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Acceptable and unacceptable criteria for prioritizing among refugees in a non-ideal world

Annamari Vitikainen & Kasper Lippert-Rasmussen

All persons have a right to seek and find asylum¹. Arguably, the international community, or the states that comprise it, have a duty to provide such asylum. In the present circumstances, such rights of refugees, or the duties of the receiving states, are not always fulfilled. Not everyone is able to seek, let alone find, asylum, and many refugees, all deserving of asylum, are left unprotected, living in permanent limbos in camps and shelters, or with other precarious, even illegal statuses.

This symposium addresses the following question, which the prevailing non-ideal circumstances of refugee protection gives rise to: **What, if any, are the acceptable principles for selecting refugees for admission in circumstances where not all refugees – deserving of asylum – are admitted?**² The answers one gives to this question depend on a variety of factors. These include one's definition of a refugee, one's understanding of the present refugee regime, as well as the broader normative views one has on the functioning of the international order, or, for that matter, morality in general.

In the political philosophical literature on 'refugee'³, the question of 'who is a refugee' has been of central importance. The UN Refugee Convention defines a refugee as "a person outside their country who has a well-founded fear of persecution owing to their race, nationality, religion, political opinion, or membership of a particular social group"⁴. This definition, with its persecution requirement, has, however, been criticized for being too restrictive in terms of identifying those persons in desperate need of international protection.⁵ Accordingly, many political theorists and, in practice, many international aid organizations, have adopted broader definitions that do not limit refugees to only persons fleeing persecution, but may also include other persons fleeing e.g. war or famine, or other sources of severe human rights violations.⁶

The scope of the definition of a refugee plays an important role also to our present question of refugee prioritization, as it is often used to identify that group of people from which the admitted refugees are selected. Of the papers in this symposium, both Kieran Oberman's and Mollie Gerver's entries begin with an explicitly broad definition of a refugee, thus allowing the selection principles to apply, not only to refugees fleeing persecution, but also to other vulnerable groups in need of international protection. While neither Patti Lenard's nor Bouke de Vries's entries engage explicitly with this question, their respective arguments need not hang on any particular definition. Being thus, those principles applying to citizen selection (Lenard), or to denying of residence on ideological

grounds (de Vries), may be seen to apply regardless of whether the pool of potential admissions is defined according to the stricter convention principles, or according to some broader criteria.

The question of the extent to which states are allowed to restrict the entry of refugees to their territories can be viewed as a specific sub-question within the more general question concerning states' right to control their borders. According to most theories of migration, states have a presumptive right to control their borders, although this right is seldom viewed as unconditional. For example, explicitly racist or religion-based criteria for immigration admission are typically viewed as unjustifiable even among those who most strongly defend states' right to exclude.⁷ In the case of refugees, states may also have certain duties to refugees, including duties to admit (at least some) refugees into their territory. The normative grounds for such duties may, of course, be drawn from a number of sources, ranging from basic humanitarian obligations to the need for the international order to protect those whose basic human rights are not protected by their own states. Within this latter view, states' duties may be viewed as rectifying the failures of other states to protect the basic human rights of their own citizens⁸, although they may also be viewed as contribution based.⁹ In a world that is intertwined in a variety of ways, it might not always be possible to trace back the plight of refugees to those states that have, internally, failed to protect them. Indeed, other states, as well as the international community as a whole, may, by its very actions, contribute to producing refugees (e.g. by armed intervention or by the upholding of unjust international order) as well as preventing refugees from reaching safety (e.g. by a variety of non-entry measures, border controls, lack of rescue efforts etc.).

While it is thus relatively uncontroversial that states have certain duties to admit refugees, it remains deeply contested what these duties in relation to individual states consist in, or what constitutes a fair distribution of refugees among states. Should all states admit certain numbers of refugees, for example proportional to their population, GDP, or some other relevant measure? To what extent should individual state's ability to include refugees into its social fabric affect its duties, either numerically, or in terms of those specific refugees it should admit (or not admit)? Furthermore, if states are seen to retain a presumptive right to decide its immigration criteria more generally (subject to the exceptions mentioned above), should this also apply to refugees? Are states ever permitted, for example on the grounds of the well-being or security of its current residents, or for that matter of the well-being or security of refugees admitted or others, to deny entry to some refugees? (This question is discussed in this symposium in the entry by de Vries.) When allowed to make decisions on refugee admissions, what kinds of criteria may ordinary citizens resort to, as opposed to the criteria bound to by states? (The issue of citizen selection is addresses by Lenard.)

Provided that there are legitimate limits to the costs that any particular state can be expected to bear, according to which principles should states select refugees in order for this selection to be for the benefit of the many as well as of those most vulnerable? (The complex issues of balancing between the numbers and needs of refugees are addressed by Gerver.) When existing refugee regime operates, it also engages in various forms of discrimination – but when, and why, are some forms of discrimination more (or less) wrongful? (These issues of refugee discrimination are addressed by Oberman.)

As we can already see, the four articles of this symposium each address some of the central questions of refugee selection, and the acceptable and unacceptable criteria for prioritizing among refugees in a non-ideal world. In what follows, we will give a brief overview of each individual article, and consider them both in relation to the background discussions, as well as in relation to each other.

In the first article of the symposium, “Refugee Discrimination – The Good, the Bad and the Pragmatic”, Kieran Oberman frames the question of refugee selection within the literature on discrimination, and analyses the ways in which the existing refugee regime can be seen to discriminate. Oberman refers to a non-moralized notion of discrimination that is able to identify cases where people are treated worse based on their group membership, while maintaining that such discrimination may not always be wrong. Oberman discusses two sets of cases: discrimination within the refugee regime, and discrimination inherent in the construction of the regime itself. By adopting a distinctively broad notion of a refugee and by conceiving of the refugee regime as one which should protect the basic needs and welfare of people, Oberman offers a strong critique against the existing refugee regime itself. Its restrictive, persecution-based notion of a refugee, combined with the limited duties of *non-refoulement*, are wrongfully discriminating against some people that the regime should protect. Other forms of discrimination are prevalent within the regime, for example, in the ways in which certain (groups of) refugees are treated in refugee admissions. While some forms of discrimination, e.g. discrimination based on need, may be acceptable, other forms, e.g. discrimination based on religion or ethnicity, are unacceptable. Not all forms of discrimination, however, prove to be as straightforward. As an example of such hard case, Oberman discusses the underlying principles behind Canada’s ‘ability to establish’ requirement, including the ways in which discrimination based on the prospective contributions of refugees may (or may not) be acceptable. (A different element of the Canadian case, the private sponsorship –program, is discussed in Lenard’s entry.) According to Oberman, selecting refugees based on their prospective contributions constitutes wrongful discrimination as it expresses a negative attitude, disdain, for those less able to

contribute. This view of the wrongfulness of contribution-based discrimination based on its expressive function, is also discussed, and partially challenged, by Gerver's entry.

In her article, "Sufficiency, Priority, and Selecting Refugees", Mollie Gerver takes on the task of establishing general principles for the selection of refugees in circumstances where there are more refugees deserving of asylum than the state has a duty to accept. Gerver utilizes a method sometimes applied in health care distribution – a method whereby the number of Quality Adjusted Life Years (QALYs) gained through the distribution of health care is maximized for a given bundle of health care resources – and discusses a number of ways in which QALYs could be used for determining which refugees a state should admit. While Gerver admits to some difficulties, including ethical issues relating to the gathering of reliable data on QALYs among refugees, certain basic principles are seen to apply. Most notably, building on Liam Shields' work on 'non-uniform weighted prioritarianism', Gerver argues that states should select a set of refugees such that selecting any other set of refugees would result in a smaller sum of weighted benefits, with the weight of the benefits to individual refugees derived from being granted asylum becoming increasingly smaller, the further above the line of sufficiency these individual refugees would be (as well as more, the further below the sufficiency line). Importantly, Gerver argues, such 'non-uniform weighted prioritarianism' is able to explain why the state should select the worst-off refugees in many, although not in all, cases. Moreover, while Gerver disallows the permissibility of states selecting refugees based on wrongfully discriminatory criteria, an important caveat for allowing some forms of discrimination is maintained. Thus, in a discussion that contrasts with Oberman's, Gerver argues that states may be permitted to use discriminatory selection criteria (e.g. selecting mainly able-bodied contra disabled refugees) if such selection criteria increases the probability of the disabled refugees gaining asylum, and if the criteria are accepted by the refugees themselves. Further, such discrimination may, according to Gerver, be acceptable even according to the expression account of wrongful discrimination as (given the qualifications above) it expresses the state's concern for those discriminated against and its aim to increase the probabilities of those discriminated against to gain asylum.

In contrast to Oberman and Gerver, who are focused primarily on the permissible selection criteria for state actors, the third article of the symposium focuses on the criteria that should be available to individual citizens when they participate in the admission and resettlement of refugees. An example of such scheme of citizen participation, also discussed by Lenard, is the Canadian private sponsorship program that allows citizens to actively engage in the selection and resettlement of refugees, in addition to those refugees sponsored by the state.

In “The Ethics of Citizen Selection of Refugees for Admission and Resettlement”, Patti Tamara Lenard discusses the ways in which states may allow its citizens to participate in the selection and practice of refugee resettlement. Without denying the role of states as (one of) the primary duty bearers of refugee resettlement, Lenard identifies several reasons for states to allow citizens to actively participate in the work of refugee resettlement. These reasons range from the good of such work (partially ingrained in the explicit will of the citizens to do such work), and the ways in which citizen involvement may contribute to picking up the slack for some states failing to do their fair share, to the more practical considerations pertaining to the efficiency and speed in which those refugees, supported by private citizens, may become net contributors to the economy of the host society. While Lenard thus supports the idea of citizen involvement both in the selection and practice of refugee resettlement, she nevertheless argues for certain normative constraints on the ways in which citizens may select those refugees they are to support. Most notably, as agents or trustees of the state, the citizen selection may not be considered as an entirely private matter, and those refugees, selected by citizens, should, by default, be among the UNCHR priority list of those most vulnerable and most in need of resettlement. Two constraints – one pertaining to the admissible selection procedures within the list, another to the possibility of selecting refugees ‘off-list’ – are set to apply. Thus, Lenard argues that, as agents or trustees of the state, citizens should be discouraged from using discriminatory criteria (e.g. ethnicity, religion) of selection, although they may, in accordance with established and transparent criteria, also argue for a selection outside the UNHCR vulnerability list. This may be allowed, for example when it comes to the admittance of friends or family members of current citizens. Such an exemption procedure to the official UNCHR priority list is allowed in order to perform two important tasks: firstly, it operates as a corrective mechanism via which some of the blind spots of the UNCHR list may become visible, and secondly, it provides an avenue for (at least some) refugees to access what they already have a right to, that is, of family reunion.

While the three first articles all engage with questions relating to the criteria of selecting refugees *for admission*, the fourth and final article of this symposium approaches the issue from the opposite direction, asking- whether, and under which circumstances, it may be permissible for states to deny entry to certain (groups of) refugees.

In his article “Keeping Out Extremists: Refugees, Would-be Immigrants, and Ideological Exclusion”, Bouke de Vries returns to some of the basic questions relating to the moral permissibility of the would-be host societies to deny short-term and long-term residence to some refugees (possibly, although this is not explicitly stipulated, for the benefit of some other groups of refugees). De Vries

assumes that there is neither an unconditional moral right to immigrate nor an unconditional right for the state to exclude would-be residents, thus upholding the question about those conditions upon which such entry may be denied. By adopting a cosmopolitan approach – i.e. a view according to which the interests of the existing and would-be residents, as well as of other individuals, are to be given equal moral weight – de Vries aims to identify the minimal – but not necessarily only – conditions according to which liberal democratic societies are permitted to exclude would-be residents based on their suspected extremist views. De Vries discusses two conditions: one in which the entry of such extremists would pose a substantive danger to the liberal democratic institutions (for example, when the proportional number of extremists would reach the point threatening to collapse the existing liberal-democratic order), and two, where the entry of such extremists would pose a substantive danger to the ability of the existing residents to enjoy their basic rights and freedoms yet without endangering the wider liberal-democratic order (for example, via terrorist attacks or other extremist violence). According to de Vries, satisfying at least one of these conditions is sufficient for permissibly denying entry to extremists, provided that certain other conditions also apply. That is, that the assessment of the would-be residents' extremist beliefs is reliable, based on an evidence of endorsing such beliefs, rather than on some unreliable proxy (e.g. ethnicity or religion); that the danger posed on the would-be host society when allowing entry is substantively higher than the danger posed on the sending society (when denying entry); and that the danger is indeed substantive. While de Vries does not claim that the denial of entry would be the only, or even the most effective, means for states to protect liberal democratic values and principles, he nevertheless convincingly shows what such moral assessments would need to take into account and why – at least in some cases – the denial of would-be migrants based on their suspected extremist beliefs may be permissible.

We hope that this symposium provides interesting insights into the ways in which the existing refugee situation, and the non-ideal circumstances of the contemporary world, may inform our responses to the admission (or rejection) of refugees. By highlighting some of the specific features, and particular problems, involved in the selection of refugees, each of the four articles aims to find feasible, and morally justifiable, answers to the ways in which different actors – whether states, citizens or the international community – should select refugees for admission. As such, we hope that this symposium provides a welcome contribution to the ongoing discussion on the ethics of refuge, and that the debate on the acceptable and unacceptable criteria for prioritizing among refugees in the non-ideal world will continue.¹⁰

¹ UN General Assembly, Universal Declaration of Human Rights (United Nations, 1948), Art. 14.

² This was also the topic of a conference “Refugees and Minority Rights” that we organized at UiT – The Arctic University of Norway (Tromsø) in summer 2018. The entries to this symposium are all based on the presentations given at this conference. For further discussion on refugee prioritization, see Kasper Lippert-Rasmussen and Annamari Vitikainen (eds.), *The Ethics of Refugee Prioritization: Reframing the Debate*, *Ethics & Global Politics* 13:1 (2020)

³ For some notable contributions, see Michael Dummett, *On Immigration and Refugees* (London: Routledge, 2001); Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004); Matthew Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009); Serena Parekh (2017) *Refugees and the Ethics of Forced Displacement* (New York: Routledge, 2017); David Miller and Christine Straehle (eds.), *The Political Philosophy of Refugees* (Cambridge: Cambridge University Press, 2019).

⁴ UN General Assembly, Convention Relating to the Status of Refugees (United Nations, 1951), Art. 1.

⁵ See e.g. Gibney op. cit.; Michelle Foster, *International Refugee Law and Socio-Economic Rights* (Cambridge: Cambridge University Press, 2009); Alexander Betts, *Survival Migration* (Ithaca: Cornell University Press, 2013).

⁶ For example, Andrew Shacknove’s influential definition describes refugees as ‘persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible.’ Andrew Shacknove, ‘Who is a Refugee?’, *Ethics*, 92, 2 (1985), 277. Other versions of a needs-based view, dropping the controversial persecution requirement, have more recently been adopted by a number of scholars, including Gibney op. cit.; Betts op. cit.; Parekh op. cit.; Joseph Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013); David Miller, *Strangers in Our Midst* (Oxford: Oxford University Press, 2016).

⁷ See e.g. Christopher Wellman, ‘Immigration and Freedom of Association’, *Ethics* 119, 1 (2008): 109-141.

⁸ See e.g. David Owen ‘In Loco Civitatis: On the Normative Basis of the institution of Refugeehood and Responsibilities for Refugees’, in Sarah Fine and Lea Ypi (eds.) *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford: Oxford University Press, 2016).

⁹ Serena Parekh’s recent work provides interesting insights to the ways in which the international community, and the states that comprise it, may actively contribute to the demise of refugees. See Parekh op. cit.; Serena Parekh, *No Refugee: Ethics and the Global Refugee Crisis* (Oxford: Oxford University Press, 2020)

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