The Right to Asylum and its Protection

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(1st draft)

The reality is that the world is divided into territorial states that practice restrictive membership policies. One of the humanitarian crises to which this reality is contributing is the global refugee problem. While there are many individuals who are displaced internally within countries, and while forced displacement of individuals is closely related to the collapse of the rights-protective bond within a political community, the refugee phenomenon would not exist in the same sense were the world not divided into exclusive territorial states.

Instead of outlining a normative solution to the refugee problem on the premises of the ideal of open borders, in the present paper I will follow an alternative approach to tackle the problem. I will formulate a moral right to asylum and examine the duties of protecting it. One of the reasons why this type of an approach is worthwhile is that the right to asylum is already recognised as a legal human right in the international law. UN Declaration of Human Rights Article 14 declares that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. It is important to examine whether underlying the legal right to asylum there is a valid moral right with duty-bearers. Another reason is that prior to the proximity of a world where open borders are a real possibility there is an urgent need to deal with the normative aspects of the refugee problem.

In the beginning of the paper, I will outline a moral right to asylum, and examine the current mechanisms that are supposed to protect the legal right to asylum in the global framework of territorial states. Next, I will focus on examining two sources from which the duties to protect the moral right to asylum derive. Violations of negative duties to not to harm can impose duties to provide asylum or to compensate the incurring costs. Also, the capacity of states to provide asylum entails duties to protect the right to asylum when the physical security and the basic opportunities of state members are not at stake. Finally, I will focus on the issue of particular duty-bearers. I will argue that states collectively have a duty to organise a joint response towards solving the refugee problem, which entails that the current global institutional framework protecting the legal right to asylum should be radically restructured.

1. The right to asylum

Any philosophical account of the right to asylum faces the inevitable task of defining the term 'refugee'. The Convention Relating to the Status of Refugees (1951) defines a refugee as a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

This standard definition of refugee has proved to be controversial in many ways, and it is often criticised as excessively narrow.[1] The central controversy concerns whether individuals for whom the cause of deprivation is not persecution should also be included in the category. In other words, the question is about whether a persecution requirement constitutes a necessary condition for qualifying as refugee. Or should we accept that the need for protection more generally, regardless of whether the need is a result of persecution, civil war, famine, poverty, or a natural disaster, constitutes grounds for becoming eligible candidates for asylum?[2] Philosophically there is a case to be made for an expanded definition of refugee on the basis of voluntariness in migration. On this view, it is irrelevant what the final cause of migration is, as long as conditions of involuntariness are satisfied. Although it may be extremely hard to pinpoint the necessary and sufficient conditions under which migration is involuntary, there is a clear principled difference between voluntary and involuntary migration. Refugees are, as Tom Kuhlman rightly notes, not searching for some paradise at the other end, 'but merely an escape from the hell in which they live'.[3] In a comprehensive normative enquiry on voluntary and involuntary migration we might start with identifying 'push' and 'pull' factors in the place of emigration and prospective places of immigration, and examine them in relation to basic human needs and the requirements for meaningful human agency. This is, of course, a complex task likely to produce highly controversial accounts on forced displacement. In the present paper, I will accept a wider than standard definition of a refugee in which the forced displacement is related to basic human needs, but will overlook the underlying problems of voluntariness in the concept.

[1] See for example Dummet, Michael 2001, 37, 44-45.
[2] Price, Matthew E. 2009, 4.
[3] Kuhlman, Tom 1991, 8.

As forced displacement severely restricts individuals' ability to pursue their personal conceptions of the good, an access to asylum may be argued to be of central interest to any individual. Following Joseph Raz, a normative interest-based right to asylum can be formulated as follows:

> (1) An individual has a right to X when X is an interest weighty enough to generate obligations on others[4]
> (2) All individuals have a fundamental interest in not being forcibly displaced
> (2a) Interest (2) is weighty enough to generate obligations for fulfilment and non-violation of (2)
> (2b) In the cases of forced displacement interest (2) can only be protected through asylum in a modified form (2')
> (2c) Each individual that has the fundamental interest (2) has also a fundamental interest (2') when (2) is not fulfilled or is violated
> (3) All individuals have a fundamental interest in having access to asylum

But does an analysis on the protection of (3) constitute an unnecessary step from the perspective of justice? The formulation suggests that the right to asylum is a remedial right essentially treating the symptoms rather than the cause, i.e., it addresses the forced displacement rather than the initial fulfilment and non-violation of (2). Should we not instead focus on examining how institutional structures should be designed in order to comprehensively fulfil and protect the interest (2) within the limits of an ideal account of justice? While it is true that the questions regarding the fulfilment and non-violation of (2) are *prior* questions of justice, it is not evident that they constitute *primary* questions of justice in relation to the protection of (3). The protection of (3) can be interpreted as an additional element in a comprehensive account of justice that takes into consideration the contingency of circumstances. In other words, an account of justice that includes an analysis of the protection of (3) recognises the possible non-compliance with the initial requirements of justice in fulfilling and not violating (2), and integrates this possibility into the theory. Furthermore, as the reality is far from general realisation of the fulfilment and non-violation of (2) on any ideal account of justice, an enquiry on the duties of protecting (3) constitutes a worthwhile task.

But what kind of a reason does the right to asylum constitute for duties? The definition of a right requires that 'the right is a sufficient reason for a duty', but this vague formulation

[4] Raz, Joseph 1986, 166.

essentially begs the question of why the interest to asylum creates duties in the first place.[5] The nature of the interest in asylum is a fundamental one, as forced displacement is attached to basic needs and basic opportunities in a more objective sense. Without an access to asylum the forcibly displaced individuals are left to circumstances where their ability to pursue any conception of the good life is severely impaired. Following Raz, it might be argued that the forcibly displaced are like 'The Hounded Woman' escaping a fierce carnivorous animal. 'Her mental stamina, her intellectual ingenuity, her will power and her physical resources are taxed to their limits by her struggle to remain alive' until she is granted asylum.[6] Or following Alan Gewirth, it might be argued that asylum is a necessary condition for voluntariness of action, which in turn is fundamentally valuable for all individuals.[7] Asylum is a basic need, and the state between forced displacement and asylum is a state of extreme deprivation and despair in which individuals lack the basic means to maintain a meaningful human agency. Forced displacement without the following protection of (3) entails the absence of sufficient physical security as well as the absence of many basic opportunities such as a meaningful opportunity to provide oneself basic subsistence.

By definition asylum is a remedy to the non-fulfilment or violation of (2), and in these circumstances individuals, regardless of their conception of the good life, have a fundamental interest in the protection of (3). The protection of (3) regenerates circumstances of fulfilment and non-violation of (2) in the form of (2´). While the fulfilment of (2´) is not the same as fulfilment of (2), it nevertheless constitutes the second-best option for any individual that has the interest (2), as it satisfied in a modified form the basic needs of physical security and basic opportunities.

The protection of (3) is also remedy to a harm that is effectively beyond individuals' control. If individuals would be extensively in control of the fulfilment of (2), then the right to asylum would not be as strong right. This is not, however, the case with forced displacement. The individual need for the protection of (3) is primarily dependent on luck, ethnicity, and the stability and prosperity of the political community into which one is born. The extensive inability to have control over the fulfilment and non-violation of (2), and the fundamental nature of the interest in having (2) fulfilled and protected suggest that the right to asylum is a *fundamental right*, which should be protected to all forcibly displaced individuals regardless

[5] Raz 1986, 183-184.
[6] Raz 1986, 374.
[7] Gewirth, Alan 1981, 52-53.

of their community of origin. This formulation does not, however, answer yet the question of how the right to asylum should be protected, and who are the duty-bearers. This is a concern often raised in relation to rights that require some form of assistance.[8] Unless it can be more conclusively shown which agents have the responsibility to protect (3), why, and to what extent, the right to asylum remains a hollow 'manifesto right' without recognisable duty-bearers.

2. Protection of the right to asylum in the current global migration structure

Before turning to examine more closely what sources impose duties to protect the right to asylum and how these duties are attached to agents, it is worth to examine the current global efforts towards solving the refugee problem, i.e., the 'logic' of how the primary responsible agents in protecting the legal right to asylum are established. In the contemporary world, territorial states together constitute what can be called the *global migration structure*. The world is divided into territorial states between which there exists an elaborate physical migration structure. This structure connects states to each other through roads, railroads, airports, and harbours, and due to its form the physical obstacles of migration to nearly anywhere in the world are low.

Apart from the physical structure, the global migration structure consists of institutional rules and interactive routines existing between states. States provide passports to their members, engage in border control, and recognise international obligations on the treatment of non-members within their territories. Currently, the institutional rules in the global migration structure take an asymmetrical form.[9] While international law includes a general right to exit from any state individuals reside in, it stops short of recognising a general right of entry. The UDHR Article 13(1) recognises that 'everyone has the right to freedom of movement and residence within the borders of each state', and Article 13(2) states that 'everyone has the right to leave any country, including his own, and to return to his country'. In other words, there is no general right of entrance to a country of one's choice, only the right of exit.

The asymmetrical form of the global migration structure means that the forcibly displaced individuals are heavily dependent on the right to asylum for alleviating their destitution. This dependency is recognised in the institutional rules in principle, as the article 14(1) of the

[8] See for example O'Neill, Onora 2000, 135-136.
[9] For a more extensive discussion on the asymmetry in the global migration structure see Cole, Phillip 2000, ch 2.

UNDHR accords 'the right to seek and enjoy in other countries asylum from persecutions' at least to the extent they are for political crimes. However, in practice the international law assigns no responsibilities for states to grant asylum, and 'the right of states to grant asylum takes precedence over the right of individuals – would-be refugees – to receive it'.[10] The fundamental principle in the global migration structure that is supposed to protect the right to asylum is the *non-refoulement* principle, which all states acknowledge. According to the *non-refoulement* principle set by Article 33 of the Refugee Convention, states are obligated not to expel individuals to areas where there is a threat of being subjected to persecution. In other words, each state has an obligation to process the asylum claims of only those individuals who make first-asylum claims on their jurisdictional territory. Even this requirement is, however, a weak requirement. If asylum seekers have passed through other countries after leaving the state of departure, states reserve the right to return the asylum seekers to the 'first country of arrival' without processing asylum applications, or to a 'safe third country'.[11] Apart from having control over the process which determines whether the first-asylum seekers applying for resettlement are in fact forcibly displaced and thus qualify for the status of refugee, states also judge for themselves the extent of their own duties towards refugees. If the claims are deemed valid by the state in which the asylum claims are filed, and if the state holds that it is yet to fully discharge its duties towards refugees, the right to asylum is protected by the state through compliance with the *non-refoulement* principle.[12]

This entails that in the current global migration structure refugees are heavily dependent on luck and the benevolence of states. The recognised responsibilities of states to protect the right to asylum in the current global migration structure take essentially the following form: there is a set of maxims (international law) that assigns a responsibility role (*non-refoulement*) to each agent (state) in the collective (the global migration structure) in the protection of the right to asylum. The global migration structure in which the central 'logic' of protecting the right to asylum through the application of the *non-refoulement* principle has led to a state of affairs where states have perverse reward incentives to divert the flows of refugees towards other states. States engage in actions the central aim of which is to avoid coming under the *refoulement* obligation, and they hold free-riding as a 'rational' strategy. Any asylum claim filed on the territory of one state effectively discharges other states from burden-bearing in the protection of the right to asylum.

[10] Haddad, Emma 2008, 79.
[11] Hathaway, James C. 2005, 323-328.
[12] Dummet 2001, 32.

A common strategy to avoid becoming the assigned bearer of the responsibility towards protecting the right to asylum is *non-entrée* policies. Many states proactively have, among other things, implemented strict visa requirements, penalised carriers of unauthorised asylum seekers, created 'international zones' to airports, and attempted to pressure the governments in the countries of departure to limit the flow of asylum seekers towards them. The only constraint imposed on this rationalising strategy is the pressure mounted from domestic refugee advocates, international human rights organisations such as the UNHCR and Amnesty International, and other states.[13]

One of the central reasons why the current global migration structure facilitates 'rational' approaches like *non-entrée* policies and insidious judgments on the status of refugees is that there are no joint agreements on proportionate burden-sharing between states or collective enforcement mechanisms in securing the right to asylum. As Matthew Gibney rightly notes, the *non-refoulement* principle, which is supposed to be the fundamental principle of refugee protection, does nothing to guarantee a just distribution of refugees between states. Instead, the central distributive logic in the principle is proximity.[14] As the global migration structure currently stands, the first-asylum claims made in one state effectively release other states from their obligations towards claim-filers as well as towards the states in which the claims are filed. States are competing with each other as to who will have to bear the burden of protecting the right to asylum. As no other particular state has a recognised obligation to share the burden with the first-asylum states, this entails that the first-asylum states are often stuck with the asylum claimants without any guarantee that the responsibilities to protect the right to asylum are distributed in a 'fair way'.

To sum up the section, 'the logic' of the current migration structure in assigning the responsibility to protect the right to asylum is founded on the *non-refoulement* principle. As protecting (3) is in general at least a minor burden to the host state, the effort to secure the right to asylum with the *non-refoulement* principle creates perverse reward incentives for states to avoid becoming under obligation to protect (3). States judge for themselves their own quotas of intake, and also whether asylum seekers qualify as refugees. This often leads to insidious judgments about the urgency of asylum seeking individuals' claims. Even if we leave open the final extent of states' duties towards protecting the moral right to asylum, the practices of insidious judgments and *non-entrée* policies are in themselves regrettable and

[13] Schuck, Peter H. 1997, 253.
[14] Gibney, Matthew 2007, 67.

problematic from a normative perspective.[15] Also, to anticipate the conclusion below, the wide implementation of 'rationalising' practices suggests that the 'logic' of the legal code currently protecting the right to asylum not only fails to sufficiently address the concerns of those refugees who have a valid moral claim for the protection of the right to asylum, but it also fails in holding those states with possible duties of protection proportionately accountable.

3. The liability model of protection

The physical nature of forced displacement and the inability or unwillingness of a political community to protect the fulfilment and non-violation of (2) suggests a profound dependency on agents outside one's political community in the protection of (3). But who are the primary agents that should bear the duties of protecting (3) when (2) is unfulfilled or violated? The first source from which responsibilities to particular agents to protect the right to asylum derives is the failure to respect the negative duty to not to harm. Negative duty to not to harm is the strongest kind of moral duty, and the failure to comply with it entails responsibilities of remedy. In relation to the right to asylum outlined in the beginning of the paper, the failure to respect the negative duty does not amount to non-fulfilment of (2), but rather to an agent-linked violation of (2). The responsibility to protect the interest (3) derives from the remedial responsibility of (2). This view may be called the *liability model*, and it has its source in legal reasoning. It would be, of course, in many cases absurd to attempt to enforce the primary violator of the negative duty to simultaneously protect the right to asylum. The nature of asylum is such that in many cases those whose (2) has been violated can only rely on those agents who are not primarily responsibility for the harmful outcome. Yet, it is nevertheless worthwhile to examine how the liability model relates to the protection of the right to asylum.

On the liability model, there is a direct causal connection between the cause of forced displacement and the responsibility to protect the right to asylum. The model examines backwards the chain of events that has led to an outcome X as well as the moral blame of agents in causing the outcome X. If agent A has caused a chain of events that leads the outcome X to unfold, the agent may also have an obligation towards remedying the outcome X if it constitutes harm to agent B.[16] This view follows the idea that individuals who choose

[15] For an insightful analysis on counterproductive incentives, see Pogge, Thomas 2008, 80-82.
[16] For an extensive analysis on causation and responsibility see Hart, H.L.A., and Honoré, Tony 1985, esp. ch. 3.

in liberty are as a consequence permitted to enjoy the benefits their doings create as well as required to bear the costs of harms that fall on others.[17]

At its weakest point, the assignment of the responsibility to remedy on the liability model does not necessarily require that the forced displacement has been caused with intentional acts or omissions. Rather, it is enough to show that when acting the agent 'should have known better'. In the context of individual liability, often cited examples are cases where a person sets a fire, and the fire eventually gets out of control and damages other person's property. Instead of intentional acts or omissions, the liability model requires only that the agent should have been able to foresee the prospective outcomes, and that the agent acted voluntarily.[18] There can, of course, be multiple agents who contribute to a particular harmful outcome. In these cases, the strength of the causal link partially determines the responsibility role an agent has remedying the outcome. In legal context, for example, distinctions are often made between the primary perpetrator(s) and the accomplices with varying impacts on a harmful outcome. While the primary remedial responsibility is on the perpetrating agent, accomplices with weaker causal links may bear secondary remedial responsibility.

On the premises of the liability model it might be argued that all states equally share the responsibility to remedy the global refugee problem. As it was pointed out earlier in the paper, territorial states constitute a global migration structure within the limits of which the refugee problem takes its current form. States limit the opportunities of individuals in their search for asylum within the global migration structure, and they maintain the global migration structure in its current form regardless of the awareness that the structure is partly responsibility for the creation of the refugee problem. In the end, however, being a constitutive part of the global migration structure provides an insufficient ground to assign a remedial responsibility to protect the right to asylum. While the existence of the global migration structure does contribute to the refugee problem in the sense that it is sustaining it, the causal links between the global migration structure and the violations of (2) are, if existing at all, extremely weak.

On the liability view, violation of (2) is the reason why duties of protecting the right to asylum can be assigned in the first place. While it is true that the institutional rules in the global migration structure are asymmetrical and lead to difficulties in migrating to other

[17] Miller, David 2007, 87. See also Held, Virginia 1970, 472-473.
[18] Miller 2007, 96.

countries when (2) remains non-fulfilled or violated, the existence of the global migration structure or the asymmetrical form of its institutional rules does not in itself do anything to violate (2). In other words, while the structure may limit the range of solutions to the refugee problem, these limitations are separate of the harmful contributions. This suggests that by the virtue of constituting the global migration structure states may not be assigned equal remedial responsibility to protect (3).

We might follow another route in arguing for the liability of states to protect (3) due to their remedial responsibility of (2). Apart from simply having constitutive links to the global migration structure, states may have more active causal roles in their contribution to the violation of (2) than their membership in the global migration structure. States sustain a global economic order that deprives many countries of natural resources with which these countries could more effectively fulfil their citizens' (2), and provide more stable circumstances the reduce the violations of (2). Many states also directly sell weapons technology and engage in other types of trade with unstable governments knowing that there is a high probability that these governments directly violate their citizens' (2) or overlook these violations.[19] As well, states may craft legislation that provides a platform for private corporations and citizens to engage in trade with states where (2) is violated, and abstaining from revising the legislation can be intentional due to possible received benefits.

On these grounds, it might be argued that states that violate (2) or allow through laws corporations and private citizens to contribute to the violations of (2) have a remedial responsibility to protect the right to asylum. A foreseeable harm of forced displacement that has been allowed by a state to occur can impose remedial responsibilities. The argument of foreseeable preventable harm that is imposed by governments and citizens of states, while I believe offering a valid foundation for accountability in the protection of (3), is not without problems either.

If this form of a remedial responsibility is accepted as valid, and we recognise that a state has a duty to offer asylum to a refugee whose (2) has been violated by the government or the citizens of the state, there remains the task of establishing the final extent of remedial responsibility as well as attaching it to the right agents *within* a state. Firstly, there are epistemological issues, as often the causal chains of events that have led to a particular outcome are extremely complex, and the strength of causal roles agents have in causing the

[19] See Pogge 2008, 118-122, 205-210.

outcome may be hard to establish accurately. Secondly, assigning responsibility to remedy requires establishing the level of voluntariness among agents causally linked to an outcome.[20] This means that we ought to be able to establish the true motives and the reasoning of agents in the causal chain of events in the final assigning of remedial responsibility roles. Not all citizens have chosen to become members of the state, and not all members agree with their government's foreign policies. This raises questions about the extent to which dissidents and involuntary members of a group may be held liable for actions executed in the name of the group.[21]

Finally, the identification of responsibility roles can be problematic due to possible incommensurable dimensions in causal roles. The initiative roles of agents and their authority, causal links sub-tasks play in an outcome, the links acts and omissions play in the outcome, the derived profit of the causally linked agents, and the forms of profit agents derive each need to be evaluated first in relation to all agents causally linked to the outcome and then compared against each other when establishing the final proportionate distribution of remedial responsibility roles.[22] All the causal dimensions cannot necessarily be brought under a single comprehensive standard of evaluation, and there may be irreducible incommensurabilities due to which the final guideline of distribution of remedial responsibility roles remains incomplete.

Even if the issues of internal distribution of remedial responsibility within states were solved, there is also another, and for our current purposes more relevant, issue in the liability model regarding the protection of the right to asylum. The right to asylum protected solely on the premises of the liability model would remain a weak right for the following reasons. Firstly, the issues of epistemology and incommensurability complicate the assignment of the responsibility in global affairs. Violations of (2) can be indirect, and there may not always be a recognisable violator. The second issue is related to the first. The fact that the responsibility is assigned to states solely on the basis of their own violations of negative duties entails that states only have responsibilities towards the *particular* refugees to which they are linked through the violation of (2). Therefore, before a refugee can make a claim for asylum in a

[20] Feinberg, Joel 1968, 685.
[21] For a futher discussion on the distribution of responsibility within a state see Parrish, John M., 2009 and Stilz, Anna (forthcoming). For an account why dissidents in a group may be held responsible for group actions see Räikkä, Juha 1997.
[22] Feinberg 1968, 685.

particular state a case needs to be made on her behalf why citizens or the government of this particular state has contributed to the violation of her (2).

While the two previous issues are at in principle solvable, the third point suggests legitimate limitations in the duty of protection. The liability model is only applicable when the forced displacement has agent-related causal link and is due to violations of (2). This entails that forced displacement due to famine or natural disasters may constitute non-fulfilment of (2) that has no causal reasons which impose a responsibility to protect the right to asylum. In other words, in not every case of incurring interest (3) there is an underlying violation of (2). Fourthly, while an argument might be made that the global institutional order leads to the violation of many individuals' (2), it may be reasonably argued that there are also many instances of forced displacement that are not linkable to the global institutional order, but instead they occur due to unrelated agent-linked reasons existing within states. For example, it is hard to see how the persecution of homosexuals by a particular religious faction in a country where the government sympathises with the persecutors for ideological reasons and overlooks these acts is linkable to the larger global institutional order. While the remedial responsibility for imposing a global institutional order may lead to some responsibilities towards refugees, not in every case of violation of (2) it provides a sufficient reason to assign a responsibility to protect (3) to states constituting the global institutional order. In some cases of violation of (2) the refugees may not rely on those who bear the primary remedial responsibility, but instead can only turn towards those states that have a weaker link or no link to the violation of (2), and thus are under a weakened or under no obligation to secure (3). Finally, the liability model can lead to incentives for the wealthy and powerful to distance themselves from those whose (2) remains close to non-fulfilment, leading to their further deprivation and the weakening of their entitlement of the protection of (3).[23] The lesser the causal and intentional link is to the violation of (2), the lesser accountability, and as a consequence the lesser remedial responsibility of (2) through the protection of (3).

The liability model offers a framework within which some responsibility to remedy the global refugee problem may be assigned due to failures to fulfil negative duties of non-violation (2). Yet, the responsibilities it assigns are far from sufficient to amount to protection of all individuals' right to asylum. If asylum would be fully dependent on the remedial responsibility of (2) and founded solely on the liability model, this would entail that although

[23] Simon Caney makes a similar argument in the context of poverty relief. See Caney, Simon 2007, 284-285.

of interest to individuals, the right to asylum would be a weak right with no strong duties on all states to protect it. What the liability model can offer is a premise for compensatory claims in cases where the violator is not the agent that also bears the eventual burden in protecting (3). This, however, requires an institutional order with global reach that can effectively hold the primary violators of (2) accountable for their actions. In terms of liability, the current global institutional structure is a disappointment, as there exists no strong institutions that can hold violators of (2) effectively accountable for the burden that the protection of (3) causes for non-violators of (2). In principle, such institutions as the International Criminal Court (ICC) could be expanded to serve the role of advancing accountability in the protection of (3), but currently political obstacles effectively undermine this aim.

4. The capacity to provide asylum

The second duty includes an appeal to the capacities to protect the right to asylum, and its source is the principle of humanity.[24] On this view, it is irrelevant whether a direct violation of (2) has occurred, as the position and the capacity to secure (3) entail moral obligations to do so. There are two central controversies related to the capacity-based view of duties. First concerns the required form of action of those with the capacity to remedy a harmful outcome, and the second concerns the extent of required actions.

Individuals separately are not in a good position to protect the right to asylum, as they lack the capacities for sufficient protection of (2) as well as (2'). Therefore, they are not in a meaningful way able to protect the right to asylum to any refugees. Then it may be asked whether the lack of individual capacity to protect (2) and (2') suggest that there are no capacity-based duty-bearers to protect the right to asylum at all? Individuals are members of cooperative institutional orders, which in turn are in a position to protect (2) and (2'). States hold a jurisdiction over a territory, and control the use of force on it. Generally they also act on behalf of their individual members' interests in international relations. Individuals, by being members of collective territorial institutional structures, have a shared principled capacity to protect the right to asylum. When the rights-protective bond breaks down within the state of one's origin, the refugees could migrate to a territory over which a rights-protective state has jurisdiction. Therefore, the question regarding the capacity-based duty is essentially about how states as collectives of individuals should respond to the refugee problem.

[24] For a classic argument on capacity-based positive duties to provide aid, see Singer, Peter 1972, 241.

The acceptance of this position does not, however, tell anything about the final extent to which states as collectives of members may have responsibilities towards non-members. It only suggests that states are recognisable aggregates of members that may or may not be bound by requirements of justice to collectively provide aid to non-members through state institutions. This brings us to the second issue, which concerns the extent to which those states with the capacity to protect the right to asylum should do so. Communitarian theorists who outline accounts of asylum argue that there can be 'tragic' cases where refugees whose (2) remains unfulfilled or violated do not have a right to enter a state that in principle could protect (3), as the state may have already exhausted its duties towards refugees.[25] David Miller, for example, contends that while refugees 'have a very strong, but not absolute, right to be admitted to a place of safety', this does not take away from the fact that states are entitled to 'considerable autonomy to decide how to respond to particular asylum applications'.[26]

If we accept the previous conclusion that the interest in asylum is a fundamental interest and a remedy to harm that is in general beyond individuals' control, and that the aim is to protect it to *all* forcibly displaced individuals, a general appeal to autonomy of a collective seems to constitute an insufficient reason for exclusion. Then the question becomes, what reasons provide sufficient grounds to discharge states as collectives of individuals from protecting the fundamental interests of non-members, i.e., under what circumstances those with a capacity to remedy a harmful outcome can legitimately claim that 'we have done enough'? At least circumstances of extreme scarcity seem to constitute sufficient reasons. In a world at war, the sole territorial state that has been able to remain outside the war could reasonably be discharged of the duty to protect the right to asylum to all the world's refugees if this would lead to the state's collapse, to the expansion of the war to its territory, and the reduction of well-being of the host population to the level of the refugees. In other words, when fundamental needs such as physical security and basic opportunities to provide oneself subsistence are at stake there are justifiable reasons to exclude refugees.[27] But are there good reasons for excluding refugees when physical security and basic opportunities of members of a state are not at stake?

[25] Miller, David 2007, 227. Walzer, Michael 1983, 48-51.
[26] Miller 2007, 227.
[27] The argument here is compatible with a position according to which there are good reasons to accept 'at least' a threshold account of global justice. Whether the final model of global distributive justice is a 'threshold account' or a more extensive account is left open here. For a recent study on a threshold account, see Brock, Gillian 2009, ch. 3. For a classic more extensive account on global justice, see Beitz, Charles R. 1975.

Miller provides two reasons why this may be the case. Firstly, he claims that the duties of other states towards refugees are weakened by the failure of the state of their origin to fulfil and protect (2).[28] In other words, on this view states may legitimately turn away some of the refugees *because* the state of their origin, which is supposed to be the primary duty-bearer, has for one reason or another failed to discharge its duties sufficiently. While we may accept that the initial responsibility to fulfil and to protect the non-violation of (2) is on the state of one's origin, it is not directly evident that the failure of the initially responsible to do so constitutes a sufficient reason to discharge or weaken the responsibility of those states with the capacity to protect (3). Disproportionate distribution of burdens is, to be sure, a question of justice between the states with a capacity to provide asylum and states that have violated (2) or have neglected the fulfilment of (2). While disproportionate distribution of burdens does constitute a compensatory claim against other duty-bearers, it seems to provide an insufficient reason for inaction against the right-bearer at least in cases of urgency.[29]

Consider the following case. A passer-by sees a drowning child, and she has the capacity to save the child. She is also initially bound by the duty to do so as there are no incurring excessive costs, but the duty is weakened when it is found out that the child was pushed to the pond by another passer-by and that he has a mother who could have saved him but failed to do so for whatever reason. Had the child been an orphan and been blown by the wind to the pond, he would have been saved by the passer-by complying with her responsibility to do so. In this case, however, the child had a living parent and was a victim of malevolent deed, to which the passer-by can justifiably reply 'tough luck', and walk away. The child is not responsible for the harmful outcome, and it seems unreasonable to suggest that the relative considerations of justice between duty-bearers override the responsibility to rescue him.

As it was noted already before, the state between forced displacement and asylum is a state of severe deprivation and undignified human existence. In protecting the right to asylum, states may have valid compensatory claims from other states, depending of the initial distribution of resources and other circumstances between the states protecting (3) and the states failing to fulfil (2). As well, as it was noted in the last section on remedial liability, states may have valid compensatory claims from agents that bear a remedial responsibility of (3). Yet, the responsibility of a state with the capacity to protect (3) is essentially a forward-looking

[28] Miller 2007, 47, 227.
[29] Leif Wenar outlines a similar argument in his analysis on 'primary responsibility' and 'secondary responsibility'. See Wenar, Leif 2007, 265, 269.

responsibility *towards* refugees, and these relative considerations of burden-bearing are apart from the duties to protect the fundamental right to asylum.

Miller offers also an alternative account on the reasons why refugees with a right to asylum may be excluded. He contends that the final judgment on the extent of response to remedy the refugee problem 'must rest with the members of the receiving state, who may decide that they have already done their fair share of refugee resettlement'.[30] In other words, Miller appeals to the democratic process in determining the extent of the duty to protect the right to asylum. This seems, however, to equate to subjective judgments about one's duties, a conclusion which Miller wants to avoid in his general theory on global justice. It may be reasonably asked what stops states from making insidious judgments about their duties if the final decision-making is left to democratic processes? The recent wave of political anti-refugee rhetoric in many European states provides a clear example of insidious judgments on capacities to help. Regardless of how low the final number of refugees is that a state accommodates, right-wing politicians maintain that their state is bearing an excessive burden beyond its moral duty to protect the non-members' (3). When members of a state simply decide that they have done enough to remedy the refugee problem, is it reasonable to conclude that they have *actually* done enough? Miller's account suggests that only some form of 'initial willingness' to participate in the efforts to remedy the refugee problem is required, after which states may subjectively decide their sufficient role in discharging the responsibility towards protecting the right to asylum.

Finnish asylum policies, and a comparison of the circumstances between Finland and Haiti, provide a real world example of the insidious judgments that the democratic process can produce. According to the Human Development Index (HDI), Finland has a 'very high' level of human development, ranking 12th of the 182 countries in the Index listing. The country has 5.3 million inhabitants, and it has the lowest population density of the countries in the European Union 16 inhabitants/km^2. In comparison, Haiti, which currently faces an urgent humanitarian crisis, has more than twenty times higher population density, altogether 361.5 inhabitants/km^{2,} and it is 149th most developed country according to the HDI. Finland has per capita GDP $44,491 (nominal), while Haiti has $733. In the year 2009, there was altogether 5988 individual asylum claims filed in Finland. Of the applicants, however, only 1373 were

[30] Miller 2007, 227.

finally granted asylum. This entails that the total increase in the country's population due to refugees in 2009 was around 0.02 per cent.

Finland is also currently facing a populist anti-immigration and anti-refugee tide, and there is a strong pressure on the government to keep the number of granted asylum claims low and even to reduce them. The right-wing politicians vehemently argue that Finland has not secured the well-being of its own citizens in a sufficient manner, and that it does not have the duty to protect any refugees' (3). Should we, then, at face value accept the populist argument made by the right-wing politicians that Finland is bearing an excessive burden in protecting (3)? Or should we at face value accept the judgments of the elected politicians in the government, who do not wish to alienate the populist constituency, that Finland is current bearing 'at the very least sufficient burden' in protecting non-members' (3)? The previous statistical facts strongly suggest that these claims constitute insidious judgments about the real capacities of Finland to protect the right to asylum.

To steer away from the insidious judgments of states regarding their actual capacities, legal theorists and migration experts have been outlining several factors in relation to which more a objective standard on states' capacities to help refugees might be established. Although these proposals have been made in the context of relative burden-sharing between states, they also provide a foundation for a normative analysis of the final extent of absolute capacity-based responsibilities of states towards refugees. In the proposals, such measurements as the national wealth, the size of a territory, the population of a state and the prospective population growth are taken into consideration when establishing the final responsibility roles of states.[31] While there may be contextual issues of physical security for example that need to be considered more carefully in the final determination, the proposed measurements provide worthwhile a starting-point for closing the gap between normative theory and practice in protecting the fundamental right to asylum.

To sum up the current section, I have argued that states have capacity-based duties towards remedying the non-fulfilment or violation of (2) by protecting (3) when discharging this duty does not conflict with protecting the physical security and the basic opportunities of their members. I have also examined some of the communitarian arguments in defence of the exclusion of refugees. I have argued against Miller's view according to which the failure of other duty-bearers to remedy a harmful outcome constitutes a sufficient reason for inaction.

[31] Suhrke, Astri 1998, 397.

The relative consideration of distributing burdens should be considered as secondary issue of justice in cases where there is an urgent need for remedial response from any of the duty-bearers towards a right-bearer. As well, contrary to what Miller claims, the outcome of the democratic decision-making process should not have the final judgment on the extent of the duty to protect the right to asylum. Leaving states the democratic right to decide the extent of their duty to protect (3) amounts to accepting an account of subjective determination of duties, and it gives states perverse reward incentives to engage in insidious judgments. To avoid these problems, there is a need to appeal to a more objective standard of evaluation in establishing the final duty to protect the right to asylum. This standard includes the national wealth, the size of a territory, and the prospective population growth. While the current formulation of the 'objective standard of evaluation' may be incomplete, it nevertheless provides a more reasonable foundation for evaluating the state of physical security and basic opportunities than the outcomes of democratic processes.

5. The duty to restructure the global migration structure

The above analysis leaves, however, open the form of global cooperation states should engage in protecting the right to asylum. If we accept that there is 'a general capacity-based' duty to protect the right to asylum when the physical security and the basic opportunities of members are not at stake, we still face the problem of indeterminacy when there are many recognisable responsible agents. It is not uncommon to hear appeals that 'the international community should act and do something about this problem'. While these types of arguments have some intuitive appeal, especially in the face of urgent global problems that are beyond the remedy of any institutional structure of a single state, they leave the question of assigned particular duty-bearers unanswered.

In her work, Onora O'Neill argues that without 'determinate institutional structure' the rights that require positive assistance amount only to 'rhetoric rather than entitlement'. Rights specify primarily what is to be received, and obligations specify the agents that are responsible for providing what is to be received by the right-bearer.[32] The assignment of the responsible on the premises of the negative duty to not to violate (2) is straightforward: it is distributed to everyone.[33] It is slightly less obvious when a negative duty has been violated how the responsibility to protect (3) is allocated, as it was pointed out in the section

[32] O'Neill 2000, 125.
[33] It is not, however, as straightforward how the responsibility to establish and maintain the institutional structures that enforce the compliance with the negative duty is assigned and allocated.

examining the liability model. When we move to the capacity to protect (3) the distribution of task responsibility seems even less obvious, as the capacity-based duty does not intrinsically include a similar distributive mechanism as the duty to not to interfere or the duty to remedy a harm done. As O'Neill points out, someone who has a claim-right may assert that her rights have been violated, 'but unless obligations to deliver […] have been established and distributed, she will not know where to press her claim, and it will be systematically obscure whether there is any perpetrator, or who has neglected or violated her rights'.[34]

The issue of particular assigned states is essentially about second-order collective responsibility, i.e., the collective responsibility of collectives. Each state is separately bound by a duty towards refugees regardless of the relative efforts of other duty-bearers, and this duty derives from the obligations of members to aid non-members. The failure to act to protect the right to asylum imposes moral blame on all states that have the capacity to protect (3) but have not done so. Apart from the moral blame as separate collective agents, however, states also share a collective moral blame for their failure to discharge their separate responsibilities towards the refugees through joint action that constitutes an effective response within the limits of their duties.

This view follows an argument according to which the institutional structures of assigning responsibilities are not required prior to the recognition of assistance-based rights. As Elizabeth Ashford rightly notes in her criticism against O'Neill, 'institutional structures are essential to the realization of the rights but not to their existence'.[35] A right that is of fundamental nature 'exist independently of the institutions that define and allocate the duty of aid […] in virtue of the universal moral status of human beings'. Rather than requiring a particular set of institutions with assigned distributive obligations prior to the right, the right can be interpreted as providing a test on whether existing institutions are minimally just.[36] Thomas Nagel suggests similarly that the 'existence of moral rights does not depend on their political recognition or enforcement'. While institutions may be designed to enforce them, 'the reality of moral rights is purely normative rather than institutional'.[37] In other words, we should examine the current global migration structure in the light of how it secures the right to asylum. If the global migration structure in its current form fails to secure the fundamental

[34] O'Neill 2000, 105.
[35] Ashford, Elizabeth 2007, 215. For a similar criticism against O'Neill's position, see Tasioulas, John 2007, 91, 94.
[36] Ashford 2007, 217.
[37] Nagel, Thomas 2002, 33.

right to asylum to all who need protection of (3) due to a violation or non-fulfilment of (2), and if such failure of protection is reasonably avoidable, it may be argued that the form of the structure is unjust.

The absence of a systematic global structure or the fact that states constitute a random group of collective agents does not make a difference here. As Virginia Held rightly argues, a random group of agents may at times be held morally accountable for its failure organise itself as well as its inaction. Held gives an example of three pedestrians witnessing an accident, and argues that the fact that they happen to be in a position to help imposes them a collective responsibility to get organised and provide aid to the victim of the accident. Held contends that a random group of individuals may be 'morally responsible for not constituting itself into a group capable of deciding upon action […] when it is obvious to the reasonable person that action rather than inaction by the collection is called for' in the situation.[38] The fact that states constitute a random group instead of a previously organised group does not make a difference from the perspective of forcibly displaced. From their viewpoint, it would be abhorrent to suggest that the responsibility of states to organise a system of cooperation is dependent on the prior links of states to each other rather than the realisability of such a system of cooperation.

In reality, states in the global migration structure have more extensive ties to each other than a random group of individuals in a particular physical space witnessing an accident. As it has been pointed out in the institutional theories of global justice, there exists an elaborate global institutional order that is instated by world's powerful states (or rather by a small number of citizens in a small number of states).[39] States actively engage with each other on international forums and deliberate on global issues such as the global economy, climate change, and humanitarian crises. Most states also have trade relations and diplomatic relations with each other, some of them have defensive pacts and open border agreements, many states have intertwined histories, and the very formation of all states is related at least to the circumstances and events in the surrounding states.

The requirement of collective organisation is dependent on the awareness that action rather than inaction is required, and the realisability of a restructured migration structure that would more effectively provide general protection for the right to asylum. There is, of course, a

[38] Held, Virginia 1970, 479.
[39] Pogge 2008, 118-121.

general global awareness of the fact that 'action rather than inaction' is called for in solving the refugee problem, and the question is mainly about the political will to engage in action. We only need to look at the statistical data on forcibly displaced in support of the fact that the refugee problem is a humanitarian crisis that requires urgent action. In 2008 there were altogether around 42 million forcibly displaced individuals worldwide. This category of forcibly displaced includes not only those under the standard definition of a refugee who may or may not already enjoy a sufficient protection of (3), but also those who have been uprooted due to a shortage or lack of clean water, food, sanitation, shelter, health care and protection from violence and abuse.[40]

Simultaneously, there was an estimate of 1.2 billion people living in countries the UN identifies as 'more developed'. These countries comprise of European and North American countries, Australia, New Zealand, and Japan.[41] A comparison to Human Development Index (HDI), which apart from per capita GDP takes into consideration also life-expectancy and education, shows that on the list of countries with 'very high human development' the first 20 are also on the UN list of more developed countries.[42] If all the individuals that the UNHCR currently recognises as 'forcibly displaced' were provided asylum in one of the more developed countries, this would increase the total population in these countries by 3.5%. Even if in the current political climate it is unfeasible that all the forcibly displaced would be provided asylum in a more developed country, this figure is altogether low in relation to the level of human development in these countries as well as to the fundamental nature of the interest in having an access to asylum.[43] This conclusion is strengthened by the projected population growth in the more developed countries. The projected population growth between 2008-2050 in the more developed countries is +5%, while in the 'least developed countries' that in 2008 had total population of 797 million the projected growth is +109%.

Governments are also well aware that the burden in securing the right to asylum is distributed in an unfair way between states. A short review of statistics gives strong evidence of the fact

[40] UNHRC, Global Trends 2008, 3. http://www.unhcr.org/4a375c426.html.
[41] Population Reference Bureau, World Population Data Sheet 2008, 7, 15. http://www.prb.org/pdf08/08WPDS_Eng.pdf.
[42] Human Development Report 2007/2008, 229. http://hdr.undp.org/en/media/HDR_20072008_EN_Indicator_tables.pdf.
[43] The conclusion is also strengthened by a short examination of spending priorities in the more developed countries. As it was reported by New York Times in September 28, 1998, Americans spend an average of $8 billion in a year to cosmetics, Europeans spend $11 billion a year on ice cream, and Americans and Europeans together spend $17 billion a year on pet food. These may be reasonably argued to be part of satisfaction of non-fundamental needs of members, and they currently override the satisfaction of non-members' fundamental needs.

that the distribution of burdens is extremely disproportionate. According to UNHCR, at the end of 2008, developing countries hosted four fifths of world's refugees. In total, this constitutes 8.4 million refugees, of which the 49 least developed countries provided asylum to 18 per cent.[44] Pakistan hosted the largest number of refugees in relation to its economic capacity, 733 refugees per 1$ GDP (PPP) per capita. The Democratic Republic of the Congo was second with 496 refugees per 1 USDGDP (PPP) per capita, followed by the United Republic of Tanzania (262), the Syrian Arab Republic (257), and Chad (230). The developing countries bear most of the burden in protecting the right to asylum, and the developed countries with far higher general levels of well-being remain visibly absent from the list of first 25 countries that in relation to their economic capacities accommodate refugees. The first developed country on the list is Germany on the 26th place with 16 refugees per 1$ GDP (PPP) per capita.[45]

The disproportionate burden-sharing and the ineffectiveness of the efforts to secure the right to asylum to all whose (2) has been non-fulfilled or violated suggests that there is a duty on states to restructure the migration structure. The lack of political will to act does not in itself constitute a sufficient reason to discharge states of their duty to organise themselves collectively and act jointly towards securing the right to asylum. But the questions of allocation of responsibility and the form of restructuring still remain. How should the global migration structure be restructured in order for it to include mechanisms that more effective protect the right to asylum and allocate responsibility between states more justly? The first step towards a more just global migration framework would be the expansion of the definition of refugee to include non-agent related indirect agent-related deprivations that constitute forced displacement. The second step would be to transfer the design of the refugee status determination process and its oversight under the control of a supranational organisation such the UNHCR. This would create a common standard of evaluating the merits of asylum claims and reduce insidious judgments. Thirdly, by strengthening supranational institutions of accountability such as the ICC, the final burden of protecting the right to asylum would be allocated in a more just way.

The final step would be the abandonment of the *non-refoulement* principle and the implementation of a collective system of asylum protection that recognises requirements of burden-sharing. This would entail the reduction of incentives to engage in *non-entrée* policies,

[44] UNHCR, Global Trends 2008, 7. http://www.unhcr.org/4a375c426.html.
[45] UNHCR, Global Trends 2008, 2. http://www.unhcr.org/4a375c426.html.

as the first-asylum states would not necessarily be the final states where the asylum is eventually provided. Although the final form of the joint response to protect the right to asylum is left open here, there are many different proposals to consider. The joint response may, for example, consist of monetary compensations to the states hosting a disproportionate number of refugees, proportionate physical distribution of refugees, or proportionate quota system which allows states to participate in trading of refugees.[46] Each of these proposals has their own ethical issues, and their desirability needs to be evaluated relative to each other.[47] Nevertheless, each of these constitute a step towards complying with the duty to organise an effective and proportionate institutional structure for the protection of (3), as well as a step away from a global migration structure that dreadfully fails both the refugees who lack sufficient protection of (3) and the developing countries that bear an excessive relative burden in accommodating refugees.

6. Conclusion

In the current paper, I have outlined a moral right to asylum and examined the sources that impose states duties to protect it. I have claimed that the right to asylum is a fundamental right, and the aim is to provide its protection to all individuals regardless of their communities of origin. The liability model imposes responsibilities to protect the right to asylum in cases where agents have not complied with the duty to not to harm. I have argued that if the liability model were the sole source of duty, the right to asylum would be a weak right. The second source of duty that entails a responsibility to protect the right to asylum is the capacity to do so. I have argued that when the physical security and the basic opportunities of citizens are not threatened, states have a duty to protect the right to asylum for non-members. Finally, I have contended that states have a collective responsibility towards restructuring the global migration structure in such a way that it promotes effective response and burden-sharing. This conclusion suggests a need to move away from the current institutional practices of separated responsibility of *non-refoulement*, and towards a system where initial refugee quotas are assigned to states in accordance with more objective standards of evaluation.

[46] An argument for the second type of solution has been outlined in Hathaway & Neve 1970, and for the third type of a solution in Schuck 1997.
[47] For a comparative normative enquiry on these proposals, see Gibney 2007, 68-75.

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