The Ethics of Migration Policy Dilemmas

Refugee Containment and the Costs of Creating False Dilemmas. A Response to Aleinikoff and Owen (2022)

Cathryn Costello and Ashwini Vasanthakumar

Cathryn Costello is Professor of Fundamental Rights and Co-Director of the Centre for Fundamental Rights at the Hertie School, Berlin & Andrew W. Mellon Professor of Refugee and Migration Law at the Refugee Studies Centre, Universty of Oxford. She is the Principal Investigator of ERC Grant RefMig, Grant Agreement 716968, which supported work on this article. Her research spans all aspects of international refugee and migration law, and the intesections of labour and migration governance.

Ashwini Vasanthakumar is Associate Professor and Queen's National Scholar in Legal & Political Philosophy at Queen's Law School, Canada, and a 2021-2022 Visiting Fellow at the Centre for Fundamental Rights at Hertie School, Berlin. Her research examines border control, transnational politics, and the ethics of oppression.

In their paper, Alex Aleinikoff and David Owen (2022) (the authors) frame as a 'genuine ethical dilemma' for 'conscientious policy makers in the Global North' whether to devote 'resources' to refugee protection in their territory or 'in the Global South'. The authors critique Betts and Collier (2017), and we share those criticisms. We also agree with much of the authors' prior scholarship, in particular on refugee mobility (Owen 2019; Aleinikoff & Zamore 2019).

While we we agree with many of the conclusions in this piece, we argue these conclusions do not go far enough. We argue in particular that accepting that there is a 'genuine ethical dilemma' in this context concedes too much ground to the status quo. We open with some observations about the problems this framing entails, and question whether a Global North / Global South heuristic is really useful when discussing obligations to refugees. We suggest instead that focusing on the costs and harms of containment, and denaturalizing the distinction between 'here' and 'there,' is an important element of improving refugee protection everywhere.

Genuine dilemmas and hard choices

The authors frame their analysis as addressing the 'genuine ethical dilemma' confronting the 'conscientious policymaker' in two scenarios: a realistic utopia and a non-ideal world

characterised by widespread non-compliance. Yet, they do not define an ethical dilemma. Typically, an ethical dilemma arises when the actions required by two ethical principles conflict, and it is uncertain which principle prevails. Refugee protection may well throw up ethical dilemmas, but whether or not a choice is, in fact, a dilemma is not obvious, and the authors do not tell us why the choice between protection 'there' or 'here' is a dilemma.

Framing a choice as a dilemma has two important implications. First, it seems to legitimate granting discretion to the policymaker; after all, if there truly is a dilemma, there is in principle no single right action to take. And second, framing a choice as a dilemma masks the extent to which the range of policy options results from prior deliberate decision-making. In this case, we suggest that the apparent choice results from extensive and long-standing efforts to contain refugees elsewhere.

Not every hard choice, or choice made under conditions of epistemic uncertainty, is a dilemma. The appropriate response to epistemic uncertainty is to pursue better information and decision-making mechanisms[1] —and not rest on speculative assertions about how well physical proximity tracks refugees' cultural and social affinities or their abilities to contribute politically to the home country ([Vasanthakumar 2021](#)). In short, framing the choice between protection 'here' or 'there' as a 'genuine ethical dilemma' without justification is question-begging, risks enabling arbitrary rather than evidence-based policymaking, and obfuscates the extent to which apparent dilemmas are in fact the result of prior policy choice.

We appreciate that this framing arises in part because the authors are contributing to a debate on migration policy dilemmas, and we agree that it is important to recognize the 'existence of competing moral goals' (Bauböck, Mourão Permoser and Ruhs 2022). However, by uncritically accepting the premise that protection 'here' or 'there' is a 'genuine ethical dilemma,' the authors cede too much ground. We concur with the authors' ultimate conclusion calling for a mix of protection 'here' and 'there,' but we question the very dichotomy between 'here' and 'there.' In particular, we highlight the refugee containment practices that are necessary to create the apparent choice between protection 'here' or 'there.' The extensive harms these practices inflict call into question the moral permissibility of the choice between 'here' and 'there'; the futility of such containment efforts in keeping refugees 'there' undermines the practical utility of this choice to policymakers. Instead of taking as a given that protection 'here' or 'there' is a choice (much less a genuine ethical dilemma) in either the 'realistic utopia' or 'real world,' we suggest key aspects of policies and practices that ought to be on the table of any serious reform discussion, among policymakers and scholars alike.

Understanding the maldistribution of refugees

The article is framed around protection 'here' and 'there', the Global North and Global South. The article's empirical starting point is the statistic that 'The proportion of refugees hosted in the Global South has increased from 75% to 85% over the past decade or so',

---

[1] For example, the Global Action Platform on Forced Displacement proposed by Aleinikoff and Zamore might be able to aid in decision-making tailored to particular displaced populations and contexts ([Aleinikoff and Zamore 2019](#), at 120-122).

not least because of the conscious efforts made by states of the Global North to prevent refugees arriving at their borders (Fitzgerald, 2019).

This oft-repeated statistic serves an important moral function, reminding citizens of wealthy states that most refugees are far away, and that the states offering the most protection are poor. However, the contemporary distribution in the official statistics reveals that Europe is a key region for providing refugee protection. According to the UNHCR, out of a total of 24.5 million people displaced across borders (refugees, people in refugee-like situations and Venezuelans displaced abroad) at the end of 2020, around 6.8 million (28%) were protected in Europe, more than in any other UNHCR region. Over half of these, 3.7 million, were in Turkey alone. In comparison, the UNHCR regions of Africa and the Americas hosted around 6.5 million and 4.6 million refugees respectively (UNHCR 2020)[2]. Considering that EU member states now host around 4 of the 5 million people so far displaced externally by Russia's 2022 invasion of Ukraine, Europe's importance as a refugee-hosting region only seems to grow.

It is also worth considering the underlying counting mechanisms and demographic patterns more carefully. Many of the 'refugees' counted in the global statistics are born into exile; sometimes their parents or grandparents fled decades ago. Thus, the number of Afghan refugees in, say, Iran and Pakistan grows generation by generation, while those Afghans who seek protection in Europe may not be recognised as refugees, but often still stay for the long-term under tolerated status. The numbers of Afghan refugees in the 'Global South' swells, while Afghans seeking protection in Europe are invisibilised. We suggest that a more contextualised analysis of the number of people who have fled, sought, and enjoyed protection (including ad hoc and temporary protection) paints a very different picture: even more than the official statistics would suggest, European states accommodate a large proportion of the people fleeing conflict and persecution.

How do these empirical facts alter our understanding of the debate on protection 'here' or 'there'? In our view, they require us to pause and recalibrate any worldview that uses this dichotomy as a basic heuristic to understand the global refugee regime. In this section, we offer some empirical, political, and ethical correctives to this heuristic.

Empirically, we suggest that this dichotomy cannot account for Europe's role in refugee protection as described above. Irrespective of the many restrictions on mobility that states employ to prevent people from fleeing, refugees will arrive at Europe's borders given its geographical location. It is, after all, a small peninsula protruding to the north of Africa and the west of Asia. The authors assume that there is no real ethical choice for conscientious policymakers in the Global South but to admit refugees onto their territory' when refugees flee from states that are 'proximate'. But, legally and practically, we would contend that also applies for European states. Indeed, all states are obliged not to refoule (Costello & Foster 2016).

If the 'Global North' frame suggests that states can effectively keep refugees away, then it scarcely fits the reality of European states, notwithstanding their attempts to do so. If 'Global North' connotes mainly the US, Canada, Australia, New Zealand and perhaps the United Kingdom, what is the utility of the term? Should we not name and shame these

---

[2] See Appendix for a detailed breakdown.

states that devise and share policies that undermine protection for the other 190 states in the world? The 'Global North' heuristic seems to play some role in enabling these states to normalise and legitimate their worst practices. Indeed, as we write, Australia's abhorrent offshore practices are being mimicked in grotesque fashion by the United Kingdom and Denmark. However, in both these cases, legal constraints make it doubtful whether these policies will ever go beyond spectacle. It is difficult to envisage courts in either the UK or Denmark accepting Rwanda as a 'safe third country' (see generally Freier, Karageorgiuo and Ogg 2021).

Moreover, as the authors acknowledge, 'here' and 'there' also belies the fact that refugees do not flee equally into all proximate states in the Global South. Rather, they follow well-worn migratory and historical paths, assessed in light of contemporary protection opportunities. Most of all, as the authors are well aware, the decision to flee immediately to a neighbouring country, or stay in the nearest states, is significantly dictated by the barriers to refugee flight that states in the Global North have erected. In the world of visas and carrier sanctions, there is, as Fitzgerald (2019) characterises it, a moat and dome preventing many protection seekers from using regular, safe means of travel (planes and ferries). This does not mean refugees don't come. On the contrary. It is at least arguable that irregular refugee arrivals tend to be en masse when containment backfires, as the best explanations of Europe's 2015 'refugee crisis' would suggest.

The harms and costs of containment

The authors offer us good reasons to reconsider policy prescriptions that seem to allow rich states to choose to protect refugees 'there' rather than 'here'. But perhaps the greatest harm of setting up the discussion as a dilemma is that it seems to obscure the harms of containment, in that it does not examine the policies that prevent refugees from moving to seek protection, the costs they entail and the harms they inflict. This is not to suggest that all refugees would move if they could, but rather that discussing whether to protect 'there' or 'here' seems to imagine some fungibility in refugee protection. Supporting those in need with humanitarian and development assistance (refugees and local communities) reflects one distinct set of duties on rich states. Those duties exists independently of duties to enable and encourage all states to protect refugees.

Refugee containment is the defining feature of the global refugee regime in the late 20th and early 21st centuries. Containment practices are built around the system of visas and carrier sanctions. Visa policies distribute mobility opportunities unequally, often bearing down particularly heavily on those seeking protection (de Haas et al 2019; Czaika, de Haas, and Villares-Varela 2018), sometimes deflecting them into irregular routes and statuses (Czaika and Hobolth 2016). A longer view of refugee protection in the era before containment became normalised reveals a very different picture, with refugees often permitted and enabled to migrate onwards. Carrier sanctions prevent those without visas from travelling safely, and are also of relatively recent origin (Baird & Spijkerboer 2019). Indeed, it is notable that when first adopted, UNHCR argued strongly and cogently that carrier sanctions were illegal, as powerfully articulated by Erica Feller (1989). While carrier sanctions are the keystone in the edifice of refugee containment, they get relatively little attention in ethical or policy discussions, and are barely mentioned in the Compacts, for

example (Costello 2018).

With visas and carrier sanctions in place, refugees journeying beyond the (few) neighbouring states open to them are frequently illegalised. Framing refugees as 'illegal immigrants' is no mere rhetoric and leads to a cascade of human rights violations (Costello 2020; Costello and Mann 2020; Vasanthakumar 2018). Those states that wish to shirk their legal obligations to refugees focus their activities on combatting illegal immigration by means of policing and militarising their borders. Thereafter, depending on political vicissitudes, further fortification, surveillance and militarisation of borders appears legitimate. The vast sums spent on containment and bordering practices do not feature in the authors' discussion, although this must surely be part of the debate about where resources should flow in a fair global refugee regime. Moreover, while these policies have profound impacts and harm refugees, they do not actually contain refugees.

Improving refugee protection everywhere?

In spite of our qualms about the framing of the piece, we agree with the authors that 'any cogent scheme of refugee protection should involve a much greater mix of refugee protection "here and there" than is currently available. Notably, the dilemma the authors stipulate at the outset is one they ultimately dissolve. Even so, we suggest that their prescriptions are underwhelming in light of the harmful nature of containment practices they largely seem to take as a given, and for which their suggestions of enabling refugees to access labour migration programmes or encouraging inclusion at the municipal level do not provide sufficient remedy.

Before our eyes, we see in the EU's reaction to the millions who have fled Ukraine since the Russian invasion a refugee response based on mobility, agency and work rights. By happenstance, Ukrainians have not needed visas to enter the EU since 2017. With the Russian invasion, the EU decided to further enable their mobility, in effect according them temporary legal status and permitting them to move onwards to choose their own place of refuge. Their status accords them immediate access to work and social rights. It appears that, at least for now, the system of self-allocation is working, and does not require formal responsibility-sharing mechanisms.

This example demonstrates that practices deemed completely unrealistic when the EU faced mass arrivals from Syria are now in place, and apparently working. One day's 'realistic constraints' that shape policy prescriptions and debate evaporate the next. To be clear, temporary protection is not a panacea: its temporariness means that decisions on stay or return will have to be made in a short three years. But it forestalls the need to make individual and costly individualised asylum determinations, and affords agency and dignity during the waiting period. While its application in this particular legal form is novel for the EU, the general practice of making swift mass protection decisions is not. Such system are a longstanding feature of the global refugee regime, protecting Syrians in Turkey, for example, Venezualans in Colombia, and most refugees in Africa.

We know that states' responses to refugees depend on local and global political interests, resulting in discriminatory practices (Abdelaatay 2021). In a world where all states have ethical and legal obligations towards refugees, the role of law should be to assist to level

up and generalize good practices. We know from the most convincing scholarship that international human rights commitments depend on domestication for their efficacy, which in turn depends on civil society and transnational alliances (Sikkink 2017). Given these insights, it would be more fruitful to focus on engaging in and supporting the sorts of activism, alliances and institutions that support refugee rights in all states, rather than dividing the globe in a way that enables the richest states to shirk their obligations. Shirking mechanisms are often of recent provenance and should be directly confronted, rather than assumed as necessary features of a realistic worldview.

Acknowledgements

References

Abdelaaty, Lamis E. 2021. Discrimination and Delegation: Explaining State Responses to Refugees. Oxford: Oxford University Press.

Aleinikoff, T. Alexander and Leah Zamore. 2019. The Arc of Protection: Reforming the International Refugee Regime. Stanford: Stanford University Press.

Aleinikoff, T. Alexander and David Owen. 2022. "Refugee Protection: 'Here' or 'there'?" Migration Studies, mnac002, pp. 1-20.

Bauböck, Rainer, Julia Mourão Permoser and Martin Ruhs. 2022. The Ethics of Migration Policy Dilemmas. Unpublished Manuscript.

Betts, Alexander and Paul Collier. 2017. Refuge: Rethinking Refugee Policy in a Changing World. Oxford: Oxford University Press.

Baird, Theodore and Thomas Spijkerboer. 2019. "Carrier Sanctions and the Conflicting Legal Obligations of Carriers: Addressing Human Rights Leakage", Amsterdam Law Forum, Vol. 11, No. 11, pp. 4–19.

Costello, Cathryn. 2018. "Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?", International Journal of Refugee Law, Vol. 30, No. 4, pp. 643–649.

Costello, Cathryn. 2020. "Overcoming Refugee Containment and Crisis", German Law Journal, Vol. 21, No. 1, pp. 17–22.

Costello, Cathryn and Michelle Foster. 2016. "Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test." In Maarten den Heijer and Harmen van der Wilt (eds.), Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?, pp. 273–327. The Hague: T.M.C. Asser Press.

Costello, Cathryn and Itamar Mann. 2020. "Border Justice: Migration and Accountability for Human Rights Violations", German Law Journal, Vol. 21, No. 3, pp. 311–334.

Czaika, Mathias and Mogens Hobolth. 2016. "Do restrictive asylum and visa policies increase irregular migration into Europe?", European Union Politics, Vol. 17, No. 3, pp. 345–365.

Czaika, Mathias, Hein de Haas, and María Villares-Varela. 2018. "The Global Evolution of Travel Visa Regimes", Population and Development Review, Vol. 44, No. 3, pp. 589–622.

de Haas, Hein et al. 2019. "International Migration: Trends, Determinants, and Policy Effects", Population and Development Review, Vol. 45, No. 4, pp. 885–922.

Feller, Erika. 1989. "Carrier sanctions and international law", International Journal of Refugee Law, Vol. 1, No. 1, pp. 48-66.

FitzGerald, David. S. 2019. Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers. Oxford: Oxford University Press.

Freier, Luisa Feline, Eleni Karageorgiou, and Kate Ogg. 2021. "The Evolution of Safe Third Country Law and Practice." In Cathryn Costello, Michelle Foster, and Jane McAdam (eds.), The Oxford Handbook of International Refugee Law, pp. 518-534. Oxford: Oxford University Press.

Owen, David. 2019. "Refugees, EU Citizenship and the Common European Asylum System: A Normative Dilemma for EU Integration", Ethical Theory and Moral Practice, Vol. 22, No. 2, pp. 347–369.

Sikkink, Kathryn. 2017. Evidence for Hope: Making Human Rights Work in the 21st Century. Princeton: Princeton University Press.

UNHCR. 2020. Global Trends: Forced Displacement in 2020.

Vasanthakumar, Ashwini. 2018. "Privatising Border Control", Oxford Journal of Legal Studies, Vol 38, No. 3, pp. 411-429.

Appendix: Breakdown of Refugees, people in refugee-like situations and Venezuelans displaced abroad, by UNHCR Regions. UNHCR Global Trends 2020, page 15.

Table 1 | Refugees, people in refugee-like situations and Venezuelans displaced abroad, by UNHCR regions | 2020

UNHCR regions	Start-2020				End-2020				Change (total)	
	Refugees	People in refugee-like situations	Venezuelans displaced abroad	Total	Refugees	People in refugee-like situations	Venezuelans displaced abroad	Total	Absolute	%
- East and Horn of Africa and Great Lakes	4,388,700	-	-	4,388,700	4,511,500	-	-	4,511,500	122,800	3%
- Southern Africa	744,400	-	-	744,400	720,400	-	-	720,400	- 24,000	-3%
- West and Central Africa	1,204,700	-	-	1,204,700	1,353,500	-	-	1,353,500	148,800	12%
Total Africa*	6,337,800	-	-	6,337,800	6,585,400	-	-	6,585,400	247,600	4%
Americas	592,900	108,800	3,582,200	4,283,900	650,300	108,800	3,856,300	4,615,400	331,500	8%
Asia and Pacific	4,114,400	48,700	-	4,163,100	3,968,400	48,000	-	4,016,400	-146,700	-4%
Europe	6,543,500	27,000	-	6,570,500	6,671,900	105,300	-	6,777,200	206,700	3%
Middle East and North Africa	2,602,400	40,300	-	2,642,700	2,483,500	26,000	-	2,509,500	- 133,200	-5%
Total	20,191,000	224,800	3,582,200	23,998,000	20,359,600	288,100	3,856,300	24,504,000	506,000	2%

About the "Dilemmas" project

This commentary contributes to the ‘Dilemmas’ project at the EUI's Migration Policy Centre. Dilemmas analyses and debates fundamental ethical dilemmas in policy-making on migration and refugee protection.

Sugggested citation

Costello, C., Vasanthakumar, A. (2022) 'Refugee Containment and the Costs of Creating False Dilemmas. A Response to Aleinikoff and Owen (2022)', Commentary for 'The Ethics of Migration Policy Dilemmas' project, Migration Policy Centre (MPC), European University

Migration Policy Centre

The Migration Policy Centre (MPC) at the European University Institute (EUI) conducts advanced research on the transnational governance of international migration, asylum and mobility. It provides new ideas, rigorous evidence and critical thinking to inform major European and global policy debates.

Contacts

Website: https://www.migrationpolicycentre.eu/

Twitter: @MPC_EUI

Facebook: Migration Policy Centre

E-mail: migration@eui.eu

Address: Convento di San Domenico
Via delle Fontanelle 19

I-50014 San Domenico di Fiesole (FI)