

Mollie Gerver

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Refugee Quota Trading within the Context of EU- ENP Cooperation: Rational, Bounded Rational and Ethical Critiques

Mollie Gerver *The London School of Economics and Political Science*

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Abstract

In 1997 Peter Schuck proposed a 'refugee quota trading' mechanism, whereby countries voluntarily form a union, each country accepting a quota of refugees and able to buy and sell the quota to other states within and even outside of the union. Today, the EU arguably has a de facto cash transfer mechanism both within the EU and between the EU and European Neighbourhood Policy countries. This article explores the question of refugee quota trading, explaining why current EU policy fails to increase refugee protection. Throughout the critique, states are treated either as rational actors or actors with present-preference bias, the latter largely ignored in current discussions on international refugee 'burden sharing'. In addition, the ethics of refugee quota trading is presented using arguments distinct from that of Anker et al. (1998) who argue that refugee quota trading creates a 'commodification' of refugees. One could argue that refugees' protection is being commodified, not refugees themselves. However, when states are provided funds not to deport refugees, this can be a type of reward for not taking an action that states ought to follow regardless of the reward. Just as there are non-utilitarian reasons not to rely on rewards alone for lowering the crime rates for heinous crimes within states, there may be non-utilitarian arguments against refugee quota trading.

Keywords

Refugees, asylum-seekers, burden sharing, European Neighborhood Policy

The 1951 Geneva Convention for the Protection of Refugees and its 1967 Protocol give refugees the right to gain asylum in the first country in which they arrive. Yet, within the European Union (EU), some states receive significantly more 'spontaneous refugees' compared to others. Most EU countries accept significantly fewer refugees per capita, and certainly fewer per GDP, compared to European Neighborhood Policy (ENP) countries (UNHCR 2009). Solutions proposed in the current academic literature include mechanisms for 'burden sharing', to ensure a more equal distribution of obligations towards refugee protection. In relation to this, the provision of quotas for each country is proposed, each country also given the ability to trade these quotas amongst themselves (Schuck 1997). A similar policy involves money transfers in return for asylum without any set quotas (Hathaway and Neve 1997). These mechanisms have already been the subject of analysis by Anker et al. (1998) and Smith (2004) and others (Czaika 2009: 103 and Facchini et al. 2006) have shown the practical weaknesses of a money transfer scheme between rational states. This paper returns to this debate within the context of the EU itself and its relationships with ENP countries. It also (see Anker et al. 1998) tackles the questions of the practical results of quota trading and the ethical limits of the quota trading proposal but uses fresh theoretical critiques and applies the issue specifically to EU-ENP relations. It answers the question: *Do refugee quotas and quota sharing within the EU and between the EU and ENP countries constitute a viable and ethical policy?*

The article also engages with key wider debates concerning the relationship between the normative and cost-benefit logic of states attempting to take part in burden sharing for refugee protection. It first provides insight into why rational states may not be incentivised to absorb refugees as part of a voluntary quota trading scheme. Unlike previous critiques (Czaika 2009; Facchini et al. 2006; Smith 2004; and Anker et al. 1998), the article compares and contrasts refugee quota trading to catastrophic health insurance in the private and public sector, the analogy used by Schuck (1997). The comparison helps clarify why refugee quota sharing may fail in an international arena. This comparison with insurance is necessary, considering the term 'insurance' has increasingly been used to explain why states agree to burden sharing mechanisms. This

article then goes beyond the logic of both rational choice and norms to show how a 'bias towards the present' (Parfit 2011) or 'status quo bias' (Kahneman et al. 1991) may diminish the effectiveness of quota trading on a theoretical level. The bias towards the present may also serve as an additional logic for the actions of states, rather than only a combination of normative and rational cost-benefit logic as addressed by Thielemann in the context of the EU (2003a). Finally, building on literature that questions the ethics of refugee quota trading (Smith 2004; and Anker et al. 1998), the article questions an approach that only addresses the 'provision of asylum capacities' (Czaika 2009: 91) or the 'utilitarian social welfare' (Facchini et al. 2006: 418) of burden sharing mechanisms. Unlike previous literature, I show why refugee quota trading might be considered unethical even if it succeeds in protecting refugees.

Before this contribution, the following second section will provide broader context, including an overview of policies within the EU and ENP countries with regards to asylum coordination, and a brief overview of the current literature on burden-sharing. The solution of refugee quota trading is then critiqued in the third section of the article, using four major categories of argumentation, each using a slightly different qualitative methodology. The first and second categories, which build on the assumptions of Schuck (1997), assess the potential impact of refugee quota trading for EU and ENP states, with states assumed to be rational actors. The methodology also partially draws on the analytical framework developed by Noll (2003) who demonstrates the value of using a game-theoretic approach to understanding why cooperation may fail. The third category of argumentation uses a bounded rational choice assumption, attempting to explore the potential limits of refugee quota trading if states have a status quo bias. This methodology differs from Noll (2003), Thielemann (2003a) and others who limit their analysis to the tangible and intangible costs and benefits and coordination challenges in refugee burden sharing, rather than biases even under a completely coordinated system with tangible costs. However, the bias towards the present could be interpreted as an intangible cost, and therefore be a new factor to consider within the theoretical framework developed by Noll (2003) and Thielemann (2003a). In this section the theoretical examples use a two-country model, extending the Facchini et al. (2006) quantitative model by making qualitative suggestions that can be applied to a quantitative analysis.

The fourth argument in this section relates more closely to the study of ethics, and questions whether the morality of refugee quota trading conflicts with our intuitions about moral responsibility. This fourth critique will include an imaginary thought experiment of a policy that would be considered morally wrong, yet which is similar enough to refugee quota trading to raise moral concerns about that policy. This is a similar method to Smith (2004), who compares quota trading to another policy considered immoral. Like Smith, the methodology does not include a full philosophical analysis, though it presents a starting point for such analysis by showing the intuitive limits of an approach that only attempts to maximise welfare utility.

THE ASYLUM DEBATE

Attempts at a coordinated asylum policy in the EU and with ENP countries

A brief overview of the evolution of cooperation within the EU and between EU and ENP countries is necessary first in order to understand better why money transfers have become relevant in refugee absorption and in the academic literature on refugee burden sharing. International law, though not always followed, sets the general standards for asylum processing within the EU. The 1951 Convention and the 1967 protocol are the main pieces of international law, along with the UNHCR's (United Nations Refugee Agency) non-legally binding ExCom Conclusions. In the 1951 Convention and subsequent UNHCR guidelines, which have been incorporated into domestic law in EU

countries, an individual has the right to asylum if he or she can prove his or her life is under threat in the country they fled from, because of persecution due to their ethnicity, national origin, membership in a particular social group, or political opinion. However, different countries offer different levels of assistance to refugees, and have different criteria for proof of refugee status. This in itself can make cooperation on refugee absorption a challenge, even if states agree to accept more refugees, which they often do not.

In the 1980s, the Council of Europe agreed that it was necessary to harmonise asylum law to prevent 'country shopping,' whereby asylum-seekers do not request asylum at the first country they reach, leading to the Dublin Convention in 1990 (European Union 1997), which determined the state responsible for examining an application for asylum. Similarly, with the signing of the Maastricht Treaty, immigration law, including asylum law, was considered a common interest of EU countries. As a result, there were limited attempts to coordinate and create more equal burden sharing, and this included responsibilities towards refugees who had fled first countries of asylum outside of the EU. A press release from Brussels in September 2009 emphasises that the number of refugees voluntarily resettled in any member country is lower than those resettled in the US, Canada, and Australia, but that far more spontaneous asylum cases reach the EU compared to these countries (European Commission 2009). Many of these refugees arrive from third countries that may not follow the principle of non-refoulement.

Coordination between EU countries therefore involves engaging with third countries. The original readmission responsibilities of the EU were described in Article 63(3)(b) of the Amsterdam Treaty as including 'repatriation of illegal immigrants' (Official Journal C 340 1997). However, if third countries are not processing asylum-seekers, and perhaps deporting them, these particular people have the right under the Convention to seek asylum. Protected Entry Procedures were suggested in the November 2000 Communication. This entails asylum-seekers getting refugee status recognition outside of the EU and then applying for resettlement in EU member states (Noll et al. 2002). The Commission recommended that this particular procedure be complementary and not at the expense of asylum-seekers who reach EU member states without prior refugee status recognition. However, such protection may come at the expense of spontaneous asylum-seekers. For example, in the case of Denmark's mechanism of requiring visas for Bosnians, and for allowing a limited quota of 'particularly distressed' Bosnians, such protection came after access to Danish territory had already been blocked to most Bosnians (ibid). This mechanism within the EU therefore relies on improvement of asylum mechanisms within third countries, though these are not always available. Bosnians, for example, needed to cross the border into Croatia to reach a Danish representative or a UNHCR representative (ibid). Therefore, in 2005 a communication on Regional Protection Programmes (RPP) set out the need to improve asylum processes and conditions in non-EU countries, perhaps in order to prevent refugees from reaching the EU. RPP was to consist of practical actions that aimed to 'deliver real benefits both in terms of protection offered to refugees and in their support of existing arrangements with the relevant third country.' (COM [2005] 388). 'Real benefits' included cash transfers as a mechanism for refugee protection in third countries.

Funds for asylum processing and refugee absorption

The 'European Union Policy towards a Common European Asylum System' created a EUR 250 million budget in the AENEAS Programme between 2004 and 2008 to be given to those third countries which needed assistance in asylum processing (COM [2006] 26). Within the EU, member states can voluntarily agree to accept refugees who have already received refugee status from the UNHCR, and these member states will receive EUR 4,000 for every refugee they accept from the European Refugee Fund, the budget of which was EUR 614 for the period between 2008 and 2013 (European Parliament and

Council 2007). Funds provided through the International Organization for Migration (IOM) are given in the case of some readmission agreements, with the purposes of improving asylum processes. According to the Ukrainian Deputy Minister of Internal Affairs, Vasyl Marmazov, one temporary centre for illegal migration located in Volyn, Ukraine cost UAH 36 million (USD 4,497,335) with funds received directly from the EU and through the IOM (in Klymonchuk 2009). The total budget for the IOM is close to CHF 40 million (USD 75 million), though the total budget for all country field missions for the 2010 year was CHF 3,673,000 (IOM 2009).

Funds for EU countries are often not enough to encourage voluntary acceptance of asylum-seekers, suggesting funds in exchange for re-admittance of stateless persons may not be the most effective incentive for a fair asylum process, both in terms of the incentive of countries to pay other countries and the incentive the payment creates to accept refugees. For instance, Guild points out that only Romania, a non-EU country at the time, agreed to accept Uzbek refugees fleeing from Kyrgyzstan in 2005, even though EU states would have received funding from the European Refugee Fund (ERF) and Romania could not (Guild 2006: 631).

There are mixed results in the extent to which funding from the EU to third countries leads to readmission agreements. The 2007 EU-Ukraine Cooperation Council established EU financial support for asylum processes and infrastructure needs in addition to easier visa access for Ukrainian citizens, in return for Ukraine re-admitting stateless persons who had left Ukraine for EU countries. Wichmann uses this as an example of a mechanism used in the ENP to improve judicial procedures in non-EU countries. However, she also points to the failed negotiations with Morocco, an ENP country which requested and was denied funding for processing immigrants from Sub-Saharan Africa (Wichmann 2007: 14). Because Spain solicited Morocco for a readmission agreement, but could not pay the costs of assuring that immigrants from Sub-Saharan Africa would be repatriated to their country of origin after readmission to Morocco, the agreement was never fully implemented (Cassarino 2009).

Furthermore, even if funds are provided to absorb those who are readmitted to non-EU countries, these refugees may also be forcibly repatriated to areas of conflict. The ENP progress report on Israel, for example, states that 'Israel, in coordination with Egypt, continues to instantly and forcibly send back asylum-seekers/migrants from countries such as Sudan, Eritrea and Somalia' (European Commission 2009a). Even when states accept refugees and therefore receive funding to assist them, the funds are not necessarily utilised for this purpose. The UNHCR funds to UNHCR offices in Egypt for processing asylum seekers were arguably/apparently misused when refugees had difficulty accessing UNHCR offices, and could therefore not receive funds meant to be allocated for the welfare of refugees (Moorhead 2005). Furthermore, legal aid assists in gaining refugee status in Cairo, but those without such aid have extreme difficulties (Kagan 2006).

Financial transfers therefore play a role, positive or otherwise, in the relations between EU and ENP countries. States view accepting refugees as a burden, and this can inhibit states from absorbing them, making refugees vulnerable to deportations. Money transfers can be used for a variety of purposes, including as incentive to absorb refugees, as a means to cover costs of absorption, and as a means to deport refugees from an ENP country to the country of origin or another country of asylum. A type of explicit trading is therefore increasingly playing a role in the refugee regime, both in terms of bilateral agreements and as a result of attempts at burden sharing.

Burden sharing and refugee quota trading in the current literature

While it is clear that cash transfers play some role in refugee policy, current scholarly work has attempted to understand better the patterns of burden sharing within the EU and proposals for coordination that improve welfare and better protect refugees. One debate within this literature is why states agree to take part in burden sharing, such as contributing to the European Refugee Fund, when they would appear to be worse off in such a scheme. Thielemann argues that one reason may be because they are committed to certain norms, such as human rights protection. Another reason is that the scheme can be in their interests if they are receiving side-payments for agreeing to the scheme. The scheme can also serve as insurance for the future (Thielemann 2003b: 228) because states know that, should a large number of refugees enter their country in the future, other states will assist in absorption. Empirical evidence shows that states act according to both a cost-benefit logic and a norm logic, taking actions that are deemed 'appropriate', without necessarily calculating the costs and benefits (Thielemann (2003a).

Another related debate is whether refugee protection is a 'public good'. Suhrke (1999) argues that refugees staying in their home countries can fuel conflict, destabilising security for all. Refugee protection, like a public good, creates non-excludable benefits for states – meaning no state can be excluded from the benefits, in general, of the refugee protection regime - and non-rival benefits – meaning one state benefiting from refugee protection does not diminish the benefits to others. This is because all states benefit as a result of increased security from refugee protection, tempting states to free-ride off the generosity of other states providing this protection (Suhrke 1999). If refugee protection is a public good, a voluntary insurance scheme may not work because of free-riding. Yet there are benefits that only accrue to a state that contributes to the burden-sharing regime, suggesting that there are instances in which states can be incentivised to contribute (Betts 2003). Refugee protection, Betts argues, may not be a public good model but a 'joint-product model' where there is a positive relationship between a state's contributions to the regime and the excludable benefits it gains from the regime. In other words, the benefits that it gains means that others, as a result of not contributing, will not gain. This would suggest that states have an interest in not always free-riding. For example, resettlement agreements with other countries, should a state be faced with far more refugees than it feels it can absorb, are perhaps dependent on having absorbed at least a given minimum number of refugees.

If states, for whatever reason, do contribute to the regime – either despite the fact that it is a public good or because they have an interest in contributing because it is a joint product model – this could allow for what Thielemann (2008: 13) calls 'trading in refugee protection contributions'. A 'multi-dimensional burden sharing regime' (Thielemann (2008: 13) can exist, for example, when one state focuses on peacekeeping to prevent refugees from needing to flee and another state focuses on asylum. In a sense, the first country is contributing less by absorbing fewer refugees in return for contributing more through peacekeeping. Using the same logic, money transfers to countries in return for them absorbing more refugees could be one type of 'multi-dimensional burden sharing regime'. Hathaway and Neve propose one type of money transfer scheme, a solution they call 'responsibility sharing allocations' (1997:203). Opposing quotas according to GNP (Grahl-Madsen 1982), Hathaway and Neve support temporary settlement in areas according to geographical and cultural proximity of the country refugees are fleeing. To 'offset inequitably assigned costs' they propose also that 'fiscal burden sharing will be guaranteed' which would include money transfers from Northern states to Southern states (1997:204).

Others have tested money-transfer mechanisms through theoretical models. Facchini et al. (2006) build a two country model to show that the possibility of cross-country financial transfers may increase strategic responses in democratic countries, leading to sub-optimal outcomes from the perspective of utilitarian social welfare. In addition,

countries where refugee absorption involves a high cost, or where other countries' absorption of refugees involves very few spill-over gains, may choose to take a unilateral policy approach (Czaika 2009: 103) as there is little incentive to pay another country to absorb more refugees.

Schuck, like Hathaway and Neve, supports money transfers to countries that have a greater number of refugees, but he does not recommend that refugees receive protection in any particular country. He proposes creating a union where states can voluntarily join to accept a proportional quota of refugees (Schuck 1997: 246). States can then buy and sell their quota to other states within the block. He emphasises that all would be consensual, and on a regional or sub-regional basis, not a global one. States without large numbers of refugees at their borders may join in order to avoid absorbing large numbers of refugees in the future. Schuck (1997), like Hathaway and Neve (1997), presents his proposals as analogous to an insurance scheme where everyone will voluntarily agree to take part because of their own long-term self-interest. He also proposes that states within the block can sell quota-relief to countries outside the consensual block. Schuck notes that structural elements require that there be an 'agreement on the norms to share temporary and permanent protection needs in proportion to their "burden-bearing capacity"'. Perhaps Schuck uses the term 'norms' here in a similar way to Thielemann who, drawing on March and Olsen (1998: 7-10), views norms as expressing 'appropriateness' as opposed to the 'logic of expected consequences' where actors are strategic. If so, then a state would first need to hold an underlying belief about the appropriateness of absorbing refugees in proportion to their capacity before joining the scheme, in order for the scheme to function. However, if a country is acting according to the 'norm' of refugee protection because of the payments, actions are not directly taken as a result of 'appropriateness' but as a result of a cost-benefit logic. Though states may hold a norm and only be able to act on it with payments, the direct reason is still the payments, following a cost-benefit logic. Schuck explains that a central refugee status would decide who is and who is not a refugee, the quota set, and exceptions for particular national groups. If a country does not respect human rights, they cannot join the block or accept refugees until they do. A central agency would assure fair selling and buying, though its main goal would be ensuring human rights protection of refugees. This is because states already have an interest in ensuring that transactions go through even if they do not have an interest in ensuring protection for refugees. Furthermore, small instalments, paid on the condition of humane protection of refugees, would ensure that refugee rights are in place over time.

Anker et al. (1998) have critiqued the proposals of Schuck and Hathaway and Neve, arguing that Northern states will not be incentivised to provide cash to Southern states which provide greater protection, even if – and of this they are doubtful – there is money saved from the diminished need for individualised refugee status determination process in Northern states. Furthermore, even if money is transferred to Southern states, it may not be used for refugee protection. They also critique the moral soundness of the scheme, both because of its failure to protect refugees and because the plan creates a 'commodification' of refugees. Others, who are concerned about respecting the preferences of refugees, have expanded and modified the basic models of refugee quota trading. Mortaga and Rapoport's model (2010), for example, allows refugees to rank their preferences for country of destination.

Even as his plan has been critiqued and modified over the last sixteen years, Schuck's basic proposal remains particularly relevant for a discussion on the relationship between the EU and ENP in burden sharing, because his mechanism allows for a union of states to assign quotas voluntarily to each state within the union – such as the EU – yet also trade these quotas with states outside the union – such as ENP countries. Schuck's proposal is especially relevant in the current discussions because there is arguably implicit and explicit quota trading between the EU and ENP states. The completely voluntary nature of his plan is also unique, and may be especially relevant in an EU that has yet to

establish binding agreements with ENP countries concerning refugee protection. Though many of the critiques that arise in this article are also applicable to other money transfer schemes, Schuck serves as an important focal point for the overall critique by showing the limits to a voluntary scheme.

A CRITIQUE

Incentives

There are two main critiques regarding incentives. First, the perception of refugees as a public good – even if they are not – may diminish the incentive to stay in a quota trading insurance scheme. Second, even if refugee protection is not a public good or perceived as such, quota trading from above may still not function as predicted. Because both these critiques address the lack of incentive on the part of states, newer money transfer models that take into account refugee preferences, such as Mortaga and Rapoport (2010), do not sufficiently address this weakness even if their work is more sensitive to the preferences of refugees.

Refugee protection as a public good

Anker et al. (1998) address the argument that incentives may be weak. They point out that Northern states may have no interest in buying the insurance proposed by Hathaway and Neve (1997) and Schuck (1997) because they do not perceive refugees as a threat that is unstoppable; current border control mechanisms may suffice. Additionally, because many EU states do not feel that they will be receiving a significant number of refugees in the near future, there is little reason to join an insurance scheme, though an iterative game can create an incentive to cooperate in case a significant number of refugees suddenly enter a country in the future (Noll 2003: 242).

Building on this, one reason states may stop refugees reaching their borders is because refugee protection is viewed as at least partially a public good. If this is the case, even the prospect of a long 'shadow of the future' (Axelrod 1984: 126) in an iterative game (Noll 2003: 242) may not create an incentive to join an insurance scheme. Insurance works best if refugee protection is not a public good. If it was, individuals would have an incentive to free-ride (Thielemann, 2003b) and there would be no incentive to buy insurance voluntarily. Yet, refugee protection is currently partially a public good in the sense that, if one state deports a refugee to another state, the norm of refugee protection would largely be intact for all if the other state accepts the refugee, and the norm would be no less intact for all even if only one state is accepting all refugees. Czaika's model, for this reason, includes protection in another country as benefiting all countries that place value on refugee protection in general. This would be true even if refugee protection does not, as Suhrke (1999) claims, contribute to the security of all. A good that is a partial public good may require a partially involuntary requirement as a basis for a voluntary insurance scheme. Health care serves as an example for this argument. Like refugee protection, society may believe that health ought to be a public good, making it so, to an extent. For example, if wealthy patients pay for a doctor, and a doctor cannot morally or legally turn away a poor patient who shows up at their private emergency room, then health care becomes partially a public good that is susceptible to free riding by those who could afford to pay for emergency care. This can lead to sub-optimal health care for all. One reason that this does not happen is perhaps because the government requires all to pay taxes that contribute to both emergency and preventative medical care. The existence of government-funded hospitals, and government-funded health insurance, is the existence of required burden-sharing in health where all who work are required to pay for taxes that contribute to hospitals or

health insurance. Therefore, because the state, doctors, and society as a whole have largely decided that medical care should be a public good, one cannot opt-out in any given year from paying taxes which contribute to health care.

Perhaps refugee protection is not functioning as envisioned in the 1951 Convention partly because there is a perception that some country in the world may provide protection, yet there is no required involuntary mechanism for subsidising the protection, as exists in health care. Even if refugee protection is only partly a public good, the perception should still have the impact of free-riding, just as private doctors in private clinics saving some lives for free may have some impact on the ability of a completely voluntary insurance scheme to function. This critique is distinct from the arguments put forth by those who argue that Northern states may not perceive large refugee inflows as a risk (Anker et al. 1998: 299) because they have mechanisms for stopping refugees from entering their borders. It is also distinct from Thielemann's (2003b) comment that insurance schemes function best when all parties have the same risk perceptions. Rather, the critique here emphasises the impact of everyone perceiving refugee protection as something that ought to be a public good, and all behaving, some of the time, in a way that reinforces the perception of refugee protection as a public good, leading to free-riding.

Carbon trading serves as an example of a policy that, while certainly not sufficient to protect against global warming, is relatively successful compared to refugee protection mechanisms in that companies are lowering their emission levels within the EU. Carbon trading within the EU includes a required carbon emissions limit; for a member state of the EU, and a company within the EU, emissions limits are not voluntary, they are required, even if the buying and selling of emissions limits is voluntary. Even if the original legislation needed to pass by consensus, today all countries must continue to follow this as a condition for their continuing membership in the EU as a whole. The trading and selling of emissions outside the EU is possible partly because it is not voluntary for companies within the EU. Firms would not have an interest in buying and selling if there were no legal requirements regarding emissions. This is solved by simply forcing countries to have emissions standards within the EU. Similarly, EU countries should be forced to accept certain refugee quotas in order for an insurance scheme to be effective.

Pre-existing conditions

A second critique relating to the health insurance analogy accepts that refugee protection may not entirely be a public good or even perceived as such. Indeed, healthcare is not always a public good, even if it ought to be, yet the existence of voluntary health insurance may increase the overall health and welfare of a society. Even so, private health insurance does not allow any individual to opt-in at any point and receive the same benefits at the same cost. Rather, individuals with pre-existing conditions pay a higher premium if they have these conditions at the point of buying insurance. The reason an individual may be incentivised to buy catastrophic health insurance during a time when they are healthy is partly because buying health insurance after or during a sickness will be significantly more expensive.

In contrast, in Schuck's plan states do not receive a higher quota or less money in return for absorbing refugees when they join the union only after they have more than their quotas of refugees. It is perfectly rational for a country that has no interest in absorbing refugees regardless of payments to join only when they have more than their quota, thus avoiding a situation where they must accept the minimum quota or pay another country. Yet, if all acted this way, there may be no country to which to sell the extra quotas. This is not possible in a completely private sector health insurance scheme, because a private health insurance company demands higher premiums for anyone with

pre-existing conditions, thus incentivising individuals to join before they are sick. The reason private health insurance schemes can maximise their profits through such premiums for pre-existing conditions is because they are, in essence, competing against sickness without treatment. While Schuck creates a market mechanism for the trading of quotas, the cost of not joining the scheme does not fall on states, but on refugees. For this reason, it is unlikely that states will act as citizens in a health insurance scheme.

Therefore, even if refugee protection is not a public good and never will be, Schuck's quota trading plan – and arguably other completely voluntary insurance burden sharing plans (Hathaway and Neve 1997) - may not create the necessary incentives for states to join.

Cheating the system and inhumane conditions

Even if states appear to be incentivised to accept payments for refugee protection or are willing to pay other states for refugee protection, it is not clear that refugees are actually being protected within these states. The problem of human rights abuses within EU states and within ENP states is related to current burden-sharing mechanisms. As noted above, outsourcing of asylum processing is a method of preventing new refugees from entering the EU, leaving them in ENP countries. Protected Entry Procedures often come at the expense of spontaneous refugees (Noll et al. 2002) who may be fleeing a country that is not offering true asylum in the form of protection from human rights abuses, either because they are at risk of deportation to another country that abuses human rights or because they are abused within the host country. Schuck recognises this current problem and suggests small instalments, paid on condition of humane protection of refugees, to ensure that refugee rights are in place. The UNHCR would ensure that conditions are following those required in international law. There are four central critiques related to this plan.

Firstly, under the status quo, the UNHCR is not always fulfilling this role, especially in states that claim not to have the capacity to provide the conditions demanded in the 1951 Convention. Even when EU states do agree not to deport refugees – as when the agreement between Spain and Morocco fell through – this is partially possible because there are ways to prevent future spontaneous refugees from arriving, as shown with Denmark limiting entrance to Bosnians. If countries can already deport refugees back to first countries, without taking responsibility for the conditions refugees face in these first countries, and if countries can already prevent entrance, it is unclear why it would be in the interests of EU countries to pay first ENP countries to accept refugees. Even if they are willing to pay – as Morocco demanded of Spain – it is unclear why EU countries have an interest in ensuring that humane conditions are met.

Secondly, the market-orientated plan, within the context of the EU and ENP countries, can lead to even more human rights abuses if countries that currently abuse refugees join the trading system and now also have a financial incentive to keep refugees within their borders, by force if necessary. Or, alternatively, if the abusing country does not want to pay the price of more refugees in return for funds, it can illegally deport refugees back to their country of origin, accepting more refugees, and counting both the deported and newly arrived as part of the overall number in their country. Considering that Egypt (USCRI 2009) and Israel (European Commission 2010) both ENP countries, have been known secretly to deport recognised refugees back to Sudan, this is a possibility that must be taken into account.

Thirdly, the instalment scheme has limited power to address these problems. Any instalment paid by one country to another is one more reason for this paying country not to accept these refugees, because money has already been given. More importantly, there is no way of ensuring that the time it takes to pay all instalments stretches out

over the time period that the country of asylum must provide protection to the refugees. If refugees come from a country of origin that cannot be returned to for a period longer than the period for completing the payment of instalments, then the country of asylum can begin deporting refugees after all the instalments have been paid. This can be seen today. The UNHCR, whose funds come partly from EU states, pays developing states, including ENP countries, funds to cover the costs of accepting refugees. In a way, this is a type of instalment scheme, in that the UNHCR can stop the funds if initial refugees are abused. However, this did not happen on the ground in Egypt, where the Egyptian government continued to receive funds from the UNHCR for refugees accepted, up until over one hundred refugees were killed in front of the UNHCR offices by Egyptian security forces in Cairo in 2005 (Smrkolj 2010). Even after this event, the UNHCR continued to settle asylum-seekers inside Egypt, despite the fact that this settlement scheme was, according to many, the equivalent to refoulement (Fouda 2007: 512), due to the risks of staying in Egypt.

Finally, measuring the level of abuse is especially difficult. Entering a host country and asking if refugees are given their rights can be difficult if freedom of speech is limited within the country, or if refugees in particular are afraid to release information on their true conditions. For example, in Israel, an ENP country, Sudanese refugee children could not register in local public schools in Eilat. In interviews, when asked why they did not publicise this, or demand their rights to education, they responded that 'we do not want to have any problems, or be kicked out of the town'.¹ The fear that inhumane conditions create can also lead to fear of discussing such conditions. The worse the conditions, the more difficult it may be to assess those conditions.

Transparency in the process for Refugee Status Determination (RSD) is equally problematic. Schuck acknowledges that his plan would necessitate transparency of method for establishing who is and is not a refugee and in the allocation procedure and criteria for allocating quotas. However, within the EU, financial transparency arguably evolved through a gradual process (Cini 2008: 751). Once the policy passed, the commitment to the publication of the EU's Structural Funds was made permanent and countries could not simply opt out, as they could when the publication of the use of funds was done through national laws. Without ensuring this transparency, refugees' lives will be put at risk within countries that, under refugee quota trading, are now given a financial incentive to keep refugees within their borders.

Status quo bias and present-biased preferences

The arguments pertaining to incentives and cheating assume that the agents involved are rational. Present-bias preferences may play a role in states' actions, meaning they act in a way that is perhaps distinct from both a normative and cost-benefit logic. These biases may also assist in explaining why coordination has failed in the past and why EU states are not always prepared to provide funds to ENP states, just as Northern states are hesitant to provide sufficient funds to Southern states (Anker et al. 1998).

This bias has been addressed in both philosophy, when attempting to determine moral reasoning, such as Parfit who calls this 'the bias towards the near' (Parfit 2011: 46), and in behavioural economics, where status quo bias in human behaviour has been found to exist through controlled studies of human subjects. Schuck (1997) and others who propose quota trading (Mortaga and Rapoport 2010) and money transfers (Hathaway and Neve 1997) do not take into account the possibility of this non-normative and non-rational bias. There is evidence that this bias exists. Immediate deportations, before the public or human rights groups are aware that the refugee has made it to the country, are common by border patrols which do not have the resources or expertise to decide if an individual is a true refugee (Mertus 1998). There may be a bias for action to keep the status quo and deport, but once refugees have stayed in the country for a particular

time, then the status quo changes to be one where refugees are now in the country, and inaction may be more common. International law may also create a status quo bias. Noll (2003), for example, suggests that international law creates certain risks for states that deport refugees within their borders, in contrast to extra-territorial prevention of refugee entrance which 'costs' less in the form of legal repercussions.

Taking status quo into account, let us assume two countries, A and B, have the same level of normative belief in refugee protection and the same resources. However, country A has refugees directly crossing their border, and country B does not. Country A will deport as many refugees as it can at the border today, because of status quo bias. Country A will also not deport some refugees who manage to somehow stay in the country, also because of status quo bias because the status quo is now that there are refugees in the country. Country A has accepted exactly their quota. Country B is willing to pay country A money not to deport any new refugees in the future, though country B is far enough away to not necessarily be faced with the deportees from A.

Taking into account status quo bias, even if country A values refugee protection, the cost of accepting refugees it wants to deport today is both the cost of changing the status quo and the general resources needed to accept refugees. Both A and B will gain the normative value of protecting refugees, though B has none of these costs. Even if country B also fears these refugees will flee to country B, and its status quo bias for preventing new refugees will encourage it to pay country A to keep refugees, this is a more distant 'threat', and it is statistically a lesser threat compared to that faced by country A. In a sense, country B may be influenced by 'present-biased preferences' (O'Donoghue and Rabin 1999). That is to say, avoiding *future losses* from *future new refugees* for country B will not translate into as high a monetary value as country A's *current losses* from the *current new refugees*.

If the mental mechanism for present-biased preferences is that 'concrete mental representation' seems more valuable than theoretical rewards (Loewenstein 1996), then country A will expect to get a concrete mental representation reward in return for a concrete mental representation of accepting refugees. Country B is expected, in Schuck's model, to pay concrete mental representations in the form of funds for a more theoretically uncertain threat of future refugees. Country B will presumably be willing to pay less than what country A demands, because country B is gaining something theoretical only, while country A is paying the cost of the more concrete mental representation of allowing refugees to cross their borders or stay within their borders even though they have just arrived. If country B will not pay country A enough, no transaction will occur, and country A will illegally deport even if both A and B believe that deportation is normatively wrong on the same level.

Another possibility is that countries may be overpaid to keep refugees who have already lived in the country for long enough to become the status quo in status quo bias. These are the refugees who managed to stay in country A despite country A deporting some refugees. This, presumably, is less problematic, as refugees will still not be deported. However, more worryingly, citizens in country A may have exaggerated perceptions of the number of refugees within their country who have recently been absorbed compared to the number of refugees that citizens in country B perceive that country A has absorbed. Country A will, for this reason as well, demand far more money than country B is willing to provide in return for accepting more refugees. One can see today that many citizens have exaggerated perceptions of the percentage of refugees that they have provided protection to, perhaps a type of concrete mental representation influencing those perceptions. A British 2003 poll found that, on average, British people 'estimated that Britain had 23 per cent of the world's refugees' rather than the actual 2 per cent at the time of the poll (ICAR 2003). States with refugees may exaggerate the value they are giving to alleviate the world 'burden', making the cost they perceive as higher than the cost that other states perceive.

However, if a choice is presented as if it is the status quo, then perhaps the alternative will be accepted (Kahneman et al. 1991). If citizens view the quota requirement as the status quo, as opposed to a change from the current number of refugees accepted, then a quota system could encourage refugee hosting in countries that currently accept less than the quota to be agreed upon. However, any number above the quota may be viewed as changing the status quo, leading to illegal deportations of those who have managed to settle in the country, and who, today, may have been given some sort of protection. This could mean that refugees who arrive after a quota is filled would be put at greater risk if the trading mechanism fails.

Ethical Critique

If the plan puts refugees at great risk, Anker et al. (1998) point out, it is questionable on moral grounds. They also provide an argument for why the plan itself is not moral, irrespective of its ability to protect refugees (1998: 294). They claim that refugee quota trading creates 'commodification' of refugees. In response to this, one could just as well argue that the protection is the commodity traded, rather than the refugees, just as in a hospital it is the treatment which is the commodity, not the patient. Smith provides a slightly different ethical argument, comparing refugee quota trading to parents paying mercenaries to avoid their children being drafted into the military (Smith 2004: 137). Outsourcing one's moral obligations can create divides in society based on wealth and forcing those with fewer means to take the greatest risks. As distinct from Anker et al., one could understand Smith's argument as showing that refugee quota trading is the commodification of moral obligations which may be immoral.

This article attempts to show that refugee quota trading is even worse than the hiring of mercenaries and the outsourcing of one's moral obligations. With mercenaries, those fighting are being paid money for risk taking, and not only to fulfil a moral obligation. With refugee quota trading, the refugees are not being paid to take the risk – the accepting state is being paid, regardless of its history with the treatment of refugees. However, this still does not signify that refugees are a commodity if the payments to states are for their own protection. A purely utilitarian argument may hold that this is just if more refugees will be saved. A moral critique of the utilitarian nature of the plan must therefore question the morality of the plan even if more refugees are saved in this plan. To do this, a new critique is presented which explores the nature of reward and punishment.

Quota trading, in essence, awards countries for 'voluntarily' accepting refugees, when many of these refugees should, under the current policy, be able to access asylum without the receiving countries being rewarded for providing asylum. With refugee quota-trading, the final country to receive refugees would be rewarded for not breaking what is currently the law, rather than rewarded for receiving more refugees than is required under the law. Today, any country that rejects refugees automatically passes the buck to another country to accept the burden and this next country, in turn, also has the legal obligation to accept the refugees, not the voluntary responsibility. Schuck is legitimising non-refoulement as a voluntary action when states receive more than their quota, because it is something that is dependent on payment from another country, rather than punished when not followed. If non-refoulement was required in his plan, states receiving more than their quota as a result of other states rejecting refugees could not demand that another state pay it for absorbing refugees. It would need to absorb the refugees, both morally and legally, if every other country would deport the refugees to their country of origin.

While a deeper philosophical analysis is beyond the scope of this article, an example from within a country may demonstrate why quota trading may be intuitively unethical even if more refugees are protected. Within countries, high murder rates could arguably

justify a type of 'murder quota-trading' mechanism: all citizens who wished to murder would need a specified large number of points; each citizen is given one point upon birth, and citizens can buy and sell points. Any citizen that commits murder without the necessary points would have their point/s revoked, be imprisoned and unable to take part in the murder-quota trading mechanism in the future. Prison sentences would be shorter than today, as there already exists a positive incentive not to murder in order to sell one's points either directly or indirectly (through traders) to others who did wish to murder. The number of points needed to murder would result in a lower number of murders compared to the number of murders hitherto occurring. Such a mechanism could, potentially, lower murder rates – the incentive not to murder to sell points might be cheaper to organise compared to lengthy prison sentences and giving the option only to murder when one bought sufficient points would perhaps encourage potential murderers to wait, think twice, and kill sparingly in return for no prison sentence at all.

Most would view this as morally wrong. It is not wrong only because there may be practical limitations to such a mechanism. The ethical limitations surely dwarf any technical limitations. An action which is seen as unquestionably wrong, and which no human being should take, is being rewarded simply for not being taken. Similarly, refugee quota trading may be wrong because it rewards countries for fulfilling an obligation that ought to be punished if transgressed.

This is not to argue that, today, countries are not transgressing the principles of the 1951 Convention and 1967 protocol. The EU does not allow 'country shopping' between EU countries and between ENP and EU countries, even when many refugees are not shopping but fleeing. They may be fleeing an ENP country to Europe, out of fear that the ENP country will deport them back to their country of origin, or provide such inhumane conditions that they are arguably refugees of the ENP country, such as the condition for Sudanese refugees in Egypt in 2005 (Srnkolkj 2010). They may be fleeing from one EU country to another. Darfur refugees who were threatened with deportation from the United Kingdom (Gilmore 2007), an EU member, could arguably qualify for genuine asylum in another EU country, without being blamed for 'shopping'.

If this is the current state of refugee protection, then perhaps the moral stance should be stated as such: even if it is morally better to punish a country for committing a crime than to reward a country for not committing a crime, this is only true if the same amount of lives is saved in both scenarios. At the very least, it is still better to save more lives through a mechanism that rewards countries for not committing the crime of illegal deportation than to spare lives through a mechanism that only punishes. However, a refugee quota trading mechanism must show that ensuring protection for refugees in countries which receive a reward for taking more than their quota will somehow be easier than ensuring protection for refugees in countries which are receiving a punishment for illegal deportations. The proponents of refugee quota trading have failed to establish this. Even if they had, there are still doubts as to the morality of the policy, just as murder quota trading would be unacceptable to many even under conditions where murder rates would go down as a result of the plan.

Furthermore, the problem with refugee quota trading is not necessarily that it is utilitarian at all, in the philosophical sense, as Anker et al. (1998) claim. The act of commodifying refugees – and certainly the psychological damage for refugees who feel they are being commodified – could very well be a 'bad' that a utilitarian would wish to avoid. In addition, even if one is only concerned with utilitarian social welfare, the reason punishment is used for heinous crimes is perhaps for reasons that are also utilitarian from the perspective of social welfare. If a punishment feels psychologically worse than the lack of a reward, perhaps due to loss-aversion (Kahneman and Tversky 1979), then a reward mechanism may be less effective. This argument is therefore potentially compatible with a range of philosophical perspectives and raises doubts as to the morality of an EU Refugee Fund that is used as an incentive payment to states to accept refugees.

This logic could be applicable to the case of EU-ENP relations in the sphere of refugee protection. Today, the EU often threatens to demote trade relations with countries that have poor records in human rights, including in the areas of illegal deportation of refugees. The ENP country reports have detailed information about the conditions and policy with regards to refugees and, at least officially, claim to build relations partially according to these and other human rights conditions (COM [2004] 373). There is a case to be made for demoting relations, without rewarding compliance with international refugee law, in order to uphold certain moral principles that may be distinct from optimising social welfare from a utilitarian perspective, or which may be consistent with utilitarian perspectives that take into account non-rational biases.

CONCLUSION

This article set out to show how the ability to deport ultimately makes any insurance plan incomparable to successful catastrophic health insurance schemes. States can opt in and out of a scheme strategically and the element of bias towards the present skews the ability for a purely rational incentive mechanism to encourage refugee absorption. Most importantly, this article suggested that a moral argument must show why the trading of refugee quotas may not be ethically sound even if more lives are saved, and this idea can be applied to current relations between EU and ENP countries. The failed agreements between Spain and Morocco, the failure of Bosnians to receive protection in Denmark, and the failure of the EU to absorb more refugees in proportion to states' GNP, are not only examples of failures of rational states to cooperate. They may have been a failure on the part of the EU to create the type of mechanism that takes into account the way rational and irrational states act in a world where deportation is still a possibility, and the way rational and irrational states ought to act in an EU that has yet to fulfil its international obligations set forth in 1951 and 1967.

These theoretical ideas could perhaps be better tested using a stronger, more complex theoretical analysis seen in the work of Noll (2003), Facchini et al. (2006), Czaika (2009), and Mortaga and Rapoport (2010). The analysis could also be greatly enhanced by testing the ideas against a broader array of policies and data, as done by Thielemann (2003a) within the context of the EU. The limited data on unauthorised deportations and abuses in countries with limited human rights may create challenges for testing the ideas against reality, yet it is possible to do so with extensive field work.

One may argue that, even when the idea of quota trading appears morally questionable, it still may appear more ethically sound compared to today's unequal distribution of contributions towards refugee protection. Perhaps it is not enough to show that quota trading is wrong, but that it is more wrong than the current policies. Nonetheless, there are other ways in which refugees can be protected through cash transfers, such as offering more funds to private NGOs and charities, or directly to refugees, rather than to host countries in return for greater asylum processing and refugee protection. Assuming the idea of refugee quota trading would be as difficult to implement as other less morally questionable forms of refugee protection and assistance, then quota trading should play no or only a limited role in the shaping of EU and ENP policies towards refugees. There may still be a place for cash transfers, but it must be done in a way that makes rational and moral sense.

¹ Interview with Adam, September 12, 2009 in Eilat, Israel. Interviews were conducted with eight refugees on September 12th 2009 in two community centres.

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