

# *Asylum for Sale: A Market between States that is Feasible and Desirable*

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The asylum system faces problems on two fronts. States undermine it with populist politics, and migrants use it to satisfy their migration preferences. To address these problems, asylum services should be commodified. States should be able to pay other states to provide determination and protection-elsewhere. In this paper, I aim to identify a way of implementing this idea that is both feasible and desirable. First, I sketch a policy proposal for a commodification of asylum services. Then, I argue that this policy proposal is not only compatible with the right to asylum, but also supported by moral considerations. Despite some undesirable moral features, a market in asylum facilitates the provision of asylum to those who need it.

## **Introduction**

The right to asylum is a unique human right. Asylum is a right of last resort. When your state fails to protect your basic human rights, the right to asylum delegates this responsibility for basic protection to other states. This backup function makes asylum particularly important. In practice, however, the right to asylum depends on a system that many describe as “broke”. It “fails to afford adequate protection to the enormous and growing number” of asylum-seekers.<sup>1</sup> Recent events are putting increasing pressure on this already problematic system. From 2011 to 2014, the number of asylum applications tripled to around 1.7 million, which was the highest level ever recorded.<sup>2</sup> In 2015 this number increased again by 48% to around 2.5 million asylum seekers.<sup>3</sup> Almost 150,000 Syrian refugees comprise the majority of asylum-seekers in industrialized countries. Meanwhile, the four million Syrian refugees who are stuck in countries such as Turkey and Lebanon are not even included in this figure.

The asylum system is beset with problems on at least two fronts. First, the political will on the part of receiving states to protect and welcome asylum-seekers is relatively small.<sup>4</sup> Instead, politicians boast about the high numbers of migrants rejected at their borders as populism grows stronger. Second, challenges arise from the side of asylum-seekers. Some migrants use the right to asylum to pursue their hopes of migrating into comparatively prosperous economies.<sup>5</sup> Those asylum-seekers increase the number of applications and appeals receiving states have to cope with. Both problems undermine an effective provision of the right to asylum for those who need it.

This paper discusses a solution. States should be able to trade the fulfillment of asylum services in a market where receiving states pay other states to process asylum claims and protect asylum-seekers elsewhere.<sup>6</sup> Some such “protection-elsewhere” policies are already in place within Germany, within the European Union (EU), and in the Pacific region. However, these policies are often considered immoral.<sup>7</sup> So, although the policies actually in place are politically feasible, they are not morally desirable. Scholars have proposed alternative protection-elsewhere policies. These alternatives may be morally desirable but they are not politically feasible. These alternative proposals often require an internationally unanimous agreement on refugee quotas but they have not been specified with respect to the particular institutional regime in which they would take shape. With this paper, I hope to address these two points. Is there a proposal that is both feasible and desirable? I sketch an institutional regime and then argue that this policy proposal is not only compatible with the right to asylum, but is supported by moral considerations. As such, this paper’s approach is in non-ideal theory. The proposal I discuss is by far not the most desirable solution overall and it does not address all problems that the asylum system faces today, but it rectifies some central problems of the system and hence improves on the status quo.

To illustrate the proposal, consider the United Kingdom (UK) as an example, where immigration is a central and divisive policy issue. An open market for protection-elsewhere would give the UK the option to outsource its asylum services to countries such as Ghana. This would not only take the divisive issue of asylum-seeking off the domestic political agenda in the UK but such an arrangement would also discourage asylum applications by those who

mainly aim to take residence in the UK without qualifying for asylum protection. An independent authority within the United Nations (UN) would oversee decent standards of protection and due process in Ghana while fallback duties may remain with the UK.

Relative to existing proposals, such a market in asylum services has some noteworthy features that I describe below. In the course of doing so, it will become clear that the proposal raises distinct moral issues about the right to asylum that have often been overlooked. After discussing these, I will consider the proposal from the vantage point of market ethics. I argue that such a market is not only compatible with the right to asylum; it is supported by moral considerations.

## **A Market in Asylum Services**

There should be a market for the fulfillment of asylum services in which some states pay other states to fulfill their asylum-related duties on their behalf. These asylum-related duties include, but are not limited to, processing asylum applications, protecting and housing asylum-seekers, and eventually resettling or integrating them into their own societies, if needed. The existence of this market should not affect what rights asylum-seekers have or to what extent they can enjoy them. The proposal leaves the content and the value of the right to asylum untouched. The only change is in the identity of the state providing asylum-related services. Hence, the good that is traded from one state to another is the *services* to which asylum right-holders have a claim-right against a receiving state.<sup>8</sup>

To continue the above illustration, suppose the UK has outsourced its asylum services to Ghana. Nevertheless, the process of filing an asylum application in the UK begins with an asylum-seeker indicating his or her intention to apply for asylum at any port of entry to the UK or at any of the UK's representations abroad. Yet, in doing so, the asylum-seeker does not face officials of the UK. Instead, officials acting on behalf of Ghana receive the asylum application.<sup>9</sup> Deciding an asylum application takes at least several months, so the asylum-seeker will be flown out to Ghana, which takes over the so-called duty of *non-refoulement* that corresponds to "the most critical of all

refugee rights.”<sup>10</sup> Non-refoulement means that the state has to grant the asylum-seeker protection for the period of time in which the application for refugee status is considered. From then on, the asylum application will be handled not only *by* Ghana but it will also be handled *in* Ghana. Cases should be treated symmetrically, in the sense that applications from asylum-seekers who applied to Ghana directly should not be discriminated relative to those who applied at a UK point of contact.

This transaction is a form of outsourcing. In our example, the UK is the buyer and Ghana is the seller. The *buyers* are the states that want to outsource, that is, to *buy* the fulfillment of its asylum-related duties. The other states, which are interested in providing this service on the buyer’s behalf, are the *sellers*. This market for asylum is similar to schemes already in place in other sectors. For example, private companies provide custody services in the United States (US) or the UK. Even policing, a paradigmatic example of a sovereign exercise, has been outsourced to the private sector.<sup>11</sup> Most related to the current case, some US embassies rely on outside contractors to handle significant parts of the visa application process.

What sets the market in asylum services apart from other market transactions is that only states, but not private companies, can take part. The ability to provide asylum requires the ability to potentially provide citizenship. This rules out private actors. Select states may even be excluded. The tender should be restricted to states that meet minimal conditions concerning, for example, the quality of service provision, political stability and good governance, and the opportunities it offers to asylum-seekers. The bids would be placed through a UN agency, for example the United Nations High Commissioner for Refugees (UNHCR), that would vet the buying parties, and oversee the provision of the services charging a commission fee for its services. On the proposed regime, this agency would have exclusive competence of underwriting such contracts. Bilateral trades outside this system should be made contrary to international law. This would constitute a significant departure from the current legal framework that allows any deals to be struck between any two states.

To enter the market, the buyer invites tenders through the UN agency to fulfill asylum services on her behalf specifying the volume (for example, 200,000 applications) and the period of time (say, 10 years). In return, sellers pitch their bids and the buyer picks among them. Although the UN agency responsible might assist in arranging the deal, states are likely to survey for interested parties and pre-negotiate terms bilaterally. After all, not only the price but also diplomatic and political considerations will figure into the buyer's decision. For example, the buyer could prefer outsourcing asylum to her allies or strategic partners. When the offer is accepted, the seller sets up the fulfillment of the asylum duties on the buyer's behalf on all points of entry where the buyer had previously placed its respective officers. Even though they are not directly involved, the buyer together with the UN agency shall oversee the seller's fulfillment of the contract. The contract should affect only newly arriving asylum-seekers but not the stock of migrants in a country that is present at the time before the asylum-services are outsourced.

Since not only the protection but also the processing of asylum applications may be outsourced, some additional precautions must be taken. First, the outsourcing requires some form of conditionality. Without conditionality, the selling state may have incentive to cash in the money and reject applications. Therefore, some of the benefits that the selling state receives must be conditional on, for example, the numbers of asylum-seekers admitted for asylum.<sup>12</sup> Second, the outsourcing requires some degree of coordination. Just as the UN agency will determine minimal standards of protection, it will also stipulate minimal standards of processing concerning the determination of asylum applications. This may, as a side effect, open the opportunity for greater coordination of asylum processing standards. Third, the outsourcing requires some exceptions. In the case of Ghana, to continue this example, an asylum-seeker who is a member of a LGBT community cannot sensibly find protection as long as homosexual acts are illegal in Ghana. Whether an asylum-seeker is a member of a LGBT community is already an important consideration for the assessment of asylum applications today. So, based on such existing procedures, certain groups should fall under exceptions of this outsourcing scheme.<sup>13</sup>

Some bilateral policies that are in some respects similar are already in place. For example, the "PNG Solution" is an agreement that was reached in 2013

between Australia and Papua New Guinea (PNG). Under this agreement, Papua New Guinea houses and potentially resettles asylum-seekers that would otherwise arrive in Australia. Hence, Australia has effectively outsourced its asylum protection to Papua New Guinea. Several political groups and human rights NGOs have protested against this policy. Rightly so: The problem with the PNG Solution, and its predecessor the Pacific Solution (2001-07), is that minimal standards are violated. The living conditions in the asylum camp are reportedly abhorrent. The applicants are kept in detention for a long time, mostly indefinitely, and rights to appeal are effectively limited.<sup>14</sup> Furthermore, Papua New Guinea cannot sensibly provide a permanent resettlement of asylum-seekers and successfully integrate them in their society.

Australia's PNG Solution is hence a warning and a lesson. It is a warning because it illustrates that states, when the pressure of populism mounts, take action unilaterally. As this trend continues and as international migration accelerates, the PNG Solution will not be the last of its kind.<sup>15</sup> But this need not be a bad thing. I argue there are moral reasons in favor of trading asylum services, if done right. The PNG Solution is a lesson in that it illustrates what can go wrong if asylum services are traded freely and unchecked as they are today. With the experience of the PNG Solution, I argue instead to set up a market with oversight and regulation. A one-off effort of the international community could establish a global standard that would serve as a default mechanism for asylum transactions and hence discourage states from outsourcing their asylum system in a morally more problematic way.

This proposal adds to existing market-based approaches to govern migration.<sup>16</sup> However, it differs importantly from each of the existing proposals in at least one of the following four aspects. To see the asylum for sale proposal more clearly, let me contrast it against similar existing proposals.

First, the present proposal is not a proposal on the issue of immigration generally but only on asylum, which is only a special subset of immigration and makes up only a very small fraction of all global migratory movements. In contrast, many existing proposals deal with regular migration and do not consider the case of asylum.<sup>17</sup> But asylum differs from other forms of migration with respect to the moral and legal norms that govern it. Of course, apart from

asylum-related claims, there might be further moral reasons for granting non-citizens residential status, such as special ties, personal relationships, or the rectification of past injustices.<sup>18</sup> However, my discussion focuses specifically only on the moral considerations concerning refugees arriving at a state's borders without special ties or relevant personal relationships to persons residing in any particular state.<sup>19</sup>

Second, what is for sale on the proposed market is not the right to immigrate but rather the duty to provide asylum. Furthermore, it is states that act on the market, not migrants. In this regard, my proposal is identical to, for example, that of Peter Schuck.<sup>20</sup> This is an important point to keep in mind when it comes to considering the objection that trading asylum services is an undignified use of asylum-seekers because it expresses a negative valuation, because it constitutes a commodification of asylum-seekers, or because it is discriminatory. These are significant objections to any market for asylum services. Since they have been addressed elsewhere, I do not discuss them here.<sup>21</sup>

Third, this proposal is a processing elsewhere scheme and not only a protection-elsewhere scheme. Including the processing component of asylum significantly expands the focus of the proposal. One important strategic reason for a processing elsewhere scheme is that this might help to remove the issue of irregular migration off the domestic political agenda and thereby assuage populist pressure.

Fourth, this proposal is politically feasible in the short run. In contrast to existing proposals, the asylum for sale proposal does not require a consensus on binding global refugee quotas. A market in asylum services requires only minimal collective agreement and action on establishing the respective UN agency and outlawing outsourcing of asylum-services outside of this regime. Apart from agreeing on minimal service standards, the proposal involves no legal commitments on member states. Although the price of this feasibility is that the proposed system would address only some of the many problems of the asylum system, a more ambitious approach based on quotas seems out of reach. Consider the repeated failure of UN climate negotiations to agree on emissions quotas or the more recent struggle between EU member states to agree on refugee quotas. Far from wanting to agree on a quota, governments have an

incentive to free ride and to impose limits on the number of refugees their country receives. In light of this, a policy proposal requiring a comprehensive and binding multi-lateral agreement on international refugee quotas seems just not feasible.<sup>22</sup> Yet, many existing proposals assume exactly that.<sup>23</sup> The asylum for sale proposal offers a way for states to impose limits on the numbers of asylum-seekers they take in without the destructive incentive of minimizing their moral obligations.<sup>24</sup>

I fully concur with Gibney that “a just distribution of refugees between states is an important normative goal.”<sup>25</sup> Thus, leaving the quota component out of the proposal might result in the proposal being unjust in one way. But this worry is not decisive here. First of all, the worry rests on an assumption in favour of a certain egalitarianism between states that many do not share. For example, some political realists might reject the egalitarian background assumption. Furthermore, to push a more principled point, we should generally not give up urgent human rights of individuals in favour of claims made by collectives. The rights of individuals to basic protection have greater relative moral importance compared to the claims of states to a fair distribution. So, if we can make asylum-seekers’ lives better in the near future with a solution that is non-ideal from the perspective of justice as far as states are concerned, we should do it. Individuals matter more than states.

## **Arguments for a Market: Rights and Welfare**

From the standpoint of market ethics, arguments pull in both directions: in favor of trading asylum services but also against doing so. Some of the literature sees the idea of trading asylum services unfavorably and hence there is a focus among proponents on presenting a negative case, that is, on defending protection-elsewhere schemes from objections.<sup>26</sup> In this paper I instead focus on positive considerations in favor of trading asylum services that have sometimes gone overlooked.<sup>27</sup>

There are two considerations in favor of trading asylum services. The first adopts general arguments for trade and applies them to the special case of asylum. Trade lets agents exercise their rights and increases overall welfare of the exchanging parties. These are the right-based and welfare-based arguments



for trade in a general form. The second consideration in favor of trading asylum services takes on the specific case of asylum directly. A market for asylum services will help to rectify existing perverse incentives for both states and migrants. This is an effectiveness argument. Both considerations – the general arguments for trade based on rights or welfare as well as the arguments focusing on asylum specifically – pull in the same direction. A market in asylum will help to make sure that asylum is provided to those who need it.

Since the general arguments for trade are well rehearsed in the literature, I review them only synoptically in this section. In the next section, I discuss the consideration that applies to the proposal directly, namely, that a market in asylum services helps to rectify perverse incentives.

There are two classes of general arguments in favor of market exchanges.<sup>28</sup> One class of arguments is based on libertarian rights. Roughly, the idea is that an agent has a right to decide how to use her property. Another class of arguments is based on welfare considerations. The idea is that allowing exchanges increases overall welfare of the exchanging parties.

Consider first the rights-based argument. The central assumption of this argument is that a state has certain ownership rights over its asylum services. That is, a state owns the infrastructure, territory, and resources used in providing asylum services and a state employs individuals who provide those services. This central assumption about ownership of asylum services is then paired with a more general normative assumption that an owner has a right to sell whatever she rightfully owns so long as no other weighty moral consideration stands in the way. Thus, as long as there are no countervailing weighty moral considerations, states have a right to commodify asylum services.<sup>29</sup> Put in a different way, even if states cannot rid themselves of the duty to provide asylum, they can decide in which way asylum is provided. More technically, states may decide about the proportions of the production factors of asylum services. States may trade off using their territory and infrastructure versus their monetary resources to employ individuals in providing asylum. Hence, they may shift the production factors away from using their own territory and infrastructure towards paying and employing someone else to do it. This is the rights-based moral argument in favor of commodifying asylum services.

A welfare-based argument, the second class of general arguments in favor of market exchanges, applies to the case of asylum as well. This argument uses a basic finding in welfare economics that there are gains from trade that lead to an optimum. When one party prefers having something the other party has, and *vice versa*, and each is willing to give up what they have in return for what the other party gives them in return – everybody benefits from an exchange.<sup>30</sup> In our case, the buyer prefers losing money over having to provide asylum services, and the seller prefers receiving the money and providing additional asylum services over the status quo. Hence, trading asylum services increases overall welfare. This is the welfare-based argument in favor of commodifying asylum services.

This welfare-based argument assumes that there are no negative externalities. This assumption seems plausible. In fact, there might be positive externalities to accepting migrants.<sup>31</sup> By facilitating migration, and in particular by protecting asylum-seekers, states help to alleviate poverty and thereby contribute to the production of a public good. Asylum-seekers, in turn, contribute to the economic production of a country. Hence, trading asylum services increases not only the welfare of the transacting parties but, via positive externalities, it also increases the welfare of third parties.<sup>32</sup>

It is important to note assumptions that this welfare-based argument does *not* make. First, the argument does not assume that the distribution of initial endowments between the trading parties is just. Even if some have a lot and others have very little, there are welfare gains from trade. And even if the distribution emerged from a history of injustice, there are welfare gains from trade. Second, voluntariness plays no role. Even if transactions are not voluntary, there can be welfare gains from trade. This phenomenon is well known in the literature on exploitation. For example, poverty might lead you to consent to selling your kidney but you might still be better off after all.

This makes this idealized economic argument surprisingly applicable to non-ideal theory. In our world the welfare distribution between states is not just. Likewise, states may not agree to certain transactions voluntarily. Nevertheless, or so the welfare-based argument suggests, there can be one way in which trading is better than not trading. Hence the welfare-based argument helps to

identify small and isolated improvements before a backdrop of larger moral problems.

## **Arguments for a Market: Avoid Perverse Incentives**

The second consideration in favor of commodifying asylum services, next to the rights-based and the welfare-based arguments, is that such a commodification will rectify perverse incentives. As things stand today, the asylum system presents states and migrants with incentives that potentially undermine the system's effectiveness.<sup>33</sup> I present the incentive problem for each side – states and migrants – and discuss how a market in asylum services would solve this problem.

### **States: Populist Politics against Asylum Rights**

First, consider the side of states. Joseph Carens argues that “states use techniques of exclusion” with the aim of “limiting the demands that are actually made of them.”<sup>34</sup> Indeed, it is a centerpiece of conservative policy to take a tough stance on migration inflow. The Conservative Party of the UK, following a campaign promise by former prime minister David Cameron, has committed to lowering net migration from more than 200,000 to “tens of thousands”.<sup>35</sup> More starkly, Donald Trump announced during his presidential campaign to deport all illegal immigrants and build a wall on the US–Mexico border.<sup>36</sup> In Germany, Chancellor Angela Merkel faced a “backlash” in 2015 when she refused to put a limit on the number of refugees the country would take in. Consequently, her popularity “dropped to its lowest level since the start of the euro crisis in 2011”.<sup>37</sup> If you look to Eastern Europe, for example to Hungary, you will find even more drastic illustrations of this dynamic of politicians and public opinion.

This populist dynamic undermines the effective provision of asylum. Many politicians tend to give in to mounting public opinion pressure and commit to a net migration target. Although states adopt sharp measures in their attempts,<sup>38</sup> it is unclear to what extent states can influence migration,<sup>39</sup> especially when – as is the case within the EU – there is an agreement to guarantee free movement. This brings into focus those kinds of migration that are at a state's discretion by involving an application. Together with visa applications, applications for asylum are about the only way in which a government can directly influence

immigration. Therefore, when governments aim to lower net migration figures, they will be restrictive on applications for visas and asylum.<sup>40</sup>

Given this situation, it should not come as a surprise that refugee recognition rates vary wildly between countries.<sup>41</sup> For example, asylum applications lodged by refugees from Afghanistan were successful around 75% of the time in Turkey, Indonesia, Italy, and Sweden. But they were successful only 25% of the time in Bulgaria, Hungary, and Greece.<sup>42</sup> These figures reflect a major unfairness in the current asylum system. Plausibly, this unfairness is explained, at least in part, by the perverse incentives on the side of governments.

A market for asylum services will help to rectify these perverse incentives that lead populist governments to artificially depress asylum-related migration inflow. In order to achieve lower migration inflow, they no longer need to focus on the asylum system by refusing to protect those that need protection. Instead, they may outsource what they perceive to be an “immigration problem.” On the other side, the seller governments can justify the migration inflow with the additional money they receive in return. And if the domestic political costs for retaining asylum-seekers increase, the international price on the market for asylum services will rise in step.

The buying states should be willing to spend money on such an outsourcing scheme for two reasons. First, they avoid the costs of processing and protecting asylum-seekers themselves. Since the selling state might be able to provide the same services significantly cheaper, the buying state may be able to outsource the system at the same or even at a lower cost compared to the present scheme while the selling state can maintain a profit margin. Second, politicians in a buying state, by setting up such an outsourcing scheme, send a signal to their electorate about their conservative profile. The politicians can thereby satisfy their preferences of shaping their public image, perhaps exploiting populist dynamics, without thereby damaging the asylum system.

### **Migrants: Free Riding on a Public Good**

Second, consider the side of asylum-seekers. They too face perverse incentives. Economically speaking, they have an incentive to exploit the public good that the asylum system constitutes and “to make opportunistic use of the system”.<sup>43</sup>

In fact, there are two distinct incentive problems on the side of asylum-seekers. For means of illustration, I will distinguish schematically between two kinds of asylum-seekers. First, *bona fide* asylum-seekers, who should qualify for asylum, may have an incentive to seek asylum in relatively prosperous states. They have a mixed-motive: protection and prosperity. Second, *mala fide* asylum-seekers, who should not qualify for asylum, are incentivized by a hope of bettering their economic situation, and use the asylum system to do so. *Mala fide* asylum-seekers have a pure-motive: they simply seek prosperity.<sup>44</sup>

The data suggests that asylum-seekers – to the extent they are able to do so at all – choose their destination on a preference for certain prosperous economies. For example, although Germany, the United States, and Sweden are not anywhere close to where the asylum-seekers come from, these countries consistently rank among the top destinations for new asylum-seekers.<sup>45</sup>

For asylum-seekers it is understandable to try to economically better their situation. But there are two problems. First, in the case of *bona fide* asylum-seekers, their preference fuels populism. Although *bona fide* asylum-seekers have a strong claim for protection, populist politicians try to undermine their status. The politicians focus only on one half of *bona fide* asylum-seekers' mixed motive and argue that they are merely "economic migrants." Second, in the case of *mala fide* asylum-seekers, they not only give populist politicians an argument to take a tough stance toward immigration, these migrants also unfairly exploit the asylum system in order to satisfy their preference. *Mala fide* asylum-seekers increase the administrative caseload on receiving countries, and they thereby make it potentially harder for *bona fide* asylum-seekers to receive the protection they need. Hence, there are different ways in which the perverse incentives on the side of asylum-seekers undermine the effectiveness of the asylum system.

A market for asylum services will, at least to some extent, disentangle destination and protection. The market thereby solves the problem of perverse incentives on the side of asylum-seekers. It is plausible that the states, which are the target of *mala fide* applications, are likely to be exactly those states that will outsource their asylum system to poorer states. This removes incentives to exploit the asylum system in order to better one's life prospects and hence allows more effective protection for those in need. *Bona fide* asylum-seekers will not

anymore be able to exercise both parts of their mixed motive. They will only get protection but perhaps not prosperity. But protection is all the right to asylum comprises.

## **The Right to Asylum**

The proposal to outsource asylum services raises substantive moral questions, of which I will discuss two. The first question is this: Can asylum-seekers choose their own destination? That is, does the right to asylum include a choice-right by which asylum-seekers can direct a claim-right towards a particular state? This question is about the right's content. A market in asylum requires giving a negative answer to this first question.<sup>46</sup> In contrast to the first question, which hones in on the bearer of the right, the second question is about the bearer of the corresponding duty. The second question is this: Should the duties induced by the asylum claim-right be inalienable? This is a question about the right's form. Once more, a market in asylum requires that we give a negative answer to this question because it presupposes that asylum-related duties can be traded.

Note also that the duties associated with the asylum claim-right are *imperfect*. Initially, there is no specified duty-bearer and no specified recipient. The duty-bearer and the recipient become specified only when an individual applies for asylum with a particular state. Some argue that this special relation transforms an imperfect claim into a perfect claim in the process by which the recipient and the duty-bearer are specified.<sup>47</sup>

### **On the Content of the Right**

Consider the first question about the asylum right's content. Does the right to asylum include a choice-right? Does it include the right to choose where one's application is considered? It is hard to see why that should be the case.<sup>48</sup> The right to asylum is generally justified by its function, namely, that a person receives protection by other states if her own state fails to do so.<sup>49</sup> But, as indicated by the fact the right is imperfect, this function is not bound to any particular state. Many states can provide this protection of last resort. As Carens puts it, "refugees have a moral right to a safe place to live, but they do not have a moral entitlement to choose where that will be."<sup>50</sup> Thus, the traditional justification for the right to asylum does not yield the choice-right. Hence, the

right to asylum by its content is respected when a country different from the one in which asylum-seekers originally applied provides the fulfillment of asylum duties.

Of course, grounds separate from asylum may justify a choice-right, that is, a privilege of the asylum-seeker to determine herself where she applies for asylum. For example, an asylum-seeker's personal relations or her family ties may support such a choice-right.<sup>51</sup> But these grounds for a choice are separate from the right to asylum are handled separately from asylum applications. Furthermore, these additional grounds concern the stock of refugees already present in destination countries today who remain unaffected by this proposal. At any rate, when a buyer state outsources the asylum system entirely, family reunions in the buyer state will phase out as all new refugees will reside in the seller state.

### **On the Form of the Right**

Consider now the second question about the asylum right's form. Are the associated duties inalienable? Or can some other state discharge these duties on a first state's behalf? I concede that asylum-related duties are in part inalienable. Some of the asylum-related duties are second-order duties of oversight that concern the proper fulfillment of asylum rights. These duties may remain with the original receiving state even after the state outsourced the fulfillment of the duty to another state.<sup>52</sup> However, I contend that the first-order duties concerning the fulfillment itself are alienable. Other agents may discharge of your duties on your behalf. When we consider similar cases, we see that many duties do not require that you perform the duty-discharging actions yourself.<sup>53</sup>

There might be a value to doing certain things yourself rather than leaving them to others to do for you.<sup>54</sup> For example, a vegetarian who makes an exception to eat turkey on Thanksgiving might think it important to slaughter the turkey herself. Doing something oneself might not only be important to the agent herself, it might be praiseworthy. Specifically, it might be praiseworthy if a state finds the right to asylum so important that they insist on providing the protection themselves. But it does not follow that it is impermissible to outsource the fulfillment of asylum duties to others. Letting others fulfill your duties on your behalf might still be permissible, even if doing it yourself would be better.

Consider the following case that is in many ways analogous to the issue of asylum. Suppose you live next door from your twin sister. One day a distressed person shows up at your door claiming that her life is at risk. You let the visitor in but, unfortunately, you feel that having this person around will distract you from your work. So you ring up your twin sister next door, who agrees to take care of the visitor in exchange for you taking your sister out for dinner. Presumably, given that you have a reason to believe that your visitor is threatened, you have a duty to protect her. Do you discharge of that duty by making sure your sister offers the visitor shelter on your behalf? It seems so. Given that the person at your door has originally no claim that is directed specifically towards you, what matters is just that she is protected. You do not have the duty to protect her yourself but only the duty *to see to it* that she is protected. In contrast to a first-order duty, which has the form of *doing-that*, the moral importance rests on a second-order duty of the form *seeing-to-it-that*.<sup>55</sup>

When your sister agrees to take care of the visitor, not all of your duties with respect to that person are transferred to her. It seems plausible that certain oversight duties remain with you.<sup>56</sup> Those that remain are the second-order *seeing-to-it-that* duties that appropriate protection is given. But the first-order *doing-that* duty to provide the protection may be transferred in exchanges between third parties. In practice, this means that you must have evidence to believe that your sister will fulfill the duty sufficiently well. Furthermore, if for some reason your sister cannot provide the protection any longer, the *doing-that* duty of fulfillment will fall back to you. In the market for asylum services, these functions are fulfilled by the oversight agency. Sellers will have to report to this agency and be assessed on the quality of the provision. Moreover, buyers will have to be prepared to take over the protection themselves in case the sellers fail on their contractual obligations to provide protection.

Outside of the domain of asylum, these kinds of transfers of duties of care take place on a daily basis and we endorse them as a part of our lives. Consider the example of a kindergarten. As a parent you have the duty to care for your child. But that does not mean that you have to fulfill this duty yourself all of the time. It is certainly permissible that you sign your child up for a kindergarten to fulfill your duty of care on your behalf. Nevertheless, even while your child is in their care you have inalienable duties of oversight. When you have evidence that



the kindergarten is not living up to reasonable standards, then morality requires that you ought not send your child there. This reasoning extends to other cases involving duties of care, for example, to cases about care for the elderly.

Of course, the analogy between asylum and a distressed person at your door is imperfect. For example, it sets aside that “the current global situation is radically different because of the sheer number of people in need.”<sup>57</sup> Furthermore, the sisters in the analogy should rather be quite unlike. Given the political and economic reality, one would be a princess and the other a pauper. But if the analogy were amended in this way, there would be additional arguments favoring the commodification of asylum services. One would now expect welfare gains from trade to be even greater.

In sum, there are two features about the right to asylum that we need to keep in clear view. First, the right to asylum does not comprise the choice-right about one’s asylum destination. Second, the first-order duty to provide care oneself is alienable but the second-order duty *to see to it* that the first-order duty is fulfilled cannot be traded and remains with the original duty-bearer.

## **Conclusion**

In this paper, I argued that asylum services should be commodified and allowed to be traded on a global market under the oversight of an international agency. This would solve problems that the asylum system faces on two fronts. From the side of states, the system is threatened by populist politics of anti-immigration. Asylum-seekers, on the other hand, exploit the system in order to satisfy migration preferences. Institutionalizing the idea that states can buy protection elsewhere would rectify these perverse incentives that undermine the asylum system. The asylum system may then work again as a crucial right of last resort in favor of those that have been let down by their own states.

The discussion led to three important observations. First, general arguments for trade apply to asylum. Arguments based on rights as well as arguments based on welfare speak in favor of permitting a commodification of asylum services. Second, the right of asylum does not by itself confer a choice-right on the asylum-seekers to pick their destination. The right to asylum is a claim for protection, which is separate from further claims grounded in family ties or the

idea of free movement. Third, states have an inalienable duty *to see to it* that asylum-seekers are protected. Although this second-order duty is inalienable, states do not have to provide the protection themselves.

In summary, establishing a market in asylum services is feasible and desirable. Such a market is feasible because it requires only agreement on minimal provision standards but, unlike alternative proposals, it does not require agreement on quotas. Such a market is desirable for three reasons. First, it prevents the situation from deteriorating. The market establishes a standard for asylum outsourcing and thereby imposes a significant cost on states' attempts to unilaterally violate this standard. This discourages further human rights violations like Australia's so-called PNG Solution. Second, the market is in line with considerations based on rights and welfare putting in practice classic arguments for commodification. Third, the market rectifies perverse incentives. This is because it disentangles protection and destination. In this way, a market in asylum services ensures that protection is effectively provided to those who need it the most.

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## NOTES

<sup>1</sup> Peter H. Schuck, 'Refugee Burden-Sharing: A Modest Proposal', *Yale Journal of International Law*, 22 (1997), 243-297, (p. 247).

<sup>2</sup> UNHCR, *Global Trends 2014* (United Nations, June 2015), p. 27 <<http://unhcr.org/556725e69.html>> [accessed 22 September 2015].

<sup>3</sup> UNHCR, *Global Trends 2015* (United Nations, 20 June 2016), p. 38 <<http://www.unhcr.org/576408cd7.pdf>> [accessed 22 December 2016].

<sup>4</sup> Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004); 'Refugees and Justice between States', *European Journal of Political Theory*, 14.4 (2015), 448-63, at pp. 450-52, <<https://doi.org/10.1177/1474885115585325>>.

<sup>5</sup> Joseph Carens observes that "the principle of non-refoulement creates incentives for refugees to seek asylum in a rich democratic state rather than somewhere else." See Joseph H. Carens *The Ethics of Immigration* (New York: Oxford University Press, 2013), p. 209. See also Paul Collier *Exodus: How Migration Is Changing Our World* (Oxford: Oxford University Press, 2013), p. 38. Other authors find that economic output in destination countries has a positive influence on migration generally. See Francesc Ortega and Giovanni Peri 'The Effect of Income and Immigration Policies on International Migration', *Migration Studies*, 1.1 (2013), 47-74 <<https://doi.org/10.1093/migration/mns004>>.

<sup>6</sup> Compare Schuck, 'Refugee Burden-Sharing' op. cit.; David de la Croix and Axel Gosseries, 'Procreation, Migration and Tradable Quotas', in *Population Aging, Intergenerational Transfers and the Macroeconomy*, ed. by Robert Louis Clark, Naohiro Ogawa, and Andrew Mason (Cheltenham: Edward Elgar Publishing, 2007); Jesús Fernández-Huertas Moraga and Hillel Rapoport, *Tradable Immigration Quotas*, IZA Discussion Papers (2011) <<http://www.econstor.eu/handle/10419/69584>> [accessed 28 August 2013].

<sup>7</sup> For a discussion see Matthew Gibney, 'Forced Migration, Engineered Regionalism, and Justice between States', in *Regionalism and Asylum Seekers: Challenges Ahead*, Ed. Susan Kneebone, and Felicity Rawlings-Sanei, 2008, pp. 57-77, at pp. 70-75; UNHCR, 'Australia-Papua New Guinea Asylum Agreement Presents Protection Challenges', *UNHCR*, 2013 <<http://www.unhcr.org/51f2426e6.html>> [accessed 16 September 2013]; Guy Verhofstadt, 'This Turkish Deal Is Illegal and Betrays Europe's Values', *The Guardian*, 10 March 2016, section Opinion <<http://www.theguardian.com/commentisfree/2016/mar/10/refugee-crisis-turkey-deal-europe-values>> [accessed 7 September 2017].

<sup>8</sup> See Schuck op. cit.; de la Croix and Gosseries op. cit.; Fernández-Huertas Moraga and Rapoport op. cit.; Andy Lamey, 'A Liberal Theory of Asylum', *Politics, Philosophy & Economics*, 11.3 (2012), 235-57 <<https://doi.org/10.1177/1470594X11416775>>; Carens op. cit.

<sup>9</sup> It should be possible that states can still opt to take over specific asylum cases at their discretion. For example, the UK, given its colonial history, could consider it an important act of solidarity to grant political asylum to opposition leaders from Myanmar. See Souter 'Towards a Theory of Asylum as Reparation for Past Injustice', *Political Studies*, 62.2 (2014), 326-42 <<https://doi.org/10.1111/1467-9248.12019>>.

<sup>10</sup> J. C. Hathaway and R. A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Journal*, 10 (1997), 115-333 (p. 160); Carens op. cit. (p. 205).

<sup>11</sup> BBC, 'Private Firms Offered Police Role', *BBC*, 3 March 2012, section UK <<http://www.bbc.co.uk/news/uk-17242956>> [accessed 25 March 2012].

<sup>12</sup> Similarly, conditionality is needed to counteract perverse incentives for cases in which buyer states can influence which or how many asylum-seekers arrive in their corresponding seller state. Suppose that Ghana allows or enables asylum-seekers to travel to the UK only to then receive them back under the protection-elsewhere agreement. As part of a solution, individuals that the

selling state could have accepted at an earlier point in time but failed to do so must not count for the outsourcing transaction. Likewise, conditionality is needed to prevent that a seller state's provision of asylum to asylum-seekers received from a buyer state comes at the expense of the provision of asylum to asylum-seekers who arrive through family reunion rights or at the seller state's own borders. For example, the supervision regime must ensure that the asylum recognition rates do not significantly vary depending on the arrival channel of individuals.

<sup>13</sup> The determination of whether a person is a member of a LGBT community raises issues of epistemological justice. For example, a person might be forced to out herself. This problem of forced outing already exists today and would have to be addressed independently of my proposal.

<sup>14</sup> UNHCR, 'UNHCR Welcomes Close of Australia's Pacific Solution', *UNHCR*, 2008 <<http://www.unhcr.org/47ac3f9c14.html>> [accessed 12 October 2015].

<sup>15</sup> Collier op. cit., pp. 27–53.

<sup>16</sup> Gary S. Becker, 'Sell the Right to Immigrate', *The Becker-Posner Blog*, 2005 <<http://www.becker-posner-blog.com/2005/02/sell-the-right-to-immigrate-becker.html>>

[accessed 25 June 2012]; Julian L. Simon, 'Auction the Right to Be an Immigrant', *The New York Times*, 28 January 1986; de la Croix and Gosseries op.cit.; Hathaway and Neve op. cit.; Fernández-Huertas Moraga and Rapoport op. cit.; Jaakko Kuosmanen, 'Perfecting Imperfect Duties: The Institutionalisation of a Universal Right to Asylum', *Journal of Political Philosophy*, 21.1 (2013), 24–43 <<https://doi.org/10.1111/j.1467-9760.2011.00412.x>>; Schuck op.cit.

<sup>17</sup> For example, Becker op. cit.

<sup>18</sup> Joseph H. Carens, 'Who Should Get in? The Ethics of Immigration Admissions', *Ethics & International Affairs*, 17.1 (2003), 95–110 <<https://doi.org/10.1111/j.1747-7093.2003.tb00421.x>>; Gibney, *The Ethics and Politics of Asylum* op. cit.

<sup>19</sup> Another issue that I set aside concerns the grounds of asylum. Many theorists argue that "the definition of 'refugee' must be broadened" (Gibney, 'Refugees and Justice between States', p. 449). Others disagree, see Max Cherem, 'Refugee Rights: Against Expanding the Definition of a "Refugee" and Unilateral Protection Elsewhere', *Journal of Political Philosophy*, 24.2 (2016), 183–205 <<https://doi.org/10.1111/jopp.12071>>.

<sup>20</sup> Peter H. Schuck, 'Refugee Burden-Sharing' op. cit.; *Refugee Burden-Sharing: A Modest Proposal Fifteen Years Later?* (Rochester, NY: Social Science Research Network, 2014) <<http://papers.ssrn.com/abstract=2478844>> [accessed 2 October 2015].

<sup>21</sup> Jaakko Kuosmanen, 'What (If Anything) Is Wrong with Trading Refugee Quotas?', *Res Publica*, 19.2 (2013), 103–19 (pp. 111–15) <<https://doi.org/10.1007/s11158-012-9198-y>>.

<sup>22</sup> Deborah Anker, Joan Fitzpatrick, and Andrew Shacknove, 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck', *Harvard Human Rights Journal*, 11 (1998), 295 (pp. 300-03); Joseph Blocher and Mitu Gulati, 'Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis', *The Columbia Human Rights Law Review*, 48.1 (2016), p. 6 <<https://papers.ssrn.com/abstract=2674831>>.

<sup>23</sup> Schuck, 'Refugee Burden-Sharing' op. cit.; Hathaway and Neve op. cit.; Kuosmanen, 'What (If Anything) Is Wrong with Trading Refugee Quotas?' op. cit.; Fernández-Huertas Moraga and Rapoport, *Tradable Immigration Quotas* op. cit.; Schuck, *Refugee Burden-Sharing* op. cit.; Jesús Fernández-Huertas Moraga and Hillel Rapoport, *Tradable Refugee-Admission Quotas and EU Asylum Policy*, IZA Discussion Papers (2014) <<http://www.econstor.eu/handle/10419/107486>> [accessed 8 October 2015].

<sup>24</sup> A further issue that limits feasibility but which is generally overlooked concerns respecting the perspectives and interests of African states. On this see James Milner and Alexander Betts, 'The Externalization of EU Asylum Policy: The Position of African States', *Centre on Migration, Policy and Society Working Paper*, 36 (2006) <<http://yorkspace.library.yorku.ca/xmlui/handle/10315/7913>> [accessed 24 January 2016]; Alexander Betts, 'The Normative Terrain of the Global Refugee Regime', *Ethics & International Affairs*, 29.04 (2015), 363–375 (p. 371) <<https://doi.org/10.1017/S0892679415000350>>.

<sup>25</sup> 'Refugees and Justice between States', p. 449.

<sup>26</sup> Kuosmanen ‘What (If Anything) Is Wrong with Trading Refugee Quotas?’ gives an overview over various objections against commodification and discusses them critically. Cherem op. cit. opposes such regimes not in principle but only those that are “unilateral”. See also Gibney, ‘Forced Migration, Engineered Regionalism, and Justice between States’ op. cit.

<sup>27</sup> But see Fernández-Huertas Moraga and Rapoport, *Tradable Immigration Quotas* op. cit.

<sup>28</sup> Amartya Sen, ‘The Moral Standing of the Market’, *Social Philosophy and Policy*, 2.02 (1985), 1–19 <<https://doi.org/10.1017/S0265052500003186>>.

<sup>29</sup> Gibney, ‘Forced Migration, Engineered Regionalism, and Justice between States’ op. cit.; Kuosmanen, ‘What (If Anything) Is Wrong with Trading Refugee Quotas?’ op. cit.; Cherem op. cit.

<sup>30</sup> Sen op. cit., pp. 9–14.

<sup>31</sup> Fernández-Huertas Moraga and Rapoport, *Tradable Immigration Quotas* op. cit.; Alexander Betts and Paul Collier, ‘Help Refugees Help Themselves’, *Foreign Affairs*, 2015 <<https://www.foreignaffairs.com/articles/levant/2015-10-20/help-refugees-help-themselves>>.

<sup>32</sup> Gibney, ‘Forced Migration, Engineered Regionalism, and Justice between States’ op. cit., pp. 72–74.

<sup>33</sup> Carens, *The Ethics of Immigration* op. cit., pp. 216–18.

<sup>34</sup> *The Ethics of Immigration*, p. 218.

<sup>35</sup> Net migration is usually defined as the number of arrived non-citizens remaining in the country for more than three months, minus the number of citizens leaving the country for more than three months. In fact, however, net migration remained above 200,000. Conservative Party, ‘The Conservative Party | Policy | Where We Stand | Immigration’, 2012 <[http://www.conservatives.com/policy/where\\_we\\_stand/immigration.aspx](http://www.conservatives.com/policy/where_we_stand/immigration.aspx)> [accessed 27 June 2012].

<sup>36</sup> Heather Haddon, ‘Donald Trump Says He Would Deport Illegal Immigrants’, *Wall Street Journal*, 16 August 2015, section Politics <<http://www.wsj.com/articles/trump-saying-illegal-immigrants-have-to-go-targets-obama-orders-1439738967>> [accessed 12 October 2015].

<sup>37</sup> The Economist, ‘Angela the Beleaguered’, *The Economist*, 10 October 2015 <<http://www.economist.com/news/leaders/21672219-german-chancellor-faces-backlash-asylum-seekers-she-should-hold-firm-angela>> [accessed 12 October 2015].

<sup>38</sup> Gibney, *The Ethics and Politics of Asylum* op. cit.

<sup>39</sup> Eiko R. Thielemann, ‘The Effectiveness of Governments’ Attempts to Control Unwanted Migration’, in *Immigration and the Transformation of Europe*, ed. by Craig Parsons and Timothy M. Smeeding (Cambridge: Cambridge University Press, 2006), p. 445.

<sup>40</sup> Taking asylum-related migration out of net migration figures would not help. In many states, voters take issue with any kind of migration, regardless of its legal or moral grounding.

<sup>41</sup> Figures here refer to the Total Recognition Rate (TRR) as calculated by UNHCR, which “divides the number of asylum-seekers granted Convention refugee status or a complementary form of protection by the total number of substantive decisions” UNHCR, *Global Trends 2014*, p. 30..

<sup>42</sup> UNHCR, *Global Trends 2014* op. cit., p. 31; cf. Luc Bovens, Chlump Chatkupt, and Laura Smead, ‘Measuring Common Standards and Equal Responsibility-Sharing in EU Asylum Outcome Data’, *European Union Politics*, 13.1 (2012), 70–93 <<https://doi.org/10.1177/1465116511428358>>.

<sup>43</sup> The quote is from Carens, *The Ethics of Immigration* op. cit., p. 216. Economists call something a public good if its consumption is non-excludable and non-rival. This is arguably the case for asylum. Not only is the *protection* of refugees a public good because it alleviates poverty (see Fernández-Huertas Moraga and Rapoport, *Tradable Immigration Quotas* op. cit.), also the institutional existence of the *possibility to apply* for asylum is a public good that is produced by all states that respect at least the 1951 Geneva Convention.

<sup>44</sup> I focus here only on those mala fide asylum-seekers who seek protection in relatively prosperous economies. It should also be noted that, despite providing a rudimentary and useful framework, this common way of making the distinction “fails to capture much of the

complexities involved in why people move,” such as the role of migration networks (Gibney, *The Ethics and Politics of Asylum* op. cit., p. 12). See also Collier op. cit., p. 38.

<sup>45</sup> UNHCR, *Global Trends 2014* op. cit., p. 28.

<sup>46</sup> Kuosmanen, ‘What (If Anything) Is Wrong with Trading Refugee Quotas?’ op. cit.; Gibney, ‘Forced Migration, Engineered Regionalism, and Justice between States’ op. cit.; ‘Refugees and Justice between States’ op. cit.

<sup>47</sup> Kuosmanen, ‘Perfecting Imperfect Duties’ op. cit.

<sup>48</sup> Kuosmanen, ‘What (If Anything) Is Wrong with Trading Refugee Quotas?’ op. cit., pp. 108–11; Gibney, ‘Forced Migration, Engineered Regionalism, and Justice between States’ op. cit., p. 71; Lamey; ‘Refugees and Justice between States’ op. cit., pp. 457–61; *Debating the Ethics of Immigration: Is There a Right to Exclude?*, ed. by Christopher Heath Wellman and Phillip Cole (Oxford: Oxford University Press, USA, 2011), pp. 117–24; Luara Ferracioli, ‘The Appeal and Danger of a New Refugee Convention’, *Social Theory and Practice*, 40.1 (2014), 123–144 (p. 142).

<sup>49</sup> If asylum is instead grounded in a claim to compensation or reparation, then its content will change. See, for example, Gibney ‘Refugees and Justice between States’ op. cit., pp. 459–61.

<sup>50</sup> Carens, *The Ethics of Immigration* op. cit., p. 216.

<sup>51</sup> But even these grounds for a choice-right are disputed. A focus on family ties seems arbitrary vis-à-vis potentially deeper personal relationships. On this see Luara Ferracioli, ‘Family Migration Schemes and Liberal Neutrality: A Dilemma’, *Journal of Moral Philosophy*, 1.23 (2014) <<https://doi.org/10.1163/17455243-4681056>>. In addition, the relations that ground such a choice-right separate from asylum could in principle be enjoyed in third country. Instead of accepting additional family-members into the UK, the UK may offer to relocate the entire family.

<sup>52</sup> Michelle Foster, ‘Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State’, *Michigan Journal of International Law*, 28 (2006), 223 (p. 284); Cherem op. cit.

<sup>53</sup> Robert E. Goodin, *Utilitarianism as a Public Philosophy* (Cambridge: Cambridge University Press, 1995), pp. 81–87.

<sup>54</sup> Betts op. cit., p. 367; Axel Gosseries, ‘What’s Wrong with Trading Emission Rights?’, in *Climate Change and Justice*, ed. by Jeremy Moss (Cambridge: Cambridge University Press, 2015), pp. 89–106 (pp. 102–04) <<https://doi.org/10.1017/CBO9781316145340.006>>.

<sup>55</sup> Likewise, Wellman advances a similar analogy argument between asylum and an infant at the doorstep. He argues that “clearly, I must bring the infant in from the cold, but it does not follow that I must then adopt the child and raise her as my own.” See Wellman op. cit., pp. 120–23. Goodin distinguishes more generally between duties and task-responsibilities. See Goodin op. cit., pp. 81–87.

<sup>56</sup> Foster op. cit., p. 284; Cherem op. cit.

<sup>57</sup> Wellman and Cole op. cit., p. 125.