

The Appeal and Danger of a New Refugee Convention

Luara Ferracioli¹

Part I

Two important questions lie at the core of the philosophical literature on the ethics of migration: the conceptual question of who counts as a refugee, and the normative question of how states should assist those in need of asylum. With regard to the former, the Convention Relating to the Status of Refugees² specifies that refugees are persons who are living outside their country of citizenship or residence, who have suffered or have a well-founded fear of suffering persecution at the hands of their government (or groups supported by their government) in virtue of their race, religion, nationality, membership of a particular social group or political opinion (Art. 1A). With regard to the normative question, the Convention specifies that when a refugee makes her way to another country, that country is under an obligation not to return her to a country in which she is in danger of suffering persecution (*non-refoulement*, Art. 33 (1)). Taken together, these two specifications provide the basic legal framework for the current international system of refugee protection.

But do these specifications fall in line with how morality bears on matters of immigration and international assistance? Many political and legal philosophers think not. Andrew E. Shacknove, for instance, argues that the bond between the citizen and her state can be damaged in ways other than persecution, and that a proper definition of a refugee must account for the broader ways in which this bond can be cut off.³ Shacknove's own preferred definition is that of "persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international

¹ Fellow, Oxford-Princeton Global Leaders Fellow. E-mail: luara.ferracioli@politics.ox.ac.uk.

² The Convention Relating to the Status of Refugees (henceforth: Refugee Convention) was adopted in 1951. Because the Convention originally applied to European Refugees in the context of the Second World War, the international community adopted a protocol in 1967 in order to expand its geographic and temporal dimensions.

³ Andrew E. Schacknove 'Who is a Refugee', *Ethics*, 95 (1985), p. 276.

assistance is possible.”⁴ David Miller takes a similar line and argues that we should understand refugees as persons who cannot meet their basic needs in their countries of origin, and that recipient states have a duty of assistance to open their borders to those who find themselves in such dire circumstances.⁵ And finally, Mathew J. Gibnay contends that refugees are those individuals in need of a new place of residence due to the inadequacy or brutality of their state of citizenship, and that they are owed such assistance on pure humanitarian grounds.⁶

To further illustrate the shortcomings of the current Refugee Convention, consider the following real-world cases. The first involves a Somali farmer who left her land due to a severe drought in the 1980s and spent days walking towards Uganda (she even “adopted” a number of orphaned children whom she found on her way).⁷ When she finally arrived and claimed asylum in Uganda, she had her claim denied on the grounds that it did not qualify as persecution, for she had never been persecuted and had no reason to fear persecution. There was also no law in Somalia that discriminated against her on any basis and she did not belong to any religious or political group that was targeted by the authorities. In fact, the story was much simpler: she and the children were citizens of a failed state and they were starving.

The second case I want to mention involves a young Iranian homosexual, who was repeatedly sexually assaulted by a male guard, and who then had a criminal charge filled *against him* by his own assailant when the abuse came to an end.⁸ The charge stipulated the crime of homosexuality, which meant both that he was in danger of facing the death penalty, and that his sexual orientation had become known to his family, leading to humiliation and intrafamilial conflict. He then sought asylum in the United States, but had it denied on the grounds that he was not “feminine” and could “easily” avoid persecution in Iran by hiding his sexual orientation.

As these and other cases in the literature indicate, there is some strong evidence that the current refugee Convention is inapt to tackle the different

⁴ Ibid., p. 277.

⁵ David Miller, ‘Immigration: The Case for Limits’, in A. I. Cohen and C. H. Wellman (eds.), *Contemporary Debates in Applied Ethics* (Malden, MA; Blackwell, 2005), p. 202.

⁶ Matthew J. Gibnay, ‘Liberal Democratic States and Responsibilities to Refugees’, *The American Political Science Review*, 93 (1999), pp. 169-181.

⁷ Susan Harris-Rimmer, ‘Gender and Displacement: the heart of the matter’, Presented at The Herbert & Valmae Freilich Foundation (Unpublished essay).

⁸ Deborah A. Morgan, ‘Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases’, *Law and Sexuality*, 15 (2006), pp. 135-161.

vulnerabilities that can only be addressed through international migration.⁹ This is due to its *under-inclusiveness*, which limits international assistance to those who have suffered or live in fear of suffering *political persecution*. But think again of the Somali farmer and the children mentioned earlier. While it would be hard to claim that they were victims of persecution, it would be quite reasonable to contend that their inability to migrate rendered them unable to claim their most fundamental human rights. Similar difficulties burden the case of homosexuals in Iran. Given that they are culturally and legally forced to keep their homosexuality private, it is not tremendously clear that they constitute a “social group” or express a “political opinion.”¹⁰ But of course, whether Iranian homosexuals do form a social group or express any sort of collective view is to some extent irrelevant, since the important question relates to whether they are able to lead minimally decent lives *qua homosexuals* in Iran. Arguably, the inability to pursue important life plans associated with the free expression of their sexuality, and the constant fear and anxiety associated with their situation means that they do not in fact enjoy the necessary conditions for a minimally decent life.

It is therefore clear that vulnerable members of the international community are in urgent need of a more desirable refugee protection regime, one that would expand its scope so as to include those who do have a moral but not yet legal right to asylum, and those whose legal claims are currently subjected to judicial interpretation by the courts of recipient states. But in order for states to improve the current refugee protection regime, they must first negotiate a new Refugee Convention, one that

⁹ See L. W. Marshall, ‘Towards a new definition of ‘refugee’: is the 1951 convention out of date?’, *European Journal of Trauma and Emergency Surgery*, 37 (2011), pp. 61-66, Alexander Betts, ‘Survival Migration: A New Protection Framework’, *Global Governance*, 16:3 (2010), p. 364, and Aristide Zolberg, et al. *Escape From Political Violence: Conflict and the Refugee Crisis in the Developing World* (New York: Oxford University Press, 1989).

¹⁰ This question depends of course on how one interprets the conception of a social group. If we follow the United Nations High Commissioner for Refugees (henceforth: UNHCR), gay Iranians are not to be considered a social group because they do not necessarily share a “similar background, habits or social status,” in Office of the U.N. High Commissioner for refugees, ‘Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees’, U.N. Doc. HCR/IP/4 Reedited (Geneva, 1992), para 77. But if we instead follow the Wiesbaden Court in Germany, then homosexuals in Iran do constitute a social group, since the general population views homosexuals as a socially undesirable group, in Maryellen Fullerton, ‘A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group’, *Cornell International Law Journal*, 26 (1993), pp. 534-535.

would do justice to the moral claim of *all* of those who can only secure their most fundamental human rights by immigrating to another country.¹¹

Unfortunately, legal reform in the refugee protection regime seems unlikely due to the lack of motivation on the part of refugee receiving states.¹² Moreover, abandoning the current Convention presents great danger to the plight of refugees. There is strong agreement among scholars and practitioners that if states attempted to negotiate a new Convention in the current political environment, they would adopt an even weaker set of legal norms, one that would leave even more vulnerable people outside its scope. Scholar Joan Fitzpatrick explains: “[t]he reluctance of the international community to abandon the 1951 foundation reflects not only a sense that the Convention embodies indispensable and enduring values, but also a pragmatic awareness that *hoped for advances might instead dilute standards of protection.*”¹³ Philosopher Michael Dummett adds that, “any suggestion of renegotiating the Convention is dangerous: there are many signatory states that now consider its terms too generous.”¹⁴ On the face of it, legal change in the current refugee protection regime is at best infeasible and at worse perilous.

Given such stark tension between what is morally desirable and what is currently attainable, it is not surprising that philosophers have kept their discussion at the theoretical level and have not advocated meaningful legal reform in this area. But this reluctance seems to some degree complacent. If we have strong reasons to believe that the current refugee protection regime is flawed, then surely we must think hard about how we might fix it. Simply pointing out the gaps in the Convention will not do justice to all the vulnerable people who currently are (or soon will be) in urgent need of international protection. But equally, naively pushing for legal reform may lead to a situation where even more desperate people are left without proper assistance. We are then left with a dilemma: long-term and robust change will only take place if states sign on to a new Convention, and yet if states do attempt to negotiate a new

¹¹ I assume (without argument) that human rights are international legal devices that aim to secure important human interests. In this essay, I refer to fundamental human rights as those rights that track the *most basic and non-negotiable* human interests. This means of course that the list of human rights I am appealing to will not coincide with the broader list of the United Nations Human Rights Declaration, where, for instance, the right for paid holiday is considered a basic human right.

¹² Guy S. Goodwin-Gill, ‘Asylum: The Law and Politics of Change’, *International Journal of Refugee Law*, 7:1 (1995), p. 11.

¹³ Joan Fitzpatrick, ‘Revitalizing the 1951 Refugee Convention’, *Harvard Human Rights Journal*, 9 (1996), p. 234, emphasis mine. See also, Betts, ‘Survival Migration’, pp. 377-378.

¹⁴ Michael Dummett, *On Immigration and Refugees* (London: Routledge, 2001), p. 37.

Convention, we might end up with an even weaker refugee protection regime. Call this *the feasibility dilemma of a new refugee protection regime*.

In this essay, I attempt to show that this feasibility dilemma is only apparent. My claim is that we can actually pursue reform in a way that does not risk losing what the international community has already achieved. But in order to do so, we must first alleviate the key constraints that make legal progress currently unattainable. More specifically, I argue that we must first deal with motivational and institutional constraints that currently obstruct progress in the area of refugee protection. Only then, can the international community embark on the road to legal reform.

This remainder of this essay is structured as follows: In part II, I discuss what sort of legal reform is needed if we are to do justice to the moral claims of the most vulnerable members of the international community. In part III, I argue that the feasibility dilemma I have presented earlier is only an illusion because the motivational and institutional constraints that hinder progress in this area can be substantially alleviated or transformed. In Part IV, I offer a feasible proposal that is likely to alleviate the constraints in question, rendering the international community more likely to sign up to a more robust Convention in the future. In part V, I address a key objection to my argument and conclude.

Part II

We have seen in the previous section that the 1951 Convention no longer provides (if it ever did) the international community with the conceptual and normative tools it needs to secure robust protection of vulnerable individuals. While the specification of who counts as a refugee is problematic because it is under-inclusive, the specification of how states should assist refugees is slightly disingenuous since it does not accept that refugees actually have a positive right to immigrate, and start a new life in another country (as I mentioned earlier, *non-refoulement* entails only a right not to be returned to the place of persecution). While I do not intend to expose all the shortcomings of the current Convention, I do want to defend the idea that it falls short of meeting three important desiderata. And in so doing, I aim to strengthen the case for eventual legal reform in the area of refugee protection.

So what are the desiderata that a new Refugee Convention must meet? It seems to me that a new Convention must *at the very least* meet the following three

desiderata: D1. its specification of who qualifies for protection must be appropriately inclusive, D2. its assignment of legal responsibility to states must track their prior moral responsibility, and finally, D3. its text must give some guidance on how migration sits with other moral responsibilities enjoyed by recipient states. Let me take each of these desiderata in turn.

The first, and arguably most important, desideratum is that the specification of who counts as a refugee be appropriately inclusive. This means that it should acknowledge the different ways in which citizens become dependent upon migration in order to protect and promote their most basic human rights. While it is certainly true that much vulnerability that leads to migration is a by-product of political persecution, it is important to acknowledge that there are other sources of vulnerability that dramatically push persons outside of their country of origin. The most obvious examples are severe poverty due to residence in a failed state, severe displacement due to harmful climate change, or even inability to access basic goods and services due to a pervasive civil conflict or war.¹⁵ An appropriately inclusive criterion of refugeehood is one that defines refugees as *persons who cannot secure their most fundamental human rights without migration*.¹⁶

At the same time, it is important that the criterion does not become over-inclusive. Scholar Penelope Mathew, for instance, argues that opposition to the one child policy in China is a type of political opinion, which in turn, warrants the provision of asylum.¹⁷ This conclusion strikes me as problematic. To see why, compare the plea of Chinese couples with those who cannot exercise their right to adequate nutrition, or might be murdered for professing their sexuality in public, or those living on an island that will soon become uninhabitable. Surely these persons

¹⁵ Here is what an Iraqi refugee living in Jordan had to say about the effects of the US intervention in Iraq and his own ability to protect his most basic human rights: “[Iraq] has no law and order, it has no services, no electricity, water, petrol, gas, fuel, there is only air left and if America could suck that out, it would have.” He then asks, “Wouldn’t you be mad if this happened to your country? Of course we suffer, seeing all the death and killing. This suffering flows like blood in our veins. We feel it daily. We can’t eat or drink like normal human beings because our country is gone and done for!” in Olivia Rousset, ‘State of Despair’, *Dateline*, SBS Live 9 May 2011.

¹⁶ It is important to note here that a focus on human rights is already part of different regional strategies to address refugee flows. The Organization of African Unity, for instance, has a comprehensive criteria for refugee status which also includes fear due to external aggression, occupation and foreign domination. A similar criteria can be found in the Declaration of Cartagena, where Latin American countries have recognized gross and severe violations of human rights as grounds for asylum.

¹⁷ According to Penelope Mathew, the right to asylum must follow any violation of a legitimate human right. In regards to the one child policy, she argues that the legitimate right that is violated is the right of a couple to determine the number and spacing of their children, in ‘Conformity or Persecution: China’s One Child Policy and Refugee Status’, *UNSW Law Journal*, 23 (2000), p.119.

are vulnerable in a way that is not true of prospective Chinese parents. In fact, a more accurate interpretation of the Chinese policy is that it *severely constrains* the right of parents to choose the number of their children; but not that it violates it. While I certainly agree that ideally we would want to leave matters of reproduction to parents alone, it is appropriate for the state to impose reasonable limits on this right in a domestic context of overpopulation.¹⁸ It is therefore misleading to claim that the one child policy violates a fundamental human right, rendering Chinese couples in need of asylum.

To be sure, there are cases that are not necessarily clear-cut, and there can be genuine and irresolvable disagreement over whether someone has a right for international assistance in the form of migration. This is why this desideratum stipulates that the criteria must be *appropriately* inclusive. While a system of refugee protection should neither err on the side of under-inclusiveness nor on the side of over-inclusiveness (by protecting individuals whose claims do not actually create stringent moral obligations on the part of the international community), it must still err on the side of assistance in cases of uncertainty. That is, if cases are unclear due to reasonable and unresolvable disagreement on the part of negotiators, the international community should err on the side of protection. Doing otherwise would risk grave injustice by potentially excluding individuals whose basic human rights can only be appropriately promoted and protected in a second political community.

Let us now move to the second desideratum. The thought here is that legal obligations collectively adopted by states must, as much as possible, track their prior moral obligations. To see the importance of this requirement, we need only consider the key legal obligation that states incur by virtue of ratifying the current Refugee Convention: the principle of *non-refoulement*.

The principle of *non-refoulement* stipulates that refugees should not be returned to states where they would suffer persecution, but *not* that they are entitled to become members of another state.¹⁹ This means that states are under a negative obligation not to contribute to harm, but not under a stringent positive obligation to assist. However, a negative legal responsibility in this context misses the point of

¹⁸ To be sure, there are components of the one child policy that may warrant action on the part of the international community, such as the sporadic use of forced abortion and sterilization by the Chinese government. But note that what is problematic about these coercive measures is that they violate women's *bodily integrity*, not that they constraint the right of parents to choose the number of their children.

¹⁹ For a discussion, see Fullerton, 'A Comparative Look at Refugee Status', pp. 510-514.

what we are primarily concerned with: ensuring that persons can have their basic human rights promoted and protected, which at times, can only be achieved through the creation of a new bond between the vulnerable person and the state of asylum. Of course, *non-refoulement* can at times lead to permanent membership in a new political community, as is the case with numerous refugees who currently enjoy the benefits of citizenship around the world. The trouble is that *non-refoulement* can equally lead to on-going placement in refugee camps, or access to temporary protection.²⁰ This is why a robust bond between a refugee and her state of asylum entails a positive right to immigrate (to arrive in a recipient country and settle there) and not merely a negative right not to be returned to the place where one is incapable of securing her most basic human rights.

But if *non-refoulement* is not enough, why have states not yet committed themselves to a positive duty to include refugees? A charitable interpretation of the rationale of states for avoiding an actual duty to include is that they are concerned with the potential high costs that would follow from the legal recognition of such moral right. The worry is that it could become too burdensome for each individual state to provide membership to all genuine refugees who make their way to its borders. By accepting a legal right to immigrate, so this interpretation goes, states would therefore bind themselves to a much more demanding legal obligation, potentially leading to disastrous consequences at the domestic level.²¹

While we must be careful and acknowledge that much of the concern around refugee numbers involves gross exaggeration on the part of the media in refugee-receiving countries, a reasonable version of this worry still deserves to be taken seriously. After all, small and poor states are severely constrained in their ability to include large numbers of refugees. Even territorially large and wealthy states, such as Australia, would not be able to provide membership to all those seeking entrance, since their limited natural resources might eventually place a cap on the size of their

²⁰ The most fundamental problem with refugee camps is that they only allow refugees to secure their basic biological interests (nutrition, shelter and clothing), without giving them enough room to pursue the socio, economic and political dimensions of their life goals. As for temporary protection arrangements, the problem is the lack of knowledge of whether (and when) refugees may go back home. Because under temporary arrangements, states protect those rendered vulnerable until the conditions at home change, refugees simply lack the knowledge of how long they will safely reside in their country of asylum. And of course, such knowledge is essential if they are to make use of their moral power to form, revise and pursue their most important life plans. For a discussion of the value of taking certain things in life as fixed, see Robert E. Goodin, *On Settling* (Princeton: Princeton University Press, 2012).

²¹ See Gibnay, 'Liberal Democratic States', pp. 174-175.

population. The fact of the matter is that due to the costs involved, states vary in their capacity to assist refugees, and this has implications for how we might conceive of their moral and legal obligations.

To be sure, at the level of morality, it is not at all controversial that moral obligations are sometimes sensitive to costs. This is the case irrespective of whether moral agency lies at the individual or at the collective level. While I should certainly assist a poor person if I can do so at reasonable costs to myself (by, for instance, donating a reasonable percentage of my income), I am under no moral obligation to assist if this would require that I sold my house and became homeless. And if we move to the collective level, we reach similar results: a developing country like Brazil can be under an obligation to assist a neighbouring country in the aftermath of an earthquake, but under no obligation to spend half of its total budget on foreign development aid.²²

The same holds in the area of refugee protection. Before holding states to have a moral responsibility to include refugees on a permanent basis, we must take the costs of membership provision into account. While virtually all legitimate states in the international community can include hundreds of refugees at any given time, not all of them can include thousands, and fewer can include millions. So the idea that states must include all refugees seeking to enter their borders overlooks the important point that like individual moral agents, states should not bear *unreasonable* costs in order to discharge their moral obligations (although they should certainly take extra costs in case they have contributed unduly to the creation of refugee flows – a point to which I will return to later). But can an international Convention acknowledge that responsibilities are constrained in this way? I believe it can.

Examples of cost considerations can be found in exemption or limitation clauses. In fact, article 32 (1) of the Refugee Convention specifies that the “Contracting States shall not expel a refugee lawfully in their territory *save on grounds of national security or public order* (my emphasis).” This is the form in which such documents can take costs on board, although in this specific case, the content can be interpreted in problematic ways. One interpretation is that refugees who are found to be a danger to the public security of their host country can be

²² For a discussion, see Richard W. Miller, ‘Beneficence, Duty and Distance’, *Philosophy and Public Affairs*, 32 (2004), pp. 357–383, and Christian Barry & Gerhard Øverland, ‘How Much for a Child?’, *Ethical Theory and Moral Practice* (forthcoming).

permissibly deported. Another (less likely) interpretation is that a country of asylum can permissibly expel refugees if their presence becomes overly costly.

The problems with either of these potential interpretations should be obvious. Once a state includes a refugee, a new bond between the refugee and the state is created, one that should be equal to the bond between the state and those who acquired membership by birth, ancestry or who followed other legitimate channels of permanent migration. And in the same way that states are not generally permitted to banish their own citizens because they are found to be dangerous, or expel them because they unduly burden the welfare system, states should not be morally entitled to treat refugees in this way. Once a refugee is granted asylum in a recipient state, they should automatically enjoy *all* the benefits and burdens of citizenship.

In light of this, how else can states avoid the high costs associated with the inclusion of large numbers of vulnerable people while still treating them with equal respect? As I see it, they can do this by adopting a limitation clause that is *ex-ante*. That is, before states are said to have a legal responsibility to include another refugee, some sort of cost proviso must be satisfied. Whilst it is not permissible for a recipient state to include refugees and then deport them, it is certainly permissible for the same state *not to include* refugees if the costs would be too high. A potential way forward here is to follow the United Nations Human Rights Convention, which specifies that human rights can be limited “for the *purpose* of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (Art 29 (2))” There is no reason to think that the right to asylum cannot be limited in a similar way.

Let me briefly summarize what I have argued so far. D1 specifies that a new Refugee Convention must be appropriately inclusive. In order to achieve this, it must include all those individuals whose basic human rights cannot be secured without migration (without taking it too far by also including those whose claims do not actually track basic moral entitlements). As for D2, it specifies that states’ legal responsibilities must accurately track their prior moral obligations. The obvious way in which states can achieve this is by both accepting a presumptive right to immigrate on the part of refugees, and a right on the part of citizens not to bear unreasonable costs when providing membership to those entitled to international protection. Let me now elaborate on D3.

The final desideratum I want to motivate here is that a new Convention must explain how immigration sits with other moral obligations on the part of states. That is, it must be sensitive to the fact that some vulnerable individuals can actually be helped in their own state of citizenship, while others can only be helped through inclusion in a new political community. This is important because those states that find themselves in a privileged position to assist non-members usually have an array of measures at their disposal. They can provide vulnerable foreigners with membership, assist them with aid, engage in humanitarian intervention, and so on. States must, then, find ways to discern between vulnerabilities that trigger a duty of asylum and those that do not. In fact, if they fail to be more nuanced about their moral responsibilities towards vulnerable foreigners, they might both bear higher costs than what morality requires, and fail to give priority of inclusion to those who cannot be assisted in other ways.

To illustrate this point, let us imagine that we can bring the international community to accept that homosexuals do in fact constitute a 'social group,' thereby qualifying them for asylum in cases like that of Iran. Let us also assume that the rest of the current Convention remains the same. Does it then follow that all homosexuals from Iran automatically have a right to asylum? If we follow the Convention as it is framed, it will indeed be the case that once the criterion is so interpreted, Iranian homosexuals have a right not to be returned to Iran.

Yet it seems to me that whether homosexuals should be protected through migration should also depend on whether recipient states can assist them in other ways. All else being equal, if the international community could effectively assist gays in Iran without granting them asylum, then they should do so, and leave migration to those who really cannot be assisted without migrating to a second political community. But of course, if there is really nothing else that the international community can do (if executing gay persons is an important and non-negotiable part of the Iranian political agenda, for example), then asylum remains a last resort obligation on their part. A similar rationale would hold for individuals who find themselves in geographical areas (coastal areas or island states) that are predicted to disappear or become uninhabitable due to the on-going rise in sea levels linked to harmful climate change. If there is scope to assist those rendered vulnerable without resorting to migration, then the international community should assist them in their own state of citizenship. But in cases like that of Tuvalu (where what is not

submerged will be uninhabitable due to the intrusion of saltwater), states can only discharge their moral obligation to assist by settling the Tuvaluans in their territory.²³

The obvious question that follows is how a legal instrument might incorporate a more nuanced understanding of moral responsibility. Indeed, in discussing D2, I conceded that things are much more straightforward at the level of morality than they are at the level of international law and politics. Notwithstanding this difficulty, it seems to me that when negotiating a new Convention, states should incorporate an exclusion clause that deals directly with this question. Such a clause could stipulate that states are under no obligation to include refugees who can already access a *comparable* degree of protection in their countries of origin.²⁴ Interestingly, the current Convention stipulates that its provisions do not apply to persons who have committed certain kinds of crime (Art. 1F). It is therefore hard to see why states cannot equally stipulate that protection in the form of international migration does not apply to individuals who already have access to a comparable degree of protection in their countries of citizenship.

As becomes clear, these three desiderata highlight the problems with the current Convention while also pointing out the need for (and the way towards) legal reform. More specifically, they show that a new Refugee Convention should commit states to including on a permanent basis those who cannot otherwise promote and protect their most basic human rights.

Part III

Showing that legal reform in the refugee protection regime is morally desirable is unfortunately not the same as showing that it is also feasible. As mentioned earlier, desirable legal reform in the area of refugee protection is virtually infeasible due to the lack of motivation on the part of refugee-receiving states. However, the fact that progress is not likely to occur now tells us nothing about whether it is likely to occur

²³ Cara Nine, 'Ecological Refugees, States Borders, and the Lockean Proviso', *Journal of Applied Philosophy*, 27 (2010), p. 2.

²⁴ Note that this differs from the doctrine of "local remedies" insofar as it specifies that assistance in the country of origin must be *comparable* (not simply available) to assistance in the country of asylum. And of course, the term comparable sets the bar high, which is not ideal but still preferable than relying on the idea of local remedies, which in the past have contributed to a situation in which Sri Lankan Tamils, Indian Sikhs, Bosnians and Iraqi Kurds were deemed by the international community to enjoy protection in their countries of citizenship, in Andrew E. Schacknove, 'From Asylum to Containment', *International Journal of Refugee Law*, 5 (1993), pp. 516-533.

in the future. For reasons that will become apparent later, a more desirable system of refugee protection can be *rendered* more feasible.

In order to understand the role that feasibility ought to play in non-ideal theorising, I follow two distinct, yet linked, conceptual understandings of feasibility. First, I follow Gerald A. Cohen in assuming that the two crucial elements of feasibility are *accessibility* and *stability*.²⁵ For Cohen, when we think about the feasibility of *x* (such as a policy proposal or a social arrangement), we must explore whether we can bring it about, *and* whether we have good reasons to suppose that it is likely to be stable over time. I also follow Pablo Gilabert and Holly Lawford-Smith in assuming that there are two useful senses of feasibility, one binary, the other scalar. As long as there is a way to bring *x* about and render it stable, it is feasible in the binary sense. But *x* can also be more or less feasible.²⁶ For these authors, only *hard constraints* (such as logical, nomological and biological constraints) will rule out *x* as infeasible. *Soft constraints* (such as economic, religious, cultural, motivational and institutional constraints), on the other hand, will specify the degree of its feasibility.

Given the two dimensions of feasibility (accessibility and stability) and the existence of hard and soft constraints, Gilabert and Lawford-Smith propose two tests to assess whether a proposal is indeed feasible, and if so, how feasible it is. The first (binary) test simply identifies whether a proposal is feasible or not. At this stage, only hard constraints are taken into account since we are only interested in minimal feasibility. Proposals that fail the binary test are immediately ruled out as infeasible. The scalar test, on the other hand, is about *how* feasible a proposal or set of recommendations actually is. As the proponents of this view explain, “[soft constraints] place limits on what people are comparatively more likely to do, but the limits are neither permanent nor absolute.”²⁷ What makes these constraints *soft* is precisely the fact that they can be *alleviated, transformed, or overcome* so that they cease to be constraints in the future.

At this stage, I can already affirm that a more desirable legal framework is feasible in the binary sense. States could bring it about if they actually tried. But the important feasibility question asks *how likely* it is that states will try. And the answer to this is that, unfortunately, refugee-receiving states are not in fact very likely to try.

²⁵ Gerald A. Cohen, *Why not Socialism?* (Princeton: Princeton University Press, 2009), pp. 56-57.

²⁶ Pablo Gilabert and Holly Lawford-Smith, ‘Political Feasibility. A Conceptual Exploration’, *Political Studies* (forthcoming).

²⁷ *Ibid.*

As I have already mentioned, there is a great degree of scepticism on the part of scholars and practitioners that states would be willing to bring about progressive reform in the area of refugee protection. And even if states were willing, I have also mentioned that the current political climate would possibly gear states towards a less desirable legal agreement. I hope to show, however, that states would be much more likely to sign onto a more desirable Convention if other (less risky) reforms are carried out first. The upshot here is that the feasibility of a new refugee protection regime can be increased once we alleviate significant and enduring soft constraints.

Before I shed some light on the details of such reforms, there are still two prior questions that need tackling. The first pertains to the nature of the soft constraints in question: what are the facts of the world that make states unwilling to sign on to a more desirable Refugee Convention? The second pertains to agency: who is responsible for alleviating the constraints once they have been identified? I will take each question in turn.

There are three facts that significantly impact on the sort of position states are likely to adopt towards refugees. The more marginal one is the type of diplomatic relationship recipient states have previously established with the state of origin. Indeed, there is some empirical evidence that if recipient and sender states do not enjoy amiable ties, it is politically easier for the former to grant asylum to citizens of the latter. And of course, the opposite also holds for two friendly nations, since including refugees from one's close allies may put diplomatic relations at risk.²⁸

Another (more important) dimension affecting states' response to refugees is their heightened concern with irregular migration. Because developed states have so far implemented a moderately successful travel regime to exclude unauthorised immigrants (i.e, carrier sanctions, visa requirements, border control, etc.) they have placed themselves in a position in which they can bypass the aims of the Refugee Convention without violating its legal requirements.²⁹ That is, states' legitimate concern with the unauthorised entrance of immigrants into their territory provides them with the institutional apparatus to impede refugees from arriving and making a legal claim in the first place.

²⁸ See Gil Loescher & James Milner, 'The significance of protracted refugee situations', *The Adelphi Papers*, 45 (2005), p. 10, Jackie King, 'Factors Affecting Australia's Refugee Policy: The Case of the Kosovars', *International Migration*, 39 (2001), p. 84.

²⁹ Alexander Betts, 'The Refugee Regime Complex', *Refugee Survey Quarterly*, 29:1 (2010), p. 16.

The third and final important factor relates to public opinion. It is well known that the mood of voters plays a major role in determining a state's response to a given refugee crisis. Examples include the response to the Kosovo conflict in Australia, where public opinion dramatically shaped that country's decision to permit the temporary settlement of Albanian refugees. While the Australian government initially refused to grant them asylum, it eventually changed its position due to pressure from the public.³⁰ But while in this specific case the predicament of refugees gave rise to a great degree of sympathy on the part of voters, the recent decades have seen an increasing degree of hostility and mistrust, which in turn have led to weaker responses on the part of recipient states.³¹

But why are so many people unmoved by the claims of those who are in urgent need of asylum? Empirical evidence suggests that "procedural and distributive fairness concerns [on the part of the public] contribute uniquely to predicting social attitudes and action to asylum seekers."³² Indeed, one must only open the leading newspapers or talk to the average person on the street to see that the public is increasingly suspicious of refugees who cross national borders unauthorised, make use of smugglers, or risk the lives of their children in the process of making an asylum claim. Changing the public's perception of the trustworthiness of refugees and the validity of their moral claim is therefore essential to bringing about positive and enduring legal change. The upshot here is that the negotiation of more desirable Refugee Convention will require a shift in the way the public in refugee-receiving countries perceives the current refugee protection regime.

In light of the previous discussion, we might want to say that the soft constraints that require alleviation are both institutional and motivational. They are institutional because the global governance of migration is not robust enough to limit the impact of diplomatic and security considerations in a state's response towards a given refugee crisis. They are also motivational because the public in refugee-receiving countries has become increasingly more hostile towards refugees. We must therefore change the public's attitude towards those seeking asylum, as well as improve the global governance of migration and refugee protection.

³⁰ King, 'Factors Affecting Australia's Refugee Policy', p. 86.

³¹ See Schacknove, 'From Asylum to Containment', p. 517.

³² Louis R. Winnifred, et al., 'Why do citizens want to keep refugees out? Threats, fairness and hostile norms in the treatment of asylum seekers', *European Journal of Social Psychology*, 37 (2007), p. 66.

This leads me to the question of agency. Who exactly is the “we” responsible for making these changes? These are persons or collective agents (most notably states and the UNHCR) who are in a privileged position to alleviate the motivational and institutional constraints identified earlier.³³ While past contribution to harm is the paradigmatic case in which moral responsibility arises, the mere capacity to assist at moderate costs to oneself creates a stringent positive responsibility on the part of the agent (or collective agent) towards those currently in need of assistance.

But how exactly can we ground a responsibility to assist the refugees *of tomorrow* (those that will actually benefit from a more desirable legal framework)? It seems that by alleviating the current constraints identified earlier, the relevant agents will discharge what can be referred to as their stringent *dynamic* duties. According to Gilibert, these are duties that “are not merely focused on what is to be done within certain circumstances, but also on changing certain circumstances so that new things can be done.”³⁴ Dynamic duties play, as it were, a double role in moral reasoning, since they enable agents to promote morally desirable outcomes now, as well as move closer to a world in which other morally desirable outcomes can be brought about. Let me now suggest some reforms that will allow states and the UNHCR to discharge their dynamic duties towards the refugees of tomorrow.

Part IV

As we have just seen, there are three important facts that hinder, to different degrees, progress in the refugee protection regime. The first is that states sometimes take diplomatic considerations into account when deciding whether or not to grant asylum to a citizen of a particular state. The second is that states want to avoid the movement of unauthorized immigrants. And the third is that the public in refugee-receiving countries often perceives refugees to be violating norms of procedural and distributive fairness (by for instance, accusing refugees of “jumping the queue,” taking a “leaky boat,” financing the “people smuggling networks,” arriving without a visa, and so

³³ This not to deny that other actors, such as NGO’s or media outlets don’t have an extremely important role to play in terms of bringing awareness to the plight of refugees.

³⁴ Pablo Gilibert, ‘The Feasibility of Basic Socioeconomic Human Rights: A Conceptual Exploration’, *Philosophical Quarterly*, 59 (2009), p. 677.

on).³⁵ Taken together, they lead to the view that recipient states must respond to refugee flows by shifting their emphasis onto re-settlement, so that concerns with procedural and distributive fairness are substantially alleviated.³⁶

In order to make sense of this shift, it pays to understand what the international community already considers appropriate durable solutions to the plight of refugees. The preferred solutions are repatriation to the country of origin, provided that it is safe for the refugee to return home, and integration in the country where processing has taken place.³⁷ Another, less celebrated, option is re-settlement in a third country after processing has been finalized. And as it is to be expected, whether states choose any of these options often depends on political factors, the degree to which they accept their legal obligations, and what happens to be in their immediate self-interest.³⁸ However, I want to claim that a first important reform will require states to privilege re-settlement over integration when responding to the claims of *bona fide* refugees.

There are at least two reasons as to why states should move towards re-settlement. The first is that re-settlement would allow the international community to better distribute numbers in accordance with each state's capacity to assist, thereby addressing public concern around *distributive* fairness. The second reason is that the possibility of re-settlement in a third country would arguably discourage *bona fide* refugees from targeting their country of choice with the help of smugglers, thereby alleviating public concern around *procedural* fairness.

Now, I am not claiming that re-settlement would solve all the problems to do with either the current refugee protection regime or the unauthorised movement of persons. While the fact of unauthorised migration significantly overlaps with the refugee protection regime, they are distinct phenomena that require distinct political solutions. But the important difference between the current refugee protection regime

³⁵ In Australia, research has found that community attitudes are heavily influenced by misconceptions of refugees as "illegal immigrants" who jump the UNHCR queue, in Amnesty International Australia, "Rethink Refugees," available at <<http://www.rethinkrefugees.com.au/>>.

³⁶ It is possible that much of the concern around distributive and procedural fairness are motivated by xenophobia by the public in refugee-receiving countries. However, here I want to give the public in those countries the benefit of the doubt, and assume that their concerns are in fact related to the perception of the current regime as failing on fairness grounds. If turns out that citizens in refugee-receiving countries will always perceive the refugee protection regime as problematic, then at the very least, a refugee protection regime that is fairer will make xenophobic concerns more apparent and more likely to be challenged in the public domain.

³⁷ See Loescher and Milner, 'UNHCR and the Global Governance of Refugees', p. 192.

³⁸ Ibid.

and the shift towards re-settlement that I am proposing is that by making the country of processing the same as the country of final settlement, the current regime creates a very strong incentive for both unauthorised immigrants and *bona fide* refugees to make their way to affluent countries with the help of smugglers. This, in turn, leads to a perverse system where smugglers exploit the vulnerability of their clients, and where the sort of protection received by a refugee can often be a function of her economic ability to contract the services of smugglers.

But if I am right that re-settlement would best conform to widely held norms of procedural and distributive fairness, how should the international community change their approach? The best way to move towards re-settlement would be for recipient states to collectively and progressively increase their quotas for refugees coming from a country of processing, while decreasing their quota for those seeking asylum directly in their territory (while I am not well placed to say how exactly the quotas should be allocated, unauthorised immigrants would arguably only be discouraged if a majority of quotas went to re-settlement). Moreover, the international community would need to expand the mandate and funding of the UNHCR, so that each state would receive clear legal guidance and material assistance in order to process those temporarily in their territory and re-settle those who have already been processed elsewhere.³⁹

But would states be at all moved by the reasons in favour of re-settlement? While it is easy to dismiss proposals that require collective action on the part of the international community, there are good reasons to be optimistic here. A collective shift towards re-settlement would discourage unauthorised immigrants from falsely claiming to be refugees, for if successful in their false claim, these immigrants could end up in a state with significantly fewer economic opportunities than their country of origin. And of course, the fact that states would have a self-interested motive to move towards re-settlement is important because, as Guy S. Goodwin-Gill explains, “we can only expect States to accept further obligations [to refugees] if they are linked to a gain. States need a *quid pro quo*, for none of them today will be moved by humanitarianism alone.”⁴⁰

³⁹ This point is important because a system based on re-settlement will only work for refugees if there is genuine legal and material coordination between states. If states act unilaterally, they might put their self-interest first and either free ride on the assistance of other states, or make use of problematic selection criteria.

⁴⁰ Goodwin-Gill, ‘Asylum’, p. 14.

But while states do have a self-interested reason to push for re-settlement, two other changes must take place if the system is to maintain its level of protection while increasingly changing public perception. Firstly, emerging economies such as Chile, Argentina and Brazil should play a more active role in the re-settlement of refugees (the successful transition to stability and democracy in South America has meant that these countries have been largely insulated from asylum claims).⁴¹ Secondly, states that have unduly contributed to the creation of refugee flows in other parts of the world should be strongly encouraged by the international community to take direct responsibility to the flows they have helped to create. The fact that the UNHCR and other international organizations rarely mention the causal link between action abroad and refugee status renders the public in some countries wholly unaware of their connection to the vulnerability of those making a claim in their territory.

Before I conclude this section, I want to mention a couple of potential worries against the reforms advocated above. The first is that, if implemented, these reforms would lead to a regime where refugees no longer choose which safe country to become members of, and so are no longer able to exercise some degree of control over their lives. The second worry is that these reforms will not necessarily increase the number of refugees who receive protection in the short term and so will not lead to an improvement over the *status quo*.

Let me make two brief points in response. While certainly not ideal, I believe it to be permissible to deny refugees the right to choose the country of final destination given the importance of creating a regime that fares better in terms of distributive and procedural fairness. If states stick to the current arrangement, those refugees with enough resources will in fact decide where to receive protection, but then the counterpart of that is that fewer refugees will actually receive any sort of protection in the future. As for the second point, it is indeed true that these reforms will not automatically lead to a significant increase in numbers. But recall that the discussion in this section is not about how to meet D1 or any of the other desiderata mentioned earlier, but rather about creating the conditions so that the desiderata are much more likely to be met in the future.

⁴¹ The exception to this rule has been the on-going Colombian conflict. For a discussion of the Colombian case and an interesting example of re-settlement in practice, see Lilita Lyra Jubilit & Wellington Pereira Carneiro, 'Resettlement in Solidarity: A New Regional Approach Towards a More Humane Durable Solution', *Refugee Survey Quarterly* 30 (2011), pp. 63-86.

Part V

I now want to conclude the discussion by responding to a potential concern with the methodology of this essay. The concern could be expressed as follows: there is no guarantee that states and the UNHCR will in fact discharge their dynamic duties, or that the reforms advocated here will in fact lead to a more progressive system of international protection. Given these uncertainties around the likelihood of change, the concern is that this discussion is at best irrelevant and at worse confused.

It is certainly true that changes at the international level are often unpredictable (few people predicted the collapse of the USSR, or the end of Apartheid). But to conclude from this fact that we should not try to investigate the most feasible ways of bringing about change is to throw the role of agency out the window. It is certainly true that the end of Apartheid was not predictable to many agents at the time, but it is not true that no one was trying to bring it to an end. Local, national, and global structures certainly affect outcomes, but so do moral agents who mobilize strongly in favour of political change.

I am also not denying that the feasibility of legal reform is extremely difficult to measure, and I am not oblivious to the fact that there is only so much that political philosophy can do on its own. But by taking feasibility for what it is (a scalar concept that admits degrees of possibilities), I have hopefully pointed the discussion towards areas of further research, while avoiding the unhelpful conclusion that change is unlikely and therefore not worth pursuing. Indeed, in this essay I have sought to focus primarily on the fact that unless existing moral agents try and alleviate the motivational and institutional constraints currently blocking change, the refugees of tomorrow will not be able to access the protection they so badly need.

At the end of the day, sceptics would be right in claiming that there is no guarantee that we will succeed in bringing about a more desirable refugee protection regime. They would also be right in noting that the reforms I propose here might never be implemented, or if implemented, that it might not succeed in changing public attitudes. But given what is at stake for the vulnerable men and women who may soon become refugees, we certainly have very weighty reasons to try.