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Lukasz Dziedzic

# What Is Owed to Refugees when Attributing Responsibilities to States in Institutionalized Responsibility Sharing Regimes?

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# What is Owed to Refugees when Attributing Responsibilities to States in Institutionalized Responsibility Sharing Regimes?

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**Abstract**

Responsibility sharing has been at the core of the debates on asylum in the European Union given that the legal framework designed to perform this task, the so-called Dublin System, failed to provide justice among states in responsibility attribution by its very design. This paper addresses the question of justice in responsibility sharing among the Member States of the EU while also providing normative and empirical arguments for rethinking what is being owed to refugees qua refugees, as the envisioned beneficiaries of responsibility sharing regimes, when thinking about reforming the system of responsibility attribution in Europe.

**Keywords**

Asylum; Responsibility Sharing; Justice

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The aim of this paper is to provide normative support and empirical examples for the need of extending our understanding of what is owed to refugees when they are distributed among states through institutionalized responsibility sharing mechanisms. The focus will thereby be on the conceptualization of this issue particularly in the context of the EU – with the examples and concluding remarks being embedded in this context. While it is not being denied that ultimately, a just international regime of refugee protection is something that should be normatively strived for, the realist

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position taken in this paper and its focus on the European Union is being justified by feasibility constraints on the international level. On the international level there is a need for firstly creating ad hoc coalitions of the willing to address the problems at stake, the European Union, however, provides a context of a permanent group of states that collectively agreed to provide refugee protection and where states have committed to sincere cooperation and created political institutions and policy instruments able to tackle the questions of responsibility sharing.[2]

## Responsibility Sharing – A Just Distribution between States?

In the context of the European Union, the question of justice between states in regard to refugee protection emerged as a topic of broader debate in the early 1990s in the follow-up of the refugee movements caused by the Balkan wars, which resulted in a large discrepancy in the numbers of refugees taken in by single Member States of the community. Germany, for example, received more than 435,000 asylum applications in 1992 alone, what constituted 66% of all the applications of the – back then – European Community.[3] As a result of these developments, the German Council Presidency in 1994 pushed for a Draft Council Resolution on Burden Sharing, which envisioned a distribution of asylum seekers and their temporary protection based on a distribution key attributing quotas to Member States on the basis of a country's GDP as well as the size of its territory and population.[4]

These strict and seemingly objective criteria however, and especially the binding nature of the envisioned burden sharing scheme, did not survive the negotiations of the proposal. After these initial marginal efforts, considerable developments took place in 1997. The Dublin convention entered into force, and specifically the Amsterdam Treaty moved the policies on asylum and migration into the first pillar of the EU. For the first time, an embryonic fair sharing provision was also introduced into primary EU law on asylum with Article 63 of the reformed EC Treaty calling for

[2] Rainer Bauböck, "Europe's commitments and failures in the refugee crisis" (2018) 17 *European Political Science* 140, 147.

[3] Piotr Juchno, "Asylum Applications in the European Union" (2007) 110 *Statistics in Focus: Population and Social Conditions*, 2, available at: https://ec.europa.eu/eurostat/documents/3433488/5285137/KS-SF-07-110-EN.PDF/c95cc2ce-b50c-498e-95fb-cd507ef29e27 (last accessed: 02.12.2018).

[4] The criteria used for the distribution key were taken from the so-called 'Königssteiner Schlüssel', which is the distribution key Germany applies within its territory to distribute asylum seekers equitably across its territory.

"measures promoting a balance of effort between Member States in receiving and bearing the consequences of refugees and displaced persons."[5]

The Treaty also called for legislation in the area of asylum to be enacted to provide for a minimal harmonization of asylum legislation across the European Union. This was put into practice in 1999 at the Tampere European Council, which was the birth place of the Common European Asylum System (CEAS) and the regulations and directives making it up, which were enacted in the following years and provided a minimum harmonization of amongst others refugee status determination, reception conditions for asylum seekers and asylum procedures. The CEAS for the first time in history created a shared commitment and responsibility of states to collectively provide protection to refugees.[6] Unfortunately, however, the instrument within the system, which was envisioned to distribute the responsibility for the status determination and reception of asylum seekers across this group of states, the above mentioned Dublin Convention that – after several reforms – is still in force today as the Dublin-III Regulation, did not really tackle the issue of a fair distribution of responsibilities, and thus justice between states, but instead established (in the majority of cases) irregular entry into European territory,[7] a morally arbitrary criterion based on geographic location of particular states, as the default condition for responsibility attribution.

Parallel to these legal developments a broader academic debate on the question of how to share the 'burden' of refugee reception within Europe and globally was also taking place, with economists, political scientists, international relations as well as refugee law scholars being the dominant voices in its early stages. Burden sharing, as this issue has been coined in reference to earlier debates in economics regarding the

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[5] Dirk Vanheule, Joanne van Selm and Christina Boswell, "The Implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States in the field of border checks, asylum and immigration", European Parliament, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, PE 453.167, April 2011, Brussels, 31.

[6] Reinhard Marx, "Europäische Integration durch Solidarität im Flüchtlingsschutz" (2016) 49 *Kritische Justiz* 150, 151.

[7] The criteria for responsibility attribution are being established in chapters III and IV of the Dublin-III Regulation. While there are several criteria that hierarchically precede irregular entry into the territory of a Member State, it is nevertheless, together with the criterion of previous visa issuance or residence in a particular Member State, the criterion that in most cases in practice attributes responsibility for protection status determination to a particular Member State. See UN High Commissioner for Refugees (UNHCR), *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*, August 2017, available at: https://www.refworld.org/docid/59d5dcb64.html (last accessed: 02.12.2018].

sharing of costs for military spending among NATO members, has thus been looked at from the perspective of public goods theory, prisoner's dilemma contexts in game theory and other forms of cooperative action failures based on a lack of states' self-interest in refugee protection in order to explain the problems the refugee regime was facing globally, as well as in Europe.[8] In response to these problems with responsibility sharing and the provision of protection that the refugee regime was facing, refugee law scholars came up with some controversial proposals of reforming the global (and European) refugee regime. Hathaway and Neve for example suggested that responsibility for refugee protection should be allocated to the states in the region of a refugee crisis and other (e.g. Western) states would then only be obliged to contribute financially to the protection in the region, as such regional protection would be more effective given the cultural affinity, in the communitarian sense as e.g. defined by Walzer,[9] between states and refugees.[10] Schuck went even a step further in terms of the controversy of his proposal by suggesting a refugee quota trading model, whereby states would be able to trade refugee quotas they would have been assigned.[11] These proposals provoked strong criticism as they were accused of potentially shirking the responsibility to the states in vicinity of conflicts, while rich Western states would acquire the possibility to buy themselves out of responsibility for refugees through providing money to either regional protection or by means of buying refugee quotas. The refugee quota trading proposal was further criticized for commodifying refugee protection with refugees becoming a good to be traded on a market.[12]

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[8] Alexander Betts, "Public goods theory and the provision of refugee protection: The role of the joint-product model in burden sharing theory" (2003) 16 *Journal of Refugee Studies* 274, 275ff.; Gregor Noll, "Risky games? A theoretical approach to burden sharing in the asylum field" (2003) 16 *Journal of Refugee Studies* 236, 246ff.; Astri Suhrke, "Burden sharing during refugee emergencies: The logic of collective versus national action" (1998) 11 *Journal of Refugee Studies* 396, 397ff.

[9] For a convincing critique of the communitarian foundation of Hathaway's and Neve's proposal see e.g. Satvinder Juss Singh, *International Migration and Global Justice* (Ashgate Publishing, 2006), 224ff.

[10] James C. Hathaway and R. Alexander Neve, "Making international refugee law relevant again: A proposal for collectivized and solution-oriented protection" (1997) 10 *Harvard Human Rights Journal* 115, 144ff.

[11] Peter H. Schuck, "Refugee burden-sharing: A modest proposal" (1997) 22 *Yale Journal of International Law* 243, 283ff.

[12] See e.g. Deborah Anker, Joan Fitzpatrick and Andrew Shacknove, "Crisis and cure: A reply to Hathaway/Neve and Schuck" (1998) 11 *Harvard Human Rights Journal* 295, 299 ff.; Debates on the morality of refugee markets and refugee quota trading have recently gained in significance again, given the fact that practical proposals on these forms of refugee governance have, as will be also discussed further below in this contribution, gained in significance again in policy and practice. See e.g. Jaakko Kuosmanen, "What (if anything) is wrong with trading refugee quotas" (2013) 19 *Res*

At the same time, although there have been extensive discussions in the ethics of asylum on the question of refugee definition and the morality of treatment of refugees,[13] there has been until recently far less theorizing on the very idea of the moral foundations of burden or responsibility sharing between states.[14] The few contributions in the areas of political philosophy and the ethics of asylum that mention the issue thereby agree that each state having to take a fair share of refugee burden is normatively desirable. Some of the contributions engaged a bit further in what factors might help to determine what such a fair share might be, whereby causal contribution by some states to the creation of a certain refugee population is broadly considered as a primary consideration in responsibility attribution,[15] while in calculating remedial responsibility and its corresponding fair share, common but differentiated responsibilities of states are regarded as factors to be considered.[16] Thus any state's fair share would not be determined by attributing it a numerically equal ratio of the total refugee population, but instead factors that determine its ability to host a certain number of refugees, such as the country's GDP, its population size or the size of the already hosted refugee population living in its territory, would need to be taken into consideration when determining any state's fair share in refugee protection.[17] Given the fact that there are potentially many different variables influencing a state's ability to host refugees and that a consensus on a defined set of variables when calculating fair shares among states would be potentially hard to reach, David Miller,[18] for example, suggested that any state should have a certain autonomy to determine its own share as it is in the best position to assess its own abilities for refugee reception. But others have pointed out that having the possibility to determine

*Publica* 103; Mollie Gerver, "Moral Refugee Markets" (2018) 11 *Global Justice: Theory Practice Rhetoric* 45.

[13] See e.g. Andrew Shacknove, "Who is a Refugee?" (1985) 95 Ethics 274; Matthew Gibney, *The Ethics and Politics of Asylum* (Cambridge University Press, 2004); Matthew E. Price, *Rethinking Asylum: History, Practice and Limits* (Cambridge Universtiy Press, 2009).

[14] Tally Kritzman-Amir, "Not in my backyard: On the morality of responsibility sharing in refugee law" (2008) 34 *Brooklyn Journal of International Law* 355, 363.

[15] James Souter, "Towards a Theory of Asylum as Reparation for Past Injustice" (2014) 62 *Political Studies* 326, 327f.

[16] David Owen, "Refugees, economic migrants and weak cosmopolitanism" (2017) 20 *Critical Review of International Social and Political Philosophy* 745, 749 ff; Rainer Bauböck, "Refugee Protection and Burden Sharing in the European Union" (2018) 56 *Journal of Common Market Studies* 141, 147f.

[17] Matthew J. Gibney, "Refugees and Justice between States" (2015) 14 *European Journal of Political Theory* 448, 456-457.

[18] David Miller, "Immigration: The case for limits", in: Andrew I. Cohen and Christopher Heath Wellman (eds.), *Contemporary Debates in Applied Ethics* (Wiley-Blackwell, 2005), 203.

its own fair share would lead to decision making focused on self-interest that would undermine collective action and more or less maintain the status quo of current refugee protection.[19]

Notwithstanding the partial disagreements of how states' fair shares should eventually be determined, there is nevertheless a broad consensus in the few contributions on the topic that justice between states in terms of refugee protection with every state accepting its fair share is a desired goal of the broader refugee regime. Having a system that distributes the responsibilities for refugee protection justly among states is being considered to be just towards refugees, since it aims at ensuring that every refugee receives protection by being the responsibility of some state. What is thereby being owed to the individual refugee is the protection of her basic needs that could potentially be provided in any country participating in responsibility sharing – what is broadly being disregarded is the individual's say in regard to where she might potentially have an interest to end up.

The argument that refugees are owed the protection of their basic needs but have no say as to the place where this protection should be provided, given among others the concerns the consideration of their preferences might have on distributive fairness between states, is not only being raised regularly in the public and policy discourses concerning asylum in Europe, but has also been raised by normative theorists working on questions of the ethics of asylum. Ferracioli for example, claims that it is "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."[20] Similarly, Carens has repeatedly emphasized that "refugees have a moral right to a safe place to live, but they do not have the moral entitlement to choose where that will be."[21] In the same vein Kuosmanen states that having a claim to protection "does not directly amount to having a claim to access any particular country."[22] Thus these authors indicate that what is being owed to refugees is the protection of their basic needs that can potentially be provided in any country, while they do not need to have a say in where this might be. Most of these views, however, consecutively relativize this position by emphasizing that certain

[19] Matthew J. Gibney (2015), 457.

[20] Luara Ferracioli, "The Appeal and Danger of a New Refugee Convention" (2014) 40 *Social Theory and Practice* 123, 142-143.

[21] Joseph Carens, *The Ethics of Immigration* (Oxford University Press, 2013), 216.

Thereby, he also claimed that refugees are human beings with agency but that this agency, however, does not imply the right to choose the place of protection. (ibid, 208).

[22] Jaakko Kuosmanen, 108.

rights-based claims need to be taken into consideration when deciding to which country a particular refugee should be allocated. If somebody for example has close family members in a particular state she should be able to receive protection there.[23] But is this really all that is owed to refugees when thinking about where they should end up enjoying protection?

It can be namely expected that schemes based on a recognition of certain strong interests of refugees short of a rights claim, such as cultural ties, knowledge of the language of the destination country, extended family relations in such a country or potential previous residence therein,[24] would have beneficial outcomes for both, receiving states and protection seekers,[25] and that such a refocussing towards the autonomy of the protection seeker could contribute to repositioning of refugee law into the heart of human rights law.[26] While these interests might not be weighty enough to justify their nature as human rights in general, they can be considered to be weighty enough to have moral force in the context of refugee protection as they often justify refugees' choices of their country of destination.[27]

Gibney mentions that respecting claims based on strong moral interests is important in order to enable refugees to re-establish a meaningful social world in the country of protection.[28] In the next section it will be argued accordingly that distributive justice between states in terms of the physical distribution of refugees sometimes needs to give way to certain strong moral interests refugees might have in receiving protection in a particular state.[29] Based on Raz' conceptualization of personal autonomy, it will be shown that what is owed to refugees qua refugees

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[23] Matthew J. Gibney (2015), 458.

[24] Stephen H. Legomsky, "Secondary refugee movements and the return of asylum seekers to third countries: the meaning of effective protection" (2003) 15 *International Journal of Refugee Law* 567, 664.

[25] From the point of view of states taking into account certain strong interests refugees might have in ending up in a particular place might facilitate their integration into the societies of particular states.

[26] Matthew Zagor, "The struggle of autonomy and authenticity: framing the savage refugee" (2015) 21 *Social Identities* 373, 374.

[27] Jaakko Kuosmanen, 110.

[28] Matthew J. Gibney (2015), 460f.; The reason why respecting certain strong moral interests going beyond rights claims might be important when treating the claims of refugees is that, next to the harm caused to refugees' basic needs, another essential harm inherent in refugeehood is displacement, which might potentially only be remedied through granting refugees the possibility to re-establish a meaningful social world in a place they can at least co-determine. *Cf* Mollie Gerver, 53f.

[29] Cf in regard to this argument Rainer Bauböck, "Refugee Protection and Burden Sharing in the European Union", 146.

potentially needs to go beyond the protection of basic needs as claimed by Ferracioli or Carens, towards an idea of the refugee as a part-author of her own destiny within an institutionalized framework of responsibility sharing.[30]

## What is Owed to Refugees in Institutionalized Responsibility Sharing Regimes?

There are certain moral reasons for why certain strong interests short of rights claims of protection seekers should be taken into consideration in order to reinforce the political character of refugeehood and bring it closer to a human rights discourse again by reinforcing the agency of protection seekers.

A way to demonstrate the importance of the agential capacity[31] and the consideration of certain preferences of protection seekers is through approaching this issue from the point of view of Raz' concept of personal autonomy. Raz sees the ideal of personal autonomy as "the vision of people controlling, to some degree, their own destiny."[32] The ability to choose one's relationships and goals is thereby regarded as an important part of individual well-being, but Raz also acknowledges that no life can be wholly self-created independently of being enmeshed in certain particular societal structures.[33] He thereby identifies three conditions that need to be met in order for an individual to be able to lead an autonomous life, which consist of having the appropriate mental abilities, being provided with an adequate range of options to

[30] Next to the acknowledgment of the importance of the consideration of certain strong interests of protection seekers, another crucial debate in normative theorizing on responsibility sharing and asylum potentially refocuses some of the attention in the discourse towards what is owed to refugees in an institutionalized framework in which states are collectively committed to provide protection to refugees – namely the debate concerning the duty of some states to take up the slack in case other states fail to take up their fair share. While some voices in this debate stress that what a state has an obligation of justice to do is taking its fair share of refugees, and anything that would go beyond that would only potentially be a humanitarian obligation, others stress that fairness between states (thus the level of justice between states) should not outweigh the vertical obligations towards protection seekers that in the end require states to take up the slack. While there is dissent on whether there is a duty to take up the slack on a global level given the lack of institutionalized collective duty to provide protection, Bauböck for example argues that the case is different in Europe, where, as has been argued further above, there is a collective duty to provide protection to refugees and thus Member States should take up the slack of other Member States failing in their obligations towards refugees, something that is of topical importance in the practical discourses on asylum in Europe at the moment. See Rainer Bauböck, "Europe's commitments and failures in the refugee crisis", 7f.

[31] Christine Straehle, "Justified state partiality and the vulnerable subject of migration" (2017) 20 *Critical Review of International Social and Political* Philosophy 736, 740.

[32] Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986), 369.

[33] Peter Jones, *Rights* (Macmillan Press, 1994), 131.

choose from as well as independence from coercion in making such choices.[34] Personal autonomy, however, does not require that a person needs to be able to pursue any option she chooses, and the person can be even prevented from pursuing certain options by coercion as long as there are adequate other options that she can choose from.[35] This is something that distinguishes personal autonomy from self-realization in Raz' terms, which would consist of "the development to their full extent of all, or all the valuable capacities a person possesses.[36]

When considering the debate that is at the heart of this paper from the point of view of personal autonomy of those seeking protection, and recalling that an "[autonomous] person must not only be given a choice but he must be given an adequate range of choices",[37] it can be questioned whether the conditions of personal autonomy can be met by a protection seeker deprived of any agency. In the Dublin System for example the individual protection seeker is factually being coerced into receiving the protection of her basic needs in a particular state while none of her choices that are potentially based on strong moral interests are considered at all.[38] The reassertion of autonomy would, however, be an integral part on the path of moving away from the image of the protection seeker as a vulnerable subject lacking the capacity to be autonomous to an agent having some active role in determining the course of her life.[39]

It needs to be clarified that what is being argued for here is not a right to autonomy, the existence of which Raz denies himself,[40] but instead seeing the provision of adequate options from which a protection seeker can choose and which are linked to strong moral interests she may have (which however do not need to amount to rights claims)[41] as a prerequisite of equal moral concern. This would serve

[34] Joseph Raz, 372.

[35] Ibid, 377.

[36] Ibid, 375.

[37] Ibid, 373.

[38] With the exception of a certain limited consideration of family ties and rights of minors.

[39] Peter Jones, 125; Matthew Zagor, 374.

[40] Joseph Raz, 207.

[41] There are, however, some rights based claims which are already being considered, such as the possibility of protection seekers to find protection in a country in which certain family members are present derived from the right to family life, which even in the Dublin System precede the criterion of attribution based on illegal entry into EU territory (see Articles 9-11 of the Dublin-III Regulation). See also Rainer Bauböck, "Refugee Protection and Burden Sharing in the European Union", 145.

to balance out the horizontal level of distributive justice between states with what is owed to individual protection seekers – when thinking about designing institutional schemes of protection provision – in order to re-establish the individual as an agent in such schemes instead of just being a humanitarian subject in need of protection.

A way of showing that the provision of adequate choices taking into account certain strong moral interests individual protection seekers may have - going beyond the pure provision of basic security – seems to be morally required within a refugee regime, can be provided by looking at an analogy Gibney uses between a responsibility to refugees and a state's responsibility for abused and battered children in a domestic society. Gibney demonstrates that in case of battered children the state's responsibilities are not limited to taking children out of the failed families and providing physical protection but that in a second step the state also has to search for long-term arrangements (such as adoption) that are able to best promote the long-term welfare of a child. In this process several weighty interests such as e.g. the child´s personal experiences, his or her cultural and ethnic background or special needs, and even the child's subjective preferences need to be taken into consideration. He then argues that the situation of refugees can be conceptualised analogously, whereby providing security is the minimal and most important duty, but "states also have a duty to look for ways to settle refugees in countries where they are likely to flourish."[42] In developing Gibney's argument further, could it not be argued that certain strong interests by protection seekers, while not weighty enough to ground rights claims (a right to choose), could nevertheless be weighty enough to have moral force in the context of refugee protection,[43] and could eventually amount to something like a "principle of the best interest of the protection seeker", whereby states would have a duty to provide an adequate range of options and a duty of justification in considering protection seeker's choices?

In fact, some of this thinking, while not present in the initial Commission proposal for a Dublin-IV regulation, has recently emerged in the European Parliament's report on the Commission proposal, the so-called Wikström report[44], that will support the Parliament's position in the further negotiations. In this report

[42] Matthew Gibney, 459.

[43] Jaakko Kuosmanen, 110.

[44] LIBE Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 7 November 2017, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0345+0+DOC+PDF+V0//EN (last accessed: 02.12.2018)

MS examining an application would be under the new Article 19(2), subparagraph 1, entitled to request another state to take over the application "based in particular on family, cultural or social ties, language skills or other meaningful links which would facilitate his or her integration into that other Member State." Another fruitful suggestion can be found in the new default rule proposed for the Dublin-IV reform in the Wikström report, whereby the new Article 3(2), subparagraph 1, would require to shift the responsibility to a state that has so far taken the smallest number of protection seekers in ("correction mechanism"), and whereby the protection seeker would be offered four countries from which she could choose her preferable one. Of course that would constitute a fundamental first derogation from "the no choice for protection seekers" approach and would strengthen their capacity as autonomous social agents capable of rebuilding a meaningful social world for themselves – thus reinforcing autonomy as a specific ideal that states ought to foster in the Razian sense.[45] It needs to be added, however, that the prospects of this proposed corrections surviving the further negotiation stages are not very promising.

## A Case Study of Dispersal in the UK

When thinking about responsibility sharing in the European Union it appears useful to draw on empirical examples of schemes that have been already applied in comparable contexts[46] and that show the difficulties that might arise when trying to balance the fair distribution of refugees across a certain territory and certain strong interests refugees might have in residing in particular parts of that territory. One such an example is the UK system of dispersal of asylum seekers introduced through the Immigration and Asylum Act 1999, which aims at the dispersal of asylum seekers on a no-choice basis, with interests of individuals not being considered in the relocation process.[47] This dispersal system followed a preceding period during which asylum seekers basically had a free choice of where to settle on the territory of the UK and

[45] Jeremy Waldron, "Moral Autonomy and Personal Autonomy" in: John Christman and Joel Anderson (eds.), *Autonomy and the Challenges to Liberalism* (Cambridge University Press, 2005), 316

[46] Although the distribution of refugees between Member States of the EU cannot be directly compared to the way refugees are being distributed within the territory of certain states, there are however strong similarities given the fact that due to the border free Schengen Area refugees in principle also cannot be coerced by physical borders to stay within a particular Member State rather than moving on to another one to claim asylum there - as can be seen upon the example of large number of secondary movements across the EU.

[47] Emma Stewart and Marnie Shaffer, "Moving on? Dispersal policy, onward migration and integration of refugees in the UK", 14, available at: http://www.migrationscotland.org.uk/uploads/user_contributed/Moving_On_Final_Report_2015.pdf last accessed: 02.12.2018)

thus effectively self-allocated themselves. The self-allocation model led to a large majority of protection seekers settling in the greater London area and the South East, and the dispersal system was a direct reaction to the presumed pressures this geographic concentration created on the welfare and housing sectors of these regions. The shift was a radical one, from complete self-allocation to no-choice, and the importance of depriving asylum seekers of any choice was explicitly emphasized in the documents preparing the dispersal policy, such as the "Fairer, Faster, Firmer" White Paper by the Home Office of 1998, which stated e.g.: "Asylum seekers would be expected to take what was available, and would not be able to pick and choose where they were accommodated […]."[48] Earlier assessments prior to the implementation of the dispersal policy have shown that criteria which determined the allocation patterns of asylum seekers were the presence of family members or ethnic communities, as well as employment opportunities in particular regions. While those factors were initially envisioned to be considered by the authorities performing the dispersal in deciding where to send particular applicants, ultimately the factors that mostly determined where certain individuals would eventually end up was the availability of cheap social housing in many cases, which contributed to asylum seekers being dispersed to already economically deprived areas which further spurred social tensions in these areas.[49] The situation further deteriorated with an additional shift towards the privatization of dispersal in 2012, whereby three large private companies (G4S, Serco, Clearel) became responsible for housing provision, which further contributed to dispersal being solely based on market rationales in the sense of availability of cheap housing.[50]

Examples like this might show that both extremes, either the coerced allocation of protection seekers into particular regions, or the alternative where protection seekers could self-allocate themselves, led to unsatisfactory results. The full-choice model led to disproportionate responsibilities for some regions in comparison to the rest of the country and thus justice deficits on a horizontal level between the single regions, while the no-choice model of dispersal completely disregarded the interests of individual protection seekers and led to large-scale secondary migration of this

[48] Home Office, "Fairer, Faster Firmer", 1998, para 8.22, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264150/4018.pdf (last accessed: 02.12.2018).

[49] Patricia Hynes, *The Dispersal and Social Exclusion of Asylum Seekers* (Policy Press: Bristol, 2011), 71ff.

[50] Jonathan Darling, "Asylum in Austere Times: Instability, Privatization and Experimentation within the UK Asylum Dispersal System" (2016) 29 *Journal of Refugee* Studies 483, 488.

group of people into other regions.[51] There were some local practices in the early times of the dispersal scheme where local refugee service providers managed to accommodate some wishes and preferences of asylum seekers into the process of determining their dispersal destination through informal practices, as far as this was possible within the broader institutional framework, but which were later dismantled given institutional pressures and the push for privatization.[52] While there is no broad empirical data available on these practices, it could be claimed that they went a bit closer towards reconciling the interests of hosting regions and asylum seekers.

## Some Concluding Remarks

As the discussion above shows, there is some value in arguing for more consideration of the choices of refugees short of rights claims. Constructing the protection seeker legally as an active agent possessing the capacity to co-determine her destiny has a certain potential in the process of redrawing the public image of protection seekers and refugees from passive, ethicized supplicants depending on their vulnerability in their claims for protection, to more active agents with an autonomous sphere of influence in regard to the decisions taken upon them.

Of course the question remains whether a scheme of responsibility sharing that takes account of refugees' interests going beyond the protection of their basic needs is politically feasible in Europe at the moment. Several interesting approaches have been provided by a variety of authors as to how to cope with this issue. Byrne and Shacknove have already as early as 1996 advocated that the next step in the development of the Dublin regime should involve an extended recognition of certain links between a refugee and the country where she seeks asylum, such as "prior periods of residence for professional or educational reasons; strong linguistic and cultural ties […] or the existence of a well-established expatriate community."[53] Another potential first step into the right direction might be a refugee quota trading mechanism as suggested by Rapoport and Moraga, which encompasses a preferences-matching-mechanism by which the preferences of states and protection seekers are being assessed and people are sent to certain states in case the preferences of both

[51] Vaughan Robinson, "What works? Improving the effectiveness and efficiency of dispersal" in: Vaughan Robinson, Roger Andersson and Sako Musterd (eds.) *Spreading the 'Burden'? A Review of Policies to Disperse Asylum Seekers and Refugees* (Policy Press: Bristol, 2003), 154.

[52] Patricia Hynes, 75f.

[53] Rosemary Byrne and Andrew Shacknove, "The Safe Country Notion in European Asylum Law" (1996) 9 *Harvard Human Rights Journal* 185, 206.

parties match.[54] Such a matching mechanism has recently been developed further in the work of Jones and Teytelboym,[55] who suggest a refugee matching mechanism encompassing the preferences of both the state and protection seekers and matching them with the help algorithms which have been in the past successfully applied to match doctors to hospitals and school children to potential schools.

A further interesting proposal, which appears to be more feasible and would tackle some of the core problems related to the limitations of mobility and agency of recognized beneficiaries of international protection, has been presented by Jürgen Bast.[56] He argues that while one could keep the Dublin criteria in regard to protection seekers, limitations to the freedom of movement beneficiaries of international protection should be removed. This would mean that while people needed to wait in an assigned country during the process of status determination, they would be free to go to the place of their preference after obtaining a status. Initially, there could also be a transition period before granting the right to freedom of movement, but it should be drastically shorter than the five years currently required in the Long Term Residents Directive.[57] Such a solution would be a compromise in between the fair-allocation-of-responsibilities interests of states and the mobility interests of beneficiaries of international protection.[58] It would also contribute to a fairer distribution of responsibilities between states since the Member States at the external borders would still be responsible for the biggest part of status determinations while the remaining states would probably be responsible for the longer term protection of those who decide to move on after status determination.[59]

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[54] Hillel Rapoport and Jesús Fernández-Huertas Moraga, "Tradable refugee-admission quotas: a policy proposal to reform the EU asylum policy" (October 2014) EUI Working Paper RSCAS No.101.

[55] Will Jones and Alexander Teytelboym, "The International Refugee Match: A System that Respects Refugees' Preferences and the Priorities of States" (2017) 36 *Refugee Survey Quarterly*, 84-109.

[56] Jürgen Bast, "Solidarität im europäischen Einwanderungs- und Asylrecht", in: Stefan Kadelbach (ed.) *Solidarität als Europäisches Rechtsprinzip?* (Baden-Baden: Nomos, 2014), 155-156.

[57] See Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:132:0001:0004:EN:PDF (last accessed: 02.12 2018).

[58] Dana Schmalz, "Verantwortungsverteilung im Flüchtlingsschutz: Zu den Problemen 'globaler Lösungen'" (2017) 1 *Z'Flucht Zeitschrift für Flüchtlingsforschung* 9, 35.

[59] Such a model though would still potentially require financial flanking measures in form of monetary transfers in order to even out the financial contributions more popular and less popular reception states would have to bear – thus a form of additional financial 'burden sharing'.

**Postcript: Response to the Commentary by Matthias Hoesch**

I am very thankful for the comment on that paper provided by Matthias Hoesch[60] and I am happy that we at least seem to be in agreement as regards the conclusions suggested in the paper, although there seem to be several disagreements between the two of us as to the arguments used to arrive at these conclusions. In my opinion the reason for some of those disagreements stems from the different levels of abstraction on which we set our arguments – thus in a broader sense from a difference in the sensitivity to real-world factual constraints on the spectrum between ideal and non-ideal theorizing.[61] In this context I would like to respond to two critical remarks that Hoesch has voiced in commenting on my paper.

Let me start with the first critical remark that Hoesch makes in regard to my paper. He questions the added value of having to look for "special arguments" that would justify the need for taking into consideration strong moral interests of refugees going beyond rights claims when thinking about schemes of distribution of refugees across territory (in my case of the EU). He claims that it is maybe "enough just to point out that refugees are persons, and just because of that simple fact we have to consider their claims, perspectives, interests, and preferences, at least as long as there are no opposing reasons." Point taken – and from the perspective of abstract normative theorizing that could be all that should be asked for. On a lower level of abstraction, however, such an argument falls on deaf ears. Therefore, my point was to look at the special living conditions of refugees as a particular group of persons who have been forcefully displaced and relive this form of displacement through the coerciveness of the Dublin regime. My reference to Raz was meant to not only focus on the second criterion in Raz´ typology, thus the provisions of an adequate range of options (or in my interpretation countries) to choose from, but on its interrelationship with Raz´ third criterion through the coerciveness of the Dublin regime, whereby a particular group of people after already having been coerced once to leave their home territory is being coerced again to dwell in an assigned territory without once again having a say in the process. The point thereby is not the question whether they potentially could find adequate options to re-establish a life in the place they are being coerced to – but the fact that they are being forcefully coerced to move to a particular place on which they again have no say and what is something an adequate range of choices should be provided against as a remedy – a point that I admit could have been worked out a bit better in the paper.

A second critical remark provided by Hoesch that I would quickly like to comment upon concerns his warning directed towards the tendency found in my paper, but also in the work of other colleagues working in the field,[62] of limiting one´s focus in normative theorizing to regional actors

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[60] Matthias Hoesch, "Comment on Lukasz Dziedzic: What is Owed to Refugees When Attributing Responsibilities to States in Institutionalized Responsibility Sharing Regimes?", in: Matthias Hoesch and Lena Laube (eds.) *Proceedings of the 2018 ZiF Workshop "Studying Migration Policies at the Interface between Empirical Research and Normative Analysis"* (ULB Münster: miami.uni-muenster.de), 95–99. doi: 10.17879/95189436504.

[61] For an account on the question of real-world factual constraints in non-ideal theorizing see e.g. Laura Valentini, "Ideal vs. Non-Ideal Theory: A Conceptual Map" (2012) 7 *Philosophy Compass* 654-664.

[62] See e.g. Rainer Bauböck, "Refugee Protection and Burden-Sharing in the European Union" (2018) 56 *Journal of Common Market Studies* 141-156; Nils Holtug, "A Fair Distribution of Refugees in the European Union" (2016) 12 *Journal of Global Ethics* 279-288.

such as the European Union rather than taking a universal perspective, a tendency that according to Hoesch poses a big danger for those engaging in it to come into fallacies. Here once again I would claim that Hoesch is on a different level in regard to real-world factual constraints on the spectrum between ideal and non-ideal theorizing. In an ideal world in which one had the possibility to impose normative requirements of fairness upon states globally one of course should focus on a fair global system of responsibility distribution. As Hoesch in his examples indicates, the real world situation is rather one in which the EU as a whole and its Member States do not take their globally fair share of refugees but rather to some extent free ride on the efforts by other states - often those in vicinity to conflicts causing refugee movements. To draw from this the conclusion, however, that given the global inequality in refugee responsibility attribution it does not make sense to think about schemes of fair sharing inside the European Union since it would nevertheless remain unjust towards the countries outside bearing the brunt of the burden is in my opinion not helpful. In the paper I already justified why I think that such an institutional framework of refugee responsibility distribution is most likely to be first implemented in the EU given some particular elements of the institutional design of the EU. And from a point of view contextual normative theorizing I believe that it makes sense to first and foremost have a system based on solidarity and fair sharing of responsibilities inside Europe before the relationship with the global arena, and the fair share the EU as a collective should have, can be addressed. If the EU as an entity will be working on the basis of such principles internally, it is a first step in the process of reflecting upon such principles also in regard to the EU´s relationship with the outside world. If the EU already internally, with the institutional capacities for collective action it has, does not have a system based on solidarity between states and fairness towards refugees – it is difficult to even begin to factually address questions of solidarity and fairness in refugee distribution towards the broader world (in which the institutional parameters for coordination and collective action are comparatively limited).[63]

[63] I do, however, to some extent agree with Hoesch that a strong focus on real-world factual constraints to normative theorizing, at least in principle, can if performed uncritically contribute to a defence of the unjust global status quo.