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Outsourcing Refugee Protection Responsibilities: The Second Life of an Unconscionable Idea

Ronald C. Smith

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Outsourcing Refugee Protection Responsibilities: The Second Life of an Unconscionable Idea

Cover Page Footnote

December, 2004, graduate of The Florida State University College of Law. The author and his wife, Jean, have served as sponsors of more than a dozen political refugees admitted into the United States.

OUTSOURCING REFUGEE PROTECTION RESPONSIBILITIES: THE SECOND LIFE OF AN UNCONSCIONABLE IDEA

RONALD C. SMITH*

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I. INTRODUCTION

For the second time in a decade a serious proposal has been put forward suggesting nations be allowed to pay other countries to take genuine refugees off their hands rather than honor their obligations to provide asylum within their borders. Then and now the proponents of this radical idea rely on funereal assessments of the state of the international refugee regime. Wrapped in these dire pronouncements, the idea this time around is floated as a natural outgrowth of other recent developments in the international community.

The particulars of the latest discussion of the market concept are outlined in Part II of this article. The close links of the idea to a British proposal to ship asylum seekers to processing centers outside United Kingdom borders are also explored. Part III looks at the earlier suggestion of a market in refugee protection quotas that grew up on the opposite side of the Atlantic following the peak of the Haitian refugee influx to the United States. Recent developments that provide fertile ground for those who argue for changes in the refugee convention and protocol are explored in Part IV. The author then takes the position in Part V that creating an international market to trade refugee protection responsibilities is both foolhardy and unconscionable: foolhardy because it is not even in the selfish best interests of nations to export this responsibility and

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unconscionable because even debating the concept debases one of the supreme achievements of international diplomacy, an accord reached in the chaotic aftermath of World War II that is certainly a watershed moment in collective recognition of human rights by the community of nations.

II. AN IDEA REVIVED

A stark new proposal to create an international market for refugee placement has been published as a working paper on new issues in refugee research by the Office of the United Nations High Commissioner for Refugees.¹ The author, Alexander Betts, presents the concept of paying other nations to relieve a country of its international obligation to provide asylum to eligible individuals as a natural outgrowth of current discussions in Europe.² He suggests the British government's proposal³ in 2003 that the European Union consider creating transit processing centers outside the borders of the European Union lends itself to the market concept.⁴

Under the British proposal those seeking asylum upon arrival in European Union nations would be transferred to these outside processing centers and their claims evaluated.⁵ The British proposal suggests the international handling of refugees can be improved through better regional management of migration and the introduction of processing centers in strategic locations outside the European Union.⁶ The stated goal is to deal with "irregular migrants" in their regions of origin by providing protection close to their home countries and developing legal means by which "genuine refugees" could be admitted into Europe "if the situation requires."⁷

The proposal describes four elements of regional intervention. These can be briefly detailed as:

1. Preventing mass movements of refugees through wiser distribution of development assistance to the

1. ALEXANDER BETTS, THE POLITICAL ECONOMY OF EXTRA-TERRITORIAL PROCESSING: SEPARATING 'PURCHASER' FROM 'PROVIDER' IN ASYLUM POLICY, UNHCR Working Paper No. 91 (2003), available at <http://www.unhcr.ch> (last visited Nov. 1, 2004).

2. *Id.* at 6.

3. U.K. HOME OFFICE, CONCEPT PAPER PRESENTED BY THE HOME SECRETARY TO THE EU JUSTICE AND HOME AFFAIRS COUNCIL MEETING: UK PROPOSALS ON ZONES OF PROTECTION: NEW INTERNATIONAL APPROACHES TO ASYLUM PROCESSING AND PROTECTION (2003) [hereinafter NEW APPROACHES], available at <http://www.parliament.the-stationery-office.co.uk> (last visited Oct. 30, 2004).

4. BETTS, *supra* note 1, at 3.

5. NEW APPROACHES, *supra* note 3, at 3.

6. *Id.* at 2.

7. *Id.*

poorest nations and enhancing the ability of the UN to respond rapidly to any emerging crisis.⁸

2. Providing better protection of refugees in regions close to the nations they are fleeing, thus reducing the incentive to move on to Europe.⁹

3. Processing asylum claims in these protected areas and managing limited resettlement in Europe on a quota basis when protection in the region is not appropriate for the long term.¹⁰

4. Signing readmission agreements if necessary to promote acceptance of responsibility by nations to accept the return of refugees.¹¹

The intervention plan would be complemented by the introduction of transit processing centers outside the European Union.¹² These are envisioned as protected zones in third countries. Asylum seekers arriving in European countries would be transferred to these centers and have their status considered there.¹³

The centers would be paid for by the participating nations and the European Commission.¹⁴ Those granted refugee status would be accommodated in Europe under a burden-sharing formula.¹⁵ The majority of those denied asylum would be returned to their countries of origin.¹⁶ Where that would be unsafe, refugees might be given temporary status in the European Union until the situation in their homeland improved.¹⁷

The British proposal is consistent with another important development in Europe's struggle to deal with refugees over the past two decades. The Council of Europe identified a need in the 1980s to harmonize asylum laws to combat a phenomenon where asylum seekers sought entry in one nation after another.¹⁸ Under a 1990

8. *Id.*

9. *Id.*

10. *Id.* at 2-3.

11. *Id.* at 3.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 3-4.

18. Joan Fitzpatrick, *Flight from Asylum: Trends Toward Temporary "Refuge" and Local*

agreement refugees get just "one bite at the apple."¹⁹ They can gain access to the asylum adjudication process in only one member nation.²⁰ The latest British proposal simplifies the coordination of that effort.

The UK proposal prompted Betts to write because it attempts to "separate the concept of protecting asylum-seekers, to which the convention binds them [states], from that of admitting them to the country they want to go to."²¹ If this split can be made, a nation can meet its obligations under international law while handing asylum-seekers over to another safe country for processing purposes.

Betts says processing in the region creates a purchaser of services and a provider of services.²² "It allows, at its most simple, one state to pay another to provide basic asylum services on its behalf, subject to a contractual relationship."²³ He sees the leap from the already established asylum burden sharing (in the form of a European Refugee Fund) to extra-territorial processing as a jump from the transfer of money to the prospect of transferring people and money.²⁴ And once protection seekers are being moved, it is only a small step to incorporate a concept of "efficiency" in the form of payments to others to accept a country's full resettlement obligations.²⁵

Betts acknowledges his conception puts the UK proposal in its "most extreme form" but sees the existing proposal as already separating a nation where an asylum claim is made from that nation's obligations to directly supply certain social and legal services related to the processing of an asylum claim.²⁶ He sees the UK plan as a choice to contract out the traditional processing services to a hopefully more efficient provider.²⁷

The argument Betts makes is that contracting agreements such as these, when taken to their "logical extreme," could incorporate more of a nation's refugee obligations.²⁸

Responses to Forced Migrations, 35 VA. J. INT'L L. 13, 36-37 (1994) (referring to twin problems of "asylum shopping" and "refugees in orbit").

19. *Id.* at 38.

20. *Id.* However, the 1990 agreement was limited to participating states. *Id.*

21. BETTS, *supra* note 1, at 3 (quoting *Special Report on Asylum*, THE ECONOMIST, Mar. 15, 2003, at 35-38) (brackets in original).

22. *Id.* at 9.

23. *Id.* Betts acknowledges that this division "exaggerates the extent of devolved power in the current proposals," but argues that it fairly characterizes the overarching conceptual framework. *Id.* at 1.

24. *Id.* at 4.

25. *Id.*

26. *Id.* at 1.

27. *Id.*

28. *Id.*

While fiscal transfers can only offer financial compensation for non-financial costs, the human transfer allows the political, social and economic costs to be directly transferred. This is particularly politically expedient for states in which "cost" is not simply measured in terms of the provision of legal and social conditions, but extends to the marginal perceived cost of taking in another asylum-seeker.²⁹

Purchasing states would have to decide what they are willing to pay not to have to admit the qualified refugee and once other nations expressed a willingness to receive the refugees in return for compensation³⁰ a market would be born.³¹

Betts analogizes the "refugee market" to other "quasi-markets" created with some level of success in the United Kingdom since 1988.³² Although these markets will be discussed here only in passing, they are an important part of his argument for the viability of his international trade in refugee placements.

The British government retained public funding for portions of the national education and health systems but introduced market forces within the state system by forcing public providers of services to compete for the right to provide those services.³³ An education reform measure created such a quasi-market by encouraging a competition for pupils by giving parents a choice between schools.³⁴ A similar health service reform stimulated competition by creating contests between public agencies bidding to provide health and community care.³⁵

Betts sees an increased efficiency in these "quasi-markets" because he believes they allow for more appropriate and specialized services that provide incentives to reach required standards of quality at the lowest possible cost.³⁶ Extra-territorial processing of

29. *Id.* at 5. The author sees indirect costs in many areas including ethnic division and media portrayal. *Id.*

30. See Peter H. Schuck, *Refugee Burden Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243, 284 (1997) (explaining that cash, weapons, development aid or anything the receiving nation considers acceptable could serve as compensation).

31. BETTS, *supra* note 1, at 15.

32. *Id.* at 7. Betts notes that quasi-markets are "markets in which government agencies arrange care for their clients by placing contracts for the delivery of care with independent 'arm's length suppliers.'" *Id.* (quoting Carol Propper, *Quasi-Markets, Contracts, and Quality in Health and Social Care: The US Experience*, in QUASI-MARKETS AND SOCIAL POLICY 25-45 (Julian Le Grand & Will Bartlett eds., 1993)).

33. *Id.*

34. *Id.* at 8.

35. *Id.*

36. *Id.* at 9.

refugee claims would potentially create a quasi-market using third countries and international agencies as providers of asylum processing services. The final step toward the market system he envisions for refugee placements would eventually help nations overcome their "collective action failure associated with the burden-sharing debate."³⁷ His conclusion is that "[t]he market incentives inherent in such a system would induce participation by allowing each state to maximize its own perceived interests."³⁸

III. SHADOWS OF EARLIER PROPOSALS BY SCHUCK, HATHAWAY AND NEVE

The Betts proposal to a certain extent is a revival of an earlier suggestion of a market in refugee protection quotas. Though he gives no nod to the work of Peter H. Schuck,³⁹ Betts' discussion echoes Schuck's, and discussion of Betts' ideas are informed by the debate that surrounded earlier suggestions.

Schuck wrote in response to a perceived refugee crisis on the other side of the Atlantic.⁴⁰ His proposal was born in the aftermath of a Haitian influx into the United States but also followed problems in Afghanistan, Bosnia and Rwanda.

One recent commentator linked the British proposal that provides the springboard for Betts to the U.S. response to Haiti.⁴¹ Jeff Crisp says that many proposals to deal with the refugee regime have been overshadowed by a newer and more radical approach based on extraterritorial processing and the notion of protection in regions of origin.⁴² He suggests such concepts are at least 10 years old and can be traced to the U.S. treatment of asylum seekers from Haiti in the early 1990s.⁴³ It is also interesting to note that where Betts analogizes to the quasi-markets in education and health care in the United Kingdom, Schuck relied on comparisons of his refugee protection market to trading in emissions rights under the U.S. Clean Air Act.⁴⁴ He also cited affordable housing quotas imposed on cities by the state of New Jersey and a system that allowed

37. *Id.* at 22.

38. *Id.* at 15.

39. Schuck, *supra* note 30, at 243.

40. *See id.* at 244.

41. JEFF CRISP, A NEW ASYLUM PARADIGM? GLOBALIZATION, MIGRATION AND THE UNCERTAIN FUTURE OF THE INTERNATIONAL REFUGEE REGIME 12 (2003), available at <http://www.unhcr.ch> (last visited Oct. 30, 2004).

42. *Id.*

43. *Id.* at 12. Crisp says Australia's recent refusal to allow the disembarkation of refugees arriving the United States by boat and the U.K. proposal for extra-territorial processing revived the radical approach. *Id.*

44. Schuck, *supra* note 30, at 291.

municipalities to buy and sell their obligations to build housing for poor people.⁴⁵

Schuck's ideas reached the mainstream in an opinion piece he wrote for *The New York Times*.⁴⁶ After describing the international community as paralyzed in response to a worldwide tide of refugees and citing great differences in the willingness of nations to absorb refugees, Schuck offered a simplified version of his self-described "modest proposal" for the nations of the world.⁴⁷

Some are wealthy, others poor. Some are thinly settled, others overcrowded. Some have docile populations; others cannot protect refugees from violence.

Why not use these differences to promote burden-sharing? Usually, people with diverse preferences and assets turn those differences to mutual advantage by trading. When a buyer values a car more than cash, and a seller prefers cash to her car, they cut a deal and both benefit. Now apply the principle to refugees.⁴⁸

Schuck then presented what he called a "novel" idea: that the UN could establish refugee quotas for nations and permit countries to trade their quota obligations.⁴⁹ He said if these obligations and bargains were enforceable, rich but crowded countries like Japan would be likely to pay nations like Russia to relieve them of their refugee obligation.⁵⁰

Writing in much greater detail in the *Yale Journal of International Law*, Schuck said nations were already paying others to protect refugees when they contribute funds to help other countries handle "protection efforts in situ."⁵¹ He described this system as ad hoc, sluggish in response, highly political in nature and harmed by uneven contributions.⁵² He said these problems could be overcome with "[a] properly regulated market in refugee protection quotas."⁵³

45. *Id.*

46. Peter H. Schuck, *Share the Refugees*, N.Y. TIMES, Aug. 13, 1994, at A21.

47. *Id.*

48. *Id.*

49. Schuck, *supra* note 30, at 250.

50. Schuck, *supra* note 46.

51. Schuck, *supra* note 30, at 283.

52. *Id.*

53. *Id.*

Schuck opposed the idea of creating a centrally administered refugee protection fund as something that appears preferable only "at first blush."⁵⁴ He saw two disadvantages to this method when compared to a market approach. He said a protection fund would necessarily restrict payments by nations to cash and a voluntary exchange between nations opens the door to debt relief, credit, commodities, technical advice, weapons and any combination of these that is acceptable to the parties.⁵⁵ He also believed a centralized system would have higher transaction costs.⁵⁶

Schuck, in turn, owes some debt to James C. Hathaway and R. Alexander Neve. Their studies covered a six-year process of consultation at York University that brought together government officials, academics and representatives of nongovernmental agencies and international organizations.⁵⁷ Their work has been described as similar in many ways to that of Schuck⁵⁸ because each proposes creating "interest convergence groups" of states who would allocate responsibility for protecting refugees.⁵⁹ Hathaway and Neve devoted much of their work to operational burden sharing and responsibility sharing among nations and these are incorporated into Schuck's approach. Schuck, though, devoted less attention to durable solutions such as temporary protection of refugees. His work toward the creation of a market in refugee quotas is credited as an "innovation."⁶⁰

IV. FERTILE GROUND FOR RADICAL THOUGHTS: THE TRASHING OF THE REFUGEE REGIME

Bleak assessments of the health of the international refugee regime are essential elements in peddling the idea of trading refugees. The opening statement of the British government's concept paper that launched Betts' purchaser-provider treatise is in keeping with this view: "We start from the premise that the current global system is failing."⁶¹ The position paper says there are twelve million genuine refugees in the world; that the current asylum system usually requires those fleeing persecution to cross borders

54. *Id.* at 284.

55. *Id.*

56. *Id.*

57. James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997).

58. Deborah Anker et al., *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295 (1997).

59. *Id.*

60. *Id.* at 296.

61. NEW APPROACHES, *supra* note 3, at 1.

illegally; that the cost of support for asylum seekers is highly uneven across the globe; and support for refugees is badly distributed.⁶² The report says between half and three quarters of asylum seekers received by European countries do not meet the United Nations High Commissioner for Refugees (UNHCR) definition of a refugee. Because individual countries experience rapidly fluctuating numbers of refugees, there are resulting problems for genuine refugees and public concerns about the numbers of unfounded claims.⁶³

Bett's precursor, Schuck, also acknowledged the importance of the pessimistic view while repeating it. "My premise is that the current refugee regime is broke . . . and that it needs fixing."⁶⁴ He finds the existing system to be almost universally criticized.⁶⁵ In his "bill of particulars," Shuck says it was designed in the post-World War II era before the globalization of the world economy.⁶⁶ He says the distribution is "decidedly lumpy"⁶⁷ and free-riding by nations appears to be a rational strategy as nations decide how much help to provide refugees.⁶⁸ At one point he describes his work as an "effort to salvage a meaningful human rights regime from the carcass" of the present regime.⁶⁹

Hathaway and Neve started with the same basic building block: "International refugee law is in crisis."⁷⁰ They cite significant barriers erected to prevent refugees from reaching potential asylum and say refugees who get past the barriers are often dealt with in harsh ways that violate their human rights.⁷¹ They say states impose visa requirements and penalize airlines for transporting refugees in an effort to insulate themselves and that "warehousing" of refugees has become common. "[S]ummary removal to so-called 'safe third countries'" also denies those who have arrived by indirect routes any chance to pursue asylum claims, Hathaway and Neve say.⁷²

It must be said that the authors of the U.K. proposal and the champions of the refugee-marketing ideas we are examining here are not the architects of this dismal view of the present state of

62. *Id.*

63. *Id.*

64. Schuck, *supra* note 30, at 247.

65. *Id.* at 250.

66. *Id.* at 251.

67. *Id.* at 252.

68. *Id.* at 253.

69. *Id.* at 246.

70. Hathaway, *supra* note 57, at 115.

71. *Id.* at 119. They refer to these policies as non-entrée practices. *Id.* at 120.

72. *Id.*

worldwide practices regarding refugees. They have merely harnessed the negative findings of others to fuel their arguments.

There has been significant commentary on the ill-health of the refugee system over the past 15 years, perhaps accented by a flurry of articles published in anticipation of and in the aftermath of the 50th anniversary of the convention. Many of these included calls for changes in the treaty to address various concerns.

In her well-received⁷³ book, *Beyond Borders: Refugees, Migrants and Human Rights in the Post-Cold War Era*,⁷⁴ Elizabeth G. Ferris documented the early years of what is now often referred to as a crisis in the world response to refugees. Ferris traced a perceived breakdown in the system of protection to the end of the Cold War, and her view is widely shared.⁷⁵ But Ferris indicated that widespread recognition of the resulting impact didn't come until the end of the 1980s.⁷⁶ She cites a decision by *The Economist* to declare 1989 "the year of the refugee"⁷⁷ as a crystallizing moment.⁷⁸

By the late 1980s, it seemed that on every continent, refugee movements were challenging national structures and international norms. The system was being overwhelmed and could no longer cope. This was a problem not just for international lawyers and national bureaucrats working with immigration issues. It meant that the lives of millions of people were placed in jeopardy.⁷⁹

Ferris noted the numbers were increasing and the solutions were becoming more elusive.⁸⁰ Importantly, she also noted that the changing situation led to increasingly restrictive policies by many nations.⁸¹ Even in the earliest stages of the "crisis" the response by many governments was to make it more difficult for refugees to

73. Colin J. Harvey, Book Review, 6 INT'L J. OF REFUGEE L. 308 (1994) (reviewing ELIZABETH G. FERRIS, *BEYOND BORDERS: REFUGEES, MIGRANTS AND HUMAN RIGHTS IN THE POST-COLD WAR ERA* (1993)).

74. ELIZABETH G. FERRIS, *BEYOND BORDERS: REFUGEES, MIGRANTS AND HUMAN RIGHTS IN THE POST-COLD WAR ERA* (1993).

75. See, e.g., B. S. Chimni, *The Meaning of Words and the Role of UNHCR in Voluntary Repatriation*, 5 INT'L J. REFUGEE L. 442, 443-44 (1993) ("With the end of the Cold War the firm basis of interest in refugees, particularly from the developing world, has been removed: refugees no longer have ideological or geopolitical value.").

76. FERRIS, *supra* note 74, at 93.

77. See *The Year of the Refugee*, THE ECONOMIST, Dec. 23, 1989 at 17.

78. FERRIS, *supra* note 74, at 93.

79. *Id.*

80. *Id.* at 97.

81. *Id.* at 98.

receive asylum.⁸² She criticized governments for relying on ever more sophisticated methods to keep down the number of refugees reaching their borders.⁸³

Another scholar, Julie Mertus, has divided these methods into three distinct categories: direct measures, indirect measures and lowered standards.⁸⁴ Direct measures are those aimed at stopping refugees from crossing borders: This may involve physically turning them back or holding them in areas outside their own territory.⁸⁵ Indirect measures are those that constrain refugee movement.⁸⁶ These include visa requirements, carrier sanctions and empowerment of border guards to make virtually unreviewable decisions on asylum seekers' claims.⁸⁷ It can also include reducing appeal rights and shortening procedures.⁸⁸ Lowering the standard of treatment in the host country refers to anything designed to discourage refugees. This may involve denial of the right to work, reunite with family, or receive education, housing or other financial assistance.⁸⁹

Mertus described these methods as "a shift away from protection and asylum and toward containment and prevention" in defining who is aid-worthy.⁹⁰ She sees would-be receiving states sealing their borders while the international community accepts "first country resettlement," "safe areas," temporary protection and repatriation "as alternatives to asylum."⁹¹

One of the things that complicates this debate is the differing uses of the term refugee. Despite a very specific definition given in the convention, the popular use of the word covers all mass migration. In that context, some of the international responses discussed above are more defensible or at least understandable. It is a mistake for the difficulties associated with mass movements of economic refugees to be blamed on a convention never intended for that type of situation. It is not surprising countries would be unable to accommodate these greater numbers using the refugee regime intended for a narrower class deserving of individualized consideration.

82. *Id.*

83. *Id.*

84. Julie Mertus, *The State and the Post-Cold War Refugee Regime: New Models, New Questions* 20 Mich. J. Int'l L. 59, 77-78 (1998), also printed in 10 INT'L J. REFUGEE L. 321 (1998).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 86.

91. *Id.*

Clearly there are problems. That there is a new paradigm is hardly disputed. But it is rhetoric of others like Cornelius D. de Jong that “[t]he 1951 convention is alive but only just,”⁹² that fortify the arguments of Betts and Schuck. Because of their reliance on the gloom and doom reports, it is important to note that there are countervailing opinions on the health of the regime, even though most see a need for changes and improvements. The most pessimistic arguments are dismissed as “hysterical” by some⁹³ and the depiction of the current situation as a “crisis” is openly challenged.⁹⁴ Tamer academic treatments describe the situation as “providing an important challenge” to the international regime.⁹⁵ There seems to be no debating Jeff Crisp’s “central point”⁹⁶ that nations today are less willing to admit refugees or allow them to stay. He cites the end of the Cold War as a contributing factor to a declining interest in refugee programs by the West but attributes more of the changing mood to the dramatic fluctuation in numbers of refugees.⁹⁷ After accommodating about 150,000 applications for asylum each year in the early 1980s, the totals climbed to 850,000 in 1992 and have remained between 500,000 and 600,000 for the last several years.⁹⁸

The parties to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol have themselves responded by reconfirming their commitments to the treaties during a meeting of the parties in Geneva in December 2001.⁹⁹ The declaration of the parties cited the enduring importance of the convention as the primary refugee protection instrument and went on to acknowledge its continuing relevance and resilience.¹⁰⁰

In what can be seen as an acknowledgement of the concerns of many, there was agreement the convention should be further developed and strengthened.¹⁰¹ The parties also declared that regional strategies, coordinated efforts to prevent future refugee situations and voluntary repatriation consistent with the principle

92. Cornelius D. de Jong, *The Legal Framework: The Convention Relating to the Status of Refugees and the Development of Law Half a Century Later*, 10 INT’L J. REFUGEE L. 688, 98 (1998).

93. Fitzpatrick, *supra* note 18, at 27.

94. Anker, *supra* note 58, at 296.

95. CRISP, *supra* note 41, at 3.

96. *Id.* at 4.

97. *Id.* at 5-6.

98. *Id.* at 7.

99. *Declaration on International Protection Ministerial Meeting of States Parties to the 1951 Convention and or Its 1967 Protocol Relating to the Status of Refugees*, UNHCR, U.N. Doc. HCR/MMSP/2001/09 (2002), available at <http://www.unhcr.ch> (last visited Nov. 1, 2004).

100. *Id.* at 1.

101. *Id.* at 3.

of non-refoulement were preferred solutions for these mass movements.¹⁰²

V. PROBLEMS WITH OUTSOURCING MORAL OBLIGATIONS

The health of the international refugee regime and the nature of the challenges it faces can be debated interminably, but while the significance of those critiques to the viability of the refugee market concept cannot be overstated, there are more principled arguments to be made against such a market as a proposed solution to whatever problems do exist.

Some criticisms of these proposals include practical discussions of whether they would in fact work.¹⁰³ These problems are not addressed here because even if they could be cured, the market proposal must still be rejected on the basis of the remaining objections that cannot be redeemed.

Nor are the authors' efforts to temper their proposals through suggestions, such as considering languages spoken by refugees before shipping them to new lands, discussed at any length since they make the contemplated diminishment of moral responsibility for asylum seekers to one of simple financial obligation no more palatable.¹⁰⁴ Schuck's proposal was made in a broader context and included careful arguments preserving much of the refugee regime.¹⁰⁵ Betts is able to make a simpler and more direct bid, arguing that the British proposal on the table already separates purchaser and provider for some refugee services and that he is merely suggesting there are efficiencies that can be gained in going the rest of the way.¹⁰⁶

The greater concerns are the moral soundness of the idea and whether certain benefits from granting asylum and assimilating refugees have been lost in the analysis and whether some costs have been exaggerated in a way that has skewed perceptions.

The marketing of refugee quotas is simply repugnant.

A proper analogy might be to allow wealthy parents to hire a mercenary to serve in their child's place should he face a universal military draft. It can be assumed that any standard the military

102. *Id.*

103. Anker, *supra* note 58, at 301 ("Both proposals assume that financing transfers from the North to those states in the South providing physical protection to [the] refugees will be possible largely because of savings achieved by dismantling expensive non-entree and asylum adjudication systems."). The authors challenge whether these savings can in fact be realized.

Id.

104. Schuck, *supra* note 46. The author suggests that efforts might be made to convince French-speaking countries to accept Haitians, for example. *Id.*

105. *See id.*

106. BETTS, *supra* note 1, at 9.

might set for physical prowess could be met by substitute soldiers and that a price agreeable to buyer and seller of military time served could be reached. But any such allowance can easily be seen to undermine the nation's solidarity due to the perceived unfairness to those not financially able to bypass the draft. Also missing would be the wealthy family's vested interest in the proper conduct of the war, the personal growth of the individual who escapes the service and the loss to the nation of the influence of the returning veteran who might contribute to the political debate over the justness of the conflict.

The losses from entering a market in asylum obligations would parallel those of a family buying its son out of the service of his country. There would be both a dehumanizing effect and a loss of unity and purpose.

Any view of proposed trafficking in human beings as a moral offense is dismissed by Schuck, though, as a familiar argument raised "whenever the market is used to allocate scarce goods or activities."¹⁰⁷ He then reverts to his argument that a new conception could hardly leave refugees worse off than they are in the existing "jerry-built" system.¹⁰⁸

Betts and Schuck necessarily build their arguments for a market on a platform of burden sharing. Before there can be any trading in refugee protection responsibilities nations must have a carefully calculated obligation to meet. Where the burden-sharing imperative is currently "precatory and hortatory"¹⁰⁹ each would substitute a more robust commitment. The Comprehensive Plan of Action in Southeast Asia and the 1989 Conference on Central American Refugees are cited as notable commitments of this type brought about "by manipulating the formidable carrots and sticks that the powerful states control."¹¹⁰

These same examples of extraordinary actions addressing refugee troubles on opposite sides of the globe are proof that the international community can still be rallied to supplement the convention if major players are motivated to do so. The 1967 Protocol is the ultimate proof that the international community can be rallied to adapt as necessary. That accord remedied the temporal and geographic limitations and demonstrated that this is a dynamic regime.¹¹¹

107. Schuck, *supra* note 30, at 296.

108. *Id.* at 297.

109. *Id.* at 272.

110. *Id.* at 275.

111. Guy Goodwin-Gill, *The International Protection of Refugees: What Future?* 12 INT'L J. REFUGEE L. 1, 3 (2000).

It is also important to note that even the term burden-sharing has been described as “problematic”¹¹² because it suggests that providing refugees with protection is necessarily burdensome. There is a serious case to be made that there are off-setting contributions that bring the cost-benefit equation back into balance and possibly swing it in favor of the refugee more than paying his keep. Costs are likely to outweigh benefits from the host nation’s perspective in the first few months after arrival, but this is not likely to be true in a majority of cases after assimilation.¹¹³

Additionally, the value of diversity in the workplace, higher education and any other setting has been demonstrated and celebrated in the past 30 years of national debates over racial integration and affirmative action. In much the same way, refugees broaden our experience as a nation. They open our eyes, educate us to political realities in other lands and in doing so make our lives richer.

This lesson has played out repeatedly in our international understanding. The presence of a significant Polish community in the United States helped make us sensitive to the struggles of Lech Walesa’s labor movement. The large Cuban community in Florida has helped Americans comprehend the shortcomings of the Fidel Castro regime and win support for U.S. policies toward the dictator. While life in many countries is inconceivable to us, a vivid portrait of life in those nations was before us because of our acceptance of refugees from those countries.

So one consequence of out-sourcing our asylum obligations to nations willing to accept these refugees in return for compensation would be the “muffling” of these voices that educate us to the persecution in their homelands.¹¹⁴

The negative side of this equation has been just as distorted. In the United Kingdom the battle is intensely political with the Labour Government attempting to deal with the populist threat of the Conservative Party to withdraw from the 1951 convention.¹¹⁵ An argument is made that the tabloid press in the United Kingdom has brought together concerns and fears over everything from radical Islam to falling property prices and associated them with the asylum issue.¹¹⁶ “There is something quite farcical about the

112. Gregor Noll, *Risky Games? A Theoretical Approach to Burden-sharing in the Asylum Field*, 16 J. REFUGEE STUD. 236, 237 (2003).

113. *Id.*

114. Anker, *supra* note 58, at 307-08. This would result in the “persistence rather than the removal of the root causes of forced migration.” *Id.* at 8.

115. BETTS, *supra* note 1, n.23.

116. CRISP, *supra* note 41, at 10.

frenzied way in which the British tabloids have treated the asylum issues."¹¹⁷

A milder case can be made that similar fears fuel public opinion in the United States whenever it faces unusually high refugee flows.¹¹⁸ The growing negativity of recent attitudes toward asylum also can be linked to terrorism.¹¹⁹

VI. CONCLUSION

The framing of the refugee convention was a seminal moment in world history — one when leaders looked beyond their own nations' narrow interests and to the greater good of mankind.

The horrors of the Holocaust so shocked and shamed world leaders that it consequently helped rally the world diplomatic community to one of its greatest achievements.¹²⁰ As the generation that was stunned by Adolph Hitler's genocidal efforts dies out and we approach a point where there is no living witness to that unthinkable inhumanity, the positive legacy of the convention and its protocol must remain as a monument to the lessons learned and a motivator of humane treatment of refugees for generations to come.

The existence of this agreement, even if it were only aspirational, would be of primordial importance.¹²¹ An audit of the achievements since the refugee convention can be nothing but impressive.¹²² Such a study starts with the simple success of gaining acceptance of the idea that the international community is responsible for the protection of refugees.¹²³ The convention produced the fundamental guarantee of non-refoulement, and a comprehensive listing of rights and standards of treatment.¹²⁴ Once the scope of protection was agreed upon, the infrastructure would continue to evolve but the idea that each nation has a responsibility

117. *Id.* Some alarming examples of front-page headlines such as "Asylum blamed for AIDS crisis" and "Asylum threat to house prices" are reprinted as well. *Id.* at 3.

118. *Id.* at 8.

119. *Id.* at 8-9. "[I]t could be argued that an important connection exists between the 'war on terror' and the mounting challenge to asylum since the events of 9/11." *Id.* at 9.

120. See generally Karen Musalo, *British Nationality and Immigration*, 16 INT'L J. REFUGEE L. 165 (2004) (providing an overview of the history leading up to the 1951 Convention).

121. ROBERT F. DRINAN, *THE MOBILIZATION OF SHAME: A WORLD VIEW OF HUMAN RIGHTS* at i-xiii (2001). Drinan makes a similar argument in the broader context of the UN World Conference on Human Rights that whether the norms can be enforced or not they represent the public morality of the global village and even impotent international machinery would serve a powerful purpose. *Id.*

122. Goodwin-Gill, *supra* note 111, at 2.

123. See *id.*

124. *Id.*

to protect individuals who arrive at their borders and meet the refugee definition has remained at the forefront.

From an American perspective, the adoption of the treaty and the subsequent enacting legislation was meant to “insure a fair and workable asylum policy which is consistent with this country’s tradition of welcoming the oppressed of other nations.”¹²⁵ It is no more conceivable to unravel the refugee convention than it would have been to take a wrecking ball to the Statue of Liberty when that icon was decaying and in need of repair as it approached its centennial.

125. *Sofia Campos-Guardado v. INS*, 809 F.2d 285, 290 (5th Cir. 1987) (quoting H.R. 608, 96th Cong. (1st Sess. 1979)).

