

A 'basket of goods approach' as an alternative to strict legal distinctions between migrants and refugees

Stefan Schlegel

This is a pre-print of a book chapter that will be published in:

Rainer Bauböck, Christoph Reinprecht, Wiebke Sievers (eds.): *Flucht und Asyl – internationale und österreichische Perspektiven*. Vienna: Austrian Academy of Sciences Press.

Please note that the present text may still change until the completion of the publication.

A ‘basket of goods approach’ as an alternative to strict legal distinctions between migrants and refugees

Stefan Schlegel¹

1. Introduction

A lot of the normative literature on the duty to protect refugees sets out from the assumption that refugees’ reasons to migrate are qualitatively distinct from other migrants’ reasons and that it is possible, with reasonable certainty, to assess which individual falls within which group. In this article, I attempt to show that not only is it impossible to pin down a qualitative difference between refugees (under the current legal definition or under any other proposed definition) and other involuntary migrants, it is also impossible to distinguish between political, economic and environmental causes for migration. In addition to that, it is impossible to draw a clear line between involuntary and voluntary migration. While migration law might be condemned to rely on trigger points beyond which people are included in a category of special protection, the normative debate about where to locate this point would improve if it set out from the consensus that it necessarily remains a fictitious point. Once this is acknowledged, the normative debate on involuntary migration can be redirected towards procedures that assess the voluntariness of individual migration decisions and the need for protection in individual cases on a gradual spectrum. I argue that a central criterion in this procedure should be the relative value that the good “control over one’s own migration” has in the basket of goods of potential refugees. The higher they value this good, the stronger their claim to be included in a special status of protection.

To develop this argument, it is helpful to think of the right to decide over a given person’s migration to a given place as a property right. Property rights are defined as the exclusive control over a valuable resource or aspects of it (see Posner 2011, 39). Migration, in this view, is a resource. The right to decide over a given person’s migration, therefore, is a valuable asset, which can be in the hands of a state or the individual concerned or could theoretically be in the hands of some third agent (see Schlegel 2017, 111-12). If you happen to hold the right to decide

¹ Stefan Schlegel is senior researcher at the department for public law at the University of Berne. His research interests include Human Rights Law, Constitutional Law and International Law. Research for this article has been enabled by a Fellowship at the Max Planck Institute for the Study of Religious and Ethnic Diversity in Göttingen, Germany.

on your own migration, you are better off than if you do not. To have control over that resource is a precondition for a whole spectrum of economically interesting activities and – more important in many contexts – a precondition to save your life and liberty. It is therefore of significant value and if it were available in a market, people would pay substantial sums of money for it. A central task of immigration law is to allocate this asset to one of the agents who are competing for it. It is normally allocated to the receiving country so that it legally wields the control over immigration. This general rule is punctuated by quantitatively important exceptions. The clearest and most paradigmatic exceptions are systems of free movement of persons as they were established most importantly within the EU and with some of its neighbours and as they are becoming more prevalent throughout the world. In these cases, the control over the good “migration of person X to state A” has been transferred from state A to person X. Another important exception to the rule, where the good of access to another country (or at least important aspects of this bundle of rights)² is allocated to migrants rather than to states, is the realm of the 1951 Refugee Convention and its additional protocol of 1967 (see Schlegel 2018, 120-21). Refugees hold a “trump card on migration control” in the sense that they control important aspects of their migration (Gammeltoft-Hansen/Hathaway 2015, 237). The case of refugees, therefore, constitutes an instructive exception to the common allocation of the property right over migration. In what follows, I try to show the value of a property rights approach for answering the question which individuals within the larger group of migrants should be included in a status of special protection.

The problem at the outset is the conception of refugees and migrants as two clearly distinguishable groups of people and the goal, explicitly stated by policymakers at the UN-Level that “managed migration systems should [...] be based on a clear distinction between the different categories of persons” – their notion of “mixed migration flows” and the request to “protect refugees within the broader migration movements” (Schuster 2016, 300). The Global Compact for Safe, Orderly and Regular Migration of 2018 echoes this view when it states:

² To conceive of the control over someone’s migration as a bundle of rights might seem far-fetched. However, if we conceive of the control over someone’s migration as an asset, it is hard to argue that it cannot be subdivided into different aspects, some of which may then be allocated to the bundle of rights of one agent and some to the bundle of another agent. For instance, the control over entering a country and the control over remaining in this country are two aspects of the larger asset of control over migration. As is the case in refugee law, one of these rights is allocated to a refugee (the control over remaining in the territory), the other to the receiving state (the control over entering the country). This argument draws on the observation that citizenship is “a particularly complex type of property-like entitlement” (Shachar 2009, 30). If citizenship can usefully be analyzed as a property-like entitlement then the same should be true for less well-entrenched statuses towards a state, like the statuses – or bundles of rights – of migrants and of the refugees among them.

“migrants and refugees are distinct groups governed by separate legal frameworks.”³ These formulations sustain the position, dominant in political theory, that refugees are a normatively distinct group (see Lister 2013, 654; Miller 2016, 78; Ott 2016, 15) and hence that there must be a bright line or a “morally relevant line” (Miller 2016, 82) that runs between those who fall into the group of migrants and those who fall into the group of refugees, wherever this line may be drawn exactly (see Ramji-Nogales 2017, 8-10; Crawley/Skleparis 2017, 50). This might serve to legitimize some migrants that need protection particularly desperately but also to delegitimize others (see Scheel/Ratfisch 2013, 390).

In the remainder of this article, the next section locates the problem of bright lines in the nature of the refugee status as a right (rather than a privilege). The following section unpacks the problem and demonstrates that it is not just one, but several spectrums through which an arbitrary line has to be drawn when delimiting the extent of the status of special protection. The final section addresses possible remedies among which I identify the basket of goods as the most promising one.

2. The impossibility of avoiding clear lines

The problem of fictitious bright lines concerns the very structure of *rights*. Individual rights are consequences granted under certain conditions and these conditions are either fulfilled or not. Or rather, there has to be some sort of procedure, some authoritative instance that ultimately decides whether these conditions are fulfilled and therefore whether the consequences apply or do not (see Honsell/Mayer-Maly 2017, 57-58). The alternative is to grant no rights and only provide for the possibility to extend some sort of protection. This would be a humanitarian or merit-based conception of asylum – protection granted discretionarily on the basis of generosity, a sense of sympathy or special merit of some of those seeking protection (see e.g. for the reception of Hungarian refugees in Western Europe after 1956 Piguet 2013, 74).

As soon as there is a *right* to protection, the conditions under which this right applies can be improved, enlarged, made more generous, but there is no escape from the need for conditions and therefore no escape from the fiction of clear lines. Both these conditions and the procedure to verify whether they are fulfilled are necessarily arbitrary in the sense that at the fringes the line could always be drawn somewhat differently (see Gibney 2018, 2). It is never possible to

³ United Nations General Assembly resolution 73/195, Global Compact for Safe, Orderly and Regular Migration, 19 December 2018, Preamble, n. 4.

convincingly argue that the line between those who are protected and those who are not has to be drawn at this exact point on the spectrum.

So in what follows, I am not so much concerned with the question of whether the definition of who qualifies as a refugee is clear or generous enough. I am concerned with the problem of subsumption that occurs whenever a legal rule attaches certain consequences to certain conditions, no matter how accurately or widely or flexibly these conditions are formulated.

In the case of the UN Refugee Convention, the conditions and the consequence are somewhat dispersed (see Aleinikoff/Zamore 2018, 31). They are not part of one and the same article. The convention starts out with a definition of who qualifies as a refugee, thereby stating the conditions. The most central part of these conditions reads:

For the purposes of the present Convention, the term “refugee” shall apply to any person who:

(2) (...) 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; (...).⁴

The most important *consequence* of these conditions being fulfilled is then stated in art. 33 of the Convention:

Prohibition of expulsion or return (refoulement)

1. No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.⁵

People who fulfill the conditions have, as a consequence, a *de facto* right to remain⁶ as long as the above conditions remain fulfilled – a right of non-refoulement, not a right of entry. The

⁴ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art. 1 A.

⁵ Ibid. As the term “refugee” in art. 33 of the Convention clarifies, this specific non-refoulement exclusively applies to refugees in the sense of art. 1 of the Convention (with the exception of persons not deserving protection under its art. 1 F) (see Kälin et al. 2011, n. 112). Other sources of international law, notably the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, in its art. 3, provide more extensive protection against refoulement to individuals who face a real risk of being exposed to torture (see Nowak/McArthur 2008, 200). The European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) protects against refoulement to states where there is a “real risk” of being subjected to torture or to inhuman or degrading treatment or punishment (see Harris et al. 2018, 247).

⁶ Technically, non-refoulement does not amount to a right to remain since the deportation to “frontiers” other than those of the territories where there is a risk of persecution in the sense of the convention remains permissible. That, however, is a highly theoretical possibility outside of the context of areas of a common asylum policy as it has been established within the Schengen Area. The deportation of (rejected) asylum seekers or refugees to third countries remains very difficult – the special case of Australia and neighbouring micro-island states set aside.

bundle of rights that is transferred by the Refugee Convention does not contain a right legally to migrate. Under the Convention, “(...) migrants must already have moved in order to become eligible for the right to move” (Ramji-Nogales 2017, 9; see also Aleinikoff/Zamore 2018, 31). The fact that individuals obtain a right to remain, a right of non-refoulement, not a right of entry causes a lot of the distress in the context of involuntary migration. This is not the main concern of this paper but I will come back to it at the end when I discuss how a property rights-approach may help to restructure the bundle of rights of refugees.

3. Dimensions of uncertainty

The problem with the binary world of legal rules on migration rights is that though the lines are extremely clear in the realm of the consequences – e.g. to be or not to be protected from refoulement – the conditions are unclear. They provide no bright lines and this is so in at least six different dimensions:⁷

- The *first dimension* of uncertainty concerns the motives to migrate and the distinction between (at least) political, economic and environmental events that may have caused migration. Political events, as understood here, are much broader than persecutions for political opinions, as in art. 1 A of the Refugee Convention. All other motives of persecution under the Convention and all other events emanating from the political situation in the country of origin are part of political motives. The point here is the distinction of political motives from economic and environmental motives. Every refugee in the sense of the Convention has motives stemming from the political situation in her country of origin but not all the political motives for migration qualify a migrant as a refugee.
- *Second dimension*: within the scope of political reasons, it is unclear, which of the political events amount to persecution and which not – which emigrations are just

Israel's negotiations with several African states to take in rejected asylum seekers faltered (see Yaron 2018). The same is true for earlier attempts by Switzerland (see Ellermann 2008, 168). Where alleged refugees are transferred to contracting states within a common system for the allocation of the responsibility for refugee procedures (like the Dublin-System), the transferring state is not freed from the obligation to verify that the receiving state guarantees for non-refoulement as well (see for the more expansive guarantee of non-refoulement under the European Convention of Human Rights: European Court of Human Rights (Grand Chamber) 21 January 2011, Appl. no. 30696/09 (M.S.S. v. Belgium and Greece), no. 359-60). Under these qualifications, it may be said that refugees, once within the jurisdiction of a signatory state, factually hold a right to remain – at least within the area of a common asylum policy and at least as long as the risk of persecution persists and refugees do not commit crimes that amount to the possibility to exclude them from the status of refugees (art. 1 F, Refugee Convention).

⁷ Other dimensions could be added. For instance, there is a continuum between the five officially recognized reasons for prosecution in the convention and other reasons.

caused by a chilling, intimidating or hopeless political situation (see Nathwani 2000, 377)?

- *Third dimension:* if we accept that people will have a multitude of reasons to migrate (see Crawley/Skleparis 2017, 55), it is unclear, which of these reasons is the one that ultimately triggers the emigration.
- *Fourth dimension:* it is unclear where the line between forced and voluntary migration runs (see Nathwani 2000, 367; Crawley/Skleparis 2017, 50).
- *Fifth dimension:* It is also unclear when within his or her biography an individual migrant, faced with deteriorating conditions, crosses the line between voluntary and involuntary migration. Therefore, there is no bright line on the temporal axis either.
- *Sixth dimension:* it is unclear in which cases an individual migratory event needs to have a long and in which cases only a short migration vector. Did people who had no choice but to leave their country also have no choice but to come all the way here or would they have had the possibility to seek refuge closer to home? What within their bundles of reasons to migrate triggered their decision – if it was their decision – to come here?

In all these dimensions, we face a gradual reality through which legal practice has to cut a clear line.

3.1. Misleading maps

Let us zoom into the first dimension, the problem of determining whether reasons for a migratory event stem from political events. Under the Convention definition of a refugee, this specific bright line is less crucial than the line between persecution and other forms of pressure to emigrate (the second dimension of uncertainty in the above list). However, let us assume, for the sake of the argument, that the definition of who is a refugee would have been simplified along the lines of the 1936 definition of the Institut du Droit International⁸ and that political motives for emigration were therefore the crucial element that leads to an entitlement to special

⁸ In 1936, the Institut de Droit International drafted a definition of a refugee that renounced both on the otherwise crucial elements of persecution and of involuntariness and simply stated that a refugee is whoever left the territory of a state as a cause of political events in that territory (see Kimminich 1962, 22). The definition reads: “In the present resolutions the term ‘refugee’ refers to any individual which, due political events that occurred in the territory of the state of his former habitual residence has left said territory voluntarily or other and remains outside of said territory and has not obtained a new nationality and does not enjoy diplomatic protection of any other state”, (my translation). The original text in French reads: “Dans les présentes Résolutions, le terme ‘réfugié’ désigne tout individu qui, en raison d’événements politiques survenus sur le territoire de l’Etat dont il était ressortissant, a quitté volontairement ou non ce territoire ou en demeure éloigné, qui n’a acquis aucune nationalité nouvelle et ne jouit de la protection diplomatique d’aucun autre Etat.” (Institut du Droit International 1936).

protection. Even if we are unconvinced by this definition, the argument is helpful since other, more restrictive definitions, like the one of the 1951 Convention still imply that the reasons for emigration are political in the sense of this definition. So that hurdle has to be taken anyway. It is common to distinguish reasons for migration into economic, environmental and political reasons. If we were to map these reasons for each individual migratory event, we would do so in a triangle with those three reasons at its poles. There might be events that are almost exclusively triggered by either economic or environmental or political reasons. They would be mapped in the respective corner. Other events, where reasons are more mixed, would be mapped somewhere in the middle of the triangle. Even if we knew which of the reasons that triggered a migratory event were to be counted as political reasons, it remains entirely arbitrary where within the triangle the line is to be drawn between those individuals whose reasons to migrate are mainly political and those whose reasons are not. For those on the fringes even a small shift of the line between those who are and those who aren't protected makes a big difference. There are no compelling reasons why the line should be drawn exactly where it is (see Crawley/Skleparis 2017, 82).⁹ The same is true if we were to establish other special protection statuses, for, say, "climate refugees" (see e.g. Deen 2017). There would just be another line to be drawn and it would be even more difficult to find a convincing point on the spectrum to draw it.

In any case, such a map would suggest objectivity that does not exist. It is impossible to explain why a political reason is not an environmental or economic reason or vice versa. The question of where to map migratory events within the triangle is highly dependent on the theory used to explain global inequalities in wealth, development, good governance, etc. If those who have to do the mapping (those in charge of taking a decision) tend to explain global inequalities and vulnerabilities by a geographical hypothesis (in the sense of Acemoglu/Robinson 2013, 48-56), they will tend to find environmental reasons dominant and at the source of poverty and conflict. If the decision makers tend to rely on cultural theories, they will find little politics behind economic inequalities and explain them with cultural differences. If, on the other hand, they

⁹ This could be said of other lines that are drawn by legal norms, e.g. that the voting age is reached exactly at age 18 (and not a few months earlier or later) and that driving under the influence of alcohol is a felony from 0.5 per mill upwards. There are two important differences however. First, age limits are reached by anyone at a given time and alcohol-limits can be influenced by the drinker. The arbitrariness of the line drawn is therefore of a passing nature or behaviour can be influenced in order to respect the line. The line is much less just a fate than in the case of the determination of refugee status. Second, measuring whether these lines are crossed in individual cases (the subsumption) is trivial compared to the question whether a given person falls within a specific definition of refugee status.

lean towards institutional explanations, which doubt the importance of geographical or climatic effects on political and economic outcomes and dismiss the critical influence of cultural differences, then every driver of emigration has a causal link to political institutions. Political reasons, in this view, would always be identified as the ultimate trigger.

Is there a possibility to give an environmental explanation of the civil war in Syria? There has been a debate about the contribution of a drought – driven by climate change – in the accelerated movements to cities that might have helped to trigger the upheaval that led to armed conflict. I am not concerned with the question of whether this explanation is empirically convincing (it seems not to be in this specific case, see Selby et al. 2017), but with the fact that it is conceivable in principle that environmental reasons contribute decisively to the outbreak of armed conflict. Depending on how much weight the decision makers attribute to these aspects of the conflict, involuntary migrants would have to be mapped closer to the environmental corner of the triangle. But then the question would occur, why was a drought enough to displace a big number of people from the countryside to cities? Aren't the reasons behind such a lack of resilience economic? And aren't the explanations for this economic situation ultimately political?

It is futile to pin down the actual reason or a first link in the causal chain. The idea of a linear explanation is already too simplistic (see Boom 2018, 526). So such a triangular map is misleading in suggesting objectivity regarding the reasons to migrate that is not there. Still, the map is helpful to stress the problem that only gradual distinctions are possible.

3.2. Degrees of involuntariness

We can develop this map further into a three-dimensional space in which conditions of migration could be tentatively mapped: the motives for migration within the horizontal space of the two-dimensional triangle, the degree of (in)voluntariness on the vertical axis. The more involuntary a migratory event, the higher up it is placed on the vertical axis. We realize that migration law only allows for protection within a small part of the space thus mapped. It implies that necessity to migrate can only build up around the political pole of the triangle. It is only around this corner that migration law provides room for special protection. People who are forced to leave a country for reasons that are perceived as either environmental or economic fall outside the space in which legal protection can be granted.

In sum, we face two major problems when seeking to provide legal protection for those most in need: An over-reliance on political reasons rather than on a multitude of reasons, and a lack of objective criteria for determining which reasons can ultimately be traced back to political

conditions or more narrowly to persecution. How could the idea to treat access to migration as a good (and the control over this good as a property right), help to find remedies?

4. Remedies

The pre-Convention situation of discretionary political protection instead of legal protection is certainly not a solution for this state of affairs. Such political protection cannot possibly replace the individual right of non-refoulement and the procedural rights linked to this guarantee (see Feller 2005, 28). This would expose refugees to the goodwill and the sympathy of governments, instead of being protected by rights.

4.1. Partial remedies

One partial remedy is to stretch the notion of persecution (see Miller 2016, 79) (and thereby also the notion of political motives) to include the divorced women in Pakistan, the homosexuals from Jamaica or Uganda, Christian converts from Iran, Afghans fleeing blood feuds, Eritrean conscience objectors etc. This has been done to some degree in European countries (see Kälin 2011, 28). But there is a limit to this path. Think of the people displaced by an earthquake or by an expanding desert or by a complete lack of means of sustenance. It is not that these reasons are not political – they are in the sense that the shortfalls of political institutions are partly responsible for the vulnerability of these people – but it is beyond the possibilities of extensive interpretation to count this as persecution (see Carens 2013, 200; Boom 2018, 518).

Another partial remedy is to lower the cliff at the point in the spectrum, where the line is drawn. This ensures that an ultimately arbitrary decision has only a limited effect. This has happened in recent years as the status of subsidiary protected people has been improved in many European countries, Canada, Australia and New Zealand (see McAdam 2014, 209). Within the EU this has been achieved mainly through the new qualification directive of 2011, which in its chapter VII approximates the rights for beneficiaries of refugee status and subsidiary protection with the exception of the duration of residence permits and access to social welfare (see ECRE 2013). But preponderance of political reasons remains still in place and access to the good of “international mobility” or more precisely access to the good “right to remain” is still allocated in a problematic manner.

Understanding this access as a good that needs to be allocated to either the receiving state (who can then discretionarily decide whether to admit somebody or not) or to the individual in question might offer a better remedy to the problem.

4.2. The basket of goods as an assessment tool

The key idea that flows from the understanding of international mobility as a good is the concept of a basket of goods. It conceives of would-be-migrants as agents who try to compose a basket of goods that maximizes the satisfaction of their preferences within the restrictions of their budget. If their budget is enlarged, they may put goods in their basket that are useful to them but not quite as useful as goods that they have put in their basket previously. If their budget is restricted, they will have to cut out goods from their basket, starting with the goods with the lowest relative value to them and moving on to more and more important goods as their budget is further restricted, just keeping in their basket what is most important to them. The question is then up to what point individual migrants would keep the good ‘control over their own international mobility’ in their basket if their budget is further and further restricted. On what level of the pyramid of needs would they place it? Is it a nice-to-have-good, or a necessary-to-have-good? The higher the relative value they ascribe to the good ‘control over their own migration’, the better their claim to be included into a status of special protection. A series of conceptual difficulties around the normative question of whom to include in a status of special protection can be clarified with this metaphor.

4.3. Surrogates

In the legal and the normative debate on the protection of refugees, a lot of arguments revolve – explicitly or implicitly – around the problem of surrogate goods to international mobility. International mobility is understood as a surrogate to other goods that are depicted as preferable to mobility, much like butter is to margarine: protection by the country of origin, development aid, disaster relief, international intervention into warring or failed states and protection in the region (see Lister 2016, 48). Once outside the country of origin, the right to return becomes a possible surrogate to a right to stay. If understood as entitlements that can be demanded from a state or the international community, all of the above are conceivable surrogate goods to the control over ones’ own migration. A first issue that the basket of goods helps to sort out, therefore, is the question of the availability of *surrogate goods* – and whether they are “on offer” in a particular situation (Carens 2013, 202).

By emphasizing the growing relative value of control over ones' own international mobility as surrogate options become less available, the concept of the basket of goods lends support to theories that argue to extend special international protection to "fleers of necessity" (Aleinikoff/Zamore 2018; similar Nathwani 2000, 368), to people who have no choice but to migrate in order to have their human rights protected (see Miller 2016, 83), to theories that underline the lack of protection by a country of origin (see Shacknove 1985, 277), be this in the guise of lacking diplomatic protection, statelessness or de-facto-statelessness (see Owen 2016, 747). Unlike theories that emphasize the *motive* for emigration (like persecution) or the motives of state and non-state agents who deprive people of surrogates to emigration (see Lister 2016; Feller 2005, 28), the basket of goods focuses on the question of the relative value of the possibility to migrate, regardless of the reasons for the lack of alternatives.

Compared for instance to Miller's view, human rights, much like the element of persecution, do not play a special role other than that their violation typically impairs the availability of surrogate options to emigration. The key is a lack of alternatives to migration – independently of the responsibility of the country of origin. That lack of alternatives leads to a situation in which access to migration becomes not just a valuable, but an indispensable good for the individuals concerned.

4.4. Enhancing the agency of involuntary migrants

The question of whether surrogate goods are on offer in a specific situation and whether they are conceived as acceptable surrogates are separate questions. Answering the second of these questions by some representative of a receiving state inevitably contains an element of paternalism. It implies that state agents without detailed knowledge of a given biography and of local circumstances have a better grasp of alternative solutions than the migrant in question. The concept of a basket of goods moderates this paternalism by emphasizing consumer sovereignty. It assumes that the individual, whose basket of goods is at stake, is best placed to judge the relative value and quality of international mobility compared to other goods. Absent specific indicators of an impaired judgment by a given migrant, the receiving state would have to be very reluctant in imposing its own judgment over that of a migrant.

Like margarine can be a suboptimal surrogate to butter, butter can be a suboptimal surrogate to margarine, depending on the preferences of the individual in question. The same is true for international mobility and possible surrogates. Their relative value depends on two things: the alternative goods on offer *and* individual preferences. The basket of goods stresses the

importance of taking information and preferences of alleged refugees into account when assessing their claims. To take individual preferences into account is not to say that these preferences automatically lead to a positive decision. The decision maker within a receiving state has to ponder the question whether an objectified third person would probably have taken a similar decision. The technique of an objectified, reasonable third person is often used by judges in very different contexts. In the context of migration law, it would serve as a thinking tool that forces decision makers to imagine themselves in the shoes of the asylum seeker. It thereby emphasizes the freedom- and agency-enhancing effect of the control over ones' own international mobility and thereby the agency of the most marginalized and dependent group of people within the larger group of migrants (see Aleinikoff/Zamore 2018, 42).

4.5. Temporal Issues

Composing a basket of goods is done with a degree of foresight. It can be composed not only with the question in mind “what do I need today?”, but also with the question “what do I need tomorrow?” This entails the question “what surrogates will be available tomorrow?” If potential refugees believe it to be foreseeable that no surrogates to the control over international mobility will be available tomorrow – because they foresee their situation in a country of origin deteriorating with no practical remedy available, they would insist on the necessity to keep the control over their migration in their basket of goods today. Unlike theories that emphasize persecution or immediate threats to human rights or immediate necessity, the basket of goods does not require potential refugees to wait until their situation has deteriorated to a state of utmost vulnerability or victimhood or a complete lack of choice. It would be sufficient for them to demonstrate that such deterioration is the plausible scenario if emigration is not on offer as a surrogate good. The basket of commodity allows therefore extending special protection to migration as a legitimate form of adaptation, ahead of extreme deprivation, before emigration becomes the *only* conceivable remedy to their plight (see Twele 2016, 34). In a system in which access to a status of special protection remains a scarce good and people have to queue for it, the basket of goods approach would help to order the queue. Those who are deprived of surrogates to migration in the immediate future would be in the front of the queue; those who will likely face this deprivation in the slightly more distant future would be further in the back.

4.6. The choice of the destination

If the control over someone's migration (to any given place) is an asset, it follows that the control over migration to any specific place is a partial aspect of that larger good. If the good can be split and only one aspect of it can be put into or kept in a basket of goods, then control over the migration to different destinations are also surrogate goods to each other. The question which country should be responsible for the protection of a given migrant can then be approached from the question of which destination is of particular value to this given migrant. If this particular migrant had to renounce on the entry tickets to any country but one, which one would she have kept and how big is the difference in relative values between the most valuable and the second most valuable destinations for a particular migrant? In cases of a large difference in relative value, asylum seekers can then be identified as "particularity claimants" (in the sense of Miller 2016, 77). This is not to imply that migrants, as soon as they fall within the scope of entitlement to special protection, should be free to choose where to go. It is just to suggest that their valuation of alternative destinations should have some weight in the allocation of responsibility for their protection (see Owen 2016, 746).

4.7. Re-bundle the bundles of rights

The concept of the basket of goods may help to rethink the structure of the bundle of rights that is allocated to whoever qualifies as a refugee. The bundle of rights of refugees, as it is currently structured, contains no right to enter a country although it contains a (de facto) right to remain in the country or the area of a common asylum system. This absence of admission rights is responsible for many tragic clandestine journeys that end much too often fatally and for the fact that so many people in dire need of protection have no practical means to seek protection. Analyzing the possibility to decide over someone's migration as a good allows developing arguments on how the bundle of rights should be structured. In the case of refugees, there is consensus that the right to decide whether they may remain in a given country (non-refoulement) belongs into their bundle of rights (and not in the bundle of the state or any third agent). If that holds true, it is then difficult to refute that the right to enter a country is a precondition for the practical use of the right to remain. In cases where the right to remain has a high value even before spending time in a country and making country-specific investments it is therefore unconvincing that the right to enter is not in the same bundle of rights as the right to remain. This is as if the right to cultivate the land and the right to walk on the same land would be dispersed into two different bundles of rights. It significantly lowers the value of both sticks within their respective bundle (see Friedman 2000, 113).

5. Conclusion

The concept of a basket of goods does not take away gradualism and therefore the need to draw a line somewhere in a continuum, a process that is ultimately arbitrary (see Nathwani 2000, 367). But it would be just *one* line that we would have to draw, between voluntarily and involuntarily, between migration as a basic good and migration as a complementary good. The question that decision makers in individual cases would have to answer would only be that one: If I were in the shoes of this applicant, would the control over my own migration be a basic or a complementary good to me? This allows us to sidestep the impossible task of distinguishing political or environmental reasons for migrating from economic reasons, the impossible task to distinguish prosecution from other forms of political reasons for migration, the impossible task to identify the reason that ultimately triggered migration, etc. It reduces the number of fictitious bright lines to just one. What it can accomplish is all that we can hope to accomplish in the normative debate on involuntary migration. It can order the queue in a meaningful way: from those that rely most heavily on migration as a basic good to those for whom migration is still an important good but not one entirely without surrogates (see Lister 2013, 653). The question of how exactly to define refugeehood and where to draw the line between two allegedly different groups loses in importance. Instead, the question of how the circle of those who are included in a status of special protection can be gradually enlarged moves to the fore.

A refugee status thus designed could be combined with a status of subsidiary protection that is just marginally less entrenched than the refugee status. Whoever is found to value the good “control over their own migration” just marginally less than the beneficiaries of refugee status would benefit of this subsidiary status. And it may be combined with migration policies that recognize the freedom- and agency-enhancing effect of control over ones’ own migration for all potential migrants, no matter what their reasons for migrating and no matter what the degree of voluntariness of their movements. Such politics would seek for ways to gradually transfer this control to the individuals concerned. In sum, it would be a migration politics that is successful in identifying those most in need of international protection and granting them a right to protection without falling into the trap of searching for qualitative differences that are not there.

Bibliography

- Acemoglu, Daron/Robinson, James A. 2013: *Why Nations Fail. The Origins of Power, Prosperity, and Poverty*, London.
- Aleinikoff, T. Alexander/Zamore, Leah 2018: *The Arc of Protection. Toward a New International Refugee Regime*, New York.
- Boom, Christopher D. 2018: 'Beyond Persecution. A Moral Defence of Expanding Refugee Status', *International Journal of Refugee Law*, vol. 30, no. 3, 512–531.
- Carens, Joseph H. 2013: *The Ethics of Immigration*, Oxford.
- Crawley, Heaven/Skleparis, Dimitris 2017: 'Refugees, migrants, neither, both. Categorical fetishism and the politics of bounding in Europe's 'migration crisis'', *Journal of Ethnic and Migration Studies*, vol. 44, no. 1, 48–64.
- Deen, Thalif 2017: 'Should Environmental Refugees be Granted Asylum Status?', *Inter Press Service News Agency*, 29 November. Retrieved November 22, 2019, from http://www.ipsnews.net/2017/11/should-environmental-refugees-be-granted-asylum-status/?utm_source=rss&utm_medium=rss&utm_campaign=should-environmental-refugees-be-granted-asylum-status.
- ECRE 2013: 'ECRE Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011', Retrieved October 24, 2019 from <https://www.refworld.org/docid/551922ae4.html>.
- Ellermann, Antje 2008: 'The Limits of Unilateral Migration Control. Deportation and Inter-state Cooperation', *Government and Opposition*, vol. 43, no. 2, 168–189.
- Feller, Erika 2005: 'Refugees are not Migrants', *Refugee Survey Quarterly*, vol. 24, no. 4, 27–35.
- Friedman, David D. 2000: *Law's Order. What Economics Has to Do with Law and Why It Matters*, Princeton.
- Gammeltoft-Hansen, Thomas/Hathaway, James C. 2015: 'Non-Refoulement in a World of Cooperative Deterrence', *Columbia Review of Transnational Law*, vol. 53, 235–284.
- Gibney, Matthew J. 2018: 'The Ethics of Refugees', *Philosophy Compass*, vol. 13, no. 10, 1-9.
- Harris, David J./ O'Boyle, Michael/Bates, Ed/Buckley Carla, M. 2018: *Law of the European Convention on Human Rights*, Oxford.

- Honsell, Heinrich/Mayer-Maly, Theo 2017: *Rechtswissenschaft. Die Grundlagen des Rechts*. 7th ed. Bern, Baden-Baden, Wien.
- Institut du Droit International 1936: *Statut juridique des apatrides et des réfugiés*. Retrieved October 24, 2019 from http://www.idi-iil.org/app/uploads/2017/06/1936_bru_x_02_fr.pdf
- Kälin, Walter 2011: 'Wer verdient Schutz? Der Flüchtlingsbegriff im Lichte aktueller Herausforderungen', *Asyl*, vol. 11, Special issue, 27–32.
- Kälin, Walter/Caroni, Martina/Heim, Lukas 2011: 'Article 33, para. 1 1951 Convention', in Andreas Zimmermann (ed.): *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol. A Commentary*, Oxford, New York, 1327–1396.
- Kimminich, Otto 1962: *Der Internationale Rechtsstatus des Flüchtlings*, Köln et al..
- Lister, Matthew 2013: 'Who are Refugees?', *Law and Philosophy*, vol. 32, no. 5, 645–671.
- Lister, Matthew 2016: 'The Place of Persecution and Non-State Action in Refugee Protection', in: Alex Sager (ed.): *The Ethics and Politics of Immigration. Core Issues and Emerging Trends*, Lanham, 45–60.
- McAdam, Jane 2014: 'Human Rights and Forced Migration', in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (eds.): *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford, 203-214.
- Miller, David 2016: *Strangers in our Midst. The Political Philosophy of Immigration*, Cambridge, Mass.
- Nathwani, Niraj 2000: 'The Purpose of Asylum', *International Journal of Refugee Law*, vol. 12, no. 3, 354–379.
- Nowak, Manfred/McArthur, Elizabeth 2008: *The United Nations Convention against Torture. A Commentary*, Oxford.
- Ott, Konrad 2016: *Zuwanderung und Moral*, Stuttgart.
- Owen, David 2016: 'Refugees, economic migrants and weak cosmopolitanism', *Critical Review of International Social and Political Philosophy*, vol. 20, no. 6, 745–754.
- Piguat, Etienne 2013: *L'immigration en Suisse. Soixante ans d'Entrouverture*, 3rd ed, Lausanne.
- Posner, Richard A. 2011: *Economic Analysis of Law*, 8th ed, New York.
- Ramji-Nogales, Jaya 2017: 'Moving Beyond the Refugee Law Paradigm', *American Journal of International Law*, vol. 111, no. 1, 8–12.

- Scheel, Stephan/Ratfisch, Philipp 2013: 'Refugee Protection Meets Migration Management. UNHCR as a Global Police of Populations', *Journal of Ethnic and Migration Studies*, vol. 40, no. 6, 924–941.
- Schlegel, Stefan 2017: *Der Entscheid über Migration als Verfügungsrecht. Eine Anwendung der Ökonomischen Analyse des Rechts auf das Migrationsrecht am Beispiel der Schweiz*, Tübingen.
- Schlegel, Stefan 2018: 'A Bundle of Bundles of Rights – International Treaties Regarding Migration in the Light of the Theory of Property Rights', *Utrecht Journal of International and European Law*, vol. 34, no. 2, 111–129.
- Schuster, Liza 2016: 'Unmixing Migrants and Refugees', in Anna Triandafyllidou, (ed.). *Routledge Handbook of Immigration and Refugee Studies*, New York, 297–303.
- Selby, Jan/Dahi, Omar, S./Fröhlich, Christiane/Hulme, Mike 2017: 'Climate change and the Syrian civil war revisited', *Political Geography*, vol. 60, 232–244.
- Shachar, Ayelet 2009: *The Birthright Lottery. Citizenship and Global Inequality*, Cambridge, Mass.
- Shacknove, Andrew E. 1985: 'Who Is a Refugee?', *Ethics*, vol. 95, no. 2, 274–284.
- Twele, Marcel 2016: 'Von Menschenrechten und Hilfspflichten', in Thomas Grundmann and Achim Stephan, (eds.). "Welche und wie viele Flüchtlinge sollen wir aufnehmen?", Stuttgart, 30–44.
- Yaron, Lee 2018: 'Israel Admits: Plan to Relocate Asylum Seekers Has Collapsed, No Way to Forcibly Deport Africans', *Haaretz*, 24 April. Retrieved November 22, 2019 from <https://www.haaretz.com/israel-news/israel-admits-no-way-we-can-forcefully-deport-african-asylum-seekers-1.6028435>.