

# Principles for Responsibility Sharing: Proximity, Culpability, Moral Accountability, and Capability

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Introduction .....	102
I. Responsibility by Proximity.....	103
II. Responsibility by Culpability .....	104
A. Security Council and Other Multilateral Sanctions.....	107
B. Domestic Legal Remedies .....	109
C. EU Remedies .....	111
D. Tripartite Agreements.....	111
E. Likelihood to Generate the Money .....	112
F. Widening the Circle of Culpability .....	113
III. Responsibility as Moral Accountability .....	114
A. Colonialism and Imperialism .....	115
B. Climate-Induced Natural Disaster .....	117
C. Drugs and Arms: Effects of Importation and Exportation ..	118
IV. Responsibility by Capability .....	121

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A. Alternative Ideas on International Responsibility .....	122
B. MIMC Responsibility Sharing .....	124
Conclusions .....	131

## INTRODUCTION

Responsibility sharing was a central commitment in the 2016 New York Declaration for Refugees and Migrants.<sup>1</sup> It was also a key commitment in the preamble to the landmark 1951 Refugee Convention, in which countries of first asylum were promised “international cooperation” in return for providing refuge—though the Convention did not specify what this cooperation encompassed. And, just as the 1951 Refugee Convention failed to define what international cooperation meant, the New York Declaration was long on principles but short on specific commitments.

Has the Global Compact on Refugees (“Refugee Compact”) filled this gap? We can all celebrate the significantly increased rhetorical centrality of “burden- and responsibility-sharing.”<sup>2</sup> The aim is “more equitable and predictable burden- and responsibility-sharing,”<sup>3</sup> which was intended to be “efficient, effective and practicable.”<sup>4</sup> Global Refugee Forums—the first of which took place in 2019—have implemented these commitments.<sup>5</sup> These forums, which convene every four years at a ministerial level and are co-hosted by States and the United Nations High Commissioner for Refugees (UNHCR), are supplemented by biennial officials’ meetings. At the forums, states announce “concrete pledges and contributions,” including “financial, material and technical assistance, resettlement places and complementary pathways.”<sup>6</sup> At subsequent forums, “[s]tates and relevant stakeholders” are invited to make new pledges and to “take stock of the implementation of their previous pledges and progress towards the achievement of the objectives of the global compact.”<sup>7</sup> In addition, national arrangements can form in response to specific refugee situations. These arrangements are organized by host countries with the support of a “platform” that elicits both context-specific assistance to develop a comprehensive plan and a “solidarity conference” designed to generate support for the plan.<sup>8</sup>

Altogether, the Refugee Compact constitutes a significant step forward in the rhetoric of responsibility sharing—but is it effective? Is it equitable? If neither, what should be done to make it both equitable and effective? With Presidents Trump, Putin, and Xi leading the three great powers, we have lived in

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1. See G.A. Res. 71/1, § 1 (Oct. 3, 2016).

2. See G.A. Res. 429 (V), Convention Relating to the Status of Refugees (July 28, 1951).

3. *Id.* at ¶ 15.

4. *Id.* at ¶ 16.

5. *Id.* at ¶¶ 17, 19.

6. *Id.* at ¶ 18.

7. *Id.* at ¶ 19.

8. *Id.* at ¶ 27.

times profoundly hostile to multilateral cooperation. Senior officials in the former Trump administration even made anti-multilateralism a matter of principle.<sup>9</sup> The voluntarism of the Refugee Compact—expressed through each state declaring its own understanding and setting its own goals for responsibility sharing and then reviewing its own performance—may thus be the most that we can do today. However, is it enough?

In this Article, we will explore how responsibility based on culpability, moral accountability, and capability can improve the current regime that rests on responsibility by proximity. In doing so, we draw on the 2017 Model International Mobility Convention (MIMC), a model convention drafted by a commission of independent experts and currently supported as a project of the Carnegie Council for Ethics in International Affairs.<sup>10</sup>

## I.

### RESPONSIBILITY BY PROXIMITY

As the Refugee Compact recognizes, the imbalance of responsibility sharing is glaring. Peter Sutherland, the former United Nations (UN) Special Representative of the Secretary-General for Migration and Development, aptly characterized responsibility sharing today as amounting to “Responsibility by Proximity.”<sup>11</sup> For instance, Syria’s neighbors—Turkey, Lebanon, and Jordan—overwhelmingly serve as refuges for Syrians who have fled the devastating civil war. This means that, globally, the developing world—which is both relatively poor and home to so much of the world’s armed conflict—also serves as the place of refuge for 86 percent of the world’s refugees.<sup>12</sup> Further, it does so without adequate international funding—in 2020, the UNHCR reported a funding gap of 51 percent.<sup>13</sup>

Asylum—and a guarantee that refugees will not be expelled to territories in which they will be subject to persecution—is vital. However, individual states should not exclusively bear responsibility for providing such refuge. Instead,

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9. See Mark Landler, *Bolton Expands on His Boss’s Views, Except on North Korea*, N.Y. TIMES (Sept. 10, 2018), <https://www.nytimes.com/2018/09/10/us/politics/trump-plo-bolton-international-criminal-court.html> [<https://perma.cc/V6KW-NR6G>].

10. See GLOB. POL’Y INITIATIVE, COLUM. UNIV., MODEL INTERNATIONAL MOBILITY CONVENTION (2017), [https://www.internationalmobilityconvention.org/wp-content/uploads/sites/2/2020/11/mimc\\_document\\_web.pdf](https://www.internationalmobilityconvention.org/wp-content/uploads/sites/2/2020/11/mimc_document_web.pdf) [<https://perma.cc/7EZA-9NXY>]. See also Michael Doyle, *Model International Mobility Convention*, 56 COLUM. J. TRANSNAT’L L. 219 (2018).

11. See Interview: “Refugees are the responsibility of the world . . . Proximity doesn’t define responsibility.” – Peter Sutherland, UN NEWS (Oct. 2, 2015), <https://news.un.org/en/story/2015/10/511282-interview-refugees-are-responsibility-world-proximity-doesnt-define> [<https://perma.cc/3GQD-5KKP>].

12. See *Refugee Data Finder*, UNHCR, <https://www.unhcr.org/refugee-statistics/> [<https://perma.cc/8N6R-YNMJ>].

13. UNHCR, CONSEQUENCES OF UNDERFUNDING IN 2020 6 (2020), <https://www.unhcr.org/underfunding-2020/wp-content/uploads/sites/107/2020/09/Underfunding-2020-Full-Report.pdf> [<https://perma.cc/56XH-ZN2L>].

non-governmental and international organizations must join states in protecting refugees. Together, these entities need to act on the basis of a more cosmopolitan set of commitments, because they and the people they claim to represent have a shared stake in a more humane and just global order. All need to recognize and accept three additional responsibilities: (1) responsibility by culpability, (2) responsibility as moral accountability, and (3) responsibility by capability.

## II.

### RESPONSIBILITY BY CULPABILITY

We should search out the culpable perpetrators in order to obtain compensation.<sup>14</sup> Indeed, some of the government officials of refugees' countries of origin count amongst the culpable perpetrators. For example, the Syrian government's security forces, under the pretext of responding to armed attacks by terrorists, broadly and systematically attacked civilian populations to forcibly suppress protest movements during the Arab Spring. The forces have inflicted repeated crimes of atrocity on the Syrian population, leading to the forced displacement of millions of Syrian citizens.

Responsibility by culpability reflects the straightforward norm that, while our positive cosmopolitan duties of reciprocal assistance may be poorly defined in an international order of sovereign states, there are well-understood and overriding principles imposing a negative duty not to inflict certain harms on our fellow human beings.<sup>15</sup> Undoubtedly, these harms include genocide, war crimes, crimes against humanity, and ethnic cleansing—collectively the four crimes referenced in the Responsibility to Protect (RtoP) doctrine, which has been unanimously endorsed by the UN General Assembly, and identified in the Rome Statute.<sup>16</sup> For example, under Article 7(2)(d) of the Rome Statute, forced expulsion is a crime against humanity, regardless of whether it is ethnically motivated. Moreover, the deprivation of liberty and enforced disappearance are recognized as crimes against humanity.

The evidence is overwhelming that crimes against humanity have taken place in Syria. Germany's Higher Regional Court of Koblenz<sup>17</sup> concluded that the Syrian Government induced a widespread, systemic attack on, and a deprivation of liberty of, the civilian population.<sup>18</sup> Moreover, Lina Schmitz-

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14. See Guy S. Goodwin-Gill & Selim Can Sazak, *Footing the Bill: Refugee-Creating States' Responsibility to Pay*, FOREIGN AFFS. (July 29, 2015), <https://www.foreignaffairs.com/articles/africa/2015-07-29/footing-bill> [<https://perma.cc/D24V-P5DZ>].

15. See Thomas Pogge, *World Poverty and Human Rights*, 19 ETHICS & INT'L AFFS. 1, 5 (2005).

16. Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 3 (on "arbitrary deportation and forcible transfer of population").

17. See Oberlandesgericht Koblenz [Higher Regional Court of Koblenz] Feb. 24, 2021, Az. 1 StE 3/21, juris (Ger.) <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/urteil-gegen-einen-mutmasslichen-mitarbeiter-des-syrischen-geheimdienstes-wegen-beihilfe-zu-einem-ver/> [<https://perma.cc/C2ZZ-ZVVC>].

18. See *id.*

Buhls argued that the actions in Syria qualify as “enforced disappearance” under Article 7(2)(i) of the Rome Statute.<sup>19</sup> Compared to deprivation of liberty, “enforced disappearance” requires two additional elements: (1) the state’s concealment of the disappeared person’s fate and (2) the intention to remove the person from the protection of law.<sup>20</sup> In addition, evidence concerning Syria’s chemical weapons program suggests that the government has committed war crimes under Article 8 of the Rome Statute.<sup>21</sup> After 1,400 people were killed near Damascus in August 2013, the UN Security Council unanimously adopted Resolution 2118, which addressed the removal of chemical weapons.<sup>22</sup> While the work to rid Syria of chemical weapons is considered the “sole multilateral success of the Syrian conflict to date,”<sup>23</sup> humanitarian conditions have remained alarming. The Report of the Independent International Commission of Inquiry on the Syrian Arab Republic of March 11, 2021,<sup>24</sup> points to the Syrian government’s responsibility “for violations of the right to life as well as various other human rights violations”<sup>25</sup> under the International Covenant on Civil and Political Rights (ICCPR),<sup>26</sup> the Convention on the Rights of the Child (CRC),<sup>27</sup> and the Convention against Torture (CAT).<sup>28</sup>

When a refugee’s country of origin, such as Syria, violates international law by creating a situation that results in the forced expulsion of its citizens, the culpable government should compensate those who have been harmed. Indeed, there are precedents in international law that favor financial compensation for refugees. Article 14(6) of ICCPR suggests compensating those who have been punished for a criminal offense conviction, on the basis that there has been a miscarriage of justice. This also applies to refugees. The Human Rights Committee has raised ICCPR’s Article 14(6) to demand that journalists and human rights activists be compensated for mistreatment.<sup>29</sup> In a Syrian Secret

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19. See Lina Schmitz-Buhl, *Enforced Disappearances in Syria and the Al Khatib Trial in Germany*, VÖLKERRECHTSBLOG (Jan. 27, 2021), <https://voelkerrechtsblog.org/enforced-disappearances-in-syria-and-the-al-khatib-trial-in-germany/> [https://perma.cc/9NZH-YTPB].

20. See *id.*

21. See Marlise Simons, *Criminal Inquiries Loom Over al-Assad’s Use of Chemical Arms in Syria*, N.Y. TIMES (Mar. 2, 2021), <https://www.nytimes.com/2021/03/02/world/europe/syria-chemical-weapons-assad.html?referringSource=articleShare> [https://perma.cc/56FY-6K48].

22. See S.C. Res. 2118 (Sept. 27, 2013).

23. SIMON CHESTERMAN, IAN JOHNSTONE & DAVID M. MALONE, *LAW AND PRACTICE OF THE UNITED NATIONS* 60 (2d ed. 2016).

24. See Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/46/55 (2021).

25. *Id.* at ¶ 84.

26. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

27. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

28. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

29. See PAUL M. TAYLOR, *A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 424 (2020). See also Concluding Observations of the Human Rights Committee: Kyrgyzstan ¶ 20, CCPR/CO/69/KGZ (2000); Concluding Observations of the Human Rights Committee: Kuwait ¶ 10, CCPR/CO/69/KWT (2000).

Service Department prison, known as Branch 251, individuals have been imprisoned without due process of law.<sup>30</sup> In other words, mistreatment has happened in Syria that would require compensation under ICCPR's Article 14(6).

Furthermore, the International Law Association's 1990 Draft Declaration of Principles of International Law on Compensation to Refugees and Countries of Asylum stipulated that "countries of origin owe a legal obligation to pay compensation to refugees."<sup>31</sup> Besides, the UN General Assembly Resolution 194—issued with regard to Palestinian refugees—addresses compensation on culpability grounds, namely "compensation . . . for the property of [the refugees] choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible."<sup>32</sup> In Resolution 36/148, the General Assembly re-emphasized that refugees who do not wish to return should receive "adequate compensation."<sup>33</sup>

Financial compensation could supplement UNHCR's appeals for funds to support refugees in affected areas. As mentioned above, underfunding of the UNHCR is an ongoing issue. In 2020, Syria was among the ten most underfunded affected areas and faced a funding shortfall of \$1.24 billion USD.<sup>34</sup> In addition, compensation—by reducing the costs of providing asylum—would provide a financial incentive for host countries to admit refugees, thus effectuating the principle of international responsibility sharing.<sup>35</sup>

But how does one extract financial compensation from a country such as Syria, which has been economically devastated by a civil war and ruled by a dictator like Bashar al-Assad? Fortunately, assets for financial compensation are available outside the host country. In 2012, there were credible speculations that the Syrian president had amassed up to \$1.5 billion for his family and close associates in the United Kingdom, Switzerland, and the United States.<sup>36</sup> In 2020,

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30. See Oberlandesgericht Koblenz [Higher Regional Court of Koblenz] Feb. 24, 2021, Az. 1 StE 3/21, juris (Ger.) <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/urteil-gegen-einen-mutmasslichen-mitarbeiter-des-syrischen-geheimdienstes-wegen-beihilfe-zu-einem-ver/> [<https://perma.cc/C2ZZ-ZVVC>].

31. Lee T. Luke, *Conference and Symposium Reports: The Declaration of Principles of International Law on Compensation to Refugees: Its Significance and Implications*, 6 J. REFUGEE STUD. 65, 66 (1993).

32. G.A. Res. 194 (III), ¶ 11 (Dec. 11, 1948) [Palestine – Progress Report of the United Nations Mediator]. The practice of country-to-country claims for compensation has been established in other contexts (Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (1938 & 1941)).

33. G.A. Res. 36/148 (Dec. 16, 1981) [International cooperation to avert new flows of refugees].

34. UNHCR, *supra* note 13, at 9.

35. See, e.g., Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 COLUM. HUM. RTS. L. REV. 53, 80 (2016) (asserting that international law demands home countries to pay compensation "not only to the refugees they create, but to the nations that—because of practical necessity, as well as their own legal and moral obligations—must house them").

36. See Philip Inman, *Bashar al-Assad Has Amassed Fortune of up to £950m, Analysts Estimate*, GUARDIAN (July 19, 2012), <https://www.theguardian.com/world/2012/jul/19/bashar-al->

it became public that Bashar al-Assad's uncle, Rifaat al-Assad, has assets in France as well as property in London that are worth about \$34.8 million.<sup>37</sup>

How could one legally acquire money from Bashar al-Assad, his family, and his associates to help pay for Syrian refugees? We have identified four mechanisms to access the assets of perpetrators: (A) Security Council sanctions, (B) actions in and by domestic legal systems, (C) actions on the European Union (EU) level, and (D) tripartite agreements.

#### A. Security Council and Other Multilateral Sanctions

First, as argued by Guy S. Goodwin-Gill and Selim Sazak, money could be acquired by drawing on the UN experience with sanctions, requiring all UN Member States to take compulsory countermeasures.<sup>38</sup> Indeed, at its 2005 summit, the UN General Assembly condemned all the crimes against humanity, including forced expulsion, as crimes which no state should commit; should a state do so, that state may be subject to international sanction by the UN Security Council under the RtoP doctrine. Against this backdrop, RtoP "can play an important role . . . by providing an institutional frame for international cooperation where refugees are fleeing RtoP crimes."<sup>39</sup>

Under Article 41 Chapter VII of the Charter of the United Nations (UN Charter), the Security Council may take measures to restore international peace and security, and "call upon the Members of the United Nations to apply such measures."<sup>40</sup> These measures include economic sanctions, namely the freezing of assets. Since 1990, economic sanctions have been imposed many times to stop the violation of human rights. In 2014, the Security Council adopted two resolutions<sup>41</sup> that condemned "widespread violations of human rights and international humanitarian law by the Syrian authorities"<sup>42</sup> and "reiterate[d] that some of these violations may amount to war crimes and crimes against humanity."<sup>43</sup> The UN Security Council could go one step further and impose

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assad-950m-fortune [https://perma.cc/4EHX-XARH]; Scott Cohn, *Assad's Money Trail is Hard to Trace*, CNBC (Sept. 20, 2013), <https://www.cnbc.com/2013/09/20/assads-money-trail-is-hard-to-trace.html> [https://perma.cc/2ZEC-Z988] ("Analysts have pegged Assad's personal net worth at between \$550 million and \$1.5 billion.")

37. See Kim Willsher & Bethan McKernan, *Assad's uncle sentenced to four years in jail in France for money laundering*, GUARDIAN (June 17, 2020), <https://www.theguardian.com/world/2020/jun/17/assads-uncle-sentenced-to-four-years-in-jail-in-france-for-money-laundering> [https://perma.cc/ZRC8-HRC6]

38. See Goodwin-Gill & Sazak, *supra* note 14.

39. E. Tendayi Achiume, *Syria, Cost-sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687, 761 (2015). See also MICHAEL W. DOYLE, *THE QUESTION OF INTERVENTION. JOHN STUART MILL AND THE RESPONSIBILITY TO PROTECT* 109–46 (2015).

40. Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, 1 U.N.T.S. XVI.

41. S.C. Res. 2139 (Feb. 22, 2014) (on the Middle East); S.C. Res. 2165 (July 14, 2014) (on the humanitarian situation in the Syrian Arab Republic and the establishment of a monitoring mechanism).

42. S.C. Res. 2139, *supra* note 41, at 2; S.C. Res. 2165, *supra* note 41, at 2.

43. S.C. Res. 2165, *supra* note 41, at 3.

economic sanctions under Chapter VII against government officials. Such actions have previously been taken. For example, sanctions were imposed against Iraqi officials for any direct losses resulting from unlawful invasion and occupation of Kuwait. Specifically, in Resolution 778, the Security Council announced that “all States in which there are funds of the Government of Iraq, or its State bodies, corporations, or agencies, . . . shall cause the transfer of those funds (or equivalent amounts) as soon as possible . . . .”<sup>44</sup>

Based on its resolutions in 2014 condemning Syria for widespread atrocity crimes and other human rights violations, the UN Security Council would be justified in taking actions to freeze the overseas financial assets of Syrian state officials, such as Bashar al-Assad, and using those assets to compensate the affected refugees and home countries.

In addition to the Security Council, other multilateral fora might be approached for redress and claims for compensation. The above-mentioned crimes against humanity may qualify for referral to the International Criminal Court (ICC). Syria is not a state party of the Rome Statute. Consequently, the only way to establish ICC’s jurisdiction over Syria would be through referral by the Security Council. Article 13(b) of the Rome Statute grants the Security Council the power to act under Chapter VII of the UN Charter and refer certain situations to the ICC. Yet, the prospects for a future referral are not bright. Attempts in 2014 to adopt a resolution and refer the Syrian situation to the ICC failed when Russia and China blocked it through a double veto.<sup>45</sup>

The Convention Against Torture (CAT) would be one remarkable avenue to finally reach an international court, namely the International Court of Justice (ICJ). Indeed, in February 2020, the Netherlands announced their intention to hold the Syrian government responsible under the CAT.<sup>46</sup> On March 12, 2021, Canada committed to join the Netherlands in this process.<sup>47</sup> Seeking negotiations under the CAT marks the beginning of a multi-step procedure. First, Syria would have to respond to the initial request for negotiation. If Syria did not respond, or if talks were not successful within a reasonable timeframe, Canada and the Netherlands could submit a request for arbitration. If no arbitration agreement

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44. S.C. Res. 778 (Oct. 2, 1992), at 2 (Iraq-Kuwait).

45. *Russia, China block Security Council referral of Syria to International Criminal Court*, U.N. NEWS (May 22, 2014), <https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court> [https://perma.cc/KF7L-99KN].

46. *The Netherlands holds Syria responsible for gross human rights violations*, GOV’T NETH. (Sept. 18, 2020), <https://www.government.nl/latest/news/2020/09/18/the-netherlands-holds-syria-responsible-for-gross-human-rights-violations> [https://perma.cc/9L2S-8P6K].

47. *Joint statement of Canada and the Kingdom of the Netherlands regarding their cooperation in holding Syria to account*, GOV’T CAN. (Mar. 12, 2021), <https://www.canada.ca/en/global-affairs/news/2021/03/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-their-cooperation-in-holding-syria-to-account.html> [https://perma.cc/L48U-494T]. See also Jillian Kestler-D’Amours, *Will latest push for accountability for Syria torture succeed?*, ALJAZEERA (Mar. 22, 2021), <https://www.aljazeera.com/news/2021/3/22/will-latest-push-accountability-syria-torture-succeed-canada-netherlands> [https://perma.cc/7APG-83VP].

was reached within six months, then any of the parties could refer the issue to the ICJ.<sup>48</sup> While the referral to the ICJ would raise global attention, the ICJ solely settles disputes between states; it does not issue judgments against individuals and does not have an enforcement mechanism.<sup>49</sup> Nevertheless, it could fuel efforts to bring the case of Syria before the ICC, and above all, it could give national courts an incentive to make use of universal jurisdiction.

### B. Domestic Legal Remedies

International crimes can also be prosecuted in domestic fora recognizing universal jurisdiction. Universal jurisdiction allows for prosecution of international crimes no matter who committed them or where they were committed. It allows for national proceedings where international fora are not an option.<sup>50</sup> By 2017, 147 states had adopted some form of universal jurisdiction, and several countries—such as Germany<sup>51</sup> and France—are prosecuting or have already convicted individuals involved in the Syrian situation.<sup>52</sup>

With its February 2021 decision, Germany's Koblenz Higher Regional Court became the first court globally to render a verdict against an alleged Syrian intelligence agent for aiding and abetting a crime against humanity. In January 2022, the Koblenz Court handed down another landmark verdict, this time against a higher-ranked Syrian intelligence official.<sup>53</sup>

Like Germany, France openly accepts and applies the concept of universal jurisdiction. In early March 2021, a complaint was filed in Paris that focused on the Syrian government's usage of chemical weapons. The claim filed in Paris is unique because it directly targets high-level members of the Syrian government, including Bashar al-Assad.<sup>54</sup>

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48. See Kestler-D'Amours, *supra* note 47.

49. See *id.*

50. Kroker and Kather highlighted universal jurisdiction as “the only remaining and realistic avenue to seek justice for international crimes perpetrated in Syria.” Patrick Kroker & Alexandra Lily Kather, *Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany*, EJIL TALK! (Aug. 12, 2016), [ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/](https://ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/) [<https://perma.cc/7CG4-U32F>].

51. Under German law, universal jurisdiction is genuine, meaning that the law does not require any connection between Germany and the relevant grave international crimes committed abroad. This principle is laid down in Section 1 Code of Crimes against International Law. Völkerstrafgesetzbuch vom 26. Juni 2002 (BGBl. I S. 2254), das durch Artikel 1 des Gesetzes vom 22. Dezember 2016 (BGBl. I S. 3150) geändert worden ist [Act to Introduce the Code of Crimes against International Law 2002], <http://bundesrecht.juris.de/bundesrecht/vstgb/index.html> (Ger.) [<https://perma.cc/S9VY-AJJY>].

52. Chesterman, *supra* note 23.

53. Oberlandesgericht Koblenz [Higher Regional Court of Koblenz] Jan. 13, 2022, Az. 1 StE 9/19. See Ben Hubbard & Katrin Bennhold, *Murder, Torture, Rape: A Landmark Conviction on State Violence in Syria*, N.Y. TIMES (Jan. 13, 2022), <https://www.nytimes.com/2022/01/13/world/middleeast/verdict-syria-war-crimes.html> [<https://perma.cc/AHY7-YC7H>].

54. See Chesterman, *supra* note 23 (March 2, 2021). In July 2016, the Centre for Justice and Accountability filed a criminal charge with the U.S. District Court for the District of Columbia against the Syrian government for the murder of U.S. journalist Marie Colvin. The lawsuit was filed under the

In a similar vein, Blocher and Gulati have suggested that municipal courts are likely sufficient forums for refugees to claim compensation.<sup>55</sup> Domestic legal systems, due to their ratification of the 1951 Refugee Convention and other human rights instruments, might serve as viable forums for compensation.

For example, in the United States, the Magnitsky Act applies globally, authorizing the U.S. government to sanction any foreigners accused of human rights violations under international law.<sup>56</sup> These sanctions include freezing the accused's assets and banning the accused's entry into the United States. Similarly, on December 21, 2017, President Trump issued Executive Order 13818 Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption.<sup>57</sup> U.S. law also allows for the subpoenaing of foreign records.<sup>58</sup>

Canada's recent attempt to adopt Public Bill S-259—"respecting the repurposing of certain seized, frozen or sequestered assets"—is another example of emerging redress. Although this legislation was rejected, Canada has been among the leading voices in the international movement to use dictators' frozen assets to help refugees and host states in times of refugee crisis.<sup>59</sup>

Beyond the United States and Canada, European countries have been active in seeking out funds from human rights perpetrators. For example, a Spanish judge, José de la Mata Amaya, ordered the seizure of Spanish properties owned by Assad's uncle. The properties are worth 691 million euros (about \$736

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Foreign Sovereign Immunities Act, a federal law that permits victims to sue designated state sponsors of terrorism, like Syria, for the murder of U.S. citizens. *See* Press Release, Ctr. for Just. & Accountability, Breaking News: Family of Slain U.S. Journalist Marie Colvin Sues Assad Regime (July 9, 2016), <https://cja.org/breaking-news-family-slain-u-s-journalist-marie-colvin-sues-assad-regime/> [<https://perma.cc/KJ29-BVWT>].

55. *See* Blocher & Gulati, *supra* note 35, at 95.

56. Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, 126 Stat. 1496.

57. Exec. Order No. 13818, 82 Fed. Reg. 246 (2017).

58. Section 319(b) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT) (2001) is codified at 31 U.S.C. § 5318(k) and authorizes the Attorney General and the Secretary of the Treasury to issue subpoenas and summonses to foreign banks that maintain accounts with correspondent accounts in the United States.

59. *See* CTR. FOR INT'L GOVERNANCE INNOVATION, WORLD REFUGEE COUNCIL, A CALL TO ACTION: TRANSFORMING THE GLOBAL REFUGEE SYSTEM 63–65 (2019), [https://www.cigionline.org/sites/default/files/documents/WRC\\_Call\\_to\\_Action.pdf](https://www.cigionline.org/sites/default/files/documents/WRC_Call_to_Action.pdf) [<https://perma.cc/DN3L-C8VK>].

The World Refugee Council report drew on the example of Switzerland, where legislation was enacted under which the Swiss government can apply to the Swiss Federal Court for an order authorizing the confiscation of frozen assets, which can then be restored and used to contribute to "the fight against impunity." *Id.* at 64. *See also* Mike Blanchfield, *Use money languishing in frozen accounts of dictators and despots to help refugee crisis: Lloyd Axworthy*, NAT'L POST (Nov. 11, 2018), <https://nationalpost.com/news/canada/use-frozen-funds-from-dictators-to-help-refugee-crisis-says-axworthy> [<https://perma.cc/85R6-SKK5>]; Irwin Cotler & Silver Brandon, *The Case for a New and Improved Magnitsky Law*, CANADIAN POL. & PUB. POL'Y (Sept. 12, 2020), <https://policymagazine.ca/the-case-for-a-new-and-improved-magnitsky-law/> [<https://perma.cc/U7GG-T22V>].

million in U.S. dollars). That order followed a joint investigation by Spanish and French judicial authorities, which concluded that Assad's uncle's fortune had been embezzled from public funds and was used for his personal gain to the detriment of the Syrian state.<sup>60</sup>

### C. EU Remedies

Third, the EU as a supranational organization has taken actions towards freezing assets of human rights perpetrators. Article 29 of the Treaty on European Union (TEU) allows the Council of the European Union to sanction governments of third countries (non-EU countries), non-state entities, and individuals to bring about a change in their policy or activity. This includes freezing funds owned or controlled by targeted individuals.<sup>61</sup> In December 2019, the EU foreign ministers decided to launch preparatory work to establish an EU equivalent to the U.S. Magnitsky Act, namely a regime to sanction human rights violations.<sup>62</sup> The EU finally adopted the "European Magnitsky Act" on December 7, 2020.<sup>63</sup> Clearly, the EU's global human rights sanction regime offers the prospect of coordination with U.S. and Canadian efforts to their mutual enhancement.

### D. Tripartite Agreements

Fourth, Switzerland provides an example of another mechanism: tripartite agreements. Switzerland pursues a policy of returning illegally acquired assets. In doing so, it has reached an agreement with Nigeria and the World Bank on the restitution of approximately \$321 million to Nigeria's population.<sup>64</sup> On December 4, 2017 at the Global Forum on Asset Recovery (GFAR) in Washington, D.C., the three entities signed a Memorandum of Understanding setting out modalities of restitution. This Memorandum of Understanding is directed at restitution to Nigeria, but it could function as a model for similar tripartite agreements in relation to Syria.

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60. See Mark A. Walsh, *Properties Controlled by Assad's Uncle Seized in European Laundering Inquiry*, N.Y. TIMES (Apr. 4, 2017), <https://www.nytimes.com/2017/04/04/world/europe/rifaat-al-assad-spain-properties.html> [https://perma.cc/9GE3-BTQF].

61. See Aurel Sari, *Article 29*, in THE TREATY ON EUROPEAN UNION (TEU) 1017, 1033 (Hermann-Josef Blanke & Stelio Mangiameli eds., 2013).

62. See Outcome of the Council Meeting: 3738th Council Meeting, Brussels European Council COUNCIL EUR. UNION (Dec. 9, 2019), [https://www.consilium.europa.eu/media/41952/st14949\\_final-en19.pdf](https://www.consilium.europa.eu/media/41952/st14949_final-en19.pdf) [https://perma.cc/VL9C-JQ9L].

63. See Council of the European Union, *EU adopts a global human rights sanctions regime*, COUNCIL EUR. UNION (Dec. 7, 2020), <https://www.consilium.europa.eu/en/press/press-releases/2020/12/07/eu-adopts-a-global-human-rights-sanctions-regime/> [https://perma.cc/D2NQ-9WLR].

64. Memorandum of Understanding among the Government of the Federal Republic of Nigeria, The Swiss Federal Council and the International Development Association (Dec. 4, 2017), <https://www.newsd.admin.ch/newsd/message/attachments/50734.pdf> [https://perma.cc/GK6Q-HPMV].

### E. Likelihood to Generate the Money

Having outlined EU and domestic legal remedies as potential pathways to generate assets, we need to assess their practical feasibility. In other words, how likely are those remedies to generate money from Assad, his family, and/or his affiliates?

First, domestic courts of foreign countries (outside the country affected by the respective violations) can and have convicted perpetrators of human rights violations. Examples include the above-mentioned verdicts of the Higher Regional Court of Koblenz (Germany) and recent attempts in other European countries, such as France, that are willing to apply the concept of universal jurisdiction.<sup>65</sup> Although some asset seizures can take place without prior conviction,<sup>66</sup> most seizures by U.S.<sup>67</sup> or European courts<sup>68</sup> require conviction.

Second, the likelihood of generating funds depends on the respective laws and mechanisms of the country in which the prosecution occurs, and the level of cooperation with foreign nations holding those assets. Importantly,

[t]he extent and speed of forfeiture assistance afforded by the foreign nation in which the assets are located may vary greatly depending upon the applicable treaty obligations and laws of the foreign nation. Moreover, international requests for legal assistance occasionally implicate issues of diplomatic sensitivity or require coordination with other related investigations, domestic or foreign.<sup>69</sup>

As an example, the EU Global Human Rights Sanctions Regime offers a mechanism for freezing the assets of Assad and his associates, if it can be shown that the individuals have committed the respective human rights violations: genocide; crimes against humanity; torture and other cruel, inhuman, or

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65. Note that even in the United States, the Restatement Fourth of U.S. Foreign Relations Law recognizes universal jurisdiction “with respect to certain offenses of universal concern, such as genocide, crimes against humanity, war crimes, certain acts of terrorism, piracy, slave trade, and torture, even if no specific connection exists between the state and the persons or conduct being regulated.” RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 217 (2018).

66. For example, German Law allows for “non-conviction-based confiscation.” A prerequisite for execution of foreign decisions made in these types of proceedings is that a criminal proceeding was originally initiated in a foreign country and that substantial elements of a criminal offence were proven. See RALF RIEGEL & TILL GUT, FED. MINISTRY OF JUST. & CONSUMER PROT., ASSET RECOVERY UNDER GERMAN LAW 15, [https://star.worldbank.org/sites/default/files/2021-01/2014-04-10\\_finalefassung-eng-2.pdf](https://star.worldbank.org/sites/default/files/2021-01/2014-04-10_finalefassung-eng-2.pdf). The respective German legal provisions, in particular Sections 73d, 74a, and 76a of the German Criminal Code (Strafgesetzbuch - StGB), are accessible at the website <http://www.gesetze-im-internet.de> [<https://perma.cc/4RYC-PJ9W>], including translations into English.

67. Under U.S. law, criminal forfeiture generally occurs pursuant to an in personam action, requiring a conviction. See 18 U.S.C. § 983(d); Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2389 (2018).

68. Substantial differences exist in this respect between EU Member States. See EUROPEAN PARLIAMENT, COMMON RULES FOR NON-CONVICTION BASED CONFISCATION 1 (2022), <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-common-rules-for-non-conviction-based-confiscation> [<https://perma.cc/5GBK-6B2J>].

69. U.S. DEP’T OF JUST., ASSET FORFEITURE MANUAL 109 (2021).

degrading treatment or punishment; slavery; extrajudicial, summary, or arbitrary executions and killings; enforced disappearance of persons; and arbitrary arrests or detentions.

Another question is how to ‘release’ the frozen funds and use them. The most promising part of the EU Sanctions Regime in this regard seems to be the possibility for derogation, allowing EU Member States to grant an authorization to humanitarian operators. This means that certain frozen funds can be made available if needed for humanitarian purposes.<sup>70</sup> Thus, individual EU Member States can use this derogation clause to extract funds that could be used to support refugees.

#### F. *Widening the Circle of Culpability*

The violent actions by Assad and his associates in Syria, or similar atrocity crimes by governments in other conflicts, do not exhaust the list of acts or culpable actors. One must add rebel movements that regularly employ violence to coercively mobilize support, inflict damage on governments, and raise revenue.<sup>71</sup> Whenever rebels perpetrate war crimes and their financial assets are reachable by the mechanisms we discuss above, those assets too should be seized to compensate victims and support refugees from the conflicts in which the rebels have engaged. Furthermore, when foreign governments aid or direct a domestic government or rebels in ways that produce atrocity crimes, they should also be held culpable and subjected to the seizure of overseas assets, if that is a viable means to obtain compensation for the victims or support for the refugees those conflicts produce.<sup>72</sup> In the case of Syria, several foreign governments have been engaged, including Russia and the United States.<sup>73</sup> If the indirect perpetrators are members of the UN Security Council Permanent Five, such compensation will obviously be impossible to obtain through the Security Council. It will, moreover, be costly to secure compensation from any great power capable of retaliation.

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70. See Council Decision 2020/1999, art. 4, 2020 O.J. (L 410I) 13–19.

71. See Andreas Wimmer & Chris Miner, *The Strategic Logic of Ethnoterritorial Competition: Violence Against Civilians in Africa’s Civil Wars*, 5 J. GLOB. SEC. STUD. 389, 406–07 (2019).

72. The complexities for indirect attribution of wrongful force range from “effective control” (*Nicaragua*) to “overall control” (*Tadic*) and include failure to exercise “due diligence” for wrongful acts that originate within the jurisdiction of a state or, alternatively, “complicity” in the knowledge that wrongful acts are being committed and not making efforts to stop them. But all these standards apply to specific acts by a particular actor resulting in specific harm to another party. Vladyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28 EJIL 563 (2017).

73. Achiume, *supra* note 39, at 696.

## III.

## RESPONSIBILITY AS MORAL ACCOUNTABILITY

Culpability becomes more complex the longer and more indirect the chain of causation. The 2014 genocide launched against the Yazidi population of northern Iraq by the Islamic State would probably not have occurred had Saddam Hussein not been toppled by the United States in the 2003 invasion of Iraq.<sup>74</sup> But this is far from assured. Saddam Hussein inflicted crimes against humanity tending towards genocide on two Iraqi communities, the Kurds in 1988 and the Marsh Arabs in 1991.<sup>75</sup> He was fully capable of launching another genocidal purge, had the Yazidi become a threat to him and his regime.

Also contributing to the complexity of culpability are long-term historical trends and more recent involuntary interdependencies that have manifestly disadvantaged large parts of the world. Among them are (A) colonialism, (B) climate-induced natural disasters, and (C) the global arms and drugs trades. These comprise chains of causal—and hence, moral—responsibility, linking harms to actions and actors that demand assessment. This is true even if that assessment cannot lead to punishment or compensation enforceable through a court of law or cooperative implementation through an international organization.

As Samantha Besson has described, “responsibility is a highly slippery notion in moral and political philosophy in general.”<sup>76</sup> In a nutshell, responsibility means that a person or a group of persons are confronted with the effects of their action or that of others. With regard to international law, namely the actions of states, the International Law Commission (ILC) codified a firm set of rules dealing with state responsibility for internationally wrongful conduct, the so-called Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).<sup>77</sup> While lacking binding effect as a treaty,<sup>78</sup> the generalized concept of state responsibility under the ARSIWA has reached the

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74. See Markus Nikolas Heinrich, *One War, Many Reasons: The US Invasion of Iraq*, E-INT’AL RELS. (Mar. 9, 2015), <https://www.e-ir.info/2015/03/09/one-war-many-reasons-the-us-invasion-of-iraq/> [https://perma.cc/NJ6R-YBX2]. See also Reuters, *U.S. Troops Topple Hussein Statue in Central Baghdad*, N.Y. TIMES (Apr. 9, 2003), <https://www.nytimes.com/2003/04/09/international/worldspecial/us-troops-topple-hussein-statue-in-central.html> [https://perma.cc/6UFA-T3TP].

75. Michael J. Kelly, *The Tricky Nature of Proving Genocide Against Saddam Hussein Before the Iraqi Special Tribunal*, 38 CORNELL INT’L L.J. 983, 986 (2005).

76. Samantha Besson, *International Responsibility: An Introduction*, in INT’L RESPONSIBILITY 3, 4 (Samantha Besson ed., 2017).

77. Report of the International Law Commission on the Work of its Fifty-Third Session 23 April - 1 June and 2 July - 10 August 2001, Official Records of the General Assembly, Fifty-Sixth Session, U.N. Doc. A/56/10 (2001). See also JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 45 (2013).

78. The draft has been recognized by the United Nations General Assembly in Resolution 56/83. However, the codification itself remains only a means for determining the law but not a source of international law in the sense of Article 38 Statute of the International Court of Justice.

status of binding customary international law.<sup>79</sup> Accordingly, a state can be held internationally responsible if its conduct (1) is attributable to the state and (2) constitutes a breach of an international law obligation, (3) provided that there is no circumstance precluding unlawfulness, such as valid consent by one state to the actions of another state.<sup>80</sup>

The accountability to which we refer here, on the other hand, is “equated with much broader concepts.”<sup>81</sup> Compared to international legal responsibility, accountability promises to establish good governance and transparency, irrespective of the applicable law. Furthermore, accountability embraces a duty to account, by whatever means, for the exercise of power. Eventually, it “includes primary norms that can be termed norms of good governance, and incorporates the concept of transparency in both the decision-making process and the implementation of decisions.”<sup>82</sup>

#### A. Colonialism and Imperialism

Both formal and informal colonialism and imperialism—with their violent abuses, expropriations, and capture of the effective sovereignty of indigenous communities—inflicted demonstrable harm on many societies in Africa, Asia, and the Americas.<sup>83</sup> The effects of colonialism from the 1800s to the 1900s in many parts of the Americas and Africa continue to be felt today. In many cases colonial powers favored one ethnic group over another, with terrible consequences. For example, the Belgians favored the Tutsis over the Hutus in Rwanda and thereby planted the seeds of genocidal conflict.<sup>84</sup> In Cameroon,<sup>85</sup> Anglophone and Francophone regions today are in rivalries reflecting colonial strategies of divide and rule. Colonizers made investments that contributed to the long-run development of some of these countries (railroads in India are a frequently cited example), but they only made these investments for their own

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79. See ILIAS BANTEKAS & LUTZ OETTE, *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* 93 (3d ed. 2020). See also James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 889 (2002); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, 160, ¶ 379 (Feb. 26) (referring to “the rules of customary international law of State responsibility”).

80. See JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 49 (2013).

81. Mark Bovens, *New Forms of Accountability and EU Governance*, 5 COMPAR. EURO. POL. 105 (2007).

82. See CRAWFORD, *supra* note 80, at 85.

83. See, e.g., WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1972); MICHAEL DOYLE, *EMPIRES* 30–47 (1986) (describing “effective sovereignty” control in both formal and informal empires). See generally James Souter, *Towards a Theory of Asylum as Reparation for Past Injustice*, 62 POL. STUD. 342 (2014).

84. See Elizabeth Baisley, *Genocide and Constructions of Hutu and Tutsi in Radio Propaganda*, 55 RACE & CLASS 38, 41 (2014).

85. See AFRICA REP. N°250, INT'L CRISIS GROUP, *CAMEROON'S ANGLOPHONE CRISIS AT THE CROSSROADS* (2017), [https://d2071andvip0wj.cloudfront.net/250-cameroons-anglophone-crisis-at-the-crossroads\\_0.pdf](https://d2071andvip0wj.cloudfront.net/250-cameroons-anglophone-crisis-at-the-crossroads_0.pdf) [<https://perma.cc/SGT6-XKJ5>].

benefit, and many had deleterious effects on indigenous welfare. Some of these patterns continued well into the post-colonial period. Great Britain offered its Commonwealth Caribbean immigrants (the “Windrush” generation of 1948–1971) special visas in order to fill labor shortages in the post-war British economy, only to later treat them as unwelcome when their numbers grew and the government concluded that they were no longer needed.<sup>86</sup>

In a remarkable act of colonial compensation for harms, in May 2021, the German government agreed to pay €1.1 billion over thirty years to fund projects in communities impacted by the 1904–1906 genocide of Herero and Nama peoples in modern-day Namibia.<sup>87</sup>

That compensation was in response to a demonstrable genocide with clear perpetrators and obvious victims. Other harms are not readily demonstrable. Assessing causal accountability and fair compensation is complicated. Imperial interventions generally did not violate then-existing international law, which excluded most indigenous peoples in Africa and Asia. Imperial rule relied on local collaborators and exploited pre-existing indigenous vulnerabilities—or, as in U.S. interventions in the Americas, previously imposed Spanish colonial divisions. But the largest limitation in assessing compensation is ironically the scope of the harm. Among the various current states of the developing world in Africa, Asia, and Latin America, only Thailand (the Kingdom of Siam) substantially escaped imperial exploitation.<sup>88</sup> If unrestricted immigration were to become the remedy for past colonial abuse, the world would need to be declared border free.

Ongoing unjust and illegal interventions raise liability and accountability issues more directly (as Tendayi Achiume discusses in this Symposium in connection with Honduras) that may require specified remedies, including compensatory visa access. (The first remedy, however, should be to end the unjust intervention.) And liability for past allies and clients in interventions arises when withdrawals take place, as with the “Boat People” in 1970s Vietnam, and as with U.S.-controlled armed forces, translators, and others in Afghanistan

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86. See Huon Wardle & Laura Obermuller, “Windrush Generation” and “Hostile Environment”: Symbols and Lived Experiences in Caribbean Migration to the UK, 2 *MIGRATION & SOC’Y* 81, 82 (2019).

87. See Philip Oltermann, *Germany agrees to pay Namibia €1.1bn over historical Herero-Nama genocide*, *THE GUARDIAN* (May 28, 2021), <https://www.theguardian.com/world/2021/may/28/germany-agrees-to-pay-namibia-11bn-over-historical-herero-nama-genocide> [https://perma.cc/KHR3-5HTH]. A much more problematic case of colonial reparations was Prime Minister Berlusconi’s award of \$5 billion to Muammar Qaddafi in reparation for the harms of Italian colonialism in Libya. The payment was widely regarded as a bribe to Qaddafi to prevent the transit of asylum seekers across the Mediterranean to Italy from Libya. See *Italy to Pay Libya \$5 Billion*, *N.Y. TIMES* (Aug. 31, 2008), <https://www.nytimes.com/2008/08/31/world/europe/31iht-italy.4.15774385.html> [https://perma.cc/E5SX-MT7T].

88. See Chris Baker, *Thailand Escaped Colonialism, But Still Adapted Western Ideas*, *WALL ST. J.* (June 25, 1997), <https://www.wsj.com/articles/SB86728174163740500> [https://perma.cc/9K8J-L7P4].

today.<sup>89</sup> Eventually, moral responsibility, particularly in the context of genocide, requires even more action.<sup>90</sup>

### B. Climate-Induced Natural Disaster

Climate change is the quintessential shared global ill. Predominantly produced by carbon and other emissions from (so far) Europe, North America, and Japan, it has generated debilitating droughts, famines, and hurricanes in parts of the world least capable of weathering those calamities. Indeed, the devastating effects of hurricanes Eta and Iota on Nicaragua, Honduras, and Guatemala in 2020 drove some migration and displacement from Central America toward the United States in 2021. Climate scientists have argued that hurricanes become both more frequent and more devastating as an indirect effect of climate change on the warming seas and oceans.<sup>91</sup> According to Michael Gerrard, it is reasonable to estimate that the world will likely have 100 million climate-driven refugees in 2050. Of that number, twenty-seven million could be attributed to past U.S. contributions to climate change, and twenty-five million to past European contributions.<sup>92</sup>

The UN Human Rights Committee first addressed responsibility sharing in the context of climate-change-related forced migration in the case of Ioane Teitiota. New Zealand had denied his asylum application and deported him with his wife and children to his home country of Kiribati. Specifically, the Committee highlighted that “the effects of climate change in receiving States may expose individuals to a violation of their rights under . . . the Covenant,

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89. Michael Doyle & Mark James Wood, *America Has a Moral Responsibility to Refugees Fleeing Afghanistan*, NEWSWEEK (July 13, 2021), <https://www.newsweek.com/117merica-has-moral-responsibility-refugees-fleeing-afghanistan-opinion-1608970> [<https://perma.cc/F8JB-YMSB>].

90. Only 113 years later, in May 2021, Germany’s foreign minister Heiko Maas asked Namibia to forgive about 80,000 killings of Herero and Nama people between 1904 and 1908, which was an apology with significant shortfalls. See Kavena Hambira & Miriam Gleckman Kurt, Opinion, *Germany Apologized for a Genocide. It’s Nowhere Near Enough*, N.Y. TIMES (July 8, 2021), <https://www.nytimes.com/2021/07/08/opinion/germany-genocide-herero-nama.html?referringSource=articleShare> [<https://perma.cc/5Y4D-R35F>]. Also in May 2021, the French President Emmanuel Macron visited Rwanda and recognized the responsibility of France in the 1994 Rwandan genocide, without offering an official apology. Paul Kagame, *Macron recognizes French ‘responsibility’ in Rwanda genocide*, ALJAZEERA (May 27, 2021), <https://www.aljazeera.com/news/2021/5/27/macron-recognises-french-responsibility-in-rwanda-genocide> [<https://perma.cc/4HMD-F9MM>].

91. See Nicole Narea, *Migrants are Heading North Because Central America Never Recovered from Last Year’s Hurricanes*, VOX (Mar. 22, 2021), <https://www.vox.com/policy-and-politics/2021/3/22/22335816/border-crisis-migrant-hurricane-eta-iota> [<https://perma.cc/RWM2-VCT8>]. See also Jeff Berardelli, *How climate change is making hurricanes more dangerous*, YALE CLIMATE CONNECTIONS (July 8, 2019), <https://yaleclimateconnections.org/2019/07/how-climate-change-is-making-hurricanes-more-dangerous/> [<https://perma.cc/W78Q-AL7Y>].

92. Michael Gerrard, *America is the worst polluter in the history of the world. We should let climate change refugees resettle here*, WASH. POST (June 25, 2015), [https://www.washingtonpost.com/opinions/america-is-the-worst-polluter-in-the-history-of-the-world-we-should-let-climate-change-refugees-resettle-here/2015/06/25/28a55238-1a9c-11e5-ab92-c75ae6ab94b5\\_story.html](https://www.washingtonpost.com/opinions/america-is-the-worst-polluter-in-the-history-of-the-world-we-should-let-climate-change-refugees-resettle-here/2015/06/25/28a55238-1a9c-11e5-ab92-c75ae6ab94b5_story.html) [<https://perma.cc/JF5W-ZJ5H>].

thereby triggering the non-refoulement obligations of sending States.”<sup>93</sup> Yet, in this particular case, the majority did not find that Teitiota had demonstrated the requisite standard of “irreparable harm.”<sup>94</sup> Although the island was being slowly inundated by rising seas, the Committee judged that Kiribati could still take measures (not clearly specified) to remedy and prevent the harm. Clearly, the international community requires clearer and more pertinent standards to evaluate climate asylum, including “remediable by whom” and at “what cost.”

Advancing this cause, President Biden requested a report that would include “options for protection and resettlement of individuals displaced directly or indirectly from climate change.”<sup>95</sup> The resulting July 14, 2021, *Task Force Report to the President on the Climate Crisis and Global Migration: A Pathway to Protection for People on the Move* helps to define what would constitute prudent and humane U.S. measures of prevention and protection for those forced to move by climate factors.<sup>96</sup> But more definitive assessments of moral accountability tend to be limited by the inability to attribute specific harms to specific polluters. And regarding asylum seekers, difficulty lies in separating the multiple drivers of flight, including economic distress, civil wars, and generalized violence.

### C. *Drugs and Arms: Effects of Importation and Exportation*

The drug industry is considered the world’s largest illicit market.<sup>97</sup> According to *The Economist*, the estimated retail drug sales in the United States amount to \$60 billion. European sales are similar. Pakistan, Thailand, Iran, and China account for most of the global heroin consumption. In Eastern Europe and Russia, sales are growing fast “but probably still make up less than 10% of the world’s total.”<sup>98</sup>

The importation of narcotics in major economies has had vast effects on criminal violence along trafficking routes. One remarkable example is the flow of cocaine through Central America. The geographical proximity between the United States, the principal consumer nation, and the cocaine supplier nations

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93. Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016, ¶ 9.11, U.N. Doc. CCPR/C/127/D/2728/2016 (Sept. 23, 2020).

94. *Id.* at para. 3.

95. Exec. Order No. 14013, 86 Fed. Reg. 8839 (Feb. 4, 2021).

96. REFUGEES INT’L, TASK FORCE REPORT TO THE PRESIDENT ON THE CLIMATE CRISIS AND GLOBAL MIGRATION: A PATHWAY TO PROTECTION FOR PEOPLE ON THE MOVE (2021), <https://www.refugeesinternational.org/reports/2021/7/12/task-force-report-to-the-president-on-the-climate-crisis-and-global-migration-a-pathway-to-protection-for-people-on-the-move> [<https://perma.cc/QF2S-HE8K>].

97. See *Stumbling in the Dark*, ECONOMIST (Aug. 14, 2018), <https://www.economist.com/special-report/2018/08/14/stumbling-in-the-dark> [<https://perma.cc/Z6DS-U5H9>].

98. *Id.*

Colombia, Bolivia, and Peru has made Central America a key trafficking route.<sup>99</sup> A report by the United Nations Office on Drugs and Crime (UNODC)<sup>100</sup> demonstrates that the increase in violence in Central America is connected to the volume of cocaine moving through this region. Similar patterns of drug trade-induced violence<sup>101</sup> and transnational organized crime have emerged in Myanmar, Laos, Thailand, and Cambodia.<sup>102</sup>

Arms sales have also had deleterious effects on Central America, which has high volumes of medium-sized illicit arms flowing into the region.<sup>103</sup> Between 2008 and 2018, Latin America's homicide rate increased at an average 3.7 percent per year, three times the population growth rate of 1.1 percent, with cities from El Salvador, Honduras, and Mexico ranking among the top six in homicide rates.<sup>104</sup> El Salvador alone has an estimated 60,000 gang members.<sup>105</sup> The violence of the Salvadoran civil war has compounded the effects of inequality, unemployment, and drug trafficking, forcing families to flee from the region. The U.S.-supported government forces appear to have inflicted the majority of the violence against civilians, and the United States has been a significant source of the small arms that have poured into the region.<sup>106</sup> Moreover, widespread gang

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99. As of 2011, roughly 90 percent of the cocaine consumed in the United States passed the land border between Mexico and the United States, "with the large majority of that flow crossing through or along the Pacific and Atlantic coasts of Central America." GABRIEL DEMOMBYNES, WORLD BANK, DRUG TRAFFICKING AND VIOLENCE IN CENTRAL AMERICA AND BEYOND 3 (2011), <https://openknowledge.worldbank.org/bitstream/handle/10986/27333/620310WP0Drug00BOX0361475B00PUBLIC0.pdf?sequence=1&isAllowed=y> [<https://perma.cc/43BH-89G3>].

100. U.N. OFF. ON DRUGS AND CRIME, TRANSNATIONAL ORGANIZED CRIME IN CENTRAL AMERICA AND THE CARIBBEAN: A THREAT ASSESSMENT 5 (2012), [https://www.unodc.org/documents/data-and-analysis/Studies/TOC\\_Central\\_America\\_and\\_the\\_Caribbean\\_english.pdf](https://www.unodc.org/documents/data-and-analysis/Studies/TOC_Central_America_and_the_Caribbean_english.pdf) [<https://perma.cc/TJ3B-Z5M7>].

101. Press Release, U.N. Office on Drugs and Crime, UNODC report on East and Southeast Asia: continued growth in the supply of methamphetamine while synthetic opioids spread (May 15, 2020), [https://www.unodc.org/unodc/en/press/releases/2020/May/unodc-report-on-east-and-southeast-asia\\_-continued-growth-in-the-supply-of-methamphetamine-while-synthetic-opioids-spread.html](https://www.unodc.org/unodc/en/press/releases/2020/May/unodc-report-on-east-and-southeast-asia_-continued-growth-in-the-supply-of-methamphetamine-while-synthetic-opioids-spread.html) [<https://perma.cc/VXV2-YS8B>].

102. *East and South East Asia*, INT'L DRUG POLICY CONSORTIUM, <https://idpc.net/policy-advocacy/regional-work/east-and-south-east-asia> [<https://perma.cc/7G85-JV2U>].

103. See U.N. OFF. ON DRUGS AND CRIME, GLOBAL STUDY ON FIREARMS TRAFFICKING 2020 55 (2020), [https://www.unodc.org/documents/data-and-analysis/Firearms/2020\\_REPORT\\_Global\\_Study\\_on\\_Firearms\\_Trafficking\\_2020\\_web.pdf](https://www.unodc.org/documents/data-and-analysis/Firearms/2020_REPORT_Global_Study_on_Firearms_Trafficking_2020_web.pdf) [<https://perma.cc/WDY7-BU6H>]. For instance, the Mexican government sued U.S. gunmakers in a U.S. federal court for attracting drug cartels with firearms. Natalie Kitroeff & Oscar Lopez, *Mexico Sues Gun Companies in U.S., Accusing Them of Fueling Violence*, N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/2021/08/04/world/americas/mexico-lawsuit-gun-companies.html?referringSource=articleShare> [<https://perma.cc/386F-MWGV>].

104. See ROBERT MUGGAH & KATHERINE AGUIRRE TOBON, IGARPÉ INST., CITIZEN SECURITY IN LATIN AMERICA: FACTS AND FIGURES 33 (2018) <https://igarae.org.br/wp-content/uploads/2018/04/Citizen-Security-in-Latin-America-Facts-and-Figures.pdf> [<https://perma.cc/MJA2-6GBH>].

105. EL SALVADOR EVENTS OF 2018, HUM. RTS. WATCH (2018), <https://www.hrw.org/world-report/2019/country-chapters/el-salvador> [<https://perma.cc/YKX9-QW6T>].

106. *Id.*

warfare is partly attributable to the return of gangs from the United States after the end of the civil war in El Salvador.<sup>107</sup>

Remedies need to be tailored to particular countries' situations. Violence and insecurity certainly count among the main drivers for migration, as evidenced in, among other places, a 2018 survey about the reasons for growing irregular migration from Central America. Better efforts need to be made to curb drug and arms trafficking to address these drivers of migration. Individual claims to asylum based on demonstrable threats to life should be acknowledged (as, for example, the Model International Mobility Convention proposes).<sup>108</sup>

But asylum should not be the sole remedy for all cases. Better still would be addressing the varying root causes in each country. The example of Guatemala stands out. As opposed to migrants coming from other countries in the Northern Triangle, Guatemalans indicated that they migrated to the United States for economic reasons, namely to "save what they need to make an economic go of it back home."<sup>109</sup> It would therefore be appropriate to work directly with the Guatemalan government, as well as with local communities, and invest in the funding of sustainable development projects to curb the numbers of those seeking refuge in the United States.<sup>110</sup>

Moving to the regional level, much can be learned from the Middle East's "Jordan Compact," signed in February 2016 at the London Conference hosted by the UK, Germany, Kuwait, Norway, and the UN. What makes this Compact unique is the involvement of multiple actors, including the World Bank, and a strategy combining humanitarian and development goals. These actors offered grants, loans, and preferential trade agreements with the EU to the Jordanian government if it enhanced access to public education and legal employment for Syrian refugees. The offer is designed to address marginalization of Syrian refugees in Jordan, including a poverty rate three times higher than that of Jordanians, a quadrupled rate of early marriage, a doubled rate of child labor, and serious lags in schooling.<sup>111</sup> Some early success has resulted. The Jordanian

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107. *Id.*

108. GLOB. POL'Y INITIATIVE, *supra* note 10, art. 125.

109. Anita Isaacs & Jorge Morales Toj, Opinion, *Guatemala Is America's Best Chance to Fix the Immigration Problem*, N.Y. TIMES, (June 7, 2021), <https://www.nytimes.com/2021/06/07/opinion/kamala-harris-guatemala.html> [<https://perma.cc/5GZQ-NYMS>].

110. *Id.*

111. See Bouthaina Ben Kridis, *The Jordan Compact: A model for burden-sharing in the refugee crisis*, RLI BLOG ON REFUGEE L. & FORCED MIGRATION (May 17, 2021), <https://rli.blogs.sas.ac.uk/2021/05/17/the-jordancompact-a-model-for-burden-sharing-in-the-refugee-crisis/> [<https://perma.cc/LF3D-H4ZN>]. See also VERONIQUE BARBELET, JESSICA HAGEN-ZANKER & DINA MANSOUR-ILLE, OVERSEAS DEV. INST., THE JORDAN COMPACT: LESSONS LEARNT AND IMPLICATIONS FOR FUTURE REFUGEE COMPACTS (2018), <https://cdn.odi.org/media/documents/12058.pdf> [<https://perma.cc/9KDP-3XWV>]; Cindy Huang & Nazanin Ash, *Jordan, Lebanon Compacts Should Be Improved, Not Abandoned*, NEW HUMANITARIAN (Feb. 5, 2018), <https://deeply.thenewhumanitarian.org/refugees/community/2018/02/05/jordan-lebanon-compacts-should-be-improved-not-abandoned> [<https://perma.cc/DCC9-AUBH>].

government issued 47,766 work permits to Syrian refugees in 2019, an increase of 4.6 percent compared to 2018.<sup>112</sup> Additionally, 2019 brought a 2 percent increase in enrollment of Syrian refugees in formal schools.<sup>113</sup> Nonetheless, challenges remain in the design of the Compact, which has been criticized for not comprehensively reflecting the perspective of refugees.<sup>114</sup>

Colonialism, climate, drugs, and arms do not establish clear lines of culpability and compensation (to whom or by whom) that would serve to obtain asset seizures in courts. The drivers of flight are multiple, ranging from violent state persecution and criminal gang warfare to droughts and unemployment. All these drivers play a role in inducing flight, and their presence varies among the individuals who flee. Each of the drivers in Central America has multiple causes deriving from local politics, colonial legacies, global industrial development, and both U.S. military interventions and Soviet-Cuban revolutionary assistance from the 1950s through the 1980s.

Each individual claiming asylum, presenting credible evidence of persecution or a threat to life, should have her or his case addressed on those merits. But persuasively sorting out specific attribution for an entire population at risk will be a challenge. Even if these features of moral accountability do not give rise to clear lines of individual legal culpability or international legal liability, they should move the dialogue on assistance for refugees from discretionary charity to restorative justice. They should help motivate additional sources of realizable responsibility. Fortunately, there are also other wide grounds for responsibility.

#### IV.

##### RESPONSIBILITY BY CAPABILITY

Culpability should not be the limit of responsibility and the complexity of moral accountability should motivate, not prevent, responsibility. The preamble to the 1951 Refugee Convention includes a commitment to international “cooperation,” irrespective of fault.<sup>115</sup> Although this preambular statement is not legally binding nor further elaborated upon, a moral commitment is nonetheless clearly indicated. Thus, in an ideal world of solidarity and integration, the UN Security Council (exercising its Article 48, Chapter VII powers in peace and security) could determine each state’s share of the global responsibility to protect refugees. In 2015, the European Commission attempted something similar for EU Member States, mandating a relocation formula for responsibility sharing

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112. Kridis, *supra* note 111.

113. *Id.*

114. *Id.* Other issues include gender distribution with regards to work permits and the rejection of Syrian students due to the reluctance of the Jordan government to extend the documentation enrollment waiver.

115. Convention Relating to the Status of Refugees, July 18, 1951, 189 U.N.T.S. 137, 150.

that set out four criteria—population, GDP, unemployment, and past refugee loads—as the appropriate criteria in determining each state’s responsibility.<sup>116</sup>

#### A. *Alternative Ideas on International Responsibility*

Following the collapse of the relocation formula in the EU, similar mandated plans for responsibility sharing will not happen globally.<sup>117</sup> The global community lacks sufficient solidarity and those individual states that do choose to meet their global responsibilities lack assured partners, in part due to incentives for buck-passing that characterize collective-action problems.

The current situation—a voluntary and unilateral regime of undifferentiated obligations—is considered unfair and ultimately unsustainable and has sparked a broad scholarly debate over how to distribute refugee protection responsibilities among states.<sup>118</sup> One contribution by Hathaway and Neve suggested shared but specific responsibility, such as states forming interest-convergence groups. In such groups, clusters of northern states enter binding agreements with southern states under which the former agree to fund refugee protection in the latter.<sup>119</sup> This has the advantage of enhancing the prospect of aligning interest with action, but it leaves open the likelihood of “orphan” refugee clusters, lacking the special interest of wealthy countries.

In another innovative contribution, Peter Schuck included money transfers, employing principles of market efficiency to propose a quota-market system based on two main elements: first, an agreement among states to establish a refugee protection quota for each state; second, a provision that participating states could trade their quotas by paying others to fulfill their obligations.<sup>120</sup> Critics have expressed concern about the marketization of legal and moral obligations and the overreliance on monetary fulfillment of legal obligations to the neglect of basic protections, including *non-refoulement*.<sup>121</sup> They worry that the level of protection for refugees would be inadequate. Another review of various proposals for international refugee responsibility-sharing mechanisms

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116. *Refugee Crisis: European Commission takes decisive action - Questions and answers*, EUROPEAN COMM’N (Sept. 9, 2015), [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_15\\_5597](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5597) [<https://perma.cc/W55D-W3FE>].

117. See Dan Bulley, *Shame on EU? Europe, RtoP, and the Politics of Refugee Protection*, 31 ETHICS INT’L AFFS. 51, 51 (2017) (sharing that the EU deal potentially threatened the “rights of refugees and undermine[d] the EU’s principles”).

118. See 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, 143, 211 (1997). For a general discussion, see SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* (2004).

119. See Hathaway & Neve, *supra* note 118, at 118.

120. Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT’L L. 243, 248, 297 (1997).

121. See Deborah Anker, Joan Fitzpatrick & Andrew Shacknove, *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 296, 310 (1998).

finds none of these mechanisms to be perfect, yet points to a “morally compelling reason for all States to recognize their obligation to protect refugees.”<sup>122</sup> Other critics, while supporting the exchange of quota shares, stress the need for offering more funds to private NGOs and charities, or directly to refugees.<sup>123</sup> All these concerns have merit, but all can be addressed and mitigated in schemes that retain the value of flexible and efficient allocations.

Following the abandonment of the mandatory quota plan for refugee distribution, the European Commission has recently proposed a much more attractive alternative of “flexible solidarity,” or “solidarity à la carte.” Drawing on proposals advanced by the Visegrád group four years earlier,<sup>124</sup> the Commission has introduced flexible solidarity as part of its “New Pact on Asylum and Migration.”<sup>125</sup> Under the Commission Proposal, each Member State would either take responsibility to return a migrant who does not qualify as a refugee, or it would accept a refugee (or asylum seeker) rescued from the Mediterranean.<sup>126</sup> Each accepted person would carry a €10,000 stipend, paid from the EU budget.<sup>127</sup> All Member States pay their fair shares of the EU budget; those who take in refugees could gain some of it back in €10,000 per refugee. Current numbers of refugees and asylum seekers attempting to enter the EU run about 150,000 per year, making the budgetary costs viable.<sup>128</sup> The Proposal might be restructured to be even more attractive if the refugees were given the agency to choose their destination among those EU Member States that would accept them and carry their €10,000 stipend with them.<sup>129</sup> Unfortunately, the prospects for adoption and implementation in the EU are still (as of November

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122. Tally Kritzman-Amir, *Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law*, 34 BROOK. J. INT’L L. 355, 362 (2009).

123. See Mollie Gerver, *Refugee Quota Trading Within the Context of EU-ENP Cooperation: Rational, Bounded Rational and Ethical Critiques*, 9 J. CONTEMP. EUR. RES. 74, 77 (2013).

124. Press Release, Visegrad Group, Joint Statement of the Heads of Governments of the V4 Countries (Sept. 16, 2016), <https://www.euractiv.com/wp-content/uploads/sites/2/2016/09/Bratislava-V4-Joint-Statement-final.docx.pdf> [<https://perma.cc/4CDG-RT5F>].

125. Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM (2020) 610 final (Sept. 23, 2020). See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM (2020) 609 final (Sept. 23, 2020).

126. Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], at 22, COM (2020) 610 final (Sept. 23, 2020).

127. *Id.*

128. See Jennifer Rankin, *EU proposes to ditch refugee quotas for member states*, GUARDIAN (Sept. 23, 2020), <https://www.theguardian.com/world/2020/sep/23/eu-proposes-to-ditch-refugee-quotas-for-member-states> [<https://perma.cc/YA9K-RLEM>].

129. For the importance of agency, see T. ALEXANDER ALEINIKOFF & LEAH ZAMORE, *THE ARC OF PROTECTION* (2019).

2021) uncertain.<sup>130</sup> If the Commission Proposal were applied to the global responsibility for refugees, the Proposal's €10,000 for each of the world's twenty-six million refugees would be expensive.

### B. MIMC Responsibility Sharing

The authors of the Model International Mobility Convention (MIMC) have proposed an ambitious but somewhat more modest system for flexible responsibility sharing.<sup>131</sup> The MIMC system seeks to define global responsibility for all the world's refugees, including refugee settlements unmet by the specific or regional arrangements for resettlement. Like the principles Peter Schuck proposed for shared and flexible fulfillment of legal and moral responsibilities, the MIMC relies on a voluntary agreement of states on a responsibility quota for refugees, including an option to trade, not among countries, but between financing and resettlement commitments made by each country and overseen and managed by UNHCR. It offers a proposal designed to be politically feasible and includes commitments to meet and adjust the quotas and principles for allocation that will be determined by Member States themselves.

Two proposals are embedded in the 2017 MIMC.<sup>132</sup> One proposal identifies pathways other than the formal resettlement process currently in existence for refugees to gain residence in third countries. For example, states could give priority to refugees who meet the skills and other criteria for family, labor, and student visas, making these more readily available to refugees and forced migrants. States would commit to offering 10 percent of their labor visas for these purposes, establishing a triple win-win-win that recruits labor to fill domestic needs, rescues families from circumstances they needed to leave, and relieves the costs of asylum from developing countries least able to afford them.<sup>133</sup>

The second proposal tackles refugee responsibility head on. It draws upon the sovereignty accommodation and voluntarism embodied in the Paris Agreement on climate change. Under current practice, each year the UNHCR identifies the number of refugees in dire need of resettlement and about two dozen states let the UNHCR know how much they plan to contribute and how many refugees they intend to resettle. This process needs to be formalized and expanded by way of an agreement between states.

Under MIMC's proposal, each year, the UNHCR would identify the demand for the resettlement and financing of the world's refugees and forced

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130. Eur. Comm'n, *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee, and the Committee of the Regions on the Report on Migration and Asylum*, COM (2021) 590 final (Sept. 9, 2021).

131. See GLOB. POL'Y INITIATIVE, *supra* note 10.

132. See *id.* at art. 209, 211.

133. Michael Doyle & Elie Peltz, *Finding Refuge Through Employment: Worker Visas as a Complementary Pathway for Refugee Resettlement*, 34 ETHICS INT'L AFFS. 433, 433–43 (2020) (describing the proposal).

migrants and, using a modification of the EU formula (subject to any changes agreed to by the states who are party to the convention), note the nominal “responsibility share” that each state should bear.<sup>134</sup> States might choose a different formula to assess responsibility, including, for example, the UN budget allocation formula, which allocates shares based on national income modified by negotiation to reflect development status (see Table below). Potential resettlement states would commit to pledging the share of the identified need that they would cover in the following year, choosing either to offer cash payments or visas that enable refugees to resettle in a host country. (Each visa would be counted as the financial equivalent to, for example, five years of the annual costs of support in a country of first settlement.) The MIMC specifies that no country should meet its responsibility solely by cash transfer; each should offer at least some resettlement. For simplicity’s sake, we assume that a rough average cost per refugee across the various global asylum locations comes to U.S. \$3,000 per year.<sup>135</sup>

As with climate targets, each state would set its own level of responsibility. Its sole commitment would be to set a level of responsibility. Then, in a summit before its peers (Member States), each Member State would explain why it chose that particular level of responsibility each year. If the level of responsibility differs from its global share, as identified by the UNHCR according to the formula states had set, states should explain why. In each following year, the UNHCR at the next global meeting would note the normative share, the share pledged by the state, and the funding provided or refugees resettled. The key driver here is peer pressure. However, normative “internalization” through deliberative engagement may also become a factor that induces solidarity.<sup>136</sup> In either case, the processes of agreement and reason-giving would offer opportunities to advance a diffusion of responsibility norms and, more importantly, the better protection of refugees.

Importantly, we presuppose that each refugee who is a candidate for resettlement can exercise choice in the resettlement offers made available by participating countries. No refugee will be required to accept a particular offer; none of them will be sent to a country that poses a threat of persecution or mistreatment. Instead, a matching program will be established to best match refugee preferences (for connecting with relatives, languages, job opportunities, etc.) with resettlement visas.<sup>137</sup> Empirical data confirms that the placement of

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134. See GLOB. POL’Y INITIATIVE, *supra* note 10, at art. 211.

135. Please see “The Costs of Asylum in the Developing World,” Online Appendix Table 2, for evidence and discussion.

136. See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 895, 917 (1998).

137. This important clarification was drawn to our attention by Professor Kate Jastram at the Sharing Responsibility for Refugees Symposium on April 16, 2021, at UC Berkeley School of Law. Innovative “matching” programs have been developed for matching medical school graduates with medical residency programs; much of that technology can be applied for refugee resettlement.

resettlement beneficiaries significantly impacts whether their integration is successful.<sup>138</sup> Empirical evidence also shows that reluctance to involve refugees in the placement process increases the likelihood of failure in areas such as education and employment.<sup>139</sup>

In order to assess fair shares of global responsibility, we assume as a starting point the European Commission's proposed relocation scheme, but we make important adaptations to better fit global comparisons. We use the top twenty global GDPs as the unit that should bear overall responsibility for the world's refugees. Any other contributions from states outside the top twenty would, of course, be useful and welcome, but it should be assumed that the predominant world economies are able to provide global public goods. Using consistent 2019 data from the World Bank and the UNHCR, we determine responsibility shares as follows, scaling each one to a relevant global base line:

- 1) The size of the population (weighted at 0.4) is an indicator of the number of refugees a country can take. The larger the population of a country, the easier it should be to integrate refugees. We relativize each country's population by dividing it by a base line population (in this case, the United States). We cap China and India at the U.S. base (treating their population as equal to that of the United States), in order to ensure that their outsize populations do not produce excessive burdens.
- 2) The nominal GDP (weighted at 0.4) reflects the wealth of the country and is another strong indicator of the number of refugees a country can support. Large economies should find it easier to bear the costs of refugees. Again, we use the United States as the baseline against which we measure other national GDPs.
- 3) Unemployment rate (weighted at 0.1) is a percentage of the total labor force, drawn from International Labor Organization estimates. The intuition here is that unemployment makes it more difficult to integrate refugees. We use Spain, which had the highest unemployment in the top twenty economies, as our baseline. We measure against Spain's unemployment baseline by subtracting a country's unemployment from the Spanish rate and then dividing the result by the Spanish rate of unemployment.

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138. For example, a 2018 study on the determinants of refugee naturalization in the United States revealed that "refugees are systematically more likely to naturalize when initially placed in locations with low unemployment rates and dense urban settings." Nadwa Mossaad, Jeremy Ferwerda, Duncan Lawrence, Jeremy Weinstein & Jens Hainmueller, *Determinants of Refugee Naturalization in the United States*, 115 PNAS 9175, 9178 (2018).

139. See Will Jones & Alexander Teytelboym, *Choices, preferences and priorities in a matching system for refugees*, 51 FORCED MIGRATION REV. 80, 80 (Jan. 2016) <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/destination-europe/jones-teytelboym.pdf> [<https://perma.cc/U5FD-XWEW>].

- 4) Number of refugees resettled over the last five years (weighted at 0.1) reflects the efforts made by Member States. The more refugees a state has already resettled in the previous five years, the more it has already borne its share of the total global responsibility. The baseline country for this measure is Turkey, which has sheltered the largest number of refugees over the past five years among our top twenty countries. We subtract a country's refugee load from the Turkish load and then divide the result by the Turkish base line.

The total share of a country is the sum of its points from the four measures above (each weighted by the relevant weight: 0.4 for both population and GDP; 0.1 for both unemployment and refugees) divided by the total points of the top twenty GDPs.

Table 3, "Top Twenty Country Shares of Global Refugees Using Modified EU Formula," in the Online Appendix presents the data and calculations for the top twenty GDP countries and offers the relevant shares according to the modified EU formula.

Given a global diversity in national circumstances much larger than the diversity within the EU, states might choose the more familiar UN General Assembly budget formula established by long practice as a way to divide the UN regular budget.<sup>140</sup> This is a formula based partly on gross national income (GNI) and partly on negotiated understandings that give special consideration to developing country status.

In the Table below we show the UNHCR budget request for 2019, which reflects UNHCR's assessment of what it can reasonably spend (not necessarily a global compilation of refugee needs).<sup>141</sup> We also include the contributions made by the major donors and the amounts that should have been contributed according to the modified EU formula MIMC is proposing. We also add a column for the global cost of the world's twenty-six million refugees and the

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140. G.A. Res. 76/238 (Dec. 24, 2021).

141. Exec. Comm. of the High Comm'r, Biennial Programme Budget 2020–2021 of the Office of the United Nations High Commissioner for Refugees, U.N. Doc. A/AC.96/1191 (2020). The High Commissioner described the "budget methodology" as follows:

UNHCR's programme budget for the biennium 2020–2021 is formulated on the basis of comprehensive assessment of the humanitarian needs of persons of concern to UNHCR. The global needs assessment (GNA) methodology assesses requirements through a participatory approach in consultation with various stakeholders in the field. A number of planning factors are considered when establishing the budget figures, including: the projected numbers and movements of persons of concern; UNHCR's capacity to implement programmed activities within a 12-month planning year, either directly or through partners; the presence and degree of involvement of other actors; the specific political and environmental context and security situation; capital investments required in infrastructure; the most cost-effective way of achieving the intended results; and UNHCR's level of engagement and responsibilities in IDP operations within an inter-agency response. Planning assumptions are based on the scenarios deemed most likely to occur. Therefore, budgetary provisions to cover contingencies are not included.

*Id.* ¶ 9.

costs that each country should bear according to our formula, either by funding or by resettlement. We include a column with the percentage contribution of each member state towards the yearly UN General Assembly budget and columns that apply that formula to the UNHCR budget and to the global cost of refugees. Lastly, we include two columns that assess the normative number of resettlements if a country chooses to meet its global obligations solely through resettlement. The refugee numbers (rounded to the nearest whole number) under the column labeled “Number of refugees to be resettled under MIMC formula” show the number of refugees states would have to be resettled if each bore its fair share of the total of the world’s refugees according to the MIMC/EU formula. The refugee numbers reflected in the final column, indicate the number of refugees that states would resettle over a five-year period if each resettled refugee counted (the “Premium”) as the equivalent of U.S. \$15,000 in funding for refugees (We credit each resettled refugee as five years of annual funding per refugee.).

Table 1  
UNHCR Budget, Modified EU and UN Shares, and Global Responsibility

Country	Total Amount Paid to UNHCR	Total Points (based off the MIMC formula)	Amount that should have been paid to UNHCR (using MIMC formula)	Amount that should have been paid for the global cost of refugees (using MIMC formula)	Contribution to UNGA Budget Contribution (%)		Amount to be paid of UNHCR budget (using UNGA percentage)	Number of refugees to be settled under MIMC formula	\$15,000 Premium <sup>142</sup>
United States of America	1,706,832,053	0.964425269	\$1,208,473,383.36	\$10,914,882,341.63	22.00	0.22	\$1,899,920,000.00	3,638,294	727,659
China	1,924,229	0.826645577	\$1,035,828,497.73	\$9,355,560,771.57	12.01	0.12005	\$1,036,751,800.00	3,118,520	623,704
Japan	126,466,093	0.431670668	\$540,905,064.50	\$4,885,432,495.52	8.56	0.08564	\$739,587,040.00	1,628,477	325,695
Germany	464,142,234.13	0.318791572	\$399,461,878.13	\$3,607,923,401.33	6.09	0.0609	\$525,932,400.00	1,202,641	240,528
India	16,000,000	0.610845045	\$765,419,573.61	\$6,913,238,390.60	0.83	0.00834	\$72,024,240.00	2,304,413	460,883
United Kingdom	162,493,240	0.303978109	\$380,899,864.59	\$3,440,272,051.69	4.57	0.04567	\$394,406,120.00	1,146,757	229,351
France	100,593,343	0.261158486	\$327,244,722.67	\$2,955,660,996.76	4.43	0.04427	\$382,315,720.00	985,220	197,044
Italy	90,011,963	0.234470758	\$293,803,656.17	\$2,653,622,647.20	3.31	0.03307	\$285,592,520.00	884,541	176,908
Brazil	1,089,574	0.406005726	\$508,745,600.97	\$4,594,969,531.64	2.95	0.02948	\$254,589,280.00	1,531,657	306,331

142. We have assumed that a rough average cost per refugee across the various global asylum locations comes to U.S. \$3,000 per year. The Premium credits a resettled refugee at five years of the annual \$3,000 support cost. If a Premium was to be established based of the MIMC formula, these would be the total number of refugees to be resettled per year, over a five-year period.

Country	Total Amount Paid to UNHCR	Total Points (based off the MIMC formula)	Amount that should have been paid to UNHCR (using MIMC formula)	Amount that should have been paid for the global cost of refugees (using MIMC formula)	Contribution to UNGA Budget Contribution (%)		Amount to be paid of UNHCR budget (using UNGA percentage)	Number of refugees to be settled under MIMC formula	\$15,000 Premium <sup>142</sup>
Canada	59,732,515	0.235237119	\$294,763,944.65	\$2,662,295,933.58	2.73	0.02734	\$236,108,240.00	887,432	177,486.40
Russian Federation	2,000,000	0.373860139	\$468,465,563.27	\$4,231,161,872.94	2.41	0.02405	\$207,695,800.00	1,410,387	282,077
Korea, Rep.	25,850,008	0.266987896	\$334,549,266.62	\$3,021,635,340.00	2.27	0.02267	\$195,778,120.00	1,007,212	201,442
Spain	40,843,368	0.18178001	\$227,779,497.85	\$2,057,295,140.39	2.15	0.02146	\$185,328,560.00	685,765	137,153
Australia	28,652,493	0.218676424	\$274,012,561.64	\$2,474,870,288.09	2.21	0.0221	\$190,855,600.00	824,957	164,991
Indonesia	60,000	0.524722652	\$657,503,882.07	\$5,938,548,263.23	0.54	0.00543	\$46,893,480.00	1,979,516	395,903
Netherlands	87,568,781	0.211482879	\$264,998,686.77	\$2,393,457,337.65	1.36	0.01356	\$117,104,160.00	797,819	159,564
Saudi Arabia	37,000,000	0.213079064	\$266,998,788.06	\$2,411,522,171.00	1.17	0.01172	\$101,213,920.00	803,841	160,768
Turkey	300,000	0.118801759	\$148,864,580.73	\$1,344,538,825.51	1.37	0.01371	\$118,399,560.00	448,180	89,636
Switzerland	41,700,000	0.189362697	\$237,280,986.62	\$2,143,112,199.65	1.15	0.01151	\$99,400,360.00	714,371	142,874

143

143. European countries—excluding Switzerland, which is not part of the EU or European Economic Area—contribute to UNHCR as member states as well as indirectly through their yearly contributions to the EU. To ensure we do not underestimate the contributions of the six EU countries in the table by only indicating their sole contributions to UNHCR, we assume what their contribution is to the EU budget for UNHCR by dividing their yearly contributions by the whole EU budget and multiplying by 100 to get a percentage. We use that country's percentage and multiply by the EU contributions to UNHCR; this is added to the total the member states contribute individually.

MIMC proposes that no country meets its share solely by funding but leaves the choice between funding and resettlement open to national determination, urging also that countries respond to UNHCR requests to resettle those most in need of resettlement (for reasons of medical attention, for example).

#### CONCLUSIONS

All these proposals seek to remedy a shortcoming in the 1951 Refugee Convention that made “responsibility by proximity” the default option. The lack of binding commitments for responsibility sharing has shaped refugee protection over the past sixty-five years. The world has, from time to time, relied upon *ad hoc* arrangements to meet dramatic challenges, such as the Comprehensive Plan of Action, which resettled more than one million Vietnamese in the 1980s and 1990s. Nonetheless, the time is long overdue for the international community to establish a formal system for collective action that, inspired by moral accountability, implements principles of both culpability and capability.