustrate the detailed mechanics of implementing an inclusive approach. This is an important area for future research.

\textsuperscript{204} Pursuant to Article 9(2) of the Discrimination Convention, the Discrimination Committee may issue General Recommendations. These General Recommendations “enable it to both indicate to states [the Discrimination Committee’s] view of the scope of [the Discrimination Convention’s] provisions as a guide to [state] reporting and to offer guidance on the legal interpretation of the Convention.” Boyle & Baldaccini, \textit{supra} note 141, at 172.
asylum seekers. However, by explicitly conceptualizing this marginalization as structural xenophobic discrimination prohibited under international human rights law, UNHCR would provide its field officers with a vocabulary that has legal weight (the Discrimination Convention) and can be used to influence negotiations with host governments to protect refugees and asylum seekers.

This Guidance Note would also inform UNHCR’s collaboration with other UN bodies whose mandates bring refugees and asylum seekers within their purview. These include the UN Office of the High Commissioner for Human Rights and the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance. A Guidance Note by UNHCR cannot and will not be a silver bullet for structural xenophobic discrimination. It would, however, serve the important function of setting a comprehensive agenda for the global fight against xenophobic discrimination. In light of the broad impact of UNHCR interpretation of the international law governing refugees in international, regional, and domestic courts, and in non-adjudicatory forums, a Guidance Note would make an important difference.

A General Recommendation from the Discrimination Committee would, at the international level, provide states parties with clarification of their responsibilities under the Discrimination Convention. Although General Recommendations are not legally binding on states parties to the Discrimination Convention, they provide these states with a guide for the mandatory reports that the Discrimination Convention requires them to submit. They also provide states with guidance on the legal interpretation of the Discrimination Convention. Under Article 11(1), the Discrimination Committee has the authority to hear

205. See UNHCR POLICY ON REFUGEE PROTECTION AND SOLUTIONS IN URBAN AREAS, supra note 63, ¶ 100.


207. See infra Part II.

208. Boyle & Baldaccini, supra note 141, at 172.

209. Id.
complaints brought by individuals against states parties to the Discrimination Convention. A General Recommendation might serve as an important catalyst, mobilizing refugees to bring claims of structural xenophobic discrimination against host governments before the Discrimination Committee. It would also introduce structural xenophobic discrimination against refugees and asylum seekers as a problem for which states parties would be held accountable in their mandatory reports to the Discrimination Committee. A General Recommendation might also inform the work of influential inter-governmental organizations such as the International Organization for Migration (IOM), and international human rights groups such as Human Rights First, in their own advocacy to push states to protect refugees.

Arguably of more importance is the potential impact that a shift towards an inclusive approach at the international level could have on the work of domestic refugee protection advocates. An authoritative Guidance Note from UNHCR would be a useful tool for domestic advocates adopting what Professor Scott Cummings terms a “polycentric” approach to social change. Polycenctrism “invites lawyers to move into multiple arenas, where they are required to calculate strategic costs and benefits, weighing which avenues offer the greatest possibilities for politically meaningful intervention.” While a UNHCR Guidance Note and a Discrimination Committee General Recommendation are unlikely to result in spontaneous shifts in domestic refugee protection, there is reason to believe that both could provide normative and legal anchors for domestic advocates seeking an international foundation for approaches that address the conditions of structural xenophobic discrimination. In countries bound by the Discrimination Convention, these instruments could complement direct reliance on the Discrimination Convention itself to advance an inclusive conception of xenophobic discrimination. This is important given that the Discrimination Convention is legally binding on more

210. These include lawyers, activists, and non-governmental organizations that work domestically to advance the rights of refugees. They provide direct legal services to refugees, engaging in litigation and other forms of advocacy, such as consultations with policy-makers.

211. Cummings, supra note 21, at 1020.

212. For an example of a recent empirically-based project charting how lawyers and activists in different parts of Africa are successfully using human rights—socio-economic rights in particular—to challenge structural oppression, see STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY (Lucie White & Jeremy Perelman eds., 2011); Lesley Wexler, The Non-Legal Role of International Human Rights Law in Addressing Immigration, 2007 U. Chi. Legal F. 359 (2007).
states than is the UN Refugee Convention.\textsuperscript{213} Through various trans-national legal processes, the Guidance Note and General Recommendation could assist domestic advocates in holding governments and their officials accountable for unlawful structural xenophobic discrimination.\textsuperscript{214}

In the access to education example I provided in the Introduction, a UNHCR Guidance Note and a Discrimination Committee General Recommendation would assist refugee protection advocates in lobbying the executive authority responsible for regulating public education to create special exemptions for refugees unable to provide certain forms of documentation. The authority could permit the use of refugee documentation to prove identity, and offer aptitude tests at no cost to refugees in order to determine their academic placement in the absence of official transcripts.

The same principle applies to more complex forms of structural xenophobic discrimination. Professor Jeffrey Handmaker has expressed optimism for litigation partnered with other advocacy strategies to bring about structural changes for refugees in South Africa.\textsuperscript{215} More importantly, he describes advocacy and litigation on behalf of refugees in South Africa as characterized by the use of international human rights law to challenge the “legal normative framework.”\textsuperscript{216} South Africa is a context where the use of international law to interpret the Bill of Rights is constitutionally mandated.\textsuperscript{217} It is therefore conceivable, for example, that in the context of the Guidance Note and CERD General Recommendation I propose, the South African Constitutional Court may have reached a different decision in \textit{Union of Refugee Women}, a case in which the Court upheld the gate-keeping provisions.

\textsuperscript{213} The Discrimination Convention has 175 states parties and the UN Refugee Convention has 145. \textit{Multilateral Treaties Deposited with the Secretary-General, United Nations}, http://treaties.un.org/Pages/ParticipationStatus.aspx (last visited Jan. 10, 2014).


\textsuperscript{216} Id. at 69.

\textsuperscript{217} S. Afr. Const., 1996 (“When interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law.”) This includes the Discrimination Convention because this treaty binds South Africa.
of PSIRA discussed above. As mentioned above, the ruling in that case turned on the fact that legislation curtailed refugees’ ability to choose their occupation, but did not violate their fundamental human right to work. Four Justices of the Constitutional Court issued a dissenting opinion in that case, in large part because there was:

- evidence to suggest that the relatively low-skilled work available in the private security industry was a significant source of employment for many refugees. Their exclusion from this form of employment therefore not negligible and may well have a severe impact on the ability of refugees to earn a livelihood in South Africa.

Authoritative guidance from UNHCR and the Discrimination Committee mapping the structural effects of facially neutral laws such as PSIRA might have influenced the remaining six Justices who took a different view from those dissenting. It might also have guided the pleadings of the lawyers on behalf of the refugees challenging the law to include comprehensive data on the cumulative structural exclusion of refugees from the formal employment sector.

Even more so than litigation, the Guidance Note and General Recommendation might inform domestic policy-making. For example, in the South African context where refugee protection advocates are in dialogue with the government to develop policies to combat xenophobic discrimination, an international articulation of an inclusive approach could offer important leverage for the adoption of more comprehensive policy. These two interventions would undoubtedly be beneficial arsenal for legal actors advancing structural xenophobic discrimination arguments. Pursuant to an international declaration on the issue, the government of South Africa has been drafting a National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP). The Note and Recommen-
dation would offer refugee protection advocates who are a part of the drafting process a framework for pursuing legislation and policy that provides refugees with more comprehensive protections. NAP could be an important policy document for facilitating multi-sectoral coordination across industries. This coordination would ensure that effect as well as intent is part of the calculus for identifying and preventing wrongful discrimination at the lawmakers stage. NAP might, for example, require (1) professional boards to carve out exemptions for refugees, allowing them to take re-certification exams at discounted costs; and (2) banks to offer instruments and services that balance security concerns with the needs of refugees and asylum seekers to the extent that these needs deeply implicate their human rights.222 This would be in keeping with the Discrimination Convention’s existing guidance.223

C. On the Biggest Challenge to Implementing an Inclusive Approach

1. Unwillingness or Inability

Law is, at best, only a first step toward social change. And redressing structural oppression requires far more than the existence of laws and norms that prohibit it. The unwillingness or inability of states to adopt a structural approach to xenophobic discrimination is likely to pose the most significant obstacle to its implementation.

With respect to unwillingness, the general reluctance of states to address human rights violations is not uncommon. But the economic and political costs of remedying structural violations of socio-economic rights of refugees may mean that compelling states to act is particularly challenging. Despite growing evidence that forced migrants can be an economic boon for a host state,224 states are likely to view the economic implications of a structural approach as a disincentive, at least at first blush. Politically, refugees and asylum seekers have no


223. Discrimination Against Non Citizens, supra note 172, ¶ 33, (affirming the responsibilities of states to “[t]ake measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects”).

224. See, e.g., Jacobsen, supra note 66, at 283-84.
electoral clout, and indeed special measures to assist them may have the perverse effect of fueling xenophobic sentiment among resentful nationals in ways that only further endanger these groups.225

Finding creative strategies to overcome political resistance to robust refugee protection is precisely the daily task of refugee and human rights lawyers and perhaps even scholars. I say this not to trivialize the complexity of the challenges that these advocates will have in securing remedies for structural xenophobic discrimination but to note that political resistance is not unique to the proposal I advance in this Article. It is thus a matter of advocates extending or adapting their existing toolkits to challenge political resistance to fighting structural xenophobic discrimination. The strategies they adopt will need to reflect the concrete socio-economic and political contexts within which they are embedded. And while the challenges they face will be significant, there is cause for some optimism. There exists literature on the successful if not guaranteed use of human rights to shift norms and law, even in the area of socio-economic rights in the global south.226 Notably, human rights advocates in South Africa have had remarkable successes in shifting the normative and legal framework governing the rights of refugees in South Africa. Professor Handmaker has recounted in detail the cooperative and confrontational strategies that civic actors adopted to bring about these changes, relying to a great extent on international human rights law.227 While recognizing the importance of historical and socio-legal context, he argues that his analysis of civic actors’ strategies for bringing about change is globally relevant, and sheds light on refugee protection in other parts of the world.228

The unique challenge posed by xenophobic discrimination is that measures to address it may only serve to fuel it further. In South Africa,

225. UNHCR, REPORT OF THE AD HOC INQUIRY INTO UNHCR’S RESPONSE TO THE 2008 XENOPHOBIC CRISIS IN THE REPUBLIC OF SOUTH AFRICA TO THE HIGH COMMISSIONER FOR REFUGEES (2009) (expressing this very concern as a possible reason for government reluctance to meet minimum standards of protection for displaced non-nationals, including refugees). But see UNHCR POLICY ON REFUGEE PROTECTION AND SOLUTIONS IN URBAN AREAS, supra note 63, ¶ 40 (“UNHCR will endeavour to combat discrimination and xenophobia and will ensure that the services it provides to urban refugees bring benefits to other city-dwellers, especially the neediest sections of the population and those who live in closest proximity to refugees.”).

226. For examples of the use of human rights to bring about structural socio-economic change beyond the refugee protection context, see STONES OF HOPE, supra note 212, at 7 (“The most salient lesson from this theory-practice project is that ESR activism, deployed in certain contexts and designed in certain ways, can sometimes open pathways leading to positive changes.”).

227. HANDMAKER, supra note 28.

228. Id. at 209-11.
UNHCR has noted that: “Competition between refugees and South African nationals for jobs, housing, business opportunities and social services has raised tensions, and aggravated xenophobic attitudes among some in the local community. It is noticeable that poor socio-economic conditions among host communities provide a breeding ground for xenophobia.”

It stands to reason that intervention to alleviate the suffering of refugees may only further exacerbate xenophobic attitudes and discrimination. This strongly suggests that attempts to combat structural xenophobic discrimination must be pursued in tandem with policies aimed at alleviating the suffering of the economically marginal in host nations. This is, of course, no easy feat and raises important questions regarding the resources necessary to provide the comprehensive protections that an inclusive approach entails.

In countries where host governments are irrevocably opposed to measures to alleviate the suffering of refugees and asylum seekers, a Guidance Note and General Recommendation may be of limited consequence. However, in those places where political context fluctuates in ways that even only occasionally result in interest convergence between governments and refugee protection advocates, the Guidance Note and General Recommendation have great potential. In the global south where dramatic shifts in political power regularly reset the institutional frameworks of government, the international human rights law framework can, and in fact does, play a fundamental role in shaping domestic struggles against oppression. South Africa’s own dramatic successes in moving from a country that once barred UNHCR presence to one that has adopted a human rights-based refugee protection framework is an important case in point. Today, South Africa’s jurisprudence recognizes the unique vulnerability of refugees and asylum seekers.

The normative and legal re-articulation I propose here is intended to provide domestic actors with a basis to ground advocacy for comprehensive protection against xenophobic discrimination. Perhaps in a post-conflict Syria, which has historically been host to among the

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230. Existing UNHCR policy does precisely this. See supra note 226.
231. See generally Handmaker, supra note 28.
largest refugee populations in the world, advocates might find use in a statement by the Discrimination Committee interpreting the Discrimination Convention to require states to address structural xenophobic discrimination. Syria, while not a state party to the UN Refugee Convention or Protocol, acceded to the Discrimination Convention in 1969. Although the international human rights framework does not determine domestic outcomes, it can have a profound impact on the manner in which problems are conceptualized and on the tools international and domestic actors have at their disposal to effect change.

With respect to economic challenges, in some circumstances it may not be that states are unwilling, but that they are unable to honor the requirements of an inclusive approach to xenophobic discrimination due to genuine resource constraints. UNHCR reports that in 2011, 4.7 million refugees resided in countries where the GDP per capita was below USD 3,000. In comparison, that same year, U.S. gross domestic product (GDP) per capita was USD 48,112, and U.K. GDP per capita was USD 39,038. During this time, Pakistan hosted 605 refugees per dollar of its GDP per capita, and the DRC hosted 399. Absence of the material means to redress human rights violations presents a different challenge from absence of political will to apply these means. It triggers one of the perennial and seemingly intractable problems of refugee protection: international burden- or responsibility-sharing as means of meeting the needs of refugees who are regionally concentrated in the poorest parts of the world.

Under international refugee law, wealthier states are under no explicit legal obligation to assist poorer states that host disproportionate numbers of the global refugee population on account of geographic proximity to conflict. This means there may be some contexts in which genuine economic constraints foreclose structural interventions on behalf of refugees. As an initial matter, it will be vital to distinguish between firm resource constraints and inefficient use of otherwise available resources. That said, the problem of limited resources (or the global unequal distribution of wealth) may be the Achilles heel to the successful implementation of an inclusive approach, but no more so than it is to refugee protection broadly

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234. See STONES OF HOPE, supra note 212, at 149-53.  
236. JAMES C. HATHAWAY, RECONCEPTUALISING INTERNATIONAL REFUGEE LAW xxi (1997).
speaking. The fact of scarce resources cannot overcome the need for comprehensive legal protections for refugees. It only makes meeting these needs a very difficult enterprise.

2. Feasibility

The theory of structural xenophobic discrimination that I advance holds that individual policies and practices that may not violate the rights of refugees may nevertheless have the cumulative effect of doing so. This is different from the more typical accounts of indirect discrimination that focus on the effect of a single policy. However, focusing on the cumulative discriminatory effects of policies and practices whose individual effect may not rise to the level of unlawfulness is not novel. For example, adjudicators consider cumulative discriminatory effects in refugee status determination procedures all over the world. In order to qualify for refugee status, a refugee is required to establish a well-founded fear of persecution in her country of nationality. In this context, refugees may offer acts of discrimination that they suffered in order to establish past persecution or to demonstrate a well-founded fear of future persecution.

The UN Refugee Convention provides no definition of persecution and across domestic contexts there is jurisprudential agreement—in accordance with UNHCR’s guidance—that discrimination in and of itself is not sufficient to establish persecution for the purposes of refugee status. However, refugee status adjudicators do agree that the cumulative effects of discriminatory acts that would individually fail to meet the threshold of persecution, can together result in persecution for the purposes of establishing refugee status. In this context, Rebecca Dowd describes cumulative discrimination as “the situation in which a person faces a number of different discriminatory measures, such as in education, health care, employment and/or housing,” that cumulatively rise to the level of persecution that the UN Refugee Convention aims to protect against. In this regard, UNHCR’s all-important Handbook on Procedures and Criteria for Determining Refugee Status states the following:


239. Id. at 39.
Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities . . . . Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances.  

Determining when measures cumulatively “lead to consequences of a substantially prejudicial nature” would be precisely the task involved in reaching a determination of structural xenophobic discrimination.  

Rebecca Dowd’s work offers examples of adjudicators in Canada, the United States, the United Kingdom, Australia, and New Zealand who apply this principle in refugee status determination procedures.  

The New Zealand Tribunal responsible for adjudicating appeals of those denied refugee status has stated, for example, that “[t]he need to recognize the cumulative effect of threats to human rights is particularly important in the context of refugee claims based on discrimination.”  

To be sure, in these proceedings, adjudicators typically consider discriminatory acts whose causal effects on asylum seekers are more easily established. The cumulative effect of multiple acts of discriminatory violence on an asylum seeker, for example, is more easily established than the cumulative effect of practices and policies that I argue are at the root of structural xenophobic discrimination. While conceding the complexity of establishing the cumulative effects that result in structural xenophobic discrimination, I nonetheless maintain that this is not an unreasonable task for adjudicators or other legal actors.

Environmental law is an example of an area where policy makers and

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240. UNHCR Handbook, supra note 237, ¶ 54-55.
241. This notwithstanding the fact that UNHCR’s Handbook advocates this approach in the context of establishing refugee status as opposed to the context of determining unlawful discrimination.
243. Id. at 42.
adjudicators are required to take into account cumulative effects of a broad and diverse set of factors. In the United States, the National Environmental Protection Act (NEPA) requires federal agencies to take into account cumulative effects in their environmental impact analyses. NEPA’s regulations define the “cumulative effects” of an action as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions.” As a result, federal agencies “routinely address the direct and (to a lesser extent) indirect effects” of proposed actions on the environment. This is no easy feat, as it requires “delineating the cause-and-effect relationships between the multiple actions and resources, ecosystems, and human communities of concern.” Accounting for cumulative effects in the environmental law context is complex and imperfect, and is subject to continuing efforts to improve the process. Accounting for the impact of cumulative effects on the rights of refugees will be no different. This Article takes the important first step of identifying cumulative effects as discriminatory, paving the way for the development of increasingly sophisticated technologies to empirically map and measure the cumulative effects that violate the rights of refugees.

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244. In addition to policy makers and administrative agencies, courts, too, have had to evaluate cumulative effects in environmental law claims. See, e.g., Michael D. Smith, Cumulative Impact Assessment under the National Environmental Policy Act: An Analysis of Recent Case Law, 8 ENVTL L. PRAC. 228 (2006) (examining 25 decisions from the Ninth Circuit Court of Appeals in which cumulative impact analyses were the subject of litigation); Peter N. Duinker & Lorne A. Greig, The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redeployment, 37 ENVTL MGMT. 153, 153 (2006). Europe similarly requires accounting for cumulative effects. See Elizabeth A. Masden et al., Cumulative Impact Assessments and Bird/Wind Farm Interactions: Developing a Conceptual Framework, 30 ENVTL IMPACT ASSESSMENT REV. 1, 1-2 (2010).

245. For example, the Department of Defense might have to consider how its use of a particular piece of land as a training ground impacts nesting birds in this area, and this assessment would have to account for the cumulative effect of the training given the universe of all other actions that might impact the nesting birds. COUNCIL ON ENVTL QUALITY, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997) (citing 40 CFR § 1508.7).

246. Id. at v.

247. Id. at vi.

248. See, e.g., Wanda Baxta et al., Improving the Practice of Cumulative Assessment in Canada, 19 IMPACT ASSESSMENT AND PROJECT APPRAISAL 253 (2001) (critically evaluating cumulative effects assessments and recommending improvements to the process); Barry Smit & Harry Spaling, Methods for Cumulative Effects Assessment, 15 ENVTL IMPACT ASSESSMENT REV. 81 (1995) (reviewing and evaluating the spectrum of approaches to cumulative effects analyses).
In framing structural xenophobic discrimination as a violation of international human rights law, I wish to emphasize that combating this violation cannot solely or even primarily be achieved through litigation before courts. Refugees typically have severely limited access to courts, and particularly where structural problems are concerned, remedial efforts on their behalf are best pursued at the law-making and policy-making levels. For lawmakers and policymakers, this will mean coordination among the various sectors to ensure that the measures they adopt account for the interactive and cumulative effects at the core of structural xenophobic discrimination.

V. Conclusion

The prejudice approach shields structural xenophobic discrimination from the full emancipatory potential of the international human rights framework. It prevents engagement with even those structural effects that result in human rights violations and are thus prohibited by international human rights law. I propose a conceptual shift from a prejudice approach to an inclusive approach that recognizes structural forms of xenophobic discrimination as unlawful. This better tailors the emerging anti-xenophobic discrimination regime to solve the problem it seeks to address. An inclusive approach resonates more fully with the normative vision of the non-discrimination principle under international human rights law and is readily available under the Discrimination Convention.
Article

Syria, Cost-sharing, and the Responsibility to Protect Refugees

E. Tendayi Achiume†

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INTRODUCTION

The Syrian refugee crisis is the largest refugee crisis since the Second World War. By August 2014, the UN Refugee Agency’s response to the Syrian displacement crisis had become the biggest operation it has undertaken in its 64-year history. The number of people who had fled Syria by August 2015 was staggering—over 4 million. At the time of writing nearly all Syrian refugees are concentrated in five countries in the region: Lebanon, Jordan, Turkey, Iraq, and Egypt. By November 2014,
Lebanon alone was host to over a million refugees from Syria, comprising over a quarter of Lebanon’s total population. By contrast, as of December 2014, the entire European Union had only extended protection to just over 217,000 Syrian refugees. In 2013 the United States committed to resettling a mere 2000 Syrian refugees.

There is no principled basis for the current distribution of the cost and responsibility of protecting Syrian refugees. The five countries bearing an overwhelming share of this cost are not those most responsible for causing the conflict at the root of the refugee crisis. Neither are they the countries most capable of protecting Syrian refugees. Instead, geographic proximity to conflict and porosity of borders remain the primary determinants of which nations bear the heaviest cost, with disastrous effects.

Syrian refugees have needs far beyond what their host communities and states can meet. Most of the refugees are not in camps and struggle to find food and shelter. The sheer magnitude of the refugee population in host countries is dramatically depressing wages and inflating rental prices, while depleting what public services are available for health and education. What is at stake is not only lives of the refugees, but the stability and perhaps even the survival of the states that host them. And the consequences extend further. They include: a rise in threats to regional and international security as the sectarian conflict in Syria reproduces itself in neighboring countries; creation of fertile conditions for radicalization that fuels transnational terrorist organizations, as overall conditions in the Middle East worsen; and increased unauthorized desperation-driven migration to the West (especially Europe) as refugees risk their lives to escape starvation and conflict. In short, the Syrian refugee crisis is a problem of global proportions.

6. See Needs Soar as Number of Syrian Refugees Tops 3 Million, supra note 3.

7. See id. According to the United Nations High Commissioner for Refugees, in mid-2014: “[P]erson for person, the wealthy EU [was] offering refuge to 1,000 times fewer Syrians than cash-strapped Lebanon.” Europe Must Give Syrian Refugees a Home, supra note 2.


10. See infra Part III.
Despite the gravity of the refugee crisis, states can manage it if they cooperate to share the cost and responsibility of protecting these refugees. Significantly, however, the international law regime that currently governs the refugee-specific obligations of states offers no basis for achieving this cooperation. This Article offers a novel response to addressing this gap in the regime.

In some fundamental respects, international refugee law was created to resolve the types of challenges the Syrian refugee crisis raises. The UN Refugee Convention and its Protocol legally require states to extend protection to refugees within their jurisdiction. However, these treaties create no legal obligation on states to assist other states with mass refugee influxes with which the latter are unable to cope. Eighty-six percent of the world’s refugees reside in southern states. Thus in practice, the world’s poorest countries are legally required to meet the needs of most refugees. Wealthy northern states, which


15. I use the term northern states to refer to Western Europe and North
are often instrumental in generating refugee crises, are under no legal obligation to assist southern states with shouldering the responsibility of refugee protection. When southern states such as Syria’s neighbors request international assistance with refugee protection, they do so in the absence of a framework for facilitating the requisite international cooperation. The result has been a per se unreliable mechanism for ensuring international cooperation.

In 2005, world leaders unanimously adopted a United Nations General Assembly resolution that today serves as the official statement of the international doctrine of the responsibility to protect (RtoP). RtoP conceives of sovereignty as entailing a responsibility on each state to protect its territorial population from genocide, crimes against humanity, ethnic cleansing, and war crimes (RtoP crimes). RtoP also stipulates a complementary responsibility borne by the international community. It

America.

16. This is evident in the crisis in Syria, where many foreign states including European states, the United States, Russia, Turkey, Qatar, Saudi Arabia, Iran, and others are active participants in the armed conflict variously supplying weapons, training rebel and other fighters on the ground, and in some cases engaging in the armed conflict directly. For an overview of foreign involvement in the ongoing conflict, see CHRISTOPHER M. BLANCHARD ET AL., CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSE (July 15, 2015), https://www.fas.org/sgp/crs/mideast/RL33487.pdf.

17. Hathaway & Neve, supra note 12, at 187 (“The present, loosely constructed system of international cooperation in refugee protection is characterized by vague promises of solidarity among governments, accompanied by often undependable funding.”).


19. Unlike genocide, crimes against humanity, and war crimes, international law does not define “ethnic cleansing” and ethnic cleansing is not per se an international crime. See David Scheffer, Atrocity Crimes Framing the Responsibility to Protect, 40 CASE W. RES. J. INT’L L. 111, 128–29 (2007–2008) (“As a matter of law, the invocation of ethnic cleansing in the mandates of R2P is a non-technical expression for what in fact is a sub-category of the crime against humanity of persecution. . . . In its simplest terms, ethnic cleansing is the discriminatory assault on an identifiable group within the civilian population for the purpose of removing that group permanently from territory sought by the perpetrators of the assault.”). As the 2009 UN Secretary-General Report states “acts of ethnic cleansing may constitute one of the other [RtoP] crimes.” See U.N. Secretary-General, Implementing the Responsibility to Protect: Rep. of the Secretary-General, at 5, U.N. Doc. A/67/677 (Jan. 12, 2009) [hereinafter Implementing the Responsibility to Protect].

20. With respect to RtoP, the term “international community” refers at a minimum to nation states, their regional organizations, and the United Na-
commits the international community to providing international assistance and capacity building support to help national authorities protect populations from RtoP crimes.\textsuperscript{21} Finally, RtoP commits the international community to taking timely and decisive action in response to the manifest failure of states to protect populations from RtoP crimes.\textsuperscript{22}

I have two primary objectives in this Article. The first is to offer an important, though qualified, solution to the problem of failed international cooperation to share the cost of protecting refugees such as those from Syria, fleeing mass atrocities. I argue that states and other international actors can and should use RtoP to facilitate international cooperation to protect Syrian refugees. My proposal can be generalized beyond the case of Syria and offers a much-needed means of mitigating the fallout from widespread, commonplace international displacement from conflict, which has been rising for decades.\textsuperscript{23} My second objective is to propose a new approach to how international actors develop and apply RtoP even beyond the context of refugee protection.

There is a rich literature on possible solutions to the problem of international refugee cost-sharing.\textsuperscript{24} Yet absent from the literature is any attempt to use RtoP to solve this problem. In fact, scholars have generally neglected analysis of the doctrine’s application to refugees, with few exceptions.\textsuperscript{25} Yet situations

\textsuperscript{21} Implementing the Responsibility to Protect, supra note 19, at 2.
\textsuperscript{22} See id.
\textsuperscript{23} See UNHCR GLOBAL TRENDS 2013, supra note 13.
\textsuperscript{24} See infra note 81.
\textsuperscript{25} For a discussion of the exceptions, see infra note 106.
that trigger the international community’s RtoP commitments often also give rise to vulnerable refugee populations in need of protection. Although RtoP is not legally binding on states, it can play an important role in facilitating international cooperation on behalf of refugees.26 I argue that RtoP offers a new frame for coordinating international refugee cost-sharing in cases like Syria.27 As I will explain, RtoP is by no means a perfect frame for this task. Nonetheless, it is a readily available frame that offers a meaningful opportunity to reap important benefits, at very little cost or risk to international actors invested in a more sustainable and equitable international refugee protection regime.

I argue that when refugees flee RtoP crimes, the international community in principle bears a responsibility to protect these refugees regardless of their territorial location outside their country of nationality.28 I argue that the extent and nature of the international community’s responsibility are a function of these refugees’ vulnerability. RtoP requires greater action from the international community when states hosting these refugees are less capable or less willing to provide protec-

26. RtoP is soft law: a set of principles that global actors agree should govern their behavior on the international stage, and that has in practice been used by these actors to justify a given course of action. For an overview of the range of definitions of soft law in the international relations approach to international law (IR/IL), see Gregory Shaffer & Mark A. Pollack, *Hard and Soft Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013). For more on RtoP as soft law, see Jennifer M. Welsh, *Norm Contestation and the Responsibility to Protect*, 5 GLOBAL RESPONSIBILITY TO PROTECT 365, 376–77 (2013). She helpfully states that although RtoP creates no additional legal obligations, “it helps to shape interpretation of existing rules by emphasizing particular normative understandings about domestic and international conduct.” Id. at 377.

27. Framing is “a way of selecting, organizing, interpreting, and making sense of a complex reality to provide guideposts for knowing, analyzing, persuading, and acting.” Volha Charnysh, Paulette Lloyd & Beth Simmons, *Frames and Consensus Formation in International Relations: The Case of Trafficking in Persons*, 21 EUR. J. INT’L REL. 323, 327 (2014) (citing Martin Rein & Donald Schön, *Reframing Policy Discourse*, in THE ARGUMENTATIVE TURN IN POLICY ANALYSIS AND PLANNING 145 (Frank Fischer & John Forester eds., 1993)).

28. Because RtoP is not legally binding I do not refer here to legal duties that international actors bear. For an account of how legal duties could be formulated under RtoP, see Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT’L L. 247 (2014). Instead my Article is an exploration of the commitments that international actors may work to institutionalize if they were to take RtoP seriously as a means of protecting at-risk populations.
tion to refugees. Specifically, international assistance and capacity building support, and timely and decisive action under RtoP include international cooperation to share the cost of refugee protection. I draw lessons from historical cases of international refugee cost-sharing and use these to propose that, whenever it is necessary, this cooperation should be pursued via a Comprehensive Plan of Action (CPA)\textsuperscript{29} based on RtoP. I outline an RtoP CPA for the Syrian refugee crisis that is illustrative of the policy implications of using RtoP for refugee cost-sharing.

My proposal will surprise RtoP and refugee scholars alike on account of the view among many that RtoP has shown itself to be an undesirable or unreliable facilitator of international cooperation. But I make the case that refugee protection offers a context for circumventing the central problems that commentators have identified as undermining RtoP’s suitability for generating international cooperation. In other words, although there is good reason to question RtoP’s value as a frame for international cooperation, this value varies by context. RtoP has as yet not been used as a frame for refugee cost-sharing, and there are good reasons to think it may be suitable for this purpose, even if it has been unsuitable for others.

To be clear, this is not a wholesale ideological defense of RtoP. It is instead an attempt to mine the doctrine for whatever potential it holds for protecting populations at risk of mass atrocities. At the same time, RtoP is by no means a cure-all for the perennial problem of refugee cost sharing, and I make explicit in this Article the limits even of successful implementation of my proposal. Were it to be realized, my proposal would increase the funding available to states hosting a disproportionate share \textit{only} of refugees fleeing RtoP crimes, and not those fleeing any other forms of persecution. Despite its significance, increased funding for a fraction of the global refugee population is only a partial response to the gaps in the international refugee regime.

A comprehensive solution to the refugee cost sharing problem undoubtedly requires an overhaul of the international refugee protection regime, a prospect that presently appears distant. The human and other costs of the status quo, however,

\textsuperscript{29} CPAs are platforms developed by key international refugee protection and humanitarian actors in collaboration with states, to provide a comprehensive response to a refugee crisis. See infra note 178.
warrant experimentation with existing frameworks, including one as seemingly unlikely or controversial as RtoP.

In Part I of this Article I introduce the Syrian crisis and provide an overview of the international response to the refugee problem. I note the absence of RtoP from this response. In Part II I make the case that RtoP—as a matter of principle—entails international cooperation to share the cost and responsibility of refugee protection when certain conditions exist. I also outline how RtoP might be used in practice to achieve this cooperation. In Part III I show why RtoP may work in the refugee protection context despite its failure in others, again using the Syrian crisis.

I. THE CASE OF SYRIA

This Part provides an overview of the Syrian refugee crisis and the international response to it as of July 2015, and highlights shifts in the European response in August and September 2015. It highlights the failure of the international community to share the cost of protecting Syrian refugees, noting that although international actors turned to RtoP to mobilize international cooperation to intervene early on in the crisis in Syria, RtoP has been notably absent from any attempts to pursue international cooperation on behalf of Syrian refugees.

A. THE SYRIAN REFUGEE CRISIS

The conflict in Syria began in March 2011 when Syrian security forces responded violently to peaceful pro-democracy, anti-government protests in the town of Dar’a.30 Demonstrations spread across Syria, as did the violent response from the regime of President Bashar al-Assad. President Assad spoke out against the protests, attributing them to imperialist forces, internal conspirators and “armed gangs and terrorists” determined to destroy his government.31 In April, however, he attempted to calm protesters by ending Syria’s forty-eight year state of emergency and allowing controlled demonstrations.32 This attempt failed, protests escalated, and within a week gov-

31. Id.
ernment forces had killed over a hundred protestors.\textsuperscript{33} The month of April marked an intensification of government repression and the United Nations Under-Secretary-General for Political Affairs reported reliable accounts of “artillery fire against unarmed civilians . . . shooting of medical personnel who attempted to aid the wounded,” and mass arbitrary arrests.\textsuperscript{34}

The conflict has steadily worsened over the last four years and credible sources report continuing war crimes, crimes against humanity, and other gross human rights violations.\textsuperscript{35} The expansion of the hostilities across the country has resulted in unprecedented massacres and destruction,\textsuperscript{36} including the use of chemical weapons on civilians.\textsuperscript{37} It has also resulted in a massive internal displacement crisis.\textsuperscript{38} Both the Assad regime and opposition forces are deeply implicated in the continuing violence, and the complexity of the numerous factions now involved further diminishes any prospect of the conflict’s swift resolution. Further complicating matters is the sustained participation of foreign states such as the United States, Russia, Iran, Saudi Arabia and other nations in the armed conflict.

As of April 2014 there were 191,369 documented conflict-related deaths in Syria.\textsuperscript{39} At the beginning of the conflict, the

\begin{itemize}
\item \textsuperscript{33} See id.
\item \textsuperscript{36} Id. ¶ 18.
\item \textsuperscript{38} This Article does not address RtoP’s implications for Syria’s internally displaced populations but instead focuses on those externally displaced. Internal displacement is by no means a less urgent problem, but it raises considerations that are different from the refugee crisis, and beyond the scope of this Article. For a discussion of RtoP as it relates to internally displaced populations, see Howard Adelman, Refugees, IDPs and the Responsibility to Protect (R2P): The Case of Darfur, 2 GLOBAL RESPONSIBILITY TO PROTECT 127 (2010).
\item \textsuperscript{39} MEGAN PRICE, ANITA GOHDES & PATRICK BALL, UPDATED STATISTICAL ANALYSIS OF DOCUMENTATION OF KILLINGS IN THE SYRIAN ARAB REPUBLIC 1 (Aug. 2014), http://www.ohchr.org/Documents/Countries/SY/HRDAG
number of conflict-related deaths outpaced the numbers of people fleeing the country.\textsuperscript{40} But this trend eventually reversed. In March 2013, the number of refugees fleeing Syria hit the one million mark\textsuperscript{41} and as of August 2015 this number had more than quadrupled.\textsuperscript{42} Among the refugees from Syria are nationals of other countries, who had been residing in Syria as refugees from other conflicts. For many years Syria hosted among the largest refugee populations globally.\textsuperscript{43} Almost all of those who have fled Syria are now concentrated in that country’s vicinity, specifically Lebanon, Turkey, Jordan, Iraq, and to a lesser extent Egypt.\textsuperscript{44}

Initially, host countries were able to accommodate refugees fleeing the conflict, and did so generously\textsuperscript{45} despite—with the exception of Egypt and Turkey—no having acceded to the UN Refugee Convention and its Protocol.\textsuperscript{46} However, as the num-

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\item See Crisp et al., supra note 41, ¶ 10.
\item Protocol Relating to the Status of Refugees, opened for accession Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967). Turkey and Egypt have ratified both the UN Refugee Convention and its Protocol. However, Turkey maintains the restriction found in the UN Refugee Convention according to which only persons who have become refugees as a result of events occurring in Europe are formally entitled to refugee status in Turkey. Protocol Relating to the Status of Refugees, List of Participants, Declarations and Reservations, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en#EndDec (last visited Oct. 31, 2015). Syrian refugees in Turkey are currently considered “guests” by the Turkish government, which at the time of writing, is providing these refugees with protec-
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bers of refugees has escalated, the sheer volume of the influx has strained this generosity, severely impacting the livelihood of refugees and many of their hosts.\footnote{47} Women and children make up to 75\% of the refugees,\footnote{48} revealing the vulnerability of the refugee population to sexual, labor and other forms of exploitation. Over 80\% of the refugee population is outside camps, living among host community populations.\footnote{49} Because so many of the refugees are outside of camps, the heavy impact of their presence on host communities has fuelled tensions between the two groups.\footnote{50} According to the UN Refugee Agency, “[m]any refugees reside within the poorest regions of the host countries, and in some locations the number of refugees is equal to or even greater than that of the local population.”\footnote{51} Most of these out-of-camp refugees are living in precarious socio-economic conditions.

The refugee crisis has created a need for emergency humanitarian assistance to meet the basic needs of the refugees. The most urgent needs include shelter, water, sanitation and hygiene provisions, health and education.\footnote{52} Regional needs also extend beyond traditional emergency humanitarian assistance. The Syrian refugee crisis is now a protracted refugee situation, the definition that the UN Refugee Agency considers compatible with international standards. See SUSAN M. AKRAM ET AL., BOS. UNIV. INT’L HUMAN RIGHTS CLINIC, PROTECTING SYRIAN REFUGEES: LAWS, POLICIES, AND GLOBAL RESPONSIBILITY SHARING 104 (2015).

47. UNHCR reports that in host countries “infrastructure and services for health, education, shelter, water and sanitation have faced increased pressure; competition for jobs has increased and wages have fallen; and the cost of basic goods has risen.” Crisp et al., supra note 41, ¶ 10.


51. Crisp et al., supra note 41, ¶ 32.

52. Id. ¶ 23.
and not a short-term emergency.\footnote{Protracted displacement situations are those which have moved beyond the initial emergency phase but for which solutions do not exist in the foreseeable future. . . . UNHCR identifies a major protracted refugee situation as one where more than 25,000 refugees have been in exile for more than five years.” Gil Loescher & James Milner, \textit{Understanding the Challenge}, 33 \textbf{FORCED MIGRATION REV.} 9, 9 (2009), \url{http://www.fmreview.org/FMRpdfs/FMR33/FMR33.pdf}.} Owing to the sheer scale and duration of the refugee crisis, and its impact on infrastructure and local communities, regional hosts now also urgently require development assistance in order to sustain the swell of their populations.\footnote{SRRP5, supra note 43, at 6.} Expansion of basic services such as education and healthcare within host communities is a top priority.\footnote{Id. at 10 (“Scaling up of basic services is a priority for refugees and host communities, through both direct humanitarian relief to the beneficiaries and assistance to strengthening local Government services and infrastructure.”).}

\section*{B. THE INTERNATIONAL RESPONSE TO THE REFUGEE CRISIS}

As early as August 2012 the UN Secretary General warned the Security Council about the danger posed by refugee flows out of Syria.\footnote{U.N. SCOR, 67th Sess., 6826th mtg. at 3, U.N. Doc. S/PV.6826 (Aug. 30, 2012) (remarks of the Deputy Secretary-General on behalf of the Secretary-General).} The UN High Commissioner for Refugees has addressed the UN Security Council multiple times expressing grave concern for the well-being of Syrian refugees and warning of the threat the refugee crisis poses to regional and international stability.\footnote{“While Syria continues to drain itself of its people, the prospects for a political solution and an end to the fighting remain poor, and the warning signs of destabilization in some neighbouring countries are troubling. The continuing influx could send them over the edge if the international community does not act more resolutely to help.” UNHCR Chief Urges States To Maintain Open Access for Fleeing Syrians, U.N.H.C.R. (July 16, 2013), \url{http://www.unhcr.org/51e55e9f6.html}. Previously he had warned the Security Council of “the real risk of the conflict spilling over across the region, and of the situation escalating into a political, security and humanitarian disaster that would completely overwhelm the international response capacity.” U.N. SCOR, 68th Sess., 6949th mtg. at 5, U.N. Doc. S/PV.6949 (Apr. 18, 2013) (remarks of António Guterres, United Nations High Commissioner for Human Rights).} The Security Council itself has also expressed “deep concern at the consequences of the refugee crisis” and its “destabilizing impact on the entire region.”\footnote{S.C. Pres. Statement 2013/15 (Oct. 2, 2013); \textit{see also} S.C. Res. 2139, at 1 (Feb. 22, 2014) (“Expressing grave concern at the increasing number of refugees and internally displaced persons caused by the conflict in Syria, which has a destabilizing impact on the entire region . . . .” (italics omitted)).}
However, as already highlighted, the primary responsibility and cost of hosting refugees from Syria has fallen on regional neighbors (with the exception of Israel). These countries have maintained relative access for Syrian refugees into their territories, although not always on an unrestricted basis. Working alongside regional states, the United Nations has played the lead role in coordinating the response to the refugee crisis at the national, regional, and international levels. The current platform for refugee protection coordination is the Syria Regional Refugee Response Plan, or RRP, which is periodically updated to reflect changes in the refugee crisis. The RRP was developed by “over 155 actors—including host governments, UN agencies, NGOs, [the International Organization for Migration], foundations and donors.” The UN Refugee Agency has oversight of the RRP’s implementation.

As of May 2015, international agencies and nongovernmental organizations implementing the relief effort required just over US$4.5 billion to finance the RRP. For 2014, the governments of Egypt, Jordan, and Lebanon together re-

59. Lebanon had maintained open borders permitting largely unrestricted access. However, it too announced visa restrictions for Syrians in January 2015 as it struggled to cope with the steady stream of refugees into the county. See Dana Ballout, Lebanon To Require Visas for Syrians as Refugees Strain Country, WALL ST. J., Jan. 4, 2015. Iraq, Jordan, Egypt, and Turkey have at different times imposed some restrictions on access, citing security concerns. Tom A. Peter, Egypt, Jordan, Iraq To Stem Syrian Refugee Flow, U.N.H.C.R. (July 14, 2013), http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=52fc6bd5&id=51e4d7b05.


62. See SRRP5, supra note 43, at 13 (describing the coordination framework led by UNHCR).

63. Syria Regional Refugee Response, supra note 4. This is the money required to finance the humanitarian and development assistance Syrian refugees and their hosts need.
required an additional US$583.1 million to fund their protection of Syrian refugees.\textsuperscript{64} To raise these funds, as well as those needed by Iraq, Turkey, and Egypt, the United Nations launched a massive humanitarian appeal.\textsuperscript{65} By May 2015, the Regional Response Plan was only 20\% funded.\textsuperscript{66}

In addition to raising money for the relief effort, the UN Refugee Agency has called on countries beyond the five regional hosts to commit to resettling Syrian refugees in their territories to relieve the demographic pressure on the regional hosts. As of January 2015, states outside the region had committed to resettling just under 80,000 persons—\textsuperscript{67} a mere fraction of the then 3.9 million refugee population. Perhaps even more troubling have been the sustained efforts, particularly by the European countries closest to the regional crisis, to keep Syrians from seeking refuge on their territories.\textsuperscript{68}

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\textsuperscript{66} \textit{Syria Regional Refugee Response}, supra note 4.
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\textsuperscript{68} Refugees fleeing Syria access the EU via three routes: by land through Greece or Bulgaria via Turkey (and some will then proceed to other countries in the EU); by air to any EU member state; and by sea across the Mediterranean to Greece, Cyprus, Malta, Italy, and possibly France and Spain. FARGUES \& FANDRICH, supra note 40, at 5. As the refugee crisis has continued, more and more are making the journey inland to wealthier, western European states such as Sweden and Germany. \textit{See} Natalia Banulescu-Bogdan \& Susan Fratzke, \textit{Europe’s Migration Crisis in Context: Why Now and What Next?}, MIGRATION POL’Y INST. (Sept. 24, 2015), http://www.migrationpolicy.org/article/europe-migration-crisis-context-why-now-and-what-next. From fairly early on in the conflict, countries at Europe’s frontier with the Syrian crisis such as Greece adopted effective measures to prevent Syrian refugees fleeing into their territories. These include deploying large numbers of additional border security officials at the Greece/Turkey border and placing floating barriers in the river that divides the two countries. \textit{Id.} at 12. Bulgaria took a similar approach. \textit{See} HUMAN RIGHTS WATCH, CONTAINMENT PLAN: BULGARIA’S PUSHBACK AND DETENTION OF SYRIAN AND OTHER ASYLUM SEEKERS AND MIGRANTS 2 (2014). The reasons these countries have for keeping Syrian refugees out are myriad, and include the fact that under the European
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The summer of 2015 saw a dramatic rise in the number of Syrians seeking refuge in Europe—by August 28 over 300,000 refugees and migrants had risked their lives in the Mediterranean to reach Europe, compared to 219,000 for the entire 2014. By August 2015 over 2500 had lost their lives attempting this journey. At the time of writing, a few European nations had announced changes in their asylum policy towards Syrian refugees, most notably Germany, which in August 2015 announced it would suspend deportation of all Syrian refugees, permitting them to seek asylum in that country. Still, the need far outstrips the international response, and the overwhelming majority of Syrian refugees remain in the region.

Finally, in addition to states and other public international actors, individuals and other private donors such as corporations have increasingly extended support to Syrian refugees.


70. Id.
72. See, e.g., Statement by the UN High Commissioner for Refugees, Antonio Guterres on Refugee Crisis in Europe, U.N.H.C.R (Sept. 4, 2015), http://www.unhcr.org/55e9459f6.html (“[T]here has been exemplary political and moral leadership from a number of countries. But overall, Europe has failed to find an effective common response.”).
Although it is beyond the scope of this paper to explore private support for refugees, much work remains to be done to understand the proper role of private actors in responding to mass displacement.

So why has international cooperation to protect Syrian refugees fallen so far short of the necessary response? One thing that is certain is that this is not simply a case of Syrian refugee protection being beyond the absolute financial means of the world’s states. Instead, the failure of international cooperation for Syrian refugee protection must be understood as emblematic of a systemic global failure to distribute the cost of refugee protection equitably and sustainably among states. One important reason for this failure is rooted in the nature of refugee protection itself. Scholars have characterized refugee protection as a global public good in the sense that international actors seemingly benefit even when only one or a handful of states provide refugee protection, which creates a “free rider” problem. For example if states in a region experiencing a refugee

that UNHCR received US$17 million in donations from companies and individuals in just six days).  

76. See infra Conclusion.  

77. James C. Hathaway and R. Alexander Neve argue that refugee cost-sharing has become increasingly elusive because of the shift in the demographics of the global refugee population. In the post-Second World War period, northern states showed more willingness to cooperate for the protection of European refugees for whom the UN Refugee Convention was established. Most refugees today, however are from poorer southern states, and are predominantly non-white, which has diminished the earlier generosity of northern states to refugee protection. Hathaway & Neve, supra note 12, at 119–20. See also B.S. Chimni, The Geopolitics of Refugee Studies: A View from the South, 11 J. REFUGEE STUD. 351 (1998), which also attributes the decline in northern states’ commitments to refugee cost-sharing to a post-Second World War “myth of difference” that constructs southern refugees as undesirable additions to northern societies. With respect to Syrian refugees an Islamophobic and anti-Arab rhetoric frequently equates Muslims or Arabs with terrorists, and at least in the United States this has been a barrier to further assistance of these refugees. See, e.g., Why Is the U.S. Not Doing More To Help Syrian Refugees?, NEWSWEEK (Sept. 7, 2015), http://www.newsweek .com/why-us-not-doing-more-help-syrian-refugees-369539 (describing how conflation of Iraqis and Syrians with terrorists by some Congress members helps explain why the U.S. is not accepting more refugees). Notably, the head of the World Bank has labeled Europe’s reluctance to accept refugees as undesirable additions to northern societies. See also Phil Thornton, Bank Slams European Xenophobia as It Sets out New Refugee Strategy, EMERGING MARKETS (Nov. 10, 2015), http://www .emergingmarkets.org/Article/3496412/Bank-slams-European-xenophobia-as -it-sets-out-new-refugee-strategy.html.  

78. See Alexander Betts, International Cooperation in the Refugee Regime,
crisis were able and willing to shoulder the entire cost of protecting these refugees, states in geographically remote regions would stand to benefit from the resulting regional stability even if they themselves did not share in the cost.

Because refugee-producing conflicts are concentrated in southern states, these states host the majority of the global refugee population, while contributions of northern states to assist southern states are discretionary. Moreover, southern states have diminished bargaining power, closer proximity to conflict, and diminished ability to control their borders, creating an inherent power asymmetry in the international refugee protection regime.

There are at least two distinct approaches to solving the problem of cost-sharing: a cost-benefit approach and a norm-based approach. A cost-benefit approach treats “action as being driven by a logic of rational and strategic behavior that anticipates consequences and is based on given preferences.” This approach assumes that “actors’ preference formation is external to the institutional context in which actors find themselves. Institutions affect only the strategic opportunities for achieving certain objectives.” Under this approach, solving the problem of cost-sharing hinges primarily on whether it is in the strategic interest of states to cooperate.

A norm-based approach, on the other hand, treats action as guided by “notions of identity and roles shaped by the institutional context in which actors operate.” Under this approach,
institutions are the “political environment or cultural context” that shapes an actor’s interests.\footnote{Id. at 255.} Institutional norms condition actions over time, as actors make decisions based on what’s appropriate in light of these norms.\footnote{See id.} There is a rich literature on precisely how norms condition or shape state action, and different theories posit different mechanisms or processes.\footnote{There is a range of different theories regarding how norms and institutions actually shape state behavior. For an overview of most of these theories, see Ryan Goodman & Derek Jinks, How To Influence States: Socialization and International Human Rights Law, 54 DUKE L.J. 621, 635–55 (2004) ( canvassing the various ways persuasion and acculturation influence state behavior). Margaret Keck and Kathryn Sikkink, for example, have argued the role of transnational advocacy networks in promoting “causes, principled ideas, and norms . . . [and] advocating policy changes that cannot be easily linked to a rationalist understanding of their ‘interests.’” \textsc{Margaret E. Keck \\& Kathryn Sikkink, Activists Beyond Borders} 8–9 (1998). These networks do so primarily through persuasion and socialization. \textit{Id.} at 16. For my purposes it is unnecessary to commit to any one constructivist theory, and sufficient instead to distinguish a generally constructivist approach notwithstanding differences among theories within this approach.}

These two approaches are not mutually exclusive,\footnote{Thielmann, \textit{supra} note 81, at 270 ("Political actors are constituted both by their interests, through which they evaluate anticipated consequences, and by the norms embedded in political institutions and their own identities."). Eiko Thielmann’s empirical study of burden-sharing in the European Union provides a good example of how cost-benefit and norm-based approaches work in the same institutional regime.} and I take the view that overcoming the international failure to share the cost of refugee protection requires a frame that utilizes norms and cost-benefit analyses to motivate state cooperation.\footnote{See Goodman \& Jinks, \textit{supra} note 87, at 627 (noting that “through a dynamic relationship” rational actor- and norm-based mechanisms reinforce each other, such that regime design should incorporate elements of both).} Framing is “a way of selecting, organizing, interpreting, and making sense of a complex reality to provide guideposts for knowing, analyzing, persuading, and acting.”\footnote{Charnysh, Lloyd \& Simmons, \textit{supra} note 27, at 327 (citing Rein \& Schöhn, \textit{supra} note 27, at 145–46).} There is a significant, interdisciplinary literature supporting the claim that frames play an important role in influencing the attitudes and behaviors of individuals, and relations among states.\footnote{For a review of psychology, sociology, and political science literature on framing, see \textit{id.} at 327–28. For a review of literature on framing in international legal scholarship, see Goodman \& Jinks, \textit{supra} note 87, at 636 \& n.41.} In theory an international treaty could play this framing role to achieve refugee cost-sharing. As mentioned in the Introduction,
however, the two agreements that comprise the traditional international refugee law do not provide a frame for the equitable or sustainable distribution of the cost and responsibility of refugee protection.\(^{92}\)

There is a sizeable scholarship analyzing the nature and implications of this gap, and advancing a variety of proposals for a new refugee regime.\(^{93}\) But the path to establishing a comprehensive international framework for achieving refugee cost and responsibility sharing is long and uncertain, notwithstanding the urgency that attends it.\(^{94}\) Even as scholars and policy makers work toward this goal, the untenable conditions facing

\(^{92}\) See Hathaway & Neve, supra note 12, at 141 ("[The] chaotic distribution of the responsibility to provide refugee protection is not offset by any mechanism to ensure adequate compensation to those governments that take on a disproportionate share of protective responsibilities. To the contrary, any fiscal assistance received from other countries or the UNHCR is a matter of charity, not of obligation, and is not distributed solely on the basis of relative need.").


\(^{94}\) See Hathaway & Neve, supra note 12, at 155 (“Governments . . . exhibit little enthusiasm for engaging in the kind of major negotiations needed to establish a new international refugee convention.”).
Syrian refugees and their hosts, and the instability threatened by the status quo, call for innovation in the short term.

The predominant frame that the United Nations actors spearheading international cost-sharing for Syrian refugees have used has been a general discourse of international solidarity with those suffering and those now unable to alleviate this suffering due to resource constraints. As a frame, “international solidarity” and its appeal to charity have proven insufficient, as evinced by the dramatic funding shortfall in the international response to the refugee crisis.

RtoP offers an alternative frame—one whose normative content and institutional features can be used to facilitate both norm-based and cost/benefit-based international cooperation. An especially attractive feature of RtoP is that it already exists, unlike a new treaty, which would require states to convene and commit to a whole new regime. In other words, RtoP is low-hanging fruit, whose potential in the refugee protection context remains unexplored.

Recent empirical research makes a case for soft law—specifically General Assembly resolutions—as a successful mechanism for framing the problem of and solutions to human trafficking. This research finds that how the problem of human trafficking is framed affects international consensus on

95. With no sustained talk of responsibility, the UN-led effort has appealed primarily to this international solidarity sensibility, calling for charitable donations. An important example is the Regional Response Plan, which highlights the crucial need for “more substantial international solidarity.” SRRP5, supra note 43. Another is the urgent plea made by the head of UNHCR to the UN Security Council: “Massive international solidarity with [Syria’s] neighbouring countries is central to making this appeal successful. Resettlement and humanitarian admission opportunities can complement this as useful, even if limited, measures of burden-sharing.” UNHCR Chief Urges States To Maintain Open Access for Fleeing Syrians, supra note 57. Similarly, an evaluation of UNHCR’s response to the crisis concluded:

Without a visible and tangible demonstration of international solidarity and responsibility sharing, the protection environment for refugees can be expected to deteriorate rapidly. One strategic priority must thus be to swiftly and substantially increase the level of support available to host states and communities throughout the region, thereby mitigating the socio-economic and political pressures generated by the refugee influx . . . .

Crisp et al., supra note 41, ¶ 12.

96. A heartening development to the contrary at the time of writing of this Article was the dramatic outpouring of support by private citizens in European countries for Syrian and other refugees reaching European shores. See, e.g., Smith-Spark, supra note 74.

97. See, e.g., Charnysh, Lloyd, & Simmons, supra note 27, at 324.
the required solution, and collective action to achieve that solution. In the human trafficking case, the frame that highlighted state sovereignty and state authority increased international consensus and was most successful at bringing about collective action.98 I return, in Part III, to the viability of RtoP as a frame in light of this research and other considerations. In the remainder of this Part, I note RtoP's absence from (1) the international response to the Syrian refugee crisis; and (2) from scholarship on refugee cost-sharing.

C. THE NOTABLE ABSENCE OF RTOP

Addressing the Executive Committee of the UN Refugee Agency in 2005, a high-ranking UN Refugee Agency official described RtoP as a useful framework for addressing many of the existing weaknesses in the international refugee regime.99 To date, however, refugees have received limited attention in the application of RtoP to the most high profile cases of mass atrocities since the doctrine’s adoption in 2005. Although they are explicitly recognized as subjects of protection under RtoP, they remain marginal in RtoP analyses.100

In the context of the Syrian refugee crisis, actors at the center of coordinating the response have not invoked RtoP to guide international involvement.101 Neither states nor multilateral actors within the UN have advocated application of RtoP to

98. Volha Charnysh, Paulette Lloyd, and Beth Simmons argue that state consensus on human trafficking regulation was driven by framing the problem as one of transnational crime and not of human rights. Id. at 332. The crime frame grew the coalition of states against human trafficking, and then “made possible an integrative approach that accommodates both rights and crime fighting.” Id.


101. To my knowledge, the closest any international actor has come may be the following comment made by the French representative to the Security Council, addressing the Council in January 2012: “Thousands of refugees are fleeing the violence; the sovereignty of neighbouring States is being violated; inter-community tensions are on the rise—all of which has a direct impact on the stability of an already fragile region. Even without reference to the responsibility to protect, those regional consequences are enough to establish the Council’s responsibility.” U.N. SCOR, 67th Sess., 6710th mtg. at 15, U.N. Doc. S/PV.6710 (Jan. 31, 2012).
the refugee crisis. This omission is striking given that international actors have otherwise invoked RtoP in attempts to coordinate international action to address the conflict within Syria. Significantly, these actors have invoked RtoP as relevant for determining the appropriate international response to the crisis in Syria. They have called on the Syrian government and the international community to fulfill their respective responsibilities under the doctrine to protect Syria’s territorial population.

Scholars of RtoP have generally paid little attention to refugees, as have scholars considering the Syrian crisis.

102. Two plausible reasons for this are that actors pursuing international cooperation for refugee protection view RtoP as either an undesirable or ineffective frame. In Part III, I address these views.


105. Scholarship on the crisis in Syria is plentiful, but articles focused specifically on refugees are almost entirely absent from legal scholarship. See generally Laurie R. Blank & Geoffrey S. Corn, Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition, 46 VAND. J. TRANSNAT’L L. 693 (2013) (offering a new approach to the law of armed con-
Refugee law scholars have similarly paid little attention to RtoP, with limited exception. Absent from the literature is a comprehensive analysis of what RtoP means for the international protection of refugees. Similarly absent from the literature is an analysis of what role RtoP can play in improving international cooperation for refugee cost-sharing generally, and for the Syrian crisis specifically.

Conflict in order to further humanitarian protection); Andrew Garwood-Gowers, The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?, 36 U. NEW S. WALES L.J. 594 (2013) (examining the implications of RtoP that may ultimately lead to a deadlock in Syria); Joseph Klingler, Counterintervention on Behalf of the Syrian Opposition? An Illustration of the Need for Greater Clarity in the Law, 55 HARV. INT’L L.J. 483 (2014) (exploring the legality of arming Syrian opposition groups); Tom Ruys, The Syrian Civil War and the Achilles’ Heel of the Law of Non-International Armed Conflict, 50 STAN. J. INT’L L. 247 (2014) (arguing that rebel groups should be granted combatant-like status); Dan E. Stigall, The Civil Codes of Libya and Syria: Hybridity, Durability, and Post-Revolution Viability in the Aftermath of the Arab Spring, 28 EMORY INT’L L. REV. 283 (2014) (discussing post-conflict development in Libya and Syria); Paul R. Williams et al., Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis, 45 CASE W. RES. J. INT’L L. 473 (2012) (arguing that limited use of force should be included within RtoP doctrine); Zifcak, supra note 30 (tracing differences within UN Security Council deliberations on RtoP in Libya and Syria).

106. Susan Martin has written on RtoP’s potential as a framework for protecting a broader group of displaced migrants than those meeting the definition of refugees under international refugee law. Susan Martin, Forced Migration, the Refugee Regime and the Responsibility to Protect, 2 GLOBAL RESP. TO PROTECT 38 (2010). Brian Barbour and Brian Gorlick have argued that refugees should be considered in the “analysis, scope and meaning” of RtoP. Brian Barbour & Brian Gorlick, Embracing the “Responsibility to Protect”: A Repertoire of Measures Including Asylum for Potential Victims, 20 INT’L J. REFUGEE L. 533, 564 (2008). Susan Harris Rimmer has underscored the marginal analysis of RtoP’s application to refugees in the various international reports that have shaped RtoP’s development. RIMMER, supra note 100, at 7. She argues RtoP “needs more work to become something conceptually sound and useful” for refugee protection. Id. at 15. I take that challenge on in this Article.

Alexander Aleinikoff and Stephen Poellot recently proposed what they term “the responsibility to solve,” a duty based on the principles underlying the international refugee regime and specific commitments states have as members of the UN General Assembly and signatories of the UN Refugee Convention. T. Alexander Aleinikoff & Stephen Poellot, The Responsibility to Solve: The International Community and Protracted Refugee Situations, 54 VA. J. INT’L L. 195, 195 (2014). They distinguish the responsibility to solve from RtoP because “the former does not override national sovereignty or propose coercive action . . . .” Id. at 206 n.50. I argue that although RtoP permits coercive action under certain conditions, refugee protection would never warrant this action. See infra Part II.
Refugee crises “lie at the intersection of multiple regimes,” and in addition to international refugee law, these crises may simultaneously be governed by international human rights and international humanitarian legal and normative regimes, respectively. This creates the opportunity to seek solutions within this “regime complex” as opposed to focusing narrowly on the solutions available in international refugee law. RtoP is part of this regime complex, and in this Article I explore the doctrine’s potential for promoting refugee cost-sharing.

It is difficult to say with certainty why international actors, especially those whose mandate is refugee protection, have not used RtoP to frame international responses to refugee crises, even when faced with one as large as the Syrian crisis. In the Parts that follow I engage two important possibilities, which must be addressed in order to evaluate RtoP’s potential for refugee protection.

The first is conceptual: actors within and outside the UN concerned with the refugee crisis and its implications may have conceptual misgivings about whether the existing doctrine of RtoP entails international cooperation for refugee protection generally or in the Syrian case. In other words, is RtoP a frame applicable to refugee cost-sharing? In Part II, I address any such misgivings by making explicit why RtoP entails international cooperation for refugee cost and responsibility sharing. The second possibility is that refugee protection actors have not invoked RtoP because although it applies to the cost-sharing problem it may lead to bad outcomes or be altogether ineffectual. I engage this possibility in Part III.


109. Here I refer to the various UN organs whose mandates bring the protection of refugees within the purview both directly, as is the case with the UN Refugee Agency, but also indirectly as is the case with the OHCHR and the Human Rights Council, for example. Outside of the UN these actors may be individual states, international non-governmental organizations and so on.

110. Although the UN Refugee Agency, for example, has expressed openness to RtoP’s potential, see RIMMER, supra note 100, it has not publicly engaged in a process of exploring or making explicit the nature of this potential.
II. REFUGEES AND THE RESPONSIBILITY TO PROTECT

What are the implications of the existing doctrine of RtoP for international cooperation to protect refugees such as those fleeing the Syrian conflict? In this Part, I argue that RtoP, at least in principle, entails a more equitable distribution of costs and responsibility among the world's states for protecting refugees fleeing mass human rights violations when certain conditions are met. I also outline what an RtoP-based international refugee cost-sharing framework might look like using the Syrian refugee crisis. But first, I provide an overview of RtoP.

A. THE RESPONSIBILITY TO PROTECT

Two paragraphs of the World Summit Outcome Document articulate the content of RtoP currently endorsed by UN Member states\(^{111}\) and the UN Security Council.\(^{112}\) These two paragraphs serve as an “authoritative framework within which Member States, regional arrangements and the United Nations system and its partners can seek to give a doctrinal, policy and institutional life to the responsibility to protect.”\(^{113}\) As previously noted, RtoP is not legally binding on the states that unanimously committed to it in 2005. There is, however, an expan-

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111. This document states:
138. Each individual State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. . . . In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, and in accordance with the [UN] Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. . . . We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

2005 World Summit Outcome, supra note 18.

112. The United Nations Security Council has affirmed the principles captured in paragraphs 138 and 139 in at least two of its own resolutions. Implementing the Responsibility to Protect, supra note 19, ¶ 2.

113. Id.
sive literature on how RtoP's tenets otherwise relate to international law.\textsuperscript{114}

\begin{quote}
114. A 2012 edited volume provides a good sample of representative views. See \textit{Responsibility to Protect: From Principle to Practice}, supra note 20. For a discussion of RtoP origins in the international law on the obligations of states and organizations, see Nina H.B. Jørgensen, \textit{The Responsibility to Protect and the Obligations of States and Organisations Under the Law of International Responsibility}, in \textit{Responsibility to Protect: From Principle to Practice}, supra note 20, at 125. Some proponents of RtoP describe it as a continuation of human rights protection developments that originate in the UN Charter and the Universal Declaration of Human Rights and have found expression in international treaties such as the Genocide Convention, International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, and the Rome Statute of the International Criminal Court. Hoffman & Nollkaemper, supra note 20, at 13; see also Edward C. Luck, \textit{The Responsibility to Protect: The Journey}, in \textit{Responsibility to Protect: From Principle to Practice}, supra note 20, at 39 (“The RtoP is an important innovation, not a radical departure. It is based on the existing body of law, not novel theories. . . . By combining established elements in fresh combinations, the whole has the potential to be much more than the sum of its parts.”). They argue that it embodies pre-existing responsibilities but breaks the mold by articulating the complementary responsibility of all states to protect civilians from international crimes when the territorial state fails. But see Louise Arbour, \textit{The Responsibility to Protect as a Duty of Care in International Law and Practice}, 34 REV. INT'L STUD. 445, 450 (2008) (“To date, however, outside of the Genocide Convention, no firmly established doctrine has been formulated regarding the responsibility of third-party States in failing to prevent war crimes and crimes against humanity, let alone ethnic cleansing—which it should be remembered, is not as such a legal term of art.”); Jørgensen, supra, at 126 (“[T]he notion of a ‘serious breach of an obligation arising under a peremptory norm of general international law’ entailing special consequences in the form of obligations on third States, may ultimately be said to reflect a twenty first century idea . . . even if rooted in established principle.”).

Those more skeptical of RtoP consider it as “at best, a candidate norm . . . .” Mark Swatek-Evenstein, \textit{Reconstituting Humanity As Responsibility? The “Turn to History” in International Law and the Responsibility to Protect}, in \textit{Responsibility to Protect: From Principle to Practice} supra note 20, at 47. But see Hanne Cuyckens & Philip de Man, \textit{The Responsibility to Prevent: On the Assumed Legal Nature of the Responsibility to Protect and its Relationship with Conflict Prevention}, in \textit{Responsibility to Protect: From Principle to Practice}, supra note 20, at 111 (arguing that RtoP embodied a new norm prior to the 2005 World Summit Outcome Document articulation, which he argues stripped the concept of RtoP of any legal innovation). Firmly in the camp of RtoP skeptics, Neomi Roa has called for a rethinking of RtoP by arguing: “[T]he novelty of a third-party duty to help people in other states and the insufficiency of justifications offered for this new responsibility.” Neomi Roa, \textit{The Choice To Protect: Rethinking Responsibility for Humanitarian Intervention}, 44 COLUM. HUM. RTS. L. REV. 697, 699 (2013). Put bluntly, “a general obligation requiring the international community to ensure protection of individuals whenever the state concerned fails to play its part is neither contained in a treaty, nor does it have the status of customary law.” Ludovica Poli, \textit{The Responsibility to Protect Within the Security Council’s Open Debates on the
In 2009, UN Secretary General Ban Ki-moon published a report intended as a first step toward operationalizing the RtoP mandate spelled out in the 2005 World Summit Outcome Document. The report advances a three-pillar approach to understanding RtoP and the actions to which it commits states and other international actors. This three-pillar approach is a pivotal reference point both for policy makers and scholars, who treat it as an important contribution to understanding the commitments RtoP entails.

Pillar one prescribes the protection responsibilities of individual states with respect to their territorial populations, and this includes citizens and non-citizens alike. Based on paragraph 138 of the 2005 World Summit Outcome Document: “[t]his responsibility entails the prevention of [genocide, war crimes, ethnic cleansing, and crimes against humanity], including their incitement, through appropriate and necessary means.”

Pillar two of RtoP lays out the commitment of the international community to assist states with meeting their pillar one responsibilities toward their respective territorial populations. The 2009 UN Secretary-General Report has dubbed pillar two the “International assistance and capacity-building” pillar. International assistance and capacity building under pillar two include measures such as knowledge exchange to improve the prevention of mass atrocities; international military assistance to combat instability driven by non-state actors; development assistance; and rule of law assistance.

Protection of Civilians: The Growing Culture of Protection, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE, supra note 20, at 76. There are some UN member states that embrace RtoP as “an obligation and not just as a political or moral responsibility,” id. at 75, but it is not legally binding as a matter of international law. For an argument that RtoP is soft law which is antagonistic to hard law on the use of force for humanitarian intervention, see Shaffer & Pollack, supra note 107, at 1208–39.

115. Implementing the Responsibility to Protect, supra note 19, ¶ 11(a).
116. See Jennifer D. Halbert, A Responsibility to Protect or Preclude? Examining the Beneficiaries of the Responsibility to Protect, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE, supra note 20, at 275; Luck, supra note 114, at 41.
117. 2005 World Summit Outcome, supra note 18, ¶ 138.
118. Implementing the Responsibility to Protect, supra note 19, ¶ 11(b).
119. Id.
120. Id. ¶ 37–38.
121. Id. ¶ 40.
122. Id. ¶ 43–44.
123. Id. ¶ 47.
Under pillar two, the territorial state must be willing to accept assistance from the international community, as this pillar relies on the “mutual commitment and an active partnership between the international community and the State.”

Finally, pillar three prescribes the international community’s commitment to “respond collectively in a timely and decisive manner” when a territorial state is “manifestly failing” to fulfill its responsibility to protect under pillar one. Pillar three applies when a state’s failure to protect is more extreme than under circumstances that might warrant action under pillar two. Measures under pillar three include “peaceful measures under Chapter VI of the UN Charter, coercive ones under Chapter VII and/or collaboration with regional and subregional arrangements under Chapter VIII.” Pacific measures under Chapter VI include, for example, Security Council recommendations calling on the parties engaged in a dispute that potentially threatens international peace and security to engage in diplomacy, mediation, and inclusive dialogue. Coercive measures under Chapter VII include targeted sanctions on travel, financial transfers, and arms; pursuit of accountability through the International Criminal Court (ICC); and most controversially, foreign military intervention. Importantly, only when peaceful measures (diplomatic, humanitarian or otherwise) are inadequate, can coercive measures be used under Chapter VII.

These three pillars of RtoP do not represent a rigid progression of steps or responsibilities to be pursued by the international community sequentially. Instead the three pillars

124. Id. ¶ 29.
125. Id. ¶ 28.
126. Id. ¶ 11(c). The threshold for pillar three responsibilities is expressly that “national authorities are manifestly failing to protect their population . . . .” Id. ¶ 50 (citing 2005 World Summit Outcome, supra note 18, ¶ 139). The 2009 UN Secretary-General Report terms this pillar the “timely and decisive response” pillar.
127. Id. ¶ 11(c).
129. Implementing the Responsibility to Protect, supra note 19, ¶ 57.
130. Id. ¶ 53–54.
131. Arbour, supra note 114, at 457 (“Since [RtoP] groups different tools along discrete phases, one may be tempted to believe that the available tools for protection come in rigid progression—ranging from the softest to the most
are intended to complement one another such that any given potential or actual conflict may trigger multiple pillars simultaneously.132

B. SITUATING INTERNATIONAL COOPERATION TO PROTECT REFUGEES WITHIN RTOP AS ARTICULATED UNDER THE 2005 WORLD SUMMIT OUTCOME DOCUMENT

Although the two paragraphs of the 2005 World Summit Outcome Document anchor RtoP, they do not fully elaborate the action that international actors must take to give meaning to the doctrine. In the text of the 2005 World Summit Outcome Document itself, states noted the need for further consideration of RtoP (and implicitly its implications) by the UN General Assembly.133 Accordingly, the UN General Assembly has committed to further development of the doctrine through discussions within that body and by tasking the UN Secretary General with implementing it through the UN system.134 A necessary, though by no means sufficient, step towards the use of RtoP as one of the many frames UN and other international actors employ to pursue refugee protection generally, and cost-sharing specifically, is an account of why the frame is applicable in the first place.

1. Refugees as Beneficiaries of the International Community’s Responsibility to Protect

The 2005 World Summit Outcome Document circumscribes RtoP to populations at risk from genocide, crimes against humanity, war crimes, and ethnic cleansing. As currently articulated, RtoP offers a basis only for pursuing international cooperation to protect refugee populations facing risk from these muscular options. . . . Although escalating sequences may make sense in certain cases, it may also leave dangerous protection gaps in others. . . . In situations at risk or in the midst of conflict, experience teaches that there may be, for example, a need to build capacity to protect human rights, including early warning, among local communities while enforcing coercive measures against perpetrators.”.

132. Implementing the Responsibility to Protect, supra note 19, ¶¶ 29, 50.
133. “We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law.” 2005 World Summit Outcome, supra note 18, ¶ 139.
four RtoP crimes.\footnote{For a critique of international crimes as the threshold for international involvement under RtoP, see Margaret M. deGuzman, \textit{When Are International Crimes Just Cause for War?}, 55 VA. J. INT’L L. 73 (2015).} All refugees who have fled the Syrian civil war meet this condition, but refugees fleeing persecution that does not involve RtoP crimes would not.\footnote{Recall that under the UN Refugee Convention and its Protocol, a refugee is a person who: owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. \textit{Convention Relating to the Status of Refugees, supra note 2.}} For example, members of a religious minority prohibited from freely practicing their religion and who faced religious persecution in their country of nationality qualify for refugee status under international refugee law but would not, without more, fall within the ambit of RtoP. RtoP is thus relevant only for a subset of the global refugee population.

Some have criticized RtoP’s privileging of the threat to life posed by the four international crimes over that posed by other man-made or even purely environmental conditions. I share this unease, but I nonetheless restrict my analysis here to the terms of RtoP adopted by international consensus and found in the 2005 World Summit Outcome Document, in order to focus on the potential of RtoP as the doctrine exists today.

Recall that although international actors have not used RtoP to frame what limited international response there has been to the Syrian refugee crisis, they have used it to frame the international response to the plight of Syria’s territorial population.\footnote{For example, the UN High Commissioner for Human Rights has called for a referral of Syria to the International Criminal Court and urged the Security Council to assume its responsibility to protect the population of Syria. High Comm’r for Human Rights, Statement to the Security Council at the Council’s Thematic Debate on the Protection of Civilians, (Feb. 12, 2013), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12990&LangID=E.} This practice artificially limits the beneficiaries of the international community’s responsibility to protect to the population within Syria. Another feature of RtoP’s invocation in relation to Syria is that international actors have predominantly deployed the doctrine to mobilize the international community’s
coercive commitments under pillar three. This limitation is similarly artificial in that it does not originate in RtoP’s tenets, nor does it advance the doctrine’s purpose.

The geographic territory of the sovereign state that is “manifestly failing” to protect a population—in this case Syria—is a good indicator of who is at risk of RtoP crimes, because it is the failure of this state that triggers pillar three of RtoP. But ending the analysis here ignores the persisting vulnerability of the members of this population who are forced to flee Syria’s territory to protect themselves. When international actors invoke RtoP exclusively to focus on Syria’s territorial population, they erroneously cast the border between Syria and its neighbors as an on/off switch for RtoP beneficiary status with respect to the international community.

Under pillar two, the international community’s responsibility to protect extends to any territory where a state requires assistance with protecting its population from RtoP crimes.

138. The following serve as examples: The Special Advisors of the UN Secretary General on the Prevention of Genocide and on the Responsibility to Protect have called on the international community “to take immediate, decisive action to meet its responsibility to protect populations at risk of further atrocity crimes in Syria, taking into consideration the full range of tools available under the United Nations Charter.” Statement of the Special Advisers of the Sec’y-Gen. on the Prevention of Genocide and on the Responsibility to Protect on the Situation in Syria, UN NEWS CENTRE (June 14, 2012), http://www.un.org/apps/news/infocus/Syria/press.asp?sID=44. They have also recommended that the Security Council refer the Syrian situation to the International Criminal Court. Id.

139. Implementing the Responsibility to Protect, supra note 19, ¶ 11(c).

140. Id.

141. Arbour, supra note 114, at 454–55 (“[W]hile proximity may matter most in terms of promptness and effectiveness of responses, it should not be used as a pretext for non-neighbours to avoid responsibility. Indeed, the concept of responsibility to protect holds that all States are concurrently burdened with a responsibility to protect which they share irrespective of their location. . . . I would further argue that being better positioned to avert and respond to atrocities may have as much to do with the capacity to project power and mobilise resources beyond national and regional borders as with physical proximity. In this respect, too, powerful States may be reasonably expected to play a leading role in bolstering appropriate measures of prevention, dissuasion and remedy across geographic spectrum commensurate with their weight, wealth, reach, and advanced capabilities.”).

142. The following sections of the 2005 World Summit Outcome supply the content of pillar two of RtoP:

The international community should, as appropriate, encourage and help States to exercise [their responsibility to protect]. . . . We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assist-
Under pillar three, the international community’s responsibility to take non-coercive action also includes no territorial qualifiers. Instead, whether or not members of the international community bear a responsibility to protect Syrians who have fled the country, and are by definition refugees, depends on whether they remain at risk of RtoP crimes.

The nature and extent of the international community’s RtoP commitments to refugees will correspond to the nature and extent of their vulnerability, regardless of territorial borders. It is only when vulnerability ceases that the international community’s responsibility to protect ceases.

In principle, the international community bears a responsibility towards all at-risk Syrians regardless of their territorial location outside of Syria. Admittedly, by seeking refuge in the territory of other states, Syrian refugees also fall under the protection of those host states. This is because the very first pillar of RtoP commits all states to protect their territorial populations regardless of immigration status. However, territorial displacement cannot, on its own, sever the complementary responsibility the international community owes to refugees fleeing Syria, even after they arrive in Lebanon or elsewhere.

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143. The following text of the 2005 World Summit Outcome provides the content of the international community’s responsibility to protect under pillar three:

> The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the [UN] Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

(2005 World Summit Outcome, supra note 18, ¶ 139. For a discussion of this text as the basis of pillar three of RtoP, see Implementing the Responsibility to Protect, supra note 19, ¶¶ 49–50. Notably, the wording of the 2005 World Summit Outcome refers to “populations”—with no territorial qualifiers—as the beneficiaries of the international community’s responsibility to use diplomatic, humanitarian, and other peaceful means of protection.

144. See 2005 World Summit Outcome, supra note 18, ¶ 138. The UN Refugee Convention and its Protocol also require states party to these treaties to provide protections for refugees present in their territory. See Convention Relating to the Status of Refugees, supra note 2, art. 1–25.)
Without citizenship in the host country, Syrian refugees remain at risk of RtoP crimes in Syria. In fact, their legal right to remain in the countries currently hosting the vast majority of Syrian refugees remains sufficiently tenuous that risk of return to Syria is a genuine concern. Turkey, for example, which as of July 2015 hosted the highest number of Syrian refugees globally,145 did not at that time even recognize these refugees as refugees under international or its domestic law and showed no signs of changing its policy. Syrian refugees are instead “guests” and the terms of their stay in Turkey are governed by a temporary protection regulation that could be revoked or terminated at any time. Many Syrian refugees are not even formerly registered for this or any other temporary protected status in regional host countries, and for those that are, this status offers little guarantee that they will not be pushed back into Syria by regional hosts.

Put differently, Syrian refugees living in regional host countries remain vulnerable to RtoP crimes in Syria because, as non-citizens of these countries, they remain at risk of return to Syria by deportation or refoulement. Risk of return stems also from more structural but equally dangerous factors. One example arising from the current failure of international cooperation is becoming an increasing concern among Syrian refugees. As socio-economic conditions facing refugees worsen in the region due to insufficient resources, the International Rescue Committee reported that refugees (particularly women) in Lebanon and Jordan feared they would have to return to Syria and face the threat of fatal violence, rather than die of starvation in host countries.146

The extent of the international community’s responsibility to protect Syrians outside of Syria is a function of their host states’ capacity and willingness to extend protection. As capacity and/or willingness diminish, the urgency and extent of the requisite international involvement increase. Under pillar two, the international community’s commitments come into play when a territorial state, “because of capacity deficits or lack of


teritorial control,” fails to meet its RtoP commitments. The nature and extent of the international community’s commitments under RtoP become more intensive as host states are less capable (or willing) to protect refugees within their borders. For example, at the time of writing, Sweden arguably faces no capacity deficit or lack of territorial control that would trigger the international community’s RtoP commitments to Syrians seeking refuge in that country. Jordan, on the other hand, has made explicit its inability to sustain protection of the Syrian refugees in its territory.

By early 2015, Jordan had maintained a largely open border policy for Syrian refugees and was host to over 600,000. About 20% of these refugees resided in camps, and the largest of these was Zaatari camp, which by August of 2014 had over 80,000 registered Syrian residents. The remaining 80% of the Syrian refugee population resided in non-camp urban and rural areas. To Jordan’s population of more than 6 million, Syrian refugees were about a 10% addition. Unsurprisingly, the scale of the refugee population “stretched the ability of local authorities to maintain service delivery [and] resulted in overcrowded labour markets.” Schools and hospitals operated over capacity and competition for jobs depressed wages, even as prices for fuel and rental accommodation increased for refugees and Jordanians alike. At the end of 2013, the Jordanian government calculated the gross cost of hosting 600,000 non-camp refugees to be US$1.68 billion. These circumstances warrant international assistance under pillar two of RtoP, assistance

147. Implementing the Responsibility to Protect, supra note 19, ¶ 13.
150. SYRIA REGIONAL RESPONSE PLAN: JORDAN, supra note 149.
152. SYRIA REGIONAL RESPONSE PLAN: JORDAN, supra note 149, at 6. According to the UN Refugee Agency, Syrians in urban areas “purchase water, electricity and shelter through the Jordanian market, and are granted access to public services, including health and education.” Id.
153. Id.
154. Id. at 11.
that would more sustainably and equitably distribute the cost of protecting Syrian refugees.

The case for international cooperation under RtoP is even stronger when refugees from RtoP crimes face a risk of these crimes in their host countries. The source of the threat may be external or internal to the refugee population. External threats for refugees in Turkey seeking refuge close to the border with Syria, would include shelling across Syria’s borders that puts refugees and host communities at direct risk. Another example is attacks by Islamic State militants that began in October 2014 targeting the Syrian town of Kobani, which sits at the border with Turkey. These attacks posed a legitimate threat of spillover violence, putting Syrian refugees and their Turkish hosts close to the border at direct risk of RtoP crimes.

It would be a mistake to understand the international community’s responsibility to protect as engaged only when the facts of a conflict meet the full legal threshold of the RtoP crimes.


157. See, e.g., id. (describing Islamic State militants’ attack of the Syrian town of Kobani).

158. David Scheffer has made this point elsewhere, Scheffer, supra note 19, at 115 (“R2P is as much a principle of prevention as it is of response.”), although he may ultimately favor what I view to be an overly restrictive substantiality test. He nonetheless makes the following point:

R2P cannot possibly be a viable concept if it is defined as a means of reacting to the most speculative suggestion of some relatively minor and isolated threat of genocide, crimes against humanity, ethnic cleansing, or war crimes. The threat has to have some meaningful content, and the speculation about it must be centered on the plausible possibility of a crime of some magnitude. . . . Principles of substantiality that apply to ongoing atrocity crimes are thus relevant to examining what is required to trigger R2P as a preventative measure. Id. at 120. While I agree that speculative suggestions ought not trigger RtoP, any substantiality test must be both flexible and not so overly restrictive as to essentially require fulfillment of all the legal elements of the four crimes. To this extent, I share the following view:

The most effective enforcement of R2P will normally precede an accu-
Refugees and their host communities may also face the risk of RtoP crimes in the host state for reasons internal to the refugee population. Where the volume or composition of a refugee population places itself and its hosts at risk of RtoP crimes, the international community has a responsibility to protect refugees and their hosts. Lebanon offers a good example. It has experienced a significant spike in sectarian violence as a result of the scale and composition of refugee flows. On some accounts rate legal description of the crime at issue, a task that may take years and several criminal trials, or a judgment of the International Court of Justice to establish. Policymakers must make the political decision about whether and how to take action, while gambling on the nature of the crime threatening a civilian population and how, if left unchallenged, that crime may unfold.

Id. at 134.

159. Louise Arbour has described RtoP as encompassing “a continuum of prevention, reaction, and commitment to rebuild, spanning from early warning, to diplomatic pressure, to coercive measures, to accountability for perpetrators and international aid. Thus, through a calibrated process, the norm is engaged from the earliest stages of a situation of concern.” Arbour, supra note 114, at 448.

160. See Fernande van Tets, Syria Spillover into Lebanon Intensifies with Clashes in Sidon, INDEPENDENT (June 18, 2013), http://www.independent.co.uk/news/world/middle-east/syria-spillover-into-lebanon-intensifies-with-clashes-in-sidon-8664117.html (“The southern Lebanese city of Sidon erupted in heavy clashes as followers of a radical Sunni cleric battled gunmen believed to be sympathisers of the Shia-backed Hezbollah, in the latest outbreak of violence between factions supporting opposing sides in the Syrian conflict.”); Erin A. Weir, Deluge of Syrian Refugees in Lebanon Awakens Old Sectarian Divisions, GLOBAL OBSERVATORY (June 18, 2013), http://theglobalobservatory.org/2013/06/deluge-of-syrian-refugees-in-lebanon-awakens-old-sectarian-divisions (“In Lebanon, the sectarian identities and political allegiances of half a million refugees from Syria are aggravating long-standing tensions among Lebanese communities.”). Reports in 2013 suggested a similar dynamic was developing in Iraq. See Tim Arango, Sectarian Violence Reignites in an Iraqi Town, N.Y. TIMES (Sept. 18, 2013), http://www.nytimes.com/2013/09/19/world/middleeast/sectarian-violence-reignites-in-an-iraqi-town.html (“Iraqi leaders worry that the violence here may be a sign of what awaits the rest of the country if the government cannot quell the growing mayhem that many trace to the civil war in Syria, which has inflamed sectarian divisions, with Sunnis supporting the rebels and Shiites backing the Assad government.”).
this is the worst sectarian violence the country has experienced since the end of its own civil war.\footnote{In Tripoli, Deadly Sectarian Violence Fanned by Syrian Conflict, PBS (June 5, 2013), http://www.pbs.org/newshour/bb/middle_east-jan-june13-syria2_06-05.} This violence may fore-
shadow an escalation that could well lead to the commission of
RtoP crimes in Lebanon.\footnote{For an account of how the ethnic and sectarian dynamics of the refu-
gee population and host communities are reproducing the conflict in Lebanon, see Chris Zambelis, Syrian Unrest Raises Sectarian Tensions in Lebanon, 9 TERRORISM MONITOR, Aug. 4, 2011, http://www.jamestown.org/single/?no_cach=1&amp;tx_ttnews%5Btt_news%5D=38285. A report produced for the United States Secretary of Defense warns that refugee influxes into Turkey, Lebanon, Iraq, and Jordan are a key factor likely to contribute to the spread of civil war across the region. See WILLIAM YOUNG ET AL., RAND NAT'L DEF. RESEARCH INST., SPILLOVER FROM THE CONFLICT IN SYRIA: AN ASSESSMENT OF THE FACTORS THAT AID AND IMPEDE THE SPREAD OF VIOLENCE vii (2014), http://www.jamestown.org/uploads/media/TM_009_Issue31_03.pdf.} In January 2015, the Lebanese gov-
ernment imposed visa requirements restricting the access of Syrian refugees to Lebanon. It linked this decision directly to
the staggering socio-economic, political and security ramifications of hosting a refugee population that in early 2015 constituted about a quarter of its total population.\footnote{Lebanon Restricts Free Entry of Syrian Refugees To Limit Sunni Inflow, GUARDIAN (Jan. 5, 2015), http://www.theguardian.com/world/2015/jan/05/lebanon-syrian-refugees-sunni-visa-rules.} The situation confronting Lebanon warrants international assistance under pillar two, and timely and decisive action under pillar three.

According to the 2005 World Summit Outcome, timely and
decisive action must first take the form of “appropriate diplo-
matic, humanitarian and other peaceful means,” through the UN.\footnote{2005 World Summit Outcome, supra note 18, ¶ 139.} Below, I discuss what form this non-coercive timely and
decisive action might take. However, pillar three of RtoP allows
for coercive measures, too, when a territorial state is manifestly
failing to protect its population and a state refuses interna-
tional assistance to ensure protection.

Although I endorse peaceful measures under pillar three
that operate on the basis of voluntary cooperation with the refu-
gee-hosting state, I see no place for coercive measures against
refugee-hosting states when these states themselves are not
engaged in perpetrating RtoP crimes.\footnote{This is a separate concern from the use of coercive measures against
refugee-producing states to prevent refugee flows. For Syria this would mean the use of the regional refugee crisis as justification for humanitarian inter-
dvention in Syria. See infra Part III.B.} Countries requiring as-
assistance under RtoP are unlikely to reject international assistance with protection when they are incapable of providing this protection. In fact the opposite is typically true. For example, Lebanon, Turkey, Iraq, Jordan and Egypt have made their need for international support abundantly clear. It is difficult to imagine circumstances where the goal of cost-sharing to ensure refugee protection in host countries would require or be achieved by coercive action against the host state. The question of whether coercive measures under RtoP, such as ICC referrals and humanitarian intervention, are ever appropriate responses to mass atrocities is too vast to take on in this Article. I do, however, view these measures with deep skepticism, largely on account of the harm they have historically imposed on at-risk populations, even when international actors have deployed these measures ostensibly to benefit at-risk populations. As I discuss further in Part III, I propose attempting to realize the non-coercive commitments of RtoP even while marginalizing coercive action under the doctrine.

166. Turkey is an example of a country that at first refused international assistance with protecting Syrian refugees, but that ultimately requested this assistance as the magnitude of the crisis escalated. See Syrian Refugees: A Snapshot of the Crisis—in the Middle East and Europe: Turkey, EUR. UNIV. INST., http://syrianrefugees.eu/?page_id=80 (last visited Oct. 31, 2015) (“The rising price tag has now forced the Turkish government to seek international support for an operation that, at the beginning, was guarded as a government responsibility.”).

167. Although there is no single authoritative definition of humanitarian intervention, the following is instructive:

Humanitarian intervention is the use of force across state borders by an international governmental organisation, a group of states or a single state aimed at preventing or ending gross violations of human rights and humanitarian law committed against individuals other than its own citizens, without the full and valid consent of the state within whose territory force is applied.

Diana Amnéus, Has Humanitarian Intervention Become Part of International Law Under the Responsibility to Protect Doctrine?, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE, supra note 20, at 157.

168. See infra Part III. It is arguable that to invoke RtoP, even solely to mobilize its non-coercive commitments, is inevitably to raise the specter of foreign military intervention. For one thing, this specter already exists even outside the RtoP frame: Article 42 of the UN Charter, which is legally binding on all UN member states, remains a vehicle for this whether or not RtoP is invoked. See U.N. Charter art. 42, http://www.un.org/en/documents/charter/chapter7.shtml. Article 42 permits the UN Security Council to authorize use of force to maintain or restore international peace and security. See id. Under RtoP, coercive intervention is only available if it is authorized by the UN Security Council. Furthermore, as I discuss further in Part III, it is worth attempting to realize the non-coercive commitments of RtoP even while marginalizing its coercive commitments.
In sum, pillars two and three of RtoP entail international cooperation for refugee cost-sharing when states hosting RtoP refugees are unable to protect these refugees. The nature and extent of the international community’s responsibility will be a function of the host nation’s incapacity. With respect to determining whether a refugee crisis warrants international involvement under pillar two or pillar three, such a determination will be highly contingent on the circumstances of a given crisis. As the UN Secretary General has noted on the general question of whether a given crisis triggers pillars two or three:

In dealing with the diverse circumstances in which crimes and violations relating to the responsibility to protect are planned, incited and/or committed, there is no room for a rigidly sequenced strategy or for tightly defined “triggers” for action.\(^{169}\)

By September 2015, I would argue that all of the regional Syrian refugee hosting countries met the threshold for international assistance under pillar two, and for timely and decisive action under pillar three. Regional hosts are manifestly failing to protect Syrian refugees, whose very livelihoods remain insecure in these countries, to say nothing of the hardships that host communities now face themselves as a result of the refugee crisis.

The international community also bears a responsibility when states are unwilling to protect refugees, capacity notwithstanding. However, host unwillingness to protect raises serious challenges to realizing the international community’s responsibility to protect refugees in such contexts.

Where a state is unwilling to extend protection to refugees there may be little the international community can do to change such a state’s position, and what little it can do is unlikely to include coercive action. Take the example of Israel, which has by and large closed its borders to Syrian refugees.\(^{170}\) It is difficult to imagine what form of coercive action the international community could pursue to force Israel to accept Syrian refugees on its territory, and also guarantee their genuine protection once admitted. Military intervention and sanctions are not only unlikely, but would arguably fail even if they were realized. The (only marginally) more promising route would be to seek to convince unwilling states through non-coercive means such as diplomatic negotiations.

\(^{169}\) Implementing the Responsibility to Protect, supra note 19, ¶ 50.

\(^{170}\) See Kagan, supra note 44 (examining Israel’s policy on Syrian refugees).
Ultimately, the international community bears a responsibility to protect refugees seeking protection in states unwilling to extend this protection. However, it is unlikely that the international community could successfully realize this responsibility via cooperation with an unwilling state. What this means for my analysis is that international cost-sharing to protect refugees under RtoP is more likely to benefit refugees in territories where the host state has some willingness to extend protection to these refugees, even if this state lacks the capacity to do so.

C. IMPLEMENTING RTOP-BASED REFUGEE COST-SHARING

At least one way to develop RtoP-based refugee protection would be for the UN Secretary General to issue a report per his UN General Assembly RtoP-development mandate. This report would detail RtoP’s implications for refugee protection generally and would serve as a first step in institutionalizing refugee cost-sharing under RtoP in the same way that the 2009 Secretary General report institutionalized the three-pillar approach to RtoP. This report could make explicit the relationship between refugees and RtoP as a conceptual matter, along the lines that I have done above. Additionally, this report could include an institutional road map for pursuing refugee cost-sharing under RtoP.

For any refugee crisis, protection efforts can be divided into at least two levels of activity. There are activities at the coordination level, devoted to designing the protection plan, assigning responsibility for its implementation, and securing funding and other commitments necessary to deliver refugee protection. There are also activities at the operational level devoted to implementation of the blueprint developed at the coordination level. A key feature of the UN Secretary General report would be an institutional blueprint for how RtoP could frame coordination for a more the equitable distribution of refugee protection costs.

I propose the following key features for an RtoP-based cost-sharing framework. First, initiation of this framework would occur at the joint request of the UN Refugee Agency and the government(s) hosting RtoP refugees whom they lacked the capacity to protect. 171 As the leading international actor in the ar-

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171. There is precedent for this, not under RtoP, but in initiatives in the past to secure international burden-sharing for refugee protection. For example, the International Conference on Refugees in Central American
ea of refugee protection, the UN Refugee Agency’s technical expertise makes it a natural choice for this role. The UN Refugee Agency’s suitability is evident in the centrality of this body to coordination of the ongoing Syrian regional refugee response. Also, although the UN Refugee Agency is not immune to varying degrees of political influence primarily as a result of its financial dependency on a select group of states, it nonetheless combines the best mix of expertise and independent commitment to refugee protection of any international entity.172

Recent empirical research on international cooperation for refugee protection further underscores the value of the UN Refugee Agency in this role. Looking at four of the largest international cooperation efforts for refugee protection, Alexander Betts finds that northern states contributed to refugee protection in southern states only when they appreciated the substantive linkages between “in-region protection and their interests.”173 He also finds that “[the UN Refugee Agency] has played a crucial role in creating, changing, or simply communicating these substantive linkages.”174 He acknowledges that the UN Refugee Agency has had limited ability to change “the material relationship between issue-areas, [but] it has nevertheless played a significant role in shaping states’ beliefs about the causal relationship between issue-areas.”175

(CIREFCA) was convened by the UN Refugee Agency and regional refugee hosting countries to secure international assistance with addressing the refugee crisis in Central America in the late eighties. See Alexander Betts, Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA 9–11 (UNHCR New Issues in Refugee Research, Working Paper No. 120, 2006).


173. Betts, supra note 78, at 64 (“Northern states have voluntarily contributed to burden-sharing insofar as they have believed that there has been a material, ideational, or institutional relationship between refugee protection in the South and their interests in security, trade, and immigration, for example.”).

174. Id. at 65 (“[UNHCR] has played a role in providing information in order to address uncertainty and imperfect information on linkages. In an ideational context, it has played an important epistemic role in developing a common understanding of the ‘nexus’ between refugee protection and other issue-areas. . . . It has often reinforced a certain set of beliefs about linkages through argumentation. Given the absence of a clearly defined normative and legal framework on burden-sharing, UNHCR has been able to play an important role in the institutional design of its ad hoc conferences and so shape the contractual relationship between issue-areas.”).

175. Id.
This research suggests that successfully promoting international cooperation for refugee cost-sharing under RtoP requires a central issue-linking actor, to make explicit how cost-sharing advances the normative and strategic interests of contributing states. Doing so involves managing these states’ perceptions of the refugee crisis, and a natural choice for this role is the UN Refugee Agency.176

For crises that host governments and the UN Refugee Agency deem to warrant international cost-sharing, an attractive vehicle for pursuing this cooperation is a Comprehensive Plan of Action (CPA).177 CPAs are platforms developed by key international refugee protection and humanitarian actors in collaboration with states, to provide a comprehensive response to a refugee crisis.178 CPAs have been used at various points in history to coordinate international cooperation for refugee protection, in two instances with significant though not unmediated success.179 The CPA would be a vehicle for convening UN member states to determine the levels and nature of international cooperation required to assist regional actors either under pillars two and three of RtoP according to the severity of the refugee crisis.

A fundamental goal of the CPA would be the equitable and sustainable distribution of the cost of refugees from the respective crisis. There is a range of distinct possible approaches to conceptualizing such a distribution.180

176. Id. at 44–48 (analyzing the UN Refugee Agency’s role as an issue linker successfully facilitating international cooperation to address large scale refugee crises).

177. To date, there has been at least one call for a Syrian refugee CPA by refugee advocates, but not under the RtoP frame. See AKRAM ET AL., supra note 46, at 2.

178. See Betts, supra note 171, at 5–6 (identifying the key characteristics of a CPA as an approach that “[draws] on a range of durable solutions simultaneously,” facilitates “additional burden- or responsibility-sharing between countries of origin and asylum, and third countries acting as donors or resettlement countries” and involves work across UN agencies and with NGOs to implement the plan).

179. See id. (describing the two CPAs referred to above as CIRFCA, which between 1987 and 1994 was the platform used to achieve international cooperation to assist Central American refugees, and CPAIR, which was used to achieve international cooperation to assist Indochinese refugees between 1988 and 1996 and detailing accounts of the functioning of these two important CPAs).

180. For a good discussion of the possible range of conceptions of and mechanisms for refugee cost-sharing, see Kritzman-Amir, supra note 93, at 378–89.
A sustainable distribution is one that would permit host nations and international contributors to a given refugee protection effort to maintain a minimum level of assistance to refugees and their host communities such that the fundamental human rights of these populations would be ensured for the duration of the crisis. An equitable distribution, in light of RtoP’s tenets, should be one governed by a theory of “common but differentiated responsibility,” which other scholars have recommended for international refugee cost-sharing. Although states have a shared responsibility to protect refugees under RtoP, differentiated responsibility ties each states’ contribution to the cost of refugee protection to its relative capacity to shoulder this cost.

Factoring a state’s available resources into a cost-sharing regime under RtoP is consistent with a core tenet of the doctrine, which is that international assistance is supposed, in part, to remedy capacity failures of UN member states in the face of RtoP crimes. It would be perverse for the doctrine to commit states to contributing more than they could afford. Furthermore, factoring in a state’s available resources contributes to ensuring the sustainability of a given cost-distribution.

One approach to determining the differentiated contributions of states would be to use the United Nations assessed contribution calculus to determine what fraction of the total funding requirement each UN member state would be expected to contribute. The Secretary-General report on the responsibil-

181. I adopt the term “common but differentiated responsibility” from Hathaway & Neve, who propose a regime of collectivized responsibility for refugee protection that is, however, quite different from the one I propose in this Article. See Hathaway & Neve, supra note 12, at 144 (proposing that states form interest convergence groups where clusters of northern states enter binding agreements with southern states under which the former agree to fund refugee protection in the latter).

182. See id. at 145; see also Schuck, Refugee Burden-Sharing, supra note 93, at 277 (proposing a similar approach, which he calls proportional burden-sharing, which “demands that a state’s share of the burden be limited to its burden-bearing capacity relative to that of all other states in the international community”).

183. See 2005 World Summit Outcome, supra note 18, ¶ 139.

184. See G.A. Res. 67/238 (Dec. 24, 2012), http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/67/238 (providing the formula the United Nations uses to assess the funding contributions of each of its member states to the organization that intends to capture each member state’s capacity to pay, in which the United Nations reviews the formula every three years and bases assessed contributions on a number of factors including gross national income and debt-burden). I agree with Peter Schuck that “[p]rotective capacity is
ity to protect refugees could therefore recommend that cost-sharing for a given crisis would entail assessed contributions from UN member states using the UN assessed contributions formula. An important modification to this would then be to reduce the contributions of countries already hosting refugees by an amount proportionate to the cost borne by these countries. For the Syrian refugee crisis, this approach would mean the fraction of the requisite total funding for a CPA that each UN member state would be responsible for contributing, would be determined by the UN assessed contribution calculus. Regional hosts would be exempt from this assessed contribution, and other states hosting refugees from other crises, whom they, too, lacked the capacity to protect would also be exempt.

Depending on the scale and nature of the crisis, the host government(s) and the UN Refugee Agency could seek to convene the CPA through the UN Security Council acting under its Chapter VII mandate. Chapter VII of the UN Charter empowers the UN Security Council to determine the existence of threats to international peace and security. Chapter VII also authorizes the Security Council to take action to maintain or restore international peace and security. The Security Council does so through Chapter VII resolutions, which are binding on all 193 UN member states. A Security Council resolution establishing a CPA could make the terms of the CPA binding under international law. Enforcement of or compliance with Chapter VII resolutions is by no means perfect. Although these resolutions are legally binding on all United Nations members states, violations are a fact of international practice. All the same, Chapter VII resolutions have and continue to play an important role in coordinating international action and would be an improvement on the existing vacuum in the international refugee regime.

Even in the absence of a Chapter VII mandate, a CPA is possible. Neither the CPA pursued for achieving international cooperation to protect refugees in Central America between 1987 and 1994 (CIREFCA), nor that for Indochinese refugees between 1988 and 1996 (CPAIR) involved a UN Security Coun-


186. *Id.*
Although both CPAs have been justly criticized, they achieved significant gains in international cost-sharing for protection of their respective refugee populations. CIREFCA, for example, achieved an estimated 86% of the total funding required from members of the international community to provide protection and assistance to refugees in the region. These gains could arguably be replicated for RtoP-based CPAs, including one to address the Syrian refugee crisis. Admittedly more work is required to flesh out the terms of an operationalizable CPA for Syria and for other refugee crises. This Article, as the first to explain the conceptual basis for and key features of such a CPA, is an important first step.

Even in the absence of RtoP there has been at least one attempt to lobby the UN to pursue a CPA for the Syrian refugee crisis. What, then, is gained by situating a CPA within the RtoP framework?

Situating CPAs in the RtoP frame along the lines I have proposed begins the process of institutionalizing refugee cost-sharing within a frame with potential to facilitate this cost-sharing. Every time international actors framed a conflict as triggering RtoP, any attendant refugee crisis would as a matter of course generate debate on whether a CPA was necessary. The UN and host nations could avail themselves of an established procedure, and if circumstances so warranted, they could fight the battle for funding on pre-existing terms. RtoP provides a frame within which the UN and host countries could influence state behavior through a variety of means, to share the cost of protecting refugees. In sum, situating cost-sharing within RtoP confers the benefits of institutional framing that I dis-

187. For a discussion of the formation of these CPAs, see Betts, supra note 171.
188. Id. at 5.
189. Id. at 11.
190. In his study of these two CPAs, Betts argues that their success was not historically contingent but can be replicated where certain preconditions are met. See id. at 5; Betts supra note 78, at 54 (listing factors and explanations); see also U.N.H.C.R., EXPERT MEETING ON INTERNATIONAL COOPERATION TO SHARE BURDENS AND RESPONSIBILITIES 8 (June 27–28, 2001), http://www.refworld.org/docid/4e9fed232.html (“Successful historical examples [of international cooperation to solve protracted refugee situations] demonstrate the importance of context-specific sustained engagement, usually multi-year; clear ownership of the process; differentiated support and participation; a clearly defined role for civil society; a special facilitator role for UNHCR; and good partnerships.”).
191. AKRAM ET AL., supra note 46.
discuss in Part I on attempts to secure international cost-sharing. I discuss RtoP’s viability in this regard in Part III.

As to the substance of the CPA, the Secretary-General report could not detail its content because the specific needs of RtoP refugees, and the costs of meeting these needs would vary by conflict. That said, a report could identify categories of assistance that would be central to an RtoP CPA. I propose using the three categories of assistance that the Syrian RRP adopts: protection assistance, humanitarian assistance, and development assistance.\textsuperscript{192} UN member states would thus be sharing the costs of these different forms of assistance, as opposed to the status quo, under which regional host governments with limited capacity are left to shoulder a disproportionate cost of the responsibility of protecting refugees.

RtoP refugees are likely to remain concentrated in the region where the conflict they are fleeing is located.\textsuperscript{193} As a result, the fundamental means by which states outside the region will fulfill their commitments under RtoP will be through humanitarian and development assistance. Humanitarian assistance (not to be confused with humanitarian intervention) is measures for emergency relief to refugees including their nutritional, sanitation, and emergency medical needs. This assistance might take the form of goods and services delivered to the countries hosting the refugee populations. It will also take the form of funding assistance to host states and international organizations implementing the RtoP CPA.

Development assistance is measures that go beyond emergency assistance to address the long-term needs of refugees and their hosts. These measures also address the infrastructural impact that large numbers of refugees can have on their host communities. Measures in this category would be financial and other contributions from international actors to host states. These measures would enable host governments to ensure that refugees and their host communities have access to clinics, hospitals, schools and other essential services notwithstanding the significant, and often long-term increases in population that result from refugee influxes in the wake of conflict.


\textsuperscript{193} See \textit{Europe: Syrian Asylum Applications}, supra note 73.
The Syrian refugee crisis demonstrates the importance of development assistance to regional hosts of RtoP refugees. Refugee crises that trigger RtoP will in all likelihood become protracted refugee crises meaning that emergency humanitarian assistance alone cannot meet the needs of refugees and their hosts. Analysts predict that the Syrian refugee crisis is unlikely to be resolved any time soon, thus the international response must be appropriately tailored for the long-term nature of the displacement. The short-term nature of the humanitarian assistance frame cannot equip regional host states to address the systemic challenges they now face. UN bodies, regional hosts, and even researchers have increasingly called for more development assistance for Syrian refugee hosts, which the 2009 Secretary-General Report identifies as falling squarely under pillar two of RtoP.

Protection assistance consists of measures to anchor externally displaced populations within a legal or policy framework that lays out the rights or benefits that attach to their status, and identifies the entity responsible for delivering these rights or benefits. For states bound by international refugee law and faced with Syrian refugees arriving on their territories, protection assistance would mean giving effect to the international refugee law prohibition on returning individuals in their territory to countries where they will be subjected to persecution. A best-case scenario is a policy Sweden announced in 2013, under which it would grant asylum to all Syrian refugees who apply for protection in Sweden. This policy granted Syrians permanent residence status until such a time as the Swedish

194. See, e.g., Banulescu-Bogdan & Fratzke, supra note 68.
196. See Implementing the Responsibility to Protect, supra note 19.
197. Convention Relating to the Status of Refugees, supra note 2, ¶ 1 ("No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").
government determined otherwise. Brazil offers another example. It announced in 2013 that it would provide humanitarian visas to refugees from Syria.\footnote{199}{See UN Refugee Agency Welcomes Brazil Announcement of Humanitarian Visas for Syrians, U.N.H.C.R. (Sept. 27, 2013), http://www.unhcr.org/524555689.html (detailing how under this arrangement Brazilian embassies in Syria’s neighboring countries will grant travel visas to those fleeing the conflict and their families).} As mentioned, most recently Germany announced a shift in policy towards granting asylum to all Syrians applying in that country.\footnote{200}{See Agrawal, supra note 71.} To be clear, asylum grants do not on their own resolve vulnerabilities of refugees, and even in Sweden, for example, Syrian refugees have been subject to xenophobic discrimination by those opposing the presence of refugees in that country.\footnote{201}{See, e.g., Johan Carlstrom & Niklas Magnusson, Swedish Nationalists Rise as Influx of Syrian Refugees Grows, BLOOMBERG BUS. (Aug. 21, 2014), http://www.bloomberg.com/news/articles/2014-08-20/swedish-nationalists-rise-as-record-immigration-stirs-backlash (describing Swedish backlash against refugees).} Recognizing the limits of formal legal status for refugees, however, does not diminish refugees’ need for this status.

As for countries that are not bound by international refugee law, pillars two and three of RtoP would nonetheless be bases for calling on them to extend legal protection to refugees physically present in their territories. Such protection would not be unprecedented. Lebanon, Jordan, and Iraq—key providers of protection assistance in the Syrian regional refugee crisis—are providing this protection despite not being bound by international refugee law. Their generosity is in stark contrast with European and other countries such as Australia that are bound by this legal regime, but have actively sought to keep refugees from Syria out of their territories.\footnote{202}{See Ballout, supra note 59.}

For those countries that do not have refugees physically present on their soil, protection assistance could take the form of refugee resettlement. Resettlement entails relocating refugees from the country where they have sought and been granted protection (e.g., Lebanon) to a third country (e.g., Canada). The UN Refugee Agency typically uses resettlement as a way to ensure the protection of refugees from host countries where those refugees remain vulnerable.\footnote{203}{See, e.g., Betts, supra note 171, at 40.} With displacement on the magnitude of the Syrian refugee crisis, the fraction of refugees likely to be resettled will be small. Resettlement may not put a

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200. See Agrawal, supra note 71.


202. See Ballout, supra note 59.

203. See, e.g., Betts, supra note 171, at 40.
significant dent in regional concentration of refugees, but it remains an important means of international support for refugees.

III. RTOP’S VIABILITY

Even if one accepts my claim that conceptually RtoP entails RtoP refugee cost-sharing, an important question remains: Is RtoP a viable frame for pursuing this cost-sharing?

A. LANDSCAPE OF THE DEBATE

As mentioned in the Introduction, my proposal must reckon with the debate in RtoP scholarship over the doctrine’s desirability and viability. Commentary on the benefits and viability of RtoP is divided: there are proponents and there are skeptics. Proponents believe that RtoP offers great benefits to vulnerable populations globally. They find no serious fault in the doctrine’s trajectory, and have few concerns about the use of coercive measures under RtoP. Others argue that RtoP is—even in principle—dangerous for the world’s vulnerable, and its detrimental impact is already evident. I call these the critical skeptics. And then there are those who believe that RtoP is irrelevant, with no significant capacity to shape the behaviour of international actors. I call these the realist skeptics. In the subsections that follow I provide examples of commentators whose views I believe reflect these three positions in some important respect, even though these positions may not encompass the full nuance of these commentators views on RtoP. Although, for example I may attribute realist skepticism to a given commentator’s analysis, I do not mean this label as all-encompassing of that commentators perspective on the doctrine. I also grant that it is possible for a single commentator to adopt all three positions with respect to different facets of RtoP.

1. The Proponents

RtoP proponents celebrated the international response to the 2011 conflict in Libya as exemplary of the doctrine functioning successfully. Following initial unrest in January

204. See, e.g., Alex J. Bellamy, From Tripoli to Damascus? Lesson Learning and the Implementation of the Responsibility to Protect, 51 INT’L POL. 23, 23 (2014); Ramesh Thakur, R2P, Libya and International Politics as the Struggle for Competing Normative Architectures, in THE RESPONSIBILITY TO PROTECT: CHALLENGES & OPPORTUNITIES IN LIGHT OF THE LIBYAN INTERVENTION 13
2011, Libyans took to the streets in earnest in February 2011. They protested the Gadaffi regime’s arrest of a human rights advocate.\(^{205}\) The Gadaffi regime responded with brutal violence that included the execution of unarmed civilians, and drove government officials, ambassadors, and even some members of the armed forces to resign their posts.\(^{206}\)

In response to the conflict, the UN Security Council initiated its first ever coercive action under the RtoP framework.\(^{207}\) After vitriolic threats by Colonel Gaddafi to exterminate the population of Benghazi, a city at the heart of the rebellion,\(^{208}\) the UN Security Council exercised its Chapter VII powers to issue Resolution 1970.\(^{209}\) This Security Council resolution called on Libya to abide by its obligations under international human rights and humanitarian law;\(^{210}\) referred the situation in Libya to the ICC;\(^{211}\) and imposed an arms embargo, asset freezes and


\(^{208}\) See Zifcak, supra note 30, at 60.


\(^{210}\) Id. ¶¶ 1–2.

\(^{211}\) Id. ¶¶ 4–8.
travel bans on key figures within the Gaddafi regime. 212 Nonetheless, the situation in Libya continued to deteriorate. As it did so, RtoP proponents among states sought authorization for even more coercive measures. 213

On March 17, 2011, the UN Security Council adopted Resolution 1973. This resolution authorized UN member states acting nationally or through regional organizations “to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in [Libya] . . . while excluding a foreign occupation force of any form on any part of Libyan territory[.]” 214 It also established a no-fly zone that prohibited flights in Libyan airspace, and authorized the use of “all means necessary to ensure compliance.” 215 Again, the Security Council explicitly invoked RtoP. 216 Two days later, a coalition of West-
ern states intervened militarily in Libya.\textsuperscript{217} NATO eventually took over, and between March and October 2011 it carried out military attacks as Libyan opposition forces continued their fight.\textsuperscript{218} Rebel forces subsequently captured Colonel Gaddafi’s hometown of Sirte, and he was killed during the fighting. On October 23, opposition forces announced Libya’s liberation.\textsuperscript{219} Four days later the UN Security Council terminated its use of force authorization and the no-fly zone.\textsuperscript{220} For RtoP proponents, intervention in Libya demonstrated the role the doctrine could play in facilitating international cooperation to protect populations at risk of mass atrocities.

2. The Skeptics

a. Critical Skeptics

Critical skepticism challenges RtoP both in principle and in practice.\textsuperscript{221} In important respects, critical skeptics are suspicious of RtoP as a frame on normative grounds. A salient criticism among these skeptics is that RtoP is a Trojan horse of sorts. Despite RtoP’s ostensible justification (protecting vulnerable populations from mass atrocities), these skeptics view the doctrine as a vehicle by which powerful states will undermine the sovereignty of weaker states\textsuperscript{222} in order to advance their
own national interests. At the core of this critique is a concern for the “differential meaning for, and impact on, third world States and peoples” of international legal norms.

bearing citizens. Id. at 126–27. On this account this conceptual move mirrors one central to the colonial period: “At the very outset of Western colonial expansion in the nineteenth and twentieth centuries, leading Western powers—the UK, France, Russia—claimed to protect ‘vulnerable groups.’” Id. at 127. This “vulnerable groups” framing was then used “to legitimate colonial intervention as a rescue mission.” Id.; see also B.S. Chimni, Forum Replies: A New Humanitarian Council for Humanitarian Interventions?, 6 INT’L J. HUM. RTS. 103, 104 (2002) (citing in agreement the position that “[t]he ‘sovereignty as responsibility’ thesis simply ‘raises the specter of a return to colonial habits and practices’”; Noam Chomsky, The Skeleton in the Closet: The Responsibility to Protect in History, in CRITICAL PERSPECTIVES, supra note 221, at 14 (identifying a risk that RtoP may be used as a “weapon of imperial intervention at will”). Speaking more generally about continuity of a discourse of vulnerability from the colonial period to the contemporary focus on humanitarianism, B.S. Chimni writes, “It is . . . worth reminding ourselves that colonialism was justified on the basis of humanitarian arguments (the civilizing mission). It is no different today.” B.S. Chimni, Third World Approaches to International Law: A Manifesto, in THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION 61 (Antony Anghie et al. eds., 2003) [hereinafter TWAIL Manifesto]. For more on the “civilizing mission” as justification for repeated western intervention in the third world, see Anthony Anghie & B.S. Chimni, Third World Approaches to International Law and Individual Responsibility in Internal Conflicts, 2 CHINESE J. INT’L L. 77, 84–86 (2003) [hereinafter TWAIL and Individual Responsibility]. This critique is one expression of a more general critique of international law and norms some scholars of third world approaches to international law (TWAIL) have advanced, which views “colonialism [as] central to the formation of international law,” or as having deeply influenced the formation of international law. Id. at 84.

223. See, e.g., Philip Cunliffe, A Dangerous Duty: Power, Paternalism and the Global “Duty of Care,” in CRITICAL PERSPECTIVES, supra note 221, at 51 (“[RtoP] is neither sound nor just and . . . its vitality, such as it is, stems not from its capacity to protect the wretched of the Earth but from the opportunity it offers states to extend the writ of their power both over their own peoples and over other (weaker) states.”); Mamdani, supra note 222, at 126 (“The result [of the new international humanitarian order of which RtoP is a part] is a bifurcated system whereby state sovereignty obtains in large parts of the world but is suspended in more and more countries in Africa and the Middle East.”). Commenting on this shift in international order more generally, B.S. Chimni notes “an ongoing process of redefinition of State sovereignty [that is] being justified through the ideological apparatuses of Northern States and international institutions it controls.” TWAIL Manifesto, supra note 222, at 60. A related criticism is that RtoP subverts popular sovereignty by embodying paternalism: states are responsible for their people rather than accountable to them, and the international community, rather than these people are the arbiters of when this responsibility is breached. Cunliffe, supra, at 52–53, 60–63; see also Adam Branch, The Irresponsibility of the Responsibility to Protect, in CRITICAL PERSPECTIVES, supra note 221, at 103 (arguing that RtoP “makes the legitimacy of the African state subject to determination by the ‘international community,’ according to vague moral standards”).

224. TWAIL Manifesto, supra note 222, at 57.
Critical skeptics argue that RtoP is a doctrine whose very tenets facilitate selective application, especially of coercive measures that they argue serve to harm rather than protect vulnerable populations. They fear capricious, unprincipled use of military intervention and other coercive measures to advance the interests of powerful interveners. Although RtoP requires Security Council authorization for military intervention and other coercive measures under RtoP, critical skeptics view this requirement as insufficient to ensure the sovereign interests of weaker states.

Analysis of the Libya intervention by critical skeptics foregrounded what intervening parties stood to gain from intervention on the one hand, and on the other the overwhelming price the Libyan population would have to pay for the intervention framed as ostensibly in their interest. Alan Kuperman com-

225. The concerns of the critical skeptics resonate generally with those of TWAIL. TWAIL critiques of international law have as their starting point an acute sensitivity to historically contextual analysis of international laws and norms, and their impact on the non-Western world. A central concern for TWAIL scholars has been “power relations among states and... the ways in which any proposed rule or institution will actually affect the distribution of power between states and peoples.” TWAIL and Individual Responsibility, supra note 222, at 78. Additionally, TWAIL scholars have also stressed the importance of “the principles of sovereign equality of states and non-intervention,” to the extent that these principles prevent the exploitation of populations residing in weaker states. Id. at 81–83 (describing a shift in TWAIL towards critique of the post-colonial state as itself oppressive of third world peoples).

226. Cunliffe, supra note 223, at 56 (“For in the end, all [RtoP] can really offer is the vague assurance that remote foreign powers may involve themselves in a conflict if it happens to be convenient for them to do so.”); see also Chomsky, supra note 222, at 14–15 (providing examples of international action that highlight the selective use of RtoP).

227. For a brief discussion of the controversy between powerful and weaker states over a right to intervene following NATO’s intervention in Kosovo in the 1990s, see CRITICAL PERSPECTIVES, supra note 221. For a detailed discussion of whether RtoP has modified the legal status of humanitarian intervention, see Diana Améus, Has Humanitarian Intervention Become Part of International Law Under the Responsibility to Protect Doctrine?, in RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE, supra note 20, at 165 (concluding that “[a]s most states have already come to acknowledge, RtoP is neither to be equated with nor is it developing into a right to unauthorised humanitarian intervention in international law”).

228. This concern, which I view as valid, is because determinations regarding whether or not to intervene coercively are determined by the five veto holding members of the UN Security Council, who arguably may wield this veto power only to advance their own national interests and those of their allies.

229. For a detailed and compelling account of the flaws of the intervention...
pellingly argues that a review of the intervention reveals that “NATO's primary aim . . . evolved to overthrowing Qaddafi's regime, even at the expense of increasing harm to Libya's civilians.” He also makes a strong case that “NATO intervention significantly exacerbated humanitarian suffering in Libya and Mali, as well as security threats throughout the region.”

There is no question that the power vacuum created by NATO intervention has considerably worsened human rights conditions in post-intervention Libya relative to the decade prior to the war. Ultimately, Libya's steady post-intervention implosion—for which Libyan civilians have paid the highest price long after proponents of intervention have turned to other concerns—has only vindicated the concerns of the critical skeptics.

b. Realist Skeptics

A different category of skepticism can be loosely described as falling within the realist tradition. The realist critique of
RtoP is that it is ineffectual as a mechanism for constraining or shaping state behavior. Under this view, RtoP has no meaningful, independent influence on state behavior. Instead, states act to advance their own self-interest. As RtoP proponents failed to mobilize support for humanitarian intervention or even a Security Council referral of the Syrian situation to the ICC, a realist critique of the doctrine gained momentum. At its core was the view that some expressed even following RtoP's deployment in Libya. Eric Posner, for example, issued a blistering critique of RtoP, arguing that it had been applied selectively—governed not by principle but fundamentally by national interest.

Although there is important overlap with the critical skeptics, who see RtoP as facilitating the self-interest of powerful states, the realist critique is distinct in the following way. Whereas critical skeptics are concerned with RtoP as an ideological vehicle that advances normative and material interests of the global north, the realist critique is that RtoP has proven useless for anything more than perhaps advancing the haphazard interests of powerful states. In very basic terms, the critical skeptics fear that RtoP will influence state behavior but with detrimental or disastrous outcomes for vulnerable populations, whereas the realist skeptic position (stated in its strongest variant) is that RtoP has been epiphenomenal in terms of shaping the behavior of states.

235. Eric A. Posner, Outside the Law, FOREIGN POLICY (Oct. 25, 2011), http://foreignpolicy.com/2011/10/25/outside-the-law (“As a principle or norm, [RtoP] has been applied selectively, to say the least. No one seems interested in protecting Syrian or North Korean civilians from their governments. The truth is that the Responsibility to Protect is too capacious a norm to regulate states: It can be cited to justify virtually any intervention in the type of country that the West might want to invade, while it can also be evaded on grounds that it is not formal law, so countries can avoid intervening in a crisis when intervention does not serve their interests.”); see also Aidan Hehir, Syria and the Dawn of a New Era, in INTO THE ELEVENTH HOUR: R2P, SYRIA AND HUMANITARIANISM IN CRISIS (Robert W. Murray & Alasdair McKay eds., 2014); Julian Junk, The Two-Level Politics of Support—US Foreign Policy and the Responsibility to Protect, 14 CONFLICT SEC. DEV. 535 (2014); Robert W. Murray, Rationality and R2P: Unfriendly Bedfellows, in INTO THE ELEVENTH HOUR: R2P, SYRIA AND HUMANITARIANISM IN CRISIS, supra; Nassim Yaziji, The Sad Fate of R2P: From Libya to the Lost Chance of Syria, OPEN DEMOCRACY (July 2, 2014), https://www.opendemocracy.net/openglobalrights/nassim-yaziji/sad-fate-of-r2p-from-libya-to-lost-chance-of-syria.

236. I do not mean to evoke here “the misunderstood and mischaracterized structural realist straw-man claim that ‘international law does not matter’, . . . .” Steinberg, supra note 234, at 146. I mean instead to capture deep-seated skepticism expressed by some that RtoP has operated on the basis of nothing other than national interest, rather than concern for vulnerable popu-
Without overstating the difference in views between critical and realist skeptics, this distinction is important for my analysis because it captures important nuance for assessing RtoP's suitability as a frame for my purposes. The critical skeptics capture a normative opposition to RtoP as a frame—on their view the doctrine as currently invoked advances norms and standards favoring powerful western states. The realist skeptics capture a related concern with a different nuance: interest convergence. Unless the use of RtoP simultaneously advances the national interest of powerful nations, there will be no RtoP action on behalf of vulnerable populations.

B. HYBRID APPROACH

The enthusiasm of RtoP proponents (as I have described this view above) ignores the very important concerns raised by RtoP skeptics. It is necessary to take seriously critical and realist skepticism of RtoP, though at the same time I would argue it is premature to dismiss the entire doctrine on these grounds at this stage in the doctrine's development. To be clear, as I state in the Introduction, I am not invested in a wholesale ideological defense of RtoP. Rather, I am interested in how best to realize any potential the doctrine may have as a frame for pursuing protection of populations (particularly refugees) from mass atrocities. In my approach to exploring this potential, I share many of the normative concerns that critical skeptics have with RtoP (and with international law more generally). I share their commitment to developing international norms that reflect the goals and vision of peripheral states in the international legal order, in addition to those of powerful nations.

237. I adopt the concept of “interest convergence” from Derrick Bell. See Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518 (1980). In the context of racial inequality in the United States, Derrick Bell famously posited that “the interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.” Id. at 523. Other refugee law scholars have imported this concept into the refugee protection context. See Hathaway & Neve, supra note 12 (applying Bell’s concept of interest convergence to the context of refugee burden sharing).

238. The concerns I share with critical skeptics are those underlying TWAIL. TWAIL and Individual Responsibility, supra note 222, at 79 (“TWAIL scholars seek to transform international law [into] . . . a body of rules and practices that reflect and embody the struggles and aspirations of Third World peoples and which, thereby, promotes truly global justice.”).
I also share their commitment to interrogating the impact of international norms and laws on populations of peripheral states, to ensure that global standards do not unduly adversely affect these populations. I do not, however, share the view that RtoP as a whole, necessarily functions to disadvantage vulnerable populations in peripheral states in a way that warrants completely abandoning the doctrine at this stage.

In my view, the true potential benefit that RtoP brings to international relations, and to the refugee protection landscape in particular, is a frame for shared responsibility among international actors to provide international assistance to help states unable to protect populations in their territory from the four RtoP crimes. Here I refer to material assistance that the latter states voluntarily accept, making them willing partners with the international community, sharing the aim of protecting at-risk populations.

Many critical skeptics likely view any benefit that may come from RtoP's non-coercive commitments as outweighed by the doctrine's endorsement of coercive measures. I disagree with this accounting of the costs of RtoP, because international law already permits the coercive action critical skeptics decry most with respect to RtoP. Coercive measures under RtoP require Security Council approval under Chapter VII of the UN Charter. Significantly, even in the absence of RtoP the Security Council can authorize coercive action under Chapter VII. What this means is that the risk of coercive interventions (pretextual or otherwise) already exists.

It is conceivable that using RtoP in the way I propose in Part II, lends further legitimacy even to the coercive tenets that I acknowledge can be dangerous for vulnerable populations.

239. As B.S. Chimni notes: “[I]ndividual legal regimes have to offer some concessions to poor and marginal groups in order to limit resistance to them both in the third world and, in the face of an evolving global consciousness, in the first world.” *TWAIL Manifesto*, supra note 222, at 73. This normative commitment to international norms that reflect consensus shared not only by powerful Western countries but also by states on the periphery deeply informed the early work of TWAIL scholars. *TWAIL and Individual Responsibility*, supra note 222, at 80–81.

240. I consider myself engaged in a similar project as Jennifer Welsh, who has explored how “reframing of RtoP might address, and potentially overcome” compelling concerns about RtoP. Welsh, *supra* note 26, at 368. Whether or not reframing can be a success is an empirical question, and I would argue RtoP is too young a doctrine for us to have sufficient data to resolve this question at this stage.
populations. However, it is not evident how using the doctrine to provide assistance to refugee host nations requesting this assistance makes it easier for Security Council veto-holding states to abuse their Chapter VII powers to authorize coercive action using RtoP. Even if there is some risk that using RtoP for refugee cost-sharing marginally increases the possibility of pretextual coercive intervention by the Security Council, this risk is arguably outweighed by the possible benefits of non-coercive international cooperation such as cost-sharing. Admittedly, any development that increases the risk of pretextual coercive intervention is far from ideal. However, the current structure of the international legal order itself is far from ideal, and my goal here is to consider an imperfect solution that is an improvement on the status quo.

If RtoP’s non-coercive tenets can be strengthened, the at-risk populations in southern states that critical skeptics are concerned about stand to gain in material ways. The Syrian refugee crisis illustrates my position. If RtoP were used successfully to convene a CPA for the Syrian refugee crisis, it is difficult to see how this would make coercive international action under RtoP more likely against Syria or any of the other states in the region. On the other hand, the benefits of RtoP-based cost-sharing would be monumental for Syrian refugees and their hosts.

Critical skeptics would be hard-pressed to oppose refugee cost-sharing under RtoP as anti-sovereignty or as anti-vulnerable populations, at least as I have conceptualized this protection in the previous Part. International cooperation to protect refugees typically follows requests from host nations geographically proximate to conflict. Conflicts serious enough to trigger RtoP are concentrated largely in the global south. It is southern states that shoulder most of the cost that resulting mass refugee influxes impose. Providing assistance requested by regional hosts of Syrian refugees is not a threat to sovereignty in the way that humanitarian intervention unquestionably is. Furthermore, the international assistance that would be required for refugee protection would materially benefit states geographically proximate to conflict. These are precisely the sort of states critical skeptics fear stand to lose under

241. See supra Part II.
242. What I mean here is that even from a critical skeptic perspective, using RtoP to increase material support for RtoP refugee hosting countries such as Lebanon, does not per se undermine Lebanese sovereignty.
RtoP’s current interventionist thrust. To be clear, this is not to say RtoP-based refugee cost-sharing is the most sovereignty-promoting approach one could conceive of. But again, the “perfect” ought not, per se, to be the enemy of the “available.” RtoP is available, and the benefits of experimenting with applications that possibly mitigate the seemingly intractable problem of refugee cost-sharing outweigh the risks.

Below I explore in more detail how applying RtoP to refugee protection addresses critical concerns. I also explore how this application in some circumstances closes the gap between genuine protection of at-risk populations and the interests of influential state actors.

With respect to the realist critique, it understates the role that international normative commitments can play in shaping state behavior, even when the action these commitments recommend does not maximize fulfillment of naked national interest. In this respect I view the constructivist approach to understanding how international norms shape state behavior as relevant for making sense of RtoP’s possible influence on international cooperation in the future.

As mentioned above, RtoP’s basis is a UN General Assembly Resolution. And also as referenced above, at least one recent study gives empirical support for the claim that General Assembly Resolutions can shape international consensus and facilitate collective action. That research noted that international consensus and collective action were enhanced by foregrounding the transnational crime facets of human trafficking and not its human rights implications in General Assembly Resolutions. Admittedly what I have argued for in Part II reveals RtoP as currently articulated to be more of a human rights frame than one that is fundamentally about enhancing the national security of states. What I will argue below, however, is that even under the RtoP frame, it is possible to foreground why pursuing international cooperation to share the cost of protecting refugees is firmly in the national interest of UN member states, including those in a position to make the most meaningful contribution to assisting Syrian refugees, for example.243

243. Some might wonder then, why a better approach would not be a different frame from RtoP, one that more closely tracked the national security framing of the human trafficking resolutions. First, unlike RtoP, such a frame is not readily available. Secondly, even if it were, a frame that explicitly prioritized national security above all in responding to refugee crises would result in
Although I reject the realist critique’s reduction of RtoP’s independent influence on state action to zero, I nonetheless posit that foregrounding the overlap of international normative commitments with the national interests of powerful states increases the likelihood of international cooperation to fulfil these commitments.

I thus combine critical and realist sensibilities, and use them to inform further experimentation with RtoP, with a focus on the challenges facing the international refugee regime. Below I show that critical skepticism is useful for developing a constructive normative critique of RtoP, and realism is useful for developing the institutional mechanisms necessary for realizing RtoP’s normative goals. Although in this Article I focus on how this hybrid approach has benefits for refugee protection, it is relevant for developing RtoP’s application to other areas of international concern.

1. Refugee Protection as a Means of Shoring up RtoP’s Normative Appeal

The critical skeptic critique captures justifications that states opposing international action under RtoP have offered to explain their opposition. Addressing critical concerns, among other things, simultaneously makes the doctrine more appealing (at least in principle) to a broader spectrum of states than is currently the case. RtoP’s normative appeal can be enhanced by focusing on its non-coercive tenets, around which there is broader international consensus relative to its coercive tenets. My assumption here is that expanding the normative appeal of RtoP makes the doctrine a more truly international

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244. There are methodological synergies between critical TWAIL scholarship and international relations approaches to international law (IR/IL) but there are also differences: “IR/IL approaches have much to contribute to understanding international legal structures and processes, but [TWAIL] places great emphasis on international economic relations even as it does not negate the role of power (realism), subjective factors (constructivists), the role of institutions (institutionalists) and the role of domestic politics (liberal).” TWAIL and Individual Responsibility, supra note 222, at 97; see id. at 77–87 (providing an overview of the history and content of TWAIL as a distinct method of international law). I use the term “realist sensibility” as Jack Snyder has. Snyder notes that the realist sensibility with its attention to power, strategy, and consequences is of great potential value in analyzing the problem of assisting refugees and other victims of political strife. Jack Snyder, Realism, Refugees, and Strategies of Humanitarianism, in Refugees in International Relations, supra note 78, at 29–32.
norm, which is a good in itself, and that increasing normative appeal increases the likelihood of international action under RtoP.

In the case of Libya, although Russia and China did not use their veto to block Resolution 1973, these two countries remained critical of efforts to enforce a no fly zone authorized under this resolution.\footnote{Payandeh, supra note 206, at 382. For more nuance, see S.C. Res. 2016, ¶¶ 5–6 (Oct. 27, 2011). More broadly, international opinion was mixed. The Organization of the Islamic Conference generally supported the intervention. Payandeh, supra note 206, at 380. The African Union and the Arab League were ambivalent. Id. at 382. Bolivia, Venezuela, and Cuba condemned the military intervention, while Colombia and Mexico expressed support. Id.} NATO’s mission eventually grew to include targeting government infrastructure and even deliberate targeting of Colonel Gaddafi and other regime leaders.\footnote{But as the conflict continued, NATO expanded its targets to include “command and control” centers, a result of which was the May 1 bombing of the Gaddafi family compound whose casualties included children. For this analysis, see Zifcak, supra note 30, at 66.} The United States and its allies ultimately agreed that protecting Libya’s population required regime change. But for countries such as Russia, China, Brazil, India and South Africa, regime change presented an unjustifiable violation of the principle of state sovereignty and far exceeded the mandate authorized by Resolution 1973.\footnote{Id. at 69.} These states have cited Libya as a basis for blocking intervention in Syria under RtoP, notwithstanding the immense devastation the civil war has wrought on Syria’s population.\footnote{In the face of this continuing crisis, the Security Council has struggled to reach a consensus on the appropriate response, in stark contrast to the speedy consensus achieved on the Libyan crisis in 2011. From when it first met at the end of April to address the growing crisis in Syria, there had been two broad positions on the Syrian crisis. One camp is described by one scholar as the “broadly Western position,” Zifcak, supra note 30, at 74, held by the United Kingdom, France, and the United States among others. This camp has (1) condemned the violence against civilians and called for its cessation; (2) called international accountability for crimes perpetrated; and (3) continually invoked RtoP to advocate even coercive measures such as sanctions. The other camp, loosely led by Russia and China, includes India, Brazil, and South Africa. This camp has consistently expressed concern at the crisis in Syria and also called for its cessation. However, it has been firmly opposed to any foreign intervention under RtoP, which it holds would violate the Syrian government’s sovereign right to resolve its domestic matters as it sees fit. See id. at 7.} By March 2015, members of the Security Council had made at least ten attempts to pass resolutions variously addressing the conflict in Syria, and Russia and China vetoed four of the-
Notwithstanding China and Russia’s complex political interests, these countries explicitly connected their position on Syria-related resolutions to their concerns about the expansive interpretation of Resolution 1973 in the Libya case. They worried about the precedent Libya had set for the meaning of RtoP in practice, particularly as it relates to foreign intervention on the soil of a sovereign state. Explaining a Russian veto of a draft resolution on Syria, for example, the Russian Permanent Representative stated:

The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by the statement that compliance with the Security Council resolutions in Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect . . . .

In May 2014, the Security Council voted on a different resolution that would have referred the Syria situation to the ICC. This resolution also failed as the result of vetoes by Russia and China. Russia viewed an ICC investigation as counterproductive for resolving the political crisis in Syria, and as a step in the progression towards even more coercive action. China similarly protested the referral as undermining sovereignty principles.

It is important to note that even as this debate regarding whether the appropriate collective international response to the crisis in Syria includes coercive measures, many western and


250. See Zifcak, supra note 30, at 76. Zifcak explains that whereas in the Libya case China and Russia were willing to abstain rather than oppose Resolution 1973, in the Syria case they exercised their veto powers "because in Libya, NATO had pushed the boundaries of Resolution 1973 far beyond its primary objective, which had been to protect the civilian population from attacks by government forces. China, Russia and the IBSA countries could swallow the objective. But committed as firmly as they were to the sovereignty principle, they could abide by the aim of regime change." Id. at 87.


252. Disturbingly, this draft resolution excepted other non-states parties to the Rome Statute such as the United States from the jurisdiction of the ICC’s investigation.

Gulf states are active participants in the armed conflict in Syria. Nonetheless, a focus on less controversial, non-coercive RtoP commitments such as refugee cost-sharing increases the likelihood that states with concerns about the pretextual (or any) use of collective coercive measures would actually cooperate under the RtoP framework to address the Syrian regional refugee crisis. There is good reason to be skeptical that Chinese and Russian opposition to RtoP, even as a matter of principle, is rooted entirely in sovereignty concerns. However, it is noteworthy that the only action that the Security Council had sufficient consensus to pursue by July 2015 in Syria was non-coercive, with one exception. Furthermore even if China and Russia were to oppose non-coercive international action under RtoP, their cooperation is only necessary for pillar III measures under Chapter VII of the UN Charter. Recall that adopting a CPA under RtoP would not require Chapter VII measures. Thus the success of my proposal is not contingent on all five permanent members of the Security Council embracing RtoP.


255. This position is consistent with the work of constructivist scholars who have argued the value of normative consensus facilitating international cooperation. See Jose Alvarez, Why Nations Behave, 19 MICH. J. INT’L L. 303 (1998); Anthony Clark Arend, Do Legal Rules Matter? International Law and International Politics, 38 VA. J. INT’L L. 107 (1998); Ann Florini, The Evolution of International Norms, 40 INT’L STUD. Q. 363 (1996); Alexander Wendt, Constructing International Politics, 20 INT’L SECURITY 71 (1995). TWAIL scholars, too, have foregrounded the importance of “an inclusive and participatory international law . . . [that] should evolve in a manner which is fair and acceptable to all parties rather than through formulations which reflect the views of dominant states alone.” TWAIL and Individual Responsibility, supra note 222, at 94.

256. With respect to Russia, for example, its recent breaches of Ukrainian sovereignty belie its purported principled commitment to sovereign equality.

There is a more important benefit of prioritizing non-coercive measures than Chinese and Russian support for RtoP. Prioritizing non-coercive measures would deepen the support of middle powers such as India, Brazil and South Africa for RtoP. Along with Russia and China, India, Brazil and South Africa have opposed coercive action under RtoP that they view as harmful to vulnerable populations. \(^{258}\) They, too, have opposed violations of state sovereignty under RtoP, but they have weighed their sovereignty concerns against the protection needs of at-risk populations. Their Security Council voting records for the Libyan crisis in 2011 and more recently for Syria provide evidence of a more nuanced engagement with RtoP. \(^{259}\) More generally, Brazil has taken the lead in pushing for development of RtoP’s non-coercive commitments, much in the way that I propose in this Article. It has promoted what has been called “responsibility while protecting,” which emphasizes the non-coercive and preventative aspects of RtoP. \(^{260}\) This initiative has received broad-based support from other countries. \(^{261}\)

In light of the benefit that improved international assistance would have on the protection of Syrian refugees, for example, there is good reason to believe that India, Brazil and South Africa would support the use of RtoP for that purpose. If these three countries were to lead the charge for RtoP-based international refugee cost-sharing in Syria, they could play an important role in motivating many countries such as African Union and Arab League member states to push for this action through the United Nations. India, South Africa and Brazil could also take the lead in using the RtoP frame to lobby for more international assistance to refugees, from northern states that have shown a commitment to RtoP but have not yet or insufficiently contributed to the RRP. The addition of calls from


these states, to those of host states in the region would help make an international response to the Syrian refugee crisis more of a global priority. More generally, India, Brazil and South Africa are good candidates for spearheading the long-term institutionalization of international cooperation for refugee cost-sharing under RtoP.\footnote{262}

Would the refugee focus I propose for RtoP result in new principled opposition from states that have otherwise been proponents of the doctrine? For RtoP proponent countries such as the United States, France and the United Kingdom, to oppose non-coercive action to assist refugees would strengthen the case of skeptical states that RtoP is a Trojan horse for coercive foreign intervention. Although this outcome would not benefit refugees, it would productively result in further relegation of RtoP from international relations. Although the focus of this Article is how RtoP might benefit refugee protection, there is valuable insight to be gained from states’ unwillingness to embrace my proposal even in principle. A principled rejection of my proposal by states either critical or supportive of RtoP, helps sharpen understanding of different states’ visions of the ideal international order. That said, the top three donors to the RRP are also among the leading proponents of RtoP: the United States, the European Union, and the United Kingdom. One way to read this material support for Syrian refugees is that RtoP proponent states would not, as a matter of principle, resist development of RtoP to deepen protection for a population they have shown commitment to assisting.

2. Pursuing Interest Convergence

Getting states to agree that, in principle, RtoP entails international refugee cost-sharing, is only the first step. The next step is motivating them actually to share this cost. Although some states may commit to international refugee cost-sharing solely on the basis of a principled commitment to refugee protection, other states may require additional incentives.\footnote{263} To respond to the realist account of why RtoP has

\footnote{262. Without referring to RtoP, Alexander Betts and Gil Loescher share the view that shifts in global power mean the emerging powers such as the BRICS have the potential to transform the global refugee regime. Alexander Betts & Gil Loescher, Introduction: Continuity and Change in Global Refugee Policy, 33 REFUGEE SURV. Q. 1, 5 (2014).

263. In their study of state regulation of human trafficking, Beth Simmons and Paulette Lloyd find that “actual policy implementation is contingent, calculated, and quite responsive to material costs and benefits.” Beth}
been ineffective in Syria, I propose that the doctrine can be made more effective by deploying it to leverage interest convergence.\footnote{In other words: “There is . . . an untapped interest-convergence between North and South having the potential to address the problems inherent in a system of individuated state responsibility.”\textsuperscript{264} Hathaway & Neve, supra note 12.}

This is consistent with research showing that international cooperation to share the cost of refugees has been successful where states have “believed that there has been a material, ideational, or institutional relationship between refugee protection . . . and their interests in security, trade, and immigration, for example.”\footnote{Betts, supra note 78, at 64.} What I propose is accounting for the self-interest of states and using it to improve the likelihood of international cooperation to achieve refugee cost-sharing. This is not the same as reducing international cooperation under RtoP to national self-interest.

Below I offer three bases for incentivizing states to cooperate under RtoP to share the cost of refugee protection: regional instability, managing migration and international security. I am less concerned with finding ways to incentivize countries surrounding a conflict to provide refugee protection because these countries typically do not have a choice. Instead regional instability, managing migration and international security are factors that could be used to motivate three types of countries. The first is wealthy countries that are geographically relatively removed from high conflict regions such as northern states including the United States, Canada, Australia, and western European countries. The second category is wealthy countries that despite some geographic proximity to conflict have not historically hosted disproportionately high numbers of the global refugee population such as the Gulf Cooperation Council countries.\footnote{These countries are Saudi Arabia, Kuwait, Bahrain, Qatar, the United Arab Emirates, the Sultanate of Oman, and Yemen. Betts and Loescher have described GCC states as “new humanitarian donors” in the context of refugee protection. Betts & Loescher, supra note 262, at 6. They have contributed to funding the RRP6, and Kuwait especially has been among the biggest donors to the RRP. 2014 SYRIA REGIONAL RESPONSE PLAN STRATEGIC OVERVIEW: MID-YEAR UPDATE 9 (2014), http://www.unhcr.org/syriarrp6/midyear/docs/syria-rrp6-myu-strategic-overview.pdf. The RtoP-based framework I propose would establish contribution benchmarks that fundraisers could use to spur} The third category is China and Russia, which by virtue

of being veto-holding members of the UN Security Council play an outsized role in shaping international responses to mass atrocities. Both these countries have publicly played a limited role in funding or facilitating international funding for refugee protection relative to their means and influence.

a. Regional Instability

When mass displacement triggers the international community’s responsibilities under RtoP, this displacement will likely also pose a threat to regional stability if the international community fails to assist meaningfully with shouldering the cost of refugee protection. The conflict in Syria is a case in point. As discussed above, both the volume and composition of the Syrian refugee population is destabilizing the Middle East, as host countries in the region fail to meet the needs of these refugees and their host communities. Without international assistance to the nations hosting the refugees, the economies, and social and political fabrics of these nations are unraveling. In Lebanon there is the risk of further sectarian violence and in all five host countries anti-refugee sentiments are fueling tensions that may breed violence.

Regional instability in the Middle East implicates the national interests of key players within the region and within the international community. Under the RtoP frame the UN Refugee Agency in partnership with host governments, could do more to take advantage of the national interest that wealthy or larger contributions from GCC countries. GCC countries do not dominate the list of top donors to the RRP but, the RRP does not capture their full contribution to the Syrian refugee protection effort. Media outlets regularly report sizeable bilateral donations to regional refugee hosts, and even directly to Syrian refugee communities. See, e.g., Gulf Countries: Growing Aid Powers, IRIN (Sept. 17, 2014), http://www.irinnews.org/report/100625/gulf-countries-growing-aid-powers (noting that countries like Saudi Arabia and Kuwait are increasing their humanitarian aid); UN Lauds UAE Aid to 99,000 Syrian Refugees, NATIONAL (Mar. 19, 2015, 7:36 PM), http://www.thenational.ae/uae/government/un-lauds-uae-aid-to-99000-syrian-refugees (discussing the UN aid package delivered to Syrian refugees living in Jordanian refugee camps). But see James Cusick, Exclusive: Syrian Aid in Crisis as Gulf States Renege on Promises, INDEPENDENT (May 5, 2013), http://www.independent.co.uk/news/world/middle-east/exclusive-syrian-aid-in-crisis-as-gulf-states-renege-on-promises-8604125.html (arguing Arab states and aid groups have failed to deliver their promised aid).

powerful states within and outside of the region have in region stability.

The geopolitical importance of the Middle East has meant that even states with fraught relationships have been willing to cooperate to maintain a measure of stability in the region. One example of this is the surprising move in 2013 towards cooperation between the United States and Russia to convince President Assad to relinquish chemical weapons, which stands in stark contrast to the adversarial relationship between the two countries on the issue of military intervention.\(^{268}\) This example suggests that moving beyond military intervention may create space under RtoP for international cooperation on other important measures to protect populations at risk of mass atrocities, especially where regional stability is at stake.\(^{269}\)

A significant shortcoming of relying on the national interest in regional stability, is that there are regions in the world in which many other members of the international community have little interest. The Syrian crisis is not the only crisis to have caused regional instability. Crises in Libya, the Central African Republic, South Sudan and Mali, to name a few, have all caused mass displacement that both requires international cooperation under RtoP and threatens regional stability. Not all regional instability, however, will implicate the national in-


terests of many of the states whose cooperation is required to fund refugee protection. For example, the array of states that have a national interest in the regional stability of the Middle East may view themselves as having far less of a stake in the collapse of the Central African Republic and the regional instability that displacement from the conflict has caused. As a result, using state interest in regional stability to motivate international cooperation will unfortunately make this cooperation more likely in some parts of the world but not in others.

b. Managing Migration

More comprehensive international cost-sharing for in-region refugee protection can be framed as an important strategy for managing unauthorized migration to northern states. For many northern states, immigration control is a policy priority. Anti-immigrant sentiment in some northern states is powerful enough to shape policy even in countries that relatively small numbers of asylum seekers and unauthorized migrants. At the same time, due in part to growing levels of international mobility, mass displacement has increasing repercussions for regions geographically distant from the conflicts causing the mass displacement.

The failure of the international community to assist with cost-sharing creates untenable conditions in the region for Syrian refugees, forcing them to risk their lives and journey further to escape. For example, between 2013 and 2014, the number of forced migrants attempting to reach Italy by boat quadrupled, and Syrian refugees are a significant part of the reason for this. As the Syrian crisis enters its fifth year, conditions in the region are increasingly fueling forced migration

270. Strengthening in-region protection is not a substitute for complying with obligations that these states have under international refugee or human rights law to protect refugees and other migrants arriving in their territories. U.N.H.C.R., EXPERT MEETING, supra note 190 (“International cooperation is a complement to states’ protection responsibilities and not a substitute for them.”). It instead reflects the reality that in many cases it is neither desirable nor feasible to resettle large numbers of refugees far away from their countries of origin.

271. Australia is an example of such a country.


beyond the Middle East.\textsuperscript{274} Regional hosts are imposing restrictions on refugee access to their territories.\textsuperscript{275} Conditions for those refugees that do settle in the region are increasingly harsher as they struggle to meet their basic needs, and as they confront xenophobic discrimination.\textsuperscript{276} Reports document greater numbers of Syrian refugees crossing the Mediterranean ocean to seek refuge in Europe as they escape a region whose capacity to host them is severely strained.\textsuperscript{277} As mentioned above, only a small number of European countries have shown willingness to grant Syrian refugees asylum and countries at Europe’s frontier with the Middle East have actively taken measures to repel Syrian refugees. But with the continuing growth of the refugee population and the lack of resources to support this population in the region, Syrians are endangering their lives in greater numbers to get to Europe, with increasing success.

It is in the interests of European states especially to invest in better in-region protection of Syrian refugees. It is also in their interest to develop a comprehensive plan for the protection of Syrian refugees arriving in Europe that does not leave it to frontier European states alone to accommodate these refugees. Well-funded, in-region protection and a comprehensive plan for asylum seekers arriving in Europe will serve the interests of Syrian refugees and of European states. Indeed, following the increase in Syrian and other refugees traveling to Europe in August and September 2015 European leaders pledged an additional 1 billion euros to the UN Refugee Agency and the

\textsuperscript{274} See Worsening Conditions Inside Syria and the Region Fuel Despair, Driving Thousands Towards Europe, U.N.H.C.R. (Sept. 8, 2015), http://www.unhcr.org/55eed5d66.html (discussing how events such as the mortar attacks on Damascus and vehicle explosions in various cities have caused people to migrate).

\textsuperscript{275} See id. (“Syrians now face increasing challenges to find safety and protection in neighbouring countries, which, faced with overwhelming refugee numbers, insufficient international support and security concerns, have taken measures this year to stem the flow of refugees—including restricting access or closer management of borders and introducing onerous and complex requirements for refugees to extend their stay.”).


\textsuperscript{277} Between April 2011 and September 2015, 512,909 Syrians applied for Asylum in Europe. More than half of those, 290,753 Syrians, have applied for asylum in 2015 alone. See Europe: Syrian Asylum Applications, supra note 73.
World Food Program for Syrian refugee in-region assistance. \footnote{276}{See Banulescu-Bogdan & Fratzke, supra note 68.} This suggests that further issue-linking between the need for international cooperation and the interests of international actors may result in more material support for Syrian refugees.

Of course, as with regional stability, international migration concerns of northern states will not be equally salient for all mass displacement crises.

c. International Security

International security concerns arising from mass displacement are related to regional stability and international mobility. Political and economic collapse in the Middle East threatens the national security even of countries geographically remote from the region. Syrian refugees in the region forced into starvation, for example, are more vulnerable to recruitment by radical terrorist organizations and organized crime rings. \footnote{279}{Benedetta Berti, Syrian Refugees and Regional Stability, CARNEGIE ENDOWMENT FOR INT’L PEACE (Feb. 5, 2015), http://carnegieendowment.org/sada/index.cfm?fa=show&article=58979.}

To be clear, a key driver of the international security and other concerns I raise here is the failure of the international community to assist a refugee population in dire need. \footnote{280}{Of course the conflict in Syria is the fundamental driver of the displacement crisis. But as mentioned earlier, many foreign nations are complicit in the violence in Syria.} Yet issue-linking regional instability, migration management, and international security to refugee cost-sharing as a means of motivating international cooperation is admittedly risky. All three may be manipulated to cast refugees themselves as inherently threatening to a given region and the world beyond it, as opposed to what I propose here, which is recognizing the failure of international cooperation as the true threat. Highlighting regional stability, migration and security concerns may have the perverse effect of entrenching anti-refugee sentiments all over the world, and in the case of refugees from the Middle East, reinforcing pernicious racism and islamophobia, resulting in policies that worsen the circumstances of Syrian refugees. \footnote{281}{Chimni warns of the transformation of “the language of burden sharing” into “a language of threats to the security of states.” B.S. Chimni, Globalization, Humanitarianism and the Erosion of Refugee Protection, 13 J. REFUGEE STUD. 243, 252 (2000). For a detailed argument against the securitization of refugee protection, see B.S. Chimni, The Global Refugee Problem in the 21st Century and the Emerging Security Paradigm: A Disturbing Trend, in THE LEGAL VISION OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE}
Already there have been questionable efforts by lawmakers in the United States to limit its assistance to Syrian refugees on account of ostensible terrorism-related concerns, despite executive branch assurances that assistance can be extended without jeopardizing US national security.\textsuperscript{282} It will fall to issue-linking actors such as the UN Refugee Agency, with the assistance of domestic and international refugee protection “norm entrepreneurs” to refocus attention on how the failure of international cooperation itself is a key threat. Already private citizens, civic organizations and even mayors in the United States have begun to articulate a counter-narrative rejecting Islamophobic opposition to Syrian refugees, emphasizing common humanity and their government’s capacity to screen national security threats while assisting refugees.\textsuperscript{283} These actors will have the difficult task of highlighting the dangers of a poorly managed refugee crisis while at the same time combatting attempts to vilify refugees. The alternative is the status quo, where the continuing failure of the international community to assist with refugee cost-sharing is creating the very

\textsuperscript{282} See, e.g., Kathleen Newland, \textit{The U.S. Record Shows Refugees Are Not a Threat}, MIGRATION POL’Y INST. (Oct. 2015), http://www.migrationpolicy.org/news/us-record-shows-refugees-are-not-threat (“The United States has resettled 784,000 refugees since September 11, 2001. In those 14 years, exactly three resettled refugee have been arrested for planning terrorist activities—and it is worth noting two were not planning an attack in the United States and the plans of the third were barely credible.”); U.S. Tightens Approval of Syrian Refugees Among Terror Concerns, CCTV AMERICA (Feb. 23, 2015), http://www.cctv-america.com/2015/02/23/u-s-tightens-approval-of-syrian-refugees-among-terror-concerns (reporting U.S. State Department and the FBI assurances that refugee screening procedures are intensive and adequate).

conditions that fuel the instability and insecurity that domestic and international actors should seek to avoid at all costs.

CONCLUSION

When he launched the fundraising campaign for the Syrian regional refugee crisis, the UN High Commissioner for Refugees provided some perspective on the total figure required at that time:

It represents what the Americans spend in ice cream in 32 days. It represents what the Australians spend in overseas travel in 32 weeks. It represents what German drivers spend on petrol in six weeks. I don’t recall any bail out of any average dimension bank in the western world that has not cost 5, 6, 7 or 10 times more. So, what we are asking for is indeed massive from the point of view of what is normally the support given by the international community to humanitarian needs. But it is really . . . very little compared to what is spent on other purposes in other parts of the world.  

The failure of international cooperation to protect Syrian refugees is not rooted in an absolute lack of global resources. The same can be said of every other refugee crisis the world has confronted. A key challenge to overcoming the endemic maldistribution of refugee protection cost and responsibility in the international system has been the absence of an institutional frame within which international actors can be motivated to pursue this cooperation. In this Article, I have argued the RtoP can play an important role in alleviating this problem (even if it cannot solve it) by providing an institutional frame for international cooperation where refugees are fleeing RtoP crimes. I have also made the case that reaping whatever benefits RtoP may hold, requires an approach to the institutional development of the doctrine that pursues both interest and norm-convergence.

If states resist the use of RtoP for refugees in the manner that I have proposed as a matter of principle, the terms of their resistance are nonetheless useful. Consider the BRICS, which fear that RtoP may be a neo-imperial wolf in sheep’s clothing. If these states oppose the application of RtoP to assist southern states with refugee protection, they will require a more nuanced articulation of the basis of their suspicion of RtoP, or risk undermining their own campaigns for a more globally responsive international order. This nuance can then inform how scholars approach reform of the legal regime regulating international responses to mass atrocities in a way that addresses

the principled concerns of southern states. For states such as Canada, the United States, France and the United Kingdom, opposition to my proposal strengthens concerns by southern states that the latter are not the intended beneficiaries of the international legal regime. Opposition would also further legitimate normative opposition to RtoP.

If states were to adopt my proposal, the circumstances of a significant proportion of current and future refugees would be greatly improved. However, the plight of refugees fleeing danger from non-RtoP crimes would remain unchanged. For this and many other reasons, the international legal regime regulating forced migration requires a comprehensive overhaul in order to ensure the rights of forced migrants and those of citizens of receiving states. Until this overhaul occurs, there is an urgent need for experimentation with existing “tools” such as RtoP, to mitigate the devastation and human suffering that refugee crises otherwise inevitable produce.
THE FACT OF XENOPHOBIA AND THE FICTION OF STATE SOVEREIGNTY:
A REPLY TO BLOCHER AND GULATI

BY

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

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ABSTRACT

This Essay argues the shortcomings of a debt-based market solution to the problem of global refugee responsibility sharing, shortcomings that originate in the fact of widespread xenophobia, and the legal fiction of state sovereignty. In Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis, Joseph Blocher and Mitu Gulati argue that global refugee admissions would be improved if refugee-receiving countries could enforce “refugee debt” against refugees’ countries of origin for each refugee admitted by the receiving countries. This Essay responds to that proposal, simultaneously addressing themes of general and significant importance in international refugee scholarship.

Fact and Fiction’s first contribution is to bring important nuance to the problem of refugee admissions that has implications for the success of refugee debt in solving the global refugee admission deficit. This nuance concerns who the priority targets of a proposal such as refugee debt ought to be in light of global displacement trends. I show why—if equity and sustainability concerns are taken into account—the priority targets of a proposal to increase refugee admissions are countries in the global north. Thereafter I argue that the problem of xenophobia—especially in the global north—makes it highly unlikely that the changes in rational incentives at the heart of refugee debt would result in a corresponding increase in refugee admissions. Identifying this efficacy concern is the second contribution of this essay.

The final contribution of Fact and Fiction is to challenge the normative appeal of the world that refugee debt would create. I show how the legal fiction of state sovereignty, which operates centrally in the refugee debt concept, interacts with the geopolitics of refugee displacement to generate counterproductive consequences. Holding refugees’ countries of nationality solely liable and culpable for refugee displacement ignores the reality that refugee displacement often implicates multiple sovereigns. This creates a complex accountability matrix within which liability and culpability cannot fall solely on the territorial sovereign. I argue that refugee debt risks reproduction of the very dynamic that compromises global refugee protection today: global south countries would continue disproportionately to bear the cost of global refugee protection, while hegemons in the north would escape liability for (and perhaps even profit from) their direct involvement in producing refugee displacement.

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INTRODUCTION

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

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At the same time, international financial and other assistance to the regional hosts remains dismal, as evidenced by the UN inter-agency response, which in collaboration with countries in Syria’s vicinity seeks to provide protection and assistance to millions of Syrian refugees in the Middle East. Notwithstanding the serious global implications of continuing neglect of the Syrian refugee crisis, this regional protection and assistance plan remains
tively well-resourced regional community to host far more than the 1.2 million Syrian refugees currently seeking protection there.\(^3\) Elsewhere, the Kenyan government is threatening to close the world’s largest refugee camp, in part due to the disproportionate share of the responsibility of assisting refugees it currently bears.\(^4\)

Despite these and other examples, the existing international refugee regime provides no widely accepted legal obligation for third states to assist refugee hosting states with the cost and responsibility of hosting refugees.\(^5\) This is the case notwithstanding the scale or causes of the refugee crisis. The current international response to massive contemporary refugee crises is untenable, and addressing this problem calls for, among other things, international legal and policy innovation.\(^6\)

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

The authors locate the solution to addressing the unmet need for refugee protection as lying in decreasing incentives of countries of origin to create refugees, and increasing incentives for refugee hosting countries (receiving

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\(^3\) [Syria Regional Refugee Response, UNHCR.ORG](http://data.unhcr.org/syrianrefugees/regional.php). This figure includes Syrian refugees in Switzerland and Norway, which are not part of the European Union.

\(^4\) Karanja Kibicho (Kenyan Principal Secretary for the Interior), *As the Kenyan Minister for National Security, Here’s Why I’m Shutting the World’s Biggest Refugee Camp*, THE INDEPENDENT, May 9, 2016 available at [http://www.independent.co.uk/voices/as-the-kenyan-minister-for-national-security-heres-why-im-shutting-the-worlds-biggest-refugee-camp-a7020891.html](http://www.independent.co.uk/voices/as-the-kenyan-minister-for-national-security-heres-why-im-shutting-the-worlds-biggest-refugee-camp-a7020891.html). See also Chimni, *Law and Politics*, supra note 2, at 4 (“The lack of the Western world’s commitment to burden sharing is the principle reason why African States no longer display the same kind of solidarity with refugees as they did in the past.”).


\(^6\) Even in the absence of new law or formal policy, robust political commitment to equitable and responsibility sharing would solve many of the problems confronting the international refugee regime. Nonetheless, as I have explained in more detail elsewhere, international legal regimes can serve as influential frames for achieving responsibility sharing. *Id.* at 687, 704-706.
states) to accept more refugees. According to the authors, “[t]he challenge is to make someone want the unwanted.” Their proposal for doing so is specifically to target and increase the economic and reputational incentives that states have for accepting refugees. For my purposes it is important to highlight that the Proposal’s intervention specifically seeks to increase refugee admissions as opposed to other refugee protection and responsibility sharing measures such as third state funding for countries already hosting refugees. Starting from the premise that a non-trivial barrier to states accepting refugees is economic cost, the authors advance a market-based proposal that would give receiving states enforceable financial claims against countries of nationality of any refugees these receiving states accepted on their territories. Essentially, the rationale is that by granting receiving states a financial claim enforceable against refugees’ countries of nationality, states across the globe will have an economic incentive to admit refugees into their territories.

The authors stipulate that any compensation that receiving states might claim from countries of nationality is unlikely fully to offset the economic costs of accepting refugees. Instead, a vital component of the incentive structure is the “good global citizen” reputational effects that receiving states would accrue by accepting refugees. According to the authors: “[t]he fact that the debt here would be owed by an oppressive country of origin—a quintessential bad actor—even the act of collecting it could be seen as a way of standing up for international norms, rather than simply pursuing self-interest.”

Conversely, the Proposal is designed to create displacement disincentives for refugees’ countries of nationality. By creating a “financial claim running in favor of the refugees and against their parent nation[,]” the authors propose

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8 *Id.* (“From the perspective of host nations, accepting refugees typically means feeding, clothing, and sheltering them, and giving them access to social services like education.”).

9 More precisely, “[t]he international community would give persecuted refugee groups financial claims enforceable against the countries that expelled them[,]” *Id.* at 6, but these financial claims would effectively rest with the receiving state as a means of incentivizing that state to provide refugee to individuals fleeing persecution.

10 *Id.* at 11. (“That incentive comes in the form of a financial claim against the nations who are responsible for creating the problem in the first place, and would supplement the factors that drive nations to accept refugees in the current system—likely a combination of altruism and reputational benefits that go with nations showing themselves to others as being a good global citizen.”).

11 *Id.* at 12.
that states from which refugees originate are less likely to produce refugee flows. For those concerned that “quintessential bad actor” refugee producing countries would simply ignore refugee debt held by receiving states, the authors propose a range of pathways to enforcement largely relying on countries of nationality’s dependence on international financial markets, especially their need for access to credit.

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

There is a lot one might say in response to this provocative though ultimately disquieting Proposal. Its greatest value is arguably the deep reflection it engenders regarding the existing international refugee regime and the difficult, sobering tradeoffs and realities that genuine efforts to alleviate human suffering in this context may entail. Readers of the Proposal will encounter much to ponder. In this Essay, however, I confine myself to interrogation of three aspects of the Proposal. First, I introduce important nuance to the problem the Proposal addresses. Doing so helps clarify the class of states that ought to be the priority targets of its strategy for increasing refugee admissions. Secondly I question the Proposal’s feasibility by arguing that the problem of xenophobia, especially in priority target states, makes it highly unlikely that the changes in rational incentives at the heart of the Proposal would result in a corresponding

12 Id. at 38.

13 “So long as the market recognizes the refugee debt as valid, the oppressive nation cannot ignore it. The fact that US courts have essentially shut down Argentina’s access to the international financial markets for more than a decade now, despite Argentina’s need for foreign currency, is Exhibit A.” Id.

14 Id. at 27.

15 The narrow focus of my Essay leaves to others engagement with, for example, questions regarding the persuasiveness of the legal building blocks that underlie the claim of refugee debt, or regarding technical and operational details of the Proposal.
increase in refugee admissions. Finally, setting aside questions of feasibility, I challenge the normative appeal of the world the Proposal would create. I do so by bringing into view the dangerous ways the Proposal’s operative legal fiction of state sovereignty (and other features of statehood) interact with the geopolitics of refugee displacement to undermine the Proposal’s goals of holding responsible sovereigns liable and culpable for this displacement. I argue that these dangers are only compounded by the Proposal’s injection of private financial actors such as vulture funds into the international refugee regime. In sum, my view is that the Proposal’s costs far outweigh any benefits we might associate with it.

I. Specifying the Problem: The Global Distribution of Refugees

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

Displacement statistics reflect this reality—at the end of 2015 eighty-six percent of the global refugee population or 13.9 million refugees resided in the global south, confined largely to regions housing the majority of conflicts and persecution driving refugee movements. Consider the fact that fifty-four percent of the global refugee population comes from Syria, Afghanistan, and Somalia. Correspondingly Turkey, Pakistan, Lebanon, Iran, Ethiopia, Kenya and three other global south countries host almost sixty percent of the global refugee population. According the UN Refugee Agency, “the Least Developed Countries—those least able to meet the development needs of their own citizens, let alone the humanitarian needs associated with refugee crises—provided asylum to over 4 million refugees [in 2015].” The reasons that

16 UNHCR, UNHCR GLOBAL TRENDS 2 (2015) available at http://www.unhcr.org/576408ca7.pdf. This is a trend that has been in effect at least for the last decade and a half.

17 Id. at 3.

18 Id. at 18.
neighboring states accept refugees differ. They range from solidarity with vulnerable refugees on one end of the spectrum, to sufficient lack of territorial control that refugees fleeing conflict successfully penetrate porous borders in significant numbers on the other. In important respects, the vitiated territorial sovereignty of global south countries means that many often have no choice as to whether or not refugees enter their territories. My point here, is that typically when these global south countries neighboring conflict cite legitimate capacity or equity concerns as a basis for refusing to accept additional refugees, it is neither equitable, sustainable nor pragmatic to push for further refugee admissions on their part as the solution.

As a result, on the question of intake, generally speaking it is the global north that is resoundingly failing refugees. A key means through which refugee populations are geographically redistributed under the international regime is the resettlement of refugees from the countries that have granted them refugee status to third states that volunteer to relocate these refugees on their territories. In 2015, the number of these resettled refugees collectively admitted by countries such as the United States, Canada, Australia and Norway amounted to a grand total of 107,106 in a year when 1.8 million refugees were newly displaced. This amounts to a mere 0.06% of the global total of newly displaced. The key targets of the author’s proposal, therefore, and the targets with the capacity to make a meaningful difference are countries in the global north and other hegemons, the most powerful of which are also often implicated in producing the most intractable refugee flows. These observations are especially relevant because for global north countries—the appropriate priority targets of the Proposal—capacity and other economic calculations are proving to be

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19 See e.g. Chimni, supra note 2, at 6 (noting lack of control over national borders in South Asia as a factor in refugee admissions).

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

21 Scholars responding to earlier market-based refugee responsibility sharing proposals emphasized then, too, the vital role of global north countries in precipitating crises in refugee responsibility-sharing. Deborah Anker, Joan Fitzpatrick, and Andrew Shacknove, Crisis and Cure: A Reply to Hathaway/Neve and Schuck, 11 HARV. HUM. RTS. J. 295, 297-298 (1998).


23 Id. at 2.

24 The non-global north hegemons to which I am referring include the Gulf Cooperation Countries, many of whose financial and other assistance to global and regional refugee crises remains difficult to determine as it largely occurs outside of the United Nations framework.
firmly secondary to other considerations that remain impervious to the Proposal’s market-based solution.

II. Market-Based Incentives and the Problem of Xenophobia

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

Of all forms of refugee protection, the admission of refugees into a given state’s territory is arguably the most susceptible to opposition rooted in xenophobia and other anti-foreigner attitudes that seem largely immune to objective economic and reputational incentives. This is the especially the case in the global north where such attitudes are ascendant in many of the countries that are delinquent in terms of refugee admissions. A significant barrier to higher refugee admissions in EU, the United States, and Australia, for example, is xenophobic discourse and rhetoric which legitimate existing and growing policies of refugee exclusion. In reference to the EU, even the head of the

25 Jaya Ramji-Nogales challenges this sort of assumption arguing that for the United States, Australia and countries in the European Union resistance to refugees is not objectively based in capacity concerns when the relevant data is brought to bear. Jaya Ramji-Nogales, Migration Emergencies, HASTINGS L.J. (forthcoming 2016).
26 Blocher & Gulati, supra note 7, at 18.
27 Achiume, supra note 1, at 747-759.
28 International cooperation to protect and assist refugees can take other forms such as financial or other contributions to international agencies responding to refugee movements, or to other countries that have admitted refugees but require assistance to address the needs of these admitted refugees.
29 See e.g. Jaya Ramji-Nogales, History, Hysteria, and Syrian Refugees, JUSTSECURITY.ORG (Nov. 12, 2015), https://www.justsecurity.org/27803/history-hysteria-syrian-refugees/. The of Poland’s government has, for example, accused refugees of “bringing ‘various parasites and protozoa’ to Europe,” Matt Broomfield, Poland Refuses to Take a Single Refugee Because of ‘Security’ Fears, THE INDEPENDENT (May 9, 2016), http://www.independent.co.uk/news/world/europe/poland-refuses-to-take-a-single-
World Bank has publicly stated that excluding refugees is economically counter-productive for European countries in the throes of demographic decline, and he has gone so far as to describe Europe’s exclusion of refugees as xenophobic.\textsuperscript{30} Consider that the entire European Union, which comprises twenty-eight countries has admitted about 1.2 million Syrian refugees,\textsuperscript{31} whereas the four regional host countries are hosting over 4.5 million.\textsuperscript{32} Or consider the fact that the United States has admitted a total of 10,000 Syrian refugees,\textsuperscript{33} and Australia 2,000, whereas Lebanon, a far smaller and more fragile state has admitted the equivalent of a quarter of its population in Syrian refugees.\textsuperscript{34}

The authors acknowledge that xenophobia may diminish the viability of their Proposal, but relegate this and related problems to the margins\textsuperscript{35} when in fact it presents one of the most daunting challenges to increasing refugee admissions today. Notwithstanding economic and reputational incentives, anti-refugee motivated popular and political assertions of the sovereign right to

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refugee-because-of-security-fears-a7020076.html, and “of ‘bringing in all kinds of parasites, which are not dangerous in their own countries, but which could prove dangerous for the local populations’ in Europe.” Id. All of this rhetoric has supported resounding exclusion of Syrian refugees.

\textsuperscript{30} Phil Thornton, \textit{Bank Slams European ‘Xenophobia’ As It Sets Out New Refugee Strategy}, GLOBAL CAPITAL (Oct. 11, 2015), available at http://www.globalcapital.com/article/yvxxm9tv88zb/bank-slams-europeanxenophobia-as-it-sets-out-new-refugee-strategy (quoting the World Bank’s President as saying “Many advanced economies have increasingly advanced aged populations, a rapidly shrinking workforce and very low birth rates so they need migrants and it should be part of their economic strategy to recruit the kind of immigrants that will help them[.] . . . Xenophobia is actually a very bad economic strategy[.]”).

\textsuperscript{31} See supra note 3. This figure includes Syrian refugees in Norway and Switzerland, which are not EU countries.


\textsuperscript{34} \textit{Australia Resettles Only a Sixth of Promised Syrian Refugee Intake}, THE GUARDIAN (Sept. 1, 2016), https://www.theguardian.com/australia-news/2016/sep/02/australia-resettles-only-a-sixth-of-promised-syrian-refugee-intake.

\textsuperscript{35} Blocher & Gulati, supra note 7, at 18 (“Overcoming the cost objection will not result in acceptance of all refugees—many will still be rejected because of security concerns, xenophobia, or other reasons. But any marginal change in incentives should lead to a corresponding marginal change in outcomes.”).
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exclude have undercut attempts by executives to admit refugees. In short, there is good reason to doubt marginal changes in economic or other incentives will result in more refugee admissions in particular, given that this form of refugee assistance is arguably the most susceptible to override by xenophobic and other discourses notably ascendant in countries across the globe that arguably should be doing more to ease the regional containment of refugees. It is conceivable that monumental increases in economic incentives above some threshold might overcome xenophobic resistance, but the Proposal does not advocate refugee debt at levels that would even be sufficient merely to offset costs of admission. In my view, it’s unlikely that economic benefits insufficient to offset admission costs would counter xenophobic opposition to refugee exclusion.

III. But What if it Worked?

What if pragmatic concerns regarding the Proposal’s implementation, such as the one I raise above, are set aside? Accepting the Proposal on its face, I question deeply the soundness of its normative implications, specifically in the context of geopolitics that not only constrain the operation of international law and cooperation, but that also inform international law’s fundamental concepts. At the heart of the Proposal is the presumption that the country of a refugee’s nationality is also the sovereign that ought to be held liable and culpable for producing refugee flows. Depending on context, in international law the terms liability and responsibility may be used interchangeably to mean the same thing, and need not connote the fault or moral blameworthiness that culpability

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

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


39 Refugee debt claims run against the country of nationality. Blocher & Gulati, supra note 7, at 19.
implies.\textsuperscript{40} The evolving international doctrine of the responsibility to protect (RtoP), which I have argued could play a beneficial role in enhancing international refugee responsibility sharing, offers an example of responsibility divorced from culpability.\textsuperscript{41}

The Proposal, however, trades heavily on liability and responsibility as strongly connoting blameworthiness and normative condemnation laid solely at the feet of refugees’ countries of nationality. It identifies the country of nationality as the “quintessential bad actor” and this seems the case irrespective of where true culpability lies for refugee displacement.\textsuperscript{42} For the Proposal, a critical, operative legal fiction is thus that of territorial state sovereignty. Because of it, the authors are willing to presume countries of nationality have near total or at least sufficient control over their territories to be held financially and normatively accountable for displacement due to persecution and violence.\textsuperscript{43}

In this regard, the Proposal goes further than international refugee law as embodied in the 1951 Refugee Convention and its Protocol. International refugee law conditions international protection of refugees on the inability or unwillingness of a person’s country of nationality to protect her from persecution and from certain forms of human rights violations.\textsuperscript{44} However, it does not

\textsuperscript{40} \textsc{Peter Malanczuk,} Akehurst’s Modern Introduction to International Law 254 (7th Revised Edition 1997). The evolving international doctrine of the responsibility to protect (RtoP), which I have argued could play a beneficial role in enhancing international refugee responsibility sharing, offers an example of a case where responsibility is divorced from culpability. Significantly, RtoP offers a basis for tying responsibility for refugee protection to the hosting capacity of states within the international order.

\textsuperscript{41} RtoP offers a basis for tying responsibility for refugee protection to the hosting capacity of states within the international order. Achiume, supra note 1, at 730.

\textsuperscript{42} Blocher & Gulati, supra note 7, at 33 (“The financial claim against the country of origin is the fuel for our proposal[.]”).

\textsuperscript{43} “[W]e have adopted international law’s focus on territoriality, and made countries of origin a major player in our framework—in some sense, they are the antagonists in the story.” \textit{Id.} at 48. The principle of territorial state sovereignty under international law establishes a state’s “exclusive competence to take legal and factual measures within [its] territory and prohibit[s] foreign governments from exercising authority in the same area without consent.” Akehurst’s Modern Introduction to International Law supra note 40, at 75. It presumes the state sovereign has full control of its territory. \textit{Id.}

\textsuperscript{44} This position was articulated in clear terms in 2011 by the UN Refugee Agency’s Director of International Protection, Volker Turk:

“In armed conflict or violent situations, whole communities may be exposed to persecution for 1951 Convention reasons, and there is no requirement that an individual suffers a form or degree of harm which is different to others with the same profile. Furthermore, many ordinary civilians may be at risk of harm from bombs, shelling, suicide attacks or improvised explosive devices. These methods of violence may be used in areas where
create financial liability or legal culpability for the territorial sovereign (irrespective of that sovereign’s actual role in producing refugees), as the Proposal seeks to do. In so far as international human rights law or customary international law support this extra step to attribute culpability and financial liability to the territorial sovereign, it is a retrograde development to make this a salient feature of the international refugee regime, as the Proposal would. As written, the Proposal imposes culpability and financial liability solely on the territorial sovereign even where a non-state actor, a foreign sovereign, or complex structural factors beyond the territorial sovereign’s control play a pivotal role in precipitating international displacement. This approach is at odds with the geopolitics of the most intractable refugee crises of our time, which reveal both the danger that the Proposal’s reliance on the legal fiction of territorial state sovereignty introduces, and also who stands to lose the most from the Proposal’s implementation.

As I have mentioned, international refugee law is widely understood to grant protection from persecution (including from non-state actors, where the state has failed for reasons of inability or unwillingness to provide such protection), and from certain forms of violent conflict that are a fundamental driver of global refugee displacement. Such violence often implicates sovereigns other than the refugees’ country of nationality. Indeed, research suggests that refugee-producing conflict is often strongly correlated with foreign sovereign intervention. As a result, many individuals who qualify as refugees under civilians of specific ethnic or political profiles reside or gather, and for this reason, come within the scope of the 1951 Convention.”). UNHCR, Protection Gaps in Europe? Persons Fleeing the Indiscriminate Effects of Generalized Violence, UNHCR.ORG, available at http://www.unhcr.org/4d3703839.pdf.

45 Other scholars have noted that from “international refugee law perspective[, what matters is where the conflict itself takes place, with little concern for the location of its causes[,]” even though some might view the international definition of a refugee as tacitly locating the causes of refugee flows within the refugees’ country of nationality. Aristide R. Zolberg, Astri Suhrke, and Sergio Aguayo, International Factors in the Formation of Refugee Movements, 20(2) INT’L MIGRATION REV. 151, 152 (1986).


47 UNHCR, supra note 44, at 6.

48 UNHCR supra note 44 at 5.

49 See, e.g., Zolberg et al., supra note 54, at 151. (arguing that because factors external to the regime of the country of nationality such as direct and indirect foreign intervention constitute “the norm rather than the exception, it is appropriate to think of refugee formation as
international law owe this status to circumstances where the cast of “quintessential bad actors” does not meaningfully or exclusively comprise the government of the refugees’ country of nationality. My point here is not that territorial sovereigns from which refugees originate are blameless, but rather that they often constitute one of many non-trivially culpable sovereigns.\(^{50}\)

Returning to the three biggest refugee-producing conflicts—Syria, Afghanistan and Somalia—without question, multiple sovereigns beyond the territorial sovereigns in all three cases have been complicit in the conflict and violence that has driven displacement on the scale the world is currently witnessing.\(^{51}\) The Syrian conflict illustrates this poignantly as this conflict cannot be understood absent recognition of the full-fledged proxy war that regional hegemons such as Saudi Arabia and Iran and more distant hegemons such as Russia and the United States are waging in that country. Even from a historical perspective, the production of mass refugee flows typically been a multi-sovereign affair.\(^{52}\) Yet under the Proposal, receiving states accepting refugees from these countries would hold debts enforceable, for example, only against the Syrian

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\(^{50}\) As B.S. Chimni writes, “While internalist explanations are relevant, they are one-sided and do not capture the complex reality of the root causes of refugee flows.” Chimni, Geopolitics of Refugee Studies, supra note 46, at 360.


\(^{52}\) See supra note 49.
government, debts generated on the theory that that as the territorial sovereign, Syria is the “producer” of refugees.\textsuperscript{53}

Whatever one might conclude about President Assad’s regime, attributing to it full moral culpability and financial liability for the displacement of Syrian refugees is to elide the significant role of many other sovereigns directly instrumental to the production of refugee flows. Furthermore, under the Proposal, nothing would bar the perversity of Russia, the United States or Saudi Arabia from presenting themselves in the queue to enforce refugee debt against a post-conflict Syria, for any Syrian refugees in their territories, notwithstanding these foreign sovereigns’ complicity in the Syrian conflict. Russia could even do the same with respect to Ukraine for the at least 312,000 thousand Ukrainians that have sought asylum in its territory,\textsuperscript{54} notwithstanding Russia’s central role in the creation of Ukrainian refugees.\textsuperscript{55}

The authors suggest that a variation on their proposal might seek the functional equivalent of joint and several liability for all sovereigns implicated in refugee flows\textsuperscript{56} but this, too, should raise concerns. Even if it were possible accurately to apportion liability and culpability among sovereigns for international displacement driven by complex, opaquely waged conflicts,\textsuperscript{57} it is diff-

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


\textsuperscript{55} The same dynamics might play themselves out where a receiving state seeks to enforce refugee debt against a country in which it exerts non-military influence that nonetheless may have an impact on refugee flows. Consider the following example. In the wake of political, economic and violent turmoil in Zimbabwe in the 2000s, many Zimbabweans sought refuge in South Africa where they claimed refugee status. During this period, South Africa played a key role in mediating the political conflict at the root of the displacement, and commentators questioned South Africa’s incentives in its mediation role given the economic benefits that country gained from the implosion of Zimbabwe’s production economy. One could argue that giving South Africa enforceable refugee debt against Zimbabwe would have introduced further questionable incentives to its role of mediator.

\textsuperscript{56} “But the logic of our proposal might be read to support a different kind of right to remedy, one whose duty belongs not necessarily to the country of origin, but to the nation responsible for creating the refugees in the first place. In some case, fault—and therefore obligation—could lie outside the borders of the country where the refugees originated.” Blocher & Gulati, supra note 7,at 48.

\textsuperscript{57} On this point an article by Hannah Garry is instructive in which she explores the international legal bases for holding sovereigns liable for refugee displacement. She argues that the United Nations Draft Articles on State Responsibility can be read to support legal
cult to imagine an international forum—agreed to by the world’s states—that would have and exercise the de jure and de facto authority to hold global hegemons liable for refugee debt. Despite the formal equality of all states under international law, state sovereign equality is in reality a myth. Consider the numerous ways that powerful countries such as the United States can and have shielded themselves from liability for international crimes before the International Criminal Court by relying on geopolitical hierarchies entrenched in the international order.\textsuperscript{58} There is little reason to think the UN Security Council or even the UN Refugee Agency (which relies on voluntary donations by powerful countries to fund its activities) would step in to hold hegemons liable and culpable for refugee debt in the manner the authors envision, given the geopolitics that frame and inhere in the international system.

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

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

\textsuperscript{58} See United Nations Security Council Resolutions 1422 and 1487, which shielded nationals of a subset of countries not party to the Rome Statute (such as the United States) from ICC prosecutions, despite UN Security Council referrals subjecting nationals of Sudan and Libya (neither of which are parties to the Rome Statute) to international criminal liability.

\textsuperscript{59} Indeed another scholar has made the case that obscuring the role of non-territorial sovereigns in producing refugee flows makes it easier to undermine efforts to persuade those sovereigns to resettle refugees in their territories as a means of accounting for their complicity. Chimni, Geopolitics of Refugee Studies, supra note 46, at 361.
rial regimes presumed to bear full responsibility for displacement of its citizens. Once the role of foreign sovereigns is brought into view, for example, the dangers of such an approach is evident. U.S. and Russian citizens arguably could do far more to change the fate of potential, future Syrian refugees, than could most Syrians in Syria right now. The power actors relevant for ending conflict and persecution are not reliably located within the territory from which refugees are displaced.

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

60 Blocher & Gulati, supra note 7, at 40.

61 See e.g. B.S. Chimni, Geopolitics of Refugee Studies, supra note 46, at 360-363 (highlighting the role of structural and historical factors central to understanding the production of refugees and using the example of refugee displacement from the Rwandan genocide as a case in point); B.S. Chimni, Law and Politics supra note 2, at 7-8 (citing studies on displacement from genocide Yugoslavia and Rwanda as rooted in “an economic environment shaped by structural adjustment policies recommended by international financial institutions.”).

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

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

63 According to the authors, the benefit of vulture funds is they “tend to have both the legal expertise and financial resources to pursue the recalcitrant sovereign’s assets in whichever jurisdictions around the world that those assets might show up.” Blocher & Gulati, supra note 7, at 35.

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

65 Id.

ballooning refugee debt borne largely by the global south territorial sovereigns that would reliably find themselves the target of refugee debt is deeply disturbing.

CONCLUSION

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

The Proposal would promote decontextualized demonization of global south states that would be saddled with refugee debt even after complicit territorial regimes were replaced with post-conflict regimes bearing no responsibility for incurring refugee debt in the first place. The Proposal would simultaneously permit elision of powerful states’ complicity in conflict and instability in the global south, and even permit these states to enforce refugee debt against territorial sovereigns. And those paying the highest price for this arrangement would be the populations remaining in refugees’ countries of nationality, even long after any territorial regime complicit in refugee flows had been replaced. To be clear, my Essay ought not to be read as a defense of oppressive territorial regimes that preside in refugee-producing countries. It ought to be read as a brief accounting of some of the costs of reducing the

http://www.ohchr.org/Documents/Issues/Development/IEDebt/VultureFundsAndHumanRights2014.pdf ("Vulture funds are frequently not only trying to accumulate wealth through speculative means to the detriment of indebted countries and their populations, but that they are likely to avoid or evade taxation by hiding their gains in secrecy jurisdictions. In doing so, they are impairing so to speak twice the ability of States to mobilize necessary resources for public spending and the realisation of economic, social and cultural rights."). Id at 3.

Under international law, the obligations of a state are typically not affected by a change in government. Akehurst’s Modern Introduction to International Law supra note 40, at 81-82.
complex culpability matrix for global refugee displacement solely to refugees’ countries of nationality via the fiction of territorial state sovereignty and sovereign equality. Even if there exist refugee crises for which this move is legitimate, the benefits of the Proposal are not severable from the overall implications it has for precisely the large conflicts that make the status quo in global refugee admissions untenable.

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